Before the
U.S. Copyright Office
101 Independence Ave. S.E.
Washington, D.C. 20559

In the matter of Docket No. 2021-5	Publishers' Protections Study: Notice and Request for Public Comment

COMMENTS OF PUBLIC KNOWLEDGE

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I. Introduction

A functioning and free press is vital to democracy, and the internet has posed a challenge to the business models of many journalistic outlets. Market forces, new technologies, and new business models together have meant that many press publishers have lost readers, ad dollars, and other sources of revenue.

But the Copyright Office is the wrong agency to address these challenges, and they should not be solved by creating new property rights.

Journalism is in many ways a public good that everyone benefits from, even if they don't read it or pay for it themselves. Journalism lets people know what the government is up to, so they can demand it better serve them. It helps people make more informed decisions in every area of their lives, and holds corporations to account. Studies show that citizens without access to local journalism feel less of a sense of cohesion and community, vote less, are less informed, are less likely to run for office, and experience higher corruption, costs, and corporate malfeasance in their communities. When the market fails to adequately provision a public good, a public policy response is warranted.

The decline in revenues for journalism was not caused by news aggregators or by "big tech," and goes back decades. The internet disrupted the business model of newspapers, for instance, by disaggregating classified ads, sports scores, and other information (movie times, weather, TV listings, horoscopes, etc.) that newspapers used to be the primary source of. Information of this kind would often subsidize more substantive news reporting. Additionally, the internet simply increased the number of head-to-head competitors press publishers faced. Local newspapers and their websites remain among the best ways to find out about local news, and the internet has not changed that. But readers no longer need to turn to their local

newspapers for national or international news, and can directly access other publishers from around the country, and around the world.

This is not a blame game, and policymakers should be concerned with ensuring that essential public goods continue to be produced, not somehow penalizing wrongdoers. But an incomplete understanding of the causes of a problem will likely lead to incomplete, or counterproductive solutions.

A solution based on changing copyright law or creating a new kind of intellectual property right would be a counterproductive solution. The challenges press publishers face are not copyright problems, and changing copyright law or creating new ancillary rights will not solve them, but will create harmful ripple effects. Property rights sit at the foundation of markets and the economy. Intellectual property rights are creations of law and lawmakers can and should revisit them from time to time. But this should be done carefully, and changing property rights should be weighed against other policy options. Here, the challenges faced by press publishers do not warrant such a response, and the Copyright Office does not have the authority nor the expertise to consider the full range of policy approaches. That being said, in the interest of completeness this comment will conclude with brief sketches of promising alternative approaches.

II. Creating a New Property Right Would Be the Wrong Approach

The nature of property rights is deeply rooted in the common law. While intellectual property rights are statutory creations with a shorter pedigree, they share many of the same features. While many different versions of an "ancillary" copyright have been proposed, none of them fit neatly into the contours of property rights in American law. Creating a new "property" right that does not work like any others is a recipe for confusion and unintended consequences.

Intellectual property rights should be broadly applicable. Copyright is available to all authors. Patents are available to all inventors. Even some of the more specialized intellectual property rights are not restricted to businesses that engage in certain activities, such as press publishers. Like with copyright and patent, protection for semiconductor mask designs and boat hulls is available to anyone who creates one. Some of the ideas contemplated by the Copyright Office would represent a novelty in American law—a "property" right that is only available to entities engaged in particular activities, however defined.[1]

Intellectual property rights should go to creators, and to people those creators have sold their rights to. This is not always the case internationally, where "related rights" (for record and film producers, for performers) are more common. But it is one thing to support measures designed to benefit people who contributed to a creative work—another to grant new rights to distributors, such as press publishers and broadcasters, who do not. Intellectual property rights should support creators, not particular distribution models. Notably, the United States did not join the Rome Convention, which grants broadcasters rights over content they have broadcast, whether or not they are the actual copyright rightsholder.[2]

Intellectual property rights are also typically transferable. Authors and inventors can transfer, sell, or license their rights to whoever they like. But it does not make sense conceptually to transfer a press publisher right from one company to another. This is another reason why

[1] It may also only be enforceable against certain entities, such as social media networks. In this way, it might be similar to retransmission consent, which is a right, but not an intellectual property right, that broadcasters have against multichannel video programming distributors (MVPDs), such as cable systems. 47 U.S.C. § 325. Retransmission consent is not an intellectual property right because, among other things, broadcasters frequently do not own intellectual property rights to the content they broadcast, and because MVPDs pay a statutory copyright license, administered by the Copyright Office. *See* 17 U.S.C. §§ 111, 122.

