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November 26, 2021

Ms. Shira Perlmutter

Register of Copyrights and Director of the U.S. Copyright Office
United States Copyright Office

101 Independence Avenue, S.E., LM 404
Washington, D.C. 20559

**Re: Docket No. 2021-5 – The Authors Guild’s Written Comments in
Response to U. S. Copyright Office’s Publishers’ Protection Study: Notice
and Request for Public Comment, 86 Fed. Reg. 56721 (Oct. 12, 2021)**

Dear Register Perlmutter:

The Authors Guild commends the Copyright Office for undertaking this timely inquiry into the existential threats facing press publishers today, and thanks you for the opportunity to submit these comments.

The Authors Guild is a national non-profit association of more than 11,500 professional writers, including over 3,000 journalists and scores more who regularly contribute to newspapers and magazines. Since its founding in 1912, the Guild has worked to promote the rights and professional interests of authors in various areas, including copyright, freedom of expression, and taxation. Our members cover current events and topical news, as well as important issues in history, biography, science, politics, medicine, business, and other areas; they are frequent contributors to the most influential and well-respected publications in every field. The Guild has a strong interest in ensuring the survival of a healthy press publishing ecosystem both because newspapers and magazine publishing are important sources of income for our members, and because of our belief that a free and diverse press is essential to democracy.

For the last two decades, U.S. newspaper and magazine publishers have suffered a gradually intensifying crisis due to loss of advertising revenues. According to the nonpartisan Pew Center for Research, press publisher advertising revenues have fallen from approximately \$50 billion in 2005 to an estimated \$8.8 billion in 2020.ⁱ As a consequence of the shrinking advertising market, scores of newspapers and magazines have been forced to shutter—one in five since 2008ⁱⁱ and an estimated 2,100 since 2004—or otherwise consolidated under large national media holdings, creating vast news deserts and depriving communities of much-needed transparency at the local level.ⁱⁱⁱ These losses have a direct effect on writers’ incomes and their ability to research and write newsworthy stories. Newspapers and magazines that have survived have been forced to lay off staff to stay afloat and have also decreased rates paid to freelancers in the last decade and a half.^{iv} As the NOI states, newsroom staff dropped by 40% from 2008 to 2019. Overall, newsroom employment dwindled from 114,000 employed journalists in 2008 to only 85,000 last year, a drop of more than 26%.^v

The pandemic has only accelerated these trends with as many as 90 local news outlets closing their doors or merging.^{vi} This in turn has led to further losses for freelance writers. According to surveys conducted by the Authors Guild to assess the pandemic's impact on author incomes, loss of freelance journalism work was the second-most common reason cited by authors for the slump in their incomes last year; over 70% of the authors surveyed had lost significant income due to the pandemic and on average authors reported losing nearly half of their regular pre-pandemic income.^{vii}

Loss of journalism jobs and incomes means that there are fewer reporters collecting real news and writing original stories, constricting access to fact-based news reporting, especially on the local level, for millions of Americans. This is a crisis whose reckoning is already here as we see misinformation and click-bait replace high-quality professional journalism, which takes enormous time, labor, and resources to create.

While the NOI correctly notes that domination of the advertising market by news aggregators, which include search engines and social media platforms, is the main cause of why press publishers are struggling to stay afloat, it bears emphasizing that there are two principal culprits within this broad category of “news aggregator”—Facebook and Google—who together control 55% of the entire U.S. digital advertising market and a huge percentage of new ad revenue.^{viii} For instance, in the third quarter of 2016 companies owned by Facebook or Google took 90% of all new digital ad revenue, and not a single one of their would-be competitors could even crack a 3% share of global digital advertising.^{ix}

Unsurprisingly, both the astronomical growth of these companies and the shocking decline of the entities and people who report and write the news result from an erosion of copyright norms. In particular, the expansion of fair use and introduction of the server test in the Ninth Circuit's decision in *Perfect 10*^x have emboldened online platforms and news aggregators to monetize content reported and created by journalists and publishers at enormous expense, and to take increasingly large segments of news clips and entire high-quality images as well in-line linking to news content all without paying for or seeking licenses to the content from its creators. These companies have also used their accumulated monopoly power to force content creators into one-sided terms. Google, in particular, has used its dominant position in the advertising marketplace to force news publishers to give up control over how their content is used as a condition for search visibility.^{xi} As the News Media Alliance's White Paper, “How Google Abuses Its Position as a Market Dominant Platform to Strong-Arm News Publishers and Hurt Journalism” states: “[T]he legal system gave Google protection on the theory that it was engaged in good faith, fair uses of third-party content. Now, the facts underlying that original assumption have changed dramatically and upset the balance between Google and publishers, leading to industry and societal ramifications.”^{xii}

The problems described in the NOI are a serious threat to democracy. How can a country govern itself if the bottom has been taken out of the economic system (based on copyright) on which news collection and writing depend, and which no longer distinguishes between real news created by hard-working professionals and the fake news maliciously created by agitators, political machines, criminals, and foreign governments? Unlike many other industrialized countries where governments have used antitrust and copyright laws to contain or roll back the power of tech-based monopolies, U.S. laws and policy have failed to keep pace with their growing scale. We are hopeful, however, that the Copyright Office's present inquiry, alongside antitrust oriented legislative solutions such as the Journalism Competition and Preservation Act (S.673 and H.R.1735), which the Authors Guild strongly supports, will eventually yield robust solutions to reverse this disastrous trend.

