



Before the
U.S. COPYRIGHT OFFICE

**Group Registration of
Updates to a News Website**

Docket No. 2023–8

Submitted February 20, 2024

COMMENTS OF THE NEWS/MEDIA ALLIANCE

Introduction.

The News/Media Alliance (“N/MA”) welcomes the opportunity to submit comments to the notice of proposed rulemaking regarding the creation of a group registration option for updates to a news website.

N/MA is a nonprofit organization headquartered in Washington, D.C., representing the newspaper, magazine, and digital media industries. N/MA represents over 2,200 diverse publishers in the United States and internationally, ranging from the largest news and magazine publishers to hyperlocal newspapers, and from digital-only outlets to papers who have printed news since before the Constitutional Convention. In total, N/MA’s membership accounts for nearly 90 percent of the daily newspaper circulation in the United States, over 500 individual magazine brands, and dozens of digital-only properties. Its members publish quality journalistic and creative content that covers natural disasters, conflict zones, school boards, city halls, townhalls, entertainment and the arts, food, wellness, and other matters of public interest to local, national, and international communities.

To continue investments in high-quality journalism and creative content, and disseminate that content widely to the public, publishers must rely on strong intellectual property protections. Today, however, most media publishers are practically unable to register all of their copyright-protected works due to significant inefficiencies in the copyright registration system. While print publications remain popular for some readers, a sizable amount of content appears only online and not in a print edition. Similarly, due to the fundamental nature of today's information ecosystem, readers expect online news to not only be accurate and reliable but also continuously updated with the latest developments. As a result, many online news websites are updated throughout the day, making full copyright registration logistically impossible with current registration options. This situation has led to real inequities that significantly impact publishers' practical ability to enforce their rights, including against willful infringers.

N/MA applauds the Copyright Office for publishing the Notice of Proposed Rulemaking ("NPRM"). The NPRM is a substantial and positive step forward to securing effective copyright protection for all copyrightable media content—regardless of the mode in which it is distributed—and N/MA strongly urges the Office to finalize and adopt the rule immediately, as an interim rule or on a pilot basis. Failure to do so risks leaving significant amounts of copyrighted works without reasonable access to the full statutory benefits of copyright protection and, therefore, more susceptible to systemic infringement. Swift adoption will allow the Office to consider the effects and implementation of the rule and to make additional changes as necessary.

While N/MA urges the Office to promulgate the proposed rule at once, our comments also highlight issues that should be addressed so that the rule achieves its goal of providing an effective and workable solution to registering online news content. To be clear, these suggestions should not delay the adoption and implementation of the rule. Appendix A includes a redline of our suggested amendments for the Office's convenience. Our comments are organized as follows:

- The urgency and appropriateness of adopting this rule effective immediately, on an interim or pilot basis.
- Definition of a "news website," including content published on publisher-owned mobile apps.
- Other technical suggestions to make the rule more beneficial and useful.
- The need to retract or correct statements related to principles of damages that are currently being litigated in courts and do not bear on this registration rulemaking.

I. The Office Has Good Cause to Adopt the Proposed Rule Immediately on an Interim Basis.

As we commend the Copyright Office for moving forward with its NPRM, we urge the Office to rectify a longstanding gap in services by adopting the proposed rule effective immediately upon the close of comments. Issuing the Notice was a welcome and commendable first step, but for the proposed rule to be useful and timely, it needs to be operative. *First*, making the rule operative is needed to provide adequate access to the benefits of copyright protection as envisioned by the Berne Convention, section 5(2). The option will provide needed relief for news publishers, who face strong economic headwinds and challenges due in large part to unprecedented levels of copyright infringement. *Second*, adopting the rule on an interim basis will allow the Office to study its operation and make any necessary adjustments, in accordance with the Administrative Procedures Act and the frequent, reasoned practices of the Office itself. *Third*, the rule is likely to better facilitate the records of the Copyright Office and the Library of Congress' archives, by increasing the overall number of registrations that enter the system.

a. Immediate adoption is necessary to provide reasonable access to the benefits of copyright.

Copyright is an essential and longstanding protection for news publisher content. The need to ensure publishers can avail themselves of the full benefits of copyright protection is especially acute in light of the drastic economic decline the news sector has experienced over the past two decades, only to confront the emergence of competitive generative AI models—trained on scraped news content that is used to provide substitutive output to users—that have the potential to further disrupt and undermine markets for high-quality news content.

