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January 5, 2022

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 Additional Comments in Response to U. S. Copyright Office's Publishers' Protection Study: Request for Additional Comments, Docket No. 2021-5, 86 Fed. Reg. 62,215 (Nov. 9, 2021).

Dear Register Perlmutter:

The Authors Guild is grateful for the opportunity to submit additional comments in response to the Copyright Office's Publisher's Protection Study.

The Authors Guild is a national nonprofit association of more than 12,000 professional writers, including over 3,000 journalists and thousands of book authors 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, contracts, taxation, and antitrust. Our members cover current events and topical news, as well as important issues in history, biography, science, politics, medicine, business, arts, 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 on behalf of our members' professional interests and livelihoods, and because we believe that a free and diverse press is essential to democracy.

These comments expand on our initial discussion of the threats facing journalism and the press publishing industry today and offer suggestions for concrete policy and regulatory actions that the Copyright Office could take to protect this vital industry. We also support the knowledgeable recommendations made by the News Media Alliance, the Copyright Alliance, and Professor Jane Ginsburg in their comments and during the December 9th roundtable, which together lay a strong foundation for the Copyright Office to study possible solutions. Most importantly, we emphasize that any effective solution must ensure that journalists themselves—the individuals who actually create the news content—also benefit. Giving corporate news publishers the potential to earn a greater and fairer return on investment without ensuring that journalists—who today are radically underpaid—recoup a portion will do little to solve the real news drought in this country.

RECOMMENDATIONS FOR REFORMS AND CLARIFICATIONS THAT COULD REVIVE NEWS MEDIA AND JOURNALISM PROFESSION

1. Copyright-Related Reforms and Clarifications

As the Authors Guild and other commentors have emphasized in their initial comments, the crisis in the news media industry has serious deleterious effects on democracy. The demise of local newspapers and periodicals across the country has expanded "news deserts," deprived millions of Americans of credible local news sources, and left thousands of journalists out of work. The scarcity of resources in the industry overall has created enormous challenges for press publishers and journalists to create well-researched, fact-based, high-quality content, increasingly obscured by clickbait and misinformation. Remedying the problems, which have reached a highly advanced stage, will require multifaceted regulatory and legislative approaches.

a. Clarify how a fair use analysis should be applied when news headlines, leads, photos, and other news content are copied by a news aggregator

News aggregators often rely on overly broad interpretations of fair use to copy increasingly large segments of news onto their platforms. We agree with other commentors that it would be helpful for the Copyright Office to provide guidance on how fair use should be applied to news aggregators' use of excerpts, ledes, headlines, and images under various circumstances and conditions. Comments submitted by the News Media Alliance, Professor Jane Ginsberg, and the Copyright Alliance explain how fair use factors should be analyzed with respect to news content, including the importance of (1) understanding the "originality" of news text and images under the second factor; (2) considering the "qualitative" value of an excerpt and not just the quantity taken, under the third factor per *Harper & Row v. Nation Ents,* 471 U.S. 539 (1985); and (3) acknowledging under the first and fourth factors that the way news aggregators display news content often function as a substitute for direct access to the content on the publisher's site, which harms the value of the news publisher's or journalist's work by diverting traffic and advertising dollars. We will not repeat a full fair use analysis here, but suffice it to say that—contrary to the position advanced by Google—there's no "per se" fair use justification for news aggregators' use of news media content.

Litigating fair use, however, is expensive, and different courts could easily reach different results on the same facts. For that reason, self-published journalists and small publishers are not in a position to challenge the overreaching uses of their work by news aggregators, and even larger news publishers cannot necessarily risk going into litigation against entities like Google and Facebook (Meta) who possess unlimited war chests.

