

**Before the  
U.S. Copyright Office  
Washington, D.C. 20540**

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In the Matter of	)	
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Group Registration of Updates to	)	Docket No. 2023-8
a News Website	)	
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	)	

**COMMENTS OF  
THE NATIONAL ASSOCIATION OF BROADCASTERS**

**I. INTRODUCTION**

The National Association of Broadcasters (NAB)<sup>1</sup> hereby submits the following comments in response to the U.S. Copyright Office’s Notice of Proposed Rulemaking proposing the creation of a new group registration option for frequently updated news websites.<sup>2</sup> NAB applauds the Copyright Office’s commitment to modernizing its regulations so that broadcasters and other news publishers can more actively participate in the registration system. We appreciate the opportunity to share our views regarding this proposed rule and eagerly await its adoption. In offering our general support for the proposed rule, below we provide comments and suggestions on aspects of the proposed rule that we believe would even more effectively address the needs of news publishers in the digital age.

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<sup>1</sup> NAB is the nonprofit trade association that advocates on behalf of free local radio and television stations and broadcast networks before Congress, the Federal Communications Commission and other federal agencies, and the courts.

<sup>2</sup> *Group Registration of Updates to a News Website*, Notice of Proposed Rulemaking, Docket No. 2023-8 (Jan. 3, 2024) (Notice).

## II. THE PROPOSED DEFINITION OF “NEWS WEBSITE” SHOULD BE BROADENED TO ACCOMMODATE THE NEW WAYS IN WHICH NEWS CONTENT IS DELIVERED AND CONSUMED

The methods and speeds with which news and information is now delivered and consumed requires news publishers to heighten their focus on registering their online content. The internet’s easy and instantaneous accessibility offers an immediacy of information that traditional communications simply cannot match. People are no longer restricted to reading the news in their morning paper or waiting to watch evening news broadcasts. This shift in news media consumption has caused news publishers to invest more time and resources into delivering valuable news content online. Unfortunately, as access to online news content increases, so do opportunities to infringe such content. Therefore, news publishers need modernized group registration options that are flexible enough to accommodate the dynamic nature of news content, where articles are constantly being published and updated.

Currently, news publishers are effectively unable to register their online content due to a lack of efficient and cost-effective group registration options for dynamic websites. The Copyright Office’s proposed rule will provide the necessary means for news publishers to actively participate in the registration system and obtain much-needed protection for their online content. Nevertheless, we encourage the Office to tailor the rule, where possible, to better address the needs of news websites in the digital age.

*First*, the Office defines a “news website” 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.*<sup>3</sup> As written, the last phrase of the proposed definition would improperly exclude news publishers that focus on specific subjects or activities, such as sports, finance, fashion, and food. This exclusion creates an unnecessary restriction on the proposed group registration option. While this phrase may have been appropriate in the Office’s definition for “newspapers” in 37 C.F.R. § 202.4(e)(1),<sup>4</sup> its inclusion within the definition of “news website” would preclude news websites that specialize in specific subject matters from reaping the benefits of this rule. Given the innovative ways in which readers can now personalize their news consumption and choose to engage with websites specifically tailored to their interests, this would be harmful to news publishers. As such, NAB urges the Office to delete the phrase “on all subjects and activities and is not limited to any specific subject matter” from the proposed definition in § 202.4(m)(1)(i).

*Second*, in alignment with its goal to “broade[n] participation in the registration system,”<sup>5</sup> we encourage the Copyright Office to take a proactive approach to ensuring the protection of copyrightable news content, whether that be in website or application (app) formats. Increases in digital communication have made it easier for individuals to access a wide range of news and current events directly from their digital devices, such as smartphones, computers, and tablets. In fact, the majority of Americans get at least a portion of their news – including content from newspapers – on digital devices and mainly

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<sup>3</sup> Notice at 317 (emphasis added).

<sup>4</sup> 37 C.F.R. § 202.4(e)(1) (2023) (“A newspaper is a periodical...that is mainly designed to be a primary source of written information on current events, either local, national, or international in scope. A newspaper contains a broad range of news on all subjects and activities and is not limited to any specific subject matter.”).

<sup>5</sup> See Notice at 317.

from news websites and apps.<sup>6</sup> Similar to the nature of dynamic websites, news publishers are constantly delivering updated news content via their official apps or through licensed news aggregators. Therefore, we encourage the Copyright Office to consider including accommodations for apps within the proposed language in § 202.4(m)(1)(ii).

