Before the
U.S. COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, DC

In the Matter of	)	
	)	
Publishers' Protections Study	)	Docket No. 2021–5

COMMENTS OF NATIONAL PUBLIC RADIO, INC.

I. INTRODUCTION

National Public Radio, Inc. ("NPR") is pleased to submit these Comments in response to the U.S. Copyright Office Notice of Inquiry published in the Federal Register on October 12, 2021 ("NOI").[1]

NPR is an independent, non-profit public media organization, whose mission is to work with Member stations across the United States to create a more informed public. As of November 2021, NPR has 253 Member stations. NPR produces, acquires, and distributes programming that meets the highest standards of public service in journalism; represents its members in matters of mutual interest; and provides satellite interconnection for the entire public radio system.[2] According to internal data, NPR and its Member stations produce more than 100,000 hours of original news and information programming for broadcasts and online

[1] *Publishers' Protections Study*, Notice of Inquiry, 86 Fed. Reg. 56,721 (Oct. 12, 2021).

[2] *See* NPR, *Our Mission and Vision*, https://www.npr.org/about-npr/178659563/our-mission-and-vision.

audio, including podcasts, each year. NPR also publishes text stories, photographs, audio (whether radio, podcast, or otherwise), and audio-visual works online, on its own platforms and via third-party platforms. As media consumption habits have shifted, audience demands for on-demand audio programming have increased, and NPR and Member stations have diversified their distribution of news programming.

According to Nielsen data provided to NPR, public radio stations rank as the #1 News station in the majority of America's top 50 markets, and 32 NPR Member Stations are the leading news station in the morning and/or evening drive times in their respective markets. NPR Member stations reach more people on-air weekly (33 million) than the total combined daily circulation of the top newspapers in the United States, including *USA Today*, the *Wall Street Journal*, and *The New York Times*, and NPR's digital properties receive 53 million visits per week.[3] NPR ranks first among news brands in being "trustworthy."[4]

In March 2020, when the pandemic began in the United States, the number of visitors to public radio websites surged. Stations retained much of that group and are up 20 percent over 2019 levels. Looking specifically at small stations (total station revenue less than $2 million), which make up a majority of stations, their internal data shows they retained much of the pandemic growth and are up 64 percent over 2019 levels.

NPR and its Member stations operate on a noncommercial basis. We aim to support universal service to quality local and national news and programming, not to restrict access

[3] *See* NPR, *About NPR*, https://www.npr.org/about/.

[4] E-Poll Research, E-Score Brand Oct 2021, based on U.S. adults age 18+ who are aware of each brand.

through required subscriptions or paywalls. NPR and its Member stations receive federal funding in the form of grants from the Corporation for Public Broadcasting ("CPB") to support this purpose; however, that funding only provides a portion of operating revenue. NPR receives less than one percent of its annual operating revenue in CPB grants or grants from other federal agencies or departments; in FY 2020, corporate sponsorships comprised 35 percent of its revenue.[5] CPB distributes community service grants ("CSGs") to public radio stations, including NPR Member stations, and according to CPB, in FY 2021, the mean CSG for 397 public radio grantees was $237,111. Stations that serve rural and minority communities may, in many cases, be the sole local broadcasting service available. These stations receive a higher percentage of their budgets from CPB because their communities do not have the financial resources to provide support. Regardless, in FY 2020, according to internal data, underwriting represented 22 percent of direct support for public radio stations. Individual giving, driven by listener connections to local public radio stations, represented 40 percent of direct revenue.

Based on this financial model and public service mandate, NPR and its Member stations supplement the limited public funding received with listener support and sponsorship recognition messaging. This approach helps to fund critical journalism and operations that maintain universal access. NPR and public radio stations pursue sponsorship recognition messaging differently than commercial news entities, always striving for the right tone and fit for the audience and consistent with a public service mission. Additionally, the restrictions

[5] *See* NPR, *Public Radio Finances*, https://www.npr.org/about-npr/178660742/public-radio-finances.

around sponsorship messaging limit access to commercial options like advertising networks, advertising exchanges, and programmatic advertising, which contribute to commercial publishers' revenue. For these reasons, it is important for NPR and its Members stations to control the distribution of their own content, so they can effectively monetize it through sponsorship messages. This is even more important for NPR Member stations that rely upon local business sponsorship and listener donations to fund operations, including the journalism that serves local audiences.