The lack of credible and authoritative guidance on the application of fair use doctrine to news content has allowed news aggregators to unilaterally claim fair use with respect to news content and emboldened them to copy increasingly large amounts copyrightable content onto their services so that their users never have to leave the platforms. The Copyright Office could eliminate prevailing misconceptions around fair use by creating a guide or framework for how courts, copyright owners, and users should consider the fair use factors in cases of news aggregators copying copyrightable news content.

b. Clarify that the display right is exercised when a service makes content on a third-party site appear as though it were on the service's platform through embedding or inline linking to the content

Section 106 of the Copyright Act provides for six separate exclusive rights, three of which are generally applicable to the type of copyrightable content found in online news publications and the uses thereof: reproduction, distribution, and public display. Although the display right is clearly a separate and distinct right that can be exercised and infringed on its own, some courts have made this right coextensive with the reproduction right in the online context through application of the "server test."

The "server test" was first articulated in *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007) where the Ninth Circuit held that a web platform or site that shows a copyrightable work to the public does not "publicly display" the work unless a copy is copied and saved by the website or platform owners on the servers that hosts the website. In so holding, the Ninth Circuit added a requirement that the copyrighted work be reproduced as well as displayed to the public for there to be infringement of the display right. It is quite possible and even common today, however, for the website content that a user sees on a webpage to be hosted elsewhere. When a user visits a website, they are not generally seeing a photographic-like image of static content stored on a server somewhere, but the page they view is generated by HTML or other source code that instructs the user's browser on what content to show on what part of the page. Text or images can be "embedded" in the HTML file written by the programmer and called to the screen by pointing the user's browser to the file or a URL for the content. That embedded content might be saved in files on servers controlled by the website owner or it might be on a third-party's website (if the HTML contains a third-party URL), but in either case looks to the user as though it is an integral part of the website. In this manner, third-party copyrightable content may be "displayed" to users by the website's programmers without their copying anything from the third-party website other than the URL.

In an exceedingly technical view of what it means to display a work, the Ninth Circuit concluded that a website or platform does not infringe the copyright owner's display right when it shows third-party content embedded in this manner without the copyright owner's authorization because the website is merely pointing the user's browser to a location of a file residing on a server. The court ignores the fact that what is displayed to the user is unrelated to where the images or text are stored and that the user cannot distinguish embedded third-party content from any other content on the website. The court's reasoning also runs counter to the definition of "display" in the Copyright Act, which clearly refers to what is shown to the viewer, the recipient of the display, regardless of where the display is generated from or by what means.

Section 101 of the Act states that displaying a work "means *to show a copy* of it, either directly or *by means of* a film, slide, television image, or *any other device or process*…," (emphasis added) further elaborating that:

> … to display a work 'publicly' means— (1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or (2) *to transmit or otherwise communicate a* performance or *display* of the work to a place specified by clause (1) or to the public, *by means of any device or process, whether the members of the public capable of receiving the performance or*

> *display receive it in the same place or in separate places and at the same time or at different times*.[1]

In contrast to the Ninth Circuit's "server test," the Third Circuit adopts a more natural application of the display rights in *Healthcare Advocates, Inc. v. Harding, Early, Follmer & Frailey*, 497 F. Supp. 2d 627 (E.D. Pa. 2007). The court looks not to where the copy being displayed was stored, but rather to what content was being communicated to—or displayed to—the user, stating that the Copyright Act contains an "expansive definition of public display."

Clarifying that the display right encompasses what is shown to a user when the user is on a website rather than whether the website copied the work onto its servers to display it would greatly assist news publishers, journalists, and photographers in enforcing their rights online and promoting the licensing of their works. It would be extremely helpful if the Copyright Office were to render an opinion on the correct application of the display right in online environments and to advise Congress to clarify the law in favor of the Third Circuit view.

c. **Revise advice on the uncopyrightability of "words and short phrases"**

We agree with Professor Jane Ginsberg's additional comments and remarks during the roundtable that the Copyright Office should revise its procedures and guidance with respect to the uncopyrightability of "words and short phrases."[2] The Copyright Office's rigid rule that short phrases are *never* copyrightable does not comport with existing case law. This rule, which has been taken to mean that headlines due to their brevity *categorically* lack sufficient "originality" to be copyrightable. As other comments explain, news aggregators rely on this rule, as well as fair use theories, to justify their of use headlines and short excerpts without authorization.

