

November 23, 2021

Submitted via regulations.gov Docket No. 2021–5

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

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

Dear Register Perlmutter:

This submission by the News Media Alliance (NMA) is made in response to the above-captioned Federal Register Notice of Inquiry (NOI) seeking public input to assist the Copyright Office in the preparation of the “Publishers’ Protection Study” as requested by Congress.

I. EXECUTIVE SUMMARY

The NMA is a nonprofit organization headquartered in Washington, D.C. and is the voice of the news media industry, empowering members to succeed in today’s fast-moving media environment. Our members represent nearly 2,000 diverse press organizations in the United States—from the largest news groups and international outlets to hyperlocal news sources, from digital-only and digital-first to print news—we represent the interests of all news media content creators.¹ The organization was founded in 1992 as the result of a merger of seven associations serving the newspaper industry, and was originally known as the Newspaper Association of America (NAA). Our work focuses on the key challenges and opportunities of today’s news environment: freedom of the press, public policy and legal matters, advertising growth and other matters, new revenue streams and audience development across all platforms. The NMA is dedicated to working with our members, as well as other partner organizations, to advance the industry through advocacy, critical research and resources and events that connect and inspire.

The NMA commends the Copyright Office for undertaking this important study to highlight a crisis facing press publishers and the news industry, a critical copyright-based industry

¹ NEWS MEDIA ALLIANCE, ABOUT US, <https://www.newsmediaalliance.org/about-us/>.

that has long benefited publishers, authors, and the news consuming public.² We look forward to working with the Copyright Office to offer insight and data on the industry, both in this submission and over the course of the preparation of the forthcoming study, to assist the Office in suggesting to Congress solutions to the current problems facing the industry.

As requested in the NOI, the submission focuses on the obstacles currently faced by press publishers in the digital age. This includes, but is not limited to, uncertainty regarding the scope of copyright protection for content produced by press publishers and the ability of publishers to effectively enforce their rights, as well as the scope of limitations on exclusive rights, such as the fair use affirmative defense. One very clear indicator of the failings of the current copyright marketplace for news: according to Pew Research, press publisher advertising revenues have fallen in the past 15 years from approximately \$50 billion (in 2005) to an estimated \$8.8 billion in 2020.³

This submission details the nature and scope of the problems—from both a business and legal perspective—to assist the Copyright Office in its report to Congress to detail the severity of the impediments faced by press publishers and to recommend possible solutions. In addition to answering the questions posed in the NOI, the submission includes: (i) an overview of the basics of the business of online press publishers in general; (ii) how the transition from analog to digital publications has impacted the industry, including advertising revenue and subscriptions; (iii) how so-called aggregators of news, such as Google, who do not pay (or pay fairly) for the content of press publishers, have soaked up revenue, resulting in lost jobs, from the news publishing industry; and (iv) other related matters.

At present, press publishers are confronting two challenges: (1) significant harm resulting from market abuse, *i.e.*, the exercise of monopsony power by a few dominant online platforms; and (2) uncertainty regarding the scope of protections in the current copyright legal regime, especially pertaining to the enforcement of their rights.

The market-abuse problem allows a few companies—without permission or under contracts born from dominant market power—to scrape publisher websites, reproduce and display content, disseminate it through their platforms and substitutive mobile applications, and take advertising dollars that could otherwise be funding the creation of more news content for the public. The consequences for press publishers is lost advertising and subscription revenue as the

² Recent proposed legislation offers guidance on how to define a “press publisher”. *See e.g.*, Journalism Competition and Preservation Act of 2021, S. 673, H.R. 2054, 117th Cong. (2021) (“The term ‘news content creator’ means— (A) any print, broadcast, or digital news organization that— (i) has a dedicated professional editorial staff that creates and distributes original news and related content concerning local, national, or international matters of public interest on at least a weekly basis; and (ii) is marketed through subscriptions, advertising, or sponsorship; and (B) (i) provides original news and related content with the editorial content consisting of not less than 25 percent current news and related content; or (ii) broadcasts original news and related content pursuant to a license granted by the Federal Communications Commission under title III of the Communications Act of 1934 (47 U.S.C. 301 et seq.)”); Local Journalism Sustainability Act, S. 2434, 117th Cong. (2021) (“The term ‘local newspaper’ means any print or digital publication if— (A) the primary content of such publication is original content derived from primary sources and relating to news and current events, (B) such publication primarily serves the needs of a regional or local community, (C) the publisher of such publication employs at least one local news journalist who resides in such regional or local community, and (D) the publisher of such publication employs not greater than 1,000 employees.”).

³ PEW RESEARCH CENTER, NEWSPAPER FACT SHEET, <http://www.journalism.org/fact-sheet/newspapers/> (last visited Nov. 19, 2021) [hereinafter *Newspaper Fact Sheet*].

result of the unauthorized and uncompensated taking of content from reported, gathered and compiled news articles (including, for example, headlines, ledes, graphs, photographs and graphics) by these platforms. This is accomplished by platforms either claiming the content taken is not copyright protected, or if it is, the taking (even though it is undertaken systematically), is a fair use, or permitted under the terms of non-negotiable contracts of adhesion that press publishers and others are required to accept to maintain their on-line survival.

NMA and its members hope that the Copyright Office study will provide Congress with the most detailed-to-date examination of the online problems confronting press publishers, including statistics on the nature, scope and severity of the crisis facing the news publishing industry from the unlicensed uses of their online content, and its impact on the continued viability of a robust free press providing the public with informed, detailed, and objective news. NMA suggests that the Copyright Office should offer a menu of suggested viable solutions in its study to allow Congress to make informed decisions about any necessary amendments to the Copyright Act, or other federal laws. In addition to identifying proposed changes to law that might alleviate the current problems, the Copyright Office should note “solutions” that are not viable or which may raise protracted legal challenges and thus delay any real improvements for the sustainability of the press publishing industry.

In sum, the NMA would respectfully ask the Copyright Office to: (1) conclude that the reproduction and public display of news content by aggregators is infringing; (2) implement changes to registration practices that would help protect press publishers; (3) look to Article 15 of the European Union (EU) Directive on Copyright in the Digital Single Market (the “DSM Directive”)⁴ to help ensure that American publishers benefit from and receive compensation for the consumption of their content in the EU, by adopting strong national treatment provisions in any bilateral agreements with the EU; and (4) endorse the Journalism Competition and Preservation Act of 2021 (JCPA), intended to help address the market abuse of dominant online platforms.

II. INTRODUCTION: STATE OF THE NEWS INDUSTRY

News publishing and high-quality journalism play a vital role in supporting the U.S. economy, a healthy democracy, and the communities they serve. Every day, millions of Americans rely on their local newspapers to get the latest information on what is happening in their communities and on the national and international stage—from climate change and COVID-19 to commentary on local football teams and community theater reviews. Local newspapers not only help to create a sense of community but also form a fundamental part of American life. By keeping decision-makers in check, a healthy local news ecosystem corresponds with lower municipal

⁴ See Directive (EU) 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) 92-125.

lending costs,⁵ while local and regional newspapers are also often responsible for some of the biggest scoops that affect the national discourse.

Press publishers also play an important role in the U.S. economy. In 2020, press publishers generated an estimated \$19.9 billion in total revenue, and employed approximately 31,000 people in 2020, not including any indirect employment effects.⁶ Our research shows American press publishers reached an estimated weekly audience of 129 million U.S. residents in 2019, or nearly 40 percent of the U.S. population.⁷ This audience generates over 200 million unique website visits and 6.7 billion individual page views per month.⁸ The COVID-19 pandemic has further highlighted the unique role and importance of high-quality journalism. In March 2020—the beginning of the pandemic—visits to local news sites were up 89 percent compared to the previous month. Other data shows that, during this time, press publishers were producing 45 percent more stories and garnering 124 percent more views for their articles.⁹

The success of any press publisher depends on its ability to create lasting and trusting relationships with its readers. In building these relationships, the quality of the news content matters. Publishers must invest in high-quality journalism in order to retain their existing readers and subscribers and to attain new ones. Research shows that new subscriptions are driven in large part by the desire to be connected to one’s community, while accuracy of the content, the publisher’s willingness to admit mistakes, and the newspaper’s fair treatment of different sides of an argument contribute to subscriber retention.¹⁰

Quality, however, does not come cheap, and is arguably more important today than ever before as the spread of disinformation and other harmful online content enabled by the ease of publishing on the internet threaten the very fabric of our society. Increasing the share of original and high-quality content requires considerable investment. This is true not just of local news but for all journalism, including vitally important investigative and foreign reporting. For example, the International Consortium of Investigative Journalists estimated that the Panama Papers investigation cost it approximately \$2 million, not including the considerable investments by many

⁵ See generally PENGJIE GAO, CHANG LEE & DERMONT MURPHY, *Financing Dies in Darkness? The Impact of Newspaper Closures on Public Finance*, HUTCHINS CENTER WORKING PAPER #44 (2018), available at <https://www.brookings.edu/wp-content/uploads/2018/09/WP44.pdf>.

⁶ See *Newspaper Fact Sheet*, supra note 3; Mason Walker, *U.S. Newsroom Employment Has Fallen 26% since 2008*, PEW RESEARCH CENTER (Jul. 13, 2021), <https://www.pewresearch.org/fact-tank/2021/07/13/u-s-newsroom-employment-has-fallen-26-since-2008>.

⁷ The U.S. population was 328 million in July 2019. CENSUS BUREAU, QUICK FACTS, <https://www.census.gov/quickfacts/fact/table/US/PST045219> (last visited Nov. 19, 2021).

⁸ See generally NEWS MEDIA ALLIANCE, NEWS ADVERTISING PANORAMA (2020) (publicly available to NMA members only; on file with author).

⁹ See Rebecca Frank, *COVID-19 Drives Traffic to News Sites, But Will Publishers Benefit?*, NEWS MEDIA ALLIANCE (Apr. 8, 2020), <https://www.newsmediaalliance.org/covid-drives-traffic-to-news-but-will-publishers-benefit/>.

¹⁰ See THE MEDIA INSIGHT PROJECT, PATHS TO SUBSCRIPTION: WHY RECENT SUBSCRIBERS CHOSE TO PAY FOR NEWS (2018), <https://www.americanpressinstitute.org/publications/reports/survey-research/paths-to-subscription/>.

of the news publications collaborating with the Consortium around the world.¹¹ Similarly, the New York Times estimated in the mid-2010s that it cost the newspaper \$10,000 a day to cover stories from Baghdad, Iraq.¹²

Such investments in high-quality journalism are becoming increasingly hard to sustain. Press publishers across America—and around the world—are struggling for their very existence. While due to some extent to changes in consumption habits and increased access to information, the plight of press publishers in the online ecosystem and the resulting threat to quality journalism is in large part created by fundamental power imbalances in the news marketplace that benefit a few dominant platforms to the detriment of others.

In less than two decades, the circulation and ad revenues of U.S. news publisher organizations has fallen from over \$57 billion in 2003 to an estimated \$19.9 billion in 2020.¹³ This drop of more than 65 percent has been the result of, among other things, a reduction in ad revenues of over 80 percent since 2005.¹⁴ While the digital share of newspaper ad revenues has increased from 17 percent in 2011 to 39 percent in 2020,¹⁵ much of the digital advertising spend goes to intermediaries in the ad tech ecosystem. According to some reports, it is estimated that publishers receive, on average, only 51 percent of advertiser spend on programmatic advertising.¹⁶ The lost share, worth billions of dollars, is money that publishers could invest in more journalistic content.

In addition to affecting the publishers' bottom lines and risking the sustainability of high-quality journalism in the future, this financial decline has already led to two serious consequences: a clear negative employment effect and the spread of news deserts across the country. Between 2008 and 2020, press publisher newsroom employment plummeted by more than half from 71,000 to approximately 31,000, a trend that is projected by the Bureau of Labor Statistics to continue.¹⁷ Local community newspapers have experienced the crisis most acutely. Since 2004, more than 200 counties—representing millions of Americans—no longer have a weekly or daily newspaper in print or online in their community, while half of the counties in the United States have only one

¹¹ See France24, *Crippling Costs Of War Reporting And Investigative Journalism* (Aug. 28, 2018), <https://www.france24.com/en/20180828-crippling-costs-war-reporting-investigative-journalism>.

¹² See *id.*

¹³ See *Newspaper Fact Sheet*, *supra* note 3.

¹⁴ From \$50 billion in 2005 to an estimated \$8.8 billion in 2020. See *id.*

¹⁵ See *id.*

¹⁶ See ISBA, *Programmatic Supply Chain Transparency Study 19* (May 2020), <https://www.isba.org.uk/system/files?file=media/documents/2020-12/executive-summary-programmatic-supply-chain-transparency-study.pdf>.

¹⁷ See Mason Walker, *U.S. Newsroom Employment Has Fallen 26% Since 2008*, PEW RESEARCH CENTER (Jul. 13, 2021), <https://www.pewresearch.org/fact-tank/2021/07/13/u-s-newsroom-employment-has-fallen-26-since-2008/>; BUREAU OF LABOR STATISTICS, *OCCUPATIONAL OUTLOOK HANDBOOK: REPORTERS, CORRESPONDENTS, AND NEWS ANALYSTS*, available at <https://www.bls.gov/ooh/media-and-communication/reporterscorrespondents-and-broadcast-news-analysts.htm> (last visited Nov. 19, 2021).

local newspaper.¹⁸ In total, over 2,000 newspapers have either closed or merged, with many of those communities affected being less affluent than the national average, leading to increased information inequality.¹⁹ According to a recent report, this decline represents approximately 20 percent of all local newspapers in the U.S. closing or merging since 2004, with approximately 1,300 communities having lost all local news coverage.²⁰ In 2019 alone, the media industry laid off more than 7,800 people.²¹

Despite the dire straits of the news media industry, demand for journalistic content has increased considerably. The number of average monthly unique visitors to the top 50 U.S. newspapers by circulation increased by over 68 percent since 2014: from 8.2 million in the fourth quarter of 2014 to almost 13.7 million in the fourth quarter of 2020.²² Other research shows an 11 percent increase in traffic to U.S. news sites from September 2019 to September 2021, with the data for 2020 representing an abnormal rise of 22.7 percent year-over-year.²³ However, it is clear that the increased interest in professional journalistic content has not resulted in meaningful revenue for press publishers.

In order to find new ways to survive in the online environment, press publishers have invested heavily in the digital transition, developing novel and profitable ways to respond to new ways of consuming news content. While many have explored digital subscription models and other reader-based sources of revenue, the availability of free or low-cost news online depends largely on advertising revenues to support the newsrooms and, consequently, many newsrooms rely on digital advertising models.

Although digital subscriptions are still a relatively small revenue stream for many publishers, their share is increasing rapidly. According to one study of selected newspapers, while digital subscriptions accounted for only three percent of the total revenues, their two-year compound annual growth rate was over 60 percent—showing that the publishers’ digital transition strategies are paying off at least in some respects.²⁴ However, while digital subscriptions have proved successful for a few publishers, it is difficult to find meaningful revenue growth in digital advertising that would be enough to support most press publishers.²⁵ This is particularly

¹⁸ See generally University of North Carolina at Chapel Hill, Hussman School of Journalism and Media, The Expanding News Desert, <https://www.usnewsdeserts.com/> (last visited Nov. 19, 2021) [hereinafter *Expanding News Desert Study*].

¹⁹ See *id.*

²⁰ See Tom Stites, *About 1,300 U.S. Communities Have Totally Lost News Coverage, UNC News Desert Study Finds*, POYNTER (Oct. 15, 2018), <https://www.poynter.org/business-work/2018/about-1300-u-s-communities-have-totally-lost-news-coverage-unc-news-desert-study-finds/>.

²¹ See Benjamin Goggin, *7,800 People Lost Their Media Jobs In A 2019 Landslide*, BUSINESS INSIDER (Dec. 10, 2019 5:05 p.m.), <https://www.businessinsider.com/2019-media-layoffs-job-cuts-at-buzzfeed-huffpost-vice-details-2019-2>.

²² See *Newspaper Fact Sheet*, *supra* note 3.

²³ See Molly Winik, *Benchmarks for Digital Publishers & News Sites [September 2021]*, SIMILARWEB BLOG (Oct. 20, 2021), <https://www.similarweb.com/corp/blog/research/business-benchmarking/news-industry-benchmarks/>.

²⁴ See FTI CONSULTING, *DIGITAL SUBSCRIPTIONS PLAYBOOK*, <https://www.fticonsulting.com/insights/reports/digital-subscriptions-playbook> (last visited Nov. 19, 2021).

²⁵ See *id.*

disconcerting for publishers who have traditionally provided their communities with free or low-cost news. In order to cut costs in the face of reduced revenues, many newspapers have responded to the digital transition by cutting print days, with at least 104 newspapers reducing publishing frequency from daily to weekly between 2004 and 2008.²⁶

Notwithstanding press publishers' best attempts to respond to changes in consumer behavior and the digital transition, their efforts have been hampered by the rise of a few dominant platforms that control and reap the majority of the revenue in the digital ad ecosystem while also acting as de facto regulators in the online marketplace. These platforms not only capture the financial benefits and define the rules of the game, but they also collect the majority of user data and control algorithms that decide what news content readers see and access.²⁷ For example, news aggregators amplify and lift news articles based on predetermined algorithms that are often opaque and deterministic, and that are based not on importance, originality, or reliability, but on what is likely to attract the most eyeballs.²⁸ This can be particularly harmful for small, local newspapers that are in general more vulnerable to declining revenues and changes in reading habits than larger, regional or national news outlets.

The purpose of providing this disturbing data is to seek potential solutions to ensure that copyright law and competition law can protect the rights of press publishers including their ability to effectively enforce their rights, and to thwart the current state of unfair competition in the marketplace. This will protect consumers of news content so they may continue to benefit from the availability of high-quality journalism that press publishers create and disseminate.

III. SCOPE AND NATURE OF THE PROBLEMS CURRENTLY FACING PRESS PUBLISHERS ONLINE

Federal copyright law has historically protected the original content produced by print publishers.²⁹ Thus, press publishers possess the same exclusive rights as other copyright owners, both for the individual news articles (including their ledes and photographs), as well as for compilations of articles and other materials. Publishers own copyrights in individual works either as works made for hire (largely from their employees), or via assignments or exclusive licenses, as well as owning copyrights in their collective works, such as their newspapers and websites. Press publishers also have additional rights, such as the protection for "hot news" and trademarks.

²⁶ See David Ho, *Cutting Print: Making It Work When Publishing Days Must Go*, AMERICAN PRESS INSTITUTE (Aug. 26, 2019), <https://www.americanpressinstitute.org/publications/reports/strategy-studies/cutting-print/>.

²⁷ See generally News Media Alliance, *How Google Abuses Its Position as a Market Dominant Platform to Strong-Arm News Publishers and Hurt Journalism* (Jun. 2020), <http://www.newsmediaalliance.org/wp-content/uploads/2020/06/NMA-Google-White-Paper-Design-Final.pdf> [hereinafter *NMA White Paper*] (appended hereto as part (1) of the Appendix).

²⁸ See generally *id.*

²⁹ The nature of content produced by press publishers, including news stories, does not foreclose the originality of that content and thus its copyright protection. As an example, a cursory review of the reporting of any major daily news story, illustrates the many varied ways press publishers report the story, and how they enrich and enhance the facts of the story. In doing so, there is sufficient expressive copyrightable material to these various "news" reports to each enjoy copyright protection.

However, a system that benefited publishers, creators and users (*i.e.*, the news consuming public) in the analog print world, has failed to protect publishers and creators in the current digital marketplace. There is a pervasive misconception and actions based at least in part on that misconception, that news content may be freely copied, adapted, and re-disseminated. Moreover, the massive buying power of Google and Facebook over content providers in search and social media marketplaces, respectively, is a significant deterrent to press publishers who wish to reap the benefits of their content and to enforce their rights.

As noted above, over the past two decades, the news publishing industry has had significant challenges. In its June 2020 “White Paper,” which is attached to this submission in the Appendix, NMA noted that “news publishers are suffering economically, cutting staff and closing their doors—thus reducing their ability to play the critical role served by the press.”

Today, the majority of news content is distributed by two dominant platforms, Google and Facebook. Press publishers’ financial struggles over the past two decades occurred during the rise of these dominant digital platforms that gained prominence in part due to favorable legislative measures that protected them from the usual risks and liabilities of publishing, as well as by business developments and aggressive acquisitions of rivals in the early-2000s.³⁰ This rise is exemplified by the exponential revenue increase these companies have witnessed. In 2005, Google’s revenues were approximately \$6.1 billion, while Facebook earned just \$9 million in revenues.³¹ Last year, Google reported revenues of \$182 billion, while Facebook’s revenues amounted to \$86 billion—a more than 9,000-fold increase in just fifteen years.³²

The vast majority of Google and Facebook’s revenues come from digital advertising services. Today, the two companies together account for almost 55 percent of the digital advertising market in the United States, in addition to capturing the vast majority of all digital advertising growth.³³ More than 90 percent of all internet searches go through Google or one its services, while the company is involved in nearly 70 percent of all online advertising technology

³⁰ See generally David McLaughlin, *Why Were Facebook, Amazon, Apple, and Google Allowed to Get So Big?*, FORTUNE (Mar. 16, 2019, 9:00 AM), <https://fortune.com/2019/03/16/google-amazon-antitrust-laws/>; Matt Stoller, Sarah Miller & Zephyr Teachout, *Addressing Facebook and Google’s Harms Through a Regulated Competition Approach*, AMERICAN ECONOMIC LIBERTIES PROJECT (Apr. 10, 2020), <https://www.economicliberties.us/our-work/addressing-facebook-and-googles-harms-through-a-regulated-competition-approach/>.

