Before the

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Notice of Inquiry: Publishers' Protections Study (FR Doc. 2019-26004; Copyright Office Docket Number 2021-5)	)))))))	**COMMENTS OF THE NATIONAL WRITERS UNION (NWU)**

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The National Writers Union (NWU) submits these comments in response to the Notice of Inquiry (NOI) by the U.S. Copyright Office, “Publishers’ Protections Study,” FR Doc. 2021-22077, Copyright Office Docket Number 2021-05, 86 *Federal Register* 56721-56726 (October 12, 2021)[1], the initial comments submitted in response to that Notice of Inquiry[2], and the roundtable held by the Copyright Office on December 9, 2021, at which we testified[3].

The NWU is an independent national labor union that advocates for freelance and contract writers and media workers. The NWU includes local chapters as well as at-large members nationwide and abroad. The NWU works to advance the economic conditions of writers and media workers in all genres, media, and formats. NWU membership includes, among others, journalists, fiction and nonfiction book authors, poets, novelists, playwrights, editors, academic writers, business and technical writers, website and e-mail newsletter content providers, bloggers, social media producers, podcasters, videographers, illustrators, photographers, graphic artists, and other digital media workers. The NWU is a member of the International Federation of Journalists (IFJ), which represents 600,000 media professionals from 187 labor unions and associations in more than 140 countries.[4]

As an organization of writers and multimedia journalists, our concern is with the potential impact of new protections for publishers on the livelihoods of the individuals who create what the NOI describes as “news content”.

1. By notice promulgated on November 9, 2021 (86 *Federal Register* 62215-62216, FR Doc. 2021-24506), the deadline for additional comments in response to this notice of inquiry was extended through January 5, 2022.
2. Publishers Protections Study Comments, <https://www.regulations.gov/docket/COLC-2021-0006/comments>.
3. “Publishers’ Protections Study Roundtable”, <https://www.copyright.gov/policy/publishersprotections/roundtable-agenda.pdf>.
4. “About IFJ: The Global Voice of Journalists”, <https://www.ifj.org/who/about-ifj.html>. The NWU also endorses the comments being submitted in this docket by the IFJ, and urges the Copyright Office and Congress to keep in mind the impact of U.S. copyright law and regulations on journalists and other creators worldwide.

Despite the legal fiction of “works for hire”, *publishers* (other than self-publishers, who are implicitly but significantly overlooked in the NOI[5]) do not actually create the copyrighted works at issue in the NOI. These works are created by *journalists*.

The future of journalism – the concern that underlies the NOI – depends not so much on the future of news publishers (many of whom, especially online, are being disintermediated by self-publishers) as on the future of journalists’ ability to earn a living from our creative work.

From a perspective that centers the concerns of the affected community of journalists, question (4) (f) of the NOI is critical: “Should authors receive a share of remuneration, and if so, on what basis?” Our answer to this question is unequivocal: Authors should receive a share of remuneration, and it should be determined on the basis of collective bargaining.

One of the most important lessons we have learned from the experience of IFJ members in other jurisdictions where ancillary protections for publishers have been enacted, including Australia and the member states of the European Union, is that additional revenues for publishers will not automagically “trickle down” to journalists. In the absence of a statutory definition of a share of revenues from an ancillary right that must be paid to journalists and other creators[6], a meaningful, legally-protected right to bargain collectively over the division of those revenues is essential.

5. The failure to consider self-publishers is evident from question (1) (b) of the NOI: “For content in which the press publisher owns the copyright, what is typically the basis for ownership: Work-for-hire or assignment?” Self-publishers own the copyright in the works they publish *neither* through assignment *nor* as works-for-hire. Self-publishers own the copyright in the works they publish through a third method: by *creating* those works. Self-publishing, especially digital self-publishing, is of growing importance, including in the news industry.
6. We use the term “creators” to refer to *actual* creators, not in the sense of the legal fiction of works for hire, which elides actual creators from the discourse of copyright and makes it difficult even to talk about them. In a system in which publishers are deemed “creators” of many of the works of employees and freelance contractors, what language would the Copyright Office have us use to refer to the *people* who actually create works for hire?

Many of the responses to the NOI, and many participants in the roundtable, noted that the issues of copyright law raised by the NOI cannot be separated from competition (antitrust) law.

We agree. These need to be considered together, and not in isolation. But the NOI also raises inseparable issues of *labor law*, especially as it applies to freelancers and self-publishers. Our rights are implicated as *workers* as well as copyright holders (or creators of works for hire).

The imbalance of bargaining power between the dominant “news aggregators” and the much larger number of “press publishers” (as these terms are used in the NOI), is mirrored in the imbalance of bargaining power between press publishers and individual journalists and creators.

This imbalance is hugely exacerbated by the fact that the limited exception to U.S. antitrust law for collective bargaining by labor unions on behalf of *employees* has been construed not to extend to freelancers, independent contractors, or self-publishers, who make up a growing share of journalists as salaried newsroom staff is cut back in favor of outsourcing to freelancers.

It is therefore *essential*, in our view, that any new exception to antitrust law to permit collective bargaining by press publishers with news aggregators either:

1. include a provision that expressly permits collective bargaining by creators (including freelancers, independent contractors, self-publishers, and all other actual creators of works for hire) with publishers and news aggregators regarding the division of revenues from any new ancillary or other rights for publishers; or
2. be enacted concurrently with a more general express antitrust exception permitting collective bargaining by freelancers, independent contractors, self-publishers, and all other actual creators of works for hire.

In the NOI, the Copyright Office also asks, “Would granting additional rights to press publishers affect United States compliance with the Berne Convention or any other international treaty to which it is a party?”

While granting additional rights to press publishers would not be contrary to the Berne Convention or other international treaties to which the U.S. is a party, it would not bring the U.S. into compliance with those treaties. Although we recognize that this study is unlikely to lead to legislation to bring the U.S. into compliance with its copyright treaty obligations, we are obliged – since the Copyright Office has asked – to reiterate for the record our longstanding position that bringing the U.S. into compliance with its treaty obligations would require:

1. Repeal of the requirement for registration of copyright as a prerequisite for recovery of attorney’s fees, even for foreign works, which in most cases denies authors the “effective” enforcement procedures that the WIPO Copyright Treaty requires the U.S. to provide for “any” infringement[7];
2. Statutory protection with an effective remedy for violations of authors moral rights; and
3. Statutory protection with an effective remedy for violations of Article 10 (3) of the Berne Convention (“Where use is made of works in accordance with the preceding paragraphs of this Article, mention shall be made of the source, *and of the name of the author, if it appears thereon*”), which is almost universally violated by news aggregators who identify the source but not the author of news reports.

7. While we appreciate the action taken by the Copyright Office, in response to our petition for rulemaking, to create a procedure for group registration of a limited number of works distributed online, this does nothing to address the absence of procedures, guidance, or any practical method for registering copyright in more extensive and/or dynamic bodies of Web content without prohibitively burdensome and time-consuming fees and forms. Promulgation of such procedures, if designed for ease of use and minimization of the burden required for registration, would be one of the easiest and most significant steps that the Copyright Office could take, on its own authority and without the need for any statutory changes, to enable effective remedies for infringement.

We thank the Copyright Office for the opportunity to provide these comments. We look forward to working with the Copyright Office and Congress on legislation to address the issues, some of them longstanding, that have led to this policy study.

Respectfully submitted,

National Writers Union

Larry Goldbetter, President

Edward Hasbrouck, delegate to the IFJ Authors' Rights Expert Group