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**Written Comments in Response to U. S. Copyright Office's *Publishers' Protection Study:***  
***Notice and Request for Public Comment*, 86 Fed. Reg. 56721 (Oct. 12, 2021)**

**Submitted via regulations.gov Docket No. 2021-5**

November 23, 2021

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Ms. Shira Perlmutter  
Register of Copyrights and Director of the U.S. Copyright Office  
United States Copyright Office  
101 Independence Avenue, S.E., LM 404  
Washington, D.C. 20559

**Re: Written Comments in Response to U. S. Copyright Office's *Publishers' Protection Study: Notice and Request for Public Comment*, 86 Fed. Reg. 56721 (Oct. 12, 2021)**

Dear Register Perlmutter:

I make this submission in response to the Federal Register Notice of Inquiry (NOI), above, seeking public input to assist the Copyright Office in the preparation of the “Publishers’ Protection Study” as requested by Congress. I have prepared these Comments in connection with a consultation on behalf of the News Media Alliance.

These Comments consider whether the taking of headlines, initial sentences, and photographs from online news reports for purposes of news content aggregation would, if not authorized (as it currently is), infringe the news sources’ copyrights in their reports. I will assume that the news publishers own the copyrights in the text and photographic content, either by assignment from the authors, or as works made for hire. I will also assume that the publishers’ websites have been registered with the Copyright Office, thus enabling the initiation of an infringement action, and, if registered within 3 months of publication, entitling the publishers to statutory damages and attorneys fees (but I recognize that the pre-suit registration requirement for US works could post significant practical impediments in fact).

*Prima facie* infringement

While this memo will focus on fair use, *prima facie* infringement poses a predicate question. Infringement turns on substantial similarity of protectable expression. When a news aggregator reproduces photographs and copies headlines and initial sentences, do those appropriations amount to substantial takings of protected expression? We will first consider the copying of photographs, then of the textual elements of the online news sources.

*Photographs*

Photographs, including the work of photojournalists, have long enjoyed copyright protection. Courts have amply identified the original elements of even “factual” photographs, pointing to

creative choices in framing, timing, and subject-selection.<sup>1</sup> Most recently, the Second Circuit, in *Andy Warhol Foundation v. Goldsmith*,<sup>2</sup> in rejecting a defense that Andy Warhol copied only the “factual” elements of performer Prince’s face as depicted in a photograph by Lynn Goldsmith, reiterated that “The cumulative manifestation of these artistic choices — and what the law ultimately protects — is the image produced in the interval between the shutter opening and closing, i.e., the photograph itself.” A photograph may depict actual persons or things, but it shows the subject *as seen by* the photographer. Copyright protects the fixation of that vision. Reproduction of a photojournalist’s image in whole or in substantial part constitutes *prima facie* infringement.

### *Text: headlines and ledes*

The textual elements copied by news aggregators require fuller analysis. It is important to establish that the question of infringement does not require determining whether headlines and/or initial sentences are independently copyrightable works. The Copyright Office’s position declining to register words and short phrases (*Compendium*, 313.4(C)) does not resolve the question whether cumulatively copying content, including short phrases, from works which as a whole are copyrightable infringes those works. Whether or not individual headlines manifest sufficient originality to be “works” in their own right,<sup>3</sup> the question with respect to news aggregation is whether copying them in quantity results in qualitatively substantial similarity between the relevant portion of the aggregator’s site and the source site. (That the aggregator’s site also cumulatively copies from multiple additional news sources should not distract from the substantiality of the copying with respect to individual target sites; it would be perverse to conclude that substantial copying from any given source somehow becomes insubstantial with respect to that source if the copyist also appropriates substantial amounts from many other sources.)

Headlines and ledes capture the heart of the news account. (Indeed, they are designed to engage the reader’s interest, lest the reader not go further in perusing the report.<sup>4</sup>) They convey not only the news source’s selection of information, but also the particular style of the author and the publication. Differences in fact-selection and emphasis, and in writing style manifest themselves

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<sup>1</sup> See, e.g., *Rogers v. Koons*, 960 F.2d 301, 307 (2d Cir. 1992) (photograph’s originality consists of posing the subjects, lighting, angle, selection of film and camera, evoking the desired expression, and almost any other variant involved.”); *Mannion v Coors* 377 F. Supp. 2d 444, 452-53 (SDNY 2005) (detailing originality in “timing” and in “rendition”).

<sup>2</sup> 11 F.4th 26, 38 (2021).

