**Before the**
**U.S. Copyright Office**
**Library of Congress**

November 26, 2021

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| In the Matter of | ) | |
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| Publishers' Protection Study: | ) | Docket No. 2021-5 |
| Notice and Request for Public Comment | ) | |
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**Submitted by**
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**On Behalf of the**
**The R Street Institute and the Niskanen Center**

The Niskanen Center and the R Street Institute are pleased to submit these comments on the Publishers' Protection Study Notice and Request for Public Comment at the U.S. Copyright Office. The Niskanen Center is a nonprofit, nonpartisan 501(c)3 public policy think tank working to protect private property rights, economic liberty, well-functioning markets, and to roll back regressive regulations which restrict freedom of exchange and increase inequality. R Street is a nonprofit, nonpartisan, public policy research organization ("think tank"), whose mission is to engage in policy research and outreach to promote free markets and limited, effective government. Our organizations regularly advocate on copyright policy in a digital world. In this capacity, we welcome the opportunity to provide comments on the fundamental transformation under way in the market for online journalism and its impact on legacy publishers.

## Ancillary Copyright: The Wrong Tool for the Right Problem

Our comments focus on two elements of the Notice and Request for Public Comment: (i) the effectiveness of current protections for press publishers under U.S. law; and (ii) whether additional protections for press publishers are desirable. There is no doubt that digital content poses significant challenges to traditional distribution models for news content. According to the Pew Research Center, employment at newsrooms in the United States has fallen by 26 percent since 2008. During that same time, digital native newsroom employment increased by 144 percent.[1]

With respect to the delivery of news services, both legacy publishers and online platforms have evolved—and continue to evolve—in an attempt to meet shifting consumer demand. The market has been disruptive in ways that affect both the supply and demand of journalistic content. Yet, importantly,

[1] Mason Walker, "U.S. newsroom employment has fallen 26% since 2008," Pew Research Center, July 13, 2021. https://www.pewresearch.org/fact-tank/2021/07/13/u-s-newsroom-employment-has-fallen-26-since-2008.

there is little evidence to suggest that copyright has been a problem, nor is it obvious that changing the scope of existing copyright laws will enhance the delivery or increase the supply of journalistic content.

In fact, using copyright law as a tool of industrial policy to protect news generation may be more problematic than helpful. Expanding the role of copyright to reallocate revenue from online platforms to legacy publishers is not likely to solve challenges linked to a business model no longer suited to the current state of technology. Legacy publishers represent one of the earliest models of a two-sided market, generating income through a combination of subscriptions from one side of the market and advertising revenues on the other side of the market. Yet the digital revolution that began in the 1990s disrupted this market by decoupling the demand for news stories from the demand for advertising.

The technological transformation of the late 21st century was driven by innovative new market structures, not copyright law.[2] Attempting to redefine copyright to regulate digital platforms and their ability to aggregate news does little to address the changing market structure of news distribution and consumption. The emergence of digital platforms posed two distinct challenges to news publishers. The first was severing advertising—particularly local advertising—from the supply of news. Most newspapers earned 80 percent of their revenues from advertising and only 20 percent from readers.[3] However, want ads and classifieds have been replaced by far more efficient and lower-priced digital platforms, such as Craigslist, eBay, Indeed.com, and others.[4]

The second challenge faced by legacy publishers has been the shift by retailers from print ads to digital ads that can be more effectively targeted and reach a much wider audience. In 2019, advertising in the United States crossed an important threshold, with spending on online digital advertising surpassing all spending on all other forms of advertising in 2019 and two-thirds of the ad market in 2021.[5]

At the same time, consumer demand has been changing. The price of access to information has fallen to virtually zero while the market for news and information has expanded significantly, offering consumers access to far more sources of news locally, nationally and even globally.[6] The global reach of the internet pitted publishers who were once regionally isolated against each other in a search for readers. Additionally, legacy publishers now face direct competition from non-traditional sources of publishing including bloggers, local news websites and others who provide content free of charge for their readers. The quality of the content may vary, but there a multitude of subject matter experts providing news feeds on every information niche in the market. Yet efforts to impose new copyright laws may disrupt the emerging online ecosystem for journalistic content, despite identifying an existing consumer harm. Rather these changes are predicated exclusively on reallocating revenues from one sector to another for the benefit of legacy publishers, with no impact on the underlying structural challenges in media markets.