Yet nothing in the Copyright Act or case law actually supports a blanket exception of "short phrases" to copyright. While some short phrases do indeed lack sufficient originality to be copyrightable, many others do meet the prevailing standard for copyrightability under *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. at 345 (1991), requiring only that a work contain a "modicum of creativity"—a "minimal creative spark."

There are innumerable ways to craft a headline, for instance, and they can be quite original and creative. There is no single, obvious headline for any article. Journalists and their editors often put enormous creativity and effort into writing a good headline because, as we all know, it is how journalists catch readers' attention. Professor Ginsburg's initial comments provide several examples of how a singular news item can lend very different and uniquely creative headlines,[3] including following, elicited by the news reports about the emergence of "murder hornets":

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[1] 17 U.S.C. § 101.

[2] 37 CFR § 202.1; §313.4(C) of the Compendium of Copyright Office Practices (3d ed. updated January 28, 2021) and Copyright Office Circular 33 state:

> Words and short phrases, such as names, titles, and slogans, are not copyrightable because they contain a *de minimis* amount of authorship. See 37 C.F.R. § 202.1(a). The U.S. Copyright Office cannot register individual words or brief combinations of words, even if the word or short phrase is novel or distinctive or lends itself to a play on words. See Kitchens of Sara Lee, Inc. v. Nifty Foods Corp., 266 F.2d 541, 544 (2d Cir. 1959) (concluding that the Office's regulation barring the registration of short phrases is "a fair summary of the law").

[3] Comments of Jane Ginsburg at 10 (Nov. 23, 2021), https://www.regulations.gov/comment/COLC-2021-0006-0021

"Murder Hornets" Invade America

Are "murder hornets" a threats to humans and bees?

"Murder Hornets" decapitate bees, UT experts say not to panic

Each of these headlines has a unique voice, conveys a different side of the story, and targets different audiences. The first headline, for instance, is a straightforward factual presentation of an event; the second headline echoes questions that the public may have in mind about the event; and the third uses humor to create interest in the audience. The creativity behind writing these headlines is undeniable—and measures far more than a mere "modicum" required by *Feist.* As Carlo Lavizzari stated during the roundtable,[4] copyright jurisprudence in the U.K. and other European countries recognizes and protects the creativity in headlines, and we should do the same.

Like headlines, short ledes or the beginning of ledes are also often copied by the news aggregators. Writing a good lede requires a great deal of creativity; journalists know that the lede is where they win over or lose the reader. Ledes are hardly ever just a straightforward recital of facts. A lede writer must choose what facts to include and order them a certain way, set the voice and tone, including humor, wit, sincerity, or gravity portrayed by the words chosen and their order. As Calvin Trillin writes in a recent *New Yorker* article on ledes: "[T]he function of a lede is to engage the reader."[5] He describes a humorous example of a lede where "the reader is drawn in with a single unpunctuated sentence that starts slowly and gradually becomes an express train that whistles right by the local stops without providing an opportunity to get off."[6] Denying ledes, headlines, and other original short phrases copyrightability diminishes the value of the writer's creative labor.

d. Explore *sui generis* rights and make recommendations to Congress

The scope of the problems and the important stakes involved merit consideration of *sui generis* federal protection of news articles and images such as the protections for vessel hulls and mask works in the Copyright Act. *Sui generis* protections could be used to protect headlines and short phrases that are uncopyrightable for a short period of time and could be limited to uses by large-scale aggregators. However, these protections would have to be narrowly crafted and should contain the necessary exceptions to protect free speech. The protections could be limited in time to the content's newsworthiness and the publisher would have to prove its time-sensitivity.