<sup>3</sup> Given the considerable originality many headlines manifest, it may not be appropriate to exclude them from registration as works in their own right, especially since the “words and short phrases” rule – which does not explicitly encompass headlines – appears to be a proxy for inadequate authorship. Whether a work contains more than a *de minimis* amount of authorship need not be strictly quantitative. It is not apparent what concept of creativity or what public policy are served by privileging the long-winded over the pithy. For examples of creative headlines, see, e.g., <https://www.businessinsider.com/the-20-best-headlines-of-2009-2010-4> (“Headlines sell newspapers and get page clicks. So it's key that newspapers hire ace headline writers to lure in readers”).

In any event, the assessment of the authorship in news reports does not require demonstrating that every component of a news account would be separately copyrightable.

<sup>4</sup> For basic principles of writing for journalists, emphasizing the composition of headlines and ledes, see, e.g., <https://www.poynter.org/educators-students/2017/9-tips-for-writing-stronger-headlines/>; <https://journalism.missouri.edu/style-guide/>

even in apparently straightforward headlines addressing the same topic, see, e.g., screenshots of multiple headlines and ledes covering the same topic from Google News, Appendix A. Because news aggregation does not extract facts and rewrite the source accounts, but instead “scrapes” the headlines and ledes verbatim, the practice systematically appropriates the expressive elements of the source accounts, and thus (if unauthorized) should constitute *prima facie* infringement.

### *Fair use*

Even if the copying of photographic and text content from news sites is *prima facie* infringing, the analysis must also confront the affirmative defense of fair use. Courts have reiterated that fair use is an affirmative defense, as to which the defendant bears the burden of persuasion. As the Second and Ninth Circuit recently stressed: “Not much about the fair use doctrine lends itself to absolute statements, but the Supreme Court and our circuit have unequivocally placed the burden of proof on the proponent of the affirmative defense of fair use.”<sup>5</sup> Thus, disproving fair use does not form part of the copyright owner’s case in chief; rather, it is up to the defendant to rebut the presumption of infringement that follows from the copyright owner’s establishment of a *prima facie* violation. In theory, at least, if the statutory factors, weighed together, do not decisively favor fair use, the defendant will not have borne its burden.

### *The statutory factors*<sup>6</sup>

#### Factor 1: Nature and purpose of the use

Courts applying the first factor, the nature and purpose of the use, inquire whether the defendant has created a work that transforms the copied work with “new expression, meaning, or message,”<sup>7</sup> (new works cases). Transformative use has also come to mean that the defendant has

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<sup>5</sup> *Andy Warhol Foundation, supra*, 11 F.4th at 46, quoting *Dr. Seuss Enters., L.P. v. ComicMix LLC*, 983 F.3d 443, 459 (9th Cir. 2020).

<sup>6</sup> 17 USC sec.107:

Limitations on exclusive rights: Fair use

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

<sup>7</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (citing Pierre N. Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1111 (1990)).

devoted its copying to a transformative *purpose*, putting the copied material to a new use that does not substitute for the copied work or its derivatives. New use cases have enabled a variety of technological fair uses that copied entire works without accompanying commentary, criticism or other substantive intervention in the work’s content.<sup>8</sup> While some courts in the past seemed uncritically to accept many kinds of purportedly repurposed copying as “transformative,” and underplayed the impact of the defendants’ uses on the markets for derivative works,<sup>9</sup> more recently, courts have expressed greater skepticism concerning what uses actually “transform” content copied into new literary or artistic works, or repurposed into copyright-voracious systems. As a result, in both new work and new purpose cases, courts have been reforming “transformative use” to reinvigorate the other statutory factors, particularly the inquiry into the impact of the use on the potential markets for or value of the copied work.<sup>10</sup>

### *Is news aggregation “transformative”?*

Aggregators collect and redistribute copied content; they do not comment, criticize or analyze the material they copy. In addition to criticism and comment, the preamble to section 107 also lists “news reporting” as an illustrative use that may be fair (depending on the taking into account of the statutory factors). But cutting and pasting other sources’ news reports is not itself “news reporting.” Nor does it give “new meaning or message” to the copied material, it simply encapsulates and reconveys it for commercial purposes. For example, in *Huntley v. BuzzFeed*,<sup>11</sup> the court held that a use that merely collected and disseminated photographs from 17 different African American photographers was not transformative: “The Post itself does not go beyond simply collecting photos and names of photojournalists. And it does not provide any altered expression or meaning to the allegedly infringed work beyond that for which it was originally created by the copyright holders.”

For the same reason, aggregation does not merely impart “information about” the news stories; it reduces and recycles the essence of the stories themselves. By contrast, a website that identified topics and then simply listed the sources and URLs that covered the topics would be providing information pointing to the source sites’ coverage, without reproducing *how* the sites address the common topic. News aggregation thus does not produce “new works” in the usual fair use sense illustrated by the examples in the preamble; rather, in Justice Story’s evocative condemnation, news aggregators (and their algorithms) simply make a “facile use of the scissors.”<sup>12</sup>

It also seems unlikely that news aggregation endows the conveying of the copied content with a “new purpose.” The content is communicated for its original commercial purpose: to inform

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<sup>8</sup> See, e.g., *Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015) (*Google Books*).