Newspaper circulation and advertising revenues dropped from \$57.4 billion in 2003 to an estimated \$21.4 billion in 2022—a decrease of almost two-thirds.¹ In total, almost 2,900 newspapers in the United States have either closed or merged since 2005² and more than two newspapers are closing each week. A recent study predicted that by the end of 2025 one third of the country's publications available in 2005 will have closed, leaving news deserts in their wake.³ Closures are more likely to affect already underserved rural and urban communities,

¹ PEW RESEARCH CENTER, FACT SHEETS: STATE OF THE NEWS MEDIA (Nov. 10, 2023) available at <http://www.journalism.org/fact-sheet/newspapers/> (last visited Feb. 14, 2024); Amy Watson, *Estimated Aggregate Revenue of U.S. Periodical Publishers from 2005 to 2020*, STATISTA, Dec. 5, 2022, available at <https://www.statista.com/statistics/184055/estimated-revenue-of-us-periodical-publishers-since-2005/> (last visited Oct. 13, 2023).

² Penny Abernathy, REPORT: THE STATE OF LOCAL NEWS 2023 (2023), available at <https://localnewsinitiative.northwestern.edu/projects/state-of-local-news/2023/report/>.

³ Penny Abernathy, REPORT: THE STATE OF LOCAL NEWS 2023 (2023), available at <https://localnewsinitiative.northwestern.edu/projects/state-of-local-news/2023/report/>.

with many of the lost or failing newspapers located in areas that are less affluent than the national average.

Today, many online news media providers are essentially unable to register all of their copyright-protected content. We credit the Office for correctly recognizing that the “rapid pace at which many web-based materials are created and updated presents a challenge” that is “especially pronounced for frequently updated news websites.”⁴ Indeed, the current requirement for applicants to “submit a separate application, deposit, and filing fee for each website update,” makes registration “particularly costly and time-consuming for news content, which can be added, modified, or removed on a daily or hourly basis,”⁵ and as a result many publishers are effectively unable to register all of their online content.

Although pressing, the issue is not new. As the Office acknowledges, news publishers first approached the Office about the need to make changes to facilitate registration of dynamic online content *almost fifteen years ago, in 2009*.⁶ Since then, the problem has proliferated, and both news publishers and Congress have repeatedly asked the Copyright Office about its plans to provide a path to register this content.⁷

The IT infrastructure operated by the Library of Congress and the Copyright Office mean that practically speaking, the agency lacks other reasonable methods to process this clearly copyrightable material. As the Notice recognizes, the current option of “submitting a complete copy of an entire dynamic website has been difficult for many applicants and causes problems for the Office as well.”⁸ This is not surprising, given the massive amount of digital news content created and the agency’s resources, nor is it unique to copyright registration. In 2017, the Library announced a change from its plan to archive every public Tweet, in favor of a more

⁴ Group Registration of Updates to a News Website, 89 Fed. Reg. 311, 311 (Jan. 3, 2024).

⁵ Group Registration of Updates to a News Website, 89 Fed. Reg. 311, 312 (Jan. 3, 2024).

⁶ Group Registration of Updates to a News Website, 89 Fed. Reg. 311, 312 fn.11 (Jan. 3, 2024).

⁷ See, e.g., Comments of the News Media Alliance at 19, In the Matter of: Publishers’ Protection Study, Docket No. 2021-5; Comments of the News/Media Alliance at 15, In the Matter of: Artificial Intelligence and Copyright, Docket No. 2023-6; *Oversight of the U.S. Copyright Office*, Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary, 118th Cong. (Sep. 27, 2023) (Question of Rep. Deborah Ross) (“In June 2022, the Copyright Office report titled copyright protections for press publishers. In that – in that report, the office addresses the fact that there is still no practical method available from the Copyright Office for copyright owners of dynamic and voluminous content such as a news website or a mobile app to register their content. The advent of AI, which enables new types of infringement, puts publishers in an even more precarious position. As we know the news industry is also in a precarious position. In the report, the office stated the office takes these concerns seriously and is considering how to best address them as part of its ongoing Modernization Initiative. How has the office taken steps to address these concerns?”); *Oversight of the U.S. Copyright Office*, Hearing Before the H. Comm. on the Judiciary, 116th Cong. 116-32 (Jun. 26, 2019) (Question of Rep. Ted Deutch).

⁸ Group Registration of Updates to a News Website, 89 Fed. Reg. 311, 313 (Jan. 3, 2024).

curated selection. The release announcing the shuttering of this program noted that access issues had yet to be resolved “in a cost-effective and sustainable manner.”⁹

Given the technological and practical limitations when processing massive volumes of digital works, the current options effectively deprive digital media publishers of reasonable access to the registration system for all of their copyrightable content, and may operate as an impermissible formality. This untenable situation must be swiftly rectified, and the Notice proposes a way to do it. There is a risk that the onerous, technologically difficult, and cost prohibitive status quo interferes with media publishers’ “enjoyment or exercise” of copyrights, turning copyright registration into an impermissible formality under the Berne Convention.¹⁰ As the current Register of Copyrights noted while in her prior capacity as a professor of copyright law: “To the extent that section 412 operates to prevent the effective enforcement of rights, it may amount to a formality imposed on their ‘enjoyment.’”¹¹

b. The public record will be improved by swift implementation of the proposed rule.