³¹ See Alexia Tsotsis, *Facebook’s IPO: An End To All The Revenue Speculation*, TECHCRUNCH (Feb. 1, 2012), <https://techcrunch.com/2012/02/01/facebook-ipo-facebook-ipo-facebook-ipo/>; Sec. and Exch. Comm’n, Form 10-K, Google Inc. 2005, available at <https://www.sec.gov/Archives/edgar/data/0001288776/000119312506056598/d10k.htm>.

³² See Sec. and Exch. Comm’n, Form 10-K, Facebook Inc. 2020, available at <https://sec.report/Document/0001326801-21-000014/>; Sec. and Exch. Comm’n, Form 10-K, Alphabet Inc. 2020, available at <https://www.sec.gov/Archives/edgar/data/1652044/000165204421000010/goog-20201231.htm>.

³³ See generally Alexandra Bruell, *Amazon Surpasses 10% of U.S. Digital Ad Market Share*, THE WALL STREET JOURNAL (Apr. 6, 2021), <https://www.wsj.com/articles/amazon-surpasses-10-of-u-s-digital-ad-market-share-11617703200>; Megan Graham, *Digital Ad Spend Grew 12% In 2020 Despite Hit From Pandemic*, CNBC (Apr. 7, 2021), <https://www.cnbc.com/2021/04/07/digital-ad-spend-grew-12percent-in-2020-despite-hit-from-pandemic.html>.

transactions.³⁴ While these platforms have grown exponentially and control the digital advertising ecosystem, some studies estimate that publishers receive as little as 30-40 cents for every dollar spent on advertising on their sites—revenue that publishers invest in their newsrooms and would have previously gained a larger share of.³⁵

The platforms' dominance in the digital advertising marketplace, together with their news aggregation practices (*i.e.*, taking independent news content, copying it and repackaging it for users), enable them to collect rich data about their users, which is not passed on to press publishers. This information asymmetry further widens the market imbalances and entrenches the platforms' dominant position. Press publishers collect user data to serve advertisements on their websites and to deepen their understanding of, and relationships with, their readers in order to drive engagement and subscription growth. By keeping users on the platforms' own ecosystems and collecting data on the users as they search for news items, without sharing that information with the publishers whose content the users read, the platforms deprive publishers of data that would support both their advertising and subscription attainment efforts, as well as the delivery of relevant content.³⁶

In parallel with these developments, the popularity of social media and news aggregation as a source of news has increased. In 2014, 51 percent of Americans said they used news aggregators to read news, while the share of users accessing news through social media was 47 percent in 2020.³⁷ In total, 73 percent of Americans access news online, while Facebook has become the world's most highly-trafficked distributor of news.³⁸ These services have proliferated based on a cycle where users increase their dependency on a single platform, and in turn, suppliers become increasingly dependent on that user base, and so on. News content is a particularly significant driver of value because of the time spent on engaging with news content from articles

³⁴ See generally DESKTOP & MOBILE SEARCH ENGINE MARKET SHARE UNITED STATES OF AMERICA, JANUARY 2009 TO SEPTEMBER 2020, STATCOUNTER, <https://gs.statcounter.com/search-engine-market-share/desktop-mobile/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?r=US&IR=T>; News Media Alliance, *Big Tech Says Publishers Keep Majority of Ad Revenue, But Experience Suggests Otherwise* (Nov. 16, 2020), <https://www.newsmediaalliance.org/google-ad-revenue-op-ed-70-percent/> [hereinafter *Big Tech Says*].

³⁵ See generally David Pidgeon, *Where Did the Money Go? Guardian Buys Its Own Ad Inventory*, MEDIATEL NEWS (Oct. 4, 2016), <https://mediatel.co.uk/news/2016/10/04/where-did-the-money-go-guardian-buys-its-own-ad-inventory/>; *Big Tech Says*, *supra* note 34.

³⁶ See generally *NMA White Paper*, *supra* note 27.

³⁷ See generally The Media Insight Project, *The Personal News Cycle*, AMERICAN PRESS INSTITUTE (Mar. 2014), https://www.americanpressinstitute.org/wp-content/uploads/2014/03/The_Media_Insight_Project_The_Personal_News_Cycle_Final.pdf; NIC NEWMAN, RICHARD FLETCHER, ANNE SCHULZ, SIMGE ANDI, & RASMUS KLEIS NIELSEN, REUTERS INSTITUTE DIGITAL NEWS REPORT 2020 10, available at https://reutersinstitute.politics.ox.ac.uk/sites/default/files/2020-06/DNR_2020_FINAL.pdf [hereinafter *Reuters Institute Digital News Report 2020*].

³⁸ See *Reuters Institute Digital News Report 2020*, *supra* note 37, at 10; Farhad Manjoo, *The Frightful Five Want to Rule Entertainment. They Are Hitting Limits*, NEW YORK TIMES (Oct. 11, 2017), <https://www.nytimes.com/2017/10/11/technology/the-frightful-five-want-to-rule-entertainment-they-are-hitting-limits.html>. Based on a 2019 report, 55 percent of users now access news through search engines, social media, and news aggregators. Faisal Kalim, *Now publishers are becoming news aggregators. This is why*, WHAT'S NEW IN PUBLISHING (Sep. 9, 2019), <https://whatsnewinpublishing.com/now-publishers-are-becoming-news-aggregators-this-is-why/>.

on a nearly infinite variety of subject matter, drawing a unique form of users' personal data that platforms rely on as currency.

The increased use of news aggregators is concerning as the aggregation services—and others using publishers' content without compensation—take excerpts, or in some cases full-text articles, that often allow users to obtain the core of the news story without clicking on the link and accessing the publisher website where the original content resides. In some cases, such as Google News, the services systematically display vast amounts of rich previews that contain headlines, summaries, and photographs, in violation of publishers' copyrights, but often defended by the services as fair use.³⁹ The extensive use of protected news content, together with the highly-personalized targeting of such content, decreases the likelihood of a user clicking on the link to the full article on the publisher's website or subscribing to publisher content. According to recent research, as many as 65 percent of searches on Google do not lead to clicks.⁴⁰ Even if the user does click on a link, in some cases the services give preference to publishers who have adopted their proprietary or preferred format for displaying publisher content that keeps the user within the platform's ecosystem even after the link has been clicked. Not only does this deprive the publisher of valuable traffic and data, it further blurs the lines between the publisher's quality brand and that of others with potentially lower quality information.⁴¹

The effect of aggregators on press publishers was well exemplified by two instances when Facebook's services were offline, forcing users to find other sources of news. In 2018, Facebook crashed for 45 minutes, leading to noticeable increase in traffic to press publishers' websites.⁴² Similarly in 2021, when Facebook's services went down for over five hours, data from thousands of press publishers in 60 countries showed a traffic increase of 38 percent at the peak of the outage, compared to the previous week.⁴³ These data points help demonstrate the impact of Facebook as a news distributor as well as the effect aggregators have on press publishers who are struggling to survive as the online platforms prosper. The challenge for publishers is highlighted by a quote from a German focus group member in a recent research report: "*I can get all the information that I need with the aggregator App that I use. My life revolves around my phone and whenever I have a free moment, I quickly check the news and don't see the need for any subscriptions.*"⁴⁴

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, traffic that the examples

³⁹ See generally *NMA White Paper*, *supra* note 27.

⁴⁰ See John Koetsier, 5 Trillion Searches Show Google Keeps 65% Of Visits To Itself, *FORBES* (Mar. 23, 2021), <https://www.forbes.com/sites/johnkoetsier/2021/03/23/5-trillion-searches-show-google-keeps-65-of-visits-to-itself/?sh=d38cdc6584ac>.

⁴¹ See generally *NMA White Paper*, *supra* note 27.

⁴² See Josh Schwartz, *Discovery & Engagement in a Mobile-First World*, *SLIDESHARE* (Sep. 18, 2018), <https://www.slideshare.net/chartbeat/chartbeat-discovery-engagement-in-a-mobilefirst-world-115246184/1>.

⁴³ See Laura Hazard Owen, *When Facebook Went Down This Week, Traffic To News Sites Went Up*, *NIEMANLAB* (Oct. 7, 2021), <https://www.niemanlab.org/2021/10/when-facebook-went-down-this-week-traffic-to-news-sites-went-up/>.

⁴⁴ See *Reuters Institute Digital News Report 2020*, *supra* note 37.

cited in the previous paragraph show would likely be substantially higher if the dominant platforms did not aggregate the publishers' content.⁴⁵ Press publishers invest in original journalism that the platforms then access and crawl without compensating the publishers. The platforms then use the content to keep users on their own services, while selling substantial advertising based on that content. For example, the Google News app relies heavily on AMP articles—a format originally developed and supported by Google—giving preference to publishers who have opted to provide their articles in this format. Google forces publishers who want to be featured in Google News to accept unfair and one-sided terms through a click-through agreement that severely disfavors publishers.⁴⁶

In addition to keeping users on their own services, Google—just like Facebook and other aggregators—controls the algorithms that determine both how and what content is displayed to users. As the House Judiciary Committee's recent report notes, even small changes in these algorithms can have a significant detrimental effect on publisher traffic.⁴⁷ When a user clicks on a link to the publisher's website, the link often directs them straight to the article, bypassing the landing page. This is particularly concerning as landing pages are more valuable than individual articles since users directed to landing pages are more likely to read more than one article and advertisements placed on landing pages are often more valuable.⁴⁸ In total, publishers are forced to accept the dominant platforms' rules at the expense of their own financial survival as part of a clear example of a power imbalance that is being supported by an expansive reading of Section 107 of the Copyright Act.⁴⁹

The abuse and devaluing of high-quality news content by aggregators not only hurts press publishers but also consumers and the society as a whole. Press publishers traditionally work diligently to ensure that their content is unbiased, accurate, and reliable, and safeguard the integrity of the advertising that appears next to their articles. Professional journalists also often risk their health and safety to provide readers with coverage from around the world. By grouping content together from different sources—including both professional news publishers and scammers and purveyors of disinformation—while minimizing any distinguishing characteristics between sources, while keeping users on the platforms' services, lines are blurred between the aggregators and the original publishers. In this way, aggregators create an environment where all news sources

⁴⁵ See generally *NMA White Paper*, *supra* note 27.

⁴⁶ See *id.* By relying on AMP, Google sources press publisher content that it then copies and repurposes so that Google News App users can access the materials without any license agreement in place. In addition, if users click on the summaries in the Google News App, the user is directed to the AMP versions of those published articles, hosted by Google, in lieu of the press publishers' website.

⁴⁷ See MAJORITY STAFF OF SUBCOMM. ON ANTITRUST, COMMERCIAL AND ADMIN. LAW OF THE H. COMM. ON THE JUDICIARY, INVESTIGATION OF COMPETITION IN DIGITAL MARKETS 63 (Oct. 2020) (Jerrold Nadler & David Cicilline), available at https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf?utm_campaign=4493-519.

⁴⁸ See Susan Athey, Markus Mobius & Jenő Pal, *The Impact Of Aggregators On Internet News Consumption*, NATIONAL BUREAU OF ECONOMIC RESEARCH WORKING PAPERS 14-15 (Apr. 2021), https://www.nber.org/system/files/working_papers/w28746/w28746.pdf.

⁴⁹ See generally, Brief For Amici Curiae Google Inc. and Microsoft Corp., Fox News Network, LLC v. TVEyes, Inc., 883 F.3d 169 (2d Cir. 2018) (No. 15-3885), available at <https://www.eff.org/document/amicus-brief-google-and-microsoft>.

are of equal reliability—*i.e.*, the “homogenization” of news—and this devalues the reputation and brand recognition the individual publishers have spent years investing in and building. As a press publisher’s reputation for quality journalism has traditionally mattered to the consumer, weakening the link between the newspaper (and its brand) and its readers, can have fatal consequences for trust and connection.

IV. HOW THE COPYRIGHT OFFICE, THROUGH THIS STUDY, CAN HELP PROTECT THE INTERESTS OF PRESS PUBLISHERS AND OF THE PUBLIC

Here are some initial recommendations, for further discussion and consideration, to address and potentially ameliorate challenges faced by press publishers.

1. The Reproduction and Display of News Content by Aggregators is Infringing

First, NMA asks that the Copyright Office review relevant case law and provide Congress and the courts with its views on whether the uses described, of press publishers’ content, are lawful under copyright law. We ask that the Office conclude that reproducing and displaying press publishers’ content through aggregation services are frequently infringements. Courts often look to the Office’s determinations on legal issues when deciding cases, including fair uses cases.⁵⁰ While some conclusions of the Copyright Office result from statutorily required rulemakings, this Press Publishers Study process was requested by Congress and should result in a comprehensive fair use analysis. As the Office well knows, fair use is determined on a case-by-case assessment, but the systematic copying, aggregation, and dissemination of news content (including verbatim excerpts, photographs or close paraphrasing) for commercial purposes and without new, substantive commentary by the platforms (or anyone else) does not transform the copied content with any “new meaning or message,” but merely substitutes for the original news stories or for licensed excerpts. An opinion from the Copyright Office concluding that, in many circumstances, the widespread reproduction and public display of news content by platforms are distinguishable from the kinds of uses courts have held to be fair, would be very helpful for protecting the legitimate copyright interests of press publishers. Appended hereto as part (5) of the Appendix, Professor Jane Ginsburg, who is providing consulting services to NMA, is also submitting comments in response to the NOI addressing the takings at issue and concluding that such uses are likely not fair use.

Here, the *prima facie* direct infringement on which NMA is focused, is the copying and displaying of press publishers’ copyrightable content on commercial, online platforms.⁵¹ Our infringement analysis is presented with an assumption that the platforms’ conduct is unauthorized.⁵² We also, for purposes of this analysis, do not address linking issues related to the “server test” first articulated in *Perfect 10, Inc. v. Amazon.com, Inc.*, which held that a search

⁵⁰ See *e.g.*, *Disney Enterprises, Inc. v. VidAngel, Inc.*, 869 F.3d 848 (9th Cir. 2017) (relying upon the Register’s position that space shifting motion pictures is not a fair use).

⁵¹ There are other unlawful uses of press publishers’ content in the online environment that also cause significant harm. Our infringement analysis in these comments focuses only on platforms that aggregate content through services like “Google News,” which has a (home) style landing page displaying reproduced content even if no user search query has been entered, and also renders search results in response to queries.

⁵² See section IV(4), *infra*, for a discussion of current licensing issues.

engine that embeds photos residing on third party websites did not “display” the photos.⁵³ That 2007 test has been rejected in recent years within the Southern District of New York, questioned within the Ninth Circuit, and as a result, the state of the law appears to be in flux.⁵⁴ Finally, as discussed further below, we contend that many of the headlines created by press publishers and taken by platforms rise to the requisite level of originality for protection, such that those takings, as well as the takings of complete images and qualitatively substantial excerpts from articles, are at issue. Regardless, the headlines are incorporated into larger works, such that they should not be viewed in isolation.

Turning to the only defense the platforms could likely raise, once a *prima facie* case of infringement is made, Section 107 of the Copyright Act prescribes the factors to be considered in evaluating a claim of fair use: (1) the purpose and character of the use, including whether it is of a commercial or nonprofit nature; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used; and (4) the effect of the use on the potential market for or value of the copyrighted work.⁵⁵ Under the Supreme Court’s decision in *Campbell v. Acuff-Rose Music, Inc.*,⁵⁶ courts also consider under the first factor whether a use is “transformative,” that is, whether it alters the original with “new expression, meaning, or message.” Under the fourth factor, courts inquire “whether [the use] usurps the market for the first [work] by offering a competing substitute. This analysis embraces both the primary market for the work and any derivative markets that exist or that its author might reasonably license others to develop . . .”⁵⁷ Balancing the statutory factors together, they weigh against a fair use finding.

(a) First Factor

“The first fair use factor, the purpose and character of the use, looks at the commerciality of the use and whether it is transformative. . . . Determining whether the proposed use is transformative requires a clear understanding of its contours.”⁵⁸ The contours of the platforms’

⁵³ 508 F.3d 1146, 1159 (9th Cir. 2007) (“[A] computer owner that stores an image as electronic information and serves that electronic information directly to the user . . . is displaying the electronic information in violation of a copyright holder’s exclusive display right. Conversely, the owner of a computer that does not store and serve the electronic information to a user is not displaying that information, even if such owner in-line links to or frames the electronic information.”) (internal citations omitted).

⁵⁴ See *Nicklen v. Sinclair Broad. Grp., Inc.*, No. 20-CV-10300 (JSR), 2021 WL 3239510, at *4 (S.D.N.Y. Jul. 30, 2021) (“The server rule is contrary to the text and legislative history of the Copyright Act.”); *Goldman v. Breitbart News Network, LLC*, 302 F. Supp. 3d 585, 593 (S.D.N.Y. 2018) (“The plain language of the Copyright Act, the legislative history undergirding its enactment, and subsequent Supreme Court jurisprudence provide no basis for a rule that allows the physical location or possession of an image to determine who may or may not have ‘displayed’ a work within the meaning of the Copyright Act.”).

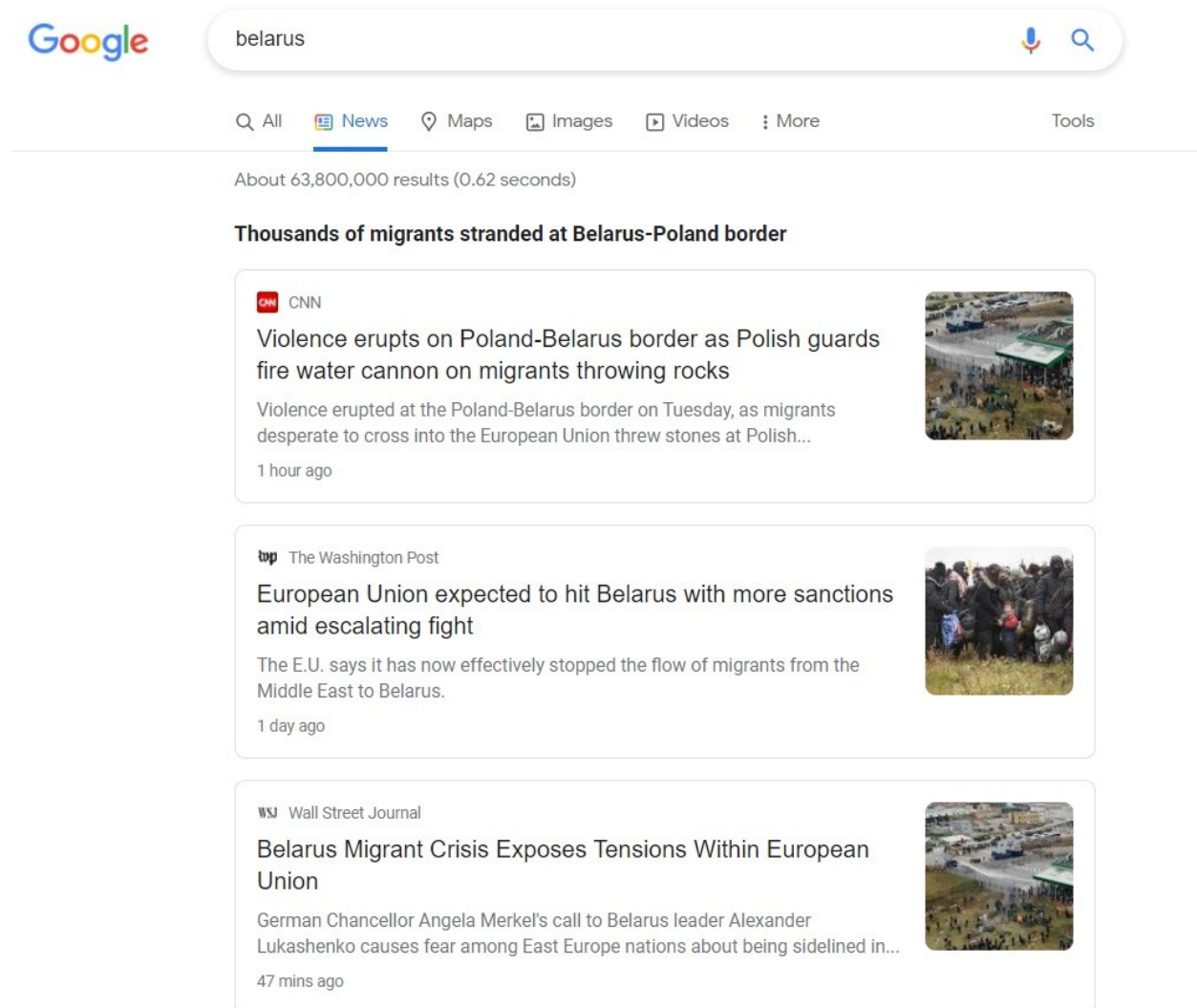
⁵⁵ 17 U.S.C. § 107.

⁵⁶ 510 U.S. 569, 579 (1994).

⁵⁷ *Andy Warhol Foundation v. Goldsmith*, 11 F.4th 26, 44 (2d Cir. 2021) (internal citation omitted). The Supreme Court and lower courts also reiterate that the fourth factor is “undoubtedly the single most important element of fair use.” See, e.g., *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 566 (1985); *Capitol Records, LLC v. ReDigi Inc.*, 910 F.3d 649, 662 (2d Cir. 2018).