II. EFFECTIVENESS OF CURRENT PROTECTIONS FOR PRESS PUBLISHERS

A. Review of Existing Copyright Protections

The Copyright Board generally seeks comment about the effectiveness of current protections for press publishers under U.S. law.[6] NPR is imparting its experience with current U.S. Copyright law as a long-standing non-profit news organization.

When examining copyright protections, it is essential to recognize that different asset categories will have different value, depending on the publisher. News organizations like NPR tend to invest more in certain types of content than others. For NPR and Member stations, audio content is central to public radio's mission and brand. This audio content includes both NPR's and Members' on-air programming delivered through broadcast radio

[6] *See* NOI at 56726.

and streamed over the Internet, as well as podcasts distributed through various platforms. Public radio also creates its own video content, which it distributes through digital platforms.

Existing law is only somewhat effective in protecting these valuable assets. The Copyright Act was written contemplating the technologies available in the 1970s, and even the modifications made over the years in recognition of digital technologies have not truly addressed the practical problems publishers face in the digital age. Specifically, there are two main problems: (1) free-riding and (2) inadequate remedies against many types of digital infringers.

The problem of "free-riding" is essentially the issue of news aggregators using publisher content, in whole or in part, on their own sites to profit from such work. They take the work of others and place advertising against it, making a profit without incurring any of the costs in gathering or writing news. Without compensating the originators of the news content, this provides them a financial advantage while taking support away from those who invest in newsgathering by drawing audience to their own sites in lieu of those who created the original works. Aggregation sites vary widely from those who blatantly steal whole stories, to those who summarize reports, to those who provide "search" functions, taking headlines and photos. Copyright law does not adequately address this distinction. Although search functionality might be "fair use" in some contexts, especially in useful, non-profit, educational or research contexts and in supporting public access to information, there is something deeply problematic when large for-profit companies can draw users to read headlines on their own site without supporting the actual producers of news. This situation can especially affect a non-profit like NPR, which is driven by mission not commercial activity, and is limited in its ability to monetize its own content.

The second problem is that of effective remedies. Even when it is clear that an aggregator is directly infringing works, it is not always easy to obtain any meaningful remedy. Many sites are difficult to track or located in other countries, and litigation is costly with no guarantee that there will be assets available to compensate those whose works are infringed. Again, this issue is amplified for entities like NPR and its Members, which operate with limited financial resources and are poorly positioned to pursue legal recourse.

B. Copyright Ownership of News Content

The Copyright Office specifically asks "(a)For a given type of news publication, what is the average proportion of content in which the copyright is owned by the publisher compared to the proportion licensed by the publisher on either an exclusive or non-exclusive basis? (b) For content in which the press publisher owns the copyright, what is typically the basis for ownership: Work-for-hire or assignment?" [7]

At NPR, the vast majority of audio content is owned by NPR. A large portion of the remainder is licensed from Member stations, and a small percentage comes from other producers of audio content. Many of the photographs NPR uses, however, are licensed from various other news sources, such as Associated Press, Getty, or established news photographers. NPR's video content is both owned by NPR and licensed from third parties.

[7] *Id.*

C. Impact of Third-Party Uses of News Content

The Copyright Office also asks about the practice and impact of third-party uses of news content, including how often and when aggregators seek licenses and the market impact of these uses.[8]

When NPR was established in 1971, we—as the publisher of audio news—owned the distribution to our listeners through local terrestrial radio broadcasts, linked (or "interconnected") by a nationally managed distribution system. When the Internet emerged, NPR viewed sharing our content over this new mode of connection as integral to its mission of universal access so that we could increase our reach to as many people in the United States as possible with reliable, trustworthy news.

NPR launched its website in 1994, and Member stations also developed their own websites. The baseline assumption continued to be that we would have the ability to control the distribution of that content over websites we managed. NPR has always sought to work with third-party platforms for text, audio, and image content, and to seek mutually beneficial relationships with these third parties to enable NPR to further the mission of making our content available to all, on the platforms where audiences are found, while maintaining control of our content.