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[2] Frederic Filloux, "Did Google and Facebook Kill the Media Revenue Model?" *Monday Note*, Dec. 7, 2020. https://mondaynote.com/did-google-and-facebook-kill-the-media-revenue-model-7aa86c425c4a

[3] Richard Perez-Pena, "Shrinking Ad Revenue Realigns U.S. Newspaper Industry," *New York Times,* Feb. 7, 2008. https://www.nytimes.com/2008/02/07/business/worldbusiness/07iht-paper.1.9823636.html

[4] Alex Stapp, "Google and Facebook Didn't Kill Newspapers, the Internet Did," *TechDirt*, Oct. 25, 2019, https://www.techdirt.com/articles/20191024/13182743257/google-facebook-didnt-kill-newspapers-internet-did.shtml

[5] Nicole Perrin, "US Digital Ad Spending 2021," eMarketer, April 14, 2021. https://www.emarketer.com/content/us-digital-ad-spending-2021.

[6] Michael Barthel, Amy Mitchell, Dorene Asare-Marfo, Courtney Kennedy And Kirsten Worden, "Measuring News Consumption in a Digital Era," Pew Research Center, Dec. 8, 2020.

Copyright law can do little to alter these changes in the market for journalistic content. To thrive in the digital world, legacy publishers must adapt their business models to a world where information costs are lower and competition is much greater. Ultimately, it is the publisher who regulates access and at what price. In this sense, news aggregators expand potential readership far beyond the news outlet's reach on its own website. Additionally, as *the New York Times*, and others have done, legacy publishers can enter the digital advertising market.[7] Markets are adjusting and publishers are adapting to new market structures that probably will never generate the levels of revenue enjoyed by publishers in the less competitive markets that existed before the digital age. Trying to do so with copyright law would not be in the public interest and would not reflect current market realities.

This should not be interpreted, however, as stating that there are no problems in the market for journalism more broadly. Though legacy publishers and individual journalists with large followings on platforms like Patreon or Substack have successfully adapted to the new age, smaller outlets which nonetheless provide valuable services to local communities are struggling. Policy solutions are necessary to address these concerns. However, these solutions need to come through other means of financing the production of local news that does not exacerbate the "superstar" effect that has benefited large outlets or prominent journalists, which would happen with the creation of ancillary copyrights.[8] If revenue from such negotiations would be proportional to consumption of news—as is the case for streaming music, buying books or purchasing a movie ticket—then there's the potential for the gap between local news and "superstars" to increase. Whether or not the economic rents from online proliferation go mostly to large publishers or large tech platforms, solutions that rely on copyright will necessarily leave behind those with relatively small readership that nonetheless provide a valuable service.

**Implementation of Ancillary Copyright Around the World**

Leaving aside these inherent problems with the design of ancillary copyright, the implementation of similar policies around the world have run into implementation snags to various degrees. Several countries are implementing policy changes to rebalance the publishing market and shore up legacy publishers facing declining ad revenue and shrinking subscriber bases. Australia, for example, recently passed the "News Media and Digital Platforms Mandatory Bargaining Code," which mandates designated digital platforms pay local news companies for linking to their content to help sustain quality journalism.[9] Targeted primarily at Google and Facebook, the legislation generated some pushback from

[7] Howard Tiersky, "The New York Times Is Winning at Digital," *CIO*, June 8, 2017. https://www.cio.com/article/3199604/the-new-york-times-is-winning-at-digital.html

