



LIBRARY COPYRIGHT ALLIANCE REPLY COMMENTS ON PUBLISHERS' PROTECTION STUDY

The Library Copyright Alliance (“LCA”) appreciates this opportunity to submit reply comment on the publishers’ protection study. The initial comments and the roundtables covered a lot of territory, so here we will focus only on a few critical points.

1. Definition of News Aggregator. For this study to have any utility, the Copyright Office must develop a much narrower definition of “news aggregator.” The definition in the notice of inquiry (“NOI”) is extremely broad, and encompasses different kinds of services that implicate different legal issues and arguably have different impacts on news publishers. Indeed, as noted during the roundtable, the news publisher *Politico*, now owned by Axel Springer, meets the NOI’s definition of a news aggregator; among its most valuable services to readers are compilations of quotations of the headline and lede of articles of interest in other news publications, with links to those articles. *See, e.g.*, “Playbook Reads” and “Great Weekend Reads” in *Politico Playbook*; “Quick Links” in *Politico Huddle*; and “Silicon Valley Must-Reads” and “Quick Downloads” in *Politico Morning Technology*.

The News Media Alliance (“NMA”) appears to center its attention on “news round-up” services such as Google News, as opposed to social media news feeds or search engines. But some of their many commenters strayed into social media platforms and search engines as well. Even if the Copyright Office focuses on news round-up services, it should be noted that that is precisely what *Politico* does with respect to specific topics.

2. Local Journalism. The Copyright Office should focus its study on local press publishers. All participants in the roundtable appeared to agree that local news deserts pose a serious problem for democracy in America. Accordingly, the Copyright Office should concentrate on understanding the different factors that have contributed to the crisis in local journalism; the role, if any, of news aggregators (properly defined) in creating this crisis; and possible solutions, if any, within the scope of the Copyright Office’s expertise.¹

¹ Over the past month, *The Washington Post* has covered the crisis in local journalism extensively, including a special “Lost Local News Issue” of the Sunday Magazine on December 6, 2021. None of these many articles appear to identify news aggregators as a factor in the decline of local journalism.

3. Fair Use and Implied Consent. The Copyright Office should not use this study as an opportunity to revisit the “words and short phrases” doctrine or to issue a legal opinion as to whether a news aggregator’s use of a headline, a lede, or a thumbnail image is a fair use.² It is not the role of the Copyright Office to produce legal opinions that parties can then rely upon in litigation. At most, the Copyright Office should provide a summary of the opposing perspectives on fair use, *e.g.*, the contrasting views of Professors Ginsburg and Netanel, among others.

In any event, there is no reason for the Office to assess in detail the adequacy of copyright protection for press publishers; the publishers claimed both in their initial comments and in the roundtable that copyright protects headlines and ledes. They are perfectly free to pursue that theory in court. That they have chosen not to over the past fifteen years does not provide grounds for the Copyright Office to render an advisory opinion on the issue. To be sure, if the publishers were demanding the enactment of ancillary rights because copyright and other existing forms of protection were insufficient, then it would be appropriate for the Copyright Office to explore the copyright issue closely, and make recommendations, if necessary, to Congress. But where the publishers are claiming they *don’t* need additional copyright protection, there is no need for the Copyright Office to ratify the publishers’ legal interpretations.³

If, however, the Copyright Office does decide to dig into the fair use question, it must consider the role of an issue overlooked by Professor Ginsburg: the failure of the publishers to use bot exclusion headers. If the failure to use a bot exclusion header constitutes an implied license, there is no need to consider the copyright issue at all; the publisher authorized the use. On the other hand, if the failure to use a bot exclusion header is not an implied license, it could nonetheless be relevant to the fair use analysis. A publisher’s decision not to employ this simple measure to prevent the crawling of its site (for over fifteen years!) sharply undermines the credibility of any argument it might make that the use has a negative effect on the potential market for or value of its copyrighted works. *See Field v. Google*, 412 F. Supp. 2d 1106 (D. Nev. 2006).

4. Hobson’s Choice and Competition. NMA tried to minimize the significance of press publishers’ implied consent in the case of Google News, and express consent in the case of Facebook, by asserting that press publishers were confronted by a Hobson’s Choice: allowing the news aggregators to use their content for free, or not receiving any traffic from the news aggregators. NMA asserted that this Hobson’s choice resulted from the market power of Google

² Likewise, the Copyright Office need not examine the copyright status of hyperlinks.