[2] WIPO, Rome Convention Contracting Parties, https://wipolex.wipo.int/en/treaties/ShowResults?search_what=C&treaty_id=17.

whatever policy solution may be appropriate to help press publishers should not be a new property right.

A new press publisher intellectual property right would thus be a novelty in American law. More than that, it would be a bad idea. It would amount to the ownership of things that should not be owned—facts and ideas. To the extent that a new right would restrict the ability of platforms or their users to link to news sites, it could be seen as a new kind of property right to control being talked about, or referred to, which as discussed below poses significant free expression challenges.

Finally, it should be pointed out that a potential user or licensor of material protected by copyright has the option of whether to do so. A movie theater can choose to publicly perform a movie, or not. If a new right is created that restricts the ability of a platform to "use" news content in some way, one response from the platform could be to stop using the content. This should not be a controversial point, but the experience overseas suggests otherwise. In France, when Google announced that it would stop doing things that triggered a new ancillary copyright, press publishers and competition authorities viewed this as anticompetitive, and Google was hit by a €500 fine.[3] This is as if a new law restricted the ability of YouTube to host music, so YouTube responded by removing music from the service—and was then fined for doing so. Under a property rights system, a potential licensor must have the ability to decide whether paying the requested fee is worthwhile, and should be free to exit lines of business that do not make economic sense. Similarly, the Australian news bargaining code is structured in a way that the obligation to "bargain" is not triggered by a platform using a press publisher's content—

[3] France Fines Google 500 mln Euros Over Copyright Row, Reuters, https://www.reuters.com/technology/france-fines-google-500-mln-over-copyright-row-2021-07-13.

despite the fact that it is exactly this uncompensated use that is the motivation for the code to begin with.[4]

The French and Australian systems, whatever they are called, amount to an inefficient way of taxing platforms, and subsidizing news outlets with the proceeds. Policymakers in general should consider directly subsidizing press publishers instead of doing so indirectly. It may be the case that some press publishers would prefer to "bargain" in the marketplace rather than receiving public subsidies, but this is only viable if the underlying economics do not support it.

III. A New Right that Prohibited Activities Currently Allowed Under Copyright Law Would Likely Be Unconstitutional

Any new press publisher right that burdens activities that either fall outside the scope of copyright or are permitted as fair uses would likely be unconstitutional.

A new press publisher right that amounted to ownership of facts would be unconstitutional. Copyright protects expression, not ideas. As the Supreme Court has stated, "copyright gives the holder no monopoly on any knowledge. A reader of an author's writing may make full use of any fact or idea she acquires from her reading." *Eldred v. Ashcroft*, 537 US 186, 217 (2003). This is not an accidental feature of copyright law, but a constitutional requirement—a "built-in First Amendment accommodation[]," *Eldred* 219, to copyright law, which would otherwise impermissibly burden free expression. As the Court explained earlier, "the First Amendment protections already embodied in the Copyright Act[]" include the "distinction between copyrightable expression and uncopyrightable facts[.]" *Harper & Row, Publishers. v. Nation Enterprises*, 471 US 539, 560 (1985). If the Constitution prohibits copyright from

[4] Australian Communications & Media Authority, News media bargaining code, https://www.acma.gov.au/news-media-bargaining-code.

extending to ownership of facts or knowledge, it would prohibit any new right, such as an ancillary copyright or a press publisher right, from doing so either. The Court summarized it well when it stated that "ideas and information must not be freighted with claims of proprietary right." *Harper & Row* 590.

A press publisher right that prohibited activities now considered fair use under copyright law would likewise be prohibited by the First Amendment. Like the idea/expression dichotomy, fair use is a constitutionally required component of copyright law. *See Harper & Row* 560 (discussing the "First Amendment protections already embodied in the Copyright Act's distinction between copyrightable expression and uncopyrightable facts and ideas, and the latitude for scholarship and comment traditionally afforded by fair use"); *Eldred*, 219-220 (fair use, like idea/expression, ensures that copyright does not impermissibly burden free speech).

