

Before the
United States Copyright Office
Washington, DC

In re

Publishers' Protections Study:
Request for Additional Comments

Docket No. 2021-5

**ADDITIONAL COMMENTS OF
COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION**

Pursuant to the notice of inquiry (“NOI”) published by the U.S. Copyright Office in the Federal Register at 86 Fed. Reg. 56721 (Oct. 12, 2021), and the subsequent NOI at 86 Fed. Reg. 62215 (Nov. 9, 2021), the Computer & Communications Industry Association (“CCIA”)¹ submits the following additional comments to respond to the initial comments as well as arguments presented during the December 9, 2021 roundtable convened by the Copyright Office.

Introduction

The submissions and the comments provided during the roundtable demonstrate there is no compelling or well-founded argument for adoption of an ancillary press publishers’ right by the United States.² As discussed in several initial submissions, *see* CCIA and Internet Association, *Initial Comment* at 11-13, 19-25 (Nov. 24, 2021); Google, *Initial Comment* at 7-10 (Nov. 24, 2021); Public Knowledge, *Initial Comment* at 2-6 (Nov. 26, 2021); Meta, *Initial*

¹ CCIA is an international, not-for-profit trade association representing a broad cross section of communications and technology firms. For fifty years, CCIA has promoted open markets, open systems, and open networks. CCIA members employ more than 1.6 million workers, invest more than \$100 billion in research and development, and contribute trillions of dollars in productivity to the global economy. A list of CCIA members is available at <https://www.cciagnet.org/members>.

² This was also evident in the European Union. Even EU regulators acknowledged this when they unsuccessfully tried to suppress a copyright-related study they had requested on press publishers’ rights because it found that “[t]he available empirical evidence shows that newspapers actually benefit from news aggregation platforms in terms of increased traffic to newspaper websites and more advertising revenue.” *See* Tom Hirche, *EU Commission Tried to Hide a Study That Debunks the Publisher’s Right as Ineffective*, IGEL (Jan. 3, 2018), <https://ancillarycopyright.eu/news/2018-01-03/eu-commission-tried-hide-study-debunks-publishers-right-ineffective>.

Comment at 11-13 (Nov. 26, 2021), adapting the European press publishers’ right to the United States would be not only undesirable but also impossible within the U.S. legal framework, given the Constitutional underpinnings of the U.S. copyright system and its inherent limits on protectable subject matter. Further, neither the submissions nor the roundtable debate identified a problem that a so-called ancillary copyright protection would address. Statements in the record include vague assertions of market dysfunction, variously referring to the market for readers’ attention, online advertisements, ideas, user time, or some unnamed amalgamation of these. None of these is a clearly identified market susceptible to appropriate examination or intervention through this study, which was prompted by a Congressional request that did not invite the Copyright Office to consider—let alone focus on—issues related to competition.³

I. Words and Short Phrases

Although Professor Ginsburg is correct that the “words and short phrases” doctrine can theoretically protect short snippets and headlines that evidence originality, as a matter of logic and constitutional limitations any copyright protection would be thin at best. As courts have long recognized, short phrases are far less likely to evidence the requisite originality to justify protection. *See, e.g., CMM Cable Rep, Inc. v. Ocean Coast Props., Inc.*, 97 F.3d 1504, 1519 (2d Cir. 1996) (“It is axiomatic that copyright law denies protection to ‘fragmentary words and phrases’ . . . on the grounds that these materials do not exhibit the minimal level of creativity necessary to warrant copyright protection.”); *Hutchins v. Zoll Med. Corp.*, 492 F.3d 1377, 1385 (Fed. Cir. 2007) (holding that short phrase “if no pulse, start CPR” was not entitled to copyright protection); *see also* 1 Nimmer § 2.01[B][3] (recognizing that generally case law “den[ies]

³ Letter from Sens. Tillis, Leahy, Cornyn, Hirono, Klobuchar, and Coons to Register of Copyrights Shira Perlmutter (May 3, 2021), *available at* <https://www.copyright.gov/policy/publishersprotections/letter-to-the-copyright-office.pdf>.

protection to fragmentary words or phrases,” and it is only in instances where a phrase exhibits “sufficient creativity” such as “Euclid alone has looked on Beauty bare” that copyright protection might be appropriate).