³ To the extent the Copyright Office believes it needs to respond to a Congressional request regarding the adequacy of existing forms of protection and the appropriateness of the EU or Australian models, the Office can simply report that the press publishers believe they have adequate protection under current law.

and Facebook. NMA thus conceded that the core issue in this study was *not* copyright, intellectual property more generally, or other forms of protection, but competition. In other words, NMA asserted that the core issue was outside the scope of the Copyright Office’s expertise.

When LCA and others pointed this out at the roundtable, NMA argued that the Copyright Office nonetheless was the appropriate venue for this study because it was the press publishers’ *copyrights* that were not being asserted due to the lack of competition. Without doubt, it is the Copyright Office’s business to explore why copyright owners are not asserting their rights in situations where changes to the Copyright Act—or intellectual property law more generally—might be part of the solution. For example, it was appropriate for the Copyright Office to examine the problems individual creators face in vindicating their copyrights, even if LCA disagrees with aspects of the solution recommended by the Copyright Office and enacted by Congress. In contrast, where—as here—the demandeur insists that the solution lies outside of copyright or related rights, the Copyright Office should defer to agencies with more expertise.

But if the Copyright Office elects to wade into the competition issues, it should recognize that to the extent that there is a competition problem, it is not that there too few news aggregators, it is that there are too many online news sites. Even if no one aggregator had market power in the antitrust sense (for example, if there were 100 aggregators each with one percent of the market), there are tens of thousands of news sites, all desperate for the visibility provided by the each of the 100 news aggregators. And while the quality of the underlying journalism varies significantly from one news site to another, the facts the news sites report in their headlines and ledes are (or should be) similar, meaning that the news aggregators would be indifferent to which sites supply them with headlines and ledes. This indifference would be magnified if news aggregation was an ancillary line of business for the aggregators, as it currently is for the leading news aggregators. In such an environment, there is no competition policy justification for requiring aggregators to pay news sites for the privilege of displaying their headlines and ledes.⁴

⁴ While LCA has no position upon the Journalism Competition and Preservation Act (“JCPA”), it is hard to see how it could succeed in causing more revenue to flow to press publishers. Even if the largest “news content creators” decided to take advantage of the JCPA to negotiate collectively with the “online content distributors,” it would be to the advantage of mid-sized news content creators to allow the online content distributors to aggregate their content under the current terms so as to capture the traffic that otherwise would have gone to the large news content creators. In other words, unless all news content creators in the United States were required to bargain collectively, and the online content distributors were required to negotiate with the news content collective, the JCPA would not change the overall dynamics of the market. Moreover, even if the JCPA succeeded in forcing news aggregators to pay to use headlines and

5. Substitution Effect. NMA argues that news aggregation sites have a significant substitution effect; that a large percentage of consumers are satisfied with the headlines and ledes displayed by the new aggregators and do not click through to the news sites hosting the articles. As the Copyright Office is well aware, determining the substitution effect of unauthorized uses of copyrighted works is extremely hard to determine with any degree of accuracy. Rights holders have long argued that every unauthorized use of a copyrighted work constituted a lost sale, even though it was obvious that a typical consumer had a limited budget for purchase of copyrighted works. This meant that he never would have purchased much of the content he downloaded. The rights holders' reasoning led to gross exaggerations of the economic impact of infringing conduct.

Similar methodological problems exist with determining the substitution effect of news aggregation. While some users may be satisfied with the headline on the news aggregator's site and not click through to the article, without the news aggregator, the user might never find the article in the first place. In other words, even if a third of the users don't click through to the article, the other two thirds may not have found the article but for the news aggregator. Moreover, it is possible that the user might not have searched for any news in the absence of the news aggregation site. That is, the incredible convenience of news aggregation sites might stimulate a demand for the consumption of news. In short, the substitution effect is highly speculative, turns on the nature of the news aggregation, *e.g.*, news round-up vs. social media vs. search engine, and depends on the many assumptions made by the researcher determining the substitution effect.