The Notice of Inquiry asks how "press publishers" might be defined. As argued elsewhere in this comment, granting a new kind of intellectual property right exclusively to a specific class of entity would be in tension with how American law typically structures property rights. Additionally, attempting to define "the press," press publishers, or even journalism is difficult, and granting legal privileges to certain speakers based on the content of their expression or the way they choose to disseminate it is likely unconstitutional. That said, in other contexts, activity-based, content-neutral regulatory approaches to promoting the creation and dissemination of news reporting can be crafted in ways that avoid constitutional pitfalls.

IV. A New Ancillary Copyright Would Interfere with Linking, Which is Foundational for the Web

The web is built on links. The technical, economic, and social practices on the web assume that any site can freely and without permission link to any other site, and any page of any site.

An ancillary copyright would break this: Whether linking was allowed, or required permission (and potentially, payment) would depend on who is doing the linking, and who is being linked to. Users, not just news aggregators or platforms could be affected, since one of the major ways that platforms link out to press publishers is through user-posted links.

Links send users from one site or service to another, and contribute to the decentralized, open nature of the web.

Compare two news aggregators: Google News, and Apple News. Apple News is a walled garden that is not based around links: All the content it provides users is licensed, and users can read articles from many different sources, all without leaving Apple News. By contrast, Google News does not host content directly, and so does not need to enter into licensing agreements. Instead, Google News sends readers directly to news sites themselves to read articles.

All things being equal, it should not be surprising that a particular publisher would rather get paid by Apple News, than not paid by Google News. But this still does not mean that the licensed model of news aggregation is better than a linking model for publishers in general, as a service like Apple News can only pay a limited number of outlets. By contrast, the open web, with permissionless linking, can direct traffic to a wider variety of sites. When setting policy, this broader view, not the perspective of a handful of the most popular press publishers, should be given priority. To the extent that dominant platforms increasingly try to keep people using their "walled garden" of services, this is a problem, but a problem that burdening linking would worsen, not solve.

The Notice of Inquiry characterizes news aggregators as "distributors." It is important to emphasize that linking is not a form of "distribution" under copyright law, and thinking of link-oriented news aggregators as "distributors" can be misleading in at least two ways. First,

"distribution" in the context of copyright law refers to disseminating physical copies of a work. 17 U.S.C. § 106. This is a statutory term with a precise definition, and activities analogous to, but different from the distribution of "copies or phonorecords of [a] copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending" are not a form of "distribution" and should not be referred to as such. (Copies and phonorecords are additionally defined by statute to be material objects. 17 U.S.C. § 101. A "distribution" therefore involves the transfer of control of physical copies of a work.) Specifically, neither the transmission of digital files over the internet, nor the creation of new copies of a work (e.g. copying a file from one computer to another), nor linking to a resource on the web can constitute a "distribution."

Second, thinking of linking as distribution not only does not fit with the terms of the Copyright Act, but is illogical on a conceptual level. A link to an article does not somehow distribute the article to a reader, but invites the reader to follow the article to where a press publisher has already presented it. Considering this to be a "distribution" in any sense, even by loose analogy, is like considering giving someone directions to a bookstore as similar to delivering a truckload of books. Far from being in tension with copyright law, linking is a way of directing readers to the original of an article or other content, as controlled and presented by the rightsholder—as opposed to circulating new copies.

The rise of dominant platforms has meant that the practice of linking itself has not been enough to fully preserve the open web, and policy responses are needed to address dominant platforms in a number of respects. But making it more difficult for platforms and their users to link to press publishers would worsen, not remedy the problem.

V. News Aggregators are Limited by Copyright, But Can Freely Disseminate Facts

One of the factors courts consider when deciding whether a use of copyrighted material is fair is the "effect of the use upon the potential market for or value of the copyrighted work." 17

U.S.C. § 107. No single fair use factor is determinative, and a use may be fair even if it is a complete market substitute for the original work or otherwise harms the market for the original work (e.g., through criticism) when the other factors are taken into account.

In the context of press publishers, however, it is important to bear in mind that copying unprotected material, such as facts, does not weigh against a finding of fair use. A news aggregator that copies a *de minimis* amount of protected material, but enough facts such that many readers would not need to click through to an article, does not infringe copyright. Only copying protectable creative expression, and not facts, can give rise to infringement. As stated above, this is a constitutional requirement that cannot be evaded through the creation of a new right. At the same time, an aggregator that exceeds the scope of fair use can already be held to account for infringing.

