



# COPYRIGHT PROTECTIONS FOR PRESS PUBLISHERS

A REPORT OF THE REGISTER OF COPYRIGHTS

JUNE 2022





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The Register of Copyrights of the United States of America  
United States Copyright Office · 101 Independence Avenue SE · Washington, DC 20559-6000

The Honorable Thom Tillis  
Ranking Member  
Subcommittee on Intellectual Property  
United States Senate  
113 Dirksen Senate Office Bldg.  
Washington, D.C. 20510

The Honorable Patrick Leahy  
Chair  
Subcommittee on Intellectual Property  
United States Senate  
437 Russell Senate Office Bldg.  
Washington, D.C. 20510

The Honorable John Cornyn  
Subcommittee on Intellectual Property  
United States Senate  
517 Hart Senate Office Bldg.  
Washington, DC 20510

The Honorable Mazie K. Hirono  
Subcommittee on Intellectual Property  
United States Senate  
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The Honorable Amy Klobuchar  
Chair  
Subcommittee on Competition Policy,  
Antitrust, and Consumer Rights  
United States Senate  
425 Dirksen Senate Office Bldg.  
Washington, DC 20510

The Honorable Christopher A. Coons  
Subcommittee on Intellectual Property  
United States Senate  
218 Russell Senate Office Bldg.  
Washington, DC 20510

June 30, 2022

Dear Senators Leahy, Tillis, Hirono, Cornyn, Klobuchar, and Coons:

On behalf of the United States Copyright Office, I am pleased to deliver a copy of a report entitled *Copyright Protections for Publishers*, which is available to the public on the Office's website.

Following a series of hearings on reforms to digital copyright law, you requested that the Copyright Office undertake a study to assess the viability of establishing "ancillary copyright" protections for press publishers, similar to protections now being implemented in Europe, that would require online news aggregators to pay publishers for excerpts of content they provide for others to view.

In response to your request, the Office solicited the views of interested stakeholders via the Federal Register and held a public roundtable to enable stakeholders to explain their positions. The Office received comments from press publishers' and authors' groups who assert that news aggregators "free ride" on publishers' investment in original reporting. In contrast, internet platforms, libraries, and users' rights groups assert that aggregators provide significant value to news publishers and to the public at large. These sets of stakeholders disagree on how far copyright law permits aggregation of news headlines and snippets. At the same time, both groups emphasize that they see the challenges publishers face as more a matter of competition policy than copyright. The Office also conducted extensive research into the legal standards governing news aggregation, including both domestic copyright law and international treaty obligations.

After carefully evaluating the information provided, the Office does not recommend adopting additional copyright-like rights for press publishers in the United States. We have concluded that ancillary copyright protections have not been shown to be necessary in light of publishers' existing rights, and would likely be ineffective so long as publishers depend on news aggregators for discoverability. Moreover, to the extent that any ancillary copyright protections would lack traditional copyright limitations and exceptions, they would raise significant policy and Constitutional concerns.

The Office nevertheless continues to believe that the challenges facing journalism are worthy of congressional attention. Stakeholders suggested a range of alternative approaches Congress could pursue, from antitrust reform to tax policy. The Office leaves assessment of these proposals to experts in the relevant fields but stands ready to assist on any copyright-related issues.

Please do not hesitate to let me know if you have any questions regarding the report.

Respectfully,



Shira Perlmutter  
Register of Copyrights and Director  
U.S. Copyright Office

Enclosure

## ACKNOWLEDGMENTS

I am pleased to deliver this Report addressing the issue of copyright protections for press publishers in the digital age. The Report is the outcome of substantial work by many people within the U.S. Copyright Office, in particular, in the Office of Policy and International Affairs. Andrew Foglia and Chris Weston, Senior Counsels for Policy and International Affairs, along with Melinda Kern, Barbara A. Ringer Copyright Honors Program Fellow, served as principal authors.

Also critical to the success of this Report was the expertise of Kimberley Isbell, Deputy Director of Policy and International Affairs, as well as the research assistance of Keyana Pusey, Barbara A. Ringer Copyright Honors Program Fellow, and Law Clerks Narae Choi, Clara Dagenais, Chris McMillan, Brandon Tuell, and Rachael Williams.

Suzanne Wilson, General Counsel and Associate Register of Copyrights, Jordana Rubel, Assistant General Counsel, Jalyce Mangum, Attorney-Advisor, Robert J. Kasunic, Associate Register of Copyrights and Director of Registration Policy & Practice, and Erik Bertin, Deputy Director of Registration Policy & Practice also contributed important insights. And from start to finish, the entire staff in the Office of Policy and International Affairs and the Office of Public Information and Education provided invaluable assistance.

Finally, I appreciate the essential contributions of the many individuals and organizations who participated in the Roundtable and provided comments.

Shira Perlmutter  
Register of Copyrights and Director,  
U.S. Copyright Office

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## EXECUTIVE SUMMARY

At the request of Senators Leahy, Tillis, Cornyn, Hirono, Klobuchar, and Coons, the Copyright Office undertook this Study to assess press publishers' existing protections under U.S. copyright law and to evaluate the advisability of adding new protections, such as those the European Union has recently adopted, that are intended to strengthen publishers' ability to demand payment for third-party uses of their news content.

Part I of the Report describes the context and history of the Study. Part II provides factual background, focusing on how the internet has changed the business of press publishing and spurred the emergence of third-party services that aggregate news content. Part III surveys recent experiments in other countries with adopting protections for press publishers beyond existing copyright law and provides an overview of competition-based approaches that have been adopted or are under consideration, including in the United States.

Part IV contains the Copyright Office's findings and recommendations, as follows:

- Press publishers have significant protections under U.S. copyright law. They generally own a copyright in the compilation of materials that they publish. In addition, they often own the copyright in individual articles through the work-made-for-hire doctrine and may also own rights in accompanying photographs. This is in contrast with the context for adoption of a new "ancillary" right in the European Union, where press publishers often lack ownership of the copyright in the underlying materials.
- A press publisher would therefore likely have a *prima facie* case of copyright infringement against an aggregator that reproduced extensive excerpts of news articles. Copyright law does, however, permit certain unlicensed uses of news content, by news aggregators or others. Facts and ideas are not protectable by copyright. The merger doctrine allows the use of original expression where there are limited ways of expressing a particular fact or idea, and individual words, titles, and short phrases are generally not protectable. Even where an aggregator reuses protectable expression, the fair use doctrine may apply. As a result, press publishers' ability to rely on copyright to prevent third-party aggregators from using their content depends on the specific circumstances, including the nature and amount of the content used.
- Although press publishers also have certain protections beyond copyright rights, notably legal prohibitions on circumvention of technical protection measures, the relevant legal theories are untested in the context of news aggregation.
- The effectiveness of all of these protections appears, at least to some degree, to be contingent on the competitive landscape. Publishers may have difficulty requiring news aggregators to pay to use news content due to disparities in bargaining power.
- Given all of these variables, the Copyright Office does not recommend adopting new



copyright protections for press publishers. Any change to U.S. copyright law that would meaningfully improve press publishers' ability to block or seek remuneration for news aggregators' use of their works would necessarily avoid or narrow limitations on copyright that have critical policy and Constitutional dimensions. Additionally, we note that this Study revealed little demand for additional copyright-related rights for press publishers. Most commenters identified changes to competition (antitrust) policy as a more effective means to improve the position of press publishers in dealing with news aggregators.

The Office recognizes that adequate funding for journalism may currently be at risk, and that there are implications for the press's essential role in our system of government. But the challenges for press publishers do not appear to be copyright-specific. It has not been established that any shortcomings in copyright law pose an obstacle to incentivizing journalism or that new copyright-like protections would solve the problems that press publishers face.

## I. INTRODUCTION AND STUDY HISTORY

The internet has multiplied the information sources accessible to many individuals and put those sources in the palm of their hands. A majority of Americans now get their news from digital devices, and a majority of those who do say their primary source is not a newspaper's website, but a search index, a social media feed, or a specialized service that aggregates news from other sources.<sup>1</sup> Digital distribution enables these "news aggregators" to provide links to and snippets of others' published reporting at low cost and with a wide reach.

The transition to digital publishing has coincided with a marked decrease in press publisher revenues.<sup>2</sup> The reasons for this decrease, the role of news aggregators, and the policy issues raised, are discussed below. As a matter of current copyright law, the central questions are whether the particular material copied, notably "snippets" of text such as headlines and ledes, is protected by copyright, and if so, whether reproduction and distribution of this material is permitted by the Copyright Act's fair use exception.<sup>3</sup> Finally, to the extent that many acts of aggregation are not infringing, should the law be changed?

The copyright issues associated with news aggregation are part of a longer discussion about the viability of legacy press publishers and, more broadly, the survival of journalism in the internet era, dating back to the early 2000s.<sup>4</sup> As this discussion gained more visibility, and other

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<sup>1</sup> See, e.g., NIC NEWMAN WITH RICHARD FLETCHER, ANTONIS KALOGEROPOULOS, DAVID A.L. LEVY & RASMUS KLEIS NIELSEN, REUTERS INSTITUTE DIGITAL NEWS REPORT 2018 at 14 (2018), <https://www.digitalnewsreport.org/survey/2018/>. In a 2020 Pew survey, respondents aged 18–29 identified social media as their main source of news. Elisa Shearer, *More Than Eight-in-Ten Americans Get News From Digital Devices*, PEW RSCH. CTR. (Jan. 12, 2021), <https://www.pewresearch.org/fact-tank/2021/01/12/more-than-eight-in-ten-americans-get-news-from-digital-devices/>. Many press publishers themselves have transitioned to a "digital first" or "digital only" model. See, e.g., Dan Sabbagh, *Guardian and Observer to Adopt 'Digital-first' Strategy*, THE GUARDIAN (June 16, 2011), <https://www.theguardian.com/media/2011/jun/16/guardian-observer-digital-first-strategy>; Tyler McCall, *'InStyle' to End Print, Going Digital-Only*, FASHIONISTA (Feb. 9, 2022), <https://fashionista.com/2022/02/instyle-print-magazine-ending-digital-only> (noting that the magazines *InStyle*, *Entertainment Weekly*, *EatingWell*, *Health*, *Parents*, and *People en Español* will be going digital-only in 2022).

<sup>2</sup> See *Estimated Advertising and Circulation Revenue of the Newspaper Industry*, PEW RSCH. CTR. (June 29, 2021), <https://pewresearch.org/journalism/chart/sotnm-newspapers-newspaper-industry-estimated-advertising-and-circulation-revenue/> (indicating that newspaper advertising revenue fell from a high of \$49.4 million in 2005 to \$9.6 million in 2020). Newsroom staff numbers have also decreased. See Mason Walker, *U.S. Newsroom Employment Has Fallen 26% Since 2008*, PEW RSCH. CTR. (July 13, 2021), <https://www.pewresearch.org/fact-tank/2021/07/13/u-s-newsroom-employment-has-fallen-26-since-2008/>.

<sup>3</sup> See, e.g., Computer & Communications Industry Association ("CCIA") and Internet Association ("IA"), Joint Comments Submitted in Response to U.S. Copyright Office's Oct. 12, 2021, Notice of Inquiry at 4 (Nov. 24, 2021) ("CCIA-IA Joint Initial Comments") ("Even where copyrighted material has actually been copied by a news aggregator, that activity will typically constitute fair use. The four fair use factors strongly favor a finding of fair use for the ordinary operation of news aggregators.").

<sup>4</sup> See generally, STEVEN WALDMAN, FED. COMM'NS CMM'N, THE INFORMATION NEEDS OF COMMUNITIES 116–33 (2011), <https://www.fcc.gov/sites/default/files/the-information-needs-of-communities-report-july-2011.pdf>; DANA A. SCHERER & CLARE Y. CHO, CONG. RSCH. SERV., R47018, STOP THE PRESSES? NEWSPAPERS IN THE DIGITAL AGE (2022), <https://crsreports.congress.gov/product/pdf/R/R47018>.

countries sought to address it through varied legal approaches, Congress asked the Copyright Office to analyze the issue.

In a letter dated May 3, 2021, Senators Leahy, Tillis, Cornyn, Hirono, Klobuchar, and Coons asked for a study of “ancillary copyright” protections for news publishers, such as have been established by the European Union,<sup>5</sup> that would “require platform aggregators to pay publishers for excerpts of content they provide for others to view.”<sup>6</sup> The letter instructed the Office that:

[t]his study should assess the viability of adding specific protections to U.S. copyright law similar to those now being implemented in Europe. Additionally, such a study should analyze what the appropriate scope of such a right should be and how that would coincide with existing rights such as those of underlying writers or visual artists as well as any existing rights held by publishers. Finally, the report should include a discussion of relevant exceptions such as “fair use” or “quotation” exceptions, and any international treaty implications.<sup>7</sup>

On October 12, 2021, the Office published a notice of inquiry seeking public comment on questions related to the effectiveness of publishers’ existing rights in news content, the desirability and potential scope of additional protections, and how any new protections would interact with existing rights, exceptions and limitations, and international treaty obligations.<sup>8</sup> The Office received approximately thirty responsive comments.<sup>9</sup>

On November 9, 2021, the Office published a second notice of inquiry inviting the public to raise new issues related to the topic of the Study; amplify initial comments; present empirical studies; or address, reply to, or expand upon any issues raised in the initial request for written comments.<sup>10</sup> The Office received seventeen additional comments.<sup>11</sup>

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<sup>5</sup> As part of its Directive on Copyright in the Digital Single Market (“Directive”), the European Union introduced a measure granting press publishers a new, exclusive right to authorize the reproduction and communication to the public of content they publish by commercial online services, with exceptions for hyperlinking and private uses. *See* Directive 2019/790 of the European Parliament and of the Council of 17 April 2019 on Copyright and Related Rights in the Digital Single Market and Amending Directives 96/9/EC and 2001/29/EC, art. 15, 2019 O.J. (L 130/92) (“Directive”).

<sup>6</sup> Letter from Senators Leahy, Tillis, Cornyn, Hirono, Klobuchar, and Coons to Shira Perlmutter, Register of Copyrights, at 1 (May 3, 2021), <https://www.copyright.gov/policy/publishersprotections/letter-to-the-copyright-office.pdf>.

<sup>7</sup> *Id.*

<sup>8</sup> Publishers’ Protections Study: Notice and Request for Public Comment, 86 Fed. Reg. 56,721 (Oct. 12, 2021).

<sup>9</sup> Comments received in response to this notice of inquiry are available at <https://www.regulations.gov/docket/COLC-2021-0006/comments>.

<sup>10</sup> Publishers’ Protections Study: Request for Additional Comments, 86 Fed. Reg. 62,215 (Nov. 9, 2021).

<sup>11</sup> Comments received in response to this notice of inquiry are available at <https://www.regulations.gov/document/COLC-2021-0006-0002/comment>.

The Office held a remote public roundtable on December 9, 2021, via Zoom. The roundtable included 24 participants divided into three panels covering: (1) the effectiveness of existing protections for press publishers, (2) the desirability of additional protections, and (3) how any new protections might affect existing rights, limitations, and international obligations. A transcript and a video recording of the event are available on the Office’s website.<sup>12</sup>

In this Report, the Office addresses only the copyright aspects of press publishers’ protections. Although we describe below the arguments made with respect to related antitrust proposals, the policy issues they raise are beyond the scope of the Office’s expertise.

## II. BACKGROUND

### A. *The Internet and Press Publishers*

The internet has transformed the news business. No longer bound by the costs of printing or the economics of paper routes, today’s press publishers can reach a larger audience at a lower cost.<sup>13</sup> Individual journalists, too, can launch their own newsletter ventures via platforms like Substack.<sup>14</sup> Readers have access to high-quality journalism from around the globe.<sup>15</sup> And although the internet-fueled boom in “hyperlocal” journalism has had mixed results,<sup>16</sup> some

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<sup>12</sup> *Study on Ancillary Copyright Protections for Publishers*, U.S. COPYRIGHT OFFICE, <https://www.copyright.gov/policy/publishersprotections/>.

<sup>13</sup> Google, Comments Submitted in Response to U.S. Copyright Office’s Oct. 12, 2021, Notice of Inquiry at 4 (Nov. 24, 2021) (“Google Initial Comments”); Gabby Miller, *A Hudson Valley Newspaper turns to Substack, Meta to Expand Digitally*, COLUM. JOURNALISM REV. (Feb. 22, 2022), [https://www.cjr.org/tow\\_center/a-hudson-valley-newspaper-turns-to-substack-meta-to-expand-digitally.php](https://www.cjr.org/tow_center/a-hudson-valley-newspaper-turns-to-substack-meta-to-expand-digitally.php).

<sup>14</sup> See Andrea Daniele Signorelli, *Are Newsletters Really the Future of Publishing?*, DOMUS (Feb. 27, 2022), <https://www.domusweb.it/en/news/2022/02/27/are-newsletters-really-the-future-of-publishing.html>; Emily Writes, *Emily Writes on How Substack Changed Her Life*, THE SPINOFF (Mar. 3, 2022), <https://thespinoff.co.nz/media/03-03-2022/emily-writes-on-how-substack-changed-her-life>; Tr. at 133:2–14 (Dec. 9, 2021) (Joshua Lamel, Re:Create) (“[A] lot of journalists are leaving the newspaper model and moving to the Substack-based model of practicing our trades. . . . I’m not saying it’s a good thing, a bad thing . . . but it’s just how evolving things are.”).

<sup>15</sup> See, e.g., Aisha Majid, *Top 50 News Sites in the US in January: Growth Continues at Sun’s US Edition*, PRESSGAZETTE (Mar. 2, 2022), <https://pressgazette.co.uk/most-popular-websites-news-us-monthly/> (showing BBC, Mail Online, and Guardian websites in the top 15 news sites in the United States for January 2022); Sara Guaglione, *The BBC will Double Digital News Team in North America to Grow the Commercial Side of the Business*, DIGIDAY (Feb. 16, 2022), <https://digiday.com/media/the-bbc-will-double-digital-news-team-in-north-america-to-grow-the-commercial-side-of-the-business/> (reporting the BBC wants to double its digital news team in the United States, reflecting the growing importance of the U.S. market to the British media organization). On the other hand, technological progress has not necessarily increased (or even sustained) U.S. news outlets’ coverage of international events. See Anup Kaphle, *The Foreign Desk in Transition*, COLUM. JOURNALISM REV. (March/April 2015), [https://www.cjr.org/analysis/the\\_foreign\\_desk\\_in\\_transition.php](https://www.cjr.org/analysis/the_foreign_desk_in_transition.php) (“Between 1998 and 2011, at least 20 US newspapers and other media outlets eliminated all their foreign bureaus, according to *American Journalism Review* (ajr). Elsewhere, the number and size of those bureaus of have shrunk dramatically.”).

<sup>16</sup> See Brad Adgate, *How Hyperlocal News Websites Are Surviving the Coronavirus Pandemic—And Some are Even Profitable*, FORBES (Apr. 27, 2022), <https://www.forbes.com/sites/bradadgate/2020/04/27/some-hyperlocal-media-websites-are->

observers still point to the promise of local blogs and listservs to cover news on a neighborhood or block level—a level so minute that “[e]ven in the fattest-and-happiest days of traditional media,” a city newspaper would not regularly have covered it.<sup>17</sup>

But the internet has also shaken the foundations of newspaper financing. From an early 2000s peak,<sup>18</sup> newspaper ad revenues plummeted 62% between 2008 and 2018.<sup>19</sup> Classified ads, which once represented upward of 50% of a newspaper’s revenue, relocated to Craigslist, Facebook Marketplace, and other internet services that offered free placement and a wider audience.<sup>20</sup>

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profitable/ (pointing to success of hyperlocals Patch and Nextdoor amid broad turmoil in local journalism); TENOR, LONDON SCH. OF ECON. & POL. SCI., *HYPERLOCAL NEWS: AFTER THE HYPE* 8 (2018), <https://www.lse.ac.uk/media-and-communications/assets/documents/research/Polis-Hyperlocal-News-report-Jul-2018.pdf> (“Even though there are a lot of examples of innovation and ingenuity, studies on hyperlocals are full of examples of underperforming business models, self-exploitation and failing ventures. Today, looking at this precarious sector, it is perhaps hard to understand the hype around hyperlocal journalism as a future business model in the US some ten years ago.” (footnote omitted)).

<sup>17</sup> WALDMAN, FED. COMM’NS COMM’N, *THE INFORMATION NEEDS OF COMMUNITIES* 16; see also María-Cruz Negreira-Rey & Xosé López-García, *A Decade of Research on Hyperlocal Media: An International Approach to a New Media Model*, 11(3) *ONLINE J. COMM’N & MEDIA TECH.* e202111 at 1 (July 2021), <https://www.ojcm.net/download/a-decade-of-research-on-hyperlocal-media-an-international-approach-to-a-new-media-model-11082.pdf>.

<sup>18</sup> See Michael Barthel & Kirsten Worden, *Newspapers Fact Sheet*, PEW RSCH. CTR. (June 29, 2021), <https://www.journalism.org/fact-sheet/newspapers/>. Newspaper ad revenue was on an overall upward trajectory between 1970 and 2006, peaking first in the early internet era of the late 1990s following a wave of consolidation in the newspaper industry (including a steady decline in the number of cities with competing daily newspapers) and, after a brief dip in 2000–01, again in 2005. *Id.*; see also *Media Concentration (Part 2): Hearings Before the Subcomm. on Gen. Oversight and Minority Enter. of the H. Comm. on Small Bus.*, 96th Cong. 4–5 (1980) (statement of James M. Dertouzos, Economist, RAND Corp.) (presenting data on consolidation in local news outlets). Earlier dips in advertising revenue were attributed to increased competition from television and radio, and later direct mail, telephone marketing, and catalogues. See Erinn Whitaker, *What History Teaches Us: How Newspapers Have Evolved to Meet Market Demands*, U.N.C. HUSSMAN SCH. OF JOURNALISM & MEDIA, CTR. FOR SUSTAINABILITY IN LOC. MEDIA (2018), <https://www.cislm.org/digitalstrategy/sdme-chapter-2-the-story-behind-the-numbers/sdme-what-history-teaches-us-how-newspapers-have-evolved-to-meet-market-demands/>; Thomas B. Rosenstiel, *The Newspaper Business is Full of Awful Stories*, L.A. TIMES (Apr. 23, 1990), <https://www.latimes.com/archives/la-xpm-1990-04-23-fi-76-story.html> (noting the newspaper industry’s inability to raise advertising rates following the recent decline in sales as a result of competition from direct mail, telephone marketing, and catalogues).

<sup>19</sup> Elizabeth Grieco, *Fast Facts about the Newspaper Industry’s Financial Struggles as McClatchy Files for Bankruptcy*, PEW RSCH. CTR. (Feb. 14, 2020), <https://www.pewresearch.org/fact-tank/2020/02/14/fast-facts-about-the-newspaper-industrys-financial-struggles/>; see also ACCENTURE, *USA NEWS MEDIA LANDSCAPE TRENDS* 5 (2021), [https://newsmedia-analysis.com/wp-content/uploads/2021/06/accenture\\_analysis\\_USAnewsmedia.pdf](https://newsmedia-analysis.com/wp-content/uploads/2021/06/accenture_analysis_USAnewsmedia.pdf) (“Between 2004 and 2018 total newspaper revenues fell by \$30 billion, to \$27.4 billion. This amounted to a 52% fall.” (emphasis added)).

<sup>20</sup> *From Town Criers to Bloggers: How Will Journalism Survive the Internet Age?: Before the Federal Trade Commission*, Tr. at 59:5–14 (Dec. 1, 2009) (Statement of Mark Contreras, Newspaper Assoc. of Am.) (“Over the last several decades, most American newspapers developed a burgeoning stream of highly profitable classified advertising revenue which until the last few years represented between 40 to 60 percent of advertising revenue and the lion’s share of our profits. There are two reasons for the decline of classified advertising: [1] the advent of interactive tools that efficiently connected buyers and sellers and [2] the increasing penetration of broadband Internet access in the United States.”); see also Robert Seamans & Feng Zhu, *Responses to Entry in Multi-Sided Markets: The Impact of Craigslist on Local Newspapers*, 60 *MGMT. SCI.* 476, 490 (2014), <http://fengzhu.info/craigslist.pdf> (describing the effect of Craigslist on newspaper ad-rates, circulation, and subscription prices); ACCENTURE, *USA NEWS MEDIA LANDSCAPE TRENDS* 3 (noting

Display advertisers followed suit, redirecting their budgets from print newspapers to the internet and national ad networks to take advantage of better consumer targeting.<sup>21</sup> And while digital ad revenue across all internet platforms soared, “half of all digital [display] revenue went to just two tech companies,” Facebook and Google.<sup>22</sup> For newspapers, now reliant upon these national ad networks to fill their digital pages rather than their in-house advertising departments, the resulting flow of digital ad revenue has been too small to offset broader declines in ad revenue.<sup>23</sup>

Internet-based competition also appears to have accelerated a preexisting decline in newspaper circulation numbers.<sup>24</sup> Just as the internet gave classified advertisers free alternatives for reaching consumers, it gave readers free alternatives for accessing the news of the day. Popular services like sports box scores or movie showtimes, which used to cross-subsidize more expensive reporting, no longer required a newspaper subscription to access.<sup>25</sup> Readers moved

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that the majority of the newspaper industry’s revenue decline was from the loss of classifieds revenue).

<sup>21</sup> SCHERER & CHO, CONG. RSCH. SERV., R47018, STOP THE PRESSES? NEWSPAPERS IN THE DIGITAL AGE 5–6.

<sup>22</sup> Michael Barthel, *5 Key Takeaways About the State of News Media in 2018*, PEW RSCH. CTR. (July 23, 2019), <https://www.pewresearch.org/fact-tank/2019/07/23/key-takeaways-state-of-the-news-media-2018/>; see also Digital Content Next (“DCN”), Comments Submitted in Response to U.S. Copyright Office’s Oct. 12, 2021, Notice of Inquiry at 2 (Nov. 26, 2021) (“DCN Initial Comments”) (“Between 2015 and 2019, Google and Facebook combined to capture 86% of the incremental US digital advertising growth. In 2020, the trend continued at 87%. Of the total US digital advertising revenue in 2020, \$40.6 billion went to Facebook and \$68.4 billion went to Google while the entire rest of the industry (publishers, ad tech, other) took home \$30.8 billion.”); STAFF OF SUBCOMM. ON ANTITRUST, COMMERCIAL AND ADMINISTRATIVE LAW, H. COMM. ON THE JUDICIARY, 116TH CONG., MAJORITY STAFF REP. ON INVESTIGATION OF COMPETITION IN DIGITAL MARKETS 131 (Comm. Print 2020) (“Majority Staff Rep.”) (“Google and Facebook both have a significant lead in the [digital advertising] market due to their significant collection of behavioral data online, which can be used in targeted advertising.”).

<sup>23</sup> ELAINE C. KAMARCK & ASHLEY GABRIELE, BROOKINGS, *THE NEWS TODAY: 7 TRENDS IN OLD AND NEW MEDIA* 4 (2015), <https://www.brookings.edu/wp-content/uploads/2016/07/new-media.pdf>. Newspapers’ returns on digital advertising have been described as “digital dimes” as compared to the dollars generated by print advertising. Andrey Mir, *The Press Now Depends on Readers for Revenue and That’s a Big Problem for Journalism*, DISCOURSE (July 28, 2021), <https://www.discoursemagazine.com/culture-and-society/2021/07/28/the-press-now-depends-on-readers-for-revenue-and-thats-a-big-problem-for-journalism/>; see also Michael Barthel, *5 Key Takeaways About the State of News Media in 2018*, PEW RSCH. CTR. (July 23, 2019), <https://www.pewresearch.org/fact-tank/2019/07/23/key-takeaways-state-of-the-news-media-2018/> (showing growth in digital ad revenue has not compensated for losses in print revenue). In fact, advertising revenues have declined so precipitously that in 2020, circulation revenues topped advertising revenues for the first time ever. See Michael Barthel, *6 Key Takeaways About the State of the News Media in 2020*, PEW RSCH. CTR. (July 27, 2021), <https://www.pewresearch.org/fact-tank/2021/07/27/6-key-takeaways-about-the-state-of-the-news-media-in-2020/>.

<sup>24</sup> See Barthel & Worden, *Newspapers Fact Sheet*, PEW RSCH. CTR.

<sup>25</sup> See Neil Weinstock Netanel, *Mandating Digital Platform Support for Quality Journalism*, 34 HARV. J.L. & TECH. 473, 491 (2021) (“In print newspapers, investigative reporting is bundled together with light entertainment. As a result, print advertising revenues and subscriptions effectively cross-subsidize investigative reporting even if readers spend far more time reading entertainment. But digital technology greatly diminishes newsrooms’ ability to bundle.”) (footnote omitted); see also Library Copyright Alliance (“LCA”), Comments Submitted in Response to U.S. Copyright Office’s Oct. 12, 2021, Notice of Inquiry at 5 (Nov. 24, 2021) (“LCA Initial Comments”).

to free online sites, including in some cases the press publishers' own sites, at the expense of paid subscriptions.<sup>26</sup> Total newspaper circulation, already declining before the internet era, in 2020 fell to its lowest point since 1940.<sup>27</sup> Digital distribution exposed city papers that once enjoyed close to local monopolies to national competition from well-resourced newsrooms like *The New York Times*.<sup>28</sup> The combination of increased competition, dwindling revenue, and high debt overhangs<sup>29</sup> led to a wave of bankruptcies, consolidations,<sup>30</sup> and leveraged buyouts among local newspapers.<sup>31</sup> From 2008 to 2019, the number of newspaper newsroom employees dropped by more than 40%,<sup>32</sup> and one in five papers closed.<sup>33</sup>

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<sup>26</sup> NEWMAN ET AL., REUTERS INSTITUTE DIGITAL NEWS REPORT 2018 at 26 (“[T]he majority of online news consumption still happens through free websites, largely supported by advertising (or through public subsidy.)”; see also KAMARCK & GABRIELE, BROOKINGS, THE NEWS TODAY: 7 TRENDS IN OLD AND NEW MEDIA 9 (“Facebook is virtually tied with local television among ‘web users’ when asked where they get their news about government and politics. In other words—news is still getting to people, just not through the traditional means.”).

<sup>27</sup> Barthel & Worden, *Newspapers Fact Sheet*, PEW RSCH. CTR. Note that during this time period, overall circulation revenues increased slightly, with higher subscription charges and growth in online circulation revenue offsetting declines in print circulation. ACCENTURE, USA NEWS MEDIA LANDSCAPE TRENDS 9.

<sup>28</sup> LCA Initial Comments at 5 (“Internet distribution has dramatically increased the competition faced by local and regional newspapers. Every newspaper in the country now competes with the *New York Times* and the *Washington Post*, as well as with every other newspaper in the country.”).

<sup>29</sup> The double blow of advertising revenue evaporating and then 2008’s great recession left even profitable papers with unsustainable levels of debt. See WALDMAN, FED. COMM’NS COMM’N, THE INFORMATION NEEDS OF COMMUNITIES 40 (noting unusual circumstances where the *Philadelphia Inquirer* and *Minneapolis Star Tribune*, although profitable, were forced to declare bankruptcy).

<sup>30</sup> SCHERER & CHO, CONG. RSCH. SERV., R47018, STOP THE PRESSES? NEWSPAPERS IN THE DIGITAL AGE 7 (“From 2004 to 2020, the percentage of daily newspapers owned by the 25 largest newspaper publishers grew from less than a third of the 1,472 dailies (including newspapers that have since decreased their publication frequency to weekly as well as those that since ceased publication) to more than to 70% of the 1,260 dailies.”). The post-2000 consolidations accelerated a trend that began early in the 20th century. See PENELOPE MUSE ABERNATHY, CTR. FOR INNOVATION & SUSTAINABILITY LOC. MEDIA, THE RISE OF A NEW MEDIA BARON AND THE EMERGING THREAT OF NEWS DESERTS 20–21 (2016), [http://newspaperownership.com/wp-content/uploads/2016/09/07.UNC\\_RiseOfNewMediaBaron\\_SinglePage\\_01Sep2016-REDUCED.pdf](http://newspaperownership.com/wp-content/uploads/2016/09/07.UNC_RiseOfNewMediaBaron_SinglePage_01Sep2016-REDUCED.pdf).

<sup>31</sup> See Michael Ewens, Arpit Gupta & Sabrina T. Howell, *Local Journalism Under Private Equity Ownership* (Nat’l Bureau of Econ. Rsch., Working Paper No. 29743, 2022) (noting a sharp increase in the share of newspapers owned by private equity funds, from about 5% in 2002 to 23% in 2019); PENELOPE MUSE ABERNATHY, CTR. FOR INNOVATION & SUSTAINABILITY LOC. MEDIA, THE EXPANDING NEWS DESERT (2018), [https://www.cislm.org/wp-content/uploads/2018/10/The-Expanding-News-Desert-10\\_14-Web.pdf](https://www.cislm.org/wp-content/uploads/2018/10/The-Expanding-News-Desert-10_14-Web.pdf); Russell Baker, *Goodbye to Newspapers?*, N.Y. REV. OF BOOKS (Aug. 16, 2007), <https://www.nybooks.com/articles/2007/08/16/goodbye-to-newspapers/> (describing slashing of news staff at various newspapers under new Wall Street owners).

<sup>32</sup> Grieco, *Fast Facts About the Newspaper Industry’s Financial Struggles as McClatchy Files for Bankruptcy*, PEW RSCH. CTR. This number has continued to rise. See Walker, *U.S. Newsroom Employment Has Fallen 26% Since 2008*, PEW RSCH. CTR. (noting that newspaper newsroom employment fell 57% between 2008 and 2020, higher than the news industry average of 26%).

<sup>33</sup> Lara Takenaga, *More Than 1 in 5 U.S. Papers Has Closed. This is the Result.*, N.Y. TIMES (Dec. 21, 2019), <https://www.nytimes.com/2019/12/21/reader-center/local-news-deserts.html>; see also ABERNATHY, CTR. FOR INNOVATION & SUSTAINABILITY LOC. MEDIA, THE EXPANDING NEWS DESERT 8.

The damage has been most severe among local papers.<sup>34</sup> A Congressional Research Service report found that “[t]he few daily newspapers with a national and/or international readership, such as the *New York Times*, the *Wall Street Journal*, *USA Today*, and the *Washington Post*, have experienced different advertising trends than those with a local or regional readership.”<sup>35</sup> Their reach and readership allow them to attract advertisers that other papers cannot.<sup>36</sup> Of the 2,100 newspapers that have closed since 2005, losses have been concentrated among those serving small and economically struggling communities.<sup>37</sup> These losses have left “news deserts” without any local newspaper.<sup>38</sup>

### *B. The Rise of News Aggregators*

Over the two-plus decades during which press publishers’ revenues have declined, a new type of distribution has arisen in the form of online news aggregation.<sup>39</sup> This umbrella term covers a number of distinct services that vary according to the nature of the service, the sources the

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<sup>34</sup> See The R Street Institute (“R Street”) and Niskanen Center (“Niskanen”), Joint Comments Submitted in Response to U.S. Copyright Office’s Oct. 12, 2021, Notice of Inquiry at 6 (Nov. 26, 2021) (“R Street-Niskanen Joint Initial Comments”) (emphasizing crisis in local journalism).