⁵⁸ SECTION 1201 RULEMAKING: EIGHTH TRIENNIAL PROCEEDING TO DETERMINE EXEMPTIONS TO THE PROHIBITION ON CIRCUMVENTION: RECOMMENDATION OF THE REGISTER OF COPYRIGHTS 107-108 (2021) [hereinafter *1201 Recommendation*]; see also *Campbell*, 510 U.S. at 580 (stating that the central purpose of the first factor in a fair use

uses of press publishers' content are described in detail above and in Appendices attached. In sum, the platforms' uses include the commercial taking of headlines, initial sentences, and photographs from content made available on press publishers' websites. These takings do not include commentary on the content: there is no new expression, meaning or message conveyed by the platforms. An example of what this looks like in context is below.



The Register recently—in the Section 1201 rulemaking—looked at whether and to what extent text and data mining of literary works may qualify as fair use, and discussed a nuanced analysis of the relevant case law that stands apart from common, broad assertions regarding the lawfulness of text and data mining that extend beyond existing precedents.⁵⁹ While the text and

enquiry is to see whether the new work merely “supersede[s] the objects” of the original creation, or instead adds something new, with a further purpose or different character); *Google Books*, 804 F.3d at 214 (“[A] transformative use is one that communicates something new and different from the original or expands its utility, thus serving copyright’s overall objective of contributing to public knowledge.”).

⁵⁹ *1201 Recommendation*, *supra* note 58, at 102-125.

data mining at issue in that proceeding—creating databases of works within academic institutions strictly for the purposes of enabling digital searches of works for scholarly research—is distinguishable from the platforms’ reproduction and display of press publishers’ content, the Register’s discussion of the issues and case law is instructive for our present purposes.

The Register concluded “that the case law has not established that all copying of works for the purpose of TDM is necessarily a fair use. Indeed, although the *Google Books* court ultimately concluded that the specific use in that case was fair, it described the case as ‘test[ing] the boundaries of fair use.’”⁶⁰ Nevertheless, the Register discerned “certain principles from the case law”⁶¹ With respect to the first factor, the Register concluded, relevant for our purposes, that “copying for the purpose of creating a search function has been considered transformative *in at least some circumstances*.”⁶² She identified this principle in cases such as *Kelly v. Arriba Soft Corp.*,⁶³ which held that displaying low-resolution, thumbnail versions of photographs in response to a search query was fair use because the function of the photographs was aesthetic, while the function of the thumbnail versions within the search engine was “to help index and improve access to images on the internet and their related web sites.” She also cited *VHT, Inc. v. Zillow Group, Inc.*,⁶⁴ where the court held that providing a search engine for photographs provides “limited transformation,” and relied on *Fox News Network, LLC v. TVEyes, Inc.*,⁶⁵ which held—in a case won by the plaintiff—that a function that allowed customers to view clips from television broadcasts was “at least somewhat transformative” because it “enable[ed] users to isolate, from an ocean of programming, material that is responsive to their interests and needs,” and to access that material precisely and efficiently. That court said the search tool at issue had “only a modest transformative character” when compared with other, more established types of transformative uses.⁶⁶ Thus, the court concluded that the first factor only “slightly” favored the defendant.⁶⁷ And the court ultimately ruled the uses at issue were infringing, despite the new purpose to which the defendant put the copied works.⁶⁸

These cases, as they have evolved to address new sets of facts, suggest that even if enabling digital searches of content in some circumstances has a claim to some minimal transformativeness, that alone does not strongly weigh in favour of fair use under the first factor, especially where the use is commercial, lacking in commentary or criticism, and likely to cause negative economic consequences for a copyright owner.

⁶⁰ *Id.* at 107 (quoting *Authors Guild v. Google, Inc.*, 804 F.3d 202, 206 2d Cir. 2015) [hereinafter “*Google Books*”].

⁶¹ *Id.*

⁶² *Id.* (emphasis added); *see id.* at 109 (“[A] use can be transformative if the function or purpose of the use differs from that of the original.”).

⁶³ 336 F.3d 811, 818 (9th Cir. 2003).

⁶⁴ 918 F.3d 723, 743 (9th Cir. 2019).

⁶⁵ 883 F.3d 169, 179 (2d Cir. 2018).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 180.

(b) Second Factor

The second statutory factor is “the nature of the copyrighted work.”⁶⁹ Here, press publishers’ works include articles with headlines, ledes, images, videos and commentary on current events and other topics. These works are distinct from functional software, for example, that has sometimes tipped the scale under the second factor in favor of fair use.⁷⁰ It has been argued that the second factor should weigh in favor of fair use if the copied material discusses facts. Courts have rejected this argument: “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.”⁷¹ The second factor should weigh against a fair use finding.

(c) Third Factor

The third fair use factor is “the amount and substantiality of the portion used in relation to the copyrighted work as a whole.”⁷² “The relevant consideration is the amount of copyrighted material made available to the public rather than the amount of material used by the copier.”⁷³ Courts look at the qualitative importance to a copyrighted work of the portions taken.⁷⁴ Where a defendant’s use is transformative and the defendant takes no more than necessary to accomplish a transformative purpose, the third factor should be neutral.⁷⁵

As discussed above, the copying and displays at issue could be described as “modest[ly] transformative,”⁷⁶ if they are transformative at all. Moreover, the portions copied and displayed by platforms go beyond the amount necessary to serve the only arguable transformative purpose at issue: enabling search to locate articles. Facilitating the finding of works of authorship can be transformative, if only mildly so. But prior search cases concerned searches initiated by users. By contrast, the platforms do not merely respond to searches but they actively provide news feeds to enable users to scroll through press publishers’ content without any search query. Thus, the platforms are engaging in the unsolicited delivery of protected content; this initiative puts the platforms beyond the search/deliver line that courts have drawn, favoring search but carefully reviewing the qualitative and quantitative substantiality of what the search delivers.⁷⁷ Here,

⁶⁹ 17 U.S.C. § 107(2).

⁷⁰ For a recent treatment of functional software see *Google, LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1201 (2021).

⁷¹ *TV Eyes*, 883 F.3d at 178, quoting *Google Books*, 804 F.3d at 220.

⁷² 17 U.S.C. § 107(3).

⁷³ *TV Eyes*, 883 F.3d at 178-79.

⁷⁴ E.g., *Harper & Row*, 471 U.S. at 565 (finding no fair use when the copying involved only about 300 words, but the portion copied was “the heart of the book”); *Oracle*, 141 S. Ct. at 1205 (“[E]ven a small amount of copying may fall outside of the scope of fair use where the excerpt copied consists of the ‘heart’ of the original work’s creative expression.”).

⁷⁵ See *Kelly*, 336 F.3d at 822; *Perfect 10*, 508 F.3d at 1167.

⁷⁶ *TVEyes*, 883 F.3d at 179.

⁷⁷ See, e.g., Jane C. Ginsburg, *Fair Use in the United States: Transformed, Deformed, Reformed?*, 2020 SINGAPORE JOURNAL OF LEGAL STUDIES 265, 293-94, <https://law1.nus.edu.sg/sjls/articles/SJLS-Mar-20-265.pdf> (“Copying to enable searching or identifying works is one thing, but the fairness of the use should turn on what the use delivers. If the output provides access to substantial and unaltered portions of copyrighted expression, the delivery is not fair use.”).

facilitating search does not require the display of complete images from articles, or of verbatim content created by press publishers. The platforms do not use the headlines, ledes, images and other material to create new works commenting on the same subject matter as the press publishers' works, but instead deliver enough of the press publishers' content—*i.e.*, the heart of the works—to satisfy many users' desire for information as expressed by the press publishers. As discussed below, this has a significant and negative impact on press publishers' ability to attract readers to their own websites. The third factor should disfavor fair use.

(d) Fourth Factor

The fourth statutory factor focuses upon the “effect” of the copying in the “market for or value of the copyrighted work.”⁷⁸ “Even if the purpose of the copying is for a valuably transformative purpose, such copying might nonetheless harm the value of the copyrighted original if done in a manner that results in widespread revelation of sufficiently significant portions of the original as to make available a significantly competing substitute.”⁷⁹ “[A] significantly competing substitute” is exactly what aggregators provide. Cases like *Kelly*⁸⁰ are distinguishable from what Google currently does, because there the defendant provided low-resolution thumbnail images, not high-resolution images along with headlines and ledes. Plus, the focus in *Kelly* was whether enabling search engine users to locate images available on the internet harmed the plaintiffs' market for offering access to full size images.⁸¹ Here, the focus should be on whether platforms are harming primary news producing markets, and potential markets, for press publishers' articles by extracting the images, headlines and ledes and providing them to readers. These markets and potential markets should include opportunities to license delivery of images, headlines and ledes.

Research has shown the substitutional impact of news aggregation on press publishers.⁸² Aggregators' uses cause some users to forgo clicking on the links and thereby deprive press publishers of visits to their own websites and the resulting advertising revenues. Aggregators also lump press publishers' content alongside unreliable content that might concern the news but does not meet the standards of integrity with which press publishers operate. This is not the sort of reputational harm that is caused by a negative book review—a classic example of fair use—but instead a systematic interference with the efforts of press publishers to compete to attract readers to their own websites and to thereby recoup investments.

Even assuming that the platforms' takings are modestly transformative, that should not overcome the market effects that these takings have on press publishers. As was the case in

If the output discloses no copyrighted expression, or only non-substitutional amounts of it, then the delivery may be deemed a fair use. The find/deliver distinction explains the different outcomes in *iParadigms*, *HathiTrust* and *Google Books* on the one hand, and *VHT v Zillow* and *TVEyes*, on the other.”)

⁷⁸ 17 U.S.C. § 107(4).

⁷⁹ *Google Books*, 804 F.3d at 223.

⁸⁰ 336 F.3d at 821-22.

⁸¹ *Id.*

⁸² See generally NMA Comments Appendix, part (4).

TVEyes, where the fourth factor analysis showed market displacement and substitution, a finding of fair use is inappropriate.⁸³

(e) Other Considerations

“Section 107’s list of factors is not exhaustive” and “some factors may prove more important in some contexts than in others.”⁸⁴ Courts consider what “public benefits the copying will likely produce.”⁸⁵ Ultimately, fair use analysis asks whether the goals of copyright law are better served by allowing a use than disallowing it.⁸⁶

Along with the economic impacts discussed above, the platforms’ uses of press publishers’ content have downstream impacts that harm society. As discussed in Hal J. Singer’s *Addressing the Power Imbalance Between News Publishers and Digital Platforms: A Legislative Proposal for Effectuating Competitive Payments to Newspapers*, appended hereto, there are

myriad social harms of newspapers not receiving competitive compensation. The news industry has incurred losses in advertising revenue every year since 2006, around the time that the platforms solidified their market power over digital advertising. This is not to say that Facebook’s and Google’s domination of digital advertising came entirely at the expense of newspapers. Rather, it is to provide context as to how any underpayment to newspapers can exacerbate an environment that is already quite dire. The effect of shrinking advertising revenues—in part caused by underpayment from dominant platforms—is less cash flow to support journalists, a clear employment effect flowing from the exercise of monopsony power by the dominant platforms. Employment among newspaper employees fell from 71,000 in 2008 to 31,000 in 2020. As a result of the deteriorating news media landscape described above, hundreds of local newspapers have been acquired or declared bankruptcy. The elimination of local news threatens democracy. Another critical role of traditional news outlets is providing fact-based journalism in the face of disinformation campaigns. The reduction in traditional newspapers has coincided with more Americans using social media platforms to access news. Moreover, the negative employment trends among newspapers, exacerbated by underpayments from the dominant platforms, can have ripple effects throughout local economies. When reporters, correspondents, and broadcasts news analysts, along with the other supporting employees at a publishing firm, lose their jobs, they lose incomes to spend at grocers, restaurants, and other local businesses. This reduction in spending can have a multiplier effect that ripples throughout a local

⁸³ See 883 F.3d at 181 (“[T]he fourth factor favors Fox as well because TVEyes has usurped a function for which Fox is entitled to demand compensation under a licensing agreement. At bottom, TVEyes is unlawfully profiting off the work of others by commercially re-distributing all of that work that a viewer wishes to use, without payment or license.”).

⁸⁴ *Oracle*, 141 S. Ct. at 1197. See H. R. Rep. No. 94-1476, pp. 65-66 (1976) (explaining that courts are to “adapt the doctrine [of fair use] to particular situations on a case-by-case basis” and in light of “rapid technological change”).

⁸⁵ *Oracle*, at 1208.

⁸⁶ *Id.* at 1203.

economy and removes stimulus that was once there. Finally, there are also social harms of news publisher closure on a community, including the lack of social cohesion and a reduction in the diversity of viewpoints.⁸⁷

In these circumstances, it must be acknowledged that it would not be enforcing press publishers' copyrights that "would stifle the very creativity which th[e copyright] law is designed to foster."⁸⁸ Widespread news aggregation is already diminishing the incentives and the practical ability to fund and create new news content. The public is suffering as a result. The takings at issue are not fair use.

2. Changes to Registration Practices Would Help Protect Press Publishers

Second, NMA asks that the Copyright Office recommend and make internal changes that would help publishers enforce their existing rights. Adopting new Copyright Office registration practices for websites, including dynamic (ever-changing) sites, such as those created and operated by press publishers, would greatly benefit not only publishers of news, but also many other copyright owners. The problems pertaining to the registration of dynamic news websites are both practical and technical ones, and are long overdue to be resolved in our view. The inability to register dynamic and voluminous website content is a foundational enforcement shortcoming that needs to be remedied for any existing or potential additional protections for press publishers to have a meaningful effect. Currently, publishers have no practical way to timely register their content without leaving numerous articles, photographs and other news content they produce unprotected by registrations on a daily basis. Because registration is a prerequisite for effective enforcement, this is a problem that needs to be remedied to allow press publishers to properly enforce their rights, on a timely basis, in the current marketplace.

A separate issue is more complicated and nuanced. NMA recommends that the Copyright Office should review its current approach to the protectability and registration of headlines and shorter works (*e.g.*, ledes)—currently articulated in U.S. Copyright Office publications, including the Compendium and regulations—to acknowledge that headlines "may" be protected in some instances—if they meet the threshold of originality—in order to dispel the notion that no headline qualifies for copyright protection.

3. Considering The Manner by Which the European Union has Addressed Misuse of News Content Could Prove Fruitful

Third, there is much we can learn, and perhaps adopt, from the European Union's Directive DSM Directive.⁸⁹ To start, the U.S. Government can ensure American publishers benefit from these new rights and receive compensation for the consumption of their content in the EU by adopting strong national treatment provisions in any bilateral agreements with the EU. Article 15 of the DSM Directive, "Protection of press publications concerning online uses," requires EU Members States to provide publishers of press publications with rights of reproduction and making

⁸⁷ NMA Comments Appendix, part (4), at 7.

⁸⁸ *Stewart v. Abend*, 495 U.S. 207, 236 (1990).

⁸⁹ See *DSM Directive*, *supra* note 4.

available and creates an ancillary copyright for press publishers and grants them an independent right to protect their content online.⁹⁰

The DSM Directive limits these rights of press publishers to a two-year right “after the press publication is published” and is not retroactive, *i.e.*, it does not apply to works first published before June 6, 2019.⁹¹ The right provided to publishers: (i) does “not apply to private or non-commercial uses of press publications by individual users”; (ii) does “not apply to acts of hyperlinking”; and (iii) does “not apply in respect of the use of individual words or very short extracts of a press publication.”⁹² The adoption of the press publishers’ right, together with its limitations, marks a significant improvement for the financial and sustained success of press publishers in the European Union.

The press publishers’ rights in Article 15 leave “intact” and “in no way affect any rights” provided in the European Union for authors and other rightsholders (*i.e.*, copyrights) “in respect of the works and other subject matter incorporated in a press publication.”⁹³ The provisions in the EU Directive 2001/29/EC regarding “limitations and exceptions” (Article 5), “technological protection measures” (Article 6), “rights management information” (Article 7) and “sanctions and remedies” (Article 8) all “apply *mutatis mutandis*” to the new publishers’ rights in the DSM Directive.⁹⁴ The DSM Directive also requires Member States to “provide that authors of works incorporated in a press publication receive an appropriate share of the revenues that press publishers receive for the use of their press publications by information society service providers.”⁹⁵

After its formal publication in the Official Journal of the EU, there was a two-year period of implementation, so all of the 27 EU countries were supposed to implement the DSM Directive by June 7, 2021. To date, nine countries have initiated the process to implement Article 15 into their national laws including, for example, Germany (in articles 87(f) and (g) of the German Copyright Law), France (in article 32 of the Copyright Act) and Spain, which earlier this month added a new Article 129bis to its Intellectual Property Law. Other EU countries that have taken implementation steps include: Netherlands, Hungary, Denmark, Malta, Italy, and Croatia, and it is reported the Belgium, Czech Republic and Sweden are beginning their implementation processes as well. Thus, it is too early to comment on the success of the new rights within the European Union. The Copyright Office should consider recommending ways to provide additional explicit

⁹⁰ *See id.*, at Art. 15 (1) (“Member States shall provide publishers of press publications established in a Member State with the rights provided for in Article 2 and Article 3(2) of Directive 2001/29/EC for the online use of their press publications by information society service providers.”).

⁹¹ *See id.*, at Art. 15 (4) (“The rights provided for in paragraph 1 shall expire two years after the press publication is published. That term shall be calculated from 1 January of the year following the date on which that press publication is published. Paragraph 1 shall not apply to press publications first published before 6 June 2019.”).

⁹² *Id.*, at Art. 15 (1).

⁹³ *Id.*, at Art. 15 (2).

⁹⁴ *Id.*, at Art. 15 (3).

⁹⁵ *Id.*, at Art. 15 (5).

publishers' rights, consistent of course, with U.S. law and any restrictions in U.S. law that differ from the laws of the European Union and the EU's new rights.⁹⁶

The new rights were adopted as a matter of reciprocity in the European Union. Thus, one way the U.S. Government can ensure that American publishers benefit from these new rights in the European Union is to adopt similar rights in the United States or to establish that the scope of U.S. copyright provides equivalent protection. Until that happens, or if it never transpires, the U.S. Government can ensure American publishers benefit from these new rights by adopting strong national treatment provisions in any bilateral agreements with the European Union, in for example, any future U.S.-E.U. Free Trade Agreement. NMA suggests that the U.S. Government should require national treatment obligations identical to the national treatment language in the 2020 U.S.-Mexico-Canada Agreement ("USMCA") for American press publishers. NMA further recommends that the language in Article 20.8 of USMCA should be the "model" national treatment language to be used in other agreements as well, so that if other countries adopt similar protections for press publishers, American publishers can be the beneficiaries of those rights in those territories as well. NMA would hope that the U.S. Copyright Office would expressly endorse these proposals in its study.

In sum, the goal of any increased or clarified protection is to ensure strong and enforceable copyright and other protections persist for online news content and to keep national and vital community news publications afloat and thriving. This goal is even more important now than ever due to the adverse economic and personnel effects of COVID on press publishers. In addition, aggregators should not be able to hide behind a few fair use cases that are read by some to render existing copyright-based protections essentially meaningless for press publishers. The essence of news reports can generally be captured even in small amounts of text, lessening the value of a full-length news article. Press publishers have rights in both their individual articles and in the "compilation" of news articles which are displayed on their websites. As noted, dominant online platforms systematically take headlines and portions of stories (including ledes and entire photographs) from news publishers, without compensation, and rely on "fair use" arguments to deny payments. The business of collecting, reporting and accurately detailing news stories, is expensive and very time-consuming. Platforms that free-ride on the content of press publishers, are not "promoting" the creation or dissemination of new works. Rather, these platforms are merely substituting their sites, for the original content producers' sites. Additional protections for news content, and clarifications of existing law and practices, would mean that press publishers could reap rewards from their investments in the gathering and reporting of news stories, and be properly compensated for the commercial use of their content online. That would promote the creation, and dissemination, of more copyrightable material, consistent with the Progress Clause.

4. NMA Also Supports a Complementary, Non-Copyright Approach, Limited to Dominant Tech Platforms

There is an urgent need to address the tech platforms' well-documented anticompetitive abuse of its market power. Because the tech platforms currently access press publishers' content through forced consent, the appropriate basis of a right to compensation for that access is competition law. While some platforms may argue that publishers have granted consent for the

⁹⁶An Australian competition law model should also be considered.

free use of their content on the platform’s services, this consent is often illusionary—obtained through predatory means and without offering publishers with any reasonable or realistic alternatives.

For example, with regards to the Google News app, many publishers years ago agreed to click-through or other agreements with Google for use of their content in Google Newsstand.⁹⁷ However, those agreements also included provisions that granted Google the right to use the publishers’ content in any future revisions of the product, regardless of the nature of those changes.

Today, the Google News app hardly resembles the earlier iterations of the product, but Google would likely argue that the publishers have consented to the use of their content, with the Google News Publisher Agreement stating that “*If you are already participating in Google News (formerly known as Newsstand) this Agreement will supersede your prior online terms.*” With the participation in the Google News website tied to the Google News mobile app, publishers have no real way of opting out of the use of their content in the app without potentially risking losing traffic through the website, in addition to risking that any opt-out may negatively affect their performance in Google search.