As other commentators have remarked, the "hot news doctrine," as articulated in *International News Service v. Associated Press* 248 U.S. 215 (1918), does little to protect journalism today. First, it is recognized in only a few states where it is not preempted by the Copyright Act, and its application is limited to time-sensitive information. Given the astronomical speed at which news travels in today's world, news remains "hot" for increasingly short durations, and the circumstances in which the hot news doctrine would apply today are rarer. Nevertheless, the

[4] Remarks of Carlo Lavizzari, Publishers' Protections Study Roundtable, Afternoon Session, tr. at 168

[5] Calvin Trillin, *Florida Woman Bites Camel*, The New YORKER (Dec. 20, 2021), available at https://www.newyorker.com/magazine/2021/12/27/florida-woman-bites-camel.

[6] *Id.* The lede he explores is: "A veterinarian prescribed antibiotics Monday for a camel that lives behind an Iberville Parish truck stop after a Florida woman told law officers she bit the 600 pound animal's genitalia after it sat on her when she and her husband entered its enclosure to retrieve their deaf dog."

current "hot news" doctrine could serve as a starting point for creating a new federal right against misappropriation of news content (with necessary exceptions) to protect the publishers' investment in time-sensitive journalism.

We encourage the Copyright Office to further investigate the viability of *sui generis* rights in its study and make recommendations to Congress to explore *sui generis* rights for news publishers.

2. Other Reforms and Clarifications

a. Journalism Protection and Competition Act

As other commentors and roundtable participants have noted, the current problems in the news industry stem in part from the monopolization of news aggregation and resulting competition issues. The Authors Guild supports the Journalism Protection and Competition Act (JCPA) (S.673 and H.R.1735) and believes that its passage is crucial for the future of the news media industry.

While it would not be a salve for all that ails the news media, the law will help level the playing field between news media companies and giant internet platforms like Facebook (Meta) and Google by allowing news media companies to collectively negotiate more equitable shares of advertising revenue generated by news aggregator use of news content. Australia's similar News Media Bargaining Code appears to have shown positive results for the media industry including for smaller players.[7] We believe that it is within the Copyright Office's purview as the agency overseeing copyright law to advise Congress on the importance of this legislation for correcting the imbalances in the copyright field. However, we ask that in any commentary or advice on the JCPA, the Copyright Office insist that small press publishers and independent journalists are given a seat at the bargaining table and that journalists are assured some benefits in agreements between news media companies and platforms. A solution that only helps the major news publishers is not a solution that will prove to provide long-term benefits to the news creation field. Journalists and reporters must be able to support themselves from their work if this country is to have a robust healthy fact-based journalism in the future.

Thank you for leading this important study, and we look forward to the final report.

Respectfully submitted,

Mary E. Rasenberger, CEO, The Authors Guild

[7] Calum Jaspan, *Country Press Australia pens Agreement with Google,* MUMBRELLA (Sep 3, 2021), https://mumbrella.com.au/country-press-australia-pens-agreement-with-google-on-showcase-program-701608 (noting how the deal would support 180 independent regional and local titles); Ben Butler, **'***Look at that penalty': after taking on Google and Facebook, Rod Sims departs ACCC with a warning*, THE GUARDIAN (Dec. 18, 2021), https://www.theguardian.com/australia-news/2021/dec/19/look-at-that-penalty-after-taking-on-google-and-facebook-rod-sims-departs-accc-with-a-warning ("Sims said the code had been "stunningly successful" and estimated the deals have pumped "well north of $200m a year" into the Australian media industry."); William Turvill, *New Zealand News Industry Battles for Collective Bargaining Rights as Australian Rivals Benefit from Big Tech Payouts*, PRESS GAZETTE (Dec. 10, 2021), https://pressgazette.co.uk/new-zealand-publishers-want-collective-bargaining-rights-for-big-tech-talks/