<sup>35</sup> SCHERER & CHO, CONG. RSCH. SERV., R47018, STOP THE PRESSES? NEWSPAPERS IN THE DIGITAL AGE 3. See also *id.* at 4 (“In 2020, for example, the *New York Times* generated approximately 58% of its advertising revenue from online advertising. In contrast, for three leading publishers of local daily newspapers, Lee Enterprises Inc., DallasNews Corp., and Tribune Publishing Company, the proportions of total advertising revenue generated by online advertising in 2020 were 36.8%, 35.9%, and 27%, respectively.” (footnotes omitted)). One commenter raised the possibility that consumers simply prefer reading national news brands to their local papers, a trend that would be difficult to reverse via law. Tr. at 54:8–18 (Dec. 9, 2021) (Daniel Takash, Niskanen).

<sup>36</sup> SCHERER & CHO, CONG. RSCH. SERV., R47018, STOP THE PRESSES? NEWSPAPERS IN THE DIGITAL AGE 3; see also WALDMAN, FED. COMM’NS COMM’N, THE INFORMATION NEEDS OF COMMUNITIES 21 (emphasizing that local journalism is struggling, while national, and even hyperlocal, are not). Even larger metro papers without a national following saw precipitous declines in their market valuation. Netanel, 34 HARV. J.L. & TECH. at 475 (market valuation for major daily newspapers, including the *Boston Globe/Worcester Telegram & Gazette*, *Chicago Sun-Times*, and *Minneapolis Star Tribune*, “dropped by more than 90% between the 1990s and early 2010s.” (citing JAMES T. HAMILTON, DEMOCRACY’S DETECTIVES: THE ECONOMICS OF INVESTIGATIVE JOURNALISM 280 (2016))).

<sup>37</sup> PENELOPE MUSE ABERNATHY, CTR. FOR INNOVATION & SUSTAINABILITY LOC. MEDIA, NEWS DESERTS AND GHOST NEWSPAPERS: WILL LOCAL NEWS SURVIVE? 9 (2020), [https://www.usnewsdeserts.com/wp-content/uploads/2020/06/2020\\_News\\_Deserts\\_and\\_Ghost\\_Newspapers.pdf](https://www.usnewsdeserts.com/wp-content/uploads/2020/06/2020_News_Deserts_and_Ghost_Newspapers.pdf).

<sup>38</sup> *Id.* at 8. Diminishing local coverage may come with social and economic costs. Research suggests that local paper closures are associated with increased partisan polarization, corruption, and municipal borrowing costs. See, e.g., Joshua P. Darr, Matthew P. Hitt & Johanna L. Dunaway, *Newspaper Closures Polarize Voting Behavior*, 68 J. COMM’N 1007, 1007–28 (2018); James M. Snyder Jr. & David Strömberg, *Press Coverage and Political Accountability*, 118 J. POL. ECON. 355, 355–408 (2010); Mary Ellen Klas, *Less Local News Means Less Democracy*, NIEMAN REPORTS (Sept. 20, 2019), <https://niemanreports.org/articles/less-local-news-means-less-democracy/>; Pengjie Gao, Chang Lee & Dermot Murphy, *Financing Dies in Darkness? The Impact of Newspaper Closures on Public Finance*, 135(2) J. FIN. ECON. 445, 445–67 (2020); Dermot Murphy, *When Local Papers Close, Costs Rise for Local Governments*, COLUM. JOURNALISM REV. (June 27, 2018), [https://www.cjr.org/united\\_states\\_project/public-finance-local-news.php](https://www.cjr.org/united_states_project/public-finance-local-news.php).

<sup>39</sup> See Eric Alterman, *Out of Print: The Death and Life of the American Newspaper*, NEW YORKER (Mar. 24, 2008), <https://www.newyorker.com/magazine/2008/03/31/out-of-print> (describing, among other things, the rise of *Huffington Post* and other news aggregators).



service uses, the topics it covers, and whether it adds original commentary, but in general refers to an online service that distributes links to and sometimes snippets of multiple third-party news articles.<sup>40</sup>

News aggregators aid the discoverability of news stories and allow consumers to customize their news intake in a way that might otherwise require scanning a dozen different outlets. Some publishers have sought to capitalize on these possibilities by offering their own daily round-ups or aggregating content from social media.<sup>41</sup> One commenter described the “immense value” of a news service with “trusted journalists acting as curators and aggregators” to deliver one place where he and other readers could get “most of the news they need.”<sup>42</sup> Another commenter noted that “commercial news aggregators provide an important service that significantly enhances individuals’ access to information.”<sup>43</sup>

While news aggregators like Apple News focus primarily or solely on the distribution of previously-reported news content, some aggregate such content only as one part of a wider-ranging news service,<sup>44</sup> and others operate a general search engine that links users to web content (*e.g.*, Google) or a social media platform that allows *users* to share news stories or access them through “trending topics” or “news” tabs and links (*e.g.*, Facebook). News aggregators may or may not seek licenses for the third-party content they use. As one commenter observed, the sheer variety of these aggregation services makes generalizing hazardous.<sup>45</sup>

The mechanics of aggregation can also vary. Many news aggregators deploy algorithms to pull and then sort headlines and snippets from news outlets’ RSS feeds or APIs.<sup>46</sup> Google’s search

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<sup>40</sup> See KIMBERLEY A. ISBELL & CITIZEN MEDIA LAW PROJECT, *THE RISE OF THE NEWS AGGREGATOR: LEGAL IMPLICATIONS AND BEST PRACTICES* (2010), Berkman Ctr. Res. Pub. No. 2010-10 [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1670339](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1670339).

<sup>41</sup> See, *e.g.*, Rachael Bade & Eugene Daniels, *Politico Playbook: Covid’s Comeback Bursts the D.C. Bubble*, POLITICO (Apr. 7, 2022) (“Playbook Reads” feature aggregating links to top stories from around the internet); Jack Greiner, *Strictly Legal: New York Federal Court Rejects Server Test*, CINCINNATI.COM (Mar. 30, 2022), <https://www.cincinnati.com/story/money/2022/03/30/new-york-federal-court-rejects-server-test/7208588001/> (reporting on lawsuit arising from *Newsweek’s* aggregation of a photograph from social media); *Goldman v. Breitbart News Network, LLC*, 302 F. Supp. 3d 585, 586–87 (S.D.N.Y. 2018) (describing facts of lawsuit arising from news websites’ aggregation of a photograph from social media); Tory Barron, *Men’s NCAA Basketball Championship: Social Media Reacts to Kansas’ Historic Comeback Win over UNC*, ESPN (Apr. 5, 2022), [https://www.espn.com/mens-college-basketball/story/\\_/id/33672054/men-ncaa-basketball-championship-social-media-reacts-kansas-historic-comeback-win-unc](https://www.espn.com/mens-college-basketball/story/_/id/33672054/men-ncaa-basketball-championship-social-media-reacts-kansas-historic-comeback-win-unc) (collecting Twitter reactions to championship basketball game).

<sup>42</sup> Tr. at 81:18–25 (Dec. 9, 2021) (Joshua Lamel, Re:Create).

<sup>43</sup> LCA Initial Comments at 1.

<sup>44</sup> Library Copyright Alliance (“LCA”), Additional Comments Submitted in Response to U.S. Copyright Office’s Nov. 9, 2021, Notice of Inquiry at 1 (Jan. 5, 2021) (“LCA Additional Comments”) (describing Politico’s news aggregation).

<sup>45</sup> *Id.* at 1 (noting the definition of “news aggregator” in the Office’s Notice of Inquiry “encompasses different kinds of services that implicate different legal issues and arguably have different impacts on news publishers”); see also ISBELL & CITIZEN MEDIA LAW PROJECT, *THE RISE OF THE NEWS AGGREGATOR: LEGAL IMPLICATIONS AND BEST PRACTICES* 2.

<sup>46</sup> Alan Mohamed et al., *News Aggregator and Efficient Summarization System*, 11 INT’L J. ADVANCED COMPUT. SCI. & APPLICATIONS 636, 637 (2020),

engine (distinct from the Google News service) aggregates by crawling the web for new or updated pages and indexing those pages by content.<sup>47</sup> Social media services like Facebook and Twitter typically do not scrape or index news content; rather, the services' users, or sometimes the news publishers themselves, share links to news stories on the platform.<sup>48</sup> According to Meta, publishers control what image will accompany the link and how much text, if any, will appear to Facebook users.<sup>49</sup>

Among news aggregation services, one of the trends of the last half decade has been the increasing dominance of the largest social media and search platforms and the decline of standalone news aggregators, including those that provide original reporting and commentary.<sup>50</sup> In recent years, Google and Facebook have consistently represented an outright majority of news aggregator web traffic and referrals,<sup>51</sup> while BuzzFeed, AOL, Yahoo, and HuffPost have cut more than a thousand jobs and smaller sites such as Gawker, Mic, Refinery29, the Outline, and PopSugar have shrunk, shuttered, or sold.<sup>52</sup>

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[https://www.researchgate.net/publication/342626761\\_News\\_Aggregator\\_and\\_Efficient\\_Summarization\\_System](https://www.researchgate.net/publication/342626761_News_Aggregator_and_Efficient_Summarization_System).

<sup>47</sup> *How Search Works for Site Owners*, GOOGLE SEARCH CENTRAL (accessed Feb. 28, 2022), <https://developers.google.com/search/docs/basics/how-search-works>.

<sup>48</sup> See Meta Platforms, Inc. ("Meta"), Comments Submitted in Response to U.S. Copyright Office's Oct. 12, 2021, Notice of Inquiry at 5–6 (Nov. 26, 2021) ("Meta Initial Comments"); Tom Rosenstiel, Jeff Sonderman, Kevin Loker, Maria Ivancin & Nina Kjarval, *Twitter and the News: How People use the Social Network to Learn about the World*, AMERICAN PRESS INSTIT. (Sept. 1, 2015), <https://www.americanpressinstitute.org/publications/reports/survey-research/how-people-use-twitter-news/single-page/>; Steven Tweedie, *How to Use Snapchat's New 'Discover' Feature*, INSIDER (Jan. 27, 2015), <https://www.businessinsider.com/how-to-use-snapchat-discover-feature-2015-1>.

<sup>49</sup> Meta Initial Comments at 5.

<sup>50</sup> See, e.g., DAVID ARDIA, EVAN RINGEL, VICTORIA SMITH EKSTRAND & ASHLEY FOX, ADDRESSING THE DECLINE OF LOCAL NEWS, RISE OF PLATFORMS, AND SPREAD OF MIS- AND DISINFORMATION ONLINE, CTR. FOR. INFO., TECH., & PUB. LIFE (2020), <https://citap.unc.edu/local-news-platforms-mis-disinformation> (describing meteoric rise of online platforms and their advantages in competition over other media outlets); Paul Farhi, *Top Editors Leave HuffPost and BuzzFeed News Amid Growing Doubts About the Future of Digital News*, WASH. POST (Mar. 12, 2020), [https://www.washingtonpost.com/lifestyle/media/top-editors-leave-huffpost-and-buzzfeed-amid-growing-doubts-about-the-future-of-digital-news/2020/03/12/32cf09c0-6222-11ea-acca-80c22bbee96f\\_story.html](https://www.washingtonpost.com/lifestyle/media/top-editors-leave-huffpost-and-buzzfeed-amid-growing-doubts-about-the-future-of-digital-news/2020/03/12/32cf09c0-6222-11ea-acca-80c22bbee96f_story.html) ("Digital publishers face the same issues that have beset, and decimated, whole swaths of the traditional media, particularly local newspapers. . . . Looming over the entire business are the twin colossi, Facebook and Google, which collect about 60 percent of every dollar spent by digital advertisers.").

<sup>51</sup> Joshua Benton, *Is Facebook Really A "News Powerhouse" Again, Thanks to Coronavirus? (No More Than It Was Before)*, NIEMANLAB (Mar. 24, 2020), <https://www.niemanlab.org/2020/03/is-facebook-really-a-news-powerhouse-again-thanks-to-coronavirus-no-more-than-it-was-before/> (showing that over the twelve preceding months, Google and Facebook reliably accounted for over 75% of outside referrals to news sites in the parse.ly network).

<sup>52</sup> See, e.g., Charlotte Tobitt, *Buzzfeed and Huffpost Deal: Charting the Rise and Fall of Two Digital News Giants as they Plan for a Better Future Together*, PRESSGAZETTE (Nov. 20, 2020), <https://www.pressgazette.co.uk/buzzfeed-and-huffpost-deal-charting-the-rise-and-fall-of-two-digital-news-giants-as-they-plan-for-a-better-future-together/> (describing post-2017 missed revenue targets, cutbacks, sales, and declining web traffic at HuffPost); Jim Waterson, *As HuffPost and BuzzFeed Shed Staff, Has the Digital Content Bubble Burst?*, GUARDIAN (Jan. 24, 2019), <https://www.theguardian.com/media/2019/jan/24/as-huffpost-and-buzzfeed-shed-staff-has-the-digital-content-bubble-burst> (describing fading fortunes of digital news outlets and their vulnerability to changes in Facebook

News aggregators, including search engines and social media platforms, have now become the preferred or initial source of news for a majority of digital news consumers.<sup>53</sup> The real-world effect of this shift is contested: Some commenters argue that the aggregation of headlines and snippets creates a “substitution effect” by allowing readers to get the news (or at least its gist) without visiting press publishers’ websites.<sup>54</sup> In their view, by failing to compensate publishers for the value their stories generate, aggregation risks undermining the incentive to produce original reporting.<sup>55</sup> Others assert that news aggregators expand the market by driving readers to press publishers’ websites, helping them discover new ones, and tempting them to click on more articles than they would otherwise read.<sup>56</sup>

Empirical data on the market effect of aggregation on news sites is thin. News aggregators drive a significant amount of traffic to news sites, and therefore their activities may serve to expand the market for press publishers.<sup>57</sup> One study found that, after the Google News home

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algorithms).

<sup>53</sup> NEWMAN ET AL., REUTERS INSTITUTE DIGITAL NEWS REPORT 2018 at 14–15; see also Doh-Shin Jeon, *Economics of News Aggregators* 1–2 (Toulouse Sch. of Econ., Working Paper No. 18-912, 2018), [https://www.tse-fr.eu/sites/default/files/TSE/documents/doc/wp/2018/wp\\_tse\\_912.pdf](https://www.tse-fr.eu/sites/default/files/TSE/documents/doc/wp/2018/wp_tse_912.pdf); *Traffic Overview: news.google.com*, SIMILARWEB, <https://www.similarweb.com/website/news.google.com/#overview> (last visited Aug. 5, 2021) (showing that in 2021 Google News averaged over 500 million visits per day); Axel Springer SE (“Axel Springer”), Comments Submitted in Response to U.S. Copyright Office’s Oct. 12, 2021, Notice of Inquiry at 7 (Nov. 23, 2021) (“Axel Springer Initial Comments”) (“In the European Union news aggregators and other digital services have become the main source for consumers to receive news. In 2016, social media (22 percent), news aggregator (14 percent) and search engines (21 percent) accounted for 57 percent of such use.” (citing *Commission Staff Working Document on Impact Assessment on the Modernization of EU Copyright Rules – Part 1*, at 157, SWD (2016) 301 final (Sept. 9, 2016), <https://digital-strategy.ec.europa.eu/en/library/impact-assessment-modernisation-eu-copyright-rules>)).

<sup>54</sup> See Eleonora Rosati, *The German ‘Google Tax’ Law: Groovy or Greedy?*, 8 J. INTEL. PROP. L. & PRAC. 497, 497 (2013); Chrysanthos Dellarocas et al., *Attention Allocation in Information-Rich Environments: The Case of News Aggregators*, 62 MGMT. SCI. 2543, 2543 (2015); Directive recital 54 (“Publishers of press publications are facing problems in licensing the online use of their publications to the providers of those kinds of services, making it more difficult for them to recoup their investments.”); see also Netanel, 34 HARV. J.L. & TECH. at 492; Axel Springer Initial Comments at 11; News Media Alliance (“NMA”), Comments Submitted in Response to U.S. Copyright Office’s Oct. 12, 2021, Notice of Inquiry at 2–3 (Nov. 23, 2021) (“NMA Initial Comments”); News Corporation (“News Corp”), Comments Submitted in Response to U.S. Copyright Office’s Oct. 12, 2021, Notice of Inquiry, at 4–5 (Nov. 26, 2021) (“News Corp Initial Comments”).

<sup>55</sup> NMA Initial Comments at 25.

<sup>56</sup> See, e.g., Joan Calzada & Ricard Gil, *What Do News Aggregators Do? Evidence from Google News in Spain and Germany* 1–2 (2018), <http://diposit.ub.edu/dspace/bitstream/2445/150425/1/695577.pdf>; Lisa M. George & Christiaan Hogendorn, *Local News Online: Aggregators, Geo-Targeting and the Market for Local News*, 68 J. INDUS. ECON. 780, 804 (2020) (finding that a redesign of Google News adding geo-targeted local news links increased the level and share of local news consumption).

<sup>57</sup> Jeon, Toulouse Sch. of Econ., Working Paper No. 18-912 (reviewing empirical literature and concluding that Google News and Facebook increase overall traffic to news sites); KENNY OLMSTEAD ET AL., PEW RSCH. CTR.: PROJECT FOR EXCELLENCE IN JOURNALISM, NAVIGATING NEWS ONLINE: WHERE PEOPLE GO, HOW THEY GET THERE AND WHAT LURES THEM AWAY (2011), <https://www.pewresearch.org/wp-content/uploads/sites/8/legacy/NIELSEN-STUDY-Copy.pdf>; Google Initial Comments at 4 (“Google services contribute significant value to news publishers by connecting users to publishers’ websites more than 24 billion times per month.”). Each referral from Google is, according to one study,

page began showing links to geo-targeted local news content, “local news consumption among heavy Google News users rose by 25%, with no evidence that consumers were visiting Google News rather than directly visiting the publishers’ platforms.”<sup>58</sup> But aggregator referrals may lead to a relatively narrow range of news sites,<sup>59</sup> and they tend to drive traffic to individual articles rather than homepages. Homepage visits are more valuable to publishers because they encourage readers to browse additional articles and spend longer on the site.<sup>60</sup> So it is possible that aggregators’ offerings substitute to some degree for the market for newspapers as a whole, even while stimulating traffic to specific articles.

Moreover, even if aggregation services do not substitute for original publications, they may undermine the market for high-quality news. Professor Neil Weinstock Netanel has argued that digital platforms aggregating news stories (or simply allowing users to aggregate them)

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worth 4–6 euro cents to the publisher. DELOITTE, *THE IMPACT OF WEB TRAFFIC ON REVENUES OF TRADITIONAL NEWSPAPER PUBLISHERS: A STUDY FOR FRANCE, GERMANY, SPAIN AND THE UK* (2019), <https://www2.deloitte.com/content/dam/Deloitte/es/Documents/financial-advisory/The-impact-of-web-traffic-on-revenues-of-traditional-newspaper-publishers.pdf>. Google has previously stated that the format of its Google News service was designed to have “readers spend as little time as possible on Google News and go to the websites of the publishers,” and the service delivers “more than 10 billion visits to news publishers around the world” every month. Luis Collado, *Google y los editores [Google and publishers]*, GOOGLE: BLOG OFICIAL DE GOOGLE ESPAÑA (Feb. 28, 2014), <https://espana.googleblog.com/2014/02/google-y-los-editores.html>; *see also* Tr. at 15:5–14 (Dec. 9, 2021) (Kate Sheerin, Google) (“We [Google] send about 24 billion clicks a month to news publishers . . .”). Two commenters, Engine and Reddit, stressed that news aggregation and linking practices support specialized communities and startups based around discussing current events. *See generally* Engine, Additional Comments Submitted in Response to U.S. Copyright Office’s Nov. 9, 2021, Notice of Inquiry (Jan. 5, 2022) (“Engine Additional Comments”); Reddit, Additional Comments Submitted in Response to U.S. Copyright Office’s Nov. 9, 2021, Notice of Inquiry (Jan. 5, 2022) (“Reddit Additional Comments”). Another commenter, representing a tech policy blog, opined that aggregators helped the blog draw an audience. Tr. at 79:12–15 (Dec. 9, 2021) (Cathy Gellis, Copia Institute) (“I think we’re not alone among news outlets to say we can only succeed when we can connect with audiences, and that’s what these third party services are doing, to help us connect with audiences.”).

<sup>58</sup> SCHERER & CHO, CONG. RSCH. SERV., R47018, *STOP THE PRESSES? NEWSPAPERS IN THE DIGITAL AGE 10* (citing Lisa M. George & Christiaan Hogendorn, *Local News Online: Aggregators, Geo-Targeting, and the Market for News*, 68 J. INDUS. ECON., 780, 780–818 (2020)).

<sup>59</sup> OLMSTEAD ET AL., PEW RSCH. CTR.: *PROJECT FOR EXCELLENCE IN JOURNALISM, NAVIGATING NEWS ONLINE: WHERE PEOPLE GO, HOW THEY GOT THERE, AND WHAT LURES THEM AWAY 22* (“According to the links users follow, Google News sends most users on to a news destination, but the range of those destinations is rather limited. Most of visitors to Google News . . . do click to a news story. According to the data, less than a third of news.google.com visitors headed to Google.com or another Google service. The remainder followed a link to a news site. But the benefactors [sic] are limited. Fully 69% of visitors to news.google.com ended up 3 places: nytimes.com (14.6%), cnn.com (14.4%) and abcnews.go.com (14.0%). Six additional sites were each the destination for 7–10% of visitors during the time period studied.”); *see also* SCHERER & CHO, CONG. RSCH. SERV., R47018, *STOP THE PRESSES? NEWSPAPERS IN THE DIGITAL AGE 10* (citing George & Hogendorn, *Local News Online: Aggregators, Geo-Targeting, and the Market for News*, 68 J. INDUS. ECON., 780, 780–818) (noting that some algorithms may give lower weight to content from local newspapers).

<sup>60</sup> *See* Jeon, Toulouse Sch. of Econ., Working Paper No. 18-912, 18 (“[N]ews aggregators reduce traffic to newspaper home pages while increasing traffic to individual news articles. Even if all empirical articles agree on the statement that the business-stealing effect is dominated by the readership-expansion effect, if this comes with a reduced traffic to home pages, it can have a long-term consequence that is not captured by the empirical studies.”).

“lack incentives to prioritize quality news content.”<sup>61</sup> Multiple parties have suggested that aggregation, by disassociating news content from the outlet and journalists who produced it, undermines publishers’ ability to build and profit from a distinct identity or a reputation for quality.<sup>62</sup>

Some argue that aggregators should compensate news publishers for the value that the publishers’ news content contributes to their services. In their view, news aggregators “free ride” on publishers’ investment in original reporting and photographs.<sup>63</sup> An economist acting as a consultant to the News Media Alliance states that “when Google scrapes newspaper content and offers detailed snippets, they can monetize this content without paying the content creators.”<sup>64</sup> Others believe that aggregators *do* effectively compensate press publishers by delivering visitors to their websites.<sup>65</sup> A Google representative described a “meaningful and profound exchange of value” between publishers and Google, noting that press publishers generally “opt in to have more of [their] content rather than less displayed on our services because they understand the value that we provide. . . . And every time [users] click through to [publishers’] sites, news publishers have an opportunity to monetize that through advertising.”<sup>66</sup> The economist for the News Media Alliance responded that “that traffic flow is being taxed at a monopoly rate by Google” and therefore delivers less value to publishers than they might expect in a more competitive market.<sup>67</sup>

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<sup>61</sup> Netanel, 34 HARV. J.L. & TECH. at 482.

<sup>62</sup> See, e.g., *id.* at 490; News Corp Initial Comments at 4–5; see also WALDMAN, FED. COMM’NS COMM’N, THE INFORMATION NEEDS OF COMMUNITIES 17, 122–125. Another commenter warned that aggregation leads to repetitious use of the same photographs, often out of context, providing readers with a narrower and sometimes misleading perspective. Jessica Silbey, Comments Submitted in Response to U.S. Copyright Office’s Oct. 12, 2021, Notice of Inquiry at 2 (Oct. 25, 2021) (“Silbey Initial Comments”).

<sup>63</sup> Tr. at 96:14–24 (Dec. 9, 2021) (Ole Jani, Axel Springer SE (“Axel Springer”)) (“[N]ews aggregators are not philanthropists. . . . And we have a situation where certain businesses are taking a free ride on other people’s assets”).

<sup>64</sup> Tr. at 91:21–24 (Dec. 9, 2021) (Hal Singer, Econ One, consultant to News Media Alliance (“NMA”).

<sup>65</sup> See Tr. at 79:12–15 (Dec. 9, 2021) (Cathy Gellis, Copia Institute); Tr. at 15:7–8 (Dec. 9, 2021) (Kate Sheerin, Google).

<sup>66</sup> Tr. at 101:1–16 (Dec. 9, 2021) (Annemarie Bridy, Google).

<sup>67</sup> Tr. at 107:1–5 (Dec. 9, 2021) (Hal Singer, Econ One, consultant to NMA).

### III. RECENT COPYRIGHT AND COMPETITION LAW APPROACHES

Out of concern for the continued viability of their news industries, several national and regional legislatures have in recent years considered or enacted new forms of legal protections for press publishers. While these protections vary in form, they can be divided into those that extend copyright or copyright-like protections and those that are based in competition law.<sup>68</sup>

#### A. *International Adoptions of Ancillary Copyright*

##### 1. Germany

In 2013, Germany enacted an “ancillary copyright” law for press publishers.<sup>69</sup> Producers of a “press product” received an exclusive right “to make the press product or parts thereof available to the public for commercial purposes” on the internet.<sup>70</sup> A “press product” was defined as “the editorial and technical preparation of journalistic contributions in the context of a collection published periodically on any media under one title, which, following an assessment of the overall circumstances, can be regarded as largely typical for the publishing house and the overwhelming majority of which does not serve self-advertising purposes.”<sup>71</sup> The new exclusive right applied only against “commercial operators of search engines or commercial operators of services which edit the content,” including news aggregators.<sup>72</sup> It did not extend to “individual words or very short text excerpts”<sup>73</sup> or to the mere act of linking, and expired “one year after publication of the press product.”<sup>74</sup>

When the law went into effect, Google changed its policy for news websites in Germany “with regard to what [was] listed in Google News from an opt-out procedure[,]” whereby a website

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<sup>68</sup> Throughout this Report, we use the term “competition” as the more common international term for the body of law generally known as “antitrust” in the United States.

<sup>69</sup> Gesetz über Urheberrecht und verwandte Schutzrechte [Urheberrechtsgesetz] [UrhG] [Copyright Act], Sept. 9, 1965, BGBl I at 1273, as amended by Aches Gesetz zur Änderung des Urheberrechtsgesetzes, May 7, 2013, BGBl I at 1161, § 87f (Ger.), [https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger\\_BGBl#\\_bgbl\\_\\_%2F%2F\\*%5B%40attr\\_id%3D%27bgbl113s1161.pdf%27%5D\\_\\_1642603369734](https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl#_bgbl__%2F%2F*%5B%40attr_id%3D%27bgbl113s1161.pdf%27%5D__1642603369734).

<sup>70</sup> *Id.* “Journalistic contributions are, more specifically, articles and illustrations which serve to disseminate information, form opinions or entertain.” *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* § 87g(4).

<sup>73</sup> *Id.* § 87f(2). The law did not define “very short text excerpts,” but the Arbitration Board under the Copyright Management Act at the German Patent and Trade Mark Office held that the term imposes a “seven-word limit for snippets, not taking into account used search terms for the maximum word limit.” GERMAN PATENT AND TRADE MARK OFFICE, ANNUAL REPORT 2015 at 44 (2016), <https://www.dpma.de/docs/english/jahresberichte/annualreport2015.pdf>.

<sup>74</sup> Gesetz über Urheberrecht und verwandte Schutzrechte [Urheberrechtsgesetz] [UrhG] [Copyright Act], Sept. 9, 1965, BGBl I at 1273, as amended by Aches Gesetz zur Änderung des Urheberrechtsgesetzes, May 7, 2013, BGBl I at 1161, § 87g(2).

could use the robots.txt file to exclude Google's web crawler, "to an opt-in mechanism where publishers [could] opt-in if they want their websites to be included in Google News."<sup>75</sup> By opting in, press publishers would renounce their right to compensation for use of their content and would continue to be aggregated by Google News. Press publishers that did not opt in alleged that Google "threatened" them with "delet[ion] [of] their publications from the results on Google News if they did not grant a license to Google for free or if they would claim money on this basis."<sup>76</sup>

Relying on the new law, several publishers joined a collective management organization, VG Media, to assert their exclusive right against news aggregators and search engines.<sup>77</sup> VG Media attempted to "establish[] a tariff for the usage of extracts of digital press products" and published the tariff in the *German Federal Gazette*.<sup>78</sup> Google responded that it would "no longer display snippets and thumbnails of some well-known websites such as bild.de, bunte.de or hoerzu.de, i.e. those publishers that are organized in VG Media," but instead would "only display the link to the article and its heading."<sup>79</sup>

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<sup>75</sup> Philipp Zimbehl, *German Copyright Reform: The First Part of the Third Basket*, KLUWER COPYRIGHT BLOG (Oct. 18, 2013), <http://copyrightblog.kluweriplaw.com/2013/10/18/german-copyright-reform-the-first-part-of-the-third-basket/>; see also Gerrit Rabenstein, *Google News bleibt offene Plattform für alle deutschen Verlage* [Google News Remains an Open Platform for All German Publishers], GOOGLE: THE KEYWORD DEUTSCHLAND (June 21, 2013) (Ger.), <https://blog.google/intl/de-de/unternehmen/engagement/google-news-bleibt-offene-plattform-fuer-verlage/> ("In the light of this development and against the background of the legal uncertainty emanating from the law, we have introduced a new confirmation system. With this, we offer German publishers another opportunity to tell us whether their content should (still) be displayed on Google News."). This change in policy apparently did not impact the display of press publishers' content through Google's general search engine "as long as the publishers ha[d] not prevented this with other technical measures." Daniel Bouhs, *Springer und das Leistungsschutzrecht: Mit Google kuscheln, vorläufig* [Springer and the Ancillary Copyright: Cuddle with Google, for the Time Being], TAZ (July 29, 2013) (Ger.), <https://taz.de/Springer-und-das-Leistungsschutzrecht/!5062286/>.

<sup>76</sup> Silke von Lewinski, *Chronique d'Allemagne (première partie): évolutions législatives en Allemagne entre 2011 et fin 2017* [News from Germany (Part i) – Legislative Developments in Germany from 2011 Until the End of 2017], 255 REVUE INTERNATIONALE DU DROIT D'AUTEUR [RIDA] 81 (2018) (Fr.), <https://www.la-rida.com/fr/article-rida/3375?lang=fr>; see also Loek Essers, *Google News Opt-in Is Not Good Enough, German Publishers Say*, PCWORLD (June 25, 2013), <https://www.pcworld.com/article/452583/google-news-optin-is-not-good-enough-german-publishers-say.html> ("The new confirmed consent tool is designed for German publishers. This means: If a German publisher does not accept the 'confirm consent' his content will not be shown any longer in any edition of Google News, e.g. also Swiss or Austrian from August 1st on." (quoting Google spokesperson)).

<sup>77</sup> von Lewinski, 255 Revue Internationale Du droit d'Auteur [RIDA] at 81.

<sup>78</sup> LSR AKTUELL, THE ANCILLARY COPYRIGHT FOR PRESS PUBLISHERS IN GERMANY P-08 (2017), [https://www.lsr-aktuell.de/sites/default/files/20170202\\_vg\\_media\\_lsr\\_broschuere\\_en.pdf](https://www.lsr-aktuell.de/sites/default/files/20170202_vg_media_lsr_broschuere_en.pdf); VG Media Tarif Presseverleger [VG Media Tariff Press Publishers], June 13, 2014, BUNDESANZEIGER [BANZ] at 1 (Ger.) (on file with the Office) (establishing an 11% tariff for "all gross revenues, including foreign sales" for "directly and indirectly achiev[ing] . . . the making available to the public excerpts from online press products"). In October 2014, the tariff was subsequently reduced to 6.0042%. See VG Media Tarif Presseverleger [VG Media Tariff Press Publishers], Oct. 17, 2014, BUNDESANZEIGER [BANZ] at 1 (Ger.) (on file with the Office).

<sup>79</sup> Philip Justus, *News zu News bei Google* [News about News at Google], GOOGLE: THE KEYWORD DEUTSCHLAND (Oct. 1, 2014) (Ger.), <https://blog.google/intl/de-de/unternehmen/inside-google/news-zu-news-bei-google/>.

When tariff negotiations bogged down, VG Media initiated a series of lawsuits against Google and other online service providers asserting both competition and copyright claims. One competition claim alleged that Google's "over 90 percent" market share in digital search in Germany, combined with its switch to an opt-in procedure that pressured publishers to offer their content to Google for free, amounted to an abuse of market power.<sup>80</sup> The copyright claims sought a judgment with respect to "whether or not the search engine should pay the publishers to show their articles online."<sup>81</sup> The Bundeskartellamt, the German Federal Cartel Office, rejected the competition claim because the complaint did "not provide sufficient indications of abusive conduct to initiate formal abuse of dominance proceedings against Google," and was "not based on a specific conduct of Google."<sup>82</sup> On September 12, 2019, the Court of Justice of the European Union ("CJEU") held that the ancillary copyright law was unenforceable because Germany had not properly notified the European Commission before passing the law.<sup>83</sup>

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<sup>80</sup> *Verlage beschwerten sich beim Kartellamt über Google [Publishers Complain to the Cartel Office about Google]*, SPIEGEL NETZWELT (June 24, 2014) (Ger.), <https://www.spiegel.de/netzwelt/netzpolitik/leistungsschutzrecht-vg-media-geht-gegen-google-vors-bundeskartellamt-a-977166.html>; see also Greg Sterling, *German Publisher Axel Springer: Loss Of Snippets Caused 80 Percent Traffic Drop*, SEARCH ENGINE LAND (Nov. 6, 2014), <https://searchengineland.com/german-publisher-axel-springer-says-removal-snippets-caused-80-percent-traffic-drop-207500> (noting that Axel Springer had "to opt back in to snippets because of a significant traffic decline that would have potentially caused some of its members 'to go bankrupt'").

<sup>81</sup> Michelle Martin, *German Publishers Have Filed Complaint Against Google: VG Media*, REUTERS (Jan. 5, 2016), <https://www.reuters.com/article/us-google-media-germany-idUSKBN0UJ1KF20160105>.