As the Notice notes, since at least 2011, the Office has “acknowledged the challenges in registering websites and content published on websites.”¹² News media publishers are eager to make use of this option to register digital news websites, which will enrich the Copyright Office public records and help the Library of Congress continue to be a valuable and neutral archive of American published materials that can be made available to its users. The status quo alternative is one where less material is registered at all, to the detriment of all interested stakeholders and the national historic records.¹³

c. The Administrative Procedure Act and the Office’s longstanding practices support immediate adoption on an interim basis.

There is ample support for adopting rules immediately on an interim basis under the Administrative Procedure Act, which permits rules to become effective immediately when rules “relieve[] a restriction” or for reasons of “good cause,”¹⁴ such as a finding that delay would be “impracticable, unnecessary, or contrary to the public interest.”¹⁵ The Office often makes good

⁹ Gayle Osterberg, *Update on the Twitter Archive at the Library of Congress*, TIMELESS BLOG (Dec. 26, 2017), <https://blogs.loc.gov/loc/2017/12/update-on-the-twitter-archive-at-the-library-of-congress-2/>.

¹⁰ See Berne Convention for the Protection of Literary and Artistic Works art. 5, Sept. 9, 1886, as revised at Paris on July 24, 1971 and amended in 1979, S. Treaty Doc. No. 99-27 (1986).

¹¹ Shira Perlmutter, *Freeing Copyright from Formalities*, 13 CARDOZO ARTS & ENT. L.J. 565, 574-75 (1993).

¹² Group Registration of Updates to a News Website, 89 Fed. Reg. 311, 312 (Jan. 3, 2024).

¹³ When considering future user-side improvements, here too, the best option is to make the rule effective, and then continue to publicly deliberate whether further improvements are feasible, but not to hold up enactment of the proposal, which N/MA strongly supports.

¹⁴ 5 U.S.C. 553(d).

¹⁵ 5 U.S.C. 553(b)(B).

use of this grant of regulatory flexibility to adopt rules immediately that can then be adjusted if necessary. It should do the same here.

As noted, the rule is long overdue and has been subject to careful consideration by the Office and the topic of multiple congressional inquiries. It also reflects input by the affected stakeholders (the news publishers who wish to use this registration option). Through this Notice, the Office also will have the benefit of public comment as it evaluates whether it is necessary to “fine-tune” the regulatory language further.¹⁶

The Office should find good cause to issue this rule now, without a 30-day notice period, as the equities strongly counsel against further delay. The upside is clear: the registration system will be palpably improved, benefiting publishers entitled by law to the full benefits of copyright protection, as well as the overall copyright system and public record. The downside is minimal: an interim rule will allow the Office to calibrate changes in response to any issues, and with the benefit of empirical knowledge that is preferable to policy estimations.

Making this rule effective immediately is most in line with the Office’s prior actions, none of which have been challenged, and would be the reasonable approach here. The Office adjusted registration rules during the pandemic without notice due to the “demonstrable urgency of the conditions they are designed to correct,”¹⁷ while during a rulemaking related to pre-1972 sound recordings (similarly targeted at alleviating pent-up demand), the Office found that “notice and public procedure prior to their issuance would be impracticable and contrary to public interest” and “a prompt interim rule best serves the legal interests of all relevant stakeholders as well as the general public.”¹⁸ Other rulemakings were similar.¹⁹ Because the proposed rule is a simple change to improve access to the registration system, a 30-day notice period is not necessary here either.

Any unforeseen kinks can be sorted out after this long-awaited registration option is made available. As the Office has frequently noted, an interim rule posture gives “both the Office and interested parties an opportunity to see how the new procedures work in practice, and to

¹⁶ Arguably, the Office did not even need to give notice, since notice is not required for “rules of agency . . . procedure, or practice” (5 U.S.C. 553(b)(A)) which merely “alter the manner in which the parties present themselves or their viewpoints to the agency.” (*JEM Broad. Co. v. F.C.C.*, 22 F.3d 320, 326 (DC Cir. 1994).

¹⁷ Technical Amendments Regarding Electronic Submissions to the Copyright Office, 85 Fed. Reg. 19,666, 19,667 (Apr. 8, 2020).

¹⁸ Filing of Schedules by Rights Owners and Contact Information by Transmitting Entities Relating to Pre1972 Sound Recordings, 83 Fed. Reg. 52,150, 52,153 (Oct. 16, 2018).