Because newspaper headlines report facts as a matter of convention, they are also highly likely to be subject to the merger doctrine, where a fact or idea can be expressed only in a few efficient ways—as is frequently the case in efficiently conveying news. *See, e.g., Hiller, LLC v. Success Grp. Int’l Learning Alliance*, 976 F.3d 620, 628 (6th Cir. 2020); *Kregos v. Associated Press*, 937 F.2d 700, 705-06 (2d Cir. 1991) (“[E]ven expression is not protected in those instances where there is only one or so few ways of expressing an idea that protection of the expression would effectively accord protection to the idea itself.”).⁴ For instance, a news headline such as “S&P 500 hits new record” or “Cubs defeat Red Sox 3-1” can be efficiently conveyed in only so many ways. Indeed, many snippets and headlines are so formulaic that they can be generated without any human intervention through machine algorithms based on the underlying unprotectable facts.⁵ Thus, as one commentator has warned, if “copyright protection were freely extended to headlines, the possible non-infringing headline variations for a particular news story might well be used up, leaving subsequent writers with no choice but to risk infringement of a previously copyrighted version.” Robert Denicola, *News on the Internet*, 23 *Fordham Intell. Prop. Media & Ent. L.J.* 68, 79 (2012).

⁴ *See also Morrissey v. Procter & Gamble Co.*, 379 F.2d 675, 678 (2d Cir. 1967) (“When the uncopyrightable subject matter is very narrow, so that the topic necessarily requires . . . if not only one form of expression, at best only a limited number, to permit copyrighting would mean that a party or parties, by copyrighting a mere handful of forms, could exhaust all possibilities of future use of the substance” (citation omitted)); *Hutchins v. Zoll Med. Corp.*, 492 F.3d 1377, 1385 (Fed. Cir. 2007) (finding that short phrases setting out the “standard instructions for performing CPR are indispensable for applying CPR” and are thus subject to merger doctrine).

⁵ Jaclyn Peiser, *The Rise of the Robot Reporter*, *N.Y. Times* (Feb. 5, 2019), <https://www.nytimes.com/2019/02/05/business/media/artificial-intelligence-journalism-robots.html>.

Importantly, both the originality requirement underlying the “words and short phrases” doctrine, as well as the expression/idea dichotomy embodied in the merger doctrine, derive from the Constitution. *See Feist Publications, Inc. v. Rural Telephone Serv. Co.*, 499 U.S. 340, 346 (1991); *Veeck v. S. Bldg. Code Cong. Int’l, Inc.*, 293 F.3d 791, 801 (5th Cir. 2002). Similarly, to the extent that a headline, lede, or image rises to the level of original expression, another constitutionally-required safety valve—the fair use doctrine—would generally permit its use by a “news aggregator.”⁶ The Copyright Office should emphasize that copyright protection for any kind of work or any part thereof can exist only to the extent permitted by the Intellectual Property Clause and the First Amendment.⁷ These are significant, non-negotiable constraints neither the EU nor Australia had to consider in their recent policy interventions related to news aggregation.

II. “Hobson’s Choice”

Even if copyright protection for “words and short phrases” could sometimes overcome inherent constitutional limits, as Professor Ginsburg seems to propose, the expansion would be unlikely to affect current practice; most publishers *voluntarily* allow so-called news aggregators to use headlines and short extracts, whether or not those materials are copyrightable. Publishers’ grant of permission to aggregators to use those short snippets and headlines necessarily prevents publishers from succeeding in any subsequent infringement action. *See, e.g., Jacob Maxwell, Inc. v. Veeck*, 110 F.3d 749, 753 (11th Cir. 1997).