<sup>82</sup> *Complaint by VG Media Not Sufficient to Institute Formal Abuse of Dominance Proceedings Against Google*, BUNDESKARTELLAMT (Aug. 22, 2014) (Ger.), [https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2014/22\\_08\\_2014\\_VG\\_Media.html](https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2014/22_08_2014_VG_Media.html). When dismissing the complaint, the Bundeskartellamt stated that it was "closely monitoring Google's conduct and detectable reactions to assertions of the ancillary copyrights by individual publishers or VG Media itself from an antitrust perspective. Where appropriate, it will consider instituting proceedings ex officio." *Id.*; see also Till Kreutzer, *Weshalb das Kartellamt die Google-Beschwerde der VG Media ablehnt [Why the Cartel Office Rejects VG Media's Google Complaint]*, IRIGHTS INFO (Aug. 22, 2014) (Ger.), <https://irights.info/artikel/bundeskartellamt-vg-media-google-leistungsschutzrecht-schreiben/23847> (reporting on and providing a PDF of the Cartel Office's decision). Later, however, the Bundeskartellamt made a formal decision not to pursue competition charges against Google based on its response to the ancillary copyright law. Bundeskartellamt [BKartA] [Federal Cartel Office] Sept. 8, 2015, B6-126/14 1 (Ger.), <https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/2016/B6-126-14.pdf>; see also ORG. FOR ECON. CO-OPERATION AND DEV., ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN 2015, at 9 (2016) (Ger.), <https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Taetigkeitsberichte/OECD-AnnualReport2015.pdf>. At the outset, the Bundeskartellamt stated, "Google's conduct most probably does not violate the prohibition of abusive practices under competition law but [it] [did] not make any conclusive findings," and further asserted that it was "highly probable that neither the opt-in declaration required by Google nor the alternative curtailed presentation of search results by omitting snippets and preview images fulfils the requirements of discrimination and unfair hindrance, even if it is assumed that Google has a dominant position." Bundeskartellamt [BKartA] [Federal Cartel Office] Sept. 8, 2015, B6-126/14 2, 5 (Ger.), <https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/2016/B6-126-14.pdf>.

<sup>83</sup> See Case C-299/17, *VG Media v. Google*, ECLI:EU:C:2019:716 (Sept. 12, 2019).



## 2. Spain

In 2014, the Spanish government approved a law adding a new publishers' right to its intellectual property law.<sup>84</sup> Unlike Germany's approach, the law did not grant publishers the right to exclude third-party uses but rather a non-waivable right to remuneration. The law required aggregators to pay "equitable compensation" to press publishers for use of news snippets.<sup>85</sup> Compensation would be collected and distributed by a collective management organization.<sup>86</sup> The new provision did not apply to search engines' use of "isolated words" necessary to provide results for a specific search, if the information was made available to the public without a commercial purpose and the search engine "include[d] a link to the page of origin of the contents."<sup>87</sup>

After the bill's approval, but before it went into effect, Google announced that it would shut down Google News in Spain, starting on December 16.<sup>88</sup> According to Google:

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<sup>84</sup> Ley 21/2014, de 4 de noviembre, por la que se modifica el texto refundido de la Ley de Propiedad Intelectual, aprobado por Real Decreto Legislativo 1/1996, de 12 de abril, y la Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil [Law 21/2014, of November 4, Amending the Consolidated Text of the Law on Intellectual Property, approved by Royal Legislative Decree 1/1996, of April 12, and Law 1/2000, of January 7, on Civil Procedure] (B.O.E. 2014, 11404), [https://www.congreso.es/constitucion/ficheros/leyes\\_espa/l\\_021\\_2014.pdf](https://www.congreso.es/constitucion/ficheros/leyes_espa/l_021_2014.pdf).

<sup>85</sup> Congreso de los Diputados, Proyecto de Ley por la que se modifica el Texto Refundido de la Ley de Propiedad Intelectual, aprobado por Real Decreto Legislativo 1/1996, de 12 de abril, y la Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil [Draft Law amending the Consolidated Text of the Law on Intellectual Property, approved by Royal Legislative Decree 1/1996, of April 12, and Law 1/2000, of January 7, on Civil Procedure], BOLETÍN OFICIAL DE LAS CORTES GENERALES 8 (Feb. 21, 2014), [https://www.congreso.es/public\\_oficiales/L10/CONG/BOCG/A/BOCG-10-A-81-1.PDF](https://www.congreso.es/public_oficiales/L10/CONG/BOCG/A/BOCG-10-A-81-1.PDF) ("The making available to the public by electronic content aggregation service providers of non-significant fragments of aggregated content which are disclosed in periodic publications or on websites which are regularly updated, for the purposes of information, for creation of public opinion or entertainment, shall not require authorization, without prejudice to the editor's right, or if appropriate, other right holders to receive fair compensation. This right shall be unwaivable and will be given effect by means of intellectual property rights management entities."). The draft law did not define "non-significant fragments." *Id.* "[P]hotographic works" and "ordinary photographs" were also included in the provision, but only required "authorization" when made available by the aforementioned services and did not require equitable compensation. *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*; see also Raquel Xalabarder, *The Remunerated Statutory Limitation for News Aggregation and Search Engines Proposed by the Spanish Government — Its Compliance with International and EU Law* 13–14 (Sept 30, 2014), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2504596](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2504596) (discussing the meaning and interpretations of Article 32.2).

<sup>88</sup> Richard Gingras, *Novedades acerca de Google Noticias en España* [News About Google News in Spain], GOOGLE: BLOG OFICIAL DE GOOGLE ESPAÑA (Dec. 11, 2014) (Spain), <https://espana.googleblog.com/2014/12/novedades-acerca-de-google-noticias-en.html> ("[W]e will proceed to withdraw Spanish publishers from Google News and close Google News in Spain."). Reuters reported that as a result of Google's decision, "readers in Latin America and around the globe will no longer find links to articles from any Spanish news publishers on Google News." Eric Auchard, *Google to Shut Down News Site in Spain over Copyright Fees*, REUTERS (Dec. 11, 2014), <https://www.reuters.com/article/us-google-spain-news/google-to-shut-down-news-site-in-spain-over-copyright-fees-idUSKBN0JP0QM20141211>.

The reason [was] that this new legislation obliges any Spanish publication to charge a remuneration whether it wants to or not, to services such as Google News for showing the slightest fragment of its publications. Since Google News is a service that does not generate revenue (we do not show advertising on the website), this new approach is simply unsustainable.<sup>89</sup>

Shortly after Google made its announcement, some Spanish news aggregators followed suit.<sup>90</sup>

Studies conducted shortly after the law was implemented suggest that the law did not have its desired effect. According to one study, “the fall in the number of visits to online newspapers, due to the introduction of the new law (and the consequent exit of several aggregators), can be estimated in the short term as 6.1%.”<sup>91</sup> This study determined that “smaller newspapers have been the worst affected ones,” concluding that “depending on the size of the newspaper, . . . with the 28 most important publishing titles, the traffic drop was [5.8]%, while the following 28 publishing titles in the sample show a [7.1]% decrease. For the 28 least read publishing titles in the sample, the result is a decrease of [13.5]%. ”<sup>92</sup> A second report authored by Chartbeat, a content intelligence platform offering analytics tools, found an average traffic decrease “between 10 and 15 percent” for Spanish news websites after Google News shut down.<sup>93</sup> Others noted that, while online newspapers suffered decreases in January, “the written online media keeps losing visitors [since the law’s enactment], but the rate is now slower, settling [down] at around 4% and 6% for all newspapers sites, except for elpais.es.”<sup>94</sup>

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<sup>89</sup> Richard Gingras, *Novedades acerca de Google Noticias en España* [News About Google News in Spain], GOOGLE: BLOG OFICIAL DE GOOGLE ESPAÑA (Dec. 11, 2014) (Spain), <https://espana.googleblog.com/2014/12/novedades-acerca-de-google-noticias-en.html>.

<sup>90</sup> See Joan Calzada & Ricard Gil, *What Do News Aggregators Do? Evidence from Google News in Spain and Germany* 9 (2018), <http://diposit.ub.edu/dspace/bitstream/2445/150425/1/695577.pdf> (listing “Planeta Ludico, NiagaRank, Multifriki, InfoAliment, and Beeeinfo” as news aggregators shutting down their services and listing “Planet Ubuntu, Astrofísica, and Física” as news aggregators who modified their content).

<sup>91</sup> PEDRO POSADA DE LA CONCHA ET AL., NERA ECONOMIC CONSULTING, IMPACTO DEL NUEVO ARTÍCULO 32.2 DE LA LEY DE PROPIEDAD INTELECTUAL [IMPACT OF THE NEW ARTICLE 32.2 OF THE SPANISH INTELLECTUAL PROPERTY ACT] 46 (2015), *within* <https://www.asktheeu.org/en/request/3176/response/11308/attach/2/AnnexI.pdf>.

<sup>92</sup> *Id.* at 51 (“It is reasonable to expect that the fall in traffic in the long run will be higher, particularly for small digital newspapers, once other aggregators close down and readers begin to focus on the big newspapers or even start to turn to other different information media, given the deterioration of the digital media with regards to innovations, variety of information, difficulty in locating content, etc.”). Other impacts included a “short-term impact on producer surplus . . . estimated at €10 million per year, which will affect the sector unevenly, presumably more so the smaller publishers, jeopardizing their financial viability.” *Id.* at 46.

<sup>93</sup> Matthew Ingram, *External Traffic to Spanish News Sites Plummets After Google Move*, GIGAOM (Dec. 16, 2014), <https://gigaom.com/2014/12/16/traffic-to-spanish-news-publishers-plummets-after-google-move/>. Chartbeat noted that it “doesn’t track every Spanish news site or publisher, but it has enough data on them as a group to indicate just how dramatic the traffic decline was.” *Id.*

<sup>94</sup> Michel Olmedo Cuevas, *Spain: Did the “Google Tax” Really Change the Market?*, IPKAT (Mar. 17, 2015), <https://ipkitten.blogspot.com/2015/03/spain-did-google-tax-really-change.html>.

Given the small number of studies and limited size of Spain’s market, any conclusions regarding the impact of Spain’s right of remuneration for press publications must be approached with caution.<sup>95</sup> It is fair to say, however, that existing evidence does not clearly indicate that the new right generally increased traffic to news websites or remuneration to press publishers.<sup>96</sup>

### 3. European Union

On June 7, 2019, the European Directive on Copyright and Related Rights in the Digital Single Market (“Directive”) entered into force.<sup>97</sup> Article 15 of the Directive requires Member States to grant press publishers a new exclusive right, for two years after publication, to authorize or prohibit the reproduction or making available to the public of press publications by third-party online service providers.<sup>98</sup> In requiring an exclusive right, the EU’s approach is closer to Germany’s earlier approach than to Spain’s right of remuneration. Article 15 does not cover “private or non-commercial uses” by individual users; “hyperlinking”; “the use of individual words or very short extracts” from a press publication;<sup>99</sup> reproduction by “[p]eriodical publications published for scientific or academic purposes”; the copying of “mere facts”; or any uses otherwise permitted by EU copyright law, such as quotations for purposes of criticism or commentary.<sup>100</sup> The Directorate General of the European Commission explained the rationale for Article 15 by stating that “it is only fair that press publishers are granted their own right in order to relieve them of the burden of having to prove ownership of copyright in each journalistic output,” noting that “[w]ithout such a right, press publishers’ abilities to license and enforce rights in the digital environment is unduly complex . . . because they have to rely on

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<sup>95</sup> One commenter cautioned that the Spanish experience is not indicative of how other experiments with ancillary copyright will fare, as the Spanish press publishers market exists on a smaller scale. *See* Tr. at 110:2–3 (Dec. 9, 2021) (Ole Jani, Axel Springer) (“Spain was simply a market too small.”). This commenter states that Article 15 of the European Union Directive on Copyright and Related Rights in the Digital Single Market has already given publishers a “tailwind” and will yield better results. Tr. at 110:19–25 (Dec. 9, 2021) (Ole Jani, Axel Springer).

<sup>96</sup> *See* PEDRO POSADA DE LA CONCHA ET AL., NERA ECONOMIC CONSULTING, IMPACT ON COMPETITION AND ON FREE MARKET OF THE GOOGLE TAX OR AEDE FEE vii, 55–59 (2017), [http://clabe.org/pdf/Informe\\_NERA\\_para\\_AEPP\\_\(INGLES\).pdf](http://clabe.org/pdf/Informe_NERA_para_AEPP_(INGLES).pdf). *But see* NEWS MEDIA ALLIANCE, THE EFFECTS OF THE ANCILLARY RIGHT FOR NEWS PUBLISHERS IN SPAIN AND THE RESULTING GOOGLE NEWS CLOSURE (2019), [http://www.newsmediaalliance.org/wp-content/uploads/2019/10/Final-Revised-Spain-Report\\_11-7-19.pdf](http://www.newsmediaalliance.org/wp-content/uploads/2019/10/Final-Revised-Spain-Report_11-7-19.pdf) (arguing that Google News’ shutdown did not cause a permanent decrease in traffic or revenue to Spanish press publishers and led to the growth of more valuable organic traffic).

<sup>97</sup> Directive art. 31 and 32.

<sup>98</sup> *Id.* art. 15. “Press publications” include “journalistic publications,” but does not cover “websites, such as blogs, that provide information as part of an activity that is not carried out under the initiative, editorial responsibility and control of a service provider, such as a news publisher.” *Id.* at recital 56. Publishers of press publications are “understood as covering service providers, such as news publishers or news agencies.” *Id.* at recital 55. The right does not apply to press publications published before June 6, 2019. *Id.* art. 15.

<sup>99</sup> The Directive does not provide a definition for “very short extracts.”

<sup>100</sup> *Id.* at recitals 45, 55–58 and art. 15.

assignments and exclusive rights granted by those who contribute to the publications (journalists or photographers).<sup>101</sup>

Article 15 also provides rights to authors and other rightsholders whose works are incorporated into press publications.<sup>102</sup> Authors are entitled to “receive an appropriate share of the revenues that press publishers receive for the use of their press publications by information society service providers.”<sup>103</sup>

Article 29 required Member States to fully implement the Directive into their own national laws by June 7, 2021.<sup>104</sup> While several countries have either completed transposition of the Directive in full or have included Article 15 among those provisions that have been transposed to date,<sup>105</sup> implementation of Article 15 is still ongoing in a handful of Member States.<sup>106</sup>

Empirical review of the effects of the Directive will have to await full implementation.

## ***B. Competition Law Approaches***

Developments in the United States and abroad have highlighted other, competition-based approaches to addressing the relationship between news publishers and large news aggregators. Many commenters in this Study argued that competition concerns (specifically, a lack of competition in search, social media, and digital advertising), not copyright, are the primary problem facing news publishers.<sup>107</sup>

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<sup>101</sup> EUROPEAN COMMISSION, DIRECTORATE GENERAL FOR INTERNAL POLICIES OF THE UNION, POLICY DEPARTMENT FOR CITIZENS’ RIGHTS AND CONSTITUTIONAL AFFAIRS, STRENGTHENING THE POSITION OF PRESS PUBLISHERS AND AUTHORS AND PERFORMERS IN THE COPYRIGHT DIRECTIVE 15 (2017), [https://www.europarl.europa.eu/RegData/etudes/STUD/2017/596810/IPOL\\_STU%282017%29596810\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2017/596810/IPOL_STU%282017%29596810_EN.pdf).

<sup>102</sup> Directive recital 59.

<sup>103</sup> *Id.* art. 15(5). The entitlement to an appropriate share of revenues “should be without prejudice to national laws on ownership or exercise of rights in the context of employment contracts, provided that such laws are in compliance with Union law.” *Id.* at recital 59.

<sup>104</sup> *Id.* art. 29(1). The Directive also requires “Member States [to] communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.” *Id.* art. 29(2).

<sup>105</sup> As of early June 2022, Austria, Croatia, Czech Republic, Estonia, Hungary, Ireland, Italy, Germany, Lithuania, Luxembourg, Malta, Netherlands, Romania, and Spain have implemented the Directive in full, while the partial implementations in Denmark and France included Article 15. *See* National transposition measures communicated by the Member States concerning: Directive 2019/790, of the European Parliament and of the Council of 17 April 2019 on Copyright and Related Rights in the Digital Single Market and Amending Directives 96/9/EC and 2001/29/EC, 2019 O.J. (L 130) 92, 92–125, EUROPEAN COMMISSION, <https://eur-lex.europa.eu/legal-content/EN/NIM/?uri=CELEX:32019L0790>.

<sup>106</sup> *See id.*

<sup>107</sup> *See generally* NMA, HOW GOOGLE ABUSES ITS POSITION AS A MARKET DOMINANT PLATFORM TO STRONG-ARM NEWS PUBLISHERS AND HURT JOURNALISM 22 (2020), *within* NMA Initial Comments at Appendix: Part 1; Hal Singer, Additional Comments Submitted in Response to U.S. Copyright Office’s Nov. 9, 2021, Notice of Inquiry (Dec. 13, 2021) (“Singer Additional Comments”); *see also* News Corp Initial Comments at 16 (“But any recalibration of copyright and related law . . . likely will prove ineffectual if the current imbalance in negotiating power between

Commenters disagreed on whether the Copyright Office ought to take any position on competition-related issues. Some specifically requested that the Office endorse the Journalism Competition and Preservation Act (“JCPA”).<sup>108</sup> Proponents of the JCPA maintain that the legislation is within the scope of the Office’s work as related to the exercise of copyright rights, comparing it to the Digital Millennium Copyright Act’s provisions concerning technical measures that control access to copyrighted works.<sup>109</sup> According to these commenters, the JCPA is “an access-based statute” that “doesn’t get into what can someone do with content they have lawful access to. It doesn’t get into fair use . . . .”<sup>110</sup> Other commenters stated that the JCPA is outside the scope of this Study and the Office “should refrain from taking any position.”<sup>111</sup>

We believe that other agencies are better positioned to evaluate the merits of competition-based protections for press publishers. For this reason, the Office does not offer any findings or recommendations with respect to competition policy or alternative models for funding journalism.

## 1. Australia

In February 2021, Australia adopted a news media bargaining code requiring Google and Facebook, specifically, to negotiate with press publishers over compensation for the value the publishers’ stories generate on the two companies’ platforms.<sup>112</sup> Any news organization can

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publishers and republishers of news content is not remedied.”); Electronic Frontier Foundation (“EFF”), Comments Submitted in Response to U.S. Copyright Office’s Oct. 12, 2021, Notice of Inquiry at 4–5 (Nov. 26, 2021) (“EFF Initial Comments”) (“The harms facing news media are not those of aggregators and copyright. A far bigger factor is monopoly control of online advertising. . . . Until there are more alternatives to the current online advertising market, news media will continue to be at the mercy of large companies like Google and Facebook.”); Netanel, 34 HARV. J.L. & TECH. at 475 (“Several factors have contributed to journalism’s tailspin. . . . But in recent years one factor looms particularly large: the overwhelming market power of digital platforms, principally Google and Facebook.”); MPA The Association of Magazine Media (“MPA”), Additional Comments Submitted in Response to U.S. Copyright Office’s Nov. 9, 2021, Notice of Inquiry at 3 (Jan. 5, 2022) (“MPA Additional Comments”); National Press Photographers Association (“NPPA”), Additional Comments Submitted in Response to U.S. Copyright Office’s Nov. 9, 2021, Notice of Inquiry at 4–5 (Jan. 5, 2022) (“NPPA Additional Comments”); National Public Radio, Inc. (“NPR”), Comments Submitted in Response to U.S. Copyright Office’s Oct. 12, 2021, Notice of Inquiry at 8 (Nov. 24, 2021) (“NPR Initial Comments”); Public Knowledge, Comments Submitted in Response to U.S. Copyright Office’s Oct. 12, 2021, Notice of Inquiry at 12 (Nov. 26, 2021) (“Public Knowledge Initial Comments”).

<sup>108</sup> See, e.g., News Corp Initial Comments at 16; NMA Initial Comments at 3, 22–23.

<sup>109</sup> Tr. at 89:23–24 (Dec. 9, 2021) (Matthew Williams, NMA); cf. 17 U.S.C. § 1201 (“Circumvention of copyright protection systems”).

<sup>110</sup> Tr. at 89:23–90:03 (Dec. 9, 2021) (Matthew Williams, NMA). See also NMA Initial Comments at 23; Tr. at 68:14–69:08 (Dec. 9, 2021) (Danielle Coffey, NMA); Tr. at 169:22–170:10 (Dec. 9, 2021) (Eric Schwartz, NMA); Tr. at 104:15–19 (Dec. 9, 2021) (Matthew Williams, NMA).

<sup>111</sup> CCIA-IA Joint Initial Comments at 7–8; Tr. at 101:17–24 (Dec. 9, 2021) (Annemarie Bridy, Google); Tr. at 125:25–126:11 (Dec. 9, 2021) (Peter Routhier, Internet Archive).

<sup>112</sup> Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2021 (Cth) (Austl.), [https://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/r6652\\_aspassed/toc\\_pdf/20177b01.pdf](https://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/r6652_aspassed/toc_pdf/20177b01.pdf). Note, however, that the law exempts platforms that reach bargains outside of the Code. Kelly Buchanan, *Australia: New Legislation Establishes Code of Conduct for Negotiations Between News Media and Digital Platforms Over Payments for*

notify Google or Facebook of its intent to bargain.<sup>113</sup> Compensation terms may account for the value the publisher derives from Google’s or Facebook’s use of its material—in other words, Google can argue that its royalty rate should be lower because it drives traffic to the publisher’s site.<sup>114</sup> If, after three months of bargaining, the parties have not reached an agreement, an arbitration panel makes a binding decision on the rate of remuneration.<sup>115</sup> Because Australia’s law is not copyright-based, the bargaining right applies to *all* news content, including headlines and snippets, not only material protected by copyright.<sup>116</sup>

Since enactment of the code, several publishers have struck licensing deals with Google and Facebook,<sup>117</sup> and several countries have discussed following Australia’s model.<sup>118</sup> Critics have

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*Content*, LIBR. CONG. GLOB. LEGAL MONITOR (Feb. 26, 2021), <https://www.loc.gov/item/gobal-legal-monitor/2021-02-26/australia-new-legislation-establishes-code-of-conduct-for-negotiations-between-news-media-and-digital-platforms-over-payments-for-content/>. The law also includes a set of minimum standards for providing advance notice of changes to algorithmic ranking and presentation of news.

<sup>113</sup> Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2021 (Cth) (Austl.) Sec. 52ZE.

<sup>114</sup> *Id.* Sec. 52ZZ1(b).

<sup>115</sup> *Id.* Sec. 52ZIA.

<sup>116</sup> Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2021 (Cth) (Austl.). Opponents of Australia’s approach, including Google, have argued that it rests on a misunderstanding of the economic forces affecting press publishers and undermines the “principle of unrestricted linking between websites.” Mel Silva, *Mel Silva’s Opening Statement to the Senate Economics Committee Inquiry*, GOOGLE: THE KEYWORD (Jan. 22, 2021), <https://blog.google/around-the-globe/google-asia/australia/mel-silvas-opening-statement/>. Facebook initially protested the law by blocking news sharing in Australia, but restored service after Australia amended the law to include a two-month mediation period and to accommodate pre-existing deals between Facebook and news publishers. Elizabeth Dwoskin, *Facebook, Australia Reach Deal to Restore News Pages After Shutdown*, WASH. POST (Feb. 23, 2021), <https://www.washingtonpost.com/technology/2021/02/22/facebook-news-australia-deal/>; see also Buchanan, *Australia: New Legislation Establishes Code of Conduct for Negotiations Between News Media and Digital Platforms over Payments for Content*, LIBR. CONG.: GLOB. LEGAL MONITOR. Some commenters state that, because Australia’s bargaining code covers unoriginal content, lacks exceptions like fair use, and compels Google and Facebook to bargain regardless of whether they wish to carry the publisher’s content, a U.S. version of the law would violate the First Amendment and U.S. treaty obligations. CCIA-IA Joint Initial Comments at 13–14, 23; Tr. at 175:17–25 (Dec. 9, 2021) (John Bergmayer, Public Knowledge); Tr. at 99:22–100:9 (Dec. 9, 2021) (Joshua Lamel, Re:Create).

<sup>117</sup> See Jo Printz & Tyrone Dalton, *Small News Publishers Band Together in Negotiations with Tech Giants Google, Facebook*, ABC CENTRAL VICTORIA (Nov. 29, 2021), <https://www.abc.net.au/news/2021-11-30/independent-publishers-begin-negotiations-with-tech-giants/100660660>; Callum Jaspán, *Country Press Australia Pens Agreement with Google on Showcase Program*, MUMBRELLA (Sept. 3, 2021), <https://mumbrella.com.au/country-press-australia-pens-agreement-with-google-on-showcase-program-701608>.

<sup>118</sup> See Andy Blatchford, *Canada Wants Digital Giants to Compensate Local News Outlets*, POLITICO (Apr. 5, 2022), <https://www.politico.com/news/2022/04/05/canada-digital-giants-compensate-local-news-00023113>; William Turvill, *Canada’s News Industry Expects up to \$150m Annual Windfall from Australia-style Big Tech Crackdown*, PRESS GAZETTE (Dec. 2, 2021), <https://pressgazette.co.uk/canada-google-facebook-regulation-news-industry/> (“Prime minister Justin Trudeau (pictured) has pledged to introduce a news media bargaining code for Canada within the next two months.”); Theano Karanikioti, *Following in Australia’s Footsteps: EU to Make Google and Facebook Pay for News?*, THE PLATFORM LAW BLOG (Feb. 12, 2021), <https://theplatformlaw.blog/2021/02/12/following-in-australias-footsteps-eu-to-make-google-and-facebook-pay-for-news/> (“Members of the European Parliament are eager to follow in Australia’s

characterized the law as a “link tax” that will undermine a key feature of the internet<sup>119</sup> while amounting to a windfall for only the largest publishers.<sup>120</sup>

As the law is only a year old, it is too soon to evaluate its impact on Australia’s press publishing ecosystem.

## 2. France

Anticipating France’s implementation of Article 15, Google announced that it would no longer display snippets of results from European press publishers as part of search results in France, unless a publisher opted in to the display free of charge.<sup>121</sup> French press publisher groups sued Google, and France’s competition authority declared that Google would have to negotiate payment in good faith.<sup>122</sup> Google subsequently signed contracts with several French news publishers<sup>123</sup> and reached a framework agreement to pay \$76 million over three years to a larger group,<sup>124</sup> but in July of 2021, the competition authority fined Google over \$500 million for failure to negotiate in good faith.<sup>125</sup> Its chief said that Google’s practices “were likely to constitute an abuse of a dominant position.”<sup>126</sup> In June 2022, Google settled this dispute.<sup>127</sup>

Some commenters have pointed to France’s fines and Google’s license negotiations as showing that combining ancillary rights and competition law can be effective in bolstering press

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footsteps and force Google and Facebook to pay for news, the *Financial Times* reported. MEPs working on the Digital Services Act (‘DSA’) and the Digital Markets Act (‘DMA’) could consider amending these instruments to reflect aspects of the proposed Australian News Media and Digital Platforms Mandatory Bargaining Code.”)

<sup>119</sup> Google Initial Comments at 9–10.

<sup>120</sup> See Public Knowledge Initial Comments at 4–5.

<sup>121</sup> See Thibault Larger & Laura Kayali, *French Publishers Win Decisive Battle Against Google*, POLITICO (Apr. 9, 2020), <https://www.politico.eu/article/french-publishers-windesicive-battle-against-google> [https://perma.cc/T7J4-X9GC].

<sup>122</sup> See Natasha Lomas, *France’s Competition Watchdog Orders Google to Pay for News Reuse*, TECHCRUNCH (Apr. 9, 2020), <https://techcrunch.com/2020/04/09/frances-competition-watchdog-orders-google-to-pay-for-news-reuse/>; Larger & Kayali, *French Publishers Win Decisive Battle Against Google*, POLITICO (Apr. 9, 2020), <https://www.politico.eu/article/french-publishers-windesicive-battle-against-google> [https://perma.cc/T7J4-X9GC].

<sup>123</sup> See Tom Hirche, *Google Signs Contracts with a Handful of French Publishers*, IGEL (Nov. 24, 2020), <https://ancillarycopyright.eu/news/2020-11-24/google-signs-contracts-handful-french-press-publishers>.

<sup>124</sup> Mathieu Rosemain & Ingrid Melander, *France Fines Google 500 Mln Euros Over Copyright Row*, REUTERS (July 13, 2021), <https://www.reuters.com/technology/france-fines-google-500-mln-over-copyright-row-2021-07-13/>.

<sup>125</sup> See *France Fines Google \$592M in a Dispute Over Paying News Publishers for Content*, NPR (Jul. 13, 2021), <https://www.npr.org/2021/07/13/1015596060/france-fines-google-592m-in-a-dispute-over-paying-news-publishers-for-content>.

<sup>126</sup> Larger & Kayali, *French Publishers Win Decisive Battle Against Google*, POLITICO (Apr. 9, 2020), <https://www.politico.eu/article/french-publishers-windesicive-battle-against-google> [https://perma.cc/T7J4-X9GC].

<sup>127</sup> Gaspard Sebag, *Google Avoids More Fines After Settling French News Dispute*, BLOOMBERG (Jun. 21, 2022), <https://www.bloomberg.com/news/articles/2022-06-21/google-avoids-more-fines-after-ending-french-dispute-over-news>.

publishers' bargaining power.<sup>128</sup> Others have criticized this approach, where Google must pay to display snippets and may be fined for not reaching agreements to do so, as creating a "must-carry" regime that would be inconsistent with principles of U.S. law.<sup>129</sup>

### 3. JCPA

The JCPA was introduced in March 2021 in both the Senate (S. 673) and the House (H.R. 1735).<sup>130</sup> As introduced, it would create a four-year safe harbor from antitrust laws for news content creators "to collectively withhold content from, or negotiate with" online content distributors about how they may distribute that content.<sup>131</sup> The bill defines news content creators as "print, broadcast, or digital news organization[s]" who have a "dedicated professional editorial staff that creates and distributes original news and related content . . . on at least a weekly basis," with "not less than 25 percent" of their total content consisting of "original news and related content,"<sup>132</sup> as well as those that are licensed by the Federal Communications Commission to "broadcast[] original news and related content."<sup>133</sup> "Online content distributors" are entities that "operate[] a website or other online service that displays, distributes, or directs users to news articles, works of journalism, or other content on the internet that is generated by third-party news content creators" and have no less than one billion monthly active users "in the aggregate, of all of [their] websites or online services worldwide."<sup>134</sup> The bill sets out conditions for collective negotiations between news content creators and online content distributors. The negotiations cannot be "limited to price" and must "directly relate to the quality, accuracy, attribution or branding, and interoperability of news."<sup>135</sup> Negotiations must be "nondiscriminatory" with respect to other news content creators and contain terms that "would be available to all news content creators."<sup>136</sup>

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<sup>128</sup> See NMA Initial Comments at 31.

<sup>129</sup> See Public Knowledge Initial Comments at 4; see also LCA Initial Comments at 15 (outlining constitutional objections to must-carry obligation). The ruling has also been criticized as it relates to EU law. See Giuseppe Colangelo, *Enforcing Copyright Through Antitrust? A Transatlantic View of the Strange Case of News Publishers Against Digital Platforms* 12–19 (Stanford-Vienna Transatlantic Tech. Law Forum, TTLF Working Papers No. 66, 2020), <https://law.stanford.edu/publications/no-66-enforcing-copyright-through-antitrust-a-transatlantic-view-of-the-strange-case-of-news-publishers-against-digital-platforms/>.

<sup>130</sup> Journalism Competition and Preservation Act of 2021, S. 673, 117th Cong. (2021). The Journalism Competition and Preservation Act was initially introduced in 2019. Journalism Competition and Preservation Act of 2019, S. 1700, 116th Cong. (2019).

<sup>131</sup> Journalism Competition and Preservation Act of 2021, S. 673, 117th Cong. § 2(b) (2021).

<sup>132</sup> *Id.* § 2(a)(2)(A)(i)–(a)(2)(B)(i) (2021).

<sup>133</sup> *Id.* § 2(a)(2)(B)(ii) (2021).

<sup>134</sup> *Id.* § 2(a)(3) (2021).

<sup>135</sup> *Id.* § 2(b)(1)(A), (C) (2021).

<sup>136</sup> *Id.* § 2(b)(1)(B), (D) (2021).



Several organizations and individuals discussed the JCPA in their comments and during the roundtable. Some commenters stated that the JCPA is “necessary” to “address the dominant online platform problem” and could help “remove” the power imbalance that allegedly exists between press publishers and online platforms.<sup>137</sup> Organizations representing writers and photographers requested that their members, and not only the publishers, be represented in any bargaining-based approach.<sup>138</sup> Other commenters warned that the JCPA could “create a form of private ownership of facts” and would “exaggerate existing power differences” by “tend[ing] to benefit large actors . . . and leaving smaller outlets and tech-enabled media startups behind.”<sup>139</sup>

### C. Other Proposals

Commenters and academics skeptical of changes to either copyright or competition law raised several other proposals for supporting journalism. These included an excise tax on digital advertising revenue, with proceeds directed to investigative journalism;<sup>140</sup> privacy reforms aimed at increasing the value of the contextual advertising newspapers can provide;<sup>141</sup> assistance for local newspapers to reorganize as nonprofits;<sup>142</sup> and other direct support for public media.<sup>143</sup>

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<sup>137</sup> NMA Initial Comments at 3, 23; Singer Additional Comments at 7.

<sup>138</sup> See, e.g., Authors Guild, Comments Submitted in Response to U.S. Copyright Office’s Oct. 12, 2021, Notice of Inquiry at 6 (Nov. 26, 2021) (“Authors Guild Initial Comments”); NPPA Additional Comments at 5.

<sup>139</sup> Public Knowledge Initial Comments at 12; Engine Additional Comments at 11. See also LCA Additional Comments at 3 n.4 (“[E]ven if the JCPA succeeded in forcing news aggregators to pay to use headlines and 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.”); Tr. at 179:06–19 (Dec. 9, 2021) (Jonathan Band, LCA) (“[A]ll the money will still go to the big publishers, and then, you know, some crumbs will go to the local publishers, and that’s not what we want.”); Netanel, 34 HARV. J.L. & TECH. at 509–10 (“[T]he proposed legislation would not prevent leading global news publishers, like News Corp., from reaching individual licensing deals with the platforms, leaving only small publishers that generate a truly negligible portion of the platforms’ overall business to bargain collectively.”). But see Tr. at 118:14–119:03 (Dec. 9, 2021) (Hal Singer, Econ One, consultant to NMA) (“[I]f the JCPA produces a pot of money, then approximates the fair market value contribution of all newspapers, including the smalls and the large, right, then the smalls will get a portion of that pot based on their *pro rata* share of however the coalition wants to break it up.”).