<sup>9</sup> See, e.g., Barton Beebe, *An Empirical Study of US Copyright Fair Use Opinions, 1978–2005*, 156 U Pennsylvania L Rev 549 (2008) (documenting how a finding of “transformative use” tended to “stampede” all the other factors).

<sup>10</sup> See generally, Jane C. Ginsburg, *Fair Use in the United States: Transformed, Deformed, Reformed?*, 2020 Sing. J. Legal Stud. 265 (2020), <https://law1.nus.edu.sg/sjls/articles/SJLS-Mar-20-265.pdf>

<sup>11</sup> *2021 U.S. Dist. LEXIS 189420* (S.D.N.Y., Sept. 30, 2021)

<sup>12</sup> *Folsom v. Marsh*, 9 F.Cas. 342, 344 (CCD Ma. 1841). Justice Story went on to indicate that “extracts of the essential parts, constituting the chief value of the original work” would infringe; see *infra* under factor 4.

the reader of the news story, in the voice of its author/publisher. Aggregation may facilitate finding articles on the topics they address, but as the Second Circuit emphasized in *Fox News Network, LLC v. TVEyes, Inc.*,<sup>13</sup> “utiliz[ing] technology to achieve the transformative purpose of improving the efficiency of delivering content,”<sup>14</sup> is only “modest at best.”<sup>15</sup> In that case, the court rejected the fair use defense of an online service that enabled its paying customers to watch time-deferred clips of televised news stories. Because the duration of the clips equalled or exceeded the totality of each extracted news story (factor 3), and because there was a “plausibly exploitable market” for deferred viewing of television content (factor 4), TVEyes’ service plainly “usurped a function for which Fox is entitled to demand compensation under a licensing agreement.”<sup>16</sup> The case reveals that even where a court might discern some shard of transformativeness in a new technological mode of communication of others’ content, such a finding will no longer weight the first factor in favor of fair use if the court maintains its principal focus on the economic consequences of the scarcely repurposed use. Where, as here and in *TVEyes*, the use is both commercial and barely transformative (if at all), the first factor is not likely to favor the defendant.

## Factor 2: Nature of the copyrighted work

The last two and a half decades of fair use caselaw tended to recite and then ignore the second fair use factor, “the nature of the copyrighted work.”<sup>17</sup> The Supreme Court’s recent decision in *Google v. Oracle*,<sup>18</sup> however, may have breathed new life into this consideration. In *Google v. Oracle*, the Court determined that the functional nature of the “declaring code” software at issue placed it “further than are most computer programs (such as the implementing code) from the core of copyright.”<sup>19</sup> The Court, moreover, appeared especially concerned that the value of Oracle’s declaring code derived substantially from the efforts of third-party developers to learn Oracle’s system and create their own software products.<sup>20</sup> The code’s functional character and the network effects that made the code so desirable to software developers rendered it particularly susceptible to fair use verbatim copying.

The majority’s often-expressed doubts about whether the declaring code was copyrightable in the first place, and its emphasis of the code’s role as an industry standard, permeated its analysis of all the fair use factors. One may therefore be skeptical of *Google v. Oracle*’s impact on fair use of less functional software, and *a fortiori* on works of authorship more broadly.<sup>21</sup> In *Andy Warhol*

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<sup>13</sup> 883 F.3d 169 (2d Cir. 2018).

<sup>14</sup> *TVEyes*, 883 F.3d at 177–78.

<sup>15</sup> *Id.* at 181.

<sup>16</sup> *Id.* at 180–81.

<sup>17</sup> The second factor weighed most heavily when the plaintiff’s work was unpublished, see *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 563–64 (1985), but a subsequent amendment to section 107 in response to lower court decisions overemphasizing works’ unpublished nature clarified that a work’s unpublished status is not dispositive.

<sup>18</sup> 141 S. Ct. 1183 (2021).

<sup>19</sup> *Id.* at 1202.

<sup>20</sup> See *id.*

<sup>21</sup> See *id.* at 1219 n.11 (Thomas, J., dissenting) (“Because the majority’s reasoning would undermine copyright protection for so many products long understood to be protected, I understand the majority’s holding as a good-for-declaring-code-only precedent.”).