NPR's experience with these third-party platforms has been mixed. NPR has benefited greatly from some of its relationships with aggregators who are open to engaging

[8] *See id.*

with NPR on the terms of providing NPR content. Not all aggregators, however, are willing to establish license agreements with news publishers. While the largest platforms still allow news publishers to monetize content through their podcast platform or news aggregator website, there is a risk to news producers because these large platforms do not offer license agreements as a part of their business model. And because large platforms control a large market share, NPR must rely on these platforms to reach key portions of its audience. NPR and other news producers on these platforms are at the mercy of these platforms if they unilaterally opt to change their platform rules. Additionally, there is no common industry standard for measuring audiences on aggregators, and this creates artificial distinctions between the metrics used in marketing across different platforms—further affecting the ability of news publishers to effectively monetize their content.

Without negotiated licensing agreements, news aggregators remove the ability to control distribution (and in turn to control the experience of the consumer), and they do so without the consent of, or any compensation to, the originators of the news stories being aggregated. They entice consumers to read headlines on an aggregation site, and they profit from those site visits through advertising. NPR has experienced this with start-up audio aggregators as well. These start-ups make transcripts of NPR podcasts, then grab short audio recordings to place on their websites, and consumers then can listen to this short recording of an episode. The websites have branding and links back to the actual show, but they are creating a derivative product based on our most valuable asset – the most compelling moment of audio from a given show, without NPR sponsorship recognition messages accompanying it.

In this way, some aggregators simply "free ride" on the work of NPR, its Member stations, and other publishers who invest in the newsgathering that makes these headlines, news stories, and podcasts possible. This "free riding" also interferes with NPR's and its Member stations' relationships with their audiences, because it diverts consumers away from the original source of news stories to aggregators.

Within audio news, the relationship with listeners is a key indicator of impact for the public radio system. If consumers are siphoned away from public radio platforms by infringing distributions to consume public radio content via aggregators, NPR and its Members stations lose the ability to connect with listeners and monetize that relationship through listener-supported donations or the sale of sponsor recognition messages.[9]

Third-party aggregation of audio content, in particular, has further affected public radio's mission because, in addition to creating potential barriers to sponsorship, it impedes NPR's ability to ensure the quality of the audio experience. Audiences have an infinite number of options to consume audio content – streaming on the computer, phone, TV, smart speakers, car radio, etc.—with an on-demand or continuous feed. To maintain quality and distinction among other news providers, it is imperative that NPR and its Member stations maintain control of their carefully crafted product with a cohesive editorial throughline. Aggregation becomes problematic when it becomes the most accessible and convenient gateway for listeners to access NPR news.

[9] As non-commercial educational stations, public radio stations are prohibited from broadcasting advertisements, but they may accept contributors of funds in exchange for on-air acknowledgements. *See* 47 U.S. Code § 399b; 47 CFR §§ 73.503(d) and 73.621(e).

NPR's experience with one audio aggregator is illustrative of the broader concerns NPR and its Member stations hold regarding the potential pitfalls of certain news aggregators. The intent of the aggregator was to offer listeners a personalized audio news experience. When launching, the platform offered no option for news publishers to monetize the content they provided to the platform, and also jumbled that content with text-to-voice news combined with highly-produced audio news, like NPR broadcasts. After reviewing the platform in 2019, NPR decided not to participate with this aggregator because it removed NPR's control of the quality of the product and offered no opportunity to develop relationships with listeners.

Another example of this broader concern is the impact of aggregation on NPR's ability to understand its audience. For broadcast news, NPR has always relied upon Nielsen ratings and other measures to understand who its audience is, how it is reaching them, and what content is most effective. NPR's digital platforms offer NPR even more timely information on its audiences, which can be used to inform editorial decisions to better serve audiences' needs and interests. In certain cases, aggregators can impede the ability of news producers to access first-party data and have a more complete understanding of audience trends. For NPR, whose public service mission is tied to reaching underserved and underrepresented audiences, this lack of data limits understanding of how NPR is reaching and serving these core audiences across digital platforms.