<sup>140</sup> Netanel, 34 HARV. J.L. & TECH. at 516–19. Netanel states that there are rough parallels for an excise tax to support journalism in France and Germany. *Id.* at 521. The economist Paul Romer has also proposed a tax on digital advertising revenue, albeit a progressive tax aimed not at financing journalism but at reducing the political power of the largest digital advertising companies. Paul Romer, *Taxing Digital Advertising*, PAUL ROMER (May 17, 2021), <https://adtax.paulromer.net/#modest>.

<sup>141</sup> Public Knowledge Initial Comments at 12–13.

<sup>142</sup> R Street-Niskanen Joint Initial Comments at 5–6.

<sup>143</sup> See Public Knowledge Initial Comments at 13; R Street-Niskanen Joint Initial Comments at 6–7.

## IV. FINDINGS AND RECOMMENDATIONS

Below, we outline existing copyright protections for press publishers under U.S. law and evaluate their adequacy. We then assess the advisability of proposed additional copyright-like protections.

### *A. Existing Protections for Press Publishers in the United States*

#### **1. Copyright Protection for News Content**

Existing U.S. copyright law gives publishers several means to protect their news content.<sup>144</sup> First, a press publisher typically owns the copyright in the whole of its print issues or in websites containing news articles as a collective work.<sup>145</sup> Second, the press publisher often owns or can assert rights in individual articles that it publishes, through the work-made-for-hire doctrine,<sup>146</sup> assignments of rights, or exclusive licenses.<sup>147</sup> The News Media Alliance estimates

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<sup>144</sup> News articles are literary works under 17 U.S.C. § 102(a)(1); news photographs are pictorial works under 17 U.S.C. § 102(a)(5); and television and radio news broadcasts, when fixed, are audiovisual works under 17 U.S.C. § 102(a)(6) and sound recordings under 17 U.S.C. § 102(a)(7), respectively. That news materials are fact-based does not prevent them from being protected by copyright in the first instance. *Authors Guild v. Google, Inc.*, 804 F.3d 202, 220 (2d Cir. 2015) (“Those who report the news undoubtedly create factual works. It cannot seriously be argued that, for that reason, others may freely copy and re-disseminate news reports.”).

<sup>145</sup> The Copyright Act defines “collective work” as a work “in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole.” 17 U.S.C. § 101. Additionally, collective works under the Copyright Act are considered a type of compilation, which in turn is defined as “a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.” *Id.* See also *id.* § 201(c) (explaining that “[i]n the absence of an express transfer of the copyright or of any rights under it, the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series.”). The website of a daily newspaper, which assembles various discrete articles, photographs, and advertisements, could be an example of one or more copyrightable digital “collective works.”

<sup>146</sup> “Work made for hire” is a category of works created for an employer or commissioning party, for which the individual(s) who create the work are not considered the author(s) or initial owner(s) for copyright purposes. Instead, the author is either (1) the employer of that individual, if the work is prepared within the scope of employment; or (2) the entity who commissions or orders the creation of the work, provided that the work fits within one of nine specific categories and the parties expressly agree in a signed writing that “the work shall be considered a work made for hire.” *Id.* § 101. Among these nine categories is “a contribution to a collective work,” meaning that a freelance article for a newspaper or magazine *may* constitute a work-made-for-hire, if the author and the publisher agreed to this in a signed writing. *Id.* In addition, any article written by an employee of a newspaper or magazine as part of their employment would clearly be a work-made-for-hire, with the publisher having the legal status of author (and copyright owner).

<sup>147</sup> For freelance articles or photographs that are not works-made-for-hire, the author—in whom all exclusive rights initially vest—may transfer her rights to the publisher, either for a limited time or for the duration of the copyright, and the transfer may cover all or some of the exclusive rights. A transfer of rights may take the form of an assignment (meaning that legal title is transferred) or an exclusive license (meaning that exclusive permission to use the right(s) is transferred). See *Minden Pictures, Inc. v. John Wiley & Sons, Inc.*, 795 F.3d 997, 1003 (9th Cir. 2015). For both types of transfers, the transferee gains the right to bring a suit for infringement. See 3 MELVIN B. NIMMER & DAVID

that its members own the copyright in the majority of the content they publish, “including the majority of individual works in their publications,” most often through the work-made-for-hire doctrine.<sup>148</sup> Photographs may be an exception: the National Press Photographers Association informs the Office that photographers usually retain the copyright in their works.<sup>149</sup>

When a press publisher owns a copyright in either a print issue or website<sup>150</sup> or in an individual article, it has the exclusive right to do or authorize the reproduction, preparation of derivative works, distribution, public performance, and public display of that work, including on the internet.<sup>151</sup> These exclusive rights are not absolute, however. Both U.S. law and international treaties establish limits on copyright, including some applicable to news content. The Berne Convention, for example, carves out “news of the day” from the protections it requires and provides an exception for “quotations from newspaper articles and periodicals in the form of press summaries.”<sup>152</sup> Under U.S. copyright law, several doctrines allow certain uses of news content, by news aggregators or others, without the news publisher’s permission or payment of licensing fees.

## a) Protectability

### (1) Facts and Ideas

One fundamental constraint on publishers’ ability to prevent reuse of their news content is that facts and ideas are not copyrightable.<sup>153</sup> As a result, news publishers may not use their

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NIMMER, NIMMER ON COPYRIGHT § 12.02[B][1] (Matthew Bender, Rev. Ed.) (“NIMMER ON COPYRIGHT”). In contrast, if the parties only agree to a nonexclusive license—meaning that the author remains free to license the work to other parties—then the grantee cannot bring an infringement suit. *See Minden*, 795 F.3d at 1003.

<sup>148</sup> NMA Initial Comments at 24.

<sup>149</sup> NPPA Additional Comments at 3.

<sup>150</sup> The relationship between the copyright in a collective work and in a particular contribution to a collective work is spelled out in the Copyright Act, which sets forth three instances where a publisher that does not own the copyright in an article may nonetheless reproduce and distribute it as part of: (1) “that particular collective work,” (2) “any revision of that collective work,” and (3) “any later collective work in the same series.” 17 U.S.C. § 201(c). In the 2001 *Tasini* decision, the Supreme Court interpreted section 201(c) as “adjust[ing] a publisher’s copyright in its collective work to accommodate a freelancer’s copyright in her contribution. If there is demand for a freelance article standing alone or in a new collection, the Copyright Act allows the freelancer to benefit from that demand; after authorizing initial publication, the freelancer may also sell the article to others.” *N.Y. Times Co. v. Tasini*, 533 U.S. 483, 497 (2001).

<sup>151</sup> *See* 17 U.S.C. § 106(1)–(5). As the Copyright Office has noted, these exclusive rights cover certain uses of copyrighted materials online, including the making available of copyrighted works for download or viewing via streaming or embedding. *See generally* U.S. COPYRIGHT OFFICE, THE MAKING AVAILABLE RIGHT IN THE UNITED STATES (2016), [https://www.copyright.gov/docs/making\\_available/making-available-right.pdf](https://www.copyright.gov/docs/making_available/making-available-right.pdf); *see also Goldman*, 302 F. Supp. 3d at 586 (holding that the embedding of an image on a website constitutes a public display of the work).

<sup>152</sup> Berne Convention for the Protection of Literary and Artistic Works art. 2(8), Sept. 9, 1886, *as revised* July 24, 1971, *and as amended* Sept. 28, 1979, S. TREATY DOC. NO. 99-27 (1986) (“Berne Convention”) (“The protection of this Convention shall not apply to news of the day or to miscellaneous facts having the character of mere items of press information.”).

<sup>153</sup> 17 U.S.C. § 102(b) (“In no case does copyright protection for an original work of authorship extend to any idea,

copyrights to exclude others from copying purely factual news content—meaning, for example, that news aggregators may repackage the facts that publishers report.

The non-copyrightability of facts in news articles in particular was affirmed by the Supreme Court over a century ago. In *International News Service v. Associated Press*,<sup>154</sup> the Court explained, “[i]t is not to be supposed that the framers of the Constitution . . . intended to confer upon one who might happen to be the first to report a historic event the exclusive right for any period to spread the knowledge of it.”<sup>155</sup> As the Supreme Court reiterated nearly 80 years later in *Feist Publications v. Rural Telephone Service*, “[t]he *sine qua non* of copyright is originality[.]”<sup>156</sup> and “[t]he first person to find and report a particular fact has not created the fact; he or she has merely discovered its existence.”<sup>157</sup> For this reason, the Supreme Court has noted that “all facts—scientific, historical biographical, and *news of the day* . . . may not be copyrighted and are part of the public domain available to every person.”<sup>158</sup>

This limitation on copyright protection for facts does not, however, mean that news *stories* as written may be freely copied.<sup>159</sup> The *International News Service* Court distinguished the literary expression of a news article, which may be subject to copyright, from the news element—“the information respecting current events contained in the literary production”—which may not.<sup>160</sup>

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procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.”); *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991); see also *Baker v. Selden*, 101 U.S. 99, 102–03 (1880) (describing idea/expression dichotomy); cf. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 589–90 (1985) (“To ensure the progress of arts and sciences and the integrity of First Amendment values, ideas and information must not be freighted with claims of proprietary right.”). This limitation has constitutional dimensions. See *Harper & Row*, 471 U.S. at 560 (noting “the First Amendment protections already embodied in the Copyright Act’s distinction between copyrightable expression and uncopyrightable facts and ideas”); see also Agreement on Trade-Related Aspects of Intellectual Property Rights art. 9(2), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 (“Copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such.”); WIPO Copyright Treaty art. 2, Dec. 20, 1996, S. TREATY DOC. NO. 105-17, 2186 U.N.T.S. 121 (“Copyright protection extends to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such.”).

<sup>154</sup> *Int’l News Serv. v. Associated Press*, 248 U.S. 215 (1918).

<sup>155</sup> *Id.* at 234.

<sup>156</sup> *Feist*, 499 U.S. at 345.

<sup>157</sup> *Id.* at 347.

<sup>158</sup> *Id.* at 348 (emphasis added); see also *Associated Press v. Meltwater U.S. Holdings, Inc.*, 931 F. Supp. 2d 537, 549 (S.D.N.Y. 2013) (“The reporting of facts is not protectable under the Copyright Act since facts are never original to an author.” (internal quotation marks omitted)).

<sup>159</sup> *Wainwright Secs. Inc. v. Wall St. Transcript Corp.*, 558 F.2d 91, 95 (2d Cir. 1977) (“It is, of course, axiomatic that ‘news events’ may not be copyrighted. But in considering the copyright protections due a report of news events or factual developments, it is important to differentiate between the substance of the information contained in the report, *i.e.*, the event itself, and ‘the particular form or collocation of words in which the writer has communicated it.’” (cleaned up)), *abrogated on other grounds by Salinger v. Colting*, 607 F.3d 68 (2d Cir. 2010).

<sup>160</sup> *Int’l News Serv.*, 248 U.S. at 234. The Court ultimately analyzed the controversy between a news publisher and a

In *Harper & Row, Publishers, Inc. v. Nation Enterprises*, the Court acknowledged that copyright law permits the copying of facts but nonetheless held that the unlicensed publication of large excerpts from Gerald Ford's memoirs unfairly appropriated the author's original expressive contribution and was therefore *prima facie* infringing.<sup>161</sup>

In the more recent case of *Associated Press v. Meltwater U.S. Holdings, Inc.*, a district court analyzed a news monitoring service's reproduction of headlines and excerpts from news articles.<sup>162</sup> The service delivered, in response to user searches, reports that displayed an article's headline, up to 300 characters of its lede, and up to 140 characters surrounding the "hit" sentence responsive to the search.<sup>163</sup> The court held that these reports reproduced protectable expression.<sup>164</sup> It noted that although "[t]he reporting of facts is not protectable under the Copyright Act, compilations of facts may be protected under the Act since the arrangement or presentation of facts can display originality."<sup>165</sup> And "[t]here is even more room for originality in descriptions of facts."<sup>166</sup>

The risk that a third party's reuse of news reporting takes original expression (and not only unprotectable facts) rises with the quantity of material reused. In *Nihon Keizai Shimbun, Inc. v. Comline Business Data, Inc.*, the Second Circuit considered a service that translated and rewrote news articles for republication to its customers.<sup>167</sup> Conducting a substantial similarity analysis with respect to twenty-two "abstracts" the service created from Nikkei publications, the court excluded facts from consideration.<sup>168</sup> It still found that most of the "abstracts" copied protectable expressive choices, mirroring the original articles' structure and organization and much of the original language.<sup>169</sup> The court distinguished two of the defendant's "abstracts" as,

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competing service that had pirated its material as one of unfair competition law. *Id.* at 235.

<sup>161</sup> *Harper & Row*, 471 U.S. at 548–49.

<sup>162</sup> *Meltwater U.S. Holdings, Inc.*, 931 F. Supp. 2d at 544–45. As the court explained, Meltwater offered a "news monitoring service" that allows "users to monitor the news based on the presence of certain words or phrases in news articles appearing on the Internet and to receive excerpts of those news articles." *Id.* at 543. To make these excerpts available to its users, Meltwater "use[d] automated computer programs or algorithms to copy or 'scrape' an article from an online news source, index the article, and deliver verbatim excerpts of the article to its customers in response to search queries." *Id.*

<sup>163</sup> *Id.* at 544–45.

<sup>164</sup> *Id.* at 550.

<sup>165</sup> *Id.* at 549–50 (cleaned up).

<sup>166</sup> *Id.* at 549 (citing *Nihon Keizai Shimbun, Inc. v. Comline Bus. Data, Inc.*, 166 F.3d 65, 70 (2d Cir. 1999)).

<sup>167</sup> *Nihon Keizai Shimbun, Inc.*, 166 F.3d 65.

<sup>168</sup> *Id.* at 70 ("Here, Comline had every right to republish the facts contained in Nikkei's articles; in determining substantial similarity, we must look only to the original elements in Nikkei's presentation of those facts.").

<sup>169</sup> *Id.* at 71 ("The Comline abstracts appear to be direct, if not word-for-word, translations of the Nikkei articles, edited only for clarity. The average Comline abstract uses about two-thirds of the protectable material in the corresponding Nikkei article. The abstracts track the information in the articles sentence by sentence, in sequence; only occasionally do the abstracts combine two Nikkei sentences, divide a sentence, or rearrange the facts among different sentences. Comline adopts, by and large, the exact same structure and organization of the facts reported by

respectively, containing only the factual information in the corresponding Nikkei article<sup>170</sup> and as copying only the first paragraph of six.<sup>171</sup>

Taken together, these cases draw a few bright lines around an unsettled area for news publishers and aggregators. A platform or service aggregating only the headline and lede of an article is less likely to reproduce the article's expressive content and more likely to reproduce only facts or other unprotectable material.<sup>172</sup> To the extent that the headline and lede themselves contain original expression, however, or the aggregator copies more of the content, the aggregator runs an increased risk of infringing. A social media post aggregating an article's headline, lede, and accompanying photograph, for example, would ordinarily be a *prima facie* infringement of at least the photograph, regardless of whether the other elements contained protectable expression.

## (2) Merger

Even original expression is not always protectable. Where there are only a few, limited ways of expressing an idea, the merger doctrine bars protection for the expression in order to avoid giving a backdoor monopoly in the idea itself.<sup>173</sup>

At least some basic headlines and ledes may be susceptible to merger. Functional considerations, such as space and the need to stress key facts, may narrow the range of expressive choices available for headlines and ledes, both of which are usually intended to convey to the reader the most important aspects of the article.<sup>174</sup> Although different outlets

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Nikkei.”).

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> Alfred C. Yen, *A Preliminary First Amendment Analysis of Legislation Treating News Aggregation as Copyright Infringement*, 12 VAND. J. ENT. & TECH. L. 947, 953–63 (2010); 1 PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 2.14.4 (3d ed. 2022) (“GOLDSTEIN ON COPYRIGHT”); *but see Meltwater U.S. Holdings, Inc.*, 931 F. Supp. 2d at 550 (finding that the reproduction of headlines, 300 characters of article ledes, and up to 140 characters surrounding the “hit” sentence responsive to the user’s search copied protectable speech).

<sup>173</sup> *N.Y. Mercantile Exch., Inc. v. IntercontinentalExchange, Inc.*, 497 F.3d 109, 116–17 (2d Cir. 2007); *Ets-Hokin v. Skyy Spirits, Inc.*, 225 F.3d 1068, 1082 (9th Cir. 2000) (“Under the merger doctrine, courts will not protect a copyrightable work from infringement if the idea underlying the copyrighted work can be expressed in only one way, lest there be a monopoly on the underlying idea.”); 4 NIMMER ON COPYRIGHT § 13.03[B][3][a] (explaining that “courts have invoked the doctrine of *merger*” where “rigorously protecting the expression would confer a monopoly over the idea itself, in contravention of the statutory command”). Similarly, the *scènes à faire* doctrine, which “exclude[s] from protection against infringement those elements of a work that necessarily result from external factors inherent in the subject matter of the work,” *Mitel, Inc. v. Iqtel, Inc.*, 124 F.3d 1366, 1375 (10th Cir. 1997), reflects a concern with locking up building blocks of creativity.

<sup>174</sup> See Yen, 12 VAND. J. ENT. & TECH. L. at 956. The rise of aggregators and the resulting competition for eyeballs and clicks on the internet, however, has spawned the opposite phenomena—an increasing prevalence of “clickbait” headlines that seek to minimize the amount of information about the story that is conveyed, in order to induce a reader to “click” on the headline to learn the full story. See Jason Hennessey, *12 Surprising Examples of Clickbait Headlines That Work*, SEARCH ENGINE JOURNAL (Apr. 22, 2020), <https://www.searchenginejournal.com/12-surprising-examples-of-clickbait-headlines-that-work/362688/>. *But see* Steve Lohr, *This Boring Headline is Written for Google*, N.Y.

often produce highly varied headlines for the same story,<sup>175</sup> some headlines are close to bare statements of fact.<sup>176</sup> While the Office is unaware of any cases applying the merger doctrine to news publications, the latter situation could lead a court to do so.

### (3) Short Phrases

Another relevant limitation on the protectability of headlines and ledes is the words and short phrases doctrine, under which courts generally refuse copyright protection to individual words, titles, and short phrases.<sup>177</sup> The doctrine dates back to 19th century common law,<sup>178</sup> and the U.S. Copyright Office has long relied on it in refusing to register words or short phrases.<sup>179</sup> This prohibition is codified at 37 C.F.R. § 202.1(a). In addition, the *Compendium of U.S. Copyright Office Practices, Third Edition* and Copyright Office Circular 33 both 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

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TIMES (Apr. 9, 2006), <https://www.nytimes.com/2006/04/09/weekinreview/ideas-trends-this-boring-headline-is-written-for-google.html> (describing how search engines find stories with plain headlines more easily).

<sup>175</sup> See Jane C. Ginsburg, Comments Submitted in Response to U.S. Copyright Office’s Oct. 12, 2021, Notice of Inquiry at 10–24 (Nov. 23, 2021) (“Ginsburg Initial Comments”) (Appendix materials comparing diverse headlines for a single event).

<sup>176</sup> See, e.g., Hugo Martín, *U.S. Mask Mandates on Planes, Buses will Likely Ease Soon. Just not Yet*, L.A. TIMES (Mar. 10, 2022), <https://www.latimes.com/business/story/2022-03-10/mask-mandate-extended-planes-buses-transit>; Lori Aratani, Ian Duncan, and Tyler Pager, *Mask Mandate Extended for Air Travel and Public Transit*, WASH. POST (Mar. 10, 2022), <https://www.washingtonpost.com/transportation/2022/03/10/transportation-mask-requirement-air-travel/>; cf. Alexander Weaver, Comment, *Aggravated With Aggregators: Can International Copyright Law Help Save the Newsroom?*, 26 EMORY INT’L L. REV. 1161, 1184 (2012) (“Short headlines ‘generally seek to encapsulate the factual content of the story,’ which would make the expression and facts inseparable and subject to the merger doctrine.” (citations omitted)); Tr. at 158:14–17 (Dec. 9, 2021) (John Bergmayer, Public Knowledge) (“[I]f a man bites a dog and you say man bites dog, even if you just posit that it is original and copyrightable, other people are allowed to say man bites dog if a man bites a dog.”).

<sup>177</sup> See Justin Hughes, *Size Matters (or Should) in Copyright Law*, 74 FORDHAM L. REV. 575, 581–82 (2005) (collecting cases).

<sup>178</sup> See 1 NIMMER ON COPYRIGHT § 2.01 [B][3]; Hughes, 74 FORDHAM L. REV. at 605 (noting that the 1879 *Drone on Copyright Treatise* “unequivocally [sic] state[d] that ‘[t]he mere title of a book, magazine, newspaper, or other publication, is not a subject of copyright’”). But see *Jollie v. Jaques*, 13 F. Cas. 910 (C.C.S.D.N.Y. 1850) (No. 7437) (speculating that ‘in the case of a valid copy-right of the work[,] . . . [i]t may be that the title should be considered as falling within the purview of the statute, and that to protect the work the court would be required to secure the title from piracy”).

<sup>179</sup> See 21 Fed. Reg. 6,022 (Aug. 11, 1956); 37 C.F.R. § 202.1(a) (1959). Although not formalized in the Code of Federal Regulations until the 1950s, the Office’s practice of denying registration to words and short phrases stretches back another 60 years, to 1899. 2 WILLIAM PATRY, PATRY ON COPYRIGHT § 4.2 (2022) (“PATRY ON COPYRIGHT”).

brief combinations of words, even if the word or short phrase is novel or distinctive or lends itself to a play on words.<sup>180</sup>

Multiple commenters, however, argue that the short phrases doctrine should not be interpreted as a categorical bar to copyrightability, especially as applied to headlines and ledes.<sup>181</sup> In the words of the News Media Alliance, “the categorical exclusion of words and short phrases has the effect of conveying to potential infringers that the use of short news excerpts, including scraping headlines, is permissible, even if it captures the heart of the infringed article that is copyrightable as a whole.”<sup>182</sup>

In a detailed analysis of the short phrases doctrine, Professor Jane C. Ginsburg offered three arguments as to why some headlines and ledes should be protectable: first, that courts applying the short phrases doctrine have focused on originality or functionality rather than brevity as such, leaving open the possibility that a sufficiently original short phrase might be copyrightable;<sup>183</sup> second, that the examples given by the *Compendium* of non-protectable words and short phrases—names of individuals or organizations, titles, catchwords, or slogans—tend either to lack all originality or be “considerably more brief than most headlines or ledes”;<sup>184</sup> and third, that a rule based solely on brevity, without any guide as to how short is too short, could be difficult to implement.<sup>185</sup>

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<sup>180</sup> U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 313.4(C) (3d ed. 2021) (“COMPENDIUM (THIRD)”); U.S. COPYRIGHT OFFICE, CIRCULAR 33: WORKS NOT PROTECTED BY COPYRIGHT (Mar. 2021), <https://www.copyright.gov/circs/circ33.pdf> (less the source references provided in the *Compendium*). Registration and copyrightability are not synonymous, and a work that the Copyright Office refuses to register may nonetheless be deemed by a court to warrant copyright protection in the context of an infringement action. See 17 U.S.C. § 411(a) (“[W]here the deposit, application, and fee required for registration have been delivered to the Copyright Office in proper form and registration has been refused, the applicant is entitled to institute a civil action for infringement if notice thereof, with a copy of the complaint, is served on the Register of Copyrights”).

<sup>181</sup> See generally, Jane C. Ginsburg, Additional Comments Submitted in Response to U.S. Copyright Office’s Nov. 9, 2021, Notice of Inquiry (Jan. 5, 2022) (“Ginsburg Additional Comments”); see also News Corp Initial Comments at 7; NMA Initial Comments at 19; Tr. at 11:12–15 (Dec. 9, 2021) (Jane C. Ginsburg, consultant to NMA) (“[W]hat we don’t have, notwithstanding the words and short phrases bar, is a true prohibition on the copying of original, albeit succinct, phrases, and I think it’s very important to take a closer look at the words and short phrases doctrine.”).

<sup>182</sup> NMA Initial Comments at 26.

<sup>183</sup> Ginsburg Additional Comments at 6–9 (collecting cases).

<sup>184</sup> *Id.* at 5. The Office has not attempted a comprehensive survey of headline length.

<sup>185</sup> *Id.* at 4. The arguments for and against the short phrases doctrine were discussed at length in *Southco, Inc. v. Kanebridge Corp.*, 390 F.3d 276 (3d Cir. 2004). There, the Third Circuit, sitting en banc, divided on the doctrine’s application to a manufacturer’s product numbers. The majority held that the short phrases doctrine was an independent grounds for rejecting the copyrightability of certain Southbridge product numbers. *Id.* at 286. It quoted from the Copyright Office’s circular and regulations setting out the words and short phrases doctrine and noted that “Congress has not disturbed the Copyright Office’s long-standing practice against registering short phrases, despite repeated and extensive revisions of the copyright code.” *Id.* at 287 (internal quotation marks and citation omitted). Two separate opinions took issue with the short phrases doctrine. The first, a concurrence by Judge Becker, joined by Judges McKee and Smith, argued that the doctrine was ambiguous: it contained no explicit word count threshold but also did not explain what else was required to identify a “short phrase.” *Id.* at 289 (Becker, J., dissenting in part). In



Courts applying the short phrases doctrine have indeed focused more on originality than brevity as such.<sup>186</sup> The *Compendium* reflects this focus by emphasizing short phrases' *de minimis* amount of "authorship" rather than their *de minimis* amount of text.<sup>187</sup> Courts do not attempt to set a *per se* rule around a specific word count, and acknowledge that some short phrases may exhibit creativity.<sup>188</sup> Likewise, the Office has avoided any suggestion that a work must contain a specific number of words to be considered more than just a short phrase.<sup>189</sup>

Lack of creativity is not, however, the sole justification for the short phrases doctrine. Short phrases may be particularly vulnerable to merger with the underlying fact or idea.<sup>190</sup> Courts have generally treated titles as uncopyrightable *per se*, regardless of any creativity their authors claim they possess.<sup>191</sup> And some courts and commentators have expressed concern about the

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practice, Judge Becker noted, courts, including those cited by the Office's circular, fell back to originality analysis. *Id.* Judge Becker suggested that the short phrases doctrine may nonetheless serve as a "rule of thumb" for copyright examiners. A dissent by Judges Roth and Chertoff was equally emphatic in rejecting a purely length-based understanding of the words and short phrases doctrine, declaring that "no court has relied on § 201.1(a) to hold that an otherwise original expression was uncopyrightable just because it was brief enough to be deemed a short phrase." *Id.* at 298 (Roth, J., dissenting).

<sup>186</sup> See, e.g., *Clanton v. UMG Recordings, Inc.*, 556 F. Supp. 3d 322, 332 (S.D.N.Y. 2021) ("Words and short phrases, including titles and slogans, rarely if ever exhibit sufficient originality to warrant copyright protection." (quoting *McDonald v. West*, 138 F. Supp. 3d 448, 454 (S.D.N.Y. 2015))); *Stern v. Does*, 978 F. Supp. 2d 1031, 1041 (C.D. Cal. 2011) ("[T]he distinction between sentence and phrase is immaterial to the originality analysis. The focus must remain on the presence of creativity. While a shorter work, *ceteris paribus*, is less likely to possess the creative spark necessary to be accorded copyright protection, that will not always be the case."); *Allen v. Destiny's Child*, No. 06 C 6606, 2009 WL 2178676, at \*25–27 (N.D. Ill. July 21, 2009). Cf. 1 NIMMER ON COPYRIGHT § 2.01[B][3] ("[E]ven a short phrase may command copyright protection if it exhibits sufficient creativity."). But see *Sega Enters v. Accolade Inc.*, 977 F.2d 1510, 1524 n.7 (9th Cir. 1992) (as amended Jan. 6, 1993) (noting that 20-bytes of code plus the letters S-E-G-A is of *de minimis* length and therefore likely a "word" or "short phrase" that is not protected by copyright law).

<sup>187</sup> COMPENDIUM (THIRD) § 313.4(C); see also *J. Racenstein & Co. v. Wallace*, No. 96 Civ. 9222, 1999 WL 632853, at \*1 (S.D.N.Y. Aug. 19, 1999) ("The governing principle of law embodied by the Copyright Office regulation is that short words and phrases tend to be too trivial or insignificant to exhibit the minimal level of creativity necessary to warrant copyright protection.").

<sup>188</sup> See *CCM Cable Rep, Inc. v. Ocean Coast Props., Inc.*, 97 F.3d 1504, 1520 n.20 (1st Cir. 1996) (acknowledging that "not all short, simple, declarative sentences fall within the meaning of [37] C.F.R. § 201.1(a)"); *Syrus v. Bennett*, 455 Fed. App'x. 806, 809 (10th Cir. 2011) ("[A] short phrase may command copyright protection if it exhibits sufficient creativity." (quoting 1 NIMMER ON COPYRIGHT § 2.01[B][3])).

<sup>189</sup> COMPENDIUM THIRD § 111.3(C) ("The 50-word limit" for the group registration option for short online literary works "is not intended to establish a general threshold for evaluating the copyrightability of literary works."); Group Registration of Short Online Literary Works, 85 Fed. Reg. 37,341, 37,342 (June 22, 2020) (by adopting a "50-word threshold" for the group registration option for short online literary works "the Office is not purporting to define a word-count-based threshold to govern copyrightability determinations for literary works generally").

<sup>190</sup> See 1 GOLDSTEIN ON COPYRIGHT § 2.7.3 ("[T]he shorter the phrase, the less likely it is to have acceptable substitutes, thus barring protection under the merger doctrine."); Hughes, 74 FORDHAM L. REV. at 617–18 ("As the expression becomes smaller and smaller, it becomes much more likely that it is the only reasonable expression of a simple idea. What we call 'merger' must apply very frequently with short phrases.").

<sup>191</sup> See generally 1 NIMMER ON COPYRIGHT § 2.16 [A] ("Copyright Office Regulations place titles outside of statutory copyright and judicial construction to that effect is plain."); *Duff v. Kan. City Star Co.*, 299 F.2d 320, 323 n.2 (8th Cir.

risk of protection for short phrases locking up the “building blocks of creativity,” even if a third party could ultimately defend its use of such phrases under the fair use doctrine.<sup>192</sup>

### b) Fair Use

Even protectable elements of news stories may be used without authorization under applicable exceptions and limitations in the Copyright Act. The most relevant of these is the fair use doctrine, codified at 17 U.S.C. § 107, which provides that:

[T]he fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section [§ 106], for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.<sup>193</sup>

In evaluating the fairness of a particular use, courts must consider four nonexclusive factors: “(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

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1962) (“The right secured by the copyright laws is the right to use a literary composition—the product of the mind and genius of the author—not the name or title given to it.” (quoting 2 HARRY D. NIMS, LAW OF UNFAIR COMPETITION AND TRADE-MARKS § 272 (4th Ed. 1947)); *Arvelo v. Am. Int’l Ins. Co.*, No. 95-1360, 1995 WL 561530, at \*1 (1st Cir. Sept. 21, 1995) (“The non-copyrightability of titles in particular has been authoritatively established.”); *Columbia Pictures Corp. v. National Broadcasting Co.*, 137 F. Supp. 348, 353 (S.D. Cal. 1955) (holding that some materials which ordinarily appear in copyrightable works, including titles, are not protectable). *But see Johnston v. Twentieth Century–Fox Film Corp.*, 82 Cal. App. 2d 796, 187 P.2d 474 (1947) (suggesting that a title may be entitled to protection if it is “arbitrary, fictitious, fanciful, artificial, or technical”).

<sup>192</sup> See *ATC Distrib. Group, Inc. v. Whatever It Takes Transmissions & Parts, Inc.*, 402 F.3d 700, 709–10 (6th Cir. 2005) (“Originality aside, there are other sound reasons for denying copyright protection to short ‘works,’ such as part numbers[.]” where even with a fair use defense, “anyone using that number in a commercial context would face the time-consuming and expensive prospect of having to defend themselves against such claims.”); *Southco, Inc.*, 390 F.3d at 286 (“Although the fair use defense would presumably protect [users] in most situations . . . fair use is an affirmative defense and may impose an undue burden.”); *Clanton*, 556 F. Supp. 3d at 332 (refusing protection to a lyric using the “ordinary building blocks” of the English language); *McDonald*, 138 F. Supp. 3d at 454 (“The principle excludes from copyright the ‘raw materials’ of art, like colors, letters, descriptive facts . . . as well as previous creative works that have fallen into the public domain. It likewise excludes the basic building blocks of music, including tempo and individual notes.”). See also BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 46 (1967) (allowing copyright to small groups of words could set up barrier to expression); Hughes, 74 FORDHAM L. REV. at 610 (“[I]ndependent protection of these small creations would arguably do harm by diminishing the public domain and producing unnecessary transaction costs through fragmentation of the copyright ‘markets.’”); Tr. 46:20–47:11 (Dec. 9, 2021) (Daniel Takash, Niskanen) (“I think, should that specific protection be extended [to headlines], you would necessarily run into an interesting dynamic . . . where you would have competing news publishers reporting on the same story and . . . mak[ing] editorial decisions based on concerns about litigation, or litigation should emerge between publishers that would simply prevent proliferation. . . . [W]e certainly wouldn’t want to create a scenario where the [news publishers] are fighting among themselves.”).

<sup>193</sup> 17 U.S.C. § 107.

effect of the use upon the potential market for or value of the copyrighted work.”<sup>194</sup> Commenters did not agree on the extent to which fair use permits aggregation of news content. While there was near-consensus among commenters that the aggregation of large extracts or entire articles can exceed what is permitted,<sup>195</sup> news publishers maintained that the scraping of headlines or lede sentences alone is not necessarily fair use; commenters representing libraries and aggregators disagreed.<sup>196</sup>

Skeptics of such aggregation as fair use emphasized facts that cut against fair use under one or more of the statutory factors, such as the absence of commentary or criticism,<sup>197</sup> the centrality of headlines and ledes to the value of news articles,<sup>198</sup> the systematic nature of the copying,<sup>199</sup> the alleged substitutional impact of aggregation,<sup>200</sup> and the potential societal harms from aggregators devaluing original reporting.<sup>201</sup> Commenters on the other side pointed to the allegedly transformative nature of linking and indexing,<sup>202</sup> the relatively thin copyright

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<sup>194</sup> *Id.*

<sup>195</sup> See, e.g., LCA Initial Comments at 2 (“If the aggregator displayed significantly more content, such as the first paragraph or two of an article, the fair use analysis might yield a different result. Arguably, copying that much content might harm the market for the article under the fourth fair use factor.”).

<sup>196</sup> Compare NMA Initial Comments at 26, and SAM RICKETSON & JANE C. GINSBURG, INTELLECTUAL PROPERTY IN NEWS? WHY NOT?, RESEARCH HANDBOOK ON INTELLECTUAL PROPERTY IN MEDIA AND ENTMT 13–19 (Megan Richardson & Sam Ricketson eds., 2016), reproduced within NMA Initial Comments Appendix: Part III at 13–19, with Google Initial Comments at 3 (citing the use of headlines and short snippets as an acceptable aggregation practice).