### III. DEPOSIT COPY REQUIREMENTS SHOULD ACCOUNT FOR NEWS PUBLISHERS THAT UTILIZE “INFINITE SCROLL” FEATURES IN THEIR WEBSITES

One of the biggest challenges in registering a website, as acknowledged by the Copyright Office, has been providing sufficient deposit copies that display the website in its entirety.<sup>7</sup> By allowing the submission of a deposit composed of identifying material representing sufficient portions of a website, as opposed to its complete contents, the proposed rule will finally provide news publishers with a feasible means to acquire meaningful copyright protection and access the statutory remedies for infringement. We further urge the Copyright Office to amend its proposal to allow news publishers to submit “a copy” of identifying material when the submission of a “complete copy” of a website’s home page is technologically unattainable.<sup>8</sup>

As proposed, the rule would only benefit applicants who are able to submit complete portable document format (PDF) copies of a website’s home page in its entirety. However,

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<sup>6</sup> Naomi Forman-Katz and Katerina Eva Matsa, *News Platform Fact Sheet*, Pew Research Center (Sep. 20, 2022) <https://www.pewresearch.org/journalism/fact-sheet/news-platform-fact-sheet/>.

<sup>7</sup> Notice at 312-13; see also News Corporation Comments at 10-11, Submitted in Response to Oct. 12, 2021 Notice of Inquiry, Publishers’ Protections Study, U.S. Copyright Office Dkt. No. 2021-5 (Nov. 26, 2021), <https://www.regulations.gov/comment/COLC-2021-0006-0016>. News Media Alliance Comments at 19, Submitted in Response to Oct. 12, 2021 Notice of Inquiry, Publishers’ Protections Study, U.S. Copyright Office Dkt. No. 2021-5 (Nov. 23, 2021), <https://www.regulations.gov/comment/COLC-2021-0006-0020>.

<sup>8</sup> Notice at 317 (stating applicants must provide PDF files that “each contain a complete copy of the home page of the website.”).

many news websites utilize an “infinite scroll” feature that automatically and continuously loads more content as users scroll down the web page, eliminating the users’ need to navigate to the next page. In this instance, it would be technologically impossible for an applicant to satisfy the deposit requirement of providing a PDF of the home page in its entirety. Allowing applicants to submit a copy of a home page would address this issue while still satisfying the Office’s requirement of demonstrating that the home page contains sufficient copyrightable authorship to be registered as a collective work.<sup>9</sup> Accordingly, the Office should amend the deposit requirements proposed in §202.4(m)(6)(i) to allow for the submission of a copy of identifying material in lieu of a complete copy of the home page.

#### **IV. SUBJECTS OF INQUIRY: PROVISION OF ADDITIONAL INFORMATION**

The Notice seeks input regarding ways in which applicants can provide additional information regarding the contents of the collective work where applicable. The Office queries whether it should allow applicants to provide additional information, such as individual article or photograph titles, when registering their news website, and asks about the impact providing additional information would have on news publishers.<sup>10</sup> Should the Copyright Office elect to permit the provision of additional information, NAB submits that any such allowance should be purely optional. Requiring applicants to provide additional details of the component works within a collective work would be unduly burdensome since news websites publish hundreds of articles and photographs every day. Given the already substantial obstacles to register news content on dynamic websites, it seems unnecessary to add additional roadblocks.

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<sup>9</sup> Notice at 317 (proposing § 202.4(m)(6)(ii)).

<sup>10</sup> Notice at 315.

**V. THE COPYRIGHT OFFICE SHOULD ACKNOWLEDGE THE “INDEPENDENT ECONOMIC VALUE” TEST AS THE MAJORITY CIRCUIT COURT APPROACH WHEN DETERMINING THE COLLECTION OF STATUTORY DAMAGES UNDER 17 U.S.C. § 504(C)(1)**

In discussing existing registration options available to news publishers, the Notice outlines several challenges associated with registering online content as a collective work.<sup>11</sup> Notably, the Notice briefly addresses the collection of statutory damages awards once a collective work has been infringed, which is a contentious issue that has resulted in a federal circuit court split. While the Notice accurately restates the Copyright Act’s one work limitation on the collection of statutory damages, it omits any discussion concerning the leading judicial interpretation of the statute.<sup>12</sup> For the reasons set forth below, NAB urges the Copyright Office to acknowledge and endorse the majority view in the discussion section of its final rule and in related materials.

The plain language of Section 504(c)(1) of the Act provides that a copyright owner may only recover one award of statutory damages for each work that was infringed, and further states that “all the parts of a compilation . . . constitute one work.”<sup>13</sup> However, there is a divide among federal courts of appeals on how to determine what constitutes “one work” — a term Congress left undefined in the Copyright Act — when multiple separate individual works within a compilation or collective work are infringed.<sup>14</sup> The overwhelming

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<sup>11</sup> Notice at 314.

<sup>12</sup> 17 U.S.C. § 504(c)(1).

<sup>13</sup> 17 U.S.C. § 504(c)(1).