[8] Shrewin Rosen defines the "phenomenon of superstars" as, "wherein relatively small numbers of people [or firms] earn enormous amounts of money and dominate the activities in which they engage…In certain kinds of economic activity, there is a concentration of output among a few individuals [or firms], marked skewness in the associated distributions of income and very large rewards at the top." Sherwin Rosen, "The Rise of Superstars," *The American Economic Review,* Vol. 71, No. 5, December, 1981 pp. 845-858. https://www.jstor.org/stable/41210977

[9] Australian Federal Register of Legislation, "Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Act 2021," No. 21, 2021. https://www.legislation.gov.au/Details/C2021A00021.

the digital platforms, with Facebook actually temporarily shutting news feeds.[10] The large platforms have remained in Australia, although it is not clear how the program will work over time.

A look at the European Union may provide some insights into the distortions created by such programs. Both Spain and Germany attempted to impose a "snippet tax" on large digital platforms that would require payment for the use of links in their search or newsfeeds.[11] These efforts were premised on a theory of ancillary copyright that provided publishers a right to any snippets used in a web search or in a feed from a news aggregator. This would allow publishers to generate revenues from news aggregators and search engines.

In practice, ancillary copyright did not generate the expected revenue. When Spain implemented this in 2014, Google News left the market, leaving consumers worse off. The platform has since returned to the market, saying they will to generate resources for publishers through other mechanisms, such as a licensing fee and a program that would pay publishers to curate content.[12]
In Germany, things ended up slightly different, due to litigation over the scope of the ancillary copyrights created. Just recently, Google announced a licensing agreement to resolve the disputes.[13]

Despite these questions over implementation, The European Union continues to press for expanding ancillary rights for publishers. Like Australia, France has issued a mandate for platforms to enter into negotiations with publishers in order to enforce new ancillary copyright. In 2020, French competition authorities mandated Google to enter into negotiations with publishers over fees for linking to their content.[14] And in July of 2021, the same authorities fined Google $593 million for failing to negotiate in good faith with publishers.[15]

Copyright was established to promote expression by content creators such as authors and journalists. It is an ill-suited tool for addressing the fundamental changes that have occurred in the market for journalism. Despite the significant revenue shortfalls faced by traditional publishers, in some sense, the 21st century is a golden age of journalism. Consumers have unprecedented access to high-quality journalism from the local level to the global level. At the same time, a journalist's audience can span the globe, reaching far more readers than ever before—only because internet platforms expand their reach. This is a positive development. Considering the importance of quality news from the global to the local

[10] Daniel van Boom and Queenie Wong, "Australia passes law forcing Google and Facebook to pay news publications," CNET, Feb. 24, 2021. https://www.cnet.com/tech/mobile/australia-passes-law-forcing-google-and-facebook-to-pay-news-publications.
[11] Celine Le Prioux, "Europe Battles Google News Over Snippet Proposal," *Phys.Org*, July 30, 2017, https://phys.org/news/2017-07-europe-google-news-snippet-tax.html
[12] Glyn Moody, "Google News Returning To Spain, As Awful 'Inalienable' Snippets Tax Is Replaced With Marginally Less Awful EU Copyright Directive," *TechDirt*, Nov. 3, 2021. https://www.techdirt.com/articles/20211103/09471247867/google-news-returning-to-spain-as-awful-inalienable-snippets-tax-is-replaced-with-marginally-less-awful-eu-copyright-directive.shtml.
[13] "Google reaches content deals with German Publishers," *Associated Press News*, Nov. 19, 2021. https://apnews.com/article/technology-business-europe-germany-fab10f19780323a8e18944c5225128ac.
[14] Natasha Lomas, "France's competition watchdog orders Google to pay for news reuse," *TechCrunch*, April 9, 2020. https://techcrunch.com/2020/04/09/frances-competition-watchdog-orders-google-to-pay-for-news-reuse.
[15] Andrew Satariano, "France fines Google $593 million for not negotiating 'in good faith' with news publishers," *The New York Times,* July 13, 2021. https://www.nytimes.com/2021/07/13/business/media/google-france-news-content-fine.html.

level, it would be problematic to use copyright ("a tax on readers for the purpose of giving a bounty to writers")[16] to support further production.