<sup>197</sup> See, e.g., Ginsburg Initial Comments at 4 (“Aggregators collect and redistribute copied content; they do not comment, criticize or analyze the material they copy.”); NMA Initial Comments at 13–15. This is not true of all aggregators, however, as some websites typically considered to be “aggregators” —like the Huffington Post and Gawker—have in the past added commentary to their summaries.

<sup>198</sup> See, e.g., Ginsburg Initial Comments at 2 (“Headlines and ledes capture the heart of the news account.”); NMA Initial Comments at 17.

<sup>199</sup> See, e.g., Ginsburg Initial Comments at 3, 8–9; NMA Initial Comments at 17.

<sup>200</sup> See, e.g., Ginsburg Initial Comments at 8–9 (“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 with respect to the text and especially regarding the photographs. Substituting for ‘the author’s manner of expression’ will weight the fourth factor against fair use.” (footnote omitted)).

<sup>201</sup> See, e.g., *id.* at 9; NPR Initial Comments at 5 (“The problem of ‘free-riding’ is essentially the issue of news aggregators using publisher content, in whole or in part, on their own sites to profit from such work. They take the work of others and place advertising against it, making a profit without incurring any of the costs in gathering or writing news. Without compensating the originators of the news content, this provides them a financial advantage while taking support away from those who invest in newsgathering by drawing audience to their own sites in lieu of those who created the original works.”).

<sup>202</sup> See, e.g., Google Initial Comments at 4 (“Moreover, not only is there substantial public benefit from services that aggregate news content, news aggregators’ transformative use of links and snippets drives profitable traffic to publishers’ copyrighted articles, increasing rather than diminishing the value of those articles.”).

protection afforded to factual content,<sup>203</sup> the small amount taken from the total original work,<sup>204</sup> the value aggregators may create for news publishers through increased referrals,<sup>205</sup> and the asserted absence of market harm flowing from the use of any creative, rather than factual, material.<sup>206</sup>

Fair use is a fact- and context-specific analysis, and small changes in a fact pattern can produce divergent results.<sup>207</sup> And there is considerable variety in aggregators, their techniques, and the context in which they use news materials. Some aggregators only link to headlines; others include multiple sentences or photographs. It is therefore not possible to determine how fair use applies to “news aggregation” in general—only how it applies in specific circumstances. Moreover, the Copyright Office is not aware of any copyright infringement suit brought by press publishers based on the aggregation of headlines and ledes that has reached a final judgment.<sup>208</sup>

Case law does provide certain guideposts. Although “news reporting” is one of the illustrative “fair” purposes listed in 17 U.S.C. § 107, and the fair use doctrine often permits quotation in a news reporting context,<sup>209</sup> the mere fact that an entity is engaged in a form of news reporting

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<sup>203</sup> See, e.g., *id.* (“Any cognizable copyright in such heavily factual, previously published content must be exceedingly thin.” (citing *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1197 (2021))); EFF Initial Comments at 3.

<sup>204</sup> EFF Initial Comments at 3.

<sup>205</sup> Google Initial Comments at 4–5 (citing a Deloitte study finding that the value of each referral from Google to news publishers was worth between 4–6 euro cents).

<sup>206</sup> In other words, if the fourth factor considers only harms that are “cognizable under the Copyright Act,” and consumers use aggregated links for their uncopyrightable factual content, then, it is argued, any substitution should not weigh against a finding of fair use. EFF Initial Comments at 3 (citing *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1206 (2021)).

<sup>207</sup> See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) (“The task [of fair use analysis] is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis. . . . All [statutory factors] are to be explored, and the results weighed together, in light of the purposes of copyright.”). Cf. *Google v. Oracle Am., Inc.*, 141 S. Ct. 1183 (2021) (explaining that fair use’s “application may well vary depending upon context”).

<sup>208</sup> Cf. Shannon Henson, *Google Settles Suit Over New Content*, LAW360 (Apr. 9, 2007), <http://www.law360.com/articles/22235/google-settles-suit-over-news-content> (reporting settlement of Agence France Presse suit against Google based on aggregation of headlines and initial sentences). Uncertainty as to the application of the above legal doctrines may have motivated some aggregators to negotiate with news publishers and may have deterred news publishers from challenging some aggregation practices in court. See NMA Initial Comments at 25 (“The lack of clarity around what types of uses may properly be transformative, as opposed to substitutional, has left press publishers with uncertainty that impedes their ability to enforce their exclusive rights in the online context.”).

<sup>209</sup> See, e.g., *Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P.*, 756 F.3d 73, 88 n.3 (2d Cir. 2014) (explaining that fair use often, though not always, supports direct quotation of copyrighted works in a news reporting context); *Payne v. The Courier-J.*, Nos. 05-5942, 05-6066, 2006 WL 2075345, at \*3 (6th Cir. July 25, 2006) (article profiling former basketball player in prison that quoted from one of his books was fair use news reporting); *Nunez v. Caribbean Int’l News Corp.*, 235 F.3d 18, 22–23 (1st Cir. 2000) (holding newspaper’s publication of controversial photos of Miss Puerto Rico Universe as part of story on controversy was fair use, in part because “the pictures were the story”); *L.A. News Serv. v. KCAL-TV Channel 9*, 108 F.3d 1119, 1121–22 (9th Cir. 1997) (holding that first factor weighed in favor of new station’s

does not resolve the fair use question.<sup>210</sup> Rather, courts' analysis of the first factor, the purpose and character of the use, varies with the context and character of the reporting.

In *Harper & Row*, the Supreme Court held that *The Nation's* unauthorized printing of excerpts from Gerald Ford's soon-to-be-published memoir was infringing, notwithstanding the excerpts' newsworthiness. The Court explained, "[i]n evaluating character and purpose we cannot ignore *The Nation's* stated purpose of scooping the forthcoming hardcover and *Time* abstracts. *The Nation's* use had not merely the incidental effect but the intended purpose of supplanting the copyright holder's commercially valuable right of first publication."<sup>211</sup> By contrast, in *Swatch Group Management Services Ltd. v. Bloomberg L.P.*, the Second Circuit held that Bloomberg's publication of an audio recording and transcript of a Swatch Group earnings call was fair, in part because Bloomberg's purpose was *not* to "scoop" but "simply to deliver newsworthy financial information to investors and analysts. . . . That kind of activity, whose protection lies at the core of the First Amendment, would be crippled if the news media and similar organizations were limited to sources of information that authorize disclosure."<sup>212</sup> The court distinguished earlier Second Circuit decisions involving conduct more like the "scooping," where a news services' translation of Japanese news articles into English and a ratings agency's copying of a competitor's information about bond redemptions were held not to be fair use: "In all three of those cases . . . the defendants attempted to use the banner of newsworthiness to supersede the core objects of original works whose production critically depended upon copyright protection."<sup>213</sup>

Under the first factor, courts regularly ask whether the use of the copyrighted material is "transformative."<sup>214</sup> On the one hand, "[i]n the context of news reporting and analogous

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rebroadcast of a competitor's news footage even as other factors did not).

<sup>210</sup> See, e.g., *Harper & Row*, 471 U.S. at 561 ("The fact that an article arguably is 'news' and therefore a productive use is simply one factor in a fair use analysis."); *Swatch Grp. Mgmt. Servs. Ltd.*, 756 F.3d at 85 ("A news organization thus may not freely copy creative expression solely because the expression itself is newsworthy."); *L.A. News Serv. v. Reuters Television Int'l, Ltd.*, 149 F.3d 987, 993–94 (9th Cir. 1998).

<sup>211</sup> *Harper & Row*, 471 U.S. at 561–62.

<sup>212</sup> *Swatch Grp. Mgmt. Servs. Ltd.*, 756 F.3d at 83–85. Although 17 U.S.C. § 107 includes among the first factor considerations, "whether such use is of a commercial nature," the *Swatch Group Management Services* court notes that "[a]lmost all newspapers, books and magazines are published by commercial enterprises that seek a profit," and therefore asked instead whether the link between Bloomberg's copying and its commercial gain was attenuated. *Id.* at 83 (quotation marks and citations omitted). Finding that it was, the Second Circuit assigned little weight to the fact that Bloomberg was a for-profit publication. *Id.*

<sup>213</sup> *Id.* at 86 (citing *Nihon Keizai Shimbun, Inc. v. Comline Bus. Data, Inc.*, 166 F.3d 65 (2d Cir. 1999); *Wainwright Sec., Inc. v. Wall Street Transcript Corp.*, 558 F.2d 91 (2d Cir. 1977); *Fin. Info., Inc. v. Moody's Invs. Serv., Inc.* ("FII"), 751 F.2d 501 (2d Cir. 1984)).

<sup>214</sup> *Swatch Grp. Mgmt. Servs. Ltd.*, 756 F.3d at 84 ("The Supreme Court has also instructed courts analyzing the first fair use factor to consider the transformativeness of the use—that is, whether 'the new work merely supersedes the objects of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.'" (quoting *Campbell*, 510 U.S. at 579)). The Office notes that a fair use case focused on what constitutes "transformative" use in the context of visual art is currently pending before the

activities, . . . the need to convey information to the public accurately may in some instances make it desirable and consonant with copyright law for a defendant to faithfully reproduce an original work without alteration.”<sup>215</sup> On the other hand, while copying without alteration or inclusion of commentary has been considered transformative in some contexts,<sup>216</sup> news reporting uses that merely quote but do not add to or elaborate on copyrighted material are less likely to be transformative.<sup>217</sup> In *Los Angeles News Service v. Reuters Television International, Ltd.*, for example, Reuters retransmitted to other news organizations a small portion of an independent news service’s footage of the Rodney King riots.<sup>218</sup> The Ninth Circuit affirmed the district court’s findings that the copying was not fair because, among other things, Reuters did not edit, explain, or otherwise elaborate on the footage.<sup>219</sup>

Courts have described some forms of “aggregation” for indexing and search as transformative. In *Perfect 10, Inc. v. Amazon.com*, the Ninth Circuit held that Google’s aggregation of copyrighted photographs into a searchable index of low-resolution thumbnail images was “highly transformative,” since “a search engine transforms the image into a pointer directing a user to a source of information”<sup>220</sup> and delivers social benefit.<sup>221</sup> Similarly, in *Authors Guild v. Google, Inc.*, the Second Circuit held that Google’s unauthorized digitization and display of snippets of copyrighted books as part of a searchable index was “highly transformative.”<sup>222</sup>

To summarize, a court analyzing the first fair use factor would not stop with the general “news reporting” purpose but also examine the context and transformative character of the use. The fact that aggregators’ purpose, by definition, is not to “scoop” a copyright owner’s right of first publication could weigh in favor of fair use.<sup>223</sup> Whether aggregators’ compilation of links and snippets could be found transformative would vary with the aggregators’ practices, but to the extent some aggregators do not add anything to the original reporting or offer a product distinct from the press publishers’, this could weigh against a finding of fair use.

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Supreme Court. See U.S. Supreme Court Order List: 596 U.S. at 2 (U.S. Mar. 28, 2022), [https://www.supremecourt.gov/orders/courtorders/032822zor\\_f2bh.pdf](https://www.supremecourt.gov/orders/courtorders/032822zor_f2bh.pdf) (granting certiorari in *Andy Warhol Found., Inc. v. Goldsmith et al.*, No. 21-869).

<sup>215</sup> *Swatch Grp. Mgmt. Servs. Ltd.*, 756 F.3d at 84.

<sup>216</sup> See, e.g., *Authors Guild*, 804 F.3d at 216–17 (holding that Google’s copying of books for the purpose of enabling search was “highly transformative purpose”); *Swatch Grp. Mgmt. Servs. Ltd.*, 756 F.3d at 83–85 (finding news outlet’s publication of audio transcript without commentary was transformative).

<sup>217</sup> See *Monge v. Maya Mags., Inc.*, 688 F.3d 1164, 1174 (9th Cir. 2012) (summarizing Ninth Circuit cases).

<sup>218</sup> *L.A. News Serv. v. Reuters*, 149 F.3d at 993–94.

<sup>219</sup> *Id.* at 990.

<sup>220</sup> *Perfect 10, Inc. v. Amazon.com*, 508 F.3d 1146, 1168 (9th Cir. 2007).

<sup>221</sup> *Id.* at 1165–66.

<sup>222</sup> *Authors Guild*, 804 F.3d at 216–17.

<sup>223</sup> The fact that copyright owners’ works have been published also relates to the second fair use factor because the “scope of fair use is narrower with respect to unpublished works.” *Harper & Row*, 471 U.S. at 564.

The second fair use factor, the nature of the copyrighted work, is less complex. In *Google v. Oracle America*, the Supreme Court noted that copyright’s protection is thinner where the work is factual rather than fictional and where it is bound up with uncopyrightable material.<sup>224</sup> Thinner protection for news articles would therefore weigh in favor of aggregators’ fair use defense. But the second factor rarely plays a determinative role in fair use analysis,<sup>225</sup> and courts often reject fair use defenses even where the copyrighted material was factual.<sup>226</sup> Accordingly, “thin” protection for news materials would not itself shield a news aggregator if the other factors tilted against a finding of fair use.

The third fair use factor, the amount and substantiality of the portion used in relation to the copyrighted work as a whole, has often carried significant weight in cases involving news reporting. In *Authors Guild v. Google, Inc.*, the Second Circuit found that the snippets Google Books displayed from copied works showed “just enough context surrounding the searched term to help [a searcher] evaluate whether the book falls within the scope of her interest (without revealing so much as to threaten the author’s copyright interests).”<sup>227</sup> In so doing, the snippets “add[ed] importantly to the highly transformative purpose of identifying books of interest to the searcher.”<sup>228</sup>

Courts have been more skeptical of fair use defenses by aggregators who took larger segments of copyrighted works.<sup>229</sup> For example, in *Fox News Network, LLC v. TVEyes, Inc.*, the Second Circuit held that the aggregation of television news content into a searchable index was not fair use, to the extent that the service enabled users to watch and share ten-minute clips.<sup>230</sup> The concurrence distinguished TVEyes’ service from Google Books’ snippets based on the length of the clips and their likelihood of substituting for the original works: “Certainly a ten minute clip

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<sup>224</sup> *Google v. Oracle Am. Inc.*, 141 S. Ct. at 1197–98; see also 4 NIMMER ON COPYRIGHT § 13.05[A] [2][a] (“[C]opyright protection is narrower, and the corresponding application of the fair use defense greater, in the case of factual works than in the case of works of fiction or fantasy.”).

<sup>225</sup> *Authors Guild*, 804 F.3d at 220 (citing WILLIAM F. PATRY, PATRY ON FAIR USE § 4.1 (2015)). But see *Google v. Oracle Am. Inc.*, 141 S. Ct. at 1201–02 (beginning fair use analysis with the second factor and concluding that the work at issue was, if copyrightable at all, far from the core of copyright, weighing in favor of fair use). Cf. Robert Kasunic, *Is That All There Is? Reflections on the Nature of the Second Fair Use Factor*, 31 Colum. J.L. & Arts 529 (2008) (discussing history of second factor and proposing a more rigorous second-factor analysis).

<sup>226</sup> See, e.g., *Harper & Row*, 471 U.S. at 561–62; *Fox News Network, LLC v. TVEyes, Inc.*, 883 F.3d 169, 180–81 (2d Cir. 2018); *L.A. News Serv. v. Reuters*, 149 F.3d at 993–94.

<sup>227</sup> *Authors Guild*, 804 F.3d at 218.

<sup>228</sup> *Id.*

<sup>229</sup> See, e.g., *MidlevelU, Inc. v. ACI Info. Grp.*, 989 F.3d 1205, 1222–23 (11th Cir. 2021) (denying judgment as a matter of law on fair use defense where aggregated index of blog content also allowed users to view full text of articles without navigating to the original source); *TVEyes, Inc.*, 883 F.3d at 180–81; *Meltwater U.S. Holdings, Inc.*, 931 F. Supp. 2d at 561 (finding news monitoring service’s reproduction and distribution of excerpts of online news articles was not fair use). Cf. *Video Pipeline, Inc. v. Buena Vista Home Entmt.*, 342 F.3d 191, 203 (3d Cir. 2003) (rejecting fair use defense of a service that compiled movie clips into a commercial database of movie trailers).

<sup>230</sup> *TVEyes, Inc.*, 883 F.3d at 180–81.

in many, perhaps most, situations suffices for a user to view an entire news segment. . . . The facts here thus differ from Google Books quite substantially.”<sup>231</sup> The Eleventh Circuit in *MidlevelU, Inc. v. ACI Information Group* reached a similar conclusion, denying judgment as a matter of law on a fair use defense where the defendant’s aggregated index of blog content allowed users to view the full text of articles without navigating to the original source.<sup>232</sup>

To be sure, the use of larger extracts is not necessarily decisive—in *Swatch Group Management*, the copying of an entire recording did not weigh against fair use, because the court held its publication was reasonable in light of the defendant’s purpose of disseminating important financial information to investors and analysts.<sup>233</sup> But cases involving news reporting or practices akin to aggregation are consistent with the general rule that “the more of a copyrighted work that is taken, the less likely the use is to be fair.”<sup>234</sup>

Analyzing the fourth fair use factor, the effect of the use upon the potential market for or value of the copyrighted work, one question is how likely the aggregator’s use is to substitute for the original.<sup>235</sup> In *Kelly v. Arriba Soft* and *Authors Guild v. Google*, courts found that low-resolution thumbnail versions of modeling photographs and short snippets of books, respectively, were unlikely to substitute for the copyrighted works, tipping the fourth factor toward fair use.<sup>236</sup> On the other hand, courts found that the full-length clips and complete articles at issue in *TVEyes* and *MidlevelU* were likely to substitute for the original works.<sup>237</sup>

To be cognizable, the market harm must flow from damage to a *protectable* interest under copyright law. In *Authors Guild v. Google*, the Second Circuit noted that, where a Google Books snippet substituted for the original book, it was likely to be because the snippet satisfied a searcher’s need for uncopyrightable facts.<sup>238</sup> The Court held that Google was entitled to answer

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<sup>231</sup> *Id.* at 187–88 (Kaplan, D.J., concurring).

<sup>232</sup> *MidlevelU, Inc.*, 989 F.3d at 1222–23.

<sup>233</sup> *Swatch Grp. Mgmt. Servs. Ltd.*, 756 F.3d at 90.

<sup>234</sup> *Id.* (citing *Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104, 109 (2d Cir. 1998)).

<sup>235</sup> *Authors Guild*, 804 F.3d at 223 (“The fourth fair use factor . . . focuses on whether the copy brings to the marketplace a competing substitute for the original, or its derivative, so as to deprive the rights holder of significant revenues because of the likelihood that potential purchasers may opt to acquire the copy in preference to the original.”).

<sup>236</sup> *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 818 (9th Cir. 2003); *Authors Guild*, 804 F.3d at 224 (finding that because “[s]nippet view, at best . . . produces discontinuous, tiny fragments, amounting in the aggregate to no more than 16% of a book[.]” it was not an effective substitute for the original works). The Second Circuit found that the market harm factor favored Google *despite* the fact that Google’s snippet function might cause some lost sales. *Id.* The court explained that evidence of lost sales is not enough, and there “must be a meaningful or significant effect ‘upon the potential market for or value of the copyrighted work.’” *Id.* (quoting 17 U.S.C. § 107(4)).

<sup>237</sup> *TVEyes, Inc.*, 883 F.3d at 180–81; *MidlevelU, Inc.*, 989 F.3d at 1222–23.

<sup>238</sup> *Authors Guild*, 804 F.3d at 224.



a query about a historical fact, taking the information from the author’s book.<sup>239</sup> “The fact that, in the case of the student’s snippet search, the information came embedded in three lines of [the original text], which were superfluous to the searcher’s needs, would not change the taking of an unprotected fact into a copyright infringement.”<sup>240</sup> Similarly, in *Swatch Group Management*, the Second Circuit held that Bloomberg’s publication of a transcript and audio recording of Swatch’s earnings call inflicted no harm to Swatch’s *copyright* interest in the content of the earnings call, as distinct from the uncopyrightable facts contained therein.<sup>241</sup> The purpose and character of the use appeared to influence the court’s determination of the fourth factor.<sup>242</sup>

By contrast, in *Los Angeles News Service v. KCAL-TV Channel 9*, the Ninth Circuit placed decisive weight on the fact that the plaintiff and defendant were in the same business and that systematic unlicensed rebroadcasting of plaintiff’s news footage would “adversely affect [plaintiff’s] creative incentives.”<sup>243</sup> And in *Harper & Row*, the possibility that readers satisfied with *The Nation*’s copied excerpts from Gerald Ford’s biography might only be interested in the facts did not prevent the Supreme Court from identifying both actual and potential market harm under the fourth factor.<sup>244</sup>

These guideposts indicate that some, but not all, news aggregation is likely to qualify as fair use. On the one hand, a news reporting purpose generally weighs in favor of fair use,<sup>245</sup> incorporating news materials into a searchable index could be considered “transformative” in the sense used in *Perfect 10* and *Authors Guild v. Google*,<sup>246</sup> the use of headlines and ledes alone covers a small percentage of a news article’s content, and the aggregated portion may at least in some cases be unlikely to substitute for the original.<sup>247</sup> To the extent that a reader is satisfied with the headline or lede, it is likely because, as the Second Circuit explained in *Authors Guild v. Google*, the reader only wanted the unprotected facts they reported.<sup>248</sup>

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<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> *Swatch Grp. Mgmt. Servs. Ltd.*, 756 F.3d at 85–86.

<sup>242</sup> The Second Circuit in *Swatch* distinguished Bloomberg’s conduct from that of copiers who published unauthorized translations of foreign-language news articles, finding the latter had “severely impeded the ability of news and research organizations to obtain payment for their expression, imperiling the economic foundation of vital industries.” *Id.* at 86.

<sup>243</sup> *L.A. News Serv. v. KCAL-TV*, 108 F.3d at 1121–23.

<sup>244</sup> *Harper & Row*, 471 U.S. at 567.

<sup>245</sup> See *Swatch Grp. Mgmt. Servs. Ltd.*, 756 F.3d at 83.

<sup>246</sup> See *Perfect 10, Inc.*, 508 F.3d at 1165; *Authors Guild*, 804 F.3d at 216–17.

<sup>247</sup> *Kelly*, 336 F.3d at 821–822; *Authors Guild*, 804 F.3d at 224.

<sup>248</sup> *Authors Guild v. Google*, 804 F.3d at 224. One commenter made this argument at the public roundtable. Tr. 193:12–17 (Dec. 9, 2021) (Jonathan Band, LCA) (“[I]f a person is satisfied by the headline, that obviously indicates that the person only wanted the facts, wasn’t interested in the expression, certainly not in the expression in the underlying article.”).

On the other hand, as with the *Los Angeles News Service* cases,<sup>249</sup> aggregators are usually not adding anything to the original headlines and ledes they take. In some cases, they use photographs in addition to the headline and lede.<sup>250</sup> As to the amount taken, some commentators argue that, qualitatively, headlines and ledes are often the heart of news articles.<sup>251</sup> And widespread aggregation may significantly impede the ability of press publishers to obtain payment for their expression. To the extent that aggregation provides a substitute that “satisfies most demand for the full original[]” and decreases the resources available for original news reporting,<sup>252</sup> this would cut against a finding of fair use.<sup>253</sup>

### c) The Server Test

One other defense that news aggregators seek to assert is the Ninth Circuit’s “server test.” Where an aggregator provides an “in-line link” to a photograph, lede, or headline, meaning that the material is visible from the aggregator’s service but still hosted solely on the news publisher’s server, courts applying the server test might hold that the aggregator has not reproduced the work and therefore not infringed one of the exclusive section 106 rights.<sup>254</sup> Courts in the Southern District of New York have lately rejected the server test, however, and would find the aggregator infringed, barring some other defense.<sup>255</sup> One commenter supportive of the these more recent rulings from the Southern District of New York states that “images displayed as part of a news summary or ‘snippet’ should be licensed by the news aggregator if viewable by the reader regardless of whether a code is used to link to the image or not.”<sup>256</sup>

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<sup>249</sup> *L.A. News Serv. v. Reuters*, 149 F.3d at 993–94; *L.A. News Serv. v. KCAL-TV*, 108 F.3d at 1121.

<sup>250</sup> Outside the search engine context analyzed in *Perfect 10*, 508 F.3d 1146 (9th Cir. 2007), and *Kelly*, 336 F.3d at 818, copying of news photographs is more likely to be fair where the photographs themselves (as objects) are the story. Compare *Nunez*, 235 F.3d at 22–23 (holding newspaper’s publication of controversial photos of Miss Puerto Rico Universe as part of story on controversy was fair use, in part because “the pictures were the story”), with *Monge*, 688 F.3d at 1175 (finding defendant’s unauthorized publication of celebrity wedding photos was minimally transformative because “[i]n contrast [with *Núñez*], the controversy here has little to do with photos”).

<sup>251</sup> See Ginsburg Initial Comments at 2; NMA Initial Comments at 16–17.

<sup>252</sup> See Ginsburg Initial Comments at 9.

<sup>253</sup> The use of artificial intelligence in news aggregation raises additional issues. News publisher commenters expressed concern about the systematic ingestion of news materials by artificial intelligence programs. See, e.g., News Corp Initial Comments at 14; MPA Additional Comments at 5; NMA, Additional Comments Submitted in Response to U.S. Copyright Office’s Nov. 9, 2021, Notice of Inquiry at 14–15 (Jan. 5, 2022) (“NMA Additional Comments”). Whether and when the systematic ingestion of copyrighted works for purposes of training an artificial intelligence may be fair use are important questions, but not specific to the press-publishing space. The Office is not aware of any infringement suit based on mass ingestion of copyrighted works to train an artificial intelligence.

<sup>254</sup> See *Perfect 10, Inc.*, 508 F.3d at 1160.

<sup>255</sup> See *Goldman*, 302 F. Supp. 3d at 595–96; *Nicklen v. Sinclair Broadcast Grp., Inc.*, 551 F. Supp. 3d 188, 195–96 (S.D.N.Y. 2021).

<sup>256</sup> Digital Media Licensing Association, Additional Comments Submitted in Response to U.S. Copyright Office’s Nov. 9, 2021, Notice of Inquiry at 4 (Jan. 5, 2022) (“Digital Media Licensing Association Additional Comments”).

## 2. Other Existing Protections for News Content

Press publishers' mechanisms for protecting their content are not limited to copyright law. First, they have several technical and commercial means of preventing aggregation of their content. They can lock it behind paywalls and control whether it is accessible to web crawlers or how it can be shared on some services.<sup>257</sup> According to Google, "if a news site (or any other site for that matter) does not want to show up or wants to control what is shown on Google, they can choose to do so using the robots.txt exclusion protocol or other forms of standard HTML markup."<sup>258</sup>

To the extent that aggregators ignore protective measures like paywalls or crawler exclusions, press publishers may have legal recourse. Commenters noted that circumvention of technological protection measures, such as a paywall, could lead to liability under section 1201 of Title 17.<sup>259</sup> If a publisher's user license forbids aggregation, an aggregator might also be liable for breach of contract or trespass to chattels.<sup>260</sup>

One historical form of legal protection for press publishers that most commenters agreed is no longer relevant is the tort of "hot news misappropriation."<sup>261</sup> This cause of action, established

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<sup>257</sup> Meta states that it gives publishers the ability to determine what photo or article text, if any, will be displayed when users share a link to their articles on Facebook. Meta Initial Comments at 5.

<sup>258</sup> Google Initial Comments at 4. News publishers state that using the robots.txt exclusion would be "suicidal" because it would not merely prevent Google from displaying snippets of the article in Google Search, but would prevent the publisher's content from being discoverable via Google Search at all. NMA, WHITE PAPER: HOW GOOGLE ABUSES ITS POSITION AS A MARKET DOMINANT PLATFORM TO STRONG-ARM NEWS PUBLISHERS AND HURT JOURNALISM 22 (2020), reproduced within NMA Initial Comments Appendix: Part 1. A scholarly article appended to the News Media Alliance's initial comments called the robots.txt exclusion a "very blunt instrument" because it does not allow publishers to make fine-grained distinctions about when to permit crawling of their content. RICKETSON & GINSBURG, INTELLECTUAL PROPERTY IN NEWS? WHY NOT? 19, reproduced within NMA Initial Comments Appendix: Part 3. In 2006, a federal district court held that a copyright owner's knowing decision not to use a "no-archive" tag to instruct Google not to cache his website amounted to an implied license for Google to provide access to his website via cached links. *Field v. Google, Inc.*, 412 F. Supp. 2d 1106, 1116 (D. Nev. 2006).

<sup>259</sup> See LCA Initial Comments at 3; Tr. at 68:18–21 (Danielle Coffey, NMA) ("Under 1201 of the DMCA, we [publishers] can actually protect access to our content, notwithstanding whether that content is protected by fair use."); see also *MDY Indus., LLC v. Blizzard Entm't, Inc.*, 629 F.3d 928 (9th Cir. 2010) (discussing the parameters and legislative history of § 1201). One commenter suggested that an aggregator who violated publishers' technological protection measures might also face liability under the Computer Fraud and Abuse Act or tort law. Tr. at 198:11–23 (Dec. 9, 2021) (Jonathan Band, LCA) ("If [publishers] use technological protections, you know, there's the Computer Fraud and Abuse Act, there's trespass to chattel. . . . [E]very state, just about, I believe, has its own version of a Computer Fraud and Abuse Act which prohibits unauthorized access to information."). Cf. *HiQ Labs v. LinkedIn Corp.*, No. 17-16783, slip. op. at 40–42 (9th Cir. Apr. 18, 2022) (holding that the CFAA does not criminalize unwanted scraping of public websites but noting that "state law trespass to chattels claims may still be available . . . [a]nd other causes of action, such as copyright infringement, misappropriation, unjust enrichment, conversion, breach of contract, or breach of privacy, may also lie").

<sup>260</sup> LCA Initial Comments at 3–4 (citing *Register.com v. Verio*, 356 F.3d 393 (2d Cir. 2004)).

<sup>261</sup> See Tr. at 68:6–13 (Dec. 9, 2021) (Danielle Coffey, NMA) ("It is still viable in the states. However, because of a string of court cases, it is not a useful tool."); Tr. at 69:14–70:9 (Dec. 9, 2021) (Jane C. Ginsburg, consultant to NMA)

by the Supreme Court in *International News Service v. Associated Press* during World War I, bars free riding on a competitor's investment in time-sensitive news gathering at the moment when the competitor was poised to reap the rewards.<sup>262</sup> Because *International News Service* was based on no-longer extant federal common law<sup>263</sup> and pre-dated the 1976 Copyright Act and early-20th-century changes in First Amendment jurisprudence,<sup>264</sup> this tort's continued viability is unclear. In one of the first modern cases to consider a hot news misappropriation claim under state law, the Second Circuit in *NBA v. Motorola* held that only a narrow version of the cause of action survived preemption by the Copyright Act.<sup>265</sup> Most courts faced with hot news misappropriation claims since *Motorola* have found them to be either preempted or insufficiently proven.<sup>266</sup>

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("[T]he hot news doctrine wouldn't really be applicable to news aggregation because, while some of its elements, notably, the threat to the business of the source of the content, is present, at least many so say, the essential hotness, heat or timeliness which underlies the hot news doctrine isn't really at issue here.").

<sup>262</sup> *Int'l News Serv.*, 248 U.S. at 230–31.

<sup>263</sup> See *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938) (holding that there is no federal general common law).

<sup>264</sup> See *Abrams v. United States*, 250 U.S. 616 (1919); *Schenck v. United States*, 249 U.S. 47 (1919).

<sup>265</sup> *NBA v. Motorola, Inc.*, 105 F.3d 841, 845 (2d Cir. 1997) (limiting hot news claims to cases where: "(i) a plaintiff generates or gathers information at a cost; (ii) the information is time-sensitive; (iii) a defendant's use of the information constitutes free-riding on the plaintiff's efforts; (iv) the defendant is in direct competition with a product or service offered by the plaintiffs; and (v) the ability of other parties to free-ride on the efforts of the plaintiff or others would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened."); see also *id.* at 853 (explaining that the "extra elements" needed for a hot news claim to survive preemption are "(i) the time-sensitive value of factual information, (ii) the free-riding by a defendant, and (iii) the threat to the very existence of the product or service provided by the plaintiff").

<sup>266</sup> See, e.g., *Brantley v. Epic Games, Inc.*, 463 F. Supp. 3d 616, 626 (D. Md. 2020); *IPOX Schuster, LLC v. Nikko Asset Mgmt. Co.*, 304 F. Supp. 3d 746, 757 (N.D. Ill. 2018); *Thousand Oaks Barrel Co. v. Deep S. Barrels LLC*, 241 F. Supp. 3d 708, 725 (E.D. Va. 2017) (holding Virginia does not recognize the tort of hot news misappropriation); *Scrappost, LLC v. Peony Online, Inc.*, No. 14-14761, 2017 WL 697028, at \*8 (E.D. Mich. Feb. 22, 2017); *World Chess US, Inc. v. Chessgames Servs. LLC*, No. 16 CIV. 8629 (VM), 2016 WL 7190075, at \*4 (S.D.N.Y. Nov. 22, 2016); *Ste. Genevieve Media, LLC v. Pulitzer Mo. Newspapers, Inc.*, No. 1:16 CV 87 ACL, 2016 WL 6083796, at \*5 (E.D. Mo. Oct. 18, 2016). But see *Dow Jones & Co. v. Real-Time Analysis & News, Ltd.*, No. 14-CV-131, 2014 WL 4629967, at \*7 (S.D.N.Y. Sept. 15, 2014), report and recommendation adopted, No. 14-CV-131, 2014 WL 5002092 (S.D.N.Y. Oct. 7, 2014) (granting damages on plaintiff's hot news misappropriation claim). One commenter noted that, while the hot news doctrine is still a viable claim under state and common law, "courts have narrowly limited *International News Service*, holding that federal copyright law's cardinal rule that facts may be freely copied preempts applications of the hot news misappropriation tort in cases that are not on all fours with the 1918 ruling." Netanel, 34 HARV. J.L. & TECH. at 499. Another commenter suggested that, in order to restore protections for hot news and avoid the preemption problem, "Congress would have to amend the Copyright Act. The most logical way to accomplish such a change would be to simply add a line in the fair use doctrine to clarify that the idea and expression provisions do not apply to hot news facts, and to then note that hot news stories would not be subject to the fair use provision for twenty-four hours after they are first published." Ryan T. Holte, *Restricting Fair Use to Save the News: A Proposed Change in Copyright Law to Bring More Profit to News Reporting*, 13 J. TECH. L. & POL'Y 1, 22 (2008), reproduced within Hon. F. Scott Kieff, Additional Comments Submitted in Response to U.S. Copyright Office's Nov. 9, 2021, Notice of Inquiry Attachment at 22 (Nov. 26, 2021) ("Kieff Additional Comments"). The Office notes that the idea/expression dichotomy is constitutional in nature and could not be abridged by a change to the fair use doctrine as codified at 17 U.S.C. § 107.