¹⁹ Pilot Program for Bulk Submission of Claims to Copyright, 82 Fed. Reg. 21,551 (May 9, 2017) (opening up pilot program for bulk submission of copyright claims). And the section 1201 anti-circumvention rulemakings have all gone into effect immediately, since that process alleviates restrictions on the public.

consider whether these procedures should be modified in any respect before the Office issues a final rule.”²⁰

It is for these reasons that N/MA urges the Office to act now.

II. The Proposed Rule Should Be Adopted, While Considering a Few Improvements.

N/MA thanks the Office for the thoughtfulness of the proposed rule. A group option for the registration of online news content is highly appropriate considering the centuries-long, complementary link between the free press, a cornerstone of democratic society, and copyright, the engine of free expression. Copyright law and media publishers share the uncommon distinction of being specifically identified in the Constitution via the Copyright Clause and the Press Clause. And news content is one of the few types of works separately enumerated for registration purposes in Section 408 of the Copyright Act. It is therefore critical to provide a reasonable and efficient path to register expressive online news content.

The proposed rule is a major step in the right direction in ensuring effective copyright protection for content of all types, regardless of the format in which they are originally published. N/MA thanks the Office for listening to publisher views and concerns, and for proposing a solution that would rely on identifying materials. The current system that requires publishers to submit full copies of all works published on their dynamic websites—including every update—simply is not workable, as evidenced by practice, and the decision to accept identifying materials is vitally important for effective protection and enforcement. We support the Office’s decision to retain the \$95 registration fee, which is both reasonable and unarbitrary. We also support the encouragement to voluntarily provide additional information about individual works included in the registration, so long as this provision remains voluntary. These aspects of the rule make it practical and resource efficient for publishers and the Office alike.

²⁰ Secure Tests, 82 Fed. Reg. 26,850, 26,853 (Jun. 12, 2017); *See also, e.g.*, Freedom of Information Act Regulations, 82 Fed. Reg. 9,505 (Feb. 7, 2017) (“The Office finds, for good cause, that allowing for notice and public procedure prior to the issuance of these interim regulations would be impracticable. . . . However, the Office will accept public comment for 45 days, and will then develop a final rule in light of comments received.”); Treatment of Confidential Information by the Mechanical Licensing Collective and the Digital Licensee Coordinator, 86 Fed. Reg. 9003, 9004 (Feb. 11, 2021) (“Having carefully considered the comments and other record materials in this proceeding, the Office is now issuing an interim rule. The Office has determined that it is prudent to promulgate this rule on an interim basis in order to retain added flexibility for responding to unforeseen circumstances. . . . The Office will consider modifications as needed in response to new evidence, unforeseen issues, or where something is otherwise not functioning as intended . . .”); The Public Musical Works Database and Transparency of the Mechanical Licensing Collective, 85 Fed. Reg. 86,803 (Dec. 31, 2020); Music Modernization Act Notices of License, Notices of Nonblanket Activity, Data Collection and Delivery Efforts, and Reports of Usage and Payment, 85 Fed. Reg. 58,114 (Sep. 17, 2020); Reporting and Distribution of Royalties to Copyright Owners by the Mechanical Licensing Collective, 85 Fed. Reg. 58,160 (Sep. 17, 2020).

As the Office proceeds, N/MA proposes a few small changes that it believes would not alter the core framework of the proposal.

a. The Definition of “News Website” Should Be Revised to Better Reflect the Online News Ecosystem.

The proposed rule applies to “news websites” and defines the term as “a website that is designed to be a primary source of written information on current events, either local, national, or international in scope, that contains a broad range of news on all subjects and activities and is not limited to any specific subject matter.”²¹ While this definition is based largely on the definition of “newspaper” in 37 CFR § 202.4(e)(1), N/MA suggests amending the definition to account for characteristics of online news marketplace to make the rule more usable for the affected stakeholders.

News properties—especially those created for the online marketplace—are often segmented in response to user demand and how online news is discovered, accessed, and consumed by readers. Online consumers may be more drawn to news around a particular subject matter, and segmented publications make that information easier to find and access. While many publications cover a range of news content—ranging from domestic to international and politics to entertainment—others provide a broad range of news about particular subject matter areas. More specialized outlets may be the leading source of news in their topic of expertise, and frequently cover related issues that are of interest to their readers. For example, a food and restaurant-focused site may review restaurant, dining, and food trends while also covering impactful investigative journalism about labor and environmental concerns in the food services industry; a business-oriented publication may also cover travel, leisure, or real estate for its intended audience;; a sports website may include investigative reporting on issues ranging from doping to sexual harassment, in addition to equipment reviews, and player interviews; a product review site may also address consumer safety issues and related product and business announcements, and so on.