*Foundation*, the Second Circuit stressed that *Google v. Oracle* represents an “unusual context” involving primarily functional computer programs that “[made] it difficult to apply traditional copyright concepts.”<sup>22</sup>

Nonetheless, one may also anticipate an argument that the headlines and ledes (if not the photographs) copied by news aggregators resemble the functional declaring code in *Google v Oracle* because any copyright these elements enjoy should be extraordinarily thin. The headlines and ledes of news reports, however, do not present the problem of industry standardization that so preoccupied the *Google v Oracle* majority. Aggregators do not copy in order to create new accounts building on prior news stories, and there is no claim that it is not possible to convey the news without copying its specific expression. On the contrary, while Oracle’s declaring code may have been purely functional (either from lack of expression, or from network effects, or both), the discussion of prima facie infringement of news reports, above, demonstrated that the headlines and ledes of news accounts are not purely factual. The many examples of different presentations of the underlying information defeat claims that the factual nature of news accounts compels a merger of information and expression (see Appendix A). While the copyright in news reports may not be as portly as in works of pure fiction, neither is it as emaciated as Oracle’s declaring code. The copyright in the textual elements, rather than “thin,” might better be described as “in fighting trim.” Moreover, the multiple expressive elements of the photographs endow their copyrights with additional bulk.

### Factor 3: Amount and substantiality of the copying

Arguably, copying only the headline and the lede of each article incorporated by news aggregators is both quantitatively insignificant, and constitutes no more than necessary to convey minimal information regarding the topic the article covered. Courts, however, address not only quantitative, but especially qualitative substantiality. In *Harper & Row v Nation Ents.*,<sup>23</sup> for example, the Supreme Court rejected the contention, credited by the court of appeals, that the verbatim copying of only 400 words from a many thousand-word book was insubstantial and therefore weighted the third factor in favor of fair use. On the contrary, the Supreme Court held, the copying appropriated the “heart,” the “most interesting and moving parts” of the book.<sup>24</sup> As discussed earlier, the headlines and ledes are designed to be the “most interesting” and compelling parts of a news account. In the case of news aggregation, moreover, the copying not only is qualitatively substantial with respect to each article, but the accumulated copying from each website is both quantitatively and qualitatively substantial. The copying is cumulative and systematic. Nor, for the reasons discussed earlier, would it be correct to contend that the copying “took no more than was necessary” to convey the information covered in each article. It is possible to communicate what the article is “about” without copying *how* the article imparts the information.

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<sup>22</sup> *Andy Warhol Foundation, supra*, 11 F.4th at at 51–52 (quoting *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1208 (2021)).

<sup>23</sup> 471 US 539 (1985).

<sup>24</sup> *Id.* at 565.

The caselaw illustrates the difference between copying in aid of finding of a work of authorship that addresses the user’s selected topic, and copying that provides an output sufficient to replace the work or its licensed derivatives. “Copying to enable searching or identifying works is one thing, but the fairness of the use should turn on what the use delivers. If the output provides access to substantial and unaltered portions of copyrighted expression, the delivery is not fair use. If the output discloses no copyrighted expression, or only non-substitutional amounts of it, then the delivery may be deemed a fair use. The find/deliver distinction explains the different outcomes in *iParadigms*, *HathiTrust* and *Google Books* on the one hand, and *VHT v Zillow* and *TVEyes*, on the other.”<sup>25</sup> In the case of news aggregation, the amount and substantiality of the content the platforms provide to users considerably traverses the line between fair use finding and infringing delivery.

Similarly, with respect to photographs, these are substantially copied, and are not necessary to convey what the news item is about. Photographs may make the copied accounts more visually arresting or appealing, but, as Judge Leval has cautioned, copying “to make a richer, better portrait . . . , and to make better reading than a drab paraphrase”<sup>26</sup> exceeds the amount of copying necessary to the informative or instructional purpose, and is not fair use.

One might counter, based on *Google v. Oracle*, that analysis should focus not only on the substantiality of the copying with respect to plaintiff’s works, but also relative to the defendant’s work. In *Google v. Oracle*, the Court declined to view “in isolation” the 11,500 lines of declaring code that Google copied, instead underscoring the 2.86 million lines of API code that Google *did not* copy.<sup>27</sup> The 11,500 lines “should be viewed . . . as one part of the considerably greater whole.”<sup>28</sup> Arguably, since any one news source’s content forms only a small part of the multiply-sourced full contents of a large-scale news aggregation site, copying from any particular source is insubstantial in relation to the *defendant’s* work as a whole. The “considerably greater whole,” that the *Google v. Oracle* court emphasized, however, consisted of new code created by Google, not of extracts of third party code cut and pasted from multiple sources. News aggregators, by contrast, string together third party content; they do not create their own news reports building on the copied material.

#### Factor 4: Effect of the copying on the market for or value of the copyrighted work

Recent fair use caselaw has emphasized the importance of the inquiry into economic harm. Where the copying substitutes for the work or for actual or potential derivative works, courts are

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<sup>25</sup> Jane C. Ginsburg, *Fair Use in the United States: Transformed, Deformed, Reformed?*, *supra* note 10, at 293-94.

