

Submitted by Michelle De Mooy  
MPA The Association of Magazine Media



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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, 86 Fed. Reg. 62,215

*Via Regulations.gov*

Dear Ms. Perlmutter,

MPA – The Association of Magazine Media (MPA) appreciates the opportunity to add further detail to the comments we submitted to the United States' Copyright Office (USCO, the Copyright Office, or the Office) on Nov. 26, 2021 regarding the Publishers' Protections Study. MPA represents more than 500 magazine media brands, including some of the nation's largest, best known and trusted brands as well as publishers of many small, regional, and niche titles serving diverse communities and interests. Our members deliver professionally written, photographed and filmed, edited, curated, copyright-protected news and other content to around 90 percent of all United States (U.S.) adults.

Many of the issues raised by this study are critically important to the success and resilience of the industry. As we and other commentators have noted, U.S. press publishers face unprecedented challenges in today's digital environment. However, it is the rise and ongoing dominance of news aggregators and platforms, via the scraping, distributing, and monetizing publisher content, that has by far landed the biggest blow to long-term viability of press publishers.

In these reply comments, we address points made by commentators and roundtable participants, including: 1) the appropriateness of the USCO's involvement in the Publisher Protections study 2) useful elements for U.S. lawmakers to consider in the approaches taken by the European Union (EU) and Australia establishing an "ancillary right" for news publishers 3) the argument for judging fair use on a fact-specific and case-by-case basis 4) the importance of creating a process that allows bulk registration of dynamic content and 5) the potential pitfalls

in platform and aggregator use of artificial intelligence to scrape and generate news and other content.

### **1. Appropriateness of the USCO's Publisher Protections Study**

[Congress asked](#) the USCO to examine developments in foreign copyright law that have included the adoption of an ancillary right for publishers, namely [Articles 15 and 17 of the European Union's Directive on Copyright in the Digital Single Market](#) and [Australia's News Media Bargaining Code](#), to assess whether the U.S.'s current protections for press publishers are sufficient and, consequently, to determine whether the U.S. should adopt similar protections. Contrary to comments made by some participants during the roundtable, it is entirely appropriate for the USCO to study the impact of current copyright protection amidst the precipitous decline of a copyright-based industry, and to consider the workability of new protections, such as those being implemented abroad. The proximity of competition and copyright issues in this case is both a reflection of marketplace changes and of policy and law's struggle to keep pace with those changes. This coupling is not a sign that the Office should back away from the issues being tackled by the study, as some commentators have suggested. Rather, it should be an impetus to action and an opportunity for the Office to offer recommendations for innovative policy solutions that better protect copyright holders.

### **2. National treatment and collective bargaining**

Protections provided to news media outlets in the EU and Australia are robust. Article 15 of the EU's Copyright Directive grants press publishers (covering journalistic matter in any media, including newspapers and magazines) a right to be compensated for any commercial use of their content by an "information society service provider" while Article 17 requires "online content-sharing service providers" to get permission from relevant rights holders before making copyright-protected content available on their platforms. Critically, Article 17 includes provisions making platforms liable for failing to get permission and/or for ensuring unauthorized content is blocked. This suite of protections establishes legal rights to fair remuneration for content, rights to revocation for exclusive and non-exclusive licenses, and a right to transparency between licensors and licensees. Australia's News Media and Digital Platforms Mandatory Bargaining Code requires platforms to participate in collective bargaining with press publishers on fair payment for content, mandating arbitration if those negotiations fail. Platforms have vehemently protested these protections, one preferring to ["go dark" in Australia](#), for example, rather than be forced to negotiate fair compensation with news publishers collectively.

While the U.S. Copyright Act is similarly vigorous on paper, it comes with an important caveat in practice – the rights and protections it affords to copyright holders have not been suitably

updated to reflect the digital environment and resulting massive changes in content reproduction, distribution, and public display.

In its analysis of the transposability of an ancillary right for U.S. press publishers, the Copyright Office must ask where the gaps in protection exist in U.S. law and what measures can be updated to most benefit press publishers today and in the future. We recommend the Office advocate for updating the law to include Article 15's definition of press publishers, Article 17's accountability provisions, and an agreement that creates "national treatment" for U.S. content in the EU, as well as requesting a review of U.S. competition law to determine whether and how it might incorporate collective bargaining, like Australia's, for press publishers.

As mentioned above, Article 15's definition of press publishers recognizes the important and necessary contributions to news of magazines and other journalistic content. "National treatment," in the context of an agreement in international copyright law, promises that creators in one country receive the same protection for their work when it is available in another. In other words, foreign authors' works are protected in the same way as native authors' works. If the U.S. were to sign a bilateral agreement with the EU to codify "national treatment," it would ensure that U.S. press publishers generate much-needed revenue from content viewed in the EU.