In short, simply because a news outlet is specialized on a topic does not mean it is any less in the news business than its competitors. The eligibility definition should not suggest an overly limiting approach to registering online news, especially with no other reasonably efficient avenue to register such content—as recognized by the Notice. Applying the proposed definition of a “news website” strictly could leave a large segment of publishers and news websites unprotected—a problem the proposed rule is seeking to resolve and an end-result we believe the Office does not intend. To be sure, with regards to print editions, N/MA member experience is that newspapers largely focused on one subject area already do register their content with the Copyright Office using the group registration option, and the same should be

²¹ Group Registration of Updates to a News Website, 89 Fed. Reg. 311, 315 & 317 (Jan. 3, 2024).

the case for online properties. And particularly considering the importance of news media material to our national cultural resources and historical record, and the pent-up demand for this option by digital publishers, we believe the equities favor a broadly lenient interpretation of “news website.”

To avoid legal or practical confusion, N/MA suggests alternate language in Appendix A that would better ensure eligibility for single subject matter publications by specifying that the definition includes news websites that focus “on a specific subject matter such as sports, travel, community affairs, technology, product reviews, or the arts.”²² Alternatively, a minimal amendment removing the regulatory reference to “all subjects and activities and is not limited to any specific subject matter” would also help reduce ambiguity, improve registration efficiency, and encourage an increased participation in the registration system. Neither of the alternative revisions to the definition of “news website” would affect other references to “newspaper” or “news” elsewhere in Copyright Office regulations. This change better suits the purposes of the registration system, and could increase participation—a win-win outcome that will avoid imposing an impermissible burden or formality on online publishers, while also increasing the records and archives of the Office and Library. And by including one of these amendments in an interim rule, the Office will be able to add additional definitional constraint if it later identifies any unforeseen consequences.

b. The Proposed Rule Should Be Broadened to Cover News Content Published in Publisher-Owned or Operated Apps.

As reader preferences and devices used to access online content evolve, publishers respond by developing new content and formats to provide access to high-quality news for as many readers as possible, including now through mobile applications. As a result, numerous N/MA members operate their own mobile applications on which they publish original, sometimes exclusive content.

While often mobile content is also published on publisher websites, some news is expressly created for and formatted to appear only in a publisher’s application, including timely summaries of breaking news. As consumer tastes change, publishers are likely to increase their production of news content that is available only on apps or other digital assets. According to Pew Research Center, news websites and apps are the most preferred source for news, with a quarter of U.S. adults preferring to get their news through these sources.²³ An international

²² If such a clarification is unfeasible or would delay adoption at present, the Office should explore explicitly expanding eligibility once the rule is fully operational. However, in the years leading up to the proposed rule, we have not become aware of any technical or administrative concern that would impede use of this language.

²³ PEW RESEARCH CENTER, NEWS PLATFORM FACT SHEET (Nov. 15, 2023) available at <https://www.pewresearch.org/journalism/fact-sheet/news-platform-fact-sheet/> (last visited Feb. 15, 2024).

study showed in 2022 that, across all the countries surveyed, the majority of people used mobile phones to access news, including 56 percent of U.S. readers.²⁴

To continue to make the registration of news content more format-agnostic, N/MA recommends including publisher-owned or operated mobile applications in the definition of eligible news “website.” N/MA submits that this change should not cause technical challenges in administration and is modeled off standards already in place for trademark prosecution. While the proposed rule would require an identifying URL to be visible in a deposit copy, mobile applications generally prominently feature the logo or other visible identifier of the publication in question. App screenshots could serve the same identifying function as URLs. The USPTO has long accepted screenshots of mobile applications as specimens, assuming they show proper display, use of the mark in website content, and are of acceptable format and quality. Particularly without any administrative or authentication-based reason to deviate, it is reasonable for copyright registration deposit standards to adopt standards from a trademark context with respect to what material appears on an application.

N/MA suggests it is timely and less arbitrary to include mobile applications in the rule’s scope and avoid excluding news content only by virtue of being published in a different format. With the proposed change, deposits would still be provided through PDFs, using the existing registration option for group registration of newspapers. The relative burden on the Office’s resources would be equal, thus justifying retaining the same \$95 application fee. To the extent any issues emerge, including applications initially on an interim or pilot basis will best allow the Office to learn from the trial and make appropriate changes, and potentially even help the Office as it considers future improvements to its Enterprise Copyright System.

Separately, once this rule is operational, and subject to the Office’s technical capabilities, N/MA would welcome working with the Office to explore further expanding the rule to cover publishers’ digital assets beyond mobile applications.²⁵

c. The Office Should Consider Other Amendments to Make the Rule More Effective and Futureproof.

In addition, N/MA suggests a few other minor amendments.