<sup>26</sup> *Craft v. Kobler*, 667 F.Supp. 120, 127 (SDNY 1987).

<sup>27</sup> See *Google v Oracle* at 1204–05. This approach is in some tension with traditional copyright doctrine. See, e.g., *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 56 (2d Cir. 1936) (“[N]o plagiarist can excuse the wrong by showing how much of his work he did not pirate.”); see also *Fioranelli v. CBS Broad. Inc.*, No. 15-CV-0952, 2021 U.S. Dist. LEXIS 145311, at \*107 (S.D.N.Y. July 28, 2021) (declining to follow defendant’s “purely mathematical approach” to the amount and substantiality, and duration, of copying from plaintiff’s photographs into defendant’s documentary films).

<sup>28</sup> *Google*, 141 S. Ct. at 1205.



unlikely to find fair use.<sup>29</sup> The NOI submission of the Newspaper Alliance documents the substitutional effect of news aggregation.<sup>30</sup> One should contrast the impact of news aggregation with a different kind of systematic copying, the communication of “snippets” of content from digitized books held to be fair use in *Google Books*.<sup>31</sup> The Second Circuit in that case repeatedly underscored the non-substitutional effects of Google’s book-scanning output, “at least as snippet view is presently constructed.”<sup>32</sup> It observed “the close linkage between the first and fourth factors, in that the more the copying is done to achieve a purpose that differs from the purpose of the original, the less likely it is that the copy will serve as a satisfactory substitute for the original.”<sup>33</sup> As we have seen, the purpose of news aggregation is the same as the purpose of the copied sources: to inform the public of the news events as characterized and elaborated by the news sources. Moreover, the Second Circuit continued, “Even if the purpose of the copying is for a valuably transformative purpose, such copying might nonetheless harm the value of the copyrighted original if done in a manner that results in widespread revelation of sufficiently significant portions of the original as to make available a significantly competing substitute.”<sup>34</sup> The paucity of “click-backs” to the original news sources from the aggregated descriptions shows that what news aggregators deliver to the public satisfies most demand for the full original.

The market harm news aggregation inflicts is not limited to substituting for consultation of the original news source (on its webpage, with its advertising); it also compromises the market for licensing content for authorized news round-ups.<sup>35</sup> It makes little sense to continue to pay for communicating headlines, ledes and photos if powerful platforms are doing it for free. The Supreme Court has instructed that the inquiry into the market effect should take into account “if it [the copying] should become widespread, it would adversely affect the potential market for the copyrighted work.”<sup>36</sup> If the most important and evocative features of news stories can be copied and recommunicated widespread and freely (in both senses of the adverb), those features will lose the market value they could otherwise command.

One might counter that any substitution effect is not cognizable because news aggregation satisfies the public demand for the *information*, not for the expression, contained in news reports.<sup>37</sup> But the systematic verbatim copying involved in news aggregation goes beyond providing information (e.g., announcing the topic), to capture the *way* the sources recount the information, both

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<sup>29</sup> See, e.g., *Dr. Seuss Ents., supra*; *Andy Warhol Foundation., supra*; *Fox News v. TVEyes., supra*; *VHT, Inc v Zillow Group, Inc.*, 918 F.3d 723 (9th Cir 2019).

<sup>30</sup> See News Media Alliance Written Comments in Response to U. S. Copyright Office’s Publishers’ Protection Study: Notice and Request for Public Comment, 86 Fed. Reg. 56721 (Oct. 12, 2021) at Parts II and III.

<sup>31</sup> *Authors Guild v Google, Inc.*, 804 F.3d 202 (2d Cir 2015).

<sup>32</sup> *Id.* at 224.

<sup>33</sup> *Id.* at 223.

<sup>34</sup> *Id.*

<sup>35</sup> For the current status of that licensing market, and the threats to it, see News Media Alliance Response to NOI, *supra*, at Part V.2 (c) and (d).

<sup>36</sup> *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417, 451 (1984).

<sup>37</sup> *Google Books*, at 224 (a snippet’s disclosure of an historical fact dispenses the researcher from consulting the full book but does not substitute for the “protected aspect” of the author’s work).

with respect to the text and especially regarding the photographs. Substituting for “the author’s manner of expression”<sup>38</sup> will weight the fourth factor against fair use.