Similarly, with regards to AMP, Google effectively gave publishers no other option than to adopt it, requiring publishers to create AMP-formatted articles that are hosted, stored, and served from Google’s own servers.⁹⁸ The adoption of AMP was linked to placement on Google’s search engine by both stating that speed is a “ranking factor” in placement and that AMP articles can be featured in mobile search “as part of rich results and carousels.”⁹⁹ Meanwhile, many other Google products give preference to AMP articles and the terms of service grant Google significant control over the content, in addition to giving it the permission to use the content in the future in broad, uncertain ways.¹⁰⁰

As documented above, and in NMA’s appended White Paper, the unchecked power imbalance between platforms and press producers is leading to too little quality news and too little journalism employment, a clear market failure. Press publishers have been unable to properly exercise the rights granted to them under the Copyright Act because of the market dominance of some platforms. One solution to this problem is to provide a temporary safe harbor for publishers of online content to collectively negotiate with dominant online platforms regarding the terms on which content may be accessed.

NMA has worked with House and Senate members on a bi-partisan bill to address the dominant online platform problem. It is the “Journalism Competition and Preservation Act” (JCPA), which was introduced in 2021 in the House (H.R. 1735) by Rep. David Cicilline (D-RI)

⁹⁷ See *NMA White Paper*, *supra* note 27, at 22.

⁹⁸ See *id.* at 11-20.

⁹⁹ GOOGLE SEARCH CENTRAL, UNDERSTAND HOW AMP LOOKS IN SEARCH RESULTS, <https://developers.google.com/search/docs/advanced/experience/about-amp#:~:text=Google%20Search%20indexes%20AMP%20pages,ranking%20factor%20for%20Google%20Search> (last visited Nov. 21, 2021).

¹⁰⁰ See *NMA White Paper*, *supra* note 27, at 11-20.

and Rep. Ken Buck (R-CO), and in the Senate (S. 673) by Sen. Amy Klobuchar (D-MN) and Sen. John Kennedy (R-LA).

For all the reasons discussed above, the JCPA is necessary. Facebook and Google abuse their massive buying power over the digital marketplace, setting the rules for press publishers and determining how journalism is displayed, prioritized, and monetized. These rules have led to the commoditization of news and the proliferation of dangerous misinformation that undermines the fabric of our democracy.

A free and diverse press is the backbone of a healthy and vibrant democracy, including the protection of local news sources. As amply noted above, press publishers and journalists have been suffering because of lost revenue and nearly half of the counties in the country have only one newspaper, while almost 200 counties have no local newspaper at all.¹⁰¹ People trust their local newspapers; in fact, in surveys of U.S. adults 73 percent say they have confidence in their local newspaper. Lower-income communities are disproportionately affected by the closure of local newspapers which serve as a check on the local, state, and federal governments. They also incentivize people to take part in our political system, with local newspapers helping to increase voter turnout. In short, quality journalism is key to sustaining civic society, and local news plays an important function in covering municipal governments. Meanwhile, opinion pages in local papers provide communities with an invaluable marketplace of ideas.

The JCPA provides a temporary safe harbor for publishers of online content to collectively negotiate with dominant online platforms regarding the terms on which content may be distributed. The safe harbor is limited in time and scope and would allow press publishers to collectively negotiate with Facebook and Google for fair compensation for the use of their content. It is NMA's view that this market-based legislation is the only appropriate way to correct the competitive imbalance that our existing antitrust laws are unable to address. It would help develop procompetitive, business-led solutions that would flow subscription and advertising dollars back to publishers and help to protect quality news and encourage competition. The JCPA will include an oversight mechanism to ensure the platforms participate in good faith negotiations and that small and local press publishers are fairly compensated.

The DMCA, 17 U.S.C. § 1201(a)(1), already permits copyright holders to implement technological protection measures to control access to their works. The "access" provisions could, among other things, prohibit dominant online platforms from programmatic access to the content produced by copyright owners—*i.e.*, the press publishers' websites. However, because dominant online platforms hold durable monopolies and possess monopsony power over the distribution of news, individual digital press publishers, acting alone, are unable to properly exercise their Section 1201 rights to prevent unauthorized access by these dominant online platforms, or to demand payments commensurate with the competitive marketplace. Press publishers need the ability to join with others to properly exercise and enforce their section 1201(a)(1) rights. That is why the JCPA could be an effective remedy for this problem against the most dominant online platforms.

Unfortunately, the JCPA also has its limitations. It applies to only a handful of dominant platforms and is time-limited. Thus, other options, beyond those addressing market power, are also

¹⁰¹ See *Expanding News Desert Study*, *supra* note 18.

needed to provide longer-term protections, not only against the dominant platforms, but against other third parties who have devalued the content created and disseminated by press publishers. This means that copyright-oriented approaches are also necessary, especially to improve the effective enforcement of press publishers' rights across the digital ecosystem.

V. RESPONSES TO NOTICE OF INQUIRY QUESTIONS

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?**

Information collected from NMA-member publishers indicates that the publishers own the copyright to the majority of the content they publish including the majority of individual works in their publications (*e.g.*, primarily written stories, photographs, videos and graphics) as well as the compilation copyright in the publications themselves. One publisher estimated that it owns the copyright to approximately 65 to 80 percent of their published articles, while the copyright ownership of published photographs may be more evenly divided between publishers and photographers. The rest of the published content is generally either from freelance contributors or licensed from wire and syndicate services, or other third-party providers. With regard to freelancers, the publisher generally receives the copyright (or co-ownership) by assignment, while a small minority license the use of their content to the publisher on 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?**

In cases where the publisher owns the copyrights to the content, NMA members stated that the ownership is, in most cases, acquired under the work-for-hire doctrine (this includes, of course, regular salaried staff) and some from freelancers who enter into work-made-for-hire agreements. The remainder of the owned content is contributed by freelancers who execute agreements assigning ownership to the publishers.

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?**

NMA believes that much of the conduct of news aggregators should require licenses. However, as described above, a few, inapposite fair use decisions have emboldened aggregators (especially large tech platforms) to assert that fair use protects a range of activity that goes well beyond the defense's intended scope. One ongoing problem detailed above is the amorphous

concept of transformative use.¹⁰² The lack of clarity around what types of uses may properly be considered transformative, as opposed to substitutional, has left press publishers with uncertainty that impedes their ability to enforce their exclusive rights in the online context. While some cases have reached correct outcomes,¹⁰³ press publishers still face assertions from users of their content that it may be reproduced, adapted, aggregated and disseminated, for free—even by commercial actors. As noted above, one case underlying much of the current jurisprudence regarding fair use online, *Perfect 10*,¹⁰⁴ concerned the use of low-resolution thumbnails by a search engine. The online ecosystem has changed considerably since that case was decided in 2007, and the aggregators’ use of news content is substantially different than the uses underlying the *Perfect 10* decision. Aggregation of news is also distinct from the project at issue in *Google Books*,¹⁰⁵ where hard copy books were copied and made available for searching, with only limited excerpts displayed in response to specific searches. The Google Books project and service did not involve real-time competition with news content, and did not involve profiting by taking the heart of a work and providing it to the public, thereby supplanting visits to the publisher’s own website.

The threat posed by online aggregators to press publishers today is largely based on the systematic use of significant excerpts and, in many cases, photographs with little or no accompanying commentary by the aggregators. Together, these often convey the most valuable portions of articles and the information, as expressed therein, sought by the user, thereby reducing traffic to news websites and consequently lessening the incentives for publishers to invest in original news content. Further, news aggregators display excerpts, not in isolation, but rather in compilations with substitutional quantities taken that more-often-than-not result in readers not clicking through to the actual article. The aggregators pose a fundamental challenge to press publishers by effectively participating in the same market for news in which the publishers operate by using the publishers’ content without compensating them for it.

NMA believes that it is vital that Congress and the Copyright Office find ways to redress commercial entities’ systematic use of news content for their own benefit. Balancing the playing field in the digital marketplace is fundamental for allowing press publishers to benefit from the protections afforded to them under the Copyright Act and to realize benefits from their investments in high-quality journalism. This is particularly important when it comes to aggregators or other services where the end-product or service offered effectively serves as a substitute to, or reduces the incentives to invest in, journalistic content. NMA stands willing to work with the Congress and the Copyright Office—including through the approaches highlighted elsewhere in these comments—while also safeguarding fair use and First Amendment rights for all users, including the right to comment on, criticize, debate, and engage with news content.

¹⁰² See, e.g., *Perfect 10*, 508 F.3d at 1146; *Google Books*, 804 F.3d at 202.

¹⁰³ E.g., *TVEyes*, 883 F.3d at 169.

¹⁰⁴ 508 F.3d at 1156.

¹⁰⁵ 804 F.3d at 207.

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

Various external factors make it harder for press publishers to negotiate licenses with the online platforms and news aggregators, ranging from government regulations and policies to clear market failures that reduce the publishers' leverage in negotiations and lessen the incentives of the platforms to engage in good faith negotiations.

There are two separate Copyright Office internal changes that would help press publishers.

First, and most importantly, are changes to allow for press publishers to register dynamic and voluminous website content. As noted above, this is a foundational shortcoming that must be remedied for existing rights (or any potential additional protections to being protected in a meaningful way). Currently, publishers have no practical way of regularly registering website content, leaving numerous articles, photographs and other types of news content unregistered, and thus from an enforcement standpoint, unprotected, every day. This is especially true today given the large amount of materials published only online. NMA looks forward to working closely with the Copyright Office to resolve this longstanding problem. Unresolved, it remains a factor in reducing the negotiating leverage that press publishers have to effectively enforce their rights. Any solution needs to allow for timely content protection to effectively enforce rights.

Second, are administrative obstacles, one example being the blanket statement in U.S. Copyright Office's Circular 33 that words and short phrase are "*uncopyrightable because they contain an insufficient amount of authorship*"¹⁰⁶—as this pertains, for example, to headlines. 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 and severely diminishes its market value.

As discussed above, the dominant position of a few online platforms has made it more difficult for publishers to effectively enforce their copyrights against infringement in the digital marketplace. These platforms have created an ecosystem where they control digital advertising and decide the rules that others must comply with in order to participate and benefit from online advertising and to gain exposure and traffic. These platforms often adopt strategies to force publishers and readers alike to stay in the platforms' own ecosystems—whether by in effect limiting the technological solutions publishers can adopt or by providing users the information they seek without having to leave the platform's service—making it harder for publishers to create and uphold meaningful relationships with readers and to build and manage their brands and reputation for quality. Due to this hold over publishers' fortunes, publishers are forced to cooperate or face the threat of having their content being demoted, thereby increasing the risk of losing traffic and ad revenue if they do not accept the online platforms' terms.

¹⁰⁶ COPYRIGHT OFFICE, CIRCULAR 33: WORKS NOT PROTECTED BY COPYRIGHT (revised Mar. 2021), <https://www.copyright.gov/circs/circ33.pdf>.

Combined, the administrative challenges and the online platforms' market dominance make negotiating licenses in the current online ecosystem in any meaningful way next to impossible for many publishers.

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

In the past, with a few exceptions, the online platforms have generally decided not to seek licenses for news content. Recently, however, Facebook and Google have started negotiating deals with press publishers, paying the publishers compensation for featuring their news on the online platforms' services. In 2020, Google launched its Google News Showcase product, originally in Brazil and Germany, which features news panels that appear in Google News and other services. Similarly, Facebook has negotiated deals with publishers, most recently in Australia and France, concerning the use of news items on its platforms.

These developments, however, are largely geographically limited and based on the size and the influence or reputation of the publisher. Google News Showcase, for example, is only available in a limited set of countries—most notably, it is not yet available in the United States—while Facebook has also only engaged in substantive negotiations with publishers in a few countries. In addition, the licenses are often opaque and only available to selected publishers, with many left in the dark, both in terms of the ability to objectively evaluate proposed licensing terms, if offered, and to participate in the products in the first place.

Further, legal and political pressure seem to have played a major, if not decisive, role in forcing Facebook and Google to negotiate with publishers in the first place. The platforms only started to negotiate once the European Union had adopted its DSM Directive. France was the first country to transpose Article 15 into its national law. Separately, Australia adopted its Media Bargaining Code. Even today, reporting suggests that Google is offering Australian publishers considerably more generous deals, presumably as a result of the Australian Code.¹⁰⁷ According to investigative reporting, Google's budget for its Australian deals is three times larger than its budget for the United Kingdom, regardless of the relative size of the two economies.¹⁰⁸

It seems clear that the platforms' recent negotiations with publishers have been largely a result of regulatory and legislative pressure, not goodwill or concern over the sustainability of high-quality journalism. Without the EU DSM Directive or the Australian Media Bargaining Code, the platforms would likely have continued to use news content without acquiring licenses. Voluntary efforts to negotiate licenses are relatively rare and generally unsuccessful—and even then, often driven by considerations specific to the platform and the publishers. It is therefore imperative that legal systems incentivize and support fair negotiations between publishers and the platforms in order to ensure that publishers can effectively enforce their rights to their content.

¹⁰⁷ See Zenger News, *Google's News Showcase Teaches Executives What Not To Do*, FORBES (Oct. 25, 2021, 8:35 PM), <https://www.forbes.com/sites/zengernews/2021/10/25/googles-news-showcase-teaches-executives-what-not-to-do/?sh=25785ccb7eae>.

¹⁰⁸ See *id.*

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

NMA member publishers indicate that news aggregators have a major impact on press publishers. While unable to quantify their effect in detail, members report losing a considerable number of readers to news aggregators, thereby impacting both subscription and advertising revenues.

NMA member publishers also raised concerns over current news aggregation practices that allow the aggregators not only to amass users but to collect data on them. The size and characteristics of the audience an online service reaches makes it more appealing to digital advertisers, and by incentivizing users to stay on their own services, online platforms make the aggregators more enticing to advertisers while diverting advertising revenues away from the originators of the news content. Similarly, the data aggregators collect from their users, is generally not shared with publishers—who are trusted partners to their readers and have an interest in knowing their readers better in order to better serve their communities—instead allowing the aggregators to reap the benefits by generating revenue through increased targeted advertising sales and other data monetization methods.

While the aggregators provide some traffic to press publishers, Alliance members note that the impact is generally negated by the display of excerpts for free, allowing users to circumvent the publishers' websites, leading to greatly decreased monetization through digital advertising and subscriptions. The aggregation of news content also flattens and devalues publisher brands and reputations that they have spent years, if not decades, and substantial resources, to build and safeguard. In an aggregated environment, users are likely to be less aware of which news organization is providing the information they consume, as well as to think that all information is equally valuable and reputable, regardless of the provider.

In totality, the current news content aggregation practices work to solidify the unlevel playing field by enabling aggregators to monetize news content and by reducing the ability of publishers to do so, while also causing severe collateral damage.

(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?

NMA has been unable to gather quantifiable data on this question, but some Alliance members state that the impact of news aggregators is particularly noticeable when it comes to local news outlets whose target audiences and readerships are considerably smaller than those of regional and national publishers. While aggregators pose a challenge to all publishers, regardless of their size or geography, local publishers are in a particularly vulnerable position and the threat posed by aggregators creates yet another test to the sustainability of high-quality community journalism.

(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?

With regards to third-party uses by services other than news aggregators, NMA members expressed that such uses may have both negative and positive effects on press publisher finances. Some third-party publications, companies, and other entities seek to license press publisher content—either directly or through a licensing partner—in addition to which some publishers have syndication agreements that allow their content to be reproduced by other publications or services. According to at least one publisher, these licenses generally provide supplementary income but account for only a very small percentage of overall revenues. However, in the best case, these licenses can be beneficial for both the third-party and the publisher alike by providing the third-party with legal certainty and the press publisher with additional exposure and revenue. The widespread use of excerpts and photographs by news aggregators has, however, negatively affected the market rate for news content and inspired others to use the content without authorization. As a result, one publisher indicated that it has reduced its licensing of content from third parties. Many press publishers do have existing robust licensing businesses, licensing materials to other publishers. This is especially true for licensing materials to foreign publishers, who, unlike the large tech platforms, will enter into contracts with press publishers that allow the publishers to control presentation, and who are willing to pay for the content.

In contrast to third-party services and websites that properly license news content from publishers, others, including foreign actors, regularly use publisher content without authorization, either by scraping publisher websites or misusing RSS feeds and then publishing full or edited stories. These infringing services, such as media monitoring enterprises, often provide users access to news articles, sometimes bypassing publisher paywalls and removing the need for a user to click through to the publisher website—a practice that is particularly harmful in the case of breaking news where the value is based in part on the content’s time-sensitivity. While these uses clearly do not fall under fair use, some services aim to evade this justifying their existence by requiring users to insert the URL for the desired news article and then offering additional tools to comment on or notate the article—tools that may be hidden behind a registration and not widely used—and relying on other parts of the Copyright Act, namely Section 512 safe harbors.¹⁰⁹ If anything, these instances further highlight the need for additional protections or increased enforceability of existing protections for news content.

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?

¹⁰⁹ While commercial piracy negatively impacts press publishers as it does all other copyright content producers, it is not the focus of the problems confronting press publishers detailed in this submission, nor do we suggest that it (or the liability limitations of Section 512) should be the focus of this Copyright Office study.

Press publishers have access to very limited sets of protections outside of the Copyright Act. Most relevant, the “hot news” doctrine, first articulated in *International News Service v. Associated Press*,¹¹⁰ was decided while federal common law still existed and is today recognized by only a few states.¹¹¹ In *International News Service*, the Supreme Court—treating the question as one of unfair competition, not copyright law—held that International News Service’s use of information from AP’s news content interfered with AP’s normal operations, giving INS an unfair advantage as it did not have to pay for newsgathering. Today, subsequent cases, including *Nat’l Basketball Ass’n v. Motorola, Inc.*,¹¹² and *Barclays Capital Inc. v. Theflyonthewall.com, Inc.*,¹¹³ follow the doctrine in those few locales where it is recognized. It is further limited to the few circumstances where an entity systematically engages in wholesale reproduction of time-sensitive news content and where the practice raises the real possibility of driving the originator of the content out of business. This standard fails to provide adequate legal certainty to press publishers, in addition to likely not applying to a large share of news content that may not meet the time-sensitivity requirement.

Other potential claims available to press publishers may arise under the 17 U.S.C. § 1201 anti-circumvention provisions in cases where an aggregator or another service circumvents, or enables others to circumvent, publisher paywalls or other technical measures. Such conduct may also violate the Computer Fraud and Abuse Act, codified at 18 U.S.C § 1030. To the extent aggregators fail to attribute collected news stories to individual authors, photographers or publishers, claims may also arise under 17 U.S.C. § 1202 for removal of copyright management information. However, satisfying the elements of that statute in the search context may be difficult.¹¹⁴ In addition, in some instances, a publisher may be able to bring a trademark claim against an aggregator if the service causes consumer confusion as to source, or otherwise infringes or misuses the publisher’s logo or other trademarked material. Publishers may also be able to avail themselves of contract law in some cases, where a service clearly violates the press publisher’s terms of service or other contractual provisions. But, cases based on contract law often lack the necessary legal certainty and effective remedies, including damages that may be difficult or expensive to prove and in any case woefully inadequate compared to copyright remedies. In many cases, the legal uncertainty may not justify the high costs of litigation.

All in all, while some potential alternative remedies exist under state and federal laws, these do not generally provide adequate remedies for press publishers, nor do they act as an effective deterrent to infringers. In order to protect news content online and to safeguard the

¹¹⁰ 248 U.S. 215 (1918).

¹¹¹ Five, as of 2012. See John C. McDonnell, *The Continuing Viability of the Hot News Misappropriation Doctrine in the Age of Internet News Aggregation*, 10 NW. J. OF TECH. & INTELL. PROP. 255, 255 (2012), available at <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1164&context=njtip>.

¹¹² 105 F.3d 841 (2d. Cir. 1997).

¹¹³ 650 F.3d 876 (2d Cir. 2011).

¹¹⁴ See *Kelly v. Arriba Soft Corp.*, 77 F. Supp. 2d 1116, 1122 (C.D. Cal. 1999), *aff’d on different grounds*, 336 F.3d 811 (9th Cir. 2003) (defendant’s search engine, by copying images from websites and displaying them without CMI, did not violate statute because the removal was “an unintended side effect of the Ditto crawler’s operation”); *Stevens v. CoreLogic, Inc.*, 194 F. Supp. 3d 1046, 1052 (S.D. Cal. 2016) (defendant’s software, which processed real estate photos for posting to the MLS website and removed CMI, did not violate statute, citing *Kelly*).

sustainability of high-quality journalism, it is vital that the ability to enforce existing copyright remedies is strengthened or other, additional protections are provided.

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?**

Article 15 of the European Union’s DSM Directive is discussed in more detail earlier in these comments. The overarching goal of the Publishers’ Right was both to protect the sustainability of journalism in Europe as well as to harmonize the legal protections available to news content across the Union. Before the DSM Directive, these protections were varied and, in many cases, cumbersome to enforce with some member states granting copyrights to publishers while publishers in other countries had to rely on contractual transfers or other arrangements. The DSM Directive changed the legal landscape by requiring member states across the Union to provide publishers a separate, economic right to protect their content—irrespective of their national copyright systems.

Meanwhile, while publishers in the United States in many cases own the copyright to the content they publish, the enforcement of these rights may be rendered ineffective by expansive judicial interpretation of the fair use defense and the competitive dominance of a few online platforms, as discussed elsewhere in this document. Therefore, while the European Union has aimed to resolve the fundamental issues in protecting news content online—notwithstanding the lacking implementation of the DSM Directive by the member states—American press publishers are still largely inhibited in their ability to protect their content and to benefit from their investments to high-quality journalism.

- 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?**

The EU only adopted the DSM Directive in 2019 and thus far only nine member states have implemented it, making it too early to tell how effective it has been, although signs from France are promising. Google has engaged in negotiations with French publishers and most recently, the French competition authority fined the company EUR 500 million for failure to negotiate in good faith and ordered Google to negotiate with the publishers—this would have been unthinkable without the Publishers’ Right. While data from an earlier effort in Spain does not lend itself to easy or straightforward conclusions, it certainly does not support the conclusion that the experiment was a failure.