The ills of the news industry are so far progressed at this point that it will take a multi-pronged approach to bring it back to sufficient health to sustain a fully functioning democracy, which requires access to true information—or knowledge. As James Madison said (a quote which appears on the front of the Library of Congress’ Madison building in which the Office is located): “A people who mean to be their own governours, must arm themselves with the power which knowledge gives.”

In addition to the Journalism Competition and Preservation Act, which would help level the playing field for negotiations between news providers and Google and Facebook, the Authors Guild recommends that the Office investigate the possibility of sui generis protection for news, akin to that provided for mask works or vessel hulls. Further, a clarification of how the display right and the server test should be applied in cases of news aggregators displaying third-party produced news to their users would be most helpful, as well as an analysis of how fair use should be applied in these cases.

We look forward to working with the Office on this important study.

Respectfully submitted,



Mary E. Rasenberger
CEO
The Authors Guild

ⁱ Pew Research Center, Newspaper Fact Sheet, <http://www.journalism.org/fact-sheet/newspapers/>

ⁱⁱ Lara Takenaga, *More Than 1 in 5 U.S. Papers Has Closed. This is the Result*, N.Y. TIMES (Dec. 21, 2019), <https://www.nytimes.com/2019/12/21/reader-center/local-news-deserts.html>

ⁱⁱⁱ UNC Hussman School of Journalism and Media, *Where Have Newspapers Disappeared?* <https://www.usnewsdeserts.com/#1536249049294-115f3533-f5e9>

^{iv} Rates actually paid to journalists today are collected on The Freelance Creative, <https://contently.net/rates-database/rates/>, and Who pays Writers, <http://whopayswriters.com/#/results>. In some cases, rates are zero or close to zero, and come out significantly lower than minimum wage based on the number of hours writers might spend on a decent news article. In almost all cases, rates are reported to be vastly lower than they were 15 years ago. We will follow up with any statistical data we can find to support the decrease in rates. The decrease in per word and piece-based rates forces journalists to report and write at enormous speed in order to make any kind of living, which leads to reduced quality and vastly lower depths of research and thought. *See for e.g.*, James Joyner, *The Declining Market for Freelance Writing*, OUTSIDE THE BELTWAY (Apr. 18, 2018), <https://www.outsidethebeltway.com/the-declining-market-for-freelance-writing/> (discussing the impact of lower-paying freelance opportunities on the quality of writing and journalism). *See also* Ryan McCready, *How Much Do Freelance Writers Actually Make?* VENNGAGE (June 10, 2016), <https://venngage.com/blog/how-much-do-writers-make/> (“The required word count does not start

getting out of hand until we look at the middle 50% and Bottom 50%. For the Middle 50% of writers, they would need to publish between 15k and 30k words a month to earn the average wage. Or between 1k and 2k words published per day. We are guessing this is where a majority of the writers are concentrated which makes the number even more concerning.”)

^v Mason Walker, *U.S. Newsroom Employment Has Fallen 26% since 2008*, PEWRESEARCH.ORG (Jul. 13, 2021), <https://www.pewresearch.org/fact-tank/2021/07/13/u-s-newsroom-employment-has-fallen-26-since-2008>.

^{vi} Kristin Hare, *More than 90 Local Newsrooms Closed During the Coronavirus Pandemic*, POYNTER (Oct. 20, 2021), available at <https://www.poynter.org/locally/2021/the-coronavirus-has-closed-more-than-60-local-newsrooms-across-america-and-counting/>.

^{vii} The Authors Guild COVID-19 Survey #3 Summary of Response, <https://www.authorsguild.org/industry-advocacy/authors-guild-covid-19-survey-3-summary-of-responses/>.

^{viii} Alexandra Bruell, *Amazon Surpasses 10% of U.S. Digital Ad Market Share*, WALL ST. J. (Apr. 6, 2021), available at <https://www.wsj.com/articles/amazon-surpasses-10-of-u-s-digital-ad-market-share-11617703200>.

^{ix} Jonathan Taplin, *Can the Tech Giants be Stopped?* WALL ST. J. (July 14, 2017), available at <https://www.wsj.com/articles/the-race-is-on-to-challenge-google-facebook-duopoly-in-digital-advertising-1497864602>.

^x *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007).

^{xi} See generally NEWS MEDIA ALLIANCE, *HOW GOOGLE ABUSES ITS POSITION AS A MARKET DOMINANT PLATFORM TO STRONG-ARM NEWS PUBLISHERS AND HURT JOURNALISM* (Jun 18, 2020), available at <https://www.newsmediaalliance.org/wp-content/uploads/2020/06/NMA-Google-White-Paper-Design-Final.pdf>.

^{xii} *Id.* at 6.