Finally, the Supreme Court in *Google v Oracle* considered that economic harm to the copyright holder may be offset by “public benefits the copying will likely produce.”<sup>39</sup> Contrasting *Google v. Oracle* with news aggregation illustrates why fair use here would in fact undermine the public interest. In *Google v. Oracle*, the court equated the public interest with Google’s ability to create a new mobile phone operating system building on Oracle’s declaring code. Because Oracle’s API had become an industry standard to which software developers had grown accustomed, coding an alternative system would have imposed great cost and difficulty.<sup>40</sup> For that reason, the Court feared that permitting Oracle a monopoly on its largely functional API might well stifle “creative improvements, new applications, and new uses developed by users who have learned to work with that interface.”<sup>41</sup> In that case, “given programmers’ investment in learning the Sun Java API, to allow enforcement of Oracle’s copyright here would risk harm to the public.”<sup>42</sup> A finding against fair use thus “would interfere with, not further, copyright’s basic creativity objectives.”<sup>43</sup>

Compare news aggregation: as discussed earlier, the spectre of a necessary, standard form of expression does not haunt news reporting or photography. Oracle’s code was, according to the Court, functional and barely expressive, as well as the beneficiary of network effects. News accounts inform, but by means of individualized expression. Reporters may be trained to frontload the most interesting and compelling information into the headlines and ledes, but, as we have seen, news sources differ both in their selection of facts to highlight, and in the way they describe them. Most importantly, focusing on whether a finding of fair use would “further copyright’s basic creativity objectives,” the economic harm that news aggregation causes, contributing to the diminution of news sources and the reduction in their resources for news reporting,<sup>44</sup> undermines those objectives.

Respectfully submitted,  
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<sup>38</sup> *Google v Oracle* at 1208.

<sup>39</sup> *Id.*

<sup>40</sup> See *id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> For detailed discussion of these harms, see submission of Hal J Singer, *Addressing the Power Imbalance Between News Publishers and Digital Platforms: A Legislative Proposal for Effectuating Competitive Payments to Newspapers* appended to News Media Alliance, *Written Comments, infra*; News Media Alliance, *Written Comments in Response to U. S. Copyright Office’s Publishers’ Protection Study: Notice and Request for Public Comment*, 86 Fed. Reg. 56721 (Oct. 12, 2021) Parts II and III.

## APPENDIX A

### Examples of headlines, ledes, and photos “scraped” and delivered by Google News

The following excerpts illustrate different news sources’ wide variations in text and in selection of images to cover the same news story

#### **Biden Declared Winner**

 USNews.com

##### Joe Biden Declares Victory in a Humble, Passionate Address to America

Joe Biden Declares Victory in a Humble, Passionate Address to America. The president-elect made it clear in his remarks that he had indisputably won the...

Nov 7, 2020



 Reuters

##### Biden declares 'clear victory' in close U.S. presidential race

(Reuters) - Joe Biden declared victory Saturday as the 46th president of the United States after voters narrowly rebuffed Republican incumbent Donald...

Nov 7, 2020



 Boston 25 News

##### AP: Joe Biden declared winner of 2020 presidential election

WASHINGTON — Democrat Joe Biden defeated President Donald Trump to become the 46th president of the United States on Saturday, positioning himself to lead a...

Nov 7, 2020



 The New York Times

##### Biden Wins Presidency, Ending Four Tumultuous Years Under Trump

Biden's victory, which came 48 years to the day after he was first elected to the United States Senate, set off jubilant celebrations in Democratic-leaning...

Nov 8, 2020





## Biden defeats Trump in an election he made about character of the nation and the President

(CNN) America has chosen Democrat Joe Biden as its 46th president, CNN projects, turning at a time of national crisis to a man whose character was forged by...

Nov 7, 2020



## Biden wins – experts on what it means for race relations, US foreign policy and the Supreme Court

Three scholars discuss what a Biden presidency may have in store in three key areas: race, the Supreme Court and foreign policy. Racism, policing and Black...

Nov 7, 2020



## **First Cases of COVID**

 CNBC

### **Pneumonia outbreak in China may be linked to family of viruses that caused SARS, WHO says**

The pneumonia outbreak in the central Chinese city of Wuhan started last month, and 59 cases had been reported by Chinese authorities by Sunday.

Jan 8, 2020



 Vox

### **China outbreak: A mysterious pneumonia is spreading in a major city.**

Wuhan, the capital of China's central Hubei province, is the site of an outbreak caused by an unknown pathogen that's sickened 59 people so far.

Jan 7, 2020



 Wall Street Journal

### **New Virus Discovered by Chinese Scientists Investigating Pneumonia Outbreak**

Latest tally of people sickened in Wuhan is 59, with seven in critical condition. Public-health officials in Bangkok hand out disease-...

Jan 8, 2020



## Kamala Harris Announced as VP

 Vox

### Kamala Harris announced as Joe Biden's VP pick

Kamala Harris as his running mate. Harris, who ran for the presidency herself, is a historic choice: She's the first Black woman and the first Asian American...