Even assuming that a narrow version of the tort survives, Professor Ginsburg points out that it would have little application to news aggregators, because they are not stealing press publishers' scoops by beating them to market but only acting after articles are published.<sup>267</sup>

## *B. Other Issues Raised by Commenters*

### **1. Bargaining Power**

Many commenters linked publishers' concerns about unlicensed aggregation to their relative lack of bargaining power with respect to large digital platforms. They focused on two companies in particular: Google and Facebook.<sup>268</sup> Google and Facebook are now among the preferred news sources for many Americans and generate a majority of referrals to news sites,<sup>269</sup> while also running the national advertising networks that newspapers rely on to serve ads on their websites.<sup>270</sup>

Google has become the leader in online search.<sup>271</sup> According to a U.S. House Judiciary Committee report, it is also a major player in the ad exchanges that advertisers and publishers use to buy, sell, and place digital advertisements.<sup>272</sup> Facebook enjoys a similarly lofty position

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<sup>267</sup> Tr. at 69:14–70:9 (Dec. 9, 2021) (Jane C. Ginsburg, consultant to NMA); RICKETSON & GINSBURG, *INTELLECTUAL PROPERTY IN NEWS? WHY NOT?* 24, reproduced within NMA Initial Comments at Appendix: Part 3.

<sup>268</sup> See generally Singer Additional Comments (arguing Google and Facebook have monopsony power over press publishers and push advertising revenue for publishers below competitive levels); NMA Initial Comments at 8–9 (describing Google and Facebook's dominance over digital advertising and the significance of their aggregation practices). See also NMA, *WHITE PAPER: HOW GOOGLE ABUSES ITS POSITION AS A MARKET DOMINANT PLATFORM TO STRONG-ARM NEWS PUBLISHERS AND HURT JOURNALISM* 22, reproduced within NMA Initial Comments at Appendix: Part 1; Netanel, 34 *HARV. J.L. & TECH.* at 475 (“But in recent years one factor looms particularly large: the overwhelming market power of digital platforms, principally Google and Facebook. As detailed below, digital platforms inflict multiple wounds on news publishers.”).

<sup>269</sup> Benton, *Is Facebook Really A 'News Powerhouse' Again, Thanks to Coronavirus? (No More Than It Was Before)*, NIEMANLAB (showing that over the twelve preceding months, Google and Facebook reliably accounted for over 75% of outside referrals to news sites in the parse.ly network).

<sup>270</sup> See Ben Morrisroe, *GoogleAdX or AdSense? Which Advertising Platform is Better for You?* PUBLIFT (Feb. 1, 2022), <https://www.publift.com/blog/google-adx-vs-google-adsense> (describing Google's advertising exchange platforms); Ana Gotter, *Everything You Need to Know About Facebook's Audience Network*, ADESPRESSO (Dec. 19, 2017), <https://adespresso.com/blog/facebook-audience-network/> (describing Facebook Audience Network).

<sup>271</sup> See Singer Additional Comments at 9 (“As of July 2020, Google accounted for a combined 89 percent of the U.S. desktop search (81 percent) and mobile search (94) markets.”). Google has obtained default placement for its search service in a majority of web browsers and mobile operating systems. MAJORITY STAFF REP. at 82; see also *id.* at 73 (noting that “[i]n October 2020, the Department of Justice Antitrust Division commenced litigation to challenge several” of Google's agreements establishing its search engine as the default on web browsers and mobile operating systems). Google is also one of only two English-language search engines to maintain a comprehensive web page index—most other search engines must negotiate access through Google. *Id.* at 78–79. Multiple governmental bodies have characterized Google as a monopoly in general online search. See, e.g., *id.* at 177; Singer Additional Comments at 8–9 (describing findings of UK, German, and Australian competition authorities).

<sup>272</sup> MAJORITY STAFF REP. at 206. Google “runs the leading ad exchange, while also running buy-side and sell-side intermediary platforms trade [sic] on the exchange.” *Id.* at 206. According to one estimate, Google is involved in

among social media networks.<sup>273</sup> Google and Facebook’s preeminence in search and social media makes them the largest sources of traffic to press publishers.<sup>274</sup> Reports from the U.S. House Judiciary Committee and from Australia’s Competition and Consumer Commission both described Google and Facebook as “gateways” to online news media.<sup>275</sup> Even some of the largest and best-known publishers claim they depend on Google “for up to 80–95% of their traffic.”<sup>276</sup> Under the circumstances, two scholars of digital journalism concluded that Google

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nearly 70 percent of all online advertising technology transactions. See NMA Initial Comments at 8–9 (citing *Desktop & Mobile Search Engine Market Share United States of America, Jan. 2009 to Sep. 2020*, STATCOUNTER, <https://gs.statcounter.com/search-engine-market-share/desktopmobile/unitedstates-of-america/#monthly-200901-202009> (last visited Nov. 19, 2021); Jeff Desjardins, *How Google Retains More Than 90% of Market Share*, BUSINESS INSIDER (Apr. 23, 2018), <https://www.businessinsider.com/how-google-retains-more-than-90-of-market-share-2018-4>; *Big Tech Says Publishers Keep Majority of Ad Revenue, But Experience Suggests Otherwise*, NEWS MEDIA ALLIANCE (Nov. 16, 2020), <https://www.newsmediaalliance.org/google-ad-revenue-op-ed-70-percent/>).

<sup>273</sup> According to one commenter, “[a]s of December 2019, Facebook had 1.8 billion monthly active persons (MAP), [Facebook-owned] WhatsApp had 2.0 billion MAP, and [Facebook-owned] Instagram had 1.4 billion MAP.” Singer Additional Comments at 10. Facebook’s closest social networking competitor had fewer than 600 million monthly active users. See *id.* Like Google, Facebook also runs a large advertising network, taking in nearly 45% of all digital display advertising revenues in 2020. Gale Stocking & Maya Khuzman, *Digital News Fact Sheet*, PEW RESEARCH CENTER (July 27, 2021), <https://www.pewresearch.org/journalism/fact-sheet/digital-news/> (Google came in second at 10% of digital display advertising revenue). A House Judiciary Majority Staff Report on competition in digital markets found that Facebook has monopoly power in the market for social networking and advertising in the social networking market. MAJORITY STAFF REP. 170.

<sup>274</sup> See Rani Molla, *Google Is Replacing Facebook’s Traffic to Publishers*, VOX (Feb. 15, 2018), <https://www.vox.com/2018/2/15/17013618/google-facebook-traffic-publishers-amp-chartbeat> (“Referral traffic made up 47 percent of publisher traffic so far this year, according to Chartbeat, with Google and Facebook accounting for most of it.”). By contrast, Google claims that news-related queries make up just 2 percent of queries on Google Search globally and that Google does not make money on the majority of searches, implying that news aggregation is a negligible part of its business. Tr. at 36:7–11 (Dec. 9, 2021) (Kate Sheerin, Google). As another commenter put it, “Google doesn’t need the *Fort Worth Star Telegram*, but the *Star Telegram* needs Google.” Tr. at 94:1–3 (Dec. 9, 2021) (Hal Singer, Econ One, consultant to NMA). Press publishers disputed Google’s numbers and state that news represents 36 percent of Google searches. Tr. at 37:1–5 (Dec. 9, 2021) (Danielle Coffey, NMA).

<sup>275</sup> See MAJORITY STAFF REP. at 63 (“Due to their outsized role as digital gateways to news, a change to [Google’s or Facebook’s] algorithm can significantly affect the online referrals to news publishers.”); AUSTL. COMPETITION & CONSUMER COMM’N, DIGITAL PLATFORMS INQUIRY: FINAL REPORT 206 (2019), <https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf> (“Google and Facebook are the gateways to online news media for many consumers.”); see also OECD, DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS, COMPETITION COMMITTEE, NEWS MEDIA AND DIGITAL PLATFORMS—NOTE BY THE UNITED STATES 3 (2021), [https://one.oecd.org/document/DAF/COMP/WD\(2021\)72/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2021)72/en/pdf); NMA Initial Comments at 10 (“Due to the gatekeeper role of the dominant platforms, publishers often have no other option but to allow aggregators to use their content for free because they are dependent on even the minimal amount of traffic the aggregators send to publishers’ websites.”); Netanel, 34 HARV. J.L. & TECH., at 475–76; Singer Additional Comments at 8–9; SCHERER & CHO, CONG. RSCH. SERV., R47018, STOP THE PRESSES? NEWSPAPERS IN THE DIGITAL AGE 2 (“Business decisions by news aggregators such as Apple News and Google News and by social media platforms such as Facebook also affect the viability of newspapers.”); NPR Initial Comments at 8 (“And because large platforms control a large market share, NPR must rely on these platforms to reach key portions of its audience. NPR and other news producers on these platforms are at the mercy of these platforms if they unilaterally opt to change their platform rules.”).

<sup>276</sup> MAJORITY STAFF REP. at 83. As an illustration of Google and Facebook’s influence, when Google updated its search algorithm in June 2019, one major news publisher’s online traffic dropped “by close to 50%.” *Id.* at 63. Similarly, one

and Facebook “now control what audiences see and who gets paid for their attention, and even what format and type of journalism flourishes.”<sup>277</sup> Publishers commenting on this Study identified this power imbalance as perhaps the most significant obstacle to asserting protections against aggregation.<sup>278</sup>

## 2. Copyright Office Registration Policies

Several news publishers in their comments voiced frustration that, even if their works are protected by copyright, Copyright Office registration practices relating to dynamic website content can make it difficult to enforce their rights.<sup>279</sup> The Copyright Act requires U.S. rightsholders to register their works before suing for infringement.<sup>280</sup> To pursue statutory damages, the rightsholder ordinarily must register either within three months of initial publication or prior to the alleged infringement.<sup>281</sup>

The Office’s current group registration policies for print and electronic versions of newspapers<sup>282</sup> do not cover dynamic websites.<sup>283</sup> Publishers raised concerns that this exclusion negatively impacts the registration of articles that are updated repeatedly and never appear in the print or ePrint versions of that day’s newspaper.<sup>284</sup> Publishers also assert that attempting to register

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analytics firm found that Facebook algorithm adjustments in 2018 “has been estimated to have decreased referral traffic from Facebook to news publishers’ sites by one third.” Singer Additional Comments at 3 n.6.

<sup>277</sup> EMILY BELL & TAYLOR OWEN, COLUMBIA JOURNALISM SCH., TOW CTR. FOR DIGIT. JOURNALISM, *THE PLATFORM PRESS: HOW SILICON VALLEY REENGINEERED JOURNALISM* 9 (2017), <https://academiccommons.columbia.edu/doi/10.7916/D8R216ZZ>. At the public roundtable, there was some dispute as to how advertising revenue is split between Google and news publishers. A Google representative reported that news publishers “keep over 95 percent of the digital advertising revenue they generate when using Google Ad Manager.” Tr. at 26:12–15 (Dec. 9, 2021) (Kate Sheerin, Google). A representative of a news publisher organization claimed that the number was actually 30 percent. Tr. at 37:1–5 (Dec. 9, 2021) (Danielle Coffey, NMA).

<sup>278</sup> See *infra* Section IV.C.

<sup>279</sup> See, e.g., News Corp Initial Comments at 9–10; NMA Initial Comments at 19; MPA Additional Comments at 4.

<sup>280</sup> See 17 U.S.C. § 411; *Fourth Est. Pub. Benefit Corp. v. Wall-Street.com, LLC*, 139 S. Ct. 881, 892 (2019) (interpreting the Copyright Act as requiring that the Copyright Office return a registration certificate, or refuse registration, before an infringement suit is filed).

<sup>281</sup> 17 U.S.C. § 412; see also *Southern Credentialing Support Servs., LLC v. Hammond Surgical Hosp., LLC*, 946 F.3d 780, 786–87 (5th Cir. 2020).

<sup>282</sup> 37 C.F.R. § 202.4(e) (allowing group registration of a month’s worth of issues in PDF form, with each issue being a work made for hire).

<sup>283</sup> Group Registration of Newspapers, 82 Fed. Reg. 51,369, 51,373 (proposed Nov. 6, 2017) (“By contrast, a newspaper Web site would not satisfy this requirement. Newspaper Web sites typically add, archive, and/or replace content on a continuing basis. As such, they are not fixed and distributed as discrete, self-contained works. Moreover, these updates are rarely distributed on an established schedule, and rarely contain numerical or chronological designations distinguishing one update from the next. For this reason, Web sites are not considered ‘newspapers’ for purposes of registration.”).

<sup>284</sup> See Tr. at 40:4–20 (Dec. 9, 2021) (Keith Kupferschmid, Copyright Alliance); see also Copyright Alliance, Additional Comments Submitted in Response to U.S. Copyright Office’s Nov. 9, 2021, Notice of Inquiry at 11 (Jan. 5, 2022)

individual articles would be time-consuming and potentially still leave gaps in coverage, if an article were later updated and a third party infringed only the new, updated content.<sup>285</sup>

The Office takes these concerns seriously and is considering how best to address them as part of its ongoing modernization initiative.

### *C. Effectiveness of Existing Protections*

Notwithstanding these limitations and concerns, news publishers have significant protections under existing U.S. copyright law. Their articles and photographs are generally copyrightable even if their constituent elements may not be.<sup>286</sup> While fair use allows a wide scope for quotation and may permit other reasonable uses, particularly of short snippets, it is unlikely to permit the use of long extracts or entire articles in most circumstances.<sup>287</sup> And outside of copyright law, news publishers have several other means to prevent unwanted aggregation.<sup>288</sup>

To be sure, news publisher comments include some criticisms of existing protections. But the most frequently recurring perspective in the comments, across all stakeholder groups, was that, although news publishers do have legal protections against aggregation, those protections are difficult to assert effectively *for reasons unrelated to copyright law*.<sup>289</sup> Reports indicate that Google and Facebook drive a majority of referral traffic to publishers' websites,<sup>290</sup> and press publishers have—implicitly or explicitly—recognized the importance of this traffic by declining to utilize robots.txt/opt out.<sup>291</sup> One trade association has opined that opting out would be “suicidal.”<sup>292</sup> The concern expressed by most news publishers is not particularly with Google and Facebook aggregating their content, but with the licensing terms the two platforms have been willing to offer. As Professor Ginsburg put it at the public roundtable: “All the copyright protection in the

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(“Copyright Alliance Additional Comments”); MPA Additional Comments at 4.

<sup>285</sup> See Tr. at 38:14–39:16 (Dec. 9, 2021) (Danielle Coffey, NMA) (describing website registration challenges).

<sup>286</sup> See *supra* Section IV.A.1.a.

<sup>287</sup> See *supra* Section IV.A.1.b.

<sup>288</sup> See *supra* Section IV.A.2.

<sup>289</sup> See, e.g., Tr. at 14:15–23 (Dec. 9, 2021) (Danielle Coffey, NMA) (“[W]e are forced to waive our ability to enforce our [intellectual property] rights because of the dominance of the platforms.”).

<sup>290</sup> See Molla, *Google is Replacing Facebook's Traffic to Publishers*, VOX.

<sup>291</sup> Google itself has noted that while publishers have control over whether their content appears on Google News using tools such as robots.txt and metatags, it “receive[s] many more requests for inclusion in Google News than for exclusion, because many publishers realize the advantage of their content being discovered by new readers or viewers.” Collado, *Google y los editores [Google and publishers]*, GOOGLE: BLOG OFICIAL DE GOOGLE ESPAÑA.

<sup>292</sup> NMA Initial Comments at 22; Tr. at 45:5–13 (Dec. 9, 2021) (Danielle Coffey, NMA) (describing opting out of Google in particular as a Hobson's choice: “It's like asking someone if they want air. Without it, we would receive no revenue, no exposure.”).



world is not going to help if the copyright owners have no choice but to agree to contractual terms that are very unfavorable to them.”<sup>293</sup>

## *D. Advisability of Adopting Additional Rights in the United States*

### **1. New Rights May Be Unnecessary**

A number of stakeholders argued that granting U.S. publishers a new right along the lines of the EU’s Article 15 is unnecessary because U.S. copyright law already offers similar protections. Article 15 gave EU press publishers reproduction and distribution rights in the content they publish—at least vis-à-vis “information society service providers”—that they previously did not have. As noted above, however, in the United States press publishers are in many cases considered the “authors” of the work of their reporters as a result of the work-made-for-hire doctrine.<sup>294</sup> In freelance situations, authors in the United States often assign ownership to the publisher.<sup>295</sup> Thus, in the view of many press publishers, the primary rationale for establishing Article 15 in the EU does not exist here, where they already have ownership rights in what they publish.<sup>296</sup> The Office concurs that comparable concerns are not present in the United States.

### **2. New Rights Are Likely to Be Ineffective Without a Change in the Competition Landscape**

Multiple commenters made the point that neither changes to copyright law nor creation of an ancillary press publishers’ right would be effective if press publishers lacked the bargaining power to insist on remuneration. Press publishers themselves advised that the problems journalism faces are primarily competition-related and that, as Professor Ginsburg put it, “even if you have uncontroverted copyright protection, if you can’t effectively bargain, that’s not going to get you very far.”<sup>297</sup>

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<sup>293</sup> Tr. at 33:3–6 (Dec. 9, 2021) (Jane C. Ginsburg, consultant to NMA).

<sup>294</sup> See, e.g., NMA Initial Comments at 24.

<sup>295</sup> See, e.g., *id.*

<sup>296</sup> See Tr. at 155:8–18 (Dec. 9, 2021) (Eric Schwartz, NMA) (“Yes, the EU adopted an ancillary right. But, if you pull back from that and take a look at what rights already exist for publishers in the United States—reproduction, distribution, public display—you’ll see that they—that a lot of what the European Union did lines up very neatly with what was already existing U.S. law. The main difference and the main motivator for the European Union is ownership questions. The European Union doesn’t have work for hire, whereas the U.S. law does.”).

<sup>297</sup> Tr. at 50:7–9 (Dec. 9, 2021) (Jane C. Ginsburg, consultant to NMA). See also News Corp Initial Comments at 16 (“But any recalibration of copyright and related law to address those gaps [in intellectual property protection] likely will prove ineffectual if the current imbalance in negotiating power between publishers and republishers of news content is not remedied.”); Tr. at 30:4–7 (Dec. 9, 2021) (Danielle Coffey, NMA) (“However, the broken marketplace, which is what we’re somewhat addressing here through copyright, but I think, in many ways, it’s more addressed through competition law.”). Cf. U.S. INT’L TRADE COMM’N, GLOBAL DIGITAL TRADE 1: MARKET OPPORTUNITIES AND KEY FOREIGN TRADE RESTRICTIONS 291–92 (2017), <https://www.usitc.gov/publications/332/pub4716.pdf> (“Small online publishers have been reluctant to demand fees from online platforms because they rely on traffic from those search engines, and industry experts have stated that ancillary copyright laws have not generated increased fees to

This theme was, unsurprisingly, echoed by commenters who opposed the creation of an ancillary press publishers' right.<sup>298</sup> Some commenters went further and argued not only that lack of competition, specifically in the online advertising space, was the primary problem for journalism, but that copyright was not an issue at all. "So this is a competition problem," said one roundtable participant, "it's not a copyright problem."<sup>299</sup> Professor Netanel made a similar point, asserting that:

Google and Facebook have devoured news publisher revenues due to the digital platforms' duopoly control of the digital advertising market. That would happen even if there were no Google News or other news aggregators.<sup>300</sup>

The publisher Axel Springer was the only commenter to wholeheartedly support the idea of the United States enacting an ancillary right for press publishers.<sup>301</sup> It proposed a right similar to Article 15 of the Directive, but broader.<sup>302</sup> Pointing to deals made in France and Germany since the passage of the Directive, Axel Springer maintained that the Article 15 right has put pressure on aggregators to conclude licensing agreements with press publishers,<sup>303</sup> and predicted that the same result would obtain in the United States.<sup>304</sup>

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publishers; rather, they have acted as a barrier to entry for news aggregators."). The News Media Alliance explained that, while they were not advocating *for* an ancillary press publisher right, they were not opposing it either. *See, e.g.*, NMA Initial Comments at 19–21; Tr. at 90:7 (Dec. 9, 2021) (Matthew Williams, NMA) ("We have not asked for an EU publisher's right."); Tr. at 155:6–8 (Dec. 9, 2021) (Eric Schwartz, NMA) ("I think it would be helpful for the Copyright Office to take a good look at Article 15 and a side by side with existing U.S. law."). *But see* Axel Springer Initial Comments at 9–10 ("The creation of an exclusive right for press publishers would be a powerful statement for the protection of the publisher freedom, original journalism and ultimately the freedom of press towards dominant online platforms.").

<sup>298</sup> *See, e.g.*, R Street-Niskanen Joint Initial Comments at 2 ("Attempting to redefine copyright to regulate digital platforms and their ability to aggregate news does little to address the changing market structure of news distribution and consumption."); Silbey Initial Comments at 1 ("More or stronger copyright—for press publishers or photojournalists—will not lead to an equitable or efficient redistribution of market power within the internet ecosystem.").

<sup>299</sup> Tr. at 91:16–17 (Dec. 9, 2021) (Hal Singer, Econ One, consultant to NMA).

<sup>300</sup> Neil Weinstock Netanel, Comments Submitted in Response to U.S. Copyright Office's Oct. 12, 2021, Notice of Inquiry at 1 (Nov. 11, 2021) ("Netanel Initial Comments").

<sup>301</sup> *See* Axel Springer Initial Comments at 9. Other rightsholder commenters referred to Art. 15 of the Directive but stopped short of advocating that it serve as a model for similar legislation in the U.S. *See, e.g.*, Authors Guild Initial Comments at 3; News Corp Initial Comments at 17. Additionally, while not endorsing an ancillary press publisher right, NPR proposed that "high-value assets" of a press publisher receive federal "hot news"-like protections for 72 hours after their initial publication or broadcast. *See* NPR Initial Comments at 12–13.

<sup>302</sup> *See* Axel Springer Initial Comments at 11–14 (explaining, for example, that its proposed right would include all periodicals, encompass "small parts" of press publications, and last for four years).

<sup>303</sup> *See id.* at 28–32.

<sup>304</sup> *See id.* at 17. Axel Springer also makes the point that "a right which is functionally equal to the European publishers' right would clear the way for protection of U.S. press publishers in Europe based on reciprocity." *Id.*

The Office shares the view that establishment of a new ancillary right alone is not likely to affect the licensing landscape. We note that, while Article 15 of the Directive does not itself mandate any negotiation right for press publishers, in practice several EU Member States have reinforced the right with competition law measures.<sup>305</sup>

### 3. Constitutional Concerns

Some commenters expressed concerns about ancillary copyright evading traditional, First Amendment-accommodating copyright limitations and thereby violating the First Amendment.<sup>306</sup> The Supreme Court has confirmed that traditional limits on copyrightability and exceptions to copyright protections—namely the idea/expression dichotomy and the fair use doctrine—constitute “built-in First Amendment accommodations” in copyright law.<sup>307</sup> So long as Congress does not alter these “traditional contours of copyright protection, further First Amendment scrutiny is unnecessary.”<sup>308</sup> But statutes that attempt to evade or modify these accommodations may trigger such scrutiny.

The Computer & Communications Industry Association (“CCIA”) and the Internet Association (“IA”) maintain that these “traditional contours of copyright protection” would likely be absent

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<sup>305</sup> See *supra* section III.B.3 (discussion of France’s use of competition enforcement along with implementation of Article 15); Ula Furgal & Giulia Priora, *Empowered to Negotiate or Obligated to Contract? Lessons from the Italian Implementation of the Press Publishers’ Right*, KLUWER COPYRIGHT BLOG (Apr. 14, 2022), [copyrightblog.kluweriplaw.com/2022/04/14/empowered-to-negotiate-or-obliged-to-contract-lessons-from-the-italian-implementation-of-the-press-publishers-right/](https://copyrightblog.kluweriplaw.com/2022/04/14/empowered-to-negotiate-or-obliged-to-contract-lessons-from-the-italian-implementation-of-the-press-publishers-right/) (“Under the Italian version of art. 15 Directive, not only press publishers are given a specific neighboring right for the online use of their press content. Platforms are also under the obligation to contract with the press publishers requesting so and pay them a fair remuneration.”).

<sup>306</sup> The Library Copyright Alliance raised an additional concern about what Constitutional power Congress could use to pass an ancillary copyright or similar law. See LCA Initial Comments at 9–13. In LCA’s view, Congress could not pass such a law under Article I, Section 8, clause 8 of the Constitution (the Intellectual Property Clause), because the Supreme Court has indicated that the Intellectual Property Clause does not permit protection of facts or unoriginal expression. See *Feist*, 499 U.S. at 346. Cf. *Graham v. John Deere Co.*, 383 U.S. 1, 5 (1966) (stating that the IP Clause serves as “both a grant of power and a limitation”). LCA bases much of its analysis on a comparison between an earlier attempt to create *sui generis* protection for databases and a putative ancillary right for press publishers. See LCA Initial Comments at 9–11. If Congress could not enact an ancillary right under the Intellectual Property Clause, LCA argues, it also could not enact it under a different enumerated power. LCA cites *Railway Labor Executives’ Ass’n v. Gibbons* for the proposition that Congress cannot evade an affirmative limitation in one clause of the Constitution by resort to another clause. See LCA Initial Comments at 11–13 (citing *Gibbons*, 455 U.S. 457, 468–469 (1982)). The Copyright Office notes that post-*Gibbons* cases on inter-clause conflict and copyright-related laws have distinguished *Gibbons* and found that the legislation in question was a legitimate exercise of Commerce Clause power. See *United States v. Moghadam*, 175 F.3d 1269, 1280 (11th Cir. 1999) (upholding anti-bootlegging statute); *United States v. Martignon*, 492 F.3d 140, 150–51 (2d Cir. 2007) (same).

<sup>307</sup> See *Eldred v. Ashcroft*, 537 U.S. 186, 219–21 (2003); *Golan v. Holder*, 565 U.S. 302, 329 (2012). Cf. *Harper & Row*, 471 U.S. at 560 (rejecting First Amendment challenge “[i]n view of the First Amendment protections already embodied in the Copyright Act’s distinction between copyrightable expression and uncopyrightable facts and ideas, and the latitude for scholarship and comment traditionally afforded by fair use”).

<sup>308</sup> *Eldred*, 537 U.S. at 221.

in an ancillary right, thus subjecting it to heightened First Amendment scrutiny.<sup>309</sup> For example, Axel Springer proposed in its comments to this Study a *sui generis* right with no originality requirement<sup>310</sup> that would extend to “the smallest parts”<sup>311</sup> of the press publication and not include a fair use defense for online news aggregators.<sup>312</sup> This type of protection would likely contradict copyright’s “traditional contours” and the Supreme Court’s holding that the Constitution “leaves no room for a statutory monopoly over information and ideas.”<sup>313</sup> An ancillary right similar to that in Article 15 of the Directive, which contains limitations on its application to “mere facts”<sup>314</sup> and an exception for “quotation for purposes such as criticism or review,”<sup>315</sup> on the other hand, would more closely track the “traditional contours” of U.S. copyright law and thus would be less likely to trigger heightened scrutiny.<sup>316</sup> Given the uncertainty over what form an ancillary right in the United States could take, the Office does not offer a view on a hypothetical First Amendment challenge but merely notes that a challenge would be likely.

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<sup>309</sup> See CCIA-IA Joint Initial Comments at 20 (“The measures discussed in the NOI would [alter the traditional contours of copyright protection], regardless of whether they take the form of an amendment to the Copyright Act or a new ancillary right. And they would do so in ways that reduce or eliminate precisely the ‘built-in free speech safeguards’ that the Court suggested were critical to copyright law’s compatibility with the First Amendment.”).

<sup>310</sup> Axel Springer Initial Comments at 12. Axel Springer’s version of the right would be an “expression of the investment of the press publisher,” *id.* at 13, a clear departure from U.S. copyright law, which does not reward the mere “sweat of the brow.” See *Feist*, 499 U.S. at 359–60.

<sup>311</sup> Axel Springer Initial Comments at 12.

<sup>312</sup> *Id.* at 9.

<sup>313</sup> *Harper & Row*, 471 U.S. at 582, quoted in LCA Initial Comments at 14.

<sup>314</sup> Directive recital 57.

<sup>315</sup> *Id.* This exception to some extent parallels the opening text of the U.S. fair use doctrine codified as codified at 17 U.S.C. § 107. See 17 U.S.C. § 107 (“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 . . . scholarship, or research, is not an infringement of copyright”).

<sup>316</sup> The CCIA-IA joint comments cite several additional First Amendment concerns. For example, CCIA-IA argues that any attempt to backstop an ancillary right with a requirement that aggregators carry (and therefore pay for) certain content would trigger heightened scrutiny. CCIA-IA Joint Initial Comments at 23–25. But the Office notes that an ancillary right standing alone would not entail a “must carry” obligation or compel speech. CCIA-IA also asserts that an ancillary right for press publishers would trigger heightened scrutiny insofar as it singled out some news media (aggregators) for differential treatment and treated the content category “news” differently from other sorts of speech. *Id.* at 21–22. A detailed analysis of whether an ancillary copyright or similar law would face heightened scrutiny and how it would fare would take this Report beyond the scope of Congress’ request, and, given the other findings in this Report, the Office does not believe it is necessary.

#### 4. Treaty Issues

A new publishers' right that set aside traditional copyright limitations could also raise questions regarding consistency with the United States' international obligations. As mentioned above, the Berne Convention provides:

[I]t shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries.<sup>317</sup>

Some scholars have argued that this is a mandatory "right of quotation" and must be permitted even with respect to *sui generis* protections such as ancillary copyright.<sup>318</sup>

Assuming that Berne's quotation exception must apply even to *sui generis* publisher protections, there is still a debate as to its scope<sup>319</sup> and whether news aggregators' conduct falls within it. Professors Sam Ricketson and Jane C. Ginsburg argue that at least some aggregators will not qualify for Berne's quotation right because they fail to credit the authors of the aggregated articles.<sup>320</sup> More broadly, quotation must be "compatible with fair practice,"<sup>321</sup> raising fact-specific questions about the extent and nature of the use.

Given these interpretive uncertainties, a publishers' right that prevented unlicensed aggregation of headlines and ledes and lacked traditional copyright limitations might raise questions as to its consistency with the Berne Convention.

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<sup>317</sup> Berne Convention art. 10(1).

<sup>318</sup> TANYA APLIN & LIONEL BENTLY, GLOBAL MANDATORY FAIR USE: THE NATURE AND SCOPE OF THE RIGHT TO QUOTE COPYRIGHT WORKS 55 (2020) ("[I]n any situation where a person proposes to quote from a published authorial work such as a newspaper article, cartoon or photograph, the press publishers' right may not be invoked to restrict or prevent such lawful quotation. Were it to do so, there would be a breach of Article 10(1) Berne."); *see also* LCA Initial Comments at 7–9. Other scholars suggest that the Berne quotation right might not preempt unfair competition law remedies or a right of remuneration. RICKETSON & GINSBURG, INTELLECTUAL PROPERTY IN NEWS? WHY NOT? 22–23; *see also* LCA Initial Comments at 8–9. Still other academics question whether the exception is, in fact, mandatory. *See, e.g.,* MIHÁLY FICSOR, THE LAW OF COPYRIGHT AND THE INTERNET ¶ 5.09 (2002); JØRGEN BLOMQVIST, PRIMER ON INTERNATIONAL COPYRIGHT AND RELATED RIGHTS 159–60 (2014).

<sup>319</sup> The precise scope of "quotation" is ambiguous (how much can be copied?), but Professor Sam Ricketson and Jane Ginsburg assert that "even concepts of quotations limited to modest . . . excerpts would accommodate the copying of an article's headline and initial one or two sentences—so long as the national law did not consider the headlines to be works in themselves." RICKETSON & GINSBURG, INTELLECTUAL PROPERTY IN NEWS? WHY NOT? 20.

<sup>320</sup> *Id.* at 22.

<sup>321</sup> Berne Convention art. 10(1); RICKETSON & GINSBURG, INTELLECTUAL PROPERTY IN NEWS? WHY NOT? 21.

## 5. Additional Policy Concerns on Which This Report Makes No Findings

Commenters raised two additional policy concerns related to the adoption of an ancillary copyright. The first is a possible reduction in information-sharing and public conversation that relies on aggregation.<sup>322</sup> The second is that, due to transaction costs and the likely prioritization by platforms of doing deals with major publishers, any revenue might flow to press publications that already have large audiences, thus exacerbating the problem of “news deserts.”<sup>323</sup> Other commenters disagreed, noting that a collective bargaining and management framework could advance the interests of smaller publishers.<sup>324</sup> Because the Office does not here recommend the adoption of a new copyright-related protection, we did not make any findings with respect to these concerns.

Similarly, the Office made no findings with respect to the interaction between new protections and the existing rights of authors and visual artists. The Office received few comments on the subject and determined that further analysis was unnecessary at this time in light of our other findings and recommendations.

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<sup>322</sup> See generally Engine Additional Comments; Reddit Additional Comments.

<sup>323</sup> See, e.g., CCIA-IA Joint Initial Comments at 10; cf. SCHERER & CHO, CNG. RSCH. SERV., STOP THE PRESSES? NEWSPAPERS IN THE DIGITAL AGE 13 (“For example, when Meta (formerly Facebook Inc.) launched a news section on its platform Facebook, it reportedly paid licensing fees to only some of the publishers whose articles it republished, with the amount depending on the size of the publisher.” (footnote omitted)); U.S. INT’L TRADE COMM’N, GLOBAL DIGITAL TRADE 1: MARKET OPPORTUNITIES AND KEY FOREIGN TRADE RESTRICTIONS 291–92 (“[I]ndustry experts have stated that ancillary copyright laws have not generated increased fees to publishers; rather, they have acted as a barrier to entry for news aggregators.”).

<sup>324</sup> See, e.g., Singer Additional Comments at 27–28; Tr. at 111:1–9 (Dec. 9, 2021) (Ole Jani, Axel Springer) (“[W]hether this law benefits large publishers rather than small publishers, this is definitely not the case. It benefits them all, and it's then a matter of how to enforce it.”).

## V. CONCLUSION

In this Study, the Copyright Office has evaluated existing copyright protections for press publishers and considered the advisability of adding new protections, similar to those recently adopted in Europe, designed to strengthen publishers' ability to exclude third-party online services from aggregating their news content.

The Office concludes that press publishers have significant protections under existing U.S. copyright law, subject to important Constitutional and statutory limitations, but that publishers' ability to assert those protections is affected by their bargaining power vis-à-vis news aggregators. Publishers often own the copyright in articles they publish; less frequently, they may own rights in photographs accompanying those articles. All commenters agree that a publisher would in many cases have a *prima facie* case of copyright infringement against an aggregator that reproduced substantial excerpts of a news article.