- 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?**

The rights adopted by the European Union in Article 15 exist for non-EU members within the territory of the EU, but only as a matter of reciprocity. Thus, unless the United States adopts

similar or equivalent rights, American publishers would not enjoy the benefits of the new rights, including remuneration, unless they qualify as an EU publisher under the Directive’s definitions, or unless there is another avenue for such protection.

One such avenue, already noted above, would be for the United States to secure strong national treatment obligations in any future U.S.-EU trade agreement. In that case (for example, modeling the national treatment obligations in the USMCA), American publishers would be entitled to enjoy the rights and remuneration in the territory of the EU in the same way that EU publishers would do so.

Note that a separate such trade agreement, with national treatment obligations, would be necessary with the United Kingdom in light of its exit from the European Union (*i.e.*, Brexit), if the U.K. adopts Article 15, or similar publishers’ rights, into its national law.

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?

NMA will provide more specific responses to the Office in ongoing discussions and submissions.

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?

As discussed above, NMA supports the adoption of additional rights for press publishers and/or clarifications of existing rights, as suggested above, and looks forward to discussing how that could be achieved within the U.S. system. NMA member Axel Springer is also submitting comments in response to the NOI on the scope and efficacy of the EU approach. However, NMA emphasizes that, even if the U.S. were to adopt something similar to a publisher’s right, other steps are also necessary, including enactment of the JCPA.

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

As discussed above, the JCPA offers a significant improvement, even if limited in time and to limited parties, to address the problems in an approach somewhat similar to the Australian approach.

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?

NMA is focused on the future of news content and its members need to be protected against uncompensated free-riding on their investments and creativity. Other publishers or copyright owners may have legitimate, similar concerns.

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?

As discussed above, NMA publisher members often own the copyrights to most of the articles and photographs contained within their publications. However, NMA members take pride in taking good care of the journalists and others who create news content. Granting new rights to publishers should not prevent other copyright owners, including independent writers and photographers who have retained their rights, from exercising their rights, within contractual bounds.

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?

This would depend on the selected approach. With respect to the JCPA, no changes to copyright law limitations or exceptions are made. Fair use is a defense that must be decided by courts on a “case-by-case” basis.¹¹⁵ But, even if we assume *arguendo* that online content distributors may engage in fair use of news content in some instances when they aggregate the content and display it to their users, the case law is clear that such fair use gives them no right to circumvent access controls used by news content creators to prevent them from accessing their content absent negotiated agreements.¹¹⁶ The JCPA would merely allow press publishers to collectively bargain with dominant platforms with respect to terms and conditions for access.

¹¹⁵ *Harper & Row*, 471 U.S. at 561.

¹¹⁶ *Universal City Studios v. Corley*, 273 F.3d 429, 459 (2d Cir. 2001) (“Fair use has never been held to be a guarantee of access to copyrighted material in order to copy it by the fair user’s preferred technique or in the format of the original.”); THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998: U.S. COPYRIGHT OFFICE SUMMARY 4 (1998), <http://www.copyright.gov/legislation/dmca.pdf> (“Since the fair use doctrine is not a defense to the act of gaining

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?

The question of whether providing additional rights to press publishers complies with the Berne Convention depends on what additional rights are being considered. For example, if the question is whether the Article 15 *sui generis* rights are limited by the Berne Convention or any other international treaty, the Berne experts who have considered this question have found that there is not a Berne-prohibition on the adoption of such rights, at least specifically to the rights adopted by the EU. In particular, the two scholars, long considered by many to be the most expert on the Berne Convention, have provided a detailed response to this question.¹¹⁷ In conclusion, NMA concurs that the recently-enacted EU publishers' right (or equivalent rights) does not (and would not) be violative of the rights established under the Berne Convention.

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.

Please see part (4) of the Appendix attached hereto.

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.

Please see part (1) of the Appendix attached hereto.

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

NMA looks forward to identifying additional, pertinent issues for the Copyright Office as the process develops.

unauthorized access to a work, the act of circumventing a technological measure in order to gain access is prohibited.”).

¹¹⁷ See Jane Ginsburg, *Minimum and Maximum Protection Under International Copyright Treaties*, 44 COLUM. J.L. & ARTS 1, 16 (2020), available at <https://journals.library.columbia.edu/index.php/lawandarts/article/view/7308/3883>; Sam Ricketson & Jane C. Ginsburg, *Intellectual Property in News? Why Not?*, in RESEARCH HANDBOOK ON INTELLECTUAL PROPERTY IN MEDIA AND ENTERTAINMENT (M. Richardson & S. Ricketson, eds., Edward Elgar Publishing, 2017). Since the relevant Berne Convention articles have been incorporated into other agreements, the question of compliance with “other international agreements” follows the treatment under Berne. See Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 9, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) (“Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto”); WIPO Performances and Phonograms Treaty, art. 1(3), Dec. 20, 1996, 2186 U.N.T.S. 203; 36 I.L.M. 76 (1997); WIPO Copyright Treaty, art. 1, Dec. 20, 1996, 2186 U.N.T.S. 121; 36 I.L.M. 65 (1997).

VI. Conclusion

In sum, NMA very much appreciates the Copyright Office's attention to this pressing problem and for undertaking this study to quantify the problem and examine the issues, and to recommend some solutions—whether in copyright law or other legal avenues. NMA looks forward to working with the Office on any questions it has regarding the materials contained in this submission, or any requests for other materials that would be helpful for the Office to complete its study.

Sincerely,



Danielle Coffey
Executive Vice President and General Counsel
News Media Alliance

APPENDIX ATTACHED

- (1) News Media Alliance, *How Google Abuses Its Position as a Market Dominant Platform to Strong-Arm News Publishers and Hurt Journalism* (Jun. 2020).
- (2) Jane C. Ginsburg, *Minimum and Maximum Protection Under International Copyright Treaties*, 44 COLUM. J.L. & ARTS 1 (2020).
- (3) Sam Ricketson & Jane C. Ginsburg, *Intellectual Property in News? Why Not?*, in RESEARCH HANDBOOK ON INTELLECTUAL PROPERTY IN MEDIA AND ENTERTAINMENT (M. Richardson & S. Ricketson, eds., Edward Elgar Publishing, 2017).
- (4) Hal J. Singer, *Addressing the Power Imbalance Between News Publishers and Digital Platforms: A Legislative Proposal for Effectuating Competitive Payments to Newspapers* (2021).
- (5) Jane C. Ginsburg, Written Comments in Response to U. S. Copyright Office's *Publishers' Protection Study: Notice and Request for Public Comment*, 86 Fed. Reg. 56721 (Oct. 12, 2021).

APPENDIX

APPENDIX: PART 1

How Google Abuses Its Position as a Market Dominant Platform to Strong-Arm News Publishers and Hurt Journalism

June 2020

Executive Summary

This White Paper is published by the News Media Alliance based on over a year's worth of interviews and consultations with many members of the organization. The news publishers speak with a collective voice in demanding that Google stop abusing its market dominant position in its interactions with them, compensate them fairly for the value of their content to Google, and give them meaningful control over the specific uses of their own news articles by Google.

As set forth in this White Paper, many of Google's current uses of news content likely exceed the boundaries of fair use under the Copyright Act. Given that reality, Google should have to negotiate an appropriate use-specific license with news publishers for each use of their content. In a competitive market, news publishers would be able to resist Google's demands by withholding their content unless and until acceptable terms were negotiated. But as set forth below, Google has so much power as the dominant online platform, with the ability to play one publisher off the other, that it has been able to effectively secure acquiescence from the news publishers for its activities, which often are harmful to publishers. At base, there has been a market failure in the news publishers' ability to exercise the rights granted to them under the Copyright Act.

Google has exercised its control over news publishers to force them into several relationships that benefit Google at the publishers' expense. These relationships include the following:

First, Google effectively gave the news publishers no choice but to implement Google's Accelerated Mobile Pages (AMP) standard – or else lose critical placement in mobile search and the resulting search traffic. Publishers were not only forced to build mirror-image websites using this format, but Google caches all articles in the AMP format and directly serves this content to mobile users. This subverts the core principle that grounded the early copyright decisions protecting Google – namely, that a search engine is a fair use primarily because it acts as an electronic pointer to the original website. AMP keeps users in Google's ecosystem while creating several disadvantages for news publishers – including making it more difficult in some cases to form direct relationships with their readers, reducing their subscription conversion rates, limiting the use of interactive features in AMP articles, reducing publisher ad revenues, and impairing their collection of certain user data. Further, Google imposed onerous terms of use on news publishers using the AMP URL API – which appear to give Google broad rights to use AMP formatted articles in any Google products.

Second, Google used its market dominant position to force news publishers into the use of their content in the newly designed Google News app – Google’s mobile news aggregator, which makes heavy use of AMP content. The Google News app is designed in a fashion to satisfy many casual readers, rather than leading them to click through to the articles. Further, to participate meaningfully in Google News, news publishers must accept the onerous Google News Producer Terms of Service, which grant Google the right to use the news content not only in Google News and the Google News app, but for all “Google Services” – defined as any products, service or technology developed by Google from time to time.

Third, Google is using news publishers’ AMP content to power its “Google Discover” service, another news aggregator that is more akin to social media. Google never negotiated any specific use license with the news publishers for this content.

Finally, Google Search is increasingly becoming a “walled garden” -- a final destination rather than an electronic pointer to news websites. Google has again used its market dominant position to force acquiescence to new features that diminish the chances that users will visit the news websites.

This White Paper makes several recommendations at its close. First, antitrust enforcers should address Google’s abuse of its market power. Second, the News Media Alliance advocates the passage of the bipartisan Journalism Competition and Preservation Act, which would allow news publishers to join forces and negotiate collectively with Google. Third, Congress should explore various means toward ensuring that publishers are compensated for their content. Journalism is essential to a functioning democracy and requires substantial investment. Google is advancing its own dominance while inflicting harm on the news industry. The detailed investigation set forth in this White Paper makes plain that action is necessary to correct this abuse.

I. Introduction: Google – the Frenemy to News Publishers

In 2007, the Ninth Circuit ruled in the *Perfect 10* case that Google’s display of grainy thumbnail photographs in its search engine results constituted fair use under the Copyright Act.¹ The decision was the leading case that defined a generation of copyright law regarding search engines and aggregators. It was also pivotal for Google, giving it the imprimatur of the courts. Some thirteen years later, Google’s use of news content in Google Search, the Google News app and Google Discover has vastly expanded, bearing little resemblance to those early days. Google has become a publisher in its own right, heavily relying on and using premier newspaper content, including news photographs, to draw traffic and thereby gather highly valuable data to fuel its advertising business.

Google’s use of news publishers’ content does send substantial traffic to news publishers, but Google is not fairly or appropriately compensating news publishers for the value of their material, or properly treating the news industry as an important strategic partner. Instead, as set forth in this White Paper, Google has misused its position as the dominant online platform to

¹ *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007).

reap the benefits of the news media’s substantial investments in reporting without paying a license fee. Further, it has misused its monopoly power to remove the ability for news publishers to have adequate control of the use of their content – often using its market power to force publishers into granting Google the apparent right to make vast and unknown uses of their intellectual property far into the future, or other problematic conditions, if they wish to be included on basic Google services. While Google, through the Google News Initiative, has donated grant funding to the news media industry and provided some useful advice, none of this is sufficient given the benefit to Google from news content and Google’s substitutive nature. In short, the legal system gave Google protection on the theory that it was engaged in good faith, fair uses of third-party content. Now, the facts underlying that original assumption have changed dramatically and upset the balance between Google and publishers, leading to industry and societal ramifications. In the process, the system has allowed Google to establish and entrench its market power at the expense of publishers and other content creators.

Copyright law should protect the news publishers, since the argument is strong that Google is exceeding the boundaries of fair use and thus should be required to pay a license fee for its current usage of news content. But as set forth below, Google has so much power as the dominant online platform, with the ability to play one news publisher off the other, that it has been able to effectively secure acquiescence from the publishers for its activities without paying a license fee for their content, despite their significant costs in reporting the news. At base, there has been a market failure in the news publishers’ ability to exercise the rights granted to them under the Copyright Act. Accordingly, copyright and competition policy need to align with these stark market realities. This White Paper details Google’s broad usage of news publishers’ content through exercise of its dominance, rather than fair negotiations or a fair license fee.

Ultimately, Google has used cases like *Perfect 10* and other decisions from the “early days” of the internet to clear cut the legal protections of content creators and propel itself to a position of unprecedented profitability and durable dominance at the expense of news publishers and other content creators.

A. A Fair Use No Longer: The Factual Assumptions of the *Perfect 10* Case No Longer Hold

The factual assumptions that led the Ninth Circuit to conclude that Google’s use of thumbnail photographs in its search engine constituted a fair use no longer hold. The fair use inquiry, set forth in 17 U.S.C. §107, is a fact-specific analysis based on several non-exclusive factors. The first factor is “the purpose and character of the use” – including whether the use is of a commercial nature as opposed to a nonprofit educational use, and whether the use is “transformative.” In order to determine if a new use is “transformative,” a court considers “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.”² The second factor is the nature of the copyrighted work, including whether it is unpublished. The third factor is the “amount and substantiality of the

² *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 579 (1994).

portion used in relation to the copyrighted work as a whole.” The fourth factor is “the effect of the use upon the potential market for or value of the copyrighted work.”

What considerations led the *Perfect 10* court to hold in 2007 that Google’s use of thumbnail photographs in its search engine was fair? First, Google’s search engine was not seen as an ultimate destination or publisher, but as merely as a tool or “pointer” providing direct access to the original website containing the original copyrighted material – and hence a “transformative” use. This was in keeping with Larry Page’s vision at the time; as he told an interviewer in 2004, “We want to get you out of Google and to the right place as fast as possible.”³ Second, the court did not see Google as heavily commercial. AdWords was still relatively nascent, and courts had yet to fully appreciate the significance of search advertising. Further, the low-quality, grainy thumbnail images in Google search results at that time were not viewed as a substitute for the original image and had no independent aesthetic appeal. Critically, the court also did not perceive a search engine as creating any market harm for the original publisher. Finally, the court viewed Google’s indexing of the plaintiff’s images as “incidental” and found that Google was acting in keeping with principles of good faith and fair dealing. At the core of its reasoning, the court concluded that the goal of the Copyright Act was to incentivize the progress of science and the arts, and that the public benefits of the search engine outweighed any minimal impact of the use on the original website’s incentive to create.

None of these assumptions apply today. In our view, Google would have a difficult time relying on fair use to justify all its uses of newspaper content in Google Search, Google Discover, and the Google News app. No longer are these confined to the minimal search results featured in the famous blue links or the tiny, grainy photos from Google’s early days. The current, highly appealing displays of news content create a deeply troubling substitution effect. A leading study commissioned by the European Union found that an astonishing 47% of EU consumers “browse and read news extracts on [search engines, news aggregators and social media] without clicking on links to access the whole article in the newspaper page.”⁴

And while the *Perfect 10* court did not view Google as a commercial business, today Google and its parent Alphabet – which had 2019 revenues in excess of \$161 billion -- are recognized as one of the most successful commercial enterprises in the world. In 2019, Google reported roughly \$98 billion in annual revenue from search and other advertising.⁵ This is roughly four times the total annual revenue for circulation and advertising of all U.S. news publishers combined. As is no secret, the news publishers are suffering economically, cutting staff and closing their doors – thus reducing their ability to play the critical role served by the press. A recent report found that

³ David Sheff, *Playboy Interview: Google guys: a candid conversation with America’s newest billionaires about their oddball company, how they tamed the web and why their motto is “Don’t be evil”*, PLAYBOY, Sept. 1, 2004 at p. 55.

⁴ Flash Eurobarometer 437 Report: Internet user’s preferences for accessing content online, EU OPEN DATA PORTAL (SEPT. 2016), at p. 5, available for download at <https://ec.europa.eu/commfrontoffice/publicopinion/index.cfm/Survey/getSurveyDetail/instruments/FLASH/surveyKy/2123>.

⁵ *Alphabet Announces Fourth Quarter and Fiscal Year 2019 Results* (Feb. 3, 2020), available at https://abc.xyz/investor/static/pdf/2019Q4_alphabet_earnings_release.pdf?cache=79552b8.

approximately 20 percent of all local newspapers in the United States have closed or merged since 2004, and approximately 1,300 communities have lost all local news coverage.⁶ In 2019 alone, the media industry laid off more than 7,800 people.⁷ Finally, given both Google’s conduct and the changed factual realities, it is likely that a court would view Google more as a free-rider and be far more reluctant to conclude that it was acting in accordance with principles of good faith and fair dealing.

B. Google Has Misused Its Position as A Market Dominant Platform to Strong-Arm News Publishers into Inequitable Arrangements

A court taking a hard, fresh look at Google would likely find that many of its current uses of newspaper content exceed what fair use permits – and thus, that Google has no legal right to use this content absent a license. Given that reality, Google should be entering into fair negotiations, and mutually acceptable written agreements, with the news publishers for each specific contemplated use of their content, negotiations that would allow the news industry to attempt to negotiate compensation and control if the playing field were remotely equal. But today’s world is also very different from 2007 in the numerous ways that Google has used its position as the dominant online platform to strong-arm the news industry into implicitly or explicitly giving into broad and often unknown or unanticipated uses of its content. Google has used its leverage in ranking search results to steer the news industry into a web of products that do not compensate publishers for their participation or give them control over their valuable content. For example, no news publisher can afford to remove itself from Google News for fear of falling in its Google Search rankings – in part because of their interoperability – and Google has used this power to advance its ends at the news media’s expense. As one publisher explained the relationship generally, Google “sucks you into the vortex one step at a time without any visibility into its eventual plans, leading to a clear dependency on Google, and only at the last minute do you realize you’ve given away the farm.” Copyright law has become an ineffective protection because the news publishers do not have the power to enforce their copyright rights.

This White Paper focuses on four examples to illustrate Google’s behavior toward the news industry and the attendant competition concerns. The first relates broadly to Google’s herding of the news publishers into using “Accelerated Mobile Pages” (known as AMP) – a stripped-down format developed by Google to shorten the load time for web pages on mobile devices, first announced in the fall of 2015. The second and third examples relate to the significantly revamped Google News app and the Google Discover feed, both launched in 2018 – which make heavy use of AMP content. In none of these situations did Google sit down with major publishers to engage in a genuine negotiation of terms involving a give-and-take, rather than a “take it or leave it” approach. Finally, this White Paper examines the changes in Google Search, which raise increasing concerns that Google Search acts as a substitute for the original news articles. In short, through the exercise of its monopoly-like power and the threat of lower search

⁶ Tom Stites, *About 1,300 U.S. communities have totally lost news coverage, UNC news desert study finds*, POYNTER (Oct. 15, 2018), available at <https://www.poynter.org/business-work/2018/about-1300-u-s-communities-have-totally-lost-news-coverage-unc-news-desert-study-finds/>.

⁷ Benjamin Goggin, *7,800 people lost their media jobs in a 2019 landslide*, BUSINESS INSIDER (Dec. 10, 2019 5:05 p.m.), available at <https://www.businessinsider.com/2019-media-layoffs-job-cuts-at-buzzfeed-huffpost-vice-details-2019-2#spin-media-group-29-jobs-september-and-january-18>.

rankings, Google dictated non-negotiable terms of service or otherwise corralled the news industry into less-than-fair terms for use of its content well beyond the boundaries of fair use.

Google’s approach toward the news industry for Google Search and Google News differs from Facebook, which has recently entered into agreements with certain news publishers to compensate them for the use of their articles in Facebook’s news tab. Apple News also provides some compensation to a small number of news publishers for Apple News Plus. While publishers have criticized aspects of these arrangements, it is noteworthy that these platforms have not adopted Google’s extreme stance of refusing to provide compensation to news publishers for use of their content in Google Search, Google News and Google Discover.

Most broadly, the four examples in this White Paper demonstrate that as Google has built its monopoly-like market power in search, aggregation, and advertising, it has used that market dominance to extract greater concessions of various sorts from publishers, in turn reinforcing Google’s dominance of the web. This pattern demands review by federal and state antitrust agencies.

II. The AMP Format: A Land Grab in the Name of Speed

Google developed and launched Accelerated Mobile Pages (AMP) in 2015, as a format sometimes described as a “website on a diet.” AMP makes use of a stripped-down version of HTML that prioritizes loading speed simultaneously with dozens of proprietary extensions. Google characterizes AMP as an open format, but it is anything but. Google did not develop AMP in a manner consistent with the obligations and practices of a standards body, and it follows almost none of the Open Stand principles defined by the organizations in charge of Internet governance.

AMP stands in stark contrast to a truly open standard such as the HTML (HyperText Markup Language) standard that defines the fundamental language used in Web pages. Over the years, the Internet Engineering Task Force (IETF), the World Wide Web Consortium (W3C), and the Web Hypertext Application Technology Working Group (WHATWG) were delegated as the independent standards bodies to oversee the technical specifications of the HTML format. All versions of HTML were contributed to, and ultimately adopted by, countless private corporations and now serve as a basis for all Web pages. On the other hand, AMP has been developed and used predominantly by Google, and imposed on the market as a condition to obtain traffic from Google Search on mobile devices.