6. Quotation Right. At the roundtable, an NMA representative argued that the quotation right in Berne Article 10(1) applied only to foreigners. Thus, Congress could provide ancillary copyright protection to U.S. publishers without violating the Berne Convention. However, after careful examination of drafting history of Article 10(1), Tanya Aplin and Lionel Bently concluded that "the quotation exception, mandatory for Berne works, was expected to be applied evenly to domestic and Berne works—and the practice of almost all Members seems to have been to apply exceptions indiscriminately to works, whatever their origin (even if, in respect of formalities, countries subsequently distinguished between domestic and foreign authors—i.e. the US)." Tanya Aplin and Lionel Bently, *Global Mandatory Fair Use: The Nature and Scope of the Right to Quote Copyrighted Works* 31–35 (2020). Moreover, if the United States did not apply the Berne quotation right to domestic authors, the United States would be violating one of the key principles of the Berne Convention: national treatment. The United States would be providing more protection to the copyrighted works of domestic authors than foreign authors.

ledes, it would not meaningfully address the problem of local journalism. Only a small fraction of the additional revenue collected would trickle down to the local news sites.

7. Constitutional Questions. Because the NOI failed to ask any questions about the constitutionality of ancillary copyright protection, none of the initial comments from press publishers addressed this critical issue. At the roundtable, the NMA representatives discussed this issue only in passing. If the press publishers do address constitutionality in detail in their reply comments, the Copyright Office should invite further comments responding to arguments that a press publishers' right could be constitutional.

To the extent NMA representatives addressed constitutionality at the roundtable, they appeared to argue that a press publishers' right that precluded quotations of headlines would be constitutional because courts have found that 17 U.S.C. § 1201 is constitutional notwithstanding that it does not contain a fair use exception. While several courts have found that section 1201 is constitutional, this is far from a settled matter, and is the subject of ongoing litigation.⁵

Moreover, the courts that have upheld the constitutionality of section 1201 have reasoned that although section 1201 may in certain instances make it more difficult for a user to exercise her fair use rights, section 1201 does not directly prohibit their exercise.⁶ The court in *Universal v. Corley*, 273 F.3d 429, 459 (2d Cir. 2001), stated that

the DMCA does not impose even an arguable limitation on the opportunity to make a variety of traditional fair uses of DVD movies, such as commenting on their content, quoting excerpts from their screenplays, and even recording portions of the video images and sounds on film or tape by pointing a camera, a camcorder, or a microphone at a monitor as it displays the DVD movie. The fact that the resulting copy will not be as perfect or as manipulable as a digital copy obtained by having direct access to the DVD movie in its digital form, provides no basis for a claim of unconstitutional limitation of fair use.

⁵ See *Green v. Department of Justice*, now on appeal. The Second Circuit's analysis of the constitutional challenge to section 1201 based on its restriction of fair use in *Universal v. Corley*, 273 F.3d 429, 458 (2d Cir. 2001), begins with the assertion that "the Supreme Court has never held that fair use is constitutionally required." Two years later, in *Eldred v. Ashcroft*, 537 U.S. 136 (2003), the Supreme Court clarified that fair use is a constitutional requirement.

⁶ We disagree with the conclusions of the *Corley* and *Elcom* courts that section 1201 does not place unconstitutional limits on fair use. Nonetheless, these cases demonstrate that section 1201 places a lighter burden on fair use than would a press publishers' right based on the EU or Australian models.

Because section 1201 did not prevent fair use copying altogether, but only limited “copying by the optimum method or in the identical format of the original,” *id.*, the *Corley* court held that section 1201 did not trespass any statutory or constitutional right.

Likewise, the court in *U.S. v. Elcom*, 203 F. Supp. 2d 1111, 1131 (N.D. Cal. 2002), found that

the DMCA does not “eliminate” fair use. Although certain fair uses may become more difficult, no fair use has been prohibited. Lawful possessors of copyrighted works may continue to engage in each and every fair use authorized by law. It may, however, have become more difficult for such uses to occur with regard to technologically protected digital works, but the fair uses themselves have not been eliminated or prohibited. For example, nothing in the DMCA prevents anyone from quoting from a work or comparing texts for the purpose of study or criticism. It may be that from a technological perspective, the fair user may find it more difficult to do so—quoting may have to occur the old fashioned way, by hand or by re-typing, rather than by “cutting and pasting” from existing digital media. Nevertheless, the fair use is still available. Defendant has cited no authority which guarantees a fair user the right to the most technologically convenient way to engage in fair use.

By contrast, a press publishers’ right based on the EU or Australian models would go much further than section 1201. It would flatly prohibit the exercise of fair use by news aggregators. They would not be able to quote headlines or ledes, or display thumbnail images, without paying a fee. Therefore, section 1201 does not provide an example of a statute that can prevent fair use constitutionally.

Respectfully submitted,

Jonathan Band
Counsel
jband@policybandwidth.com

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