²⁴ Dominic Ponsford, *How Readers Access News: Latest Data on Smartphones, Podcasts and Newsletters (Digital News Report)*, PRESS GAZETTE (Jun. 15, 2022), <https://pressgazette.co.uk/news/how-readers-access-news/>.

²⁵ In the meantime, keeping with the theme of incentivizing registration, N/MA encourages the Office to interpret the term “mobile application” broadly to encompass all application capable of being used on a portable device, including a mobile phone, tablet, or a laptop.

Deposit requirements: Time of deposit capture. The deposit requirements under subsection (m)(6)(1) do not require publishers to produce a PDF deposit at the exact same time each day. However, as the subsection states that the deposit must “show how the home page appeared at a specific point during each day of the calendar month,” this language could be clarified to state unambiguously that the deposit must show how the homepage appeared at *some point* during each day.

Deposit requirements: dynamic home pages. Subsection (m)(6) of the proposed rule states that, with regards to the deposit requirements, “‘identifying material’ shall mean separate Portable Document Format (PDF) files that *each contain a complete copy of the home page of the website.*” (emphasis added). However, some publisher homepages have extensive or close-to-infinite scroll, making it near-impossible to capture the whole homepage in PDF format. To make the rule more effective and practicable for publishers, as well as the deposit copies more readable and usable for the Office, we strongly encourage the Office to clarify that the PDF deposit copy does not have to encompass the whole homepage as long as it captures the masthead, URL identifier, and a defined minimum amount of the homepage (which in most cases will encompass all of it), including representative updates from the previous deposit copy. This change, essentially, merely adopts the same approach for “infinite scroll” news websites as the Office proposed for news websites that use multiple links to update their dynamic webpages.

Author and claimant requirements. N/MA understands that the language under subsection (m)(3) requiring the collective work to be a work made for hire to qualify for the group registration option mirrors that in the Group Registration of Newspapers option. While this technical limit is unfortunate, there does not seem to be a fundamental reason for such a limitation in principle, and in many business cases, the work may be fully owned by the publisher, or obtained via assignment or operation of law. As IT resources permit, we therefore propose eventually amending the rule—and the Group Registration of Newspapers option alike, if appropriate—to allow the author and claimant to provide for works made for hire as well as any other work created or owned by the claimant. N/MA is not aware of any potential negative issues resulting from such a change.

III. The Office Should Decline to Opine on the Independent Economic Value Test as It Comes to Determining Appropriate Damages

Finally, N/MA encourages the Office to confirm that the inclusion of a few references to Section 504(c)(1) in the Notice preamble do not reflect a substantive opinion on eligibility for statutory

damages.²⁶ Although these references do not appear in the draft rule itself, some statements could be read to imply that section 504's statement that "all parts of the collective work will constitute one work" for the purposes of statutory damages also applies to the scope of remedy available for *individual* works, simply because they are registered as part of a collective work. Opining with respect to copyright damages in a registration rulemaking is unnecessary and potentially confusing, including because the Notice further correctly clarifies that the group registration option will extend to individual works that make up the collective work if they are fully owned by the applicant.²⁷

Section 504(c)(1)'s acknowledgment that collective work can constitute an independent work in its own right for damages purposes does not speak to copyright registration. When a collective work and its constituent parts are registered with a single application, the statute does not preclude statutory damages on each underlying, individually copyrightable work that are otherwise eligible for statutory damages on a standalone basis. Indeed, multiple courts have concluded that permitting the recovery of statutory damages for underlying works is supported by the statutory text and the overall goals of the copyright system.²⁸ An alternative reading of section 504(c)(1) to imply that underlying works cannot also amount to separate, independent works is unsupported by *New York Times Co. v. Tasini*, 533 U.S. 483 (2001) and the conclusions of multiple courts who "have determined that, for the purposes of Section 504(c)(1), a 'work' is a unit of original copyrightable expression that is capable of living its 'own copyright life' in the marketplace."²⁹ Independent economic value is particularly relevant in the online news context due to the piecemeal nature of the digital ecosystem. As many readers access online news on an article-by-article basis, instead of reading editions from cover-to-cover, the value of each individual article to the publisher is heightened.

At bottom, damages eligibility should not depend on the administrative and technical processes employed by the Office to register large numbers of works. Statements regarding the availability of damages are especially to be avoided in this rulemaking considering that publishers lack alternatives to register their online works in an economically or technically

²⁶ Group Registration of Updates to a News Website, 89 Fed. Reg. 311, 313 fn.34, 314 fn.43, 314 fn.45, 315 and 316 (Jan. 3, 2024).

²⁷ See Group Registration of Updates to a News Website, 89 Fed. Reg. 311, 313-4 (Jan. 3, 2024).