But the potential scale will necessarily benefit larger, incumbent firms which are able to capitalize on this global scale. To the extent that larger platforms can adapt to this new media environment but local news may not be able to, policy solutions separate from copyright are necessary to balance between the needs of smaller actors that provide a public service outsized relative to their economic viability and readers.

**The Disparity Between the Response of Large versus Small Journalistic Outlets**

There are a number of alternatives to increase the revenue and general economic viability of newspapers unrelated to changing the Copyright Act to add ancillary copyrights. These alternatives are generally preferable for two reasons. First, as stated above due to the value of the works produced by journalistic outlets—especially local newspapers--it would be undesirable use a policy solution which by design makes it more difficult for such works to proliferate. Depending on the design of any ancillary copyrights, it would still be possible for sites like Facebook, Google News, etc. to shut down their operations or stop the sharing of links for such organizations altogether. Any solution to address this potential unintended consequence would necessarily require legislation that goes beyond the scope of copyright law—something we argue is necessary in the first place. This will not necessarily be the case, especially if non-copyright policies are added to counteract any effect, but this is a risk that should be taken seriously.

Second, changes that address structural problems with newspaper publishing as outlined below would benefit smaller, local outlets without increasing their value as financial assets for large conglomerates or also providing revenue for large legacy publishers, who have been doing well in recent years and have enough prominence to pursue alternatives to monetization with a massive audience. The present crisis is a crisis of *local* journalism, and solutions should be tailored to address their needs.

**Pivot to Nonprofit**

The pivot to a nonprofit model would also eliminate the financial incentives created by the wave of consolidation. Aggressive acquisitions and the subsequent layoffs would not apply to a world where a significant number of newspapers and journalistic outlets operate as nonprofits. According to an October 2020 U.S. House Committee on Commerce, Science, and Transportation report, "a wave of acquisitions [has] swept through the industry, leading to rapid consolidation and the formation of a small number of massive newspaper publishing groups, like Tribute Publishing, McClatchy, and Gannett (…) [I]ndustry analyst Steve Waldman writes, 'the acquisition of newspapers by private equity and hedge funds has contributed mightily, along with the digital disruption of advertising, to the decline of local

[16] Thomas Macaulay, "First Speech to the House of Commons on Copyright," February 5, 1841, found on The Public Domain, "Macaulay on Copyright," July 24, 2014. https://www.thepublicdomain.org/2014/07/24/macaulay-on-copyright/

news.'"[17] If local newspapers could be reorganized into nonprofits, the ability of large conglomerates, private equity and other financially motivated institutions to harm the local news industry would be effectively neutered. Additionally, this would better serve the role local journalism should play in the United States as an institution whose value is primarily as one to promote the public interest and not necessarily make a profit.

Though a mass-pivot of local news organizations to nonprofit status would be novel, this is not unprecedented. Outlets like National Public Radio and ProPublica are generally trusted institutions with a long record of producing quality journalism. The latter of which often collaborates with local news outlets. Moving to nonprofit status would attract philanthropic support for these institutions, even though direct policy support would be warranted.

Additional support and a policy regime that pivots local news sources to nonprofit status, however, should be paired with changes in access policy that complement local news' status as a public service. Dean Baker, Co-Director of the Center for Economic and Policy Research, has already created a similar idea. He proposed the creation of a non-refundable tax credit given to every adult to support a new class of authors and artists whose works would be public domain once produced in exchange for being eligible for such programs.[18]

A condition of eligibility for new forms of support or anything similar to them should be restrictions on the use of paywalls or the use of copyright to restrict the reproduction of the works created by entities covered under this program. The ability of readers to consume or other organizations to prepare derivatives of works covered by Baker's program is a key benefit of it. Though Baker proposes that all works created under his program be public domain upon publication, this is not necessary to achieve the same results. A more modest version of this would be the restriction of the use of paywalls alongside mandatory attribution and restriction of selling ad space for any sites or outlets that reproduce the work in question.