⁶ *See* 17 U.S.C. § 107 (specifically listing “news reporting” as a purpose that constitutes fair use). There is no accepted definition of “news aggregator.” These comments use the term “news aggregator” in the imprecise and broad manner employed by the October 12, 2021 NOI, and we do not concede whether or which CCIA members would be properly categorized as so-called “news aggregators.”

⁷ *See Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003) (holding that copyright legislation may avoid searching First Amendment scrutiny only where the government “has not altered the traditional contours of copyright protection”).

In response to this inconvenient fact, the News Media Alliance (“NMA”) during the roundtable repeatedly asserted that news publishers are faced with a “Hobson’s choice” in which they must assent to a relationship that delivers no value to them. The Merriam-Webster Dictionary defines a “Hobson’s choice” as “the necessity of accepting one of two or more equally objectionable alternatives.” Contrary to NMA’s suggestion, granting a news aggregator permission to include the publisher’s headlines, ledes, and thumbnail images in its service is not an “objectionable alternative.” News aggregators provide news publishers with enormous value: they steer a large number of readers to news sites, which in turn generates advertising revenue—and potentially ongoing subscription revenue—for those sites. Indeed, without news aggregators, many of the articles posted on news sites would never be found by readers, in which case they would generate no advertising revenue. News aggregators provide this valuable service to news sites without charge.

Not surprisingly, the news publishers would prefer to get an even better deal; they would prefer for the news aggregators to pay them for the privilege of sending them traffic. That the news publishers don’t get everything they want from news aggregators doesn’t make the interaction between news publishers and news aggregators unfair, let alone unlawful. The fact that news publishers for more than a decade have consented to being crawled by search engines, and have actively posted their content on social media sites, proves that these services provide them with enormous value.⁸ If anyone faces a Hobson’s choice, it is the services in the EU and

⁸ There is nothing unusual about news aggregators not paying news publishers for use of their content. The academic publishing market follows a similar approach in an even more stark manner. Academic authors transfer the copyrights in their articles to journal publishers without remuneration. The authors benefit financially from the publication of their articles through promotion and tenure. Although the academic authors undoubtedly would prefer to be paid for their articles, they still derive great value from the existing business model. And in this model, the journal publishers receive the copyrights in the articles for free and then sell access to the articles. The news aggregators more modestly reproduce just headlines, ledes, and thumbnail images, and link to the entire articles on the news publishers’ sites.

Australia. Under “must-carry, must-pay” regimes, the service must choose between paying license fees dictated by the government and exiting the market altogether.

III. Journalism Competition and Preservation Act

While normally it would not be necessary to opine on a legislative proposal already before Congress in these proceedings, several of the participants who appeared representing NMA articulated a belief that the Copyright Office should use this Congressionally-mandated inquiry into the wisdom of adopting an ancillary copyright right to, instead, endorse the Journalism Competition and Preservation Act (“JCPA”). At the roundtable and in its initial comments, NMA insisted that it is not seeking amendments to the Copyright Act nor the creation of a press publishers’ right similar to that enacted in the EU. Rather, its legislative request is adoption of the JCPA. The JCPA would create a safe harbor from liability under the federal and state antitrust laws enabling “news content creators” to bargain collectively with “online content distributors.” Leading antitrust experts from the Executive Branch over many administrations of both parties consistently have opposed antitrust exemptions, including the JCPA.⁹