Copyright law does, however, permit unlicensed uses of news content, by news aggregators or others, under certain circumstances. Some elements of news articles are not protectable as a matter of Constitutional law—because they are facts or because the expression merges with the facts described. Smaller elements like headlines may not be copyrightable under the words and short phrases doctrine. Even where an aggregator reuses protectable expression, the fair use doctrine may offer a defense in many circumstances. These doctrines are more likely to allow the reuse of news content where only the headline or the lede is taken. But notwithstanding these limitations, case law suggests that press publishers can, in some instances, use copyright to prevent third parties from using substantial excerpts of the publishers' content.

Press publishers also have certain protections outside of copyright law. They have the technical ability to prevent many forms of aggregation through paywalls, password protection, or use of the robots.txt exclusion protocol to stop most web crawlers. In some cases, they likely have legal causes of action to remedy violations of these non-copyright protections.

Despite these protections, press publishers assert that they cannot insist on aggregators paying to reuse news content because of their relatively weak bargaining position. In particular, they depend on the major platforms, Google and Facebook, for a critical percentage of their web traffic. Preventing those platforms from aggregating their headlines and ledes would, in the press publishers' view, deny them the traffic they need to survive.

Based on the considerations detailed in this Report, the Copyright Office does not recommend adopting a new ancillary copyright to bolster publishers' protections. Almost all commenters agreed that adopting an EU-like right is unnecessary inasmuch as U.S. law already confers many of the same rights on press publishers, including via the work-made-for-hire doctrine. For a new right to go beyond existing copyright protections, it would most likely need to avoid existing copyright limitations, which would raise First Amendment and policy concerns. Moreover, even such an expansive right would likely be ineffective in the current competition landscape: commenters on both sides of this policy question agreed that whatever rights press

publishers gained, they would feel compelled to waive them in order to ensure the flow of traffic from the largest news aggregators.

The Copyright Office's decision not to recommend additional copyright protections for press publishers should not be mistaken for a lack of concern about the future of journalism. Comments in this Study, participants at the public roundtable, and the extensive literature on economic trends in the news industry all point to a sea change in the press publishing ecosystem, with especially damaging consequences for local newspapers. Should Congress wish to explore non-copyright measures for supporting journalism, the comments on this Study offered several proposals, including the JCPA, a levy on digital advertising revenue, increased public funding, or tax breaks for journalism. All of these proposals, however, lie beyond the expertise of the Copyright Office, and we make no findings on their merits. We remain ready to provide technical advice or other assistance on copyright-related aspects of this issue to Congress going forward.



**APPENDIX A**      **CONGRESSIONAL REQUEST LETTER**

**VIA ELECTRONIC TRANSMISSION**

May 3, 2021

Ms. Shira Perlmutter  
Register of Copyrights  
United States Copyright Office  
Washington, D.C. 20559-6000

Dear Register Perlmutter:

We write you today to ask for a study of protections for publishers under copyright law. As you know, last year the Senate Judiciary Committee Subcommittee on Intellectual Property held a year-long series of hearings on reforms to digital copyright law. The purpose of these hearings was to consider what reforms are needed to ensure the growth of creative industries without undermining incentives for digital platforms and technologies.

During the course of these hearings, witnesses expressed support for the Copyright Office to conduct a study on “ancillary copyright” protection for publishers. This issue stems from ongoing developments in foreign copyright law which require platform aggregators to pay publishers for excerpts of content they provide for others to view. As some have called for similar protections to be included in U.S. law, we believe it would be valuable to have the Copyright Office’s expertise and clear guidance on this issue. This is especially true when considering the differences between domestic and foreign copyright law.

To assist us as we consider what legislative reforms, if any, should be taken in this area of copyright law, we request that your office conduct a study on this issue. This study should assess the viability of adding specific protections to U.S. copyright law similar to those now being implemented in Europe. Additionally, such a study should analyze what the appropriate scope of such a right should be and how that would coincide with existing rights such as those of underlying writers or visual artists as well as any existing rights held by publishers. Finally, the report should include a discussion of relevant exceptions such as “fair use” or “quotation” exceptions, and any international treaty implications.

We ask that you provide this report by no later than May 3, 2022. Thank you for your prompt attention to this matter. We look forward to your reply, and to working with you on this important issue.

Sincerely,



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Thom Tillis  
United States Senator



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Patrick Leahy  
United States Senator



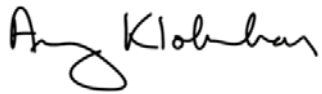
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John Cornyn  
United States Senator



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Mazie K. Hirono  
United States Senator



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Amy Klobuchar  
United States Senator



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Christopher A. Coons  
United States Senator

**APPENDIX B**

**NOTICE OF INQUIRY —  
PUBLISHERS' PROTECTIONS STUDY:  
NOTICE AND REQUEST FOR PUBLIC  
COMMENT (OCTOBER 12, 2021)**

**ADDRESSES:** Written comments should be sent to: Drug Enforcement Administration, Attention: DEA Federal Register Representative/DPW, 8701 Morrisette Drive, Springfield, Virginia 22152. All requests for a hearing must be sent to: Drug Enforcement Administration, Attn: Administrator, 8701 Morrisette Drive, Springfield, Virginia 22152. All request for a hearing should also be sent to: (1) Drug Enforcement Administration, Attn: Hearing Clerk/OALJ, 8701 Morrisette Drive, Springfield, Virginia 22152; and (2) Drug Enforcement Administration, Attn: DEA Federal Register Representative/DPW, 8701 Morrisette Drive, Springfield, Virginia 22152.

**SUPPLEMENTARY INFORMATION:** In accordance with 21 CFR 1301.34(a), this is notice that on August 18, 2019, United States Pharmacopeial Convention, 7135 English Muffin Way, Frederick, Maryland 21704, applied to be registered as an importer of the following basic class(es) of controlled substance(s):

| Controlled substance   | Drug code | Schedule |
|------------------------|-----------|----------|
| Lisdexamfetamine ..... | 1205      | II       |

The company plans to import the bulk control substance for analytical testing purposes. No other activity for these drug codes is authorized for this registration.

Approval of permit applications will occur only when the registrant's business activity is consistent with what is authorized under 21 U.S.C. 952(a)(2). Authorization will not extend to the import of the Food and Drug Administration-approved or non-approved finished dosage forms for commercial sale.

**Brian S. Besser,**

*Acting Assistant Administrator.*

[FR Doc. 2021-22138 Filed 10-8-21; 8:45 am]

**BILLING CODE 4410-09-P**

## DEPARTMENT OF JUSTICE

### Parole Commission

#### Sunshine Act Meetings

**TIME AND DATE:** 1:00 p.m. Thursday, October 14, 2021.

**PLACE:** U.S. Parole Commission, 90 K Street NE, 3rd Floor, Washington, DC.

**STATUS:** Open.

**MATTERS TO BE CONSIDERED:**

1. Approval of July 13, 2021 Quarterly Meeting Minutes.
2. Pandemic Updates since July Quarterly Meeting from the Acting

Chairman, Commissioner, Acting Chief of Staff/Case Operations Administrator, Case Services Administrator, Executive Officer, and General Counsel.

3. Update on the proposals voted forth at July 2021 Quarterly Meeting.

4. Vote on Final Rule for 28 CFR 2.218(e).

**CONTACT PERSON FOR MORE INFORMATION:** Jacquelyn Graham, Staff Assistant to the Chairman, U.S. Parole Commission, 90 K Street NE, 3rd Floor, Washington, DC 20530, (202) 346-7010.

**Patricia K. Cushwa,**

*Acting Chairperson, U.S. Parole Commission.*

[FR Doc. 2021-22254 Filed 10-7-21; 4:15 pm]

**BILLING CODE 4410-31-P**

## LIBRARY OF CONGRESS

### Copyright Office

[Docket No. 2021-5]

#### Publishers' Protections Study: Notice and Request for Public Comment

**AGENCY:** U.S. Copyright Office, Library of Congress.

**ACTION:** Notice of inquiry.

**SUMMARY:** The United States Copyright Office is undertaking a public study at the request of Congress to evaluate current copyright protections for publishers. Among other issues, the Office will consider the effectiveness of publishers' existing rights in news content, including under the provisions of title 17 of the U.S. Code, as well as other federal and state laws; whether additional protections are desirable or appropriate; the possible scope of any such new protections, including how their beneficiaries could be defined; and how any such protections would interact with existing rights, exceptions and limitations, and international treaty obligations. To aid in this effort, the Office is seeking public input on a number of questions. The Office also plans to hold a virtual public roundtable to discuss these and related topics on December 9, 2021.

**DATES:** Comments are due on or before November 26, 2021.

**ADDRESSES:** The Copyright Office is using the *regulations.gov* system for the submission and posting of public comments in this proceeding. All comments are therefore to be submitted electronically through *regulations.gov*. Specific instructions are available on the Copyright Office website at <http://www.copyright.gov/policy/publishersprotections/>. If electronic submission of comments is not feasible

due to lack of access to a computer and/or the internet, please contact the Office using the contact information below, for special instructions.

The Office plans to hold the public roundtable on December 9, 2021, from 9:00 a.m. to 5:00 p.m. Eastern Standard Time remotely using the Zoom videoconferencing platform. A participation request form will be posted on the Copyright Office website at <https://www.copyright.gov/policy/publishersprotections/> on or about October 25, 2021. Requests to participate as a panelist in a roundtable session should be submitted by 11:59 p.m. Eastern Standard Time on November 12, 2021. If electronic submission of requests for participation is not feasible, please contact the Office using the contact information below for special instructions. Attendees will be able to join the event online starting at approximately 8:30 a.m., and it will run until approximately 5:00 p.m.

**FOR FURTHER INFORMATION CONTACT:**

Kimberley Isbell, Deputy Director of Policy and International Affairs, at [kisbell@copyright.gov](mailto:kisbell@copyright.gov), or Andrew Foglia, Senior Counsel for Policy and International Affairs, at [afoglia@copyright.gov](mailto:afoglia@copyright.gov). Both can be reached by telephone at 202-707-8350.

**SUPPLEMENTARY INFORMATION:** This notification focuses on press publishers in particular, reflecting Congress's request that the Office study developments in foreign jurisdictions regarding their rights. It also includes a number of questions about publishers in other sectors, authors, and the public, to assist in evaluating the appropriate scope and definitions for any possible new protections.

### I. Introduction

#### A. The Internet, Press Publishers, and News Aggregators

The internet has ushered in an era of disruption and transformation for the press-publishing ecosystem. After rising steadily between 1970 and 2006,<sup>1</sup> newspaper ad revenues plummeted

<sup>1</sup> See Michael Barthel & Kirsten Worden, *Newspapers Fact Sheet*, Pew Research Center (June 29, 2021), <https://www.journalism.org/fact-sheet/newspapers/>. Newspaper ad revenue peaked in the early internet era of the late 1990s and, after a brief dip in 2000-01, peaked again in 2005 following a wave of consolidation in the newspaper industry (including a steady decline in the number of cities with competing daily newspapers). *Id.*; see also *Media Concentration (Part 2): Hearings Before the Subcomm. on Gen. Oversight and Minority Enter. of the H. Comm. on Small Bus.*, 96th Cong. 4-5 (1980) (statement of James M. Dertouzos, Economist, RAND Corp.) (presenting data on consolidation in local news outlets).

62% between 2008 and 2018.<sup>2</sup> Total newspaper circulation, already declining before the internet-era, in 2020 fell to its lowest point since 1940.<sup>3</sup> Digital distribution exposed city papers that once enjoyed close to local monopolies to national competition from well-heeled newsrooms like *The New York Times*. The combination of increased competition, dwindling revenue, and high debt overhangs led to a wave of bankruptcies, consolidations,<sup>4</sup> and leveraged buyouts.<sup>5</sup> From 2008 to 2019, the number of newspaper newsroom employees dropped by more than 40%,<sup>6</sup> and one in five papers closed.<sup>7</sup>

Over the two decades during which press publishers' revenues have declined, a new set of distributors has arisen in the form of online news aggregators.<sup>8</sup> This umbrella term covers

<sup>2</sup> Elizabeth Grieco, *Fast Facts about the Newspaper Industry's Financial Struggles as McClatchy Files for Bankruptcy*, Pew Research Center (Feb. 14, 2020), <https://www.pewresearch.org/fact-tank/2020/02/14/fast-facts-about-the-newspaper-industrys-financial-struggles/>.

<sup>3</sup> Newspapers Fact Sheet—More Facts: The State of the News Media, Pew Research Center (June 29, 2021), <https://www.pewresearch.org/journalism/fact-sheet/newspapers/>.

<sup>4</sup> The post-2000 consolidations accelerated a trend that began early in the 20th century. See Penelope Muse Abernathy, *The Rise of a New Media Baron and the Emerging Threat of News Deserts* 20–21 (2016), [http://newspaperownership.com/wp-content/uploads/2016/09/07.Unc\\_RiseOfNewMediaBaron\\_SinglePage\\_01Sep2016-REDUCED.pdf](http://newspaperownership.com/wp-content/uploads/2016/09/07.Unc_RiseOfNewMediaBaron_SinglePage_01Sep2016-REDUCED.pdf).

<sup>5</sup> See Penelope Muse Abernathy, *The Expanding News Desert* (2018), [https://www.cisl.org/wp-content/uploads/2018/10/The-Expanding-News-Desert-10\\_14-Web.pdf](https://www.cisl.org/wp-content/uploads/2018/10/The-Expanding-News-Desert-10_14-Web.pdf); Russell Baker, *Goodbye to Newspapers?*, N.Y. Rev. of Books (Aug. 16, 2007), <https://www.nybooks.com/articles/2007/08/16/goodbye-to-newspapers/> (describing slashing of news staff at various newspapers under new Wall Street owners).

<sup>6</sup> See Elizabeth Grieco, *Fast Facts About the Newspaper Industry's Financial Struggles as McClatchy Files for Bankruptcy*, Pew Research Center (Feb. 14, 2020), <https://www.pewresearch.org/fact-tank/2020/02/14/fast-facts-about-the-newspaper-industrys-financial-struggles/> (“Newsroom employment at U.S. newspapers dropped by nearly half (47%) between 2008 and 2018.”); Mason Walker, *U.S. Newsroom Employment Has Fallen 26% Since 2008*, Pew Research Center (July 13, 2021), <https://www.pewresearch.org/fact-tank/2021/07/13/u-s-newsroom-employment-has-fallen-26-since-2008/> (“Newspaper newsroom employment fell 57% between 2008 and 2020 . . .”).

<sup>7</sup> Lara Takenaga, *More Than 1 in 5 U.S. Papers Has Closed. This is the Result.*, N.Y. Times (Dec. 21, 2019), <https://www.nytimes.com/2019/12/21/reader-center/local-news-deserts.html>; Penelope Muse Abernathy, *The Expanding News Desert* 12 (2018), [https://www.cisl.org/wp-content/uploads/2018/10/The-Expanding-News-Desert-10\\_14-Web.pdf](https://www.cisl.org/wp-content/uploads/2018/10/The-Expanding-News-Desert-10_14-Web.pdf).

<sup>8</sup> See Eric Alterman, *Out of Print: The Death and Life of the American Newspaper*, New Yorker (Mar. 24, 2008), <https://www.newyorker.com/magazine/2008/03/31/out-of-print> (describing, among other things, the rise of Huffington Post and other news aggregators).

a number of distinct services that vary according to the sources they use, the topics they cover, who performs the aggregation, and whether they add original commentary, but in general refers to an online service that collects links to and sometimes snippets of third-party articles and makes them available to its readers.<sup>9</sup> While some news aggregators focus primarily or solely on the distribution of news content, others may aggregate such content only as one part of a wider-ranging social media service, for example by allowing users to share news stories or promoting “trending topics” or “news” tabs and links. News aggregators may or may not seek licenses for the third-party content they use.

News aggregators, including search engines and social media, have now become the preferred or initial source of news for a majority of digital news consumers.<sup>10</sup> Some commentators suggest that these sources create a “substitution effect” by allowing readers to get the news (or at least its gist) without visiting the press publishers' websites.<sup>11</sup> Others

<sup>9</sup> See Kimberley A. Isbell & Citizen Media Law Project, *The Rise of the News Aggregator: Legal Implications and Best Practices* (2010), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1670339](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1670339).

<sup>10</sup> Nic Newman, Richard Fletcher, Antonis Kalogeropoulos, David A.L. Levy & Rasmus Kleis Nielsen, Reuters Institute Digital News Report 2018 14 (2018), <http://media.digitalnewsreport.org/wp-content/uploads/2018/06/digital-news-report-2018.pdf?x89475>; see also Doh-Shin Jeon, *Economics of News Aggregators* (Toulouse Sch. of Econ., Working Paper No. 18–912, 2018), [https://www.tse-fr.eu/sites/default/files/TSE/documents/doc/wp/2018/wp\\_tse\\_912.pdf](https://www.tse-fr.eu/sites/default/files/TSE/documents/doc/wp/2018/wp_tse_912.pdf); Traffic Overview: [www.similarweb.com](https://www.similarweb.com/similarweb), similarweb, <https://www.similarweb.com/website/news.google.com/#overview> (last visited August 5, 2021) (showing that in 2021 Google News averages over 500 million visits per day). Among aggregating services, one of the trends of the last half decade has been the increasing dominance of the largest platforms and the decline of standalone aggregators. In recent years, Google and Facebook have continued to represent an outright majority of aggregator web traffic and referrals, while BuzzFeed, AOL, Yahoo and HuffPost have cut more than a thousand jobs, and smaller sites such as Gawker, Mic, Refinery29, the Outline, and PopSugar have shrunk, shuttered, or sold. Joshua Benton, *Is Facebook Really A 'News Powerhouse' Again, Thanks to Coronavirus?* (*No More Than It Was Before*), NiemanLab (Mar. 24, 2020) <https://www.niemanlab.org/2020/03/is-facebook-really-a-news-powerhouse-again-thanks-to-coronavirus-no-more-than-it-was-before/> (showing that over the twelve preceding months, Google and Facebook accounted for over 75% of outside referrals to news sites in the parse.ly network); Paul Farhi, *Top Editors Leave HuffPost and BuzzFeed News Amid Growing Doubts About the Future of Digital News*, Washington Post (Mar. 12, 2020), [https://www.washingtonpost.com/lifestyle/media/top-editors-leave-huffpost-and-buzzfeed-amid-growing-doubts-about-the-future-of-digital-news-2020/03/12/32cf09c0-6222-11ea-acc8-80c22bbe96f\\_story.html](https://www.washingtonpost.com/lifestyle/media/top-editors-leave-huffpost-and-buzzfeed-amid-growing-doubts-about-the-future-of-digital-news-2020/03/12/32cf09c0-6222-11ea-acc8-80c22bbe96f_story.html).

<sup>11</sup> See Eleonora Rosati, *The German 'Google Tax' Law: Groovy or Greedy?* 8(7) J. Intel. Prop. L. & Prac.

assert that news aggregators expand the market by helping readers to discover new websites and tempting them to click on more articles than they would otherwise read.<sup>12</sup>

Empirical data available to date on the relationship between aggregators and news sites is thin. Aggregators appear to drive a significant amount of traffic to news websites, and therefore their activities may serve to expand the market for press publishers.<sup>13</sup> But their referrals may lead to a relatively narrow range of news sites,<sup>14</sup> and they tend to drive traffic to individual articles rather than homepages.<sup>15</sup> So it is also possible

497, 497 (2013); Chrysanthos Dellarocas, Juliana Sutanto, Mihai Calin & Elia Palme, *Attention Allocation in Information-Rich Environments: The Case of News Aggregators*, 62(9) Mgmt. Sci. 2543, 2543 (2015); Directive 2019/790, of the European Parliament and of the Council of 17 April 2019 on Copyright and Related Rights in the Digital Single Market and Amending Directives 96/9/EC and 2001/29/EC, 2019 O.J. (L 130) 92, 103–04, <https://eur-lex.europa.eu/eli/dir/2019/790/oj> (“Publishers of press publications are facing problems in licensing the online use of their publications to the providers of those kinds of services, making it more difficult for them to recoup their investments.”).

<sup>12</sup> See, e.g., Joan Calzada & Ricard Gil, *What Do News Aggregators Do? Evidence from Google News in Spain and Germany* 1–2 (2018), <http://diposit.ub.edu/dspace/bitstream/2445/150425/1/695577.pdf>; Lisa M. George & Christiaan Hogendorn, *Local News Online: Aggregators, Geo-Targeting and the Market for Local News*, 68(4) J. Indus. Econ. 780, 804 (2020) (finding that a redesign of Google News adding geo-targeted local news links increased the level and share of local news consumption).

<sup>13</sup> Doh-Shin Jeon, *Economics of News Aggregators* (Toulouse Sch. of Econ., Working Paper No. 18–912, 2018), [https://www.tse-fr.eu/sites/default/files/TSE/documents/doc/wp/2018/wp\\_tse\\_912.pdf](https://www.tse-fr.eu/sites/default/files/TSE/documents/doc/wp/2018/wp_tse_912.pdf) (reviewing empirical literature and concluding that Google News and Facebook increase overall traffic to news sites); Kenny Olmstead, Amy Mitchell & Tom Rosenstiel, *Navigating News Online: Where People Go, How They Get There and What Lures Them Away* (2011), <https://www.pewresearch.org/wp-content/uploads/sites/8/legacy/NIELSEN-STUDY-Copy.pdf>.

<sup>14</sup> Kenny Olmstead, Amy Mitchell & Tom Rosenstiel, *Navigating News Online: Where People Go, How They Got There, and What Lures Them Away* 22 (2011), <https://www.pewresearch.org/wp-content/uploads/sites/8/legacy/NIELSEN-STUDY-Copy.pdf>. (“According to the links users follow, Google News sends most users on to a news destination, but the range of those destinations is rather limited. Most of visitors to Google News . . . do click to a news story. According to the data, less than a third of [news.google.com](https://www.google.com) visitors headed to [Google.com](https://www.google.com) or another Google service. The remainder followed a link to a news site. But the benefactors are limited. Fully 69% of visitors to [news.google.com](https://www.google.com) ended up 3 places: [nytimes.com](https://www.nytimes.com) (14.6%), [cnn.com](https://www.cnn.com) (14.4%) and [abcnews.go.com](https://www.abcnews.go.com) (14.0%). Six additional sites were each the destination for 7–10% of visitors during the time period studied”).

<sup>15</sup> See Doh-Shin Jeon, *Economics of News Aggregators* 18 (Toulouse Sch. of Econ., Working Paper No. 18–912, 2018), [https://www.tse-fr.eu/sites/default/files/TSE/documents/doc/wp/2018/wp\\_tse\\_912.pdf](https://www.tse-fr.eu/sites/default/files/TSE/documents/doc/wp/2018/wp_tse_912.pdf). (“News aggregators reduce traffic to newspaper home pages while increasing traffic to individual news articles. Even if all empirical articles agree on the statement that the business-

that their offerings substitute to some degree for the market for newspapers as a whole, even while stimulating traffic to specific articles. This concern has spurred policymakers in several countries to consider legislation aimed at maintaining the viability of their news industry, including by expanding press publishers' rights in the content they publish.

## II. Protections for Press Publishers Under U.S. Law

### A. Copyright Protection for News Content

Current U.S. copyright law gives publishers several means to protect their news content. First, a press publisher typically owns the copyright in the collective work, such as the print issue as a whole or the website containing individual news articles.<sup>16</sup> Second, the press publisher may own or be able to assert rights in individual articles that it publishes, through the work-made-for-hire doctrine,<sup>17</sup> assignments of rights, or exclusive licenses.<sup>18</sup>

stealing effect is dominated by the readership-expansion effect, if this comes with a reduced traffic to home pages, it can have a long-term consequence that is not captured by the empirical studies.”)

<sup>16</sup> The Copyright Act defines “collective work” as a work “in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole.” 17 U.S.C. 101. Additionally, collective works under the Copyright Act are considered a type of compilation, which in turn is defined as “a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.” 17 U.S.C. 101. The website of a daily newspaper, which assembles various discrete articles, photographs, and advertisements, could be an example of a copyrightable digital “collective work.”

<sup>17</sup> “Work made for hire” is a category of works created for an employer or commissioning party, for which the individual(s) who create the work are not considered the author(s) and initial owner(s) for copyright purposes. Instead, the author is either (1) the employer of that individual, if the work is prepared within the scope of employment; or (2) the entity who commissions or orders the creation of the work, provided that the work fits within one of nine specific categories, and the parties expressly agree in a signed writing that “the work shall be considered a work made for hire.” 17 U.S.C. 101. Among these nine categories is “a contribution to a collective work,” meaning that a freelance article for a newspaper or magazine may constitute a work-made-for-hire, if the author and the publisher agreed to this in writing. 17 U.S.C. 101. In addition, any article written by an employee of a newspaper or magazine as part of their employment would clearly be a work-made-for-hire, with the publisher having the legal status of author (and copyright owner).

<sup>18</sup> For freelance articles or photographs that are not works-made-for-hire, the author—in whom all exclusive rights initially vest—may transfer her rights to the publisher, either for a limited time or for the duration of the copyright, and the transfer may cover all or some of the exclusive rights. A transfer of rights may take the form of an

When a press publisher owns a copyright in either a collective work<sup>19</sup> or in an individual article, it has the exclusive right to do or authorize the reproduction, preparation of derivative works, distribution, public performance, and public display of that work.<sup>20</sup>

These exclusive rights are not absolute. Under U.S. law, several legal doctrines allow the use of news content in certain circumstances without permission or payment.<sup>21</sup> Most fundamentally, facts and ideas are not copyrightable.<sup>22</sup> Nor are titles and short

assignment (meaning that legal title is transferred) or an exclusive license (meaning that exclusive permission to use the right(s) is transferred). See *Minden Pictures, Inc. v. John Wiley & Sons, Inc.*, 795 F.3d 997, 1003 (9th Cir. 2015). For both types of transfers, the transferee gains the right to bring suit for infringement. See 3 Melvin B. Nimmer & David Nimmer, *Nimmer on Copyright* sec. 12.02[B][1] (2021). In contrast, if the parties only agree to a nonexclusive license—meaning that the author remains free to license the work to other parties—then the grantee cannot bring an infringement suit. See *Minden Pictures, Inc. v. John Wiley & Sons, Inc.*, 795 F.3d 997, 1003 (9th Cir. 2015).

<sup>19</sup> The relationship between the copyright in a collective work and in a particular contribution to a collective work is spelled out in the Copyright Act, which sets forth three instances where a publisher who does not own the copyright in an article may nonetheless reproduce and distribute it as part of: (1) “that particular collective work,” (2) “any revision of that collective work, and” (3) “any later collective work in the same series.” 17 U.S.C. 201(c). In the 2001 *Tasini* decision, the Supreme Court explicated section 201(c) as “adjust[ing] a publisher’s copyright in its collective work to accommodate a freelancer’s copyright in her contribution. If there is demand for a freelance article standing alone or in a new collection, the Copyright Act allows the freelancer to benefit from that demand; after authorizing initial publication, the freelancer may also sell the article to others.” *N.Y. Times Co. v. Tasini*, 533 U.S. 483, 497 (2001).

<sup>20</sup> See 17 U.S.C. 106(1)–(5). As the Copyright Office has noted, these exclusive rights cover certain uses of copyrighted materials online, including the making available of copyrighted works for download or viewing via streaming. See generally U.S. Copyright Office, *The Making Available Right in the United States* (2016), [https://www.copyright.gov/docs/making\\_available/making-available-right.pdf](https://www.copyright.gov/docs/making_available/making-available-right.pdf).

<sup>21</sup> Similar, though not identical doctrines may be found in most countries’ copyright laws. See, e.g., Berne Convention for the Protection of Literary and Artistic Works art. 2(8), Sept. 9, 1886, as revised July 24, 1971, and as amended Sept. 28, 1979, S. Treaty Doc. No. 99–27, 1161 U.N.T.S. 3 (1986) (“Berne Convention”) (“The protection of this Convention shall not apply to news of the day or to miscellaneous facts having the character of mere items of press information.”); Agreement on Trade-Related Aspects of Intellectual Property Rights art. 9(2), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 (1994), (“Copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such.”); WIPO Copyright Treaty art. 2, Dec. 20, 1996, S. Treaty Doc. No. 105–17, 2186 U.N.T.S. 121 (“Copyright protection extends to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such.”).

<sup>22</sup> 17 U.S.C. 102(b) (“In no case does copyright protection for an original work of authorship extend

phrases, including headlines.<sup>23</sup> Where there are only a few, limited ways of expressing an idea, the merger doctrine bars protection for the expression in order to avoid giving a backdoor monopoly in the idea itself.<sup>24</sup> Even where the content used is protectable, the fair use doctrine provides considerable scope for quotation and allows certain other reasonable uses.<sup>25</sup>

Applying the fair use doctrine, courts have approved some forms of aggregation of news content but not others. For example, fair use has been found to permit the aggregation of copyrighted text or images by search engines or other indexing processes where those services used only snippets or low-resolution images that were unlikely to substitute for the original copyrighted works.<sup>26</sup> By contrast, the Second Circuit has held that the aggregation of television news content into a searchable index was not fair use, to the extent that the service enabled users to watch and share ten-minute clips.<sup>27</sup> Some news aggregators have

to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.”); *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991); see also *Baker v. Selden*, 101 U.S. 99, 103 (1880) (describing idea/expression dichotomy).

<sup>23</sup> *CMM Cable Rep., Inc. v. Ocean Coast Props., Inc.*, 97 F.3d 1504, 1519–20 (1st Cir. 1996) (titles and short phrases uncopyrightable); *Aryelo v. Am. Int’l Ins. Co.*, No. 95–1360, 1995 WL 561530 at \*1 (1st Cir. Sept. 21, 1995) (per curiam, table, unpublished) (“The non-copyrightability of titles in particular has been authoritatively established”); 37 CFR 202.1(a) (excluding from copyright protection “[w]ords and short phrases such as name, titles, and slogans”).

<sup>24</sup> *N.Y. Mercantile Exch., Inc. v. IntercontinentalExchange, Inc.*, 497 F.3d 109, 116–17 (2d Cir. 2007); 4 Melvin B. Nimmer & David Nimmer, *Nimmer on Copyright* sec. 13.03[B][3] (explaining that “courts have invoked the doctrine of merger” where “rigorously protecting the expression would confer a monopoly over the idea itself, in contravention of the statutory command”).

<sup>25</sup> See, e.g., *Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P.*, 756 F.3d 73, 84 (2d Cir. 2014) (explaining that fair use often, though not always, supports direct quotation of copyrighted works in news reporting context); *Nunez v. Caribbean Int’l News Corp.*, 235 F.3d 18, 22–23 (1st Cir. 2000) (finding newspaper’s use of copyrighted photographs was fair where the photographs themselves were the news story).

<sup>26</sup> See, e.g., *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 818 (9th Cir. 2003) (finding defendant’s reproduction of thumbnails of plaintiff’s photographs in defendant’s search engine results was transformative); *Perfect 10, Inc. v. Amazon.com, Inc.* 508 F.3d 1146, 1165 (9th Cir. 2007) (same); cf. *Authors Guild v. Google, Inc.*, 804 F.3d 202, 229 (2d Cir. 2015) (finding Google’s unauthorized display of snippets of copyrighted works as part of a searchable index was fair use).

<sup>27</sup> *Fox News Network, LLC v. TVEye, Inc.*, 883 F.3d 169, 180–81 (2d Cir. 2018); see also *MidlevelU, Inc. v. ACI Information Grp.*, 989 F.3d 1205, 1222–23 (11th Cir. 2021) (denying judgment as a matter

Continued

sought licenses instead of relying on a fair use defense, presumably either because their use was more extensive than that permitted by fair use or because they wanted to avoid the expense and uncertainty of litigating.<sup>28</sup>

### B. “Hot News” Misappropriation

Separate from copyright, U.S. press publishers have at times asserted “hot news” misappropriation claims to protect against the taking of their time-sensitive news items. This cause of action, established by the Supreme Court in *International News Service v. Associated Press*<sup>29</sup> during World War I, bars free riding on a competitor’s investment at the moment in time when the competitor was poised to reap the rewards.<sup>30</sup> Because *International News Service* was based on no-longer extant federal common law<sup>31</sup> and pre-dated the 1976 Copyright Act and modern First Amendment jurisprudence,<sup>32</sup> this tort’s continued viability is unclear. In one of the first modern cases to consider a hot news misappropriation claim under New York state law, the Second Circuit in *NBA v. Motorola* held that only a narrow version of the theory survived preemption by the Copyright Act.<sup>33</sup> Indeed, most courts faced with

of law on fair use defense where aggregated index of blog content also allowed users to view full text of articles without navigating to the original source); *Associated Press v. Meltwater U.S. Holdings, Inc.*, 931 F. Supp. 2d 537, 545 (S.D.N.Y. 2013) (finding news monitoring service’s reproduction and distribution of excerpts of online news articles was not fair use). Cf. *Video Pipeline, Inc. v. Buena Vista Home Entmt.*, 342 F.3d 191, 200 (3d Cir. 2003) (rejecting fair use defense of a service that compiled movie clips into a commercial database of movie trailers).

<sup>28</sup> See, e.g., Jeffrey A. Trachtenberg and Keach Hagey, *Google to Pay News Corp for Access to Its Publications’ Content*, Wall Street J. (Feb. 17, 2021), <https://www.wsj.com/articles/google-to-pay-news-corp-for-access-to-its-publications-content-11613592397> (reporting three-year licensing deal between Google and News Corp.); Benjamin Mullin and Sahil Patel, *Facebook Offers News Outlets Millions of Dollars a Year to License Content*, Wall Street J. (Aug. 8, 2019), <https://www.wsj.com/articles/facebook-offers-news-outlets-millions-of-dollars-a-year-to-license-content-11565294575> (reporting that Facebook was seeking licenses from news outlets for proposed news section).

<sup>29</sup> 248 U.S. 215 (1918).

<sup>30</sup> *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 230–31 (1918).

<sup>31</sup> See United States Copyright Office, Report on Legal Protections for Databases 82 (1997), <https://www.copyright.gov/reports/db4.pdf> (noting abrogation of federal common law generally by the Supreme Court in *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938)).

<sup>32</sup> See *Abrams v. United States*, 250 U.S. 616 (1919); *Schenck v. United States*, 249 U.S. 47 (1919).

<sup>33</sup> 105 F.2d 841, 845 (2d Cir. 1997) (limiting hot news claims to cases where: “(i) a plaintiff generates or gathers information at a cost; (ii) the information is time-sensitive; (iii) a defendant’s use

hot news misappropriation claims since *Motorola* have found them to be either preempted or insufficiently proven.<sup>34</sup> For example, in *Barclays Capital, Inc. v. Theflyonthewall.com, Inc.*, the Second Circuit held that the Copyright Act preempted a hot news misappropriation claim under New York law based on the defendant’s publication of plaintiff’s time-sensitive stock recommendations, notwithstanding the fact that the recommendations at issue may not have been copyrightable.<sup>35</sup> This holding suggests that even if a hot news misappropriation claim could be brought against a news aggregator, it would face a significant hurdle in avoiding preemption by the Copyright Act.