Although some news publishers were initially attracted to the AMP format because it promised a better user experience, including increased speed, the truth is that Google effectively gave news publishers little choice but to adopt it – requiring them to create, in addition to their customary websites, a second, near-mirror image website with AMP-formatted versions of their articles (AMP URLs) that are hosted, stored and served from Google’s servers rather than their own.⁸ While Google asserted that AMP was not a ranking factor for Google Search, it simultaneously

⁸ AMP pages on mobile search are served from the Google AMP cache. However, Google has long indicated that “AMP pages on desktop . . . aren’t served from the Google AMP Cache/AMP Viewer.” Google Developers, *Understand How AMP Looks in Search Results*, available at <https://developers.google.com/search/docs/guides/about-amp> (last visited on June 2, 2020).

stated that “speed is a ranking factor for Google Search” -- and the whole point of the AMP format is that it loads faster.⁹ Further, shortly after making this statement, Google introduced the news carousel and indicated that “When an AMP page is available, it can be featured on mobile search as part of rich results and carousels” – placement that is critical to getting traffic.¹⁰ Thus, Google inextricably linked its AMP standard to placement for publishers on Google’s dominant search engine result page. In addition, many Google products (such as the Google News app, Google News on the web and Google Discover) give preferential treatment to AMP pages or only accept the AMP format.

In the face of Google’s pressure, the major news publishers began developing and offering a second website with AMP-formatted articles starting in 2016, putting most although not necessarily all of their articles on these AMP URLs. One major newspaper that utilizes a paywall decided not to incur the substantial cost of building an AMP website with a paywall and tried to survive for several months without participating in AMP; although its subscriptions rose, the traffic from Google and other platforms declined too precipitously for this to be a viable road.

A. News Publisher Concerns About the AMP Format

While Google effectively made it impossible for news publishers to avoid creating AMP versions of their web pages with a differently-formatted URL structure, it also extracted significant – and in many cases undue – concessions from publishers. First, the way AMP works is that once a news publisher posts its articles in the AMP format, Google caches these articles so that they can load instantly for any mobile user who accesses the articles within the Google ecosystem. By participating in AMP and using Google’s AMP URL API, publishers agree, via non-negotiable terms and conditions, to let Google copy, store, host, and directly serve their content to users. This inures to Google’s significant benefit in a variety of ways, including by permitting Google, rather than the publishers, to “own” the relationship with their readers, and by putting Google, rather than publishers, in charge of related data collection.¹¹ It also gives Google an ongoing, almost full-scale copy of all publisher content to potentially use in ways that were never contemplated. Although AMP enhances load speed for consumers, it represents a

⁹ *Id.*

¹⁰ *Id.*

¹¹ Google Developers, *FAQ*, available at <https://developers.google.com/amp/cache/faq> (last visited June 3, 2020). As the Google FAQ states:

What gets cached?

If an AMP page is valid and is requested (so the Google AMP Cache is aware of it), it will get cached. Any resources in AMP pages, including AMP images, also get cached.

Can I stop content from being cached?

No. By using AMP, content producers are making the content in AMP files available to be cached by third parties. For example, Google products use the Google AMP Cache to serve AMP content as fast as possible.

seismic shift from the fundamental assumptions that initially led the courts to view Google's search engine as fair use.

In short, while the core premise of the *Perfect 10* case was that the user would click on a link in Google Search and travel to the original website, mobile users who click on AMP-formatted articles in Google products *remain* in the Google ecosystem, where they are shown the cached article instead of being directed to the news publisher websites.

As numerous prominent developers stated in an open letter to Google, "AMP keeps users within Google's domain and diverts traffic away from other websites for the benefit of Google. At a scale of billions of users, this has the effect of further reinforcing Google's dominance of the Web."¹² Google has purposely chosen to create a premium position at the top of their search results only to "publishers that use a Google-controlled technology, served by Google from their infrastructure, on a Google URL, and placed within a Google controlled user experience."¹³

Second, as detailed below, Google unilaterally dictated the terms of service for AMP – rather than permitting the news industry to negotiate with them. Per Google, publishers using the AMP URL API are governed by Google's standard API terms of service, and these raise significant concerns regarding Google's ability to use the newspaper's content now and into the future in broad, unknown ways. In short, Google gave the news publishers little choice but to adapt the AMP format and then required them to agree to broad, unknown future uses of their content. The news publishers were corralled into building AMP URLs without knowing what they were agreeing to in connection with future uses of their content – a problem that has now apparently manifested itself with Google's more recent products, as outlined below.

The AMP format admittedly has its benefits – although many if not all of these benefits could have been achieved through means that did not so significantly increase Google's power over publishers or so favor its ability to collect data to foster its market domination. As mobile use continues to grow rapidly, news websites need to load quickly to maintain the attention of consumers with wide content choices. The AMP format increased load speed, which facilitates traffic (although there were other potential routes to increased load speed). But many in the news industry still have substantial concerns about the AMP format and its Google-dictated ramifications:

- At the most fundamental level, Google has placed itself in the middle of the relationship between the newspaper and its user. The user is no longer visiting the publisher's website directly, but instead viewing a copy of the article hosted on Google's servers. Further, Google controls the AMP elements of the format, its functions and capabilities, and encourages users to stay within the search results page, for example, by creating an H-scroll in the Top News carousels that seamlessly moves from one publisher to the next without ever leaving Google. As subscriptions become increasingly important in an era in which digital ad revenues pale in comparison to earlier revenues from print ads, having a separate

¹² *A letter about Google AMP*, (Jan. 9, 2018), available at <http://ampletter.org/>.

¹³ *Id.*

proprietary format that does not easily foster direct relationships is even more problematic.

- Some newspapers with paywalls have expressed concerns that Google’s use of articles in the AMP format has significantly hurt their ability to convert consumers into subscribers – a key and increasingly important source of revenue. One major newspaper, for example, did a study comparing subscriber conversion rates for mobile traffic to its regular website as compared to traffic to its AMP URL. The number of subscribers per million users was 39% lower for AMP traffic. Another major news publisher has likewise compared AMP traffic with the rest of search traffic and found that the conversion rate to subscribers is very significantly lower with the AMP articles – a mere fraction of “vanilla” search traffic.
- The reasons why AMP articles lead to lower subscriber conversion rates are many and varied. As discussed further below, the Google products making heavy use of AMP articles are often designed to provide a fast, free and not deeply engaging user experience. The AMP format also can make effective branding more difficult. It commoditizes page design, which many believe shifts more value to the search engine or aggregator and away from the publisher. Consumers are effectively trained to merely view publishers as websites with collection of articles rather than coherent, immersive, and differentiated experiences with their own unique identities and qualities that merit direct navigation, subscription, or longer dwell times.
- Further, Google has given publishers a Hobson’s choice regarding paywalls on AMP articles – which also impacts subscriber conversion rates. Newspapers such as *The Wall Street Journal* employ a highly customized paywall on their websites, significantly varying the number of free articles that a user is permitted to read before being asked to subscribe to the newspaper. This flexibility is highly beneficial, allowing them to maximize engagement and increase subscriptions. For AMP articles, however, Google restricts the paywall options. Unless publishers rebuild their paywall options and their meters for AMP, they can only provide *all* of their content for free or *none* of their content for free. The only other option is to use Subscribe with Google, which has many benefits for Google and downsides for news publishers.¹⁴ Accordingly, unless they invest in building another and separate paywall, news publishers who do not want to use Subscribe with Google have a *de facto* all-or-nothing choice regarding the imposition of a paywall, which lowers subscriber conversion rates.

¹⁴ These include the following: 1) Google gets the subscriber data; 2) the user must use Google Wallet or Google Pay, instead of providing its credit card to the news publisher and establishing a direct relationship with the publisher; and 3) Google takes a 5 to 15-percent cut. See Nushin Rashidian, George Civeris, Pete Brown, *Platforms and Publishers: The End of an Era*, COLUMBIA JOURNALISM REVIEW (Nov. 22, 2019), available at https://www.cjr.org/tow_center_reports/platforms-and-publishers-end-of-an-era.php.

- Other newspapers have noted that the AMP format has interfered in other ways with their methods of increasing subscriptions -- such as the lack of support for certain interstitial windows prompting users to sign up and provide their emails, later used for marketing subscriptions.
- The fact that readers are not on the news publisher's website but rather remain in Google's ecosystem for AMP articles also has impacted data collection. News publishers do not get the same information regarding readers of their AMP articles as from organic traffic to their websites. While Google did add some ways of obtaining limited data about readers, for some publications they are noticeably inferior to the data news publishers get directly on their own sites.
- While ad revenues for AMP articles have been on par with non-AMP articles for some news publishers, others have experienced a lower advertising yield from AMP articles. Ad yield is generally lower for AMP articles for a variety of reasons all connected to Google's control of this ecosystem: publishers are third-parties on AMP and face cookie-matching issues (or sometimes cookie bans such as on Safari); most ad tech providers do not have equivalent solutions on AMP as opposed to HTML because they have not invested in a format that benefits their largest competitor, Google; and AMP limits the number of ads and ad formats on the AMP articles.
- One major news organization compared the average number of page views by consumers and concluded that they are materially lower for stories featured in the AMP format. Although not all news organizations have experienced this effect, this news company reviewed the average number of page views of users clicking on an AMP-formatted story and determined that the average was 1.1 page views per customer – considerably lower than the overall average for users clicking through from all Google links. In other words, their research showed that the user clicking through on an AMP-formatted story is “one and done” and tends to bypass links to the news organization's home page or other articles. As the percentage of the total Google search landscape using the AMP format increases, this becomes more and more of a problem for their news organization. To some extent, these figures are likely partially attributable to the increase in mobile traffic, but the news organization believes that the AMP format, which is used widely now in Google search on mobile and the Google News app, has contributed to this troubling problem.
- Google's caching of AMP articles creates very significant advantages for Google, but it is a one-sided exchange without parallel advantages for the news publishers as strategic partners. The fact that the user remains on the Google ecosystem is highly beneficial to Google because it allows Google to be the first-party and collect far more and richer user engagement data, such as the dwell rate on a given article topic.

- While Google has gained highly valuable data – the lifeblood of its advertising revenues – by herding the news publishers into allowing Google to cache their articles, Google has not returned the favor by sharing its own full set of data on the users and instead only shares limited data with the newspapers.
- One of the keys ways that news publishers increasingly can provide superb reporting and distinguish themselves from the broad swath of content in all formats available online is by using data and interactive features in in-depth news articles. The AMP format imposes limitations on interactive features, and it is often sufficiently difficult to rebuild them in this format that publishers decide not to do so. While readers can still find these articles, they are not given the same prominence in Google products heavily reliant on AMP articles. Further, given Google’s long-time strength in crawling and indexing text and images but not dynamic content, Google, by dictating and limiting newspaper content in this manner, is essentially reinforcing its market power over competitors who might take a different approach toward such content.
- Standardization of the news industry into the AMP format, which (although available to other browsers such as Firefox, Safari, and Edge) is optimized specifically for Google, makes it much easier for Google to index news websites -- giving Google a significant advantage over potential competitors seeking to enter or grow in the search and news aggregation markets. A market with multiple players, none of whom had Google’s monopoly power, would inevitably lead to competitive negotiations with the news industry.

B. The Problematic Terms of Service Governing AMP

Further, by being corralled into creating AMP URLs for their websites, news publishers also became governed by terms of service that give Google vast undefined rights to use their content in future products. Google dictates that all news publishers using the AMP URL API are governed by the Google terms of service for APIs – terms of service not specifically designed for AMP.¹⁵ These terms of service raise substantial concerns. They appear to provide that merely by creating an AMP website and using the AMP URL API, the news publishers have given Google a “perpetual, irrevocable, worldwide, sublicensable, royalty-free, and non-exclusive license to Use content submitted, posted, or displayed to or from the APIs through your API Client” so long as Google’s “sole purpose” is to “provide” or “improve the APIs (and the related service(s)).” “Use” means “use, host, store, modify, communicate and publish.”¹⁶ Google is, in

¹⁵ Google Developers, *Privacy and Terms*, available at <https://developers.google.com/amp/cache/policies> (last visited June 3, 2020) (“Use of the Google AMP URL API is subject to the [Google APIs Terms of Service](#) and the [Google Privacy Policy](#).”); for APIs Terms of Service, see <https://developers.google.com/terms>. At least one news publisher has been able to devote the resources necessary to develop its own in-house solution allowing it to avoid use of Google’s AMP URL API – and thus imposition of the related terms of service -- for its news articles in the AMP format, but this requires extensive resources and is not a solution for the broader industry.

¹⁶ See Google APIs Terms of Service, ¶5(b) at Google Developers, *Google APIs Terms of Service*, available at <https://developers.google.com/terms> (last visited June 2, 2020). The full clause reads:
b. Submission of Content

effect, conditioning placement at the top of the dominant search engine—a tool ostensibly designed to assist users in locating and navigating to content on the internet—on the granting of intellectual property to Google.

Although subject to debate, this grant appears to give Google the right to use the newspapers' articles in the AMP format for any Google product, whether a then current or future product. Although some publishers anticipated that the use of their AMP content would not be limited to mobile search results, the grant language is particularly broad and vague. This paper explores two Google products launched after Google steered the news publishers into AMP URLs that make heavy use of AMP content, namely the Google News app announced in May 2018 (which is also governed by another set of terms as well) and Google Discover, announced in late September 2018. The AMP URL API terms of use appear to have robbed news publishers of the ability to negotiate regarding Google's right to use their content in these new products – or others yet to come.

In our view, the AMP URL API terms of use also amount to exclusionary and anticompetitive conduct. A news publication does not appear to have the ability to acquiesce in the use of its AMP content on Google mobile search, for example, while declining permission for use in the new (and free) Google News app, which may directly compete with a newspaper's own app or another app licensed by the publisher. Further, the language is sufficiently broad and unclear as to raise the question whether it gives Google the right to use the content for free for other purposes, such as artificial intelligence, that supposedly "improve" the APIs (and may in turn reinforce Google's market power). Moreover, the terms give Google the right to sub-license use of the content to third parties, including presumably for a license fee. Finally, the license is irrevocable; although a news entity can theoretically stop creating AMP pages for its publication and stop using Google's AMP URL API (with all its negative consequences), Google's right to use the content continues indefinitely for all earlier-posted AMP pages. It is striking that these are contractual provisions—not technical innovations—that reinforce Google's dominant position.

In the end, the two most fundamental problems with AMP are that Google has used its dominant market power and the threat of lower rankings to push publishers into the AMP format, a format and environment over which Google – and not the newspapers – appears to have near total control, now and into the future, whatever direction Google decides to pursue. In addition, it has used this power to create terms of use that appear to provide Google with broad leeway to use the AMP articles in unknown, new products of Google's own devising, without publisher control. Although the focus of this paper is on intellectual property, Google's conduct raises many significant competition concerns. As reviewed below, there are two non-mutually exclusive

Some of our APIs allow the submission of content. Google does not acquire any ownership of any intellectual property rights in the content that you submit to our APIs through your API Client, except as expressly provided in the Terms. For the sole purpose of enabling Google to provide, secure, and improve the APIs (and the related service(s)) and only in accordance with the applicable Google privacy policies, you give Google a perpetual, irrevocable, worldwide, sublicensable, royalty-free, and non-exclusive license to Use content submitted, posted, or displayed to or from the APIs through your API Client. "Use" means use, host, store, modify, communicate, and publish. Before you submit your content to our APIs through your API Client, you will ensure that you have the necessary rights . . . to grant us the license."

avenues to address these concerns: antitrust review and an antitrust safe harbor that would allow publishers to offset Google’s market power by negotiating collectively.

III. The Google News App: A News Aggregator in Direct Competition with Newspapers’ Apps

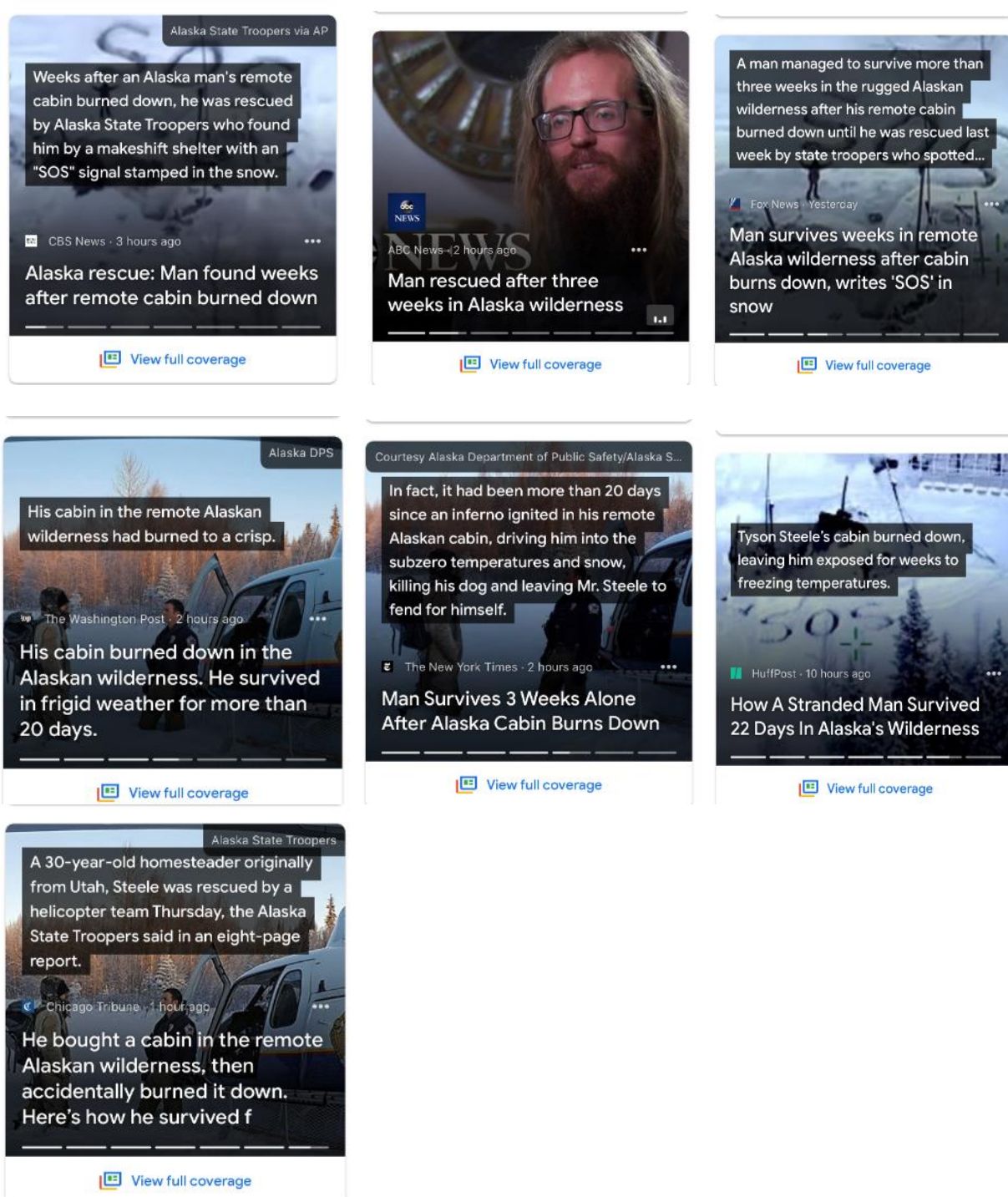
On May 8, 2018, Google announced the all-new Google News, using one all-encompassing brand name to denote what had been known as Google News on desktop, Google Play Newsstand on mobile and desktop, and the Google News & Weather app on mobile.¹⁷ While the new Google News on desktop was fairly similar to the earlier version, the new Google News app in particular features a starkly different design and functionality from its antecedents. The Google News app makes very heavy use of AMP content, on top of the traditional feeds long used for Google News (where publishers send their articles out on the feed).

If Google were relying on the fair use defense to justify the new Google News app, it would have a weak case. Critically, the Google News app is primarily an aggregator rather than a search engine – and thus has an inherently weaker claim to fair use under settled law.¹⁸ In other words, Google publishes content of its own selection in the Google News app, rather than simply providing results in response to a user’s search query, with links to the original. Further, the Google News app differs significantly from earlier versions. It presents collections of headlines with high-quality images, with a personalized “briefing” as well as curation on major news topics. The photos, which are zoomed in on before any snippet appears on top of them, are high resolution, prominent and eye-catching – the stark opposite of the grainy images of *Perfect 10* – allowing Google to capitalize on the very significant investment that news publishers make in photojournalism without contributing a dime. Videos created by the publisher at great effort and expense autoplay in the app as you scroll over them. Many “Headline” news stories are presented in an eye-catching “carousel” format, with a snippet or quote from the article appearing over the high-quality image and above the headline as the app scrolls through a collection of different publishers’ articles on a particular topic.

¹⁷Trystan Upstill, *The New Google News: AI Meets Human Intelligence* (May 8, 2018), GOOGLE: THE KEYWORD BLOG, available at https://blog.google/products/news/new-google-news-ai-meets-human-intelligence/?utm_source=tw&utm_medium=feed&utm_campaign=io18.

¹⁸ See, e.g., *Associated Press v. Meltwater US Holdings, Inc.*, 931 F. Supp. 2d 537 (S.D.N.Y. 2013); *Fox News Network v. TVEyes, Inc.*, 883 F.3d 169 (2d Cir. 2018).