For example, if *The New York Times* were to participate in any of these programs, it would have to eliminate its online paywall. Additionally, it would be permissible for any other website to reproduce in full works produced by the *Times*, provided attribution is given—including a link to the original article, if applicable—and any websites posting the work in full would not be allowed to advertise.[19]

A system of direct compensation managed via fiscal policy would be preferable to an Australian-style form of negotiation, as it would make unnecessary any need to negotiate and eliminate any uncertainty associated with breakdowns or delays in such negotiations.

A robust financing program to support local newspapers, could provide outlets with the revenue needed to stay afloat and compete effectively with larger newspaper publishers. Programs like this already exist in some form or another. The Corporation for Public Broadcasting's (CBP) 2022 budget is set to give out

[17] Maria Cantwell, *Local Journalism: America's Most Trusted News Sources Threatened*, U.S. Senate Committee on Commerce, Science, and Transportation, October 2020. https://www.cantwell.senate.gov/imo/media/doc/Local%20Journalism%20Report%2010.26.20_430pm.pdf.

[18] Dean Baker, *Eight Market-Oriented Proposals That Reduce Income Inequality*, American Enterprise Institute, January 2017. https://www.aei.org/wp-content/uploads/2017/01/Eight-Market-Oriented-Proposals-That-Reduce-Income-Inequality.pdf.

[19] Any changes to copyright law made to this effect should make clear that any such reproduction is *separate* from the rights already provided by fair use or any restrictions on exclusive rights included in the Copyright Act.

over $230 million in grants to local public television stations and over $70 million to local public radio stations.[20] In Europe, public financing of news outlets is common and such outlets are generally well-trusted and reliable sources of news for citizens.[21] Direct funding to local newsrooms could be provided via general fund revenues, though financing such spending via an advertising tax could be used to finance this directly.[22]

## Conclusion

Larger legacy publishers and "superstar" authors have been able to benefit from the changes to the digital marketplace while smaller outlets are being left behind. The crisis of local journalism is very real, and must be taken seriously. However, because this problem is largely concentrated on smaller, local news outlets additional copyright protection is not appropriate. Any revenues from increased negotiation would, by necessity, increase revenue to legacy publications like the now-profitable *New York Times*.[23] A shift to a model that treats local news as the public service it is coupled with philanthropic and public support similar to that provided by the CPB would be a preferable switch. To the extent that an inability of smaller publishers to extract rents available to large online platforms is a problem, it would be preferable to address this structural imbalance by the creation of fiscal policies designed to elevate them as nonprofits conditional upon policies designed to increase the reach of such publications.

[20] "Fiscal Year 2022 Operating Budget," Corporation for Public Broadcasting, last accessed Nov. 23, 2021. https://www.cpb.org/aboutcpb/financials/budget.
[21] Katerina Eva Matsa, "Across Western Europe, public news media are widely used and trusted sources of news," Pew Research Center, June 8, 2018. https://www.pewresearch.org/fact-tank/2018/06/08/western-europe-public-news-media-widely-used-and-trusted.
[22] For a discussion of an ad tax as a model, see Paul Romer, "A Tax That Could Fix Big Tech," *The New York Times*, May 6, 2019. https://www.nytimes.com/2019/05/06/opinion/tax-facebook-google.html.
[23] Edmund Lee, "The New York Times Reaches 8 Million Subscriptions," *The New York Times*, Aug. 4, 2021. https://www.nytimes.com/2021/08/04/business/media/nyt-new-york-times-earnings-q2-2021.html.