²⁸ See, e.g., *VHT, Inc. v. Zillow Grp., Inc.*, 69 F.4th 983, 988 (9th Cir. 2023); *Sullivan v. Flora, Inc.*, 936 F.3d 562, 572 (7th Cir. 2019); *Gamma Audio & Video, Inc. v. Ean-Chea*, 11 F.3d 1106, 1116-17 (1st Cir. 1993); *MCA Television Ltd. v. Feltner*, 89 F.3d 766, 769-70 (11th Cir. 1996); *Walt Disney Co. v. Powell*, 897 F.2d 565, 569 (D.C. Cir. 1990); *EMI Christian Music Grp., Inc. v. MP3tunes, LLC*, 844 F.3d 79, 101 (2d Cir. 2016); *Nihon Keizai Shimbun v. Comline Bus. Data*, 166 F.3d 65 (2d Cir. 1999); *UMG Recordings, Inc., et al. v. Grande Commc'ns Networks, LLC* (W.D. Tex.) (jury award for each individual infringing sound recording, pending appeal).

²⁹ Response and Principal Brief of Plaintiffs-Appellees/Cross-Appellants, *UMG Recordings, Inc., et al. v. Grande Commc'ns Networks, LLC* (quoting *Gamma Audio & Video*, 11 F.3d at 1116 (citations omitted))

<https://storage.courtlistener.com/recap/gov.uscourts.ca5.212634/gov.uscourts.ca5.212634.74.0.pdf>

reasonable manner. The alternative view, that additional registration is required, is already being exploited by defendants seeking to evade the inherent balance in the copyright system.³⁰ And requiring separate registrations collective works and each underlying individual work to preserve the right to adequate statutory damages “would promote inefficiency and duplicative efforts” and “increase costs for both copyright owners and the Copyright Office.”³¹

Given pending litigation on this issue of law, and the laudable overall goal of the proposed rule in incentivizing registrations, N/MA encourages the Office to clarify that nothing in connection with the rulemaking shall be read as an opinion as to the scope of damages a court may award. Such views would normally be offered by the Office outside the remit of the registration rulemaking process. By converse, the adoption of such a position could disincentivize the editorial curation of individual works into creative compilations, or registration of such curations, as the opportunity cost of doing so could potentially be enormous.³²

IV. Conclusion

N/MA commends the Copyright Office for publishing this notice of proposed rulemaking and for moving forward to enable publishers to register their online news content in a practical and resource-efficient manner. The rule is the culmination of a 15-year effort by both publishers and the Office to ensure that publishers can efficiently avail themselves of existing statutory protections for their valuable news content, and enforce their rights against infringers to the full extent permitted by the law. This content fulfills a vital societal function, keeping our communities informed, connected, and entertained. We strongly support the proposed rule and urge the Office to adopt it swiftly and effectively immediately, preferably on an interim or pilot basis. Following the adoption of this rule, N/MA encourages the Office to move forward with developing additional efficient ways for creators to register other types of online content.

While our comment offers suggestions to make the proposed rule more efficient, practicable, and meaningful—and we believe adopting each of the redlined changes in Appendix A changes can be done immediately—none of these considerations should delay the adoption of the rule.

³⁰ See, e.g., *Sullivan v. Flora, Inc.*, 936 F.3d 562, 566 (7th Cir. 2019) Brief for Amicus Curiae the Copyright Alliance in Support of Plaintiffs-Appellees/Cross-Appellants, *UMG Recordings, Inc., et al. v. Grande Commc’ns Networks, LLC*, No. 1:17-CV-000365-DAE (2023); Response and Principal Brief of Plaintiffs-Appellees/Cross-Appellants, *UMG Recordings, Inc., et al. v. Grande Commc’ns Networks, LLC*, No. 1:17-CV-000365-DAE (2023).

<https://storage.courtlistener.com/recap/gov.uscourts.ca5.212634/gov.uscourts.ca5.212634.74.0.pdf>

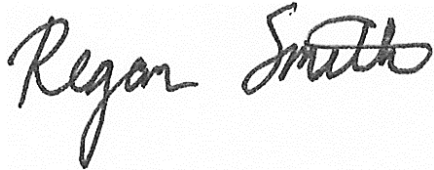
³¹ Brief for Amicus Curiae the Copyright Alliance in Support of Plaintiffs-Appellees/Cross-Appellants at 24, *UMG Recordings, Inc., et al. v. Grande Commc’ns Networks, LLC*, No. 1:17-CV-000365-DAE (2023).

³² Separately, we urge the Office to update references to Section 504(c)(1) in other public documents, including the relevant circulars and the Compendium that have become contested or outdated in light of evolving judicial doctrine and case law.