<sup>14</sup> Compare *Sullivan v. Flora, Inc.*, 936 F.3d 562, 572 (7th Cir. 2019) (stating that “[t]he inquiry and fact finding demanded by § 504(c)(1) is more functional than formal, taking account of the economic value, if any, of a protected work more than the fact that the protection came about by an artist registering multiple works in a single application.”); *VHT, Inc. v. Zillow Grp., Inc.*, 918 F.3d 723, 747 (9th Cir. 2019) (holding that the question of whether something, like a photo or television episode, has “‘independent economic value’ informs the analysis of whether the photo or episode is a work” for the purposes of statutory

majority of case law across multiple circuits uses the “independent economic value” test to calculate a plaintiff’s statutory damages in these circumstances.<sup>15</sup> Under this test, courts must analyze whether the individual works derive their value only in and through their composite whole, or instead have distinct independent value such that each individual work should be considered “one work.”<sup>16</sup> Therefore, as long as an individual work within a compilation or collective works has an economic value that is independent of the value of the compilation, a court can award statutory damages for each individual work.

The Notice’s failure to highlight the federal courts’ leading view on the issue of statutory damage options available for collective works is somewhat concerning.<sup>17</sup> Though most courts utilize the independent economic value test, the minority approach asks courts to focus its inquiry on whether the copyright holder “issued its works separately, or together

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damages for copyright infringement), *with Bryant v. Media Right Prods.*, 603 F.3d 135, 141-42 (2d Cir. 2010) (finding that § 504(c)(1) “states that all parts of a compilation must be treated as one work for the purpose of calculating statutory damages. This language provides no exception for a part of a compilation that has independent economic value, and the Court will not create such an exception.”).

<sup>15</sup> See, e.g., *Sullivan*, 936 F.3d at 571 ;*VHT, Inc.*, 918 F.3d at 747 (explaining that “the question of whether something—like a photo, television episode, or so forth—has ‘independent economic value’ informs our analysis of whether the photo or episode is a work” within the meaning of § 504(c)(1)); *MCA TV v. Feltner*, 89 F.3d 766, 769 (11th Cir. 1996) (employing the same test to determine “whether each expression has an independent economic value and is, in itself, viable”); *Gamma Audio & Video, Inc. v. Ean-Chea*, 11 F.3d 1106,1116-17 & (1st Cir. 1993) (citing *Walt Disney Co. v. Powell*, 897 F.2d 565, 570, 283 U.S. App. D.C. 111 (D.C. Cir. 1990)) (explaining that “separate copyrights are not distinct ‘works’ unless they can live their own copyright life”—a viability determination that turns on whether the work in question has independent economic value).

<sup>16</sup> *Id.*

<sup>17</sup> Notice at 314 (“Finally, when a website is registered as a compilation, the statute provides that the copyright owner may seek only one award of statutory damages for infringement of the compilation as a whole—rather than a separate award for each individual work that appears on the website—even if the defendant infringed all of the works covered by the registration.”).

as a unit.”<sup>18</sup> It is critical for the Copyright Office to adhere to the view of the majority of federal circuits, as news websites are likely to be viewed as being issued together, despite having individual component works that could generate independent economic value. The minority view would overlook this important distinction and unfairly leave broadcast station websites without the necessary protection granted by law.

Failing to acknowledge the existence of the independent economic value test as the prevailing approach to calculating statutory damages awards for collective works could both undermine the efficacy of the proposed new rule and further the inaccurate notion that statutory damages cannot be awarded for individual works contained in and registered as a compilation or collective work. Accordingly, we urge the Copyright Office to acknowledge and endorse the majority view in the discussion section of its final rule and in its materials, such as the Compendium and relevant circulars.

## **VI. CONCLUSION**

As a valuable source of investigative reports, breaking news, and entertainment, it is imperative that news publishers have means to adequately protect their online content. The Copyright Office’s proposed rule, accompanied with the above suggestions, will achieve just that. Specifically, we urge the Office to: (i) delete the last phrase in its proposed definition for “news websites” as to avoid unnecessary restrictions; (ii) add accommodations for apps within the proposed definition in § 202.4(m)(1)(ii); (iii) allow for the submission of “a copy”

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<sup>18</sup> *Bryant*, 603 F.3d at 141-42 (finding that the infringement of an album should result in only one statutory damage award since each song is published and produced as part of an album); see *Twin Peaks Prods. v. Publ'ns Int'l, Ltd.*, 996 F.2d 1366 (2d Cir. 1993) (holding that the plaintiff could receive a separate award of statutory damages for each of the eight teleplays because the plaintiff had issued the works separately, as independent television episodes, and it was the defendant who printed eight teleplays from the series in one book).

of a home page in lieu of a “complete copy” to satisfy registration deposit requirements; and  
(iv) acknowledge the independent economic value test as the majority approach federal  
circuit courts use to calculate statutory damages in instances where component works  
within a compilation or collective work are infringed.

Respectfully submitted,

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