

November 24, 2021

The Honorable Shira Perlmutter
Register of Copyrights
U.S. Copyright Office
101 Independence Ave SE
Washington, DC 20559

Re: Publishers' Protections Study; Docket No: 2021-5

Dear Register Perlmutter,

Pursuant to the notice of inquiry published by the Copyright Office (the Office) in the Federal Register at 86 Fed. Reg. 56721 (Oct. 12, 2021), **Re:Create** submits the following comments on the notice regarding Publishers Protection Study: Notice for and Request for Public Comment.

Re:Create was founded in 2015 to educate and highlight the positive impact the Internet has had on creativity and innovation over the last 25 years. Collectively, the members of Re:Create operate over 100,000 libraries visited by the public 1.5 billion times per year; fight global censorship by repressive regimes; provide platforms that enable music and video content to reach global audiences; create new and interesting works of art, literature and video enjoyed by wide audiences; invest in new startups and entrepreneurs; and generate billions of dollars in revenue for the motion picture, recording, publishing and other content industries. While our individual organizations maintain diverse views of specific issues, we are united in our overarching respect for copyright and concern for its future.

In our comments, we will address the following key points:

- Links and snippets are not copyrightable subject matter. Snippets are merely a description of, or a sentence or two from a longer article. To give them copyright or similar protection undermines the very reasons copyright law exists.
- Creating an “alternative” non-copyright like right would be an end around fair use, taking a hammer to the delicate balance in copyright law.

- The government should not be in the business of deciding what is and what is not journalism. Creating a copyright or similar right in links and snippets would require the government to define “journalism”, which has severe First Amendment implications that get at the foundations of democracy. The potential unintended consequences are immense.
- The economic challenges faced by newspapers are not the result of inadequate copyright protections under U.S. law.

Links and snippets are not copyrightable, nor should they be

Links and snippets do not rise to the level of “creative” content that copyright is intended to protect. Changing copyright law to make them copyrightable would throw off the careful balance between Congress’ right to make copyright law “to promote the progress of science and useful arts” and first amendment protections for freedom of speech in the constitution. It would undermine over 200 years of copyright law in the United States as enacted by Congress¹ and interpreted by our court system.²

A link is purely utilitarian and has no creative element to it. The small portion of an article that appears in a snippet or headline is often a sentence or less. The content is facts, titles, phrases and ideas none of which rise to the level of getting copyright protection.³ Looking at certain platforms, this becomes obvious.

A simple Google search for “Copyright Law” turns up some links followed by a sentence or less of content. This “snippet” is usually an incomplete sentence, and is more of an enticement to click through than move on. The link usually has the article’s headline. Moving to

¹ See 17 U.S.C. § 102(b) (“In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.”)

² See *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 344-45 (1991) (“no author may copyright his ideas or the facts he narrates.”); *CMM Cable Rep, Inc. v. Ocean Coast Props., Inc.*, 97 F.3d 1504, 1520 (1st Cir. 1996) (“copyright protection simply does not extend to ‘words and short phrases, such as names, titles, and slogans’”);

³ *Id.*

other platforms, you see more of the same. On Twitter, the links are a headline followed by one sentence. In a similar way to Google search, the content produced by Twitter falls far short of what U.S. law permits to have copyright protection. On platform after platform this is what consumers see.

If a new “right” was created, it would undermine fair use.

While links and snippets are clearly not copyrightable, nor should they be, if a new “right” was created different from copyright, doing so would be an egregious end run around fair use and other exceptions to copyright law, including non protectable subject matter, and its role in preserving freedom of speech under the First Amendment and supporting creativity and innovation. It would be taking a hammer to the delicate balance that exists under copyright law and set a dangerous precedent. Using a small snippet of a work, especially one that enhances the value of the underlying work⁴ and drives revenue to the publisher in the form of new readers, is about as clear and obvious fair use as one would find. It would be a shocking result for a court to find differently, which is one of the main reasons publishers have not sued on copyright infringement grounds. Creating some sort of “other” right given that the material in question is not copyrightable, would be an unprecedented expansion of protection against the balancing of fair use.

The government should not be defining “journalism” nor deciding what news is worthy of a subsidy

The government should not be in the business of deciding what is and what is not journalism. Creating a copyright or similar right in links and snippets would require the government to define “journalism”, which has severe First Amendment implications that get at the foundations of democracy. And the potential unintended consequences are immense.

⁴ It is important to note here that the snippet is intended to get users to “click through” to the news website that hosts the article.

In any democracy, the government should not be in the business of deciding what is news and what is not news. Unfortunately, creating a copyright or similar right in links and snippets would require exactly that. In the hands of the wrong people, this could be used to punish or effectively censor dissenting voices while creating financial windfalls for lies and propaganda.