To balance platform monopolies in news content distribution and advertising revenue, Australia's law mandates platforms' participation in collective bargaining with news publishers. Platforms frequently touted, in their written comments and testimony at the Dec. 9 roundtable, the ability of publishers to choose whether to list their content or allow platforms to access it. This position fails to recognize the real choice that many U.S. press publishers, especially those that are small and local, are facing: the choice between engaging with technology platforms or going out of business, sometimes closing the doors of the last community newspaper. This is not a choice but a coercive option in a system stacked against the press. Publishers in the U.S. can limit access to their content under Section 1201 of Title 17, but platform dominance has turned this protection into a nominal right; few publishers would risk the significant loss of traffic and advertising opportunities they would face by invoking it nor the wrath of platforms that threaten to "de-list" fairly licensed and compensated press content, effectively removing public access to it.

The inclusion of an Australia-like collective bargaining approach in U.S. law would, at a minimum, confer leverage onto publishers of all sizes, allowing them to negotiate fair compensation for their content and potentially rescuing some news outlets. The Office should make clear to Congress that the asymmetric bargaining power between platforms and publishers must be levelled to protect the creation of high-quality journalism.

Finally, as mentioned earlier, even if the U.S. were to adopt a policy regime or legislative framework altogether, press publishers would remain unprotected without an effective enforcement or accountability mechanism. The Copyright Office should include an analysis of the transposability of Article 17-like provisions into American copyright law.

### **3. The argument for a fact-specific and case-by-case approach to fair use**

In initial comments to the USCO and at the Dec. 9 roundtable, online platforms and supporting commenters argued that the Office should determine, first, that material they take from press publishers is not copyrightable, and second, that even if such content is copyrightable and copyrighted, their appropriation of the content constitutes fair use.

As press publishers, MPA and its members recognize and support the inherent balance contained in the fair use test. We are, under various circumstances, both complainants and defendants before the Courts. Nevertheless, we find extremely concerning statements made by aggregators that believe that there are “no circumstances” that would require them to pay licensing fees. The determination of fair use is specific to each individual set of facts and the Office should make that conclusion clear in its study. There are serious issues involving each of the fair use factors that need to be evaluated in their totality. There is much at stake for the continued survival of the news media industry.

We also disagree with the aggregators’ characterization of their use of appropriated news content as “transformative.” In contrast to the creative expressions that publishers undertake when using content initially obtained from other sources, aggregators are not inherently engaged in a transformative process. They are not seeking to produce original works based on the news content they scrape but are instead recycling and displaying it. As noted by Professor Jane Ginsburg in her Nov. 26 comments, aggregated content can simply encapsulate and reproduce the expressive and unique storytelling elements contained in the original news content.

### **4. Bulk registration of dynamic web content**

These unique storytelling elements are increasingly contained in a digital-only news content environment, with content constantly changing, updating, and refreshing in real time. For many publishers, these changes must also be performed across multiple brands and publications. Unfortunately, infringement can also happen in real time. Currently, publishers have no practical way to register their content in a timely way without leaving numerous articles, photographs, and other content they produce unprotected. Consequently, press publishers cannot pursue an infringement lawsuit in federal court without the ability to register their news. The procedures for registering copyright ignore the inherent changeability of digital content and the need for flexibility. The Office should implement a registration system for bulk

dynamic website content to address the problem, which can and should be part of the Copyright Office's modernization initiatives.

## **5. Artificial intelligence**

Finally, we believe the Copyright Office's study should examine emerging issues impacting press publishers as well as the well-documented issues we have focused on in these comments. The use of artificial intelligence (AI) by platforms and other aggregators is ubiquitous and poses a unique and existential threat to copyright and journalistic content. Specifically, platforms' use of AI's processing power to scrape and display massive amounts of content from press publishers, then use the content to train machine learning programs to "write" news stories. The scraped content is mined for more than just facts; these systems analyze grammar, word choice, and composition, resulting in stories that draw from, and are dependent upon, multiple sources of copyright-protected content. In addition, the software extracting news content to use for training input can be difficult to detect, making it that much harder for publishers to enforce their rights. This content mining, and mimicry, will continue unabated, degrading the value of legitimate news content and the overall viability of the press, without a legal framework that includes fair compensation and other protections for publishers.

MPA is grateful to the Copyright Office for its attention to these critical issues. We believe the agency is well-suited to advise Congress, and in some instances to act on its own authority, on approaches to protecting the interests of press publishers, including the adoption of an agreement with the EU to apply "national treatment" to U.S. content; the rationale for including an Australia-like collective bargaining component to potential legislative solutions; the importance of including adequate enforcement mechanisms for existing and ancillary rights; ensuring that the balance of fair use rests on the specific facts in each circumstance; modernizing the registration process to allow registration for bulk dynamic web content, and; identifying the pitfalls for press publishers of platforms' use of artificial intelligence for content scraping and training purposes and offering policies that would mitigate them.

Thank you very much again for your work on the Publisher Protections study. Please reach out to us if we can be helpful as you move forward with your deliberations.

Respectfully submitted,



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