Indeed, the most important request we have is for the Office to make this option available to publishers immediately, while the other issues can be addressed at a later stage if necessary.

Thank you for moving forward with this important rulemaking. N/MA looks forward to working with the Office on implementation of the rule, including educating N/MA members on the application of the rule.

Respectfully submitted,

A handwritten signature in black ink that reads "Regan Smith". The signature is written in a cursive style with a large, prominent "R" and "S".

Regan Smith
Senior Vice President & General Counsel
News/Media Alliance

Appendix

§202.4 Group registration.

* * * * *

(m) Group registration of updates to a news website. Pursuant to the authority granted by 17 U.S.C. 408(c)(1), the Register of Copyrights has determined that a group of updates to a news website may be registered with one application, the required deposit, and the filing fee required by § 201.3 of this chapter, with each update being registered as a collective work, if the following conditions are met:

Version A – N/MA proposed edit:³³ (1) *Definitions*. For the purposes of paragraph (m) of this section: (i) *News website* means a website **or a mobile application** that is designed to be a primary source of written information on current events, either local, national, or international in scope, that **may** contains a broad range of news ~~on all subjects and activities and is not limited to any specific subject matter~~ **or may be focused on a specific subject matter such as sports, travel, community affairs, technology, product reviews, or the arts.**

Version B – N/MA proposed edit: (1) *Definitions*. For the purposes of paragraph (m) of this section: (i) *News website* means a website **or a mobile application** that is designed to be a primary source of written information on current events, either local, national, or international in scope, that contains a broad range of news ~~on all subjects and activities and is not limited to any specific subject matter.~~

(ii) *Website* means a webpage or set of interconnected webpages that are accessed using a uniform resource locator (“URL”) organized under a particular domain name.

(iii) *Mobile application* means a program created for a mobile device and operated by or for a publisher under a specific masthead or publication.

(2) *Requirements for collective works*. Each update to the website must be a collective work, and the claim must be limited to the collective work.

³³ N/MA prefers version A for clarity, however, we support the Office in first instance adopting the regulatory language that will facilitate the swiftest finalization of this rule.

(3) *Author and claimant.* Each collective work in the group must be **created or owned by the claimant including as** a work made for hire, and the ~~author and~~ claimant for each collective work must be the same person or organization.

(4) *Updates must be from one news website; time period covered.* Each collective work in the group must be published on the same news website under the same URL and they must be published within the same calendar month. The applicant must identify the earliest and latest date that the collective works were published.

(5) *Application.* The applicant must complete and submit the online application designated for a group of newspaper issues. The application may be submitted by any of the parties listed in § 202.3(c)(1).

(6) *Deposit.* (i) For each collective work within the group, the applicant must submit identifying material from the news website. For these purposes “*identifying material*” shall mean separate Portable Document Format (PDF) files that each contain a complete copy of the home page of the website **or the mobile application. In case a complete copy is technically unfeasible or unreadable due to the size or continuous nature of the home page, the applicant may submit a significant portion of the home page that demonstrates updates from the previous deposit copy.** Each PDF must show how the home page appeared at a specific point during each day of the calendar month when new updates were published on the website.

(ii) The identifying material must demonstrate that the home page contains sufficient selection, coordination, and arrangement authorship to be registered as a collective work. If the home page does not demonstrate sufficient compilation authorship, the deposit should include as many additional pages as necessary to demonstrate that the updates to the news website can be registered as a collective work.

(iii) The identifying material must be submitted through the electronic registration system, and all of the identifying material that was published on a particular date must be contained in the same electronic file. The files must be submitted in PDF format, they must be assembled in an orderly form, and each file must be uploaded to the electronic registration system as an individual electronic file (i.e., not .zip files). The file size for each uploaded file must not exceed 500 megabytes, but files may be compressed to comply with this requirement.

(7) *Special relief.* In an exceptional case, the Copyright Office may waive the online filing requirement set forth in paragraph (m)(5) of this section or may grant special relief from the deposit requirement under § 202.20(d) of this chapter, subject to such conditions as the Associate Register of Copyrights and Director of the Office of Registration Policy and Practice may impose on the applicant.

* * * * *

(r) *The scope of a group registration.* When the Office issues a group registration under paragraph (d), (e), or (f) of this section, the registration covers each issue in the group and each issue is registered as a separate work or a separate collective work (as the case may be). When the Office issues a group registration under paragraph (c), (g), (h), (i), (j), (k), or (o) of this section, the registration covers each work in the group and each work is registered as a separate work. When the Office issues a group registration under paragraph (m) of this section, the registration covers each update in the group, and each update is registered as a separate collective work. For purposes of registration, the group as a whole is not considered a compilation, a collective work, or a derivative work under section 101, 103(b), or 504(c)(1) of title 17 of the United States Code.