Aug 11, 2020



 AP News

### Biden picks Kamala Harris as running mate, first Black woman

WILMINGTON, Del. (AP) — Joe Biden named California Sen. Kamala Harris as his running mate, making history by selecting the first Black woman to compete on a...

Aug 11, 2020



 CNN

### Joe Biden picks Kamala Harris as his running mate

"I've decided that Kamala Harris is the best person to help me take this fight to Trump and Mike Pence and then to lead this nation starting in January 2021,"...

Aug 11, 2020



## Prince Harry and Meghan Markle

**F** Forbes

### Prince Harry, Meghan Markle Want To Be 'Financially ...

Key background: Prince Harry and Meghan Markle have been subject to intense press coverage since their courtship in 2016, wedding in 2018, and birth of their...

Jan 8, 2020



**G** The Guardian

### Prince Harry and Meghan to step back from royal family

Prince Harry and Meghan plan to split their time between the UK and North America, the continent of her birth, as they raise their son, Archie.

Jan 8, 2020



**NBC** NBC News

### Harry and Meghan go from royal romance to breakup with the royals

LONDON — After Prince Harry and Meghan Markle met through friends in July 2016, it didn't take long for the British tabloids to get wind of the relationship...

Jan 8, 2020



**DB** The Daily Beast

### Prince Harry and Meghan Markle Felt 'Totally Unwelcome' in ...

Prince Harry and Meghan Markle Felt 'Totally Unwelcome' in the Royal Family— So They Quit · Tom Sykes · Tim Teeman · Photo Illustration by The Daily Beast/Photos...

Jan 8, 2020



## COP26 Methane Deal

ABC7 Chicago

### COP 26 summit: Pres. Biden calls for decisive action in fighting global at United Nations Climate Change Conference

... submit a new adaptation communication, and launch a pledge with the European Union to reduce methane emissions by at least 30% by the end of the decade.

2 weeks ago



The Week

### Biden unveils sweeping methane emission rules at COP26 climate summit

Biden is at the United Nations-sponsored COP26 climate change summit in Glasgow, Scotland, where methane emissions are a major agenda item.

2 weeks ago



BBC

### COP26: US to tackle methane leaks from oil and gas wells

The US is set to announce measures to prevent millions of tonnes of the greenhouse gas methane from entering the atmosphere.

2 weeks ago



USA Today

### Biden announces rule to limit methane leaks, targeting oil and gas industry at COP26 climate summit

Biden announces rule to limit methane leaks, targeting oil and gas industry at COP26 climate summit ... As part of Biden's plan to curb methane gas emissions, a...

2 weeks ago





# Murder Hornets

 Capital Journal

## 'Murder Hornets' invade America | Local News Stories ...

These are believed to be the initial sightings of Asian giant hornets anywhere in the U.S. Canada had also discovered Asian giant hornet in two locations in...

May 4, 2020

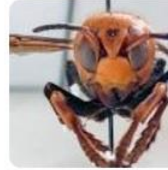


 WITN

## Are 'murder hornets' a threat to humans and bees?

And they just ravage bee nests." The "murder hornet" is actually known as the Asian Giant Hornet. The insect has reportedly invaded beehives in Washington state...

May 4, 2020

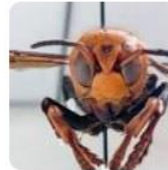


 WVLT

## Murder hornets "decapitate" bees, UT expert says not to panic

Their venomous sting can kill humans if they are stung multiple times. The hornets are also strong enough to puncture a beekeeper's suit. WVLT News spoke to...

May 4, 2020



 ABC11

## Experts say Asian Giant Hornet, also known as 'murder hornet' not a threat in North Carolina yet

RALEIGH, N.C. (WTVD) -- While the Asian giant hornet, also known as the 'murder ... RELATED: Deadly stings from bees, wasps, hornets increase over last 5...

May 4, 2020



 KHOU

## When will murder hornets make their way to Texas? Maybe sooner than you think

When will murder hornets make their way to Texas? Maybe sooner than you think. Warmer months could make invasive killer insects from east Asia spread...

May 4, 2020



 The Virginian-Pilot

### 'Murder Hornets,' with sting that can kill, land in US

The world's largest hornet, a 2-inch killer dubbed the "Murder Hornet" with an appetite for honey bees, has been found in Washington state,...

May 4, 2020



 100.7 WITL

### 'Murder Hornets' Have Been Spotted in the United States

Here's a report from CBS News that includes more pictures. (That way you're sure to have bad dreams about the 'murder hornets'.).

May 4, 2020



## Death of Soleimani

 NPR

### Trump Ordered US Strike That Killed Iranian Military Leader

...