Policy responses to ensure that journalism is properly funded and sustainable are warranted. However, much of the "copying" that is seen by some press publishers as the source of the problem amounts to the re-reporting of facts, which cannot be limited by law. Other solutions are needed.

VI. The Hot News Doctrine is Not Viable for Press Publishers

The "hot news" doctrine is unlikely to be applicable to many press publishers. The primary reason is that it may not be viable at all—as the Notice of Inquiry notes, the Second Circuit recently found it to be largely preempted by the Copyright Act except in very narrow circumstances. *See Barclays Capital v. Theflyonthewall.com*, 650 F.3d 876, 902 (2d Cir. 2011).

Revitalizing the doctrine, though, would still be unlikely to help press publishers. Although it covers some of the same ground as copyright law, it is not an intellectual property right, but an unfair competition tort that is available only in narrow, time-limited circumstances. The hot news doctrine only applies, as the name tells you, to hot news—time-sensitive

information. Information that is widely reported (or that financial markets have absorbed) is not hot news, nor are "scoops" necessarily hot news. Additionally, the doctrine has been narrowed as only applying to direct competitors. For example, a number of financial firms failed in their attempt to stop Theflyonthewall.com from reporting their investment recommendations, because, among other reasons, financial firms do not directly compete with what the court characterized as a "news aggregator." *Barclays Capital* 882.

VII. Press Publishers Can Already Opt Out of News Aggregators and Search Engines

It is sometimes overlooked in discussions about news publishing and the web that, while websites lack the ability to *legally* prevent news aggregators from linking to them, they have several self-help options.

The most obvious point is that it is only possible to link to content that is publicly accessible on the web. Many press publishers are subscription-based, and their content is only available to subscribers. Press publishers who object to being indexed by search engines or linked to from aggregators or internet users have the ability to make their content private.

Additionally, many major platforms honor opt-outs. Google will not index a site with a "noindex" tag,[5] and supports standard ways for sites to control what pages are presented in search results,[6] and in "verticals" like Google News.

As discussed below, voluntary platform practices are subject to change and should not be a basis for legal changes. But the fact that relatively few publishers take advantage of them demonstrates that press publishers currently receive value from being linked to from news aggregators, indexed by search engines, and linked to from social platforms. A publisher that

[5] Google, Block Search indexing with noindex, https://developers.google.com/search/docs/advanced/crawling/block-indexing.
[6] Google, Introduction to robots.txt, https://developers.google.com/search/docs/advanced/robots/intro.

chooses to exercise self-help by making its content more private loses discovery and reach, and readers may simply switch to competitors that are easier to access. This dynamic in turn is seen as a collective action problem, leading to calls to exempt press publishers from antitrust laws to enable them to organize group boycotts of news aggregators or otherwise collude. Problems with this concept are discussed in the next section.

VIII. This Proceeding Demonstrates that Antitrust Exemptions for Press Publishers Cannot Work

A number of news organizations have lobbied for what they portray as a simple fix for journalism in the United States: the Journalism Competition & Preservation Act. This proposed law would exempt certain news organizations from antitrust law, which is said to allow them to collectively "negotiate" with news aggregators.

Public Knowledge has argued that the JCPA, in addition to proceeding from a faulty premise (the news marketplace needs more competition, and exemptions to antitrust laws should be disfavored), likely could not work, since collective bargaining implies 1) that there is "bargaining" to begin with, and 2) an underlying right that is the subject of the bargaining.[7] (Additionally, it is unclear how a press publishers cartel would prevent "defectors" from breaking with the others without some sort of enforcement mechanism.)

As discussed above, major platforms already allow a news publisher to opt out of being linked to or indexed, but a major legal change should not be premised on the voluntary practices of companies that could change at any minute. A news publisher has no cause of action against a platform that chooses to allow users to post outgoing links to it, or against a search engine or

[7] Lisa Macpherson, Can the Journalism Competition & Preservation Act Really Preserve Local Journalism? Public Knowledge Says "Probably Not," Public Knowledge (June 17, 2021), https://www.publicknowledge.org/blog/can-the-journalism-competition-preservation-act-really-preserve-local-journalism-public-knowledge-says-probably-not/

other service that continues to index its publicly-available content despite having indicated (for example, though an industry-standard robots.txt file) a preference to not be indexed. If a single news publisher has no cause of action, neither do a dozen that band together.