### III. International Developments

Citing concerns for the continued viability of their news industries, several national and regional legislatures have considered or enacted new forms of legal protection for press publishers in recent years. These generally fall into one of two models: An extension of copyright or copyright-like protections, or regulation of the

of the information constitutes free-riding on the plaintiff’s efforts; (iv) the defendant is in direct competition with a product or service offered by the plaintiffs; and (v) the ability of other parties to free-ride on the efforts of the plaintiff or others would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened.”); see also *id.* at 853 (explaining that the “extra elements” needed for a hot news claim to survive preemption are “(i) the time-sensitive value of factual information, (ii) the free-riding by a defendant, and (iii) the threat to the very existence of the product or service provided by the plaintiff”).

<sup>34</sup> See, e.g., *Brantley v. Epic Games, Inc.*, 463 F. Supp.3d 616, 626 (D. Md. 2020); *IPOX Schuster, LLC v. Nikko Asset Mgmt. Co.*, 304 F. Supp. 3d 746, 757 (N.D. Ill. 2018); *Thousand Oaks Barrel Co. v. Deep S. Barrels LLC*, 241 F. Supp. 3d 708, 725 (E.D. Va. 2017) (holding Virginia does not recognize the tort of hot news misappropriation); *Scrappost, LLC v. Peony Online, Inc.*, No. 14–14761, 2017 WL 697028, at \*8 (E.D. Mich. Feb. 22, 2017); *World Chess US, Inc. v. Chessgames Servs. LLC*, No. 16 CIV. 8629 (VM), 2016 WL 7190075, at \*4 (S.D.N.Y. Nov. 22, 2016); *Ste. Genevieve Media, LLC v. Pulitzer Mo. Newspapers, Inc.*, No. 1:16 CV 87 ACL, 2016 WL 6083796, at \*5 (E.D. Mo. Oct. 18, 2016). But see *Dow Jones & Co. v. Real-Time Analysis & News, Ltd.*, No. 14–CV–131 (JMF)(GWG), 2014 WL 4629967, at \*7 (S.D.N.Y. Sept. 15, 2014), *report and recommendation adopted*, No. 14–CV–131 (JMF)(GWG), 2014 WL 5002092 (S.D.N.Y. Oct. 7, 2014) (granting damages on plaintiff’s hot news misappropriation claim).

<sup>35</sup> 650 F.3d 876, 902 (2d Cir. 2011). Applying the *NBA v. Motorola* factors, the court found: (i) The recommendations were works of authorship within the general subject-matter of the Copyright Act; (ii) plaintiff’s alleged “hot news” right in the recommendations could be violated by copying and distribution that, on their own, would violate the Copyright Act; and (iii) there was no evidence that the defendants were “free-riding” in the sense previously recognized in hot news cases. *Id.*

terms of competition and negotiation between the publishers and online intermediaries.

### A. Ancillary Copyright

In 2019, as part of the Directive on Copyright in the Single Digital Market (“CDSM Directive”), the European Union required Member States to grant press publishers an “ancillary” right in the content of their press publications.<sup>36</sup> The EU’s approach took inspiration from laws previously adopted in Germany and Spain. The German law, enacted in 2013 and later invalidated on procedural grounds, provided press publishers an exclusive right to make their work available to the public for commercial purposes.<sup>37</sup> The Spanish law, by contrast, grants press publishers a non-waivable right of remuneration.<sup>38</sup>

<sup>36</sup> Directive 2019/790 of the European Parliament and of the Council of 17 April 2019 on Copyright and Related Rights in the Digital Single Market and Amending Directives 96/9/EC and 2001/29/EC, 2019 O.J. (L 130) 92, 92–125, <https://eur-lex.europa.eu/eli/dir/2019/790/oj>. An “ancillary” or “neighboring” right is one that does not belong to the author of the copyrighted work. See Meghan Sali, *What the Heck is Ancillary Copyright and Why Do We Call it the Link Tax?*, Open Media (May 5, 2016), <https://openmedia.org/article/item/what-heck-ancillary-copyright-and-why-do-we-call-it-link-tax>. In this case, the term “ancillary copyright” arises because press publishers are not the authors of the news materials at issue, but will nonetheless have the right to authorize or prohibit certain uses of the materials.

<sup>37</sup> See European Parliament, Policy Department for Citizens’ Rights and Constitutional Affairs, Strengthening the Position of Press Publishers and Authors and Performers in the Copyright Directive 14 (2017) (providing an English translation of the German press publisher statute), <https://op.europa.eu/en/publication-detail/-/publication/9f45daff-c437-11e7-9b01-01aa75ed71a1/language-en/format-PDF/source-206447220>. The law covered snippets, but did not apply to individual words or “very short text excerpts,” or mere linking. In 2019, the Court of Justice of the European Union ruled the law was unenforceable for procedural reasons. See Jan Bernd Nordemann & Stefanie Jehle (Nordemann), *VG Media/Google: German Press Publishers’ Right Declared Unenforceable by the CJEU for Formal Reasons—But It Will Soon Be Reborn*, Kluwer Copyright Blog (Nov. 11, 2019), <http://copyrightblog.kluweriplaw.com/2019/11/11/vg-media-google-german-press-publishers-right-declared-unenforceable-by-the-cjeu-for-formal-reasons-but-it-will-soon-be-reborn/>.

<sup>38</sup> See Raquel Xalabarder, *The Remunerated Statutory Limitation for News Aggregation and Search Engines Proposed by the Spanish Government: Its Compliance with International and EU Law* (2014), [infojustice.org/wp-content/uploads/2014/10/xalabarder.pdf](http://infojustice.org/wp-content/uploads/2014/10/xalabarder.pdf). In response to the law, Google shut down Google News in Spain. Eric Auchard, *Google to Shut Down News Site in Spain Over Copyright Fees*, Reuters (Dec. 11, 2014), <https://www.reuters.com/article/us-google-spain-news/google-to-shut-down-news-site-in-spain-over-copyright-fees-idUSKBN0JP0QM20141211>. Both the law and Google News’s shutdown in Spain persist.



Under Article 15 of the CDSM Directive, for two years following the initial publication of press publications, publishers have the right to authorize or prohibit third-party online service providers from reproducing them or making them available to the public.<sup>39</sup> This right does not apply to: (i) Non-commercial uses by individual users; (ii) hyperlinking to, without reproducing, news content; (iii) the use of individual words or very short extracts; (iv) uses in works contained in academic periodicals; (v) any uses otherwise permitted by EU copyright law, such as the making of incidental copies as a result of lawful transmissions or quotations for purposes of criticism or commentary; or (vi) mere facts.<sup>40</sup> Article 15 applies only to “journalistic publications,” and not to “websites, such as blogs, that provide information as part of an activity that is not carried out under the initiative, editorial responsibility and control of a service provider, such as a news publisher.”<sup>41</sup> This focus on news publishers as the beneficiaries resulted from a public consultation “on the role of publishers in the copyright value chain” more broadly.<sup>42</sup>

EU Member States had until June 7, 2021 to fully implement the CDSM. To date, Article 15 has been implemented by France, the Netherlands, Hungary, Germany, Malta, and Denmark.<sup>43</sup> The

European Commission has commenced legal proceedings against other member states for failing to implement the CDSM by the deadline.<sup>44</sup>

### B. Competition Law

The second, competition-law-based approach to addressing the relationship between news publishers and online intermediaries can take many forms,<sup>45</sup> but the most-discussed initiative has been Australia’s mandatory bargaining law. In 2021 Australia passed a law requiring Google and Facebook, specifically, to negotiate with press publishers over compensation for the value the publishers’ stories generate on the two companies’ platforms.<sup>46</sup> Any news organization can notify Google or Facebook of its intent to bargain under the law.<sup>47</sup> Compensation terms may

Publishers]. *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], July 26, 2019; Diana Passinke, *An Analysis of Articles 15 and 17 of the EU Directive on Copyright in the Digital Single Market: A Boost for the Creative Industries or the Death of the internet?* (Stanford-Vienna Eur. Union L. Working Paper No. 49, 2020), <http://tlf.stanford.edu>. These laws have continued to provoke controversy. Shortly before France’s implementing law became effective, Google announced that it would no longer display snippets of results from European press publishers as part of search results in France, unless a publisher opts in to the display free of charge. French press publisher unions sued Google, and France’s competition authority declared that Google would have to negotiate remuneration to press publishers in good faith. See Natasha Lomas, *France’s Competition Watchdog Orders Google to Pay for News Reuse*, *TechCrunch* (Apr. 9, 2020), <https://techcrunch.com/2020/04/09/frances-competition-watchdog-orders-google-to-pay-for-news-reuse/>. Google has since signed contracts with several French publishers. See Tom Hirche, *Google Signs Contracts with a Handful of French Publishers*, *IGEL* (Nov. 24, 2020), <https://ancillarycopyright.eu/news/2020-11-24/google-signs-contracts-handful-french-press-publishers>. In July of 2021, France’s competition authority fined Google over \$500 million for failure to negotiate in good faith. See Associated Press, *France Fines Google \$592M in a Dispute Over Paying News Publishers for Content*, *NPR* (Jul. 13, 2021), <https://www.npr.org/2021/07/13/1015596060/france-fines-google-592m-in-a-dispute-over-paying-news-publishers-for-content>.

<sup>44</sup> See *Most EU Countries Not Enacting Copyright Laws*, *Portugal News* (Jul. 26, 2021), <https://www.theportugalnews.com/news/2021-07-26/most-eu-countries-not-enacting-new-copyright-laws/61315>.

<sup>45</sup> For example, in the United States, the proposed Journalism Competition and Preservation Act of 2021 would create a four-year safe harbor from antitrust laws for print, broadcast, or digital news companies to collectively negotiate with online content distributors. S. 673, 117th Cong. sec. 2 (2021).

<sup>46</sup> Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2021 (Cth) (Austl.), [https://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/r6652\\_apsed/toc\\_pdf/20177b01.pdf](https://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/r6652_apsed/toc_pdf/20177b01.pdf). The law also included a set of minimum standards for providing advance notice of changes to algorithmic ranking and presentation of news.

<sup>47</sup> Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2021 (Cth) (Austl.), <https://parlinfo.aph.gov.au/>

account for the value the publisher derives from Google’s or Facebook’s use of its material—in other words, Google can argue that its royalty rate should be lower because it drives traffic to the publisher’s site.<sup>48</sup> If, after three months of bargaining, the parties have not reached an agreement, an arbitration panel makes a binding decision on the rate of remuneration.<sup>49</sup> Because Australia’s law is not copyright-based, the bargaining right applies to *all* news content, including headlines and snippets, not just material protected by copyright.<sup>50</sup>

*Subjects of Inquiry:* The Copyright Office seeks public input, including empirical data where available, on the issues described above. In particular, the Office invites written comments on three issues: (i) The effectiveness of current protections for press publishers under U.S. law; (ii) whether additional protections for press publishers are desirable and, if so, what the scope of any such protections should be; and (iii) how any new protections for press publishers in the United States would relate to existing rights, exceptions and limitations, and international treaty obligations.

[parlInfo/download/legislation/bills/r6652\\_apsed/toc\\_pdf/20177b01.pdf](https://parlinfo/download/legislation/bills/r6652_apsed/toc_pdf/20177b01.pdf).

<sup>48</sup> Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2021 (Cth) (Austl.), [https://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/r6652\\_apsed/toc\\_pdf/20177b01.pdf](https://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/r6652_apsed/toc_pdf/20177b01.pdf).

<sup>49</sup> Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2021 (Cth) (Austl.), [https://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/r6652\\_apsed/toc\\_pdf/20177b01.pdf](https://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/r6652_apsed/toc_pdf/20177b01.pdf).

<sup>50</sup> Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2021 (Cth) (Austl.), [https://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/r6652\\_apsed/toc\\_pdf/20177b01.pdf](https://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/r6652_apsed/toc_pdf/20177b01.pdf). Opponents of Australia’s approach, including Google, have argued that it rests on a misunderstanding of the economic forces affecting press publishers and undermines the “principle of unrestricted linking between websites.”<sup>50</sup> Mel Silva, *Mel Silva’s Opening Statement to the Senate Economics Committee Inquiry, Google: The Keyword* (Jan. 22, 2021), <https://blog.google/around-the-globe/google-asia/australia/mel-silvas-opening-statement/>. Facebook initially protested the law by blocking news sharing in Australia, but restored service after Australia amended the law to include a two-month mediation period and to accommodate pre-existing deals between Facebook and news publishers. Elizabeth Dwoskin, *Facebook, Australia Reach Deal to Restore News Pages After Shutdown*, *Wash. Post* (Feb. 23, 2021), <https://www.washingtonpost.com/technology/2021/02/22/facebook-news-australia-deal/>; see also Kelly Buchanan, *Australia: New Legislation Establishes Code of Conduct for Negotiations between News Media and Digital Platforms over Payments for Content*, *Libr. Congress: Global Legal Monitor* (Feb. 26, 2021), <https://www.loc.gov/law/foreign-news/article/australia-new-legislation-establishes-code-of-conduct-for-negotiations-between-news-media-and-digital-platforms-over-payments-for-content/>.

<sup>39</sup> See Directive 2019/790, of the European Parliament and of the Council of 17 April 2019 on Copyright and Related Rights in the Digital Single Market and Amending Directives 96/9/EC and 2001/29/EC, art. 15(4), 2019 O.J. (L 130) 92, 92–125, <https://eur-lex.europa.eu/eli/dir/2019/790/oj>.

<sup>40</sup> See Directive 2019/790, of the European Parliament and of the Council of 17 April 2019 on Copyright and Related Rights in the Digital Single Market and Amending Directives 96/9/EC and 2001/29/EC, art. 15(1–4), 2019 O.J. (L 130) 92–125, <https://eur-lex.europa.eu/eli/dir/2019/790/oj>.

<sup>41</sup> Directive 2019/790, of the European Parliament and of the Council of 17 April 2019 on Copyright and Related Rights in the Digital Single Market and Amending Directives 96/9/EC and 2001/29/EC, 2019 O.J. (L 130) 92, 104, <https://eur-lex.europa.eu/eli/dir/2019/790/oj>.

<sup>42</sup> See European Commission, *Public Consultation on the Role of Publishers in the Copyright Value Chain and on the ‘Panorama Exception’*, European Commission, [https://ec.europa.eu/eusurvey/runner/Consultation\\_Copyright?surveylanguage=EN#page1](https://ec.europa.eu/eusurvey/runner/Consultation_Copyright?surveylanguage=EN#page1) (last visited Aug. 11, 2021).

<sup>43</sup> See *DSM Directive Implementation Tracker*, *Communia* (last visited July 28, 2021), <https://www.notion.so/DSM-Directive-Implementation-Tracker-361cfae48e814440b353b32692bba879>. Italy has adopted a “delegation law” implementing the CDSM. As noted above, Spain has a press publisher’s law that predates, but is in some respects inconsistent with, Article 15 of the CDSM. French law requires news aggregators to share with publishers data on how readers use the reproduced press material. *Loi 2019–775 du 24 juillet 2019 tendant à créer un droit voisin au profit des agences de presse et des éditeurs de presse* [Law 2019–775 of July 24, 2019 on the Creation of Neighboring Rights for the Benefit of Press Agencies and

A party choosing to respond to this Notice of Inquiry need not address every issue, but the Office requests that responding parties clearly identify and separately address each question for which they submit a response. The Office also requests that responding parties identify their affiliation and the factual or legal basis for their responses.

#### The Effectiveness of Current Protections for Press Publishers

(1) Copyright ownership of news content.

(a) For a given type of news publication, what is the average proportion of content in which the copyright is owned by the publisher compared to the proportion licensed by the publisher on either an exclusive or non-exclusive basis?

(b) For content in which the press publisher owns the copyright, what is typically the basis for ownership: Work-for-hire or assignment?

(2) Third-party uses of news content.

(a) Under what circumstances does or should aggregation of news content require a license? To what extent does fair use permit news aggregation of press publisher content, or of headlines or short snippets of an article?

(b) Are there any obstacles to negotiating such licenses? If so, what are they?

(c) To what extent and under what circumstances do aggregators seek licenses for news content?

(d) What is the market impact of current news aggregation practices on press publishers? On the number of readers? On advertising revenue?

(e) Does the impact of news aggregation vary by the size of the press publisher, or the type of content being published (e.g., national or local news, celebrity news)? If so, how?

(f) Do third-party uses of published news content other than news aggregation have a market impact on press publishers? What are those uses and what is the market impact? Do such uses require a license or are they permitted by fair use?

(3) Existing non-copyright protections for press publishers.

(a) What non-copyright protections against unauthorized news aggregation or other unauthorized third party uses of news content are available under state or federal law in the United States? To what extent are they effective, and how often are they relied upon?

#### The Desirability and Scope of Any Additional Protections for Press Publishers

(1) To what extent do the copyright or other legal rights in news content

available to press publishers in other countries differ from the rights they have in the United States?

(2) In countries that have granted ancillary rights to press publishers, what effect have those rights had on press publishers' revenue? On authors' revenue? On aggregators' revenues or business practices? On the marketplace?

(3) In countries that have granted ancillary rights to press publishers, are U.S. press publishers entitled to remuneration for use of their news content? Would adoption of ancillary rights in the United States affect the ability of U.S. press publishers to receive remuneration for use of their news content overseas?

(4) Should press publishers have rights beyond existing copyright protection under U.S. law? If so:

(a) What should be the nature of any such right—an exclusive copyright right, a right of remuneration, or something else?

(b) How should “press publishers” be defined?

(c) What content should be protected? Should it include headlines?

(d) How long should the protection last?

(e) What activities or third party uses should the right cover?

(f) If a right of remuneration were granted, who would determine the amount of remuneration and on what basis? Should authors receive a share of remuneration, and if so, on what basis?

(5) Would the approach taken by the European Union in Article 15 of the CDSM, granting “journalistic publications” a two-year exclusive right for certain content, be appropriate or effective in the United States? Why or why not?

(6) Would an approach similar to Australia's arbitration requirement work in the United States? Why or why not?

(7) If you believe press publishers should have additional protections, should these or similar protections be provided to other publishers as well? Why or why not? If so, how should that class of publishers be defined and what protections should they receive?

#### The Interaction Between Any New Protections and Existing Rights, Exceptions and Limitations, and International Treaty Obligations

(1) Would granting additional rights to publishers affect authors' ability to exercise any rights they retain in their work? If so, how?

(2) Would granting additional rights to press publishers affect the ability of users, including news aggregators, to rely on exceptions and limitations? If so, how?

(3) 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?

#### Other Issues

(1) Please provide any statistical or economic reports or studies on changes over time in the economic value of a typical news article following the date of publication.

(2) Please provide any statistical or economic reports or studies that demonstrate the effect of aggregation on press publishers or the impact of protections in other countries such as those discussed above on press publishers and on news aggregators.

(3) Please identify any pertinent issues not mentioned above that the Copyright Office should consider in conducting its study.

Dated: October 5, 2021.

**Shira Perlmutter,**

*Register of Copyrights and Director of the U.S. Copyright Office.*

[FR Doc. 2021-22077 Filed 10-8-21; 8:45 am]

**BILLING CODE 1410-30-P**

## OFFICE OF MANAGEMENT AND BUDGET

### Proposed Designation of Databases for Treasury's Working System Under the Do Not Pay Initiative

**AGENCY:** Office of Management and Budget.

**ACTION:** Notice of Proposed Designation.

**SUMMARY:** The Payment Integrity Information Act of 2019 (PIIA) provides that the Office of Management and Budget (OMB) may designate additional databases for inclusion in Treasury's Working System under the Do Not Pay (DNP) Initiative. PIIA further requires OMB to provide public notice and an opportunity for comment prior to designating additional databases. In fulfillment of this requirement, OMB is publishing this Notice of Proposed Designation to designate the National Association of Public Health Statistics and Information Systems (NAPHSIS) Electronic Verification of Vital Events (EVVE) Facts of Death (FOD) System. This notice has a 30-day comment period.

**DATES:** Please submit comments on or before November 12, 2021. At the conclusion of the 30-day comment period, if OMB decides to finalize the designation, OMB will publish a notice in the **Federal Register** to officially designate the database.

**APPENDIX C**

**NOTICE OF INQUIRY —  
PUBLISHERS' PROTECTIONS STUDY:  
REQUEST FOR ADDITIONAL COMMENTS  
(NOVEMBER 9, 2021)**

*General Provisions (§ 1926.900)*

§ 1926.900(d)—Paragraph (d) states that employers must ensure that explosives not in use are kept in a locked magazine, unavailable to persons not authorized to handle explosives. The employers must maintain an inventory and use record of all explosives—in use and not in use. In addition, the employer must notify the appropriate authorities in the event of any loss, theft, or unauthorized entry into a magazine.

§ 1926.900(k)(3)(i)—Paragraph (k)(3)(i) requires employers to display adequate signs warning against the use of mobile radio transmitters on all roads within 1,000 feet of blasting operations to prevent the accidental discharge of electric blasting caps caused by current induced by radar, radio transmitters, lighting, adjacent power lines, dust storms, or other sources of extraneous electricity. The employer must certify and maintain a record of alternative provisions made to adequately prevent any premature firing of electric blasting caps.

§ 1926.900(o)—Employers must notify the operators and/or owners of overhead power lines, communication lines, utility lines, or other services and structures when blasting operations will take place in proximity to those lines, services, or structures.

§ 1926.903(d)—The employer must notify the hoist operator prior to transporting explosives or blasting agents in a shaft conveyance.

§ 1926.903(e)—Employers must perform weekly inspections on the electrical system of trucks used for underground transportation of explosives. The weekly inspection is to detect any failure in the system which would constitute an electrical hazard. The most recent certification of inspection must be maintained and must include the date of inspection, a serial number or other identifier of the truck inspected, and the signature of the person who performed the inspection.

§ 1926.905(t)—The employer blaster must maintain an accurate and up-to-date record of explosives, blasting agents, and blasting supplies used in a blast. The employer must also maintain an accurate running inventory of all explosives and blasting agents stored on the operation.

§ 1926.909(a)—Employers must post a code of blasting agents on one or more conspicuous places at the operation. All employees also shall familiarize themselves with the code and conform to it at all times. Danger signs warning of blasting agents shall also be placed at suitable locations.

**II. Special Issues for Comment**

OSHA has a particular interest in comments on the following issues:

- Whether the proposed information collection requirements are necessary for the proper performance of the agency's functions, including whether the information is useful;
- The accuracy of OSHA's estimate of the burden (time and costs) of the information collection requirements, including the validity of the methodology and assumptions used;
- The quality, utility, and clarity of the information collected; and
- Ways to minimize the burden on employers who must comply. For example, by using automated or other technological information collection and transmission techniques.

**III. Proposed Actions**

OSHA is requesting that OMB approve the information collection requirements contained in the OSHA Standard on Blasting and the Use of Explosives (29 CFR part 1926, subpart U).

*Type of Review:* Extension of currently approved collection.

*Title:* Blasting and the Use of Explosives (29 CFR part 1926, subpart U).

*OMB Control Number:* 1218–0217.

*Affected Public:* Business or other for-profits.

*Number of Respondents:* 193.

*Frequency of Responses:* On occasion.

*Average Time per Response:* Various.

*Estimated Total Burden Hours:* 1,602.

*Estimated Cost (Operation and Maintenance):* \$0.

**IV. Public Participation—Submission of Comments on This Notice and Internet Access to Comments and Submissions**

You may submit comments in response to this document as follows:

- (1) Electronically at <http://www.regulations.gov>, which is the Federal eRulemaking Portal; (2) by facsimile (fax) at (202) 693–1648; or (3) by hard copy. All comments, attachments, and other materials must identify the agency name and the OSHA docket number for the ICR (Docket No. OSHA–2011–0747). You may supplement electronic submissions by uploading document files electronically.

*Please note:* While OSHA's Docket Office is continuing to accept and process submissions by regular mail, due to the COVID–19 pandemic, the Docket Office is closed to the public and not able to receive submissions to the docket by hand, express mail, messenger, and courier service. If you wish to mail additional materials in

reference to an electronic or facsimile submission, you must submit them to the OSHA Docket Office (see the section of this notice titled **ADDRESSES**). The additional materials must clearly identify your electronic comments by your name, date, and the docket number so the agency can attach them to your comments.

Because of security procedures, the use of regular mail may cause a significant delay in the receipt of comments.

Comments and submissions are posted without change at <http://www.regulations.gov>. Therefore, OSHA cautions commenters about submitting personal information such as social security numbers and date of birth. Although all submissions are listed in the <http://www.regulations.gov> index, some information (e.g., copyrighted material) is not publicly available to read or download through this website. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office.

Information on using the <http://www.regulations.gov> website to submit comments and access the docket is available at the website's "User Tips" link. Contact the OSHA Docket Office for information about materials not available through the website, and for assistance in using the internet to locate docket submissions.

**V. Authority and Signature**

James S. Frederick, Acting Assistant Secretary of Labor for Occupational Safety and Health, directed the preparation of this notice. The authority for this notice is the Paperwork Reduction Act of 1995 (44 U.S.C. 3506 *et seq.*) and Secretary of Labor's Order No. 1–2012 (77 FR 3912).

Signed at Washington, DC, on November 2, 2021.

**James S. Frederick,**

*Acting Assistant Secretary of Labor for Occupational Safety and Health.*

[FR Doc. 2021–24500 Filed 11–8–21; 8:45 am]

**BILLING CODE 4510–26–P**

**LIBRARY OF CONGRESS****Copyright Office**

[Docket No. 2021–5]

**Publishers' Protections Study: Request for Additional Comments**

**AGENCY:** Copyright Office, Library of Congress.

**ACTION:** Notice of inquiry.

**SUMMARY:** The U.S. Copyright Office seeks further comments on the

effectiveness of copyright protections for publishers, with a focus on press publishers. This request provides an opportunity for interested parties to raise new issues related to the topic of the study, amplify initial comments, present empirical studies, or to address, reply to, or expand upon any issues raised in the initial request for written comments—responses to which are due on or before November 26, 2021—or during the virtual public roundtable, which will be held on December 9, 2021. On November 29, 2021, the Office will post a link at <https://copyright.gov/policy/publishersprotections/> through which parties can submit second-round comments.

**DATES:** Additional comments are due on or before January 5, 2022.

**ADDRESSES:** The Copyright Office is using the *regulations.gov* system for the submission and posting of public comments in this proceeding. All comments are therefore to be submitted electronically through *regulations.gov*. Specific instructions are available on the Copyright Office website at <http://www.copyright.gov/policy/publishersprotections/>. If electronic submission of comments is not feasible due to lack of access to a computer and/or the internet, please contact the Office using the contact information below, for special instructions.

**FOR FURTHER INFORMATION CONTACT:** Kimberley Isbell, Deputy Director of Policy and International Affairs, at [kisbell@copyright.gov](mailto:kisbell@copyright.gov), or Andrew Foglia, Senior Counsel for Policy and International Affairs, at [afoglia@copyright.gov](mailto:afoglia@copyright.gov). Both can be reached by telephone at 202-707-8350.

**SUPPLEMENTARY INFORMATION:** The United States Copyright Office is undertaking a public study at the request of Congress to evaluate current copyright protections for publishers. Among other issues, the Office is considering the effectiveness of publishers' existing rights in news content, including under the provisions of title 17 of the U.S. Code, as well as other federal and state laws; whether additional protections are desirable or appropriate; the possible scope of any such new protections, including how their beneficiaries could be defined; and how any such protections would interact with existing rights, exceptions and limitations, and international treaty obligations. On October 12, 2021, the Office published an initial request for comments on several questions related to these issues. It also announced that it would hold a virtual public roundtable on the same topics on December 9, 2021.

In the interests of gathering the fullest possible record on the question of copyright protections for publishers, with a focus on press publishers, the Office is now announcing an additional round of comments, responses to which are due on or before January 5, 2022. On November 29, 2021, the Office will post a link at <https://copyright.gov/policy/publishersprotections/> through which parties can submit second-round comments. Comments submitted in this second round may address the same questions set forth in the October 12 notice, or any other issues related to the topic of the study. In submitting second-round comments, parties may raise new issues, amplify their initial comments, present empirical studies, or address, reply to, or expand upon any issues raised in the initial request for written comments or at the December 9, 2021 virtual public roundtable. As with the initial comments, the Office requests that parties submitting second-round comments identify their affiliation and the factual or legal basis for their responses.

Please note that the issuance of this notice does not mean that the deadline for submission of initial comments has expired. Initial comments may still be submitted through November 26, 2021. Additionally, a party does not have to have submitted initial comments or participated in the roundtable in order to submit second-round comments.

Dated: November 4, 2021.

**Shira Perlmutter,**

*Register of Copyrights and Director of the U.S. Copyright Office.*

[FR Doc. 2021-24506 Filed 11-8-21; 8:45 am]

**BILLING CODE 1410-30-P**

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## NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

### Office of Government Information Services

[NARA-2022-008]

#### Meeting Announcement; Chief Freedom of Information Act (FOIA) Officers Council

**AGENCY:** Office of Government Information Services (OGIS), National Archives and Records Administration (NARA), and Office of Information Policy (OIP), Department of Justice (DOJ).

**ACTION:** Notice of meeting.

**SUMMARY:** We are announcing a meeting of the Chief Freedom of Information Act (FOIA) Officers Council, co-chaired by

the Director of OGIS and the Director of OIP.

**DATES:** The meeting will be on Wednesday November 17, 2021, from 10:00 a.m. to 12:30 p.m. EST. Please register for the meeting no later than 11:59 p.m. EST on Monday, November 15, 2021 (registration information is detailed below).

**Location:** The November 17, 2021, meeting will be a virtual meeting. We will send access instructions to those who register according to the instructions below.

**FOR FURTHER INFORMATION CONTACT:** Martha Murphy, by email at [ogis@nara.gov](mailto:ogis@nara.gov) with the subject line "Chief FOIA Officers Council," or by telephone at 202.741.5770.

**SUPPLEMENTARY INFORMATION:** This meeting is open to the public in accordance with the Freedom of Information Act (5 U.S.C. 552(k)). Additional details about the meeting, including the agenda, will be available on OGIS's website at <https://www.archives.gov/ogis/about-ogis/chief-foia-officers-council> and OIP's website at <https://www.justice.gov/oip/chief-foia-officers-council>.

**Procedures:** This virtual meeting is open to the public. You must register through Eventbrite at <https://cfo-council-meeting-nov-17-2021.eventbrite.com> in advance if you wish to submit oral statements. You must include an email address so that we can provide you access information. We will also live-stream the meeting on the National Archives' YouTube channel at <https://www.youtube.com/user/usnationalarchives>, and include a captioning option. To request additional accommodations (e.g., a transcript), email [ogis@nara.gov](mailto:ogis@nara.gov) or call 202-741-5770. Members of the media who wish to register, those who are unable to register online, and those who require special accommodations, should contact Martha Murphy (contact information listed above).

**Alina M. Semo,**

*Director, Office of Government Information Services.*

[FR Doc. 2021-24395 Filed 11-8-21; 8:45 am]

**BILLING CODE 7515-01-P**

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## NATIONAL SCIENCE FOUNDATION

### Proposal Review; Notice of Meetings

In accordance with the Federal Advisory Committee Act (Pub. L. 92-463, as amended), the National Science Foundation (NSF) announces its intent to hold proposal review meetings throughout the year. The purpose of

**APPENDIX D**      **PARTICIPANTS WHO SUBMITTED  
COMMENTS IN RESPONSE  
TO THE NOTICES OF INQUIRY**

**Parties Who Submitted Comments in Response  
to the October 12, 2021 Notice of Inquiry**

1. American Arbitration Association
2. Anonymous 1
3. Anonymous 2
4. Anonymous 3
5. Artworks Legal Incubator and Residency Program
6. Axel Springer SE
7. Nicholas Brigham
8. Mary Cimaglio
9. Susan Clerkin
10. Computer & Communications Industry Association and Internet Association
11. Copia Institute
12. Copyright Alliance
13. Digital Content Next
14. Electronic Frontier Foundation
15. Jane C. Ginsburg
16. Google
17. Internet Archive
18. Library Copyright Alliance
19. Meta

20. MPA The Association of Magazine Media
21. National Public Radio, Inc.
22. Neil Netanel
23. News Corporation
24. News Media Alliance
25. Public Knowledge
26. R Street Institute and Niskanen Center
27. Re:Create
28. Ed Rieger
29. Jessica Silbey
30. Hal Singer
31. The Authors Guild



**Parties Who Submitted Additional Comments in Response  
to the November 9, 2021 Request for Additional Comments**

1. Authors Alliance
2. Axel Springer SE
3. Computer & Communications Industry Association
4. Copyright Alliance
5. Digital Media Licensing Association
6. Engine
7. Jane C. Ginsburg
8. Honorable F. Scott Kieff
9. Library Copyright Alliance
10. MPA The Association of Magazine Media
11. National Press Photographers Association
12. News Media Alliance
13. National Writers Union
14. Patreon
15. Reddit
16. Hal Singer
17. The Authors Guild

**APPENDIX E**

**PUBLISHERS' PROTECTIONS STUDY  
ROUNDTABLE AGENDA**



UNITED STATES COPYRIGHT OFFICE

# Publishers' Protections Study Roundtable

A Virtual Event

Thursday, December 9, 2021

9:00 – 9:05 AM

## WELCOME AND OPENING REMARKS

Shira Perlmutter,  
Register of Copyrights and Director, U.S. Copyright Office

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9:05 – 10:35 AM

### SESSION 1

The Effectiveness of  
Current Protections for  
Publishers

Wayne Brough  
Danielle Coffey  
Jane Ginsburg  
Keith Kupferschmid  
Kate Sheerin  
Daniel Takash

R Street Institute  
News Media Alliance  
  
Copyright Alliance  
Google  
Niskanen Center

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10:45 AM – 12:15 PM

### SESSION 2

Whether Additional  
Protections Are Desirable

Richly Awthentic  
Annemarie Bridy  
Cathy Gellis  
Ole Jani  
Elizabeth Kendall  
Joshua Lamel  
Peter Routhier  
Jessica Silbey  
Hal Singer  
Nzengha Waseme  
Matthew Williams

Southlaw Ent.  
Google  
Copia Institute  
Axel Springer  
Meta Platforms  
Re:Create  
Internet Archive  
Boston University  
Econ One  
Artworks Legal Incubator  
News Media Alliance

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12:15 – 1:30 PM    BREAK

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1:30 – 3:00 PM

**SESSION 3**

How Any New Protections  
Might Affect Existing  
Rights, Limitations, and  
Obligations

Jonathan Band  
John Bergmayer  
Edward Hasbrouck  
Carlo Lavizzari  
Eric Schwartz  
Ali Sternburg

Library Copyright Alliance  
Public Knowledge  
National Writers Union  
Lenz Caemmerer  
News Media Alliance  
Computer & Communications Industry  
Association

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3:15 – 4:00 PM

**OPEN MIC**

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