⁹ See, e.g., OECD, News Media and Digital Platforms – Note by the U.S., Antitrust Division of the Dep’t of Justice and the U.S. Fed. Trade Comm’n (Dec. 3, 2021), [https://one.oecd.org/document/DAF/COMP/WD\(2021\)72/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2021)72/en/pdf) (“For example, in May 2009, . . . DOJ’s Deputy Assistant Attorney General Carl Shapiro testified that current antitrust laws were flexible enough to meet the needs of the dynamic news media marketplace, and that vigorous antitrust enforcement remained critical. Likewise, in March, 2011, DOJ’s Assistant Attorney General Christine Varney noted that the recent attempts to expand antitrust immunity for the newspaper industry were ‘well-intentioned, but ultimately misguided.’ She repeated the DOJ’s longstanding opposition to such proposals, adding that recent changes in the industry were “not caused by antitrust enforcement, and limiting antitrust enforcement will not reverse those changes,” and that many newspapers face difficulties in spite of having an exemption.”); OECD, Working Party No. 2 on Competition and Regulation, Competition Enforcement and Regulatory Alternatives – Note by the U.S., Antitrust Division of the Dep’t of Justice and the U.S. Fed. Trade Comm’n (June 7, 2021), https://www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/competition_enforcement_and_regulatory_alternatives_us_submission.pdf (“In 2018, the DOJ hosted a public roundtable to hear views from industry participants, academics, think tanks, and other interested parties regarding exemptions and immunities from the antitrust laws, and their impact on free markets and consumers. The roundtable reflected a general consensus that Congress should not enact future antitrust exemptions or immunities and also should explore actively studying, sunseting, or eliminating current statutory exemptions and immunities.”); Makan Delrahim, Assistant Att’y Gen., U.S. Dep’t of Justice Antitrust Division, Remarks at the Antitrust Division’s First Competition and Deregulation Roundtable (Mar. 14, 2018), <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-antitrust-division-s-first> (“When I served on the Antitrust Modernization

The advisability of the JCPA—or other competition-based interventions—is far outside the institutional expertise of the Copyright Office. It is outside the statutory remit of the Copyright Office under 17 U.S.C. § 701(4): to “[c]onduct studies and programs regarding copyright, other matters under [title 17], and related matters. . .” Although the news publishers may consider themselves a “copyright industry,” the Copyright Office has no institutional expertise with respect to the economic conditions within and market forces acting upon news publishers, just as it has no particular expertise with respect to the market forces that affect other “copyright industries,” such as the motion picture industry or the music industry. Nor is this a circumstance where Congress has created an entity such as the Copyright Royalty Board specifically tasked in part with assessing the market effects of potential regulatory changes in a copyright industry, or the section 1201 rulemaking where Congress has specifically tasked the Librarian of Congress (with the assistance of the Copyright Office) to make assessments about the market effects (and other effects) of particular proposed regulatory exemptions. *See* 17 U.S.C. § 1201(a)(1)(C).¹⁰ Unlike the Federal Communications Commission, which regulates aspects of the communications industry, the Copyright Office does not regulate these so-called copyright industries. Rather, it helps administer the copyright laws.

In sum, because the JCPA is far outside of the scope of the Copyright Office’s expertise, as well as beyond the scope of the October 12, 2021 NOI and the May 3, 2021 letter by six

Commission back in 2007, we concluded that “[a]s a practical matter, an exemption from all or part of the antitrust laws means firms can avoid the tough discipline of competition. When the beneficiaries of an exemption likely appreciate reduced market pressures, consumers . . . and the U.S. economy generally bear the harm.”); Christine A. Varney, Assistant Att’y Gen., U.S. Dep’t of Justice Antitrust Division, Remarks for the Newspaper Association of America on Dynamic Competition in the Newspaper Industry (Mar. 21, 2011), <https://www.justice.gov/atr/speech/dynamic-competition-newspaper-industry> (“[T]he [newspaper] industry currently enjoys an exemption from the antitrust laws through the NPA, yet many newspaper owners still face significant difficulties. In fact, that exemption may well have contributed to industry sluggishness in making difficult but necessary choices forced by changing market dynamics.”).

¹⁰ Indeed, even then, the Copyright Office is required to consult with the Department of Commerce. *See* 17 U.S.C. § 1201(a)(1)(C).

Senators requesting that the Copyright Office study “protections for publishers under copyright law,”¹¹ the Copyright Office should refrain from taking any position on the JCPA.