The proceeding demonstrates that this argument was correct. The JCPA is not just a narrow, time-limited antitrust exemption, but a component of an intellectual property-based policy agenda that could unwisely, and unconstitutionally, create a form of private ownership of facts. An antitrust exemption allowing major publishers to collude is a bad policy on its own, that cannot succeed even under its own terms without further bad policies being implemented. Fortunately the future of journalism does not depend on this approach.

IX. While Outside of the Copyright Office's Jurisdiction, Other Approaches are Viable

There are many ways that policymakers can address the business challenges that press publishers face. As they are outside of the jurisdiction of the Copyright Office to implement, they will be sketched here briefly:

Antitrust. Addressing platform concentration online could help press publishers in a number of ways. First, if any one platform or news aggregator was less important, a given press publisher might be more willing to pull its content from that aggregator, to the extent it can. Additionally, collective action problems of the sort designed to be addressed by granting press publishers some form of antitrust exemption would be less likely to occur. Perhaps more relevant financially, though, a fairer and more competitive online ads marketplace could lead to more ad dollars being spent on press publishers themselves.

Privacy. Many platforms are able to out-compete publishers for ad revenue due to their ability to target users based on their interests and demographics. The lack of a federal privacy law means there are few limits to how much data platforms can gather about users, which they then use to serve ads. Contextual ads, by contrast, run alongside particular kinds of content or

publications that tend to serve readers with the traits that advertisers seek out. A privacy law that make it more difficult for platforms to gather data must be justified in terms of the privacy benefits it creates for internet users. At the same time, if a beneficial privacy regime would also lead to more contextual advertising directly on press publisher sites, this is a beneficial side effect that can be noted.

Public media. Good journalism is a public good, and sometimes public goods have to be funded publicly. The Corporation for Public Broadcasting was founded in 1967, because it has long been recognized that the media marketplace might fall short in providing viewers and listeners with educational, news, and entertainment programming that is valuable, but less financially remunerative. Enhanced support of public media, as well as encouraging and promoting nonprofit models for journalism, may be another way of ensuring that the public's information needs are met.

Media ownership reform. Concentration in the ownership of media outlets (such as press publishers) is bad for democracy and the public interest. One of the best ways to ensure that diverse perspectives from and information relevant to particular communities can be seen and heard is by ensuring that media outlets are not concentrated in just a few hands. Media ownership policies should complement, and go beyond antitrust, because their concern is not primarily economic. At the same time, there are economic benefits to restrictions on media ownership. A chain of newspapers, for instance, might always find something else to do with its money than invest in an underserved community—even if the investment would be profitable, it might be even more profitable to invest elsewhere. A locally owned paper, by contrast, would have every incentive to serve its market to the utmost. Similar dynamics play out across media,

and can involve demographics or interest groups that are not geographically concentrated. Modernized and strengthened media ownership policies can correct these market failures.

Similarly, Public Knowledge has described "how the business side of journalism needs to evolve to maintain sustainable news production necessary for a healthy democracy."[8] While there is some overlap with some actions policymakers can take (e.g., government funding), others are models journalists can explore themselves, including entrepreneurial journalism, nonprofit/advocacy journalism, and a renewed emphasis on subscriptions. (Indeed, in the time since that piece was written, many journalists have embraced subscription and patronage platforms like Substack and Patreon,[9] and the nonprofit ProPublica added to its string of Pulitzer Prizes,[10] showing that alternative models can be successful.)

X. **Conclusion**

The challenges journalism faces are real, but addressing them by creating a new property right or expanding copyright would be the wrong approach.

Respectfully submitted,

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[8] Harold Feld and Jane Lee, We Need to Fix the News Media, Not Just Social Media — Part 3 (October 30, 2018), https://www.publicknowledge.org/blog/part-v-we-need-to-fix-the-news-media-not-just-social-media-part-3

[9] Jael Goldfine, Substack, Patreon, and Mailchimp grew in 2020, while newspapers kept shrinking (January 1, 2021), https://www.businessofbusiness.com/articles/substack-patreon-and-mailchimp-grew-this-year-while-newspapers-shrank.

[10] Wikipedia, ProPublica, https://en.wikipedia.org/wiki/ProPublica#Awards.