Additionally, copyright does not distinguish between protections for good creativity and bad creativity. Creating a new right for news content would face this problem. It will allow business models based on clickbait journalism to be propped up, knowing they can make money off of some sort of forced negotiated payment from social media platforms, news aggregators and others. It would have the government subsidizing misinformation from the actual sources of it. Given the current challenges of differentiating between the truth and lies, news and misinformation in the marketplace, a new right to make money off the mere linking to their content would be highly problematic.

Because the First Amendment guarantees freedom of the press and freedom of speech, it would be inappropriate for the government to get in the business of deciding what is and what is not news and worthy of “protection.” Doing so undermines the very role of the press as the “Fourth Estate” in a democracy. We caution the Office in recommending any such rules to try and mitigate the subsidization of untruth.

The economic challenges faced by newspapers are not the result of inadequate copyright protections under U.S. law

The advent of the Internet created new competition for the most lucrative aspects of the newspaper industry. During the 20th century advertising accounted for 80% of revenue and subscriptions accounted for about 20%.⁵ This has been a problem for the newspaper industry as

⁵ *Federal Trade Commission Staff Discussion Draft: Potential Policy Recommendations to Support the Renvention of Journalism* (“FTC Discussion Draft”) at 2. This can be found at https://www.ftc.gov/sites/default/files/documents/public_events/how-will-journalism-survive-internet-age/new-staff-discussion.pdf

advertising revenue has shrunk. Competition for classified ads from sites like Craigslist caused the collapse of classified revenue from \$19.6 billion in 2000 to only \$6 billion in 2009⁶ and \$2.3 billion in 2019.⁷ Overall, advertising revenue dropped 45% in that decade. It dropped approximately two-thirds between 2000 and 2016.⁸ The FTC found that online advertising simply generates less revenue than print advertising did, “often described as ‘digital dimes’ as compared to the dollars generated by print ads.”⁹

Yet, the Copyright Office has opened this Notice of Inquiry to look into potential solutions to the economic challenges facing the newspaper industry. The question before the Copyright Office is if copyright or a pseudo-copyright right would serve as a strong subsidy to make up for the advertising subsidy that previously funded journalism. The FTC has already found that it is unlikely online advertising revenues will **ever** replace the print advertising revenues lost.

Nothing has changed since the FTC released its discussion draft in 2010 other than that we have new information that seems to confirm the problems with granting new intellectual property (“IP”) rights discussed in the report. Links and snippets remain uncopyrightable, as discussed below. Expanding IP rights still “could restrict citizens’ access to th[e] news, inhibit public discourse, and impinge upon free speech rights.”¹⁰ And the problem of unintended costs of a more vigorous “hot news” doctrine persists.¹¹

We also have examples that show that the FTC staff’s concerns with creating a new IP right were valid. When Spain passed a law in 2014 charging news aggregators for links and snippets, Google closed down Google News in the country because it was no longer economically rational to continue the service. It was a disaster for publishers, especially small

⁶ *Id.*

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<https://www.discoursemagazine.com/culture-and-society/2021/07/28/the-press-now-depends-on-readers-f-or-revenue-and-thats-a-big-problem-for-journalism/>

⁸ *Id.*

⁹ *FTC Discussion Draft* at 3.

¹⁰ *Id.* at 6.

¹¹ *Id.* at 10.

publishers, costing them \$10.9 million.¹² Australia's News Media Bargaining Code, passed earlier this year, has faced significant criticism that it favors dominant news outlets, aligns the interests of big tech and big media in a way that is anti-consumer, and ultimately does nothing to promote quality journalism.¹³

The mere existence of this FTC staff discussion draft should give the Copyright Office pause in beginning this undertaking. First, the discussion draft outlines many viable solutions to the problem of news profitability that are well outside of the scope of copyright. Indeed, expanding IP continues to be the **least** viable means of increasing quality journalism over a decade later. Second, there is little - if anything - that the Copyright Office can add to the FTC project which involved multiple public comments and roundtable discussions conducted over two years. The problem, the proposed solutions, and the arguments for and against each have barely changed since 2010.

Conclusion

Thank you for the opportunity to submit our thoughts on this issue. If you have any further questions, we are happy to meet with you to answer them.

Sincerely,

Joshua Lamel
Executive Director
Re:Create

¹²

<https://arstechnica.com/tech-policy/2015/07/new-study-shows-spains-google-tax-has-been-a-disaster-for-publishers/>

¹³ <https://youtu.be/uqj2z3QaRyU> (content warning: inappropriate language)