Here is an example of a carousel of articles about the same story:



By the time the user views the full collection of articles in the “carousel” format, the user often knows the high points of the news story. Although some news publishers get decent traffic from the Google News app, in the view of many in the news industry the Google News app -- with its

aggregation of content by topic, combined with high-quality photos, headlines, and snippets in “carousels” -- can satisfy the reader about the “news of the day” without ever having to click through on any given story.¹⁹ Further, the navigation features in the app make it very easy for the user who clicks through to a news story to return to the Google News interface, rather than going to other stories or the home page of the original news source, which is how a typical news publisher would design the presentation of an article. In short, while any fair use defense depends heavily on demonstrating that the new use does not substitute for or usurp the market for the original copyrighted work, the Google News app appears to do just that for many users.

Since the Google News app likely does not qualify as fair use, Google should have negotiated fair licenses with the news industry for use of their content in the app. In ordinary circumstances, a licensor discloses its potential plans for using copyrighted material and negotiates a license appropriate to the new use, with back-and-forth traded compromises. But that is not what happened with the revised Google News app for most major newspapers. The story once again reveals the unfair terms that Google has been able to obtain as a market dominant platform.

The story begins several years ago with the old Google Newsstand. Many news publishers agreed to click-through or other agreements with Google contemplating use of their content in this particular, more benign product. But the fine print in Google’s agreements with news publishers for Google Newsstand gave Google the right to use the news content in revisions of the product, no matter how significant.²⁰ Thus, even though the format of Google Newsstand changed significantly with the new Google News app, Google undoubtedly would argue that these old consents apply, in addition to the Google AMP URL API terms of use discussed above. Indeed, the terms of the current Google News Publisher Agreement begin by providing that, “If you are already participating in Google News (formerly known as Newsstand) this Agreement will supersede your prior online terms.”²¹ These provisions are a perfect example of the grossly unequal bargaining power between Google and the news organizations, which Google has misused to its strong advantage to obtain apparent consent for unknown, as yet undeveloped products.

Further, instead of negotiating a fair license -- and one specific to the new Google News app -- Google has continued to use its monopoly power to unfairly extract additional layers of consent from the news publishers for use of their content in the Google News app, and other undisclosed products. In part it has done so by tying together participation in the Google News website with

¹⁹ The Google News app has many of the aspects of the user interface that have been found to depress the reader’s propensity to visit the content producer’s website -- aspects set forth in an in-depth academic study. See Chrysanthos Dellarocase, Juliana Sutanto, Mihai Calin, Elia Palme, *Attention Allocation in Information-Rich Environments: The Case of News Aggregators*, (Dec. 10, 2015), MANAGEMENT SCIENCE Vol. 62, No. 9: 2543-2562, available at <https://pubsonline.informs.org/doi/10.1287/mnsc.2015.2237>.

²⁰ See, e.g., Google News/ Producer, Newsstand Publisher Agreement at ¶2.1, available at <https://www.google.com/producer/legacytos> (last visited June 3, 2020).

²¹ Google News /Producer, News Publisher Agreement, available at <https://www.google.com/producer/tos> (last updated Jan. 1, 2019) (“Google News Publisher Agreement”). While such clauses are not uncommon, circumstances vary widely; here, Google’s product has changed significantly and the changes have a material impact on news publishers.

the Google News mobile app – knowing full well that newspapers cannot realistically opt out of Google News on the web. Moreover, publishers fear that opting out of Google News will negatively impact their performance in search performance, since the two products are connected in ways only Google understands and controls – and the risk of losing search rankings makes it difficult if not impossible for publishers to opt out of Google News.

There is no escaping Google’s unfair terms. Google has stated that even if a news publisher does not agree to the use of its content in Google News, Google has the right to crawl the news website and include the content in all its Google News products unless the publisher blocks the Googlebot-News (via robot.txt.), which would have the adverse effect of removing the page(s) from the Google News index entirely – an unrealistic option.²² If a publisher wishes to be included in Google News, Google imposes a condition that publishers must sign up for the Google “Publisher’s Center,” and Google has indicated that only those who do so will receive essential “benefits” in Google News (including the app) – such as the right to “content and branding control,” the right to “run ads inside your content area in the [Google News] app,” the right to use paywalls through Subscribe with Google, and the ability to be eligible for the desirable Newsstand section of the Google News app.²³ The catch-22, however, is that in order to have a Google News Publisher account or to register with the Google News Publisher Center, a news organization must accept the onerous Google News Producer Terms of Service (also known as Google News Publisher Agreement).²⁴

The posted terms of the Google News Publisher Agreement are exceptionally slanted in Google’s favor. News publishers are required to grant Google vast and unclear rights to use the publishers’ news content. The required grant of rights to Google extends not only to Google News but for all “Google Services” – defined as any products, services or technology developed by Google from time to time.²⁵ In short, as a price of having their content appear on the regular Google News website, a publisher apparently is not only required to participate in the Google News app, and any future version of the Google News app, but any product or service developed by Google in the future.

More specifically, the click-through agreement provides that Publisher “authorizes Google and each Google Group Company on a worldwide . . . basis” to:

(b) use, copy, reproduce, store, display, distribute, adapt, communicate and make copies available of Publisher Content (in each case including through caching, Google Services, third-party websites and devices) to allow (on Publisher’s behalf) End Users to use, adapt, download, store, access, view . . . Publisher

²² See Support.google.com, *Appear in Google News – Publisher Center Help*, available at <https://support.google.com/news/publisher-center/answer/9607025?hl=en> (last visited June 3, 2020), and Support.google.com, *Block Access to Content on Your Site – Publisher Center Help*, available at <https://support.google.com/news/publisher-center/answer/9605477> (last visited June 3, 2020).

²³ Support.google.com, *Appear in Google News – Publisher Center Help*, available at <https://support.google.com/news/publisher-center/answer/9607025?hl=en> (last visited June 3, 2020).

²⁴ See Google News Publisher Agreement at <https://www.google.com/producer/tos>.

²⁵ *Id.* at ¶ 1 (Definitions).

Content and copy, paste, print, annotate Publisher Content . . . and do such acts as permitted by applicable law and/or which are enabled by the functionality provided from time to time by Google Services and/or platforms and devices where Google News is available.”²⁶

Nowhere does the Google News Agreement further limit how Google can use the news publisher’s articles, including any limitations on the display of photos or snippets on the display pages of the Google News app. Rather, as with the prior Newsstand Publisher Agreement, the Google News Publisher Agreement provides that Google “may add or remove functionalities or features of Google News at any time” and “may modify the Agreement at any time.”²⁷ The only “out” provided to the news publishers is not realistic: “If Publisher does not agree to any modified terms in the Agreement, this Agreement will terminate and Publisher must remove its Publisher Content from Google News and stop using Google News.”²⁸

As with other Google agreements, the Google News Agreement also contains slanted provisions requiring news publishers to provide broad warranties and indemnities to Google, while Google provides highly limited warranties and indemnities to the publishers.²⁹

While the Google News Agreement effectuates a massive land-grab from the news publishers, it makes clear that all revenues, other than for ad slots in the news articles, go to Google: “Google reserves the right to retain all other revenues derived from Google Services including any revenues from ads that may appear on any search results pages.”³⁰

In sum, Google has used its position as a market dominant platform to strong-arm news publishers into using their content in a product that weakens publishers and strengthens Google’s position to extract unreasonable and often anticompetitive concessions from publishers.

IV. Google Discover: A Move Toward “Social”

In September 2018, Google announced that it was discontinuing the old Google Feed and launching Google Discover as part of its three fundamental shifts in how it thinks about Search.³¹ Google Discover is a highly customized feed targeted to the individual user with both current news and older, evergreen content – a product far closer to social media than earlier products. Google Discover relies heavily on articles in the AMP format. Once again, Google did not sit down with the news publishers to negotiate a fair, use-specific license for this product. There

²⁶ *Id.* at ¶2.2(b).

²⁷ *Id.* at ¶2.1.

²⁸ *Id.* at ¶2.1.

²⁹ *Id.* at ¶6.1 and ¶6.3.

³⁰ Since the Google News app makes heavy use of AMP content, the above-described Google API Terms of Service would also appear to apply to AMP content on the Google News app.

³¹ See Karen Corby, *Discover new information and inspiration with Search, no query required*, GOOGLE: THE KEYWORD BLOG (Sept. 24, 2018), available at <https://www.blog.google/products/search/introducing-google-discover/> and <https://www.blog.google/products/search/improving-search-next-20-years> (hereinafter “Corby”).

was no need because Google’s massive market power meant that it could unilaterally impose its whims on publishers. Given their inability to bargain collectively, publishers were powerless to resist Google’s actions.

Although it remains unclear, Google is apparently relying on the terms of use governing AMP URL APIs for supposed “publisher consent” to use their articles in Google Discover.³² Absent these terms of use, Google would likely face an uphill battle convincing a court that its use of high quality news photos in an aggregation product like Google Discover, which is not fueled by search queries, constitutes fair use. Thus, in 2016 Google used its dominant role in search to require publisher participation in the AMP format, and created related terms of use that appear to give them authorization to use the AMP content in a new Google product released years later – and one that is far more akin to social media and less beneficial to news publishers than Google Search in several ways.

As Google proclaimed in its September 2018 announcement, its next chapter will be driven by three fundamental shifts: 1) “the shift from answers to journeys”; 2) “the shift from queries to providing a queryless way to get to the information”; and 3) “a shift from text to a more visual way of finding information.”³³ In keeping with these goals, Google Discover does not rely heavily on search queries but rather sends the user a feed with a mix of content based on either the user’s interactions with other Google products (e.g., data on the user’s web and app activity, location history and location settings),³⁴ or topics that the user has selected to follow. Articles are grouped under numerous topic headings – thus permitting the user to customize his or her experience. The feed includes both current news and older articles – for example, articles of interest if one were planning a trip. In addition to news articles, Google Discover also features “videos, sports scores, entertainment updates (such as a new movie release), stock prices, event information (such as nominees for a major awards ceremony, or the lineup of an upcoming music festival), and more.”³⁵ Again, in keeping with its new goals, Google Discover includes a lot of high quality photographs.

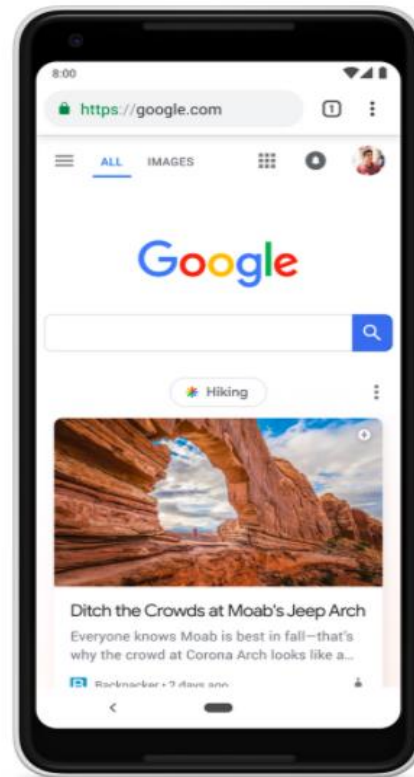
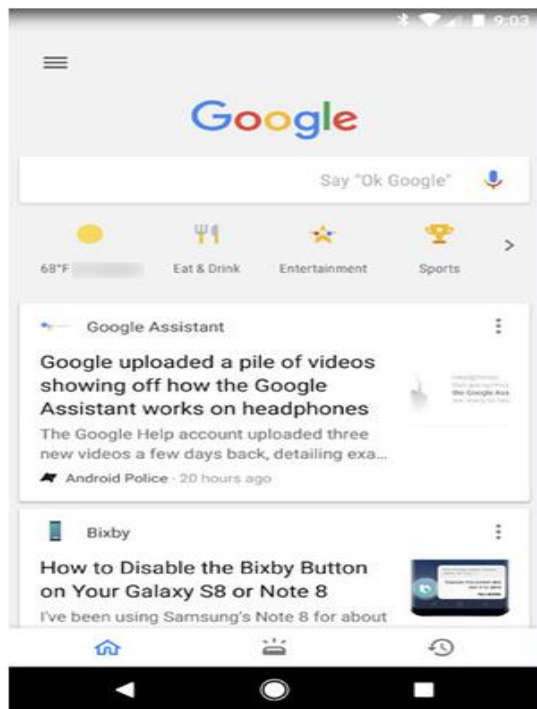
³² Thus, Google’s website states, “To enable large images in your Discover results... [e]nsure that Google has the rights to display your high-quality images to users, either by using AMP or by filling out this form to express your interest in our opt-in program.” Support.google.com, *Google Discover: Optimize your content on Discover*, available at <https://support.google.com/webmasters/answer/9046777?hl=en> (last visited June 3, 2020).

³³ Ben Gomes, *Search: Improving Search for the next 20 years*, GOOGLE: THE KEYWORD BLOG (Sept. 24, 2018), available at <https://www.blog.google/products/search/improving-search-next-20-years> (last visited June 9, 2020).

³⁴ Support.google.com, *Customize what you find in Discover*, available at <https://support.google.com/websearch/answer/2819496?co=GENIE.Platform%3DAndroid&hl=en> (last visited June 3, 2020).

³⁵ Karen Corby, *Discover new information and inspiration with Search, no query required*, GOOGLE: THE KEYWORD BLOG (Sept. 24, 2018), available at <https://www.blog.google/products/search/introducing-google-discover/>

A quick comparison of screenshots from the original Google Feed (on the left)³⁶, which mostly featured news headlines, short descriptions and occasional photos, and Google Discover (on the right) vividly displays the differences:



Google is giving Google Discover broad visibility. Not only is it on the Google app, but it is featured prominently as an option on Chrome's mobile homepage. In short, the mobile homepage gives users the ability to embark on their "search journey" via search query or via Discover.

News publishers have several concerns about Google Discover, in addition to their fundamental objections regarding use of their content without compensation and Google's failure to negotiate a specific agreement with them targeted to this use.

- First, publishers are concerned about subscriber conversion rates. Generally speaking, search is the gold standard for subscriber conversion, since users looking for specific content are the most engaged audience and therefore most likely to be willing to subscribe. News publishers have a far lower subscriber conversion rate on social media traffic than search (other than for paid content). Google Discover is essentially a social experience – one for the drifting Internet user. As one blogger described it, "Discover gives lean-back consumers . . . a platform to gobble up highly-personalized entertainment that has Google's name on it"³⁷ – and such lean-back consumers are less likely to be

³⁶ The source for this image is JR Raphael, *The Google feed has lost its soul*, COMPUTER WORLD (Oct. 3, 2017), available at <https://www.computerworld.com/article/3229933/google-feed.html>.

³⁷ Gordon Donnelly, *So Long Google Feed; Hello, Google Discover*, WORDSTREAM: BLOG (Aug. 19, 2019), available at <https://www.wordstream.com/blog/ws/2018/09/28/google-discover>.

willing to pay for content. Further, as noted above, some publishers already experience far lower subscriber conversion rates with articles in the AMP format, heavily featured in Google Discover. This one-two punch raises particular concerns as news publishers rely more heavily on subscriptions as digital advertising revenues remain disappointing.

- Second, publishers are at Google’s whim regarding its selection of content for Google Discover – more so than with search, where Google has historically, generally (although with faults) displayed the most responsive articles to a query. Although it is clear that Google Discover prefers articles in the AMP format and with high-quality photographs, its other criteria for selection for the current news articles and evergreen content are unknown.
- Third, news publishers are concerned that with all the sports scores, weather, video content, paid content, entertainment updates, and other distractions on Google Discover, users will be less focused on news articles.
- Fourth, news publishers are concerned that Google Discover is a product geared too heavily to advertisers and one that will be far more lucrative for Google than Search. Being able to target consumers based on subject-matter buckets that they follow is a highly powerful tool for advertisers. As Google has announced, it will include sponsored content labeled as advertisements in between the news articles on Google Discover. Google presumably will get all or most of the revenue from this sponsored content -- as opposed to the smaller cut paid to Google’s ad tech service for placing advertisements within news articles. News publishers fear that Google Discover will permit Google to siphon off more of the revenues sold against their content than Google Search.

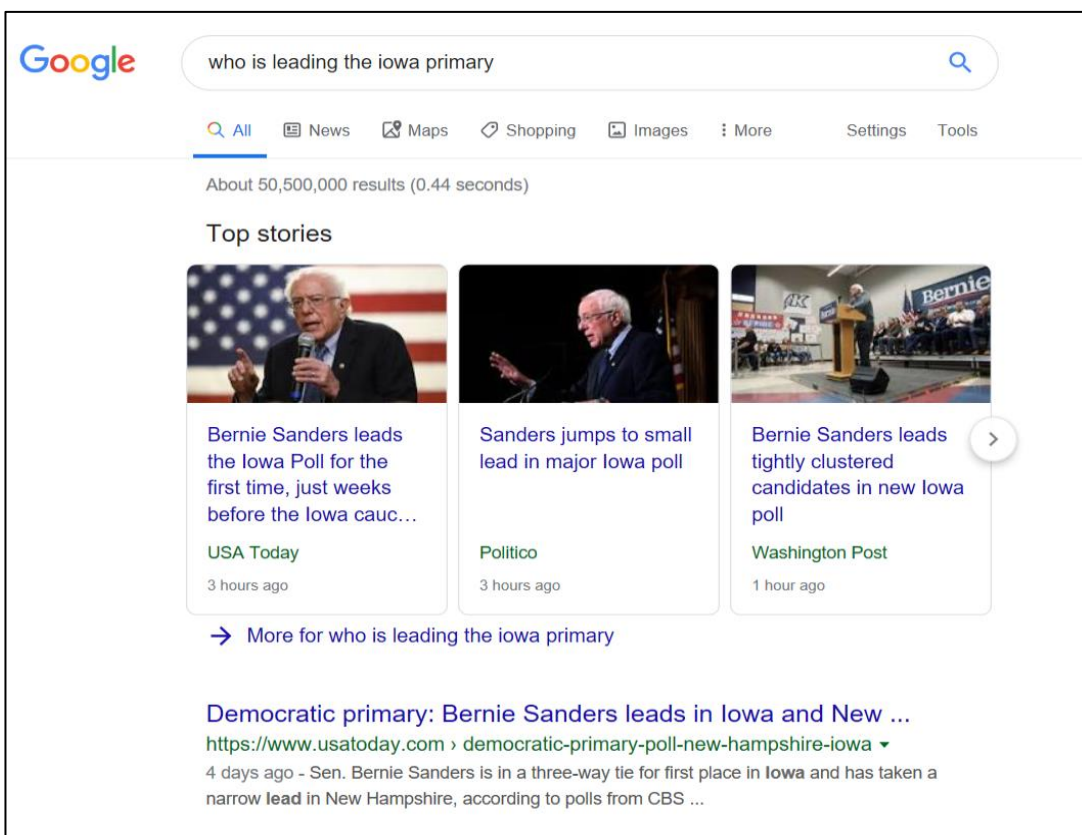
V. Google Search: Becoming A Walled Garden

News publishers have different but equally pressing concerns about the direction of Google Search – in both desktop and mobile. As stated above, in 2018 Google itself disclosed fundamental shifts in its view of search, including a shift to more visual ways of finding information – but these are only part of the problem from the publishers’ perspective. For many years, Google Search results consisted of simple blue links with only a headline and very short snippet from an article. Today, Google Search makes heavy use of premier news content, including high quality news photos. Google uses this content to enhance its own brand – especially in an era plagued by fake news – and earns substantial advertising revenues for aggregating content it did not create or fund. Moreover, news publishers worry that Google Search is increasingly becoming more of a publisher than a search engine, supplying sufficient content to substitute for their publications. This violates the core assumption at the foundation of the *Perfect 10* case.

Thus, one growing concern for the news industry is the current length of snippets from their articles, which often can collectively provide ample information on any news story to satisfy the casual reader skimming the news. Google is able to use its role as the market dominant platform to pressure newspapers into providing “rich snippets” for search. If these rich snippets are not on properly optimized pages (meaning the publisher implemented Google-dictated structured data and markup properly, and the images are of requisite quality and size), the newspaper is put at

competitive disadvantage. As illustrated by the examples and screenshots detailed below, a second, broader concern is the format and wide range of content presented by Google on today’s search results pages, usually above the traditional headlines and links to news articles – changes which undoubtedly decrease the chances that a user will click on a news link. Many have quoted the stunning statistic that, “In June of 2019, for the first time, a majority of all browser-based searches on Google.com resulted in zero clicks. We’ve passed a milestone in Google’s evolution from search engine to walled-garden.”³⁸ The situation is even more stark on mobile: in the past three years, “[o]rganic has fallen by almost 20%, while paid has nearly tripled and zero-click searches are up significantly. . . . Today . . . almost 2/3rds [of mobile searches ended without a click].”³⁹ Thus, while Google still sends substantial traffic to news websites, it is clear that it has wholly abandoned early Larry Page’s approach where he stated: “We want to get you out of Google and to the right place as fast as possible.”

Here are two examples of Google search results:




³⁸ Rand Fiskin, *Less than Half of Google Searches Now Result in a Click*, SPARKTORO: BLOG (Aug. 13, 2019), available at <https://sparktoro.com/blog/less-than-half-of-google-searches-now-result-in-a-click/> (citing studies by Jumpstart, the data arm of Avast).

³⁹ *Id.*

Google soleimani


About 231,000,000 results (0.56 seconds)

Top stories




US Special Ops tried -- but failed -- to kill another top Iranian commander on night...