Qassem Soleimani in an airstrike early Friday near the Baghdad International Airport, an escalation of tensions between Washington and Tehran that is prompting...

Jan 2, 2020



 Wall Street Journal

### Qassem Soleimani, Powerful Iranian Commander and U.S. Foe, Is Dead

Soleimani was the country's most powerful military commander since the 1979 Islamic Revolution. He was also considered a nemesis to the U.S. in the Middle East,...

Jan 3, 2020



## SpaceX Launch

 The New York Times

### SpaceX Lifts NASA Astronauts to Orbit, Launching New Era of Spaceflight

SpaceX Lifts NASA Astronauts to Orbit, Launching New Era of Spaceflight. The trip to the space station was the first from American soil since 2011 when the...

May 31, 2020



 SciTechDaily

### SpaceX Falcon 9 Rocket Launches Crew Dragon Spacecraft With NASA Astronauts: "A Great Day for America"

NASA's SpaceX Demo-2 mission to the International Space Station is a critical final flight test of the SpaceX crew transportation system. Today's launch also...

May 30, 2020



 Wall Street Journal

### Elon Musk's SpaceX Launches NASA Astronauts Into Orbit

Elon Musk's SpaceX and NASA blasted two astronauts into orbit, marking the first human launch from U.S. soil in nearly a decade and a new partnership...

May 30, 2020



## Trump Acquitted

 The Washington Post

### In historic vote, Trump acquitted of impeachment charges

Democrats fell far short of the two-thirds majority required to remove Trump from office, as senators voted 52 to 48 to acquit him on the abuse-of-power...

Feb 5, 2020



 Fortune

### Trump acquitted of all impeachment charges and will remain in office

President Donald Trump won impeachment acquittal Wednesday in the U.S. Senate, bringing to a close only the third presidential trial in American history...

Feb 5, 2020

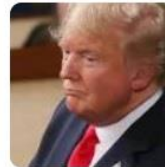


 Politico

### Trump was acquitted. But didn't get exactly what he wanted.

The Senate on Wednesday voted to acquit Trump without calling witnesses. It's an outcome that the White House has pushed for, but one that some Trump allies...

Feb 5, 2020



 USA Today

### President Trump acquitted on both impeachment charges, avoids removal

WASHINGTON - The Senate acquitted President Donald Trump for his dealings with Ukraine on Wednesday, culminating months of bitter partisan clashes over...

Feb 5, 2020



 Fortune

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Feb 5, 2020



## Weinstein Convicted

**AP** AP News

### Harvey Weinstein found guilty in landmark #MeToo moment

NEW YORK (AP) — Harvey Weinstein was convicted Monday of rape and sexual assault against two women and was led off to prison in handcuffs, sealing his...

Feb 24, 2020



**NPR** NPR

### Harvey Weinstein Verdict: Guilty Of 2 Of 5 Counts In Sex ...

A Manhattan jury has found Harvey Weinstein guilty of rape and sexual abuse but acquitted him of the most serious charges, capping one of the most closely...

Feb 24, 2020



**WABE 90.1** WABE 90.1

### Harvey Weinstein Found Guilty Of Rape, But Acquitted Of Most ...

Harvey Weinstein arrives at a Manhattan courthouse as jury deliberations continue in his rape trial, Monday, Feb. 24, 2020, in New York. Credit Seth Wenig /...

Feb 24, 2020



## January 6 Insurrection

 BuzzFeed News

### Trump Launched A Deadly Attempted Coup, Encouraging A Mob To Breach The US Capitol Building Because He Lost The Presidential Election

Trump Launched A Deadly Attempted Coup, Encouraging A Mob To Breach The US Capitol Building Because He Lost The Presidential Election · Win McNamee / Getty...

Jan 6, 2021



 New York Magazine

### Mob of Trump Supporters Seize Capitol in Stunning Attack on Democracy

President Donald Trump incited his supporters to storm the U.S. Capitol on Wednesday where they ransacked the temple of American democracy in a violent...

Jan 6, 2021



 Los Angeles Times

### Pro-Trump mob breaches Capitol, forces lawmakers to flee

The Capitol has seen frequent protests and some previous acts of violence — including a bombing in 1915 and shooting in the House Gallery by four supporters of...

Jan 6, 2021





 New York Post

## US Capitol, Washington DC on lockdown as Trump supporters breach building

Protesters broke through a flimsy fence surrounding the Capitol grounds, and scaled the steps to the building, going toe-to-toe with police. Previous. 1 of 22.

Jan 6, 2021



 Wall Street Journal

## Pro-Trump Mob Force Way Into Capitol; D.C. Orders Curfew

WASHINGTON—Rioters breached the Capitol on Wednesday afternoon as both the House and Senate were meeting inside after President Trump urged supporters to...

Jan 6, 2021