Finally, aggregators that act unilaterally and without NPR's participation can affect NPR Member stations directly by pulling audiences away from the traditional, local radio broadcasts that are at the core of the public radio system. When audiences listen on demand to audio aggregators, they lose the connection to their local public radio station. Consequently, Member stations lose the opportunity to seek critical financial support from their listeners to support station operations and local journalism. Declining audiences over radio broadcasts also affects sponsorship revenue, redefining the operating model for stations and presenting fiscal challenges.

The Copyright Office also asks whether there are existing non-copyright protections for press publishers.[10] While there are no such laws currently in place, new legislation, like S. 673/H.R. 1735, the Journalism Competition Preservation Act, would help create a more balanced marketplace and equal bargaining power for news publishers by allowing them to collectively negotiate.[11]

III. ADDITIONAL PROTECTIONS FOR NEWS PUBLISHERS

A. Suggested Additional Protections

Consideration of additional protections for news publishers must be premised on the understanding that not all news aggregators are created equal. Aggregation can serve a useful purpose for broadening an audience if listeners are directed back to the original news publisher, and that publisher has an opportunity to monetize the audience and research the audience to better understand and serve them. Aggregators that provide credit for the source,

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[10] *See* NOI at 56726.

[11] *See* Journalism Competition and Preservation Act of 2021, S. 673/H.R. 1735, 117th Congress (2021), *available at* https://www.congress.gov/bill/117th-congress/senate-bill/673?q=%7B%22search%22%3A%5B%22journalism+competition+preservation+act%22%2C%22journalism%22%2C%22competition%22%2C%22preservation%22%2C%22act%22%5D%7D&s=1&r=2.

maintain the fidelity of news, and allow audiences to discover new sources of information can benefit overall public access to news and information. In recent years, however, it has become evident that the news industry is overwhelmingly dependent upon news aggregators as the means of distributing digital content.

First and foremost, NPR strongly supports maintaining fair use principles and practice in the United States. Fair use provides critical protection to news producers in the newsgathering process, and NPR, as a news organization, regularly is on both "sides" of the fair use analysis: NPR may want to use third party content pursuant to fair use in its creation of a story (for example, using a short clip of a historical work to create a news story illustrating the development of an issue over time), and it may also have its own content used by others pursuant to fair use. As such, should Congress seek to provide a remedy for these issues, NPR recommends it be a narrow, targeted change that would directly address the imbalance between news producers and various kinds of aggregators.

Given these considerations, NPR recommends the following measures to enhance copyright protections for news publishers:

(a) Additional copyright protections should be applied to high-value assets, such as text stories, photographs, audio (whether radio, podcast, or otherwise), and audio-visual works, in "hot news" situations. Every news publisher seeks to be the first to break news, and in the 24/7 news cycle that now exists, obtaining a high-value asset—such as an exclusive audio interview or photo—is how a news publisher distinguishes itself among competitors. NPR suggests that these high-value assets receive additional protections for some time period, perhaps up to 72 hours of a breaking news story, after which their value declines. This concept aligns with the legal doctrine of fair use, as it is well-established that competitive uses tend not to be fair use, especially in breaking news contexts.[12] Already in practice, when a news organization has a timely audio and/or visual work, it will often provide other news outlets with guidelines for what it considers appropriate use.

(b) Consider recommendations to Congress in reviewing copyright protections that distinguish between asset categories that may be more valuable for news publishers. The protections that may be most helpful may depend on the type of asset being infringed. News producers create many different types of works: text stories, photographs, audio (whether radio, podcast, or otherwise), and audio-visual works. Each format raises unique issues. Text stories typically contain factual material that can be rewritten easily. As facts are not protected under copyright law (and rightly so), text materials often are not protected unless a significant amount of text is copied. Photographs, audio, and audio-visual works are typically more unique, but their use and misuse is more challenging to trace. Some aggregators offer easy ways to catch online infringers. For example, one platform provides a way for content providers to catch audio or visual "matches" to a news organization's original content. In the absence of technologies on other platforms, it is difficult to catch or pursue infringers. Yet, the impact of

[12] *See L.A. News Serv. v. KCAL-TV Channel 9*, 108 F.3d 1119, 1120 (9th Cir. 1997).

infringement on these higher-value asset categories is more detrimental to the news publisher, such as NPR and its Member stations, because of the production quality and unique experience provided to the audience.