Fox News
7 hours ago



On the day U.S. forces killed Soleimani, they targeted a senior Iranian official in Yemen

Washington Post
7 hours ago



Dems Increasingly Entertain 'Wag the Dog' Theories of Soleimani Strike

The Daily Beast
16 mins ago

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Qasem Soleimani - Wikipedia
https://en.wikipedia.org/wiki/Qasem_Soleimani
 Qasem Soleimani (Persian: قاسم سلیمانی, pronounced [qɑːˈsɛm(ɛ) sɒlɛjˈmoːˈni]; 11 March 1957 – 3 January 2020) was an Iranian Major General in the Islamic Revolutionary Guard Corps (IRGC) and, from 1998 until his death in 2020, commander of its Quds Force, a division primarily responsible for extraterritorial military ...
[Military career](#) · [Personal life and public](#) · [Sanctions](#) · [Death](#)

Qasem Soleimani ↻

Iranian general

Qasem Soleimani was an Iranian Major General in the Islamic Revolutionary Guard Corps and, from 1998 until his death in 2020, commander of its Quds Force, a division primarily responsible for extraterritorial military and clandestine operations. [Wikipedia](#)

Born: March 11, 1957, Qanat-e Malek, Kerman, Iran
Died: January 3, 2020, Baghdad, Iraq
Nationality: Iranian
Children: Mohammadreza Soleimani, Zeinab Soleimani
Nicknames: General, Sardar Soleimani, Haj Qasem
Parents: Hassan Soleimani, Fatemeh Soleimani


Examples of the expanded content presented in Google Search results before traditional news headlines and links include the following. First, sometimes Google Search simply provides the answer to a question, such as “Who owns National Geographic?”

Google who owns national geographic


About 435,000,000 results (0.73 seconds)


National Geographic Partners / Parent organization


21st Century Fox





People also search for View 15+ more



 Fox Corporation



 News Corp


 WarnerM...


 The Walt Disney Company

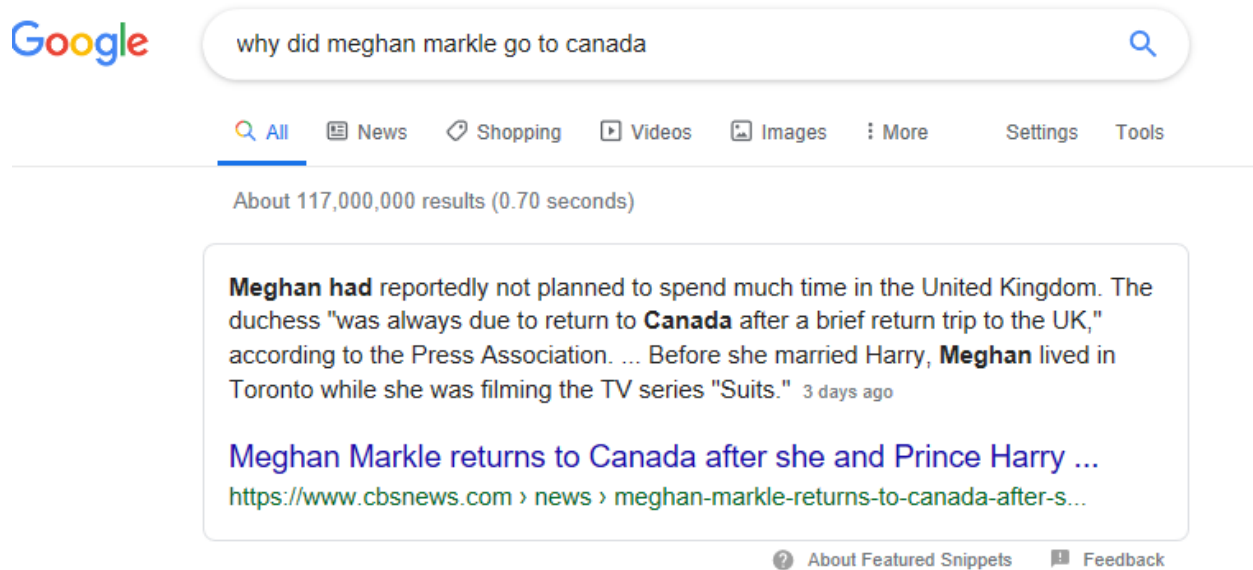

 CBS Corporation


 Lucasfilm


 Disney Streaming Services

[Claim this knowledge panel](#) Feedback

Second, Google currently is making extensive use of “featured snippets,” including on mobile. These are special boxes where the format of regular listings is reversed, showing the descriptive snippet first before the link. (Featured snippets commonly contain only one link for the listing.)



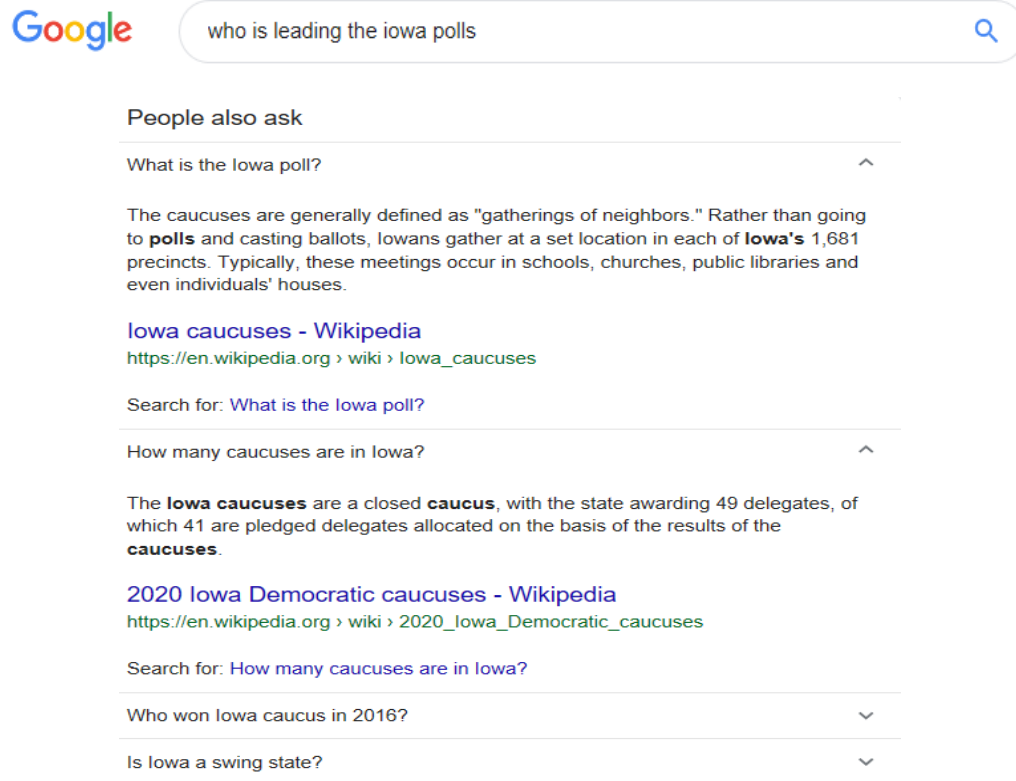
Featured snippets are often sufficiently lengthy and comprehensive that the user is far less likely to click on any news link; they also push regular news links farther down the search page. One 2017 study analyzed two million featured snippets and found that when a featured snippet is present, the first organic result showed a significant drop in click-through rate.⁴⁰ Not surprisingly, since newspapers are all in competition with one another, there is substantial pressure to provide sufficiently lengthy snippets to draw traffic or be selected for the “featured snippet” on any given topic.

Google’s website states that news publishers can only opt out of featured snippets by “remov[ing] all snippets on your page, including those in regular search results.”⁴¹ In other words, a news publisher cannot decide to opt out of featured snippets without removing all textual snippets from its ordinary search results – which would be suicidal.

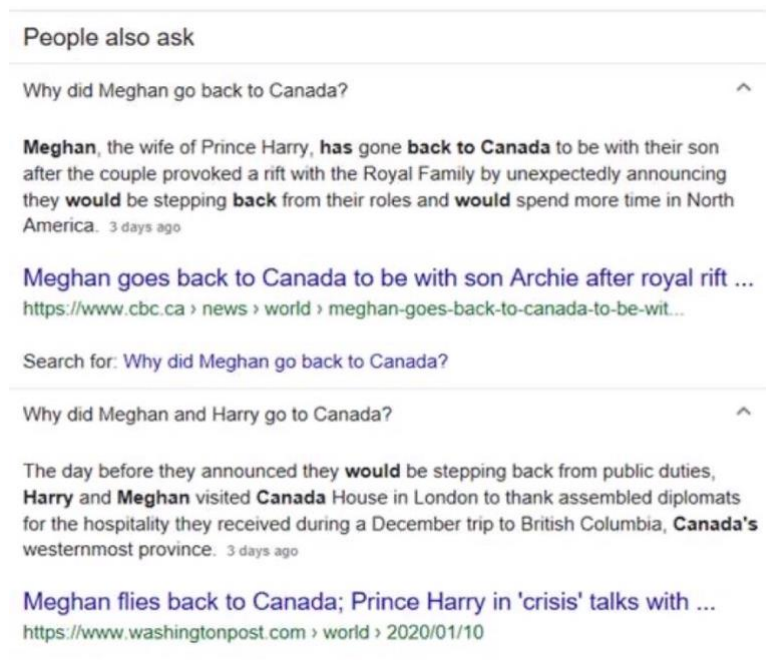
⁴⁰ See Tim Soulo, *Ahrefs’ Study of 2 Million Featured Snippets: 10 Important Takeaways*, AHREFS: BLOG (APR. 7, 2020), available at <https://ahrefs.com/blog/featured-snippets-study/>; see also Barry Schwartz, *Another Study shows how featured snippets steal significant traffic from the top organic results*, SEARCH ENGINE LAND (May 30, 2017, 10:25 a.m.), available at <https://searchengineland.com/another-featured-snippet-study-shows-steal-significant-traffic-first-organic-result-275967> (summarizing Ahrefs’ study).

⁴¹ Support.google.com, *Featured snippets and your website*, available at <https://support.google.com/webmasters/answer/6229325?hl=en> (last visited June 9, 2020).

Third, Google also has introduced the “People Also Ask” feature in Google Search, which generally provides questions and answers, often with a link to Wikipedia – reducing newspaper traffic.



Where the “People Also Ask” feature displays newspaper content, it provides lengthy snippets akin to the “featured snippets,” which often provide sufficient information that a reader will not feel the need to click through to the original site.



Fourth, Google often places ads and other sponsored content in search results, often pushing news links farther down the page and reducing the likelihood that a user will click on a news link. This is frequently the case in searches for consumer products that are reviewed in “service journalism” -- publications like *Consumer Reports*, *Reviewed* or *The Wirecutter*. Searches for topics such as “best outdoor grills” are crowded with all sorts of ads and sponsored content before the publishers’ organic search results. Moreover, as can be seen below, Google is using snippets of news content as specific promotions for individual products, all to its commercial benefit; for example, if the user clicks on these products, they link to a shopping module. In other words, Google is using the news media’s content to advance its chance of selling the product at issue, without compensation to the publisher – and circumventing the user’s need to visit the publishers’ web sites and an opportunity for publishers to earn a share of affiliate revenues.

Feedback

Top 16 Outdoor Grills

The image shows three product cards for Weber grills. Each card includes a product image, name, price, star rating, and number of reviews. Below each card are snippets from news articles and reviews, along with a table of specifications.

ProductWeber Spirit II E-310	ProductWeber Genesis II E-310	ProductWeber Spirit II E-210
\$450+	\$700+	\$350+
★★★★★ (6,404)	★★★★★ (2,336)	★★★★★ (6,080)
CNet Weber Spirit II E-310 re... Weber's Spirit II E-310 is a solid grill, but it costs a lot for what you get.	Top Ten Reviews Weber Genesis II E-310... The Weber Genesis II E-310 is your best bet for the superior grilling experience that only the best outdoor grills...	BarbecueLogic Weber Spirit II E-210 G... The flavorizer bars also distribute heat very evenly throughout the grill, making the Spirit II E-210 one of the...
Good Housekeeping 8 Best Grills to Buy 2020 - Top Gas, Charcoal, and...	FoodFireFriends.com Best Gas Grills - Top 10 for 2020, A Model for...	CNet The best grills of 2020: Gas models we love
Type: Gas Finish: Black, Red...	Type: Gas Finish: Black Propane Gas, Natural Gas	Type: Gas Finish: Black, Red...

All told, the changes in Google Search and its movement toward a “walled garden” raise significant concerns for news publishers, who rely heavily on Google Search traffic and whose content is instead used for Google’s own purposes.

News publishers also have other concerns about Google Search unrelated to Google’s movements toward a “walled garden.” They also have expressed concerns that their rankings on Google Search have fallen when they have decreased the number of free articles offered before requiring a subscription. As they have explained, the Google algorithm can detect when users leave a newspaper’s page – as they often do when hitting a paywall -- and this lowers search rankings. As the premier newspapers increasingly make use of paywalls to fund their operations, these practices by Google have troubling implications.

News publishers also are angered about Google’s apparent use of news content they have authorized for use in Google Search in entirely different Google products, including Google Assistant. Google Assistant is but one of the growing “Voice-first” Google platforms. The Google website states that, “If you search with the Google Assistant, featured snippets may also be read aloud.”⁴² The full extent of this practice is not known, but in a limited review the news publishers have certainly found examples. When Google Assistant provides an audio response, that audio response obviously does not contain any link to the original article. In short, in that setting, the *quid pro quo* that supports any fair use defense is absent. While some publishers have affirmatively opted-in by using structured data known as “speakeable markup” (used to signal consent to Google for use of excerpts in text-to-speech), most of the news industry has not provided knowing consent to this use of their content on Google Assistant. That apparently has not stopped Google. Google is currently paying license fees to some publishers for custom-tailored audio content on Google Assistant, but the full extent of Google’s use of news content for Google Assistant remains opaque but certainly goes far beyond those few publishers that have given actual consent. It is widely expected that Google Voice is the new frontier and, as with Google Search and Google News, publishers have substantial concerns regarding attribution, monetization, traffic and audience data, and customer relationship issues relating to use of their content that need to be far better addressed. Google’s use of content authorized for one product in another product entirely in very different circumstances is yet another example of Google’s misuse of its power as a market dominant platform.

VI. Needed Steps to Combat Google’s Behavior

As the facts outlined above portray, news publishers have not had the ability to rely on copyright law to protect their publications in the face of Google’s near monopoly power, which Google repeatedly deploys to extract undue concessions from the news publishers and increase that market dominance. In the *Perfect 10* case, Google got a significant “win” on a fundamentally different set of facts, and then grew so large and powerful that no individual news publisher has genuine negotiation muscle against it to enforce their rights. Thus, no matter what copyright protection the newspapers are rightfully due under the Copyright Act -- which is there to protect their ability to flourish and incentive to create -- there has been a market failure in their ability to obtain adequate compensation or control over the current and future use of their content. This is one among several causes that have greatly damaged the news publisher industry, leading to the decline of high-quality coverage of public affairs, including local news, to the detriment of all citizens. Such coverage is especially necessary in these challenging times, as truth is subject to attack and the ability of governments to grapple with pressing political challenges such as climate change and the corruption of politics by special interests becomes ever more pressing.

All of this makes it imperative that there be some structural solution to address Google’s market dominance and ability to dictate grossly one-sided terms that can be changed at its whim at any time – as well as its ability to play one publisher against another. After all, no news publisher

⁴² Support.google.com, *How Google’s featured snippets work*, available at https://support.google.com/websearch/answer/9351707?p=featured_snippets&hl=en&visit_id=637127182315986847-2628332654&rd=1 (last visited June 3, 2020); *see also* Danny Sullivan, *A Reinroduction to Google’s Featured Snippets*, GOOGLE: THE KEYWORD BLOG (Jan. 30, 2018), available at <https://www.blog.google/products/search/reinroduction-googles-featured-snippets/>.

can afford to be the lone publication standing up to Google, while its competitors cave in to Google’s unfair demands and get the resulting traffic. The concern extends far more broadly than the current versions of Google Search, Google Discover, and the Google News app. Rather, the concern only amplifies as one looks into the future – including for example, the unknown extent to which Google intends to use newspaper content in Google Voice and to develop artificial intelligence. Google Voice is anticipated to be highly important for Google, whether via Google Assistant or other platforms, and Google’s anticipated use of artificial intelligence to develop answers to questions is a hot topic in news circles.⁴³

A. The EU Adopts A Publisher’s Right and Abuse of Economic Dependence Principles

In the European Union, similar concerns recently have led to extensive studies and important legal changes. Last year, the EU adopted a “Publisher’s Right” as part of the “Directive on Copyright in the Digital Single Market” (the “Directive”).⁴⁴ Each country in the EU must now enact implementing legislation, which France has already done. The Publisher’s Right essentially gives press publications the right to compensation for use of their works by “information society service providers” – except for “the use of individual words or very short extracts of press publications.”⁴⁵ While “very short excerpts” are not defined, the Directive makes clear that “it is important that the exclusion of very short extracts be interpreted in such a way as not to affect the effectiveness of the rights provided for in this Directive.”⁴⁶ The Directive clarifies that the rights granted to publishers do not extend to acts of hyperlinking or “mere facts.”

The Directive is expressly based on the public policy considerations at stake. It recognizes that “[a] free and pluralistic press is essential to ensure quality journalism and citizens’ access to information” and that a thriving press “provides a fundamental contribution to public debate and the proper functioning of a democratic society.”⁴⁷ It seeks to address the “problems” experienced by press publications “in licensing the online use of their publications” to online services both in light of the publications’ need to “recoup their investments” and as a matter of equity -- concluding that the “reuse of press publications” constitutes an “important part of the[]

⁴³ See, e.g., Cade Metz, *Google’s Hand-Fed AI Now Gives Answers, Not Just Search Results*, WIRED (Nov. 29, 2019 7:00 a.m.), available at <https://www.wired.com/2016/11/googles-search-engine-can-now-answer-questions-human-help/>; Katrina Brooker, *Google’s quantum bet on the future of AI and what it means for humanity*, FAST COMPANY (Sept. 17, 2019), available at <https://www.fastcompany.com/90396213/google-quantum-supremacy-future-ai-humanity>.

⁴⁴ Official Journal of the European Union, Directive (EU) 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, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L0790&from=EN> (last visited June 8, 2020)

⁴⁵ *Id.* at 13.

⁴⁶ *Id.*

⁴⁷ *Id.* at 12.

business models” of online services and “a source of revenue.”⁴⁸ The Directive is premised on a recognition of the market dominance of the major platforms. As the [Commission Staff Working Document Impact Assessment] stated, “Online service providers often have a strong bargaining position and receive the majority of advertising revenues generated online This makes it difficult for press publishers to negotiate with them on an equal footing, including regarding the share of revenues related to the use of their content.”⁴⁹

It is far too early to determine the ultimate impact of the EU Publisher’s Right. Thus far, Google has publicly stated that it will not pay press publications for search results and will instead limit the detail in its search listings, citing an experiment purportedly demonstrating that in such instances, traffic will go to non-news sites, thus harming news publishers. In April 2020, the French Competition Authority found that Google was abusing its monopoly position in search to circumvent the French version of the Publisher’s Right and ordered it to engage in negotiations under stated conditions.⁵⁰

Google’s behavior is in keeping with its earlier response to similar legislation. In 2014, Spain and Germany enacted laws permitting publishers to charge Google for displaying snippets in search results, or to prohibit Google from doing so. A consortium of German publishers initially told Google that it could not display snippets or images in its search results; when Google complied (displaying only headlines), traffic to major news publishers crashed so significantly that within two weeks, Germany’s largest publisher reversed course.⁵¹ In response to the Spanish law, Google chose to shut down Google News in Spain altogether rather than pay publishers for their contents⁵²; as a result, studies documented an immediate reduction in traffic falling on smaller publishers.⁵³ However, recent reports show that over time online traffic trends

⁴⁸ *Id.* at 12-13.

⁴⁹ Commission Staff Working Document Impact Assessment on the modernization of EU copyright rules Accompanying the document Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market and Proposal for a Regulation of the European Parliament and of the Council laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes (Sept. 16, 2016) at p. 160, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/DOC/?uri=CELEX:52016SC0301&from=EN>.

⁵⁰ See Decision no. 20-MC-01 of the Autorité de la Concurrence of 9 April 2020 concerning the requests for provisional remedies submitted by the Syndicat des éditeurs de la presse magazine, Alliance de la presse d’information générale inter alia, and Agence France-Press.

⁵¹ See Harro Ten Wolde, Eric Auchard, *Germany’s top publisher bows to Google in new licensing row*, REUTERS, (Nov. 5, 2014 10:35 a.m.), available at <https://www.reuters.com/article/us-google-axel-sprngr/germanys-top-publisher-bows-to-google-in-news-licensing-row-idUSKBN0IP1YT20141105>; Colin Lecher, *German publisher caves to Google News after massive traffic drop*, THE VERGE (Nov. 5, 2014 12:47 p.m.), available at <https://www.theverge.com/2014/11/5/7160587/german-publisher-axel-springer-google-news>.

⁵² Google Europe Blog, *An update on Google News Spain* (Dec. 11, 2014), available at <https://europe.googleblog.com/2014/12/an-update-on-google-news-in-spain.html>.

⁵³ Susan Athey, Markus M. Mobius, Jeno Pal, *The Impact of Aggregators on Internet News Consumption*, (abstract), SOCIAL SCIENCE RESEARCH NETWORK (Jan. 11, 2017), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2897960

for select Spanish news sites seem to have remained largely unchanged, with the total number of unique monthly visitors actually increasing with many publishers.⁵⁴

The EU Publisher’s Right holds promise for European news publishers, although the last