Nonetheless, if the Copyright Office feels compelled to address the JCPA, we offer these observations. First, like many others, we question the wisdom of creating an industry-wide JCPA cartel—the “antithesis of competition,”¹² with severe negative consequences—as an answer to an alleged cartel’s market power.¹³ Second, if Congress were to adopt the JCPA, small publishers and consumers would be likely to suffer. Larger publishers would likely dominate the negotiations, leaving little room for the smaller publishers; accordingly, the larger publishers would be likely to benefit most from a JCPA cartel. The bill provides no mechanism to ensure, assuming the JCPA cartel successfully negotiates licenses with news aggregators for use of its content, that funds for those licenses will be used to address publishers’ key economic problems like relieving news deserts, eliminating debts, and hiring journalists. Finally, consumers are likely to suffer—it is more likely that the JCPA cartel leads to further consolidation of news publishers, not less. So the diversity of publishers will decline. Indeed, one only need look at the list of publishers that met with Congressional members in May 2021 to advocate passage of the JCPA to see that it is the largest publishers, not the smallest, that are advocating for it: Advance Publications, Atlanta Journal-Constitution, The Boston Globe, CNHI,

¹¹ Letter from Sens. Tillis, Leahy, Cornyn, Hirono, Klobuchar, and Coons to Register of Copyrights Shira Perlmutter (May 3, 2021), *supra* note 3.

¹² John M. Yun, *News Media Cartels are Bad News for Consumers*, Competition Pol’y Int’l (Apr. 25, 2019), <https://www.competitionpolicyinternational.com/news-media-cartels-are-bad-news-for-consumers/> (“[C]artels are condemned under a per se standard is because there is little to no redeeming social value from allowing competitors to jointly set the terms of trade in a market.”).

¹³ “[T]he impact of the [JCPA] is to legalize an industry-wide media cartel, which can collectively fix prices and can exclude organizations that are not deemed ‘news content creators.’ The likely result is higher content costs for these platforms, as well as provisions that will stifle the ability and freedom to innovate. In turn, this could negatively impact quality for the users of these platforms.” John M. Yun, *Static v. Dynamic Antitrust: A Reply*, Competition Pol’y Int’l (June 16, 2019), <https://www.competitionpolicyinternational.com/static-vs-dynamic-antitrust-a-reply>.

Gannett, Los Angeles Times, McClatchy, Tampa Bay Times/Times Publishing, Trib Total Media, and Tribune Publishing Company.¹⁴

IV. Quotation Right

During the roundtable, an NMA representative suggested that even if the quotation right under Article 10(1) of the Berne Convention were mandatory for Berne Convention signatories, they would only need to accord the quotation right to foreign authors. In other words, NMA argued that Congress could grant ancillary copyright to U.S. press publishers without violating the Berne quotation right. International copyright scholars Tanya Aplin and Lionel Bently, at pages 31-35 of their book *Global Mandatory Fair Use*, found that the quotation right was mandatory for domestic and foreign authors alike.¹⁵ This means that Congress could not create an ancillary copyright for U.S. press publishers without violating the Berne Convention.

V. Constitutional Concerns

No participants in the Copyright Office proceedings to date, including those representing the NMA, had a meaningful answer for the obvious constitutional flaws in expanding copyright protections to cover news links and snippets. Ancillary copyright protections violate the constitutional purposes of copyright and—by abrogating the traditional First Amendment safety valves embodied in doctrines such as the originality requirement, merger, and fair use—would be subject to heightened First Amendment scrutiny. As discussed in CCIA’s initial comments, ancillary copyright regimes such as those adopted in the EU and Australia would impinge on

¹⁴ See Press Release, News Media Alliance Hosts Congressional Meetings to Advocate for Passage of the Journalism Competition & Preservation Act (May 10, 2021), <https://www.newsmediaalliance.org/release-news-media-alliance-hosts-congressional-meetings-to-advocate-for-passage-journalism-competition-preservation-act/>.

¹⁵ Tanya Aplin & Lionel Bently, *GLOBAL MANDATORY FAIR USE: THE NATURE AND SCOPE OF THE RIGHT TO QUOTE COPYRIGHT WORKS* 31-35 (Cambridge Univ. Press 2020).

editorial discretion, potentially discriminate based on content or the identity of favored speakers,
and compel speech.

Respectfully submitted,

Ali Sternburg
Senior Policy Counsel
Computer & Communications Industry Association

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