(c) Finally, NPR recommends that the Copyright Office consider in its recommendations to Congress that aggregators provide news publishers with the following basic protections for their work and business viability:

1) Fair representation of the content to maintain the integrity of the news publisher's brand.
2) No alteration of content to maintain the integrity of the news produced.
3) Delivery of industry standard metrics on audiences, so that news publishers have the means to understand and compare audiences across aggregators, transact business on those metrics in industry standard ways, and receive the information necessary to connect with and serve their audiences.
4) Reasonable opportunity to monetize their content. For example, news publishers could receive a share of the advertising or sponsorship revenue, an opportunity to insert their own advertising or sponsorship messages, and/or simple payment from the aggregator.

B. Considerations Regarding European Union ("E.U.") Laws

The Copyright Office specifically asks "[t]o what extent do the copyright or other legal rights in news content available to press publishers in other countries differ from the rights they have in the United States."[13] It is important to recognize that the copyright that press publishers have enjoyed in the United States may be different from the rights that press publishers have had in other countries that have tried to address this issue, such as certain countries in the E.U. In the United States, publishers have generally owned copyright in the collective work that encompasses the assets in a news story and have owned rights in many of those assets as works made for hire or through assignment.

In some countries in the E.U. before the 2019 Copyright Directive, however, news publishers did not own copyright in the collective work that encompasses a news story or the law did not recognize the work-made-for-hire doctrine or permit transfer of copyright in the assets.[14] Though press publishers could enter into licensing arrangements with journalists who created the assets in most countries in the E.U., that was not true everywhere, and the number of authors that may contribute to one news story were at times too numerous to obtain all the necessary rights to enforce the publisher's rights.[15] The Directive recognizes this,

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[13] NOI at 56726.

[14] *See* European Parliament, Policy Department for Citizens' Rights and Constitutional Affairs, *Strengthening the Position of Press Publishers and Authors and Performers in the Copyright Directive*, at 22 n.51, 38 (Sept. 2017), https://www.europarl.europa.eu/RegData/etudes/STUD/2017/596810/IPOL_STU%282017%29596810_EN.pdf ("German and Austrian law take the unique view that authors cannot assign their copyright, but only give grants of use.").

[15] *Id.* at 22, 38.

stating: “In the absence of recognition of publishers of press publications as rightholders, the licensing and enforcement of rights in press publications regarding online uses by information society service providers in the digital environment are often complex and inefficient.”[16] Thus, the 2019 Copyright Directive solved a problem of giving press publishers a right they did not uniformly have before, the right to control reproduction and the public availability of the collective work.

This context is important to understand that the scope of the legal issue the European Union addressed in the 2019 Copyright Directive is not the same as in the United States. Though market issues with news aggregators are similar, some of the underlying legal challenges are different and may require different solutions to address.

IV. CONCLUSION

For the reasons stated above, NPR and its Member stations understand that the future of news in the United States is largely tied to the behavior of third-party aggregators and ensuring protections for news publishers across all types of content (audio, audio-visual, text, etc.) on digital platforms will influence the financial viability, and thus diversity, of news organizations that are able to thrive in this environment. NPR and Member stations will continue to seek opportunities to partner with third-party platforms as opportunities arise. However, without adequate protections, news publishers will see continued threats to their ability to limit infringing use and rightfully monetize content on third-party platforms,

[16] Directive (EU) 2019/790 of the European Parliament and of the Council, Recital 54 (17 Apr. 2019), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L0790.

connect with their audiences, and maintain their brand and quality. Getting this relationship between aggregators and news publishers right, however, can support greater public access to news, which is in line with NPR's non-profit mission. NPR encourages the U.S. Copyright Office to consider how it can strike this balance in its study and recommendations on this matter.

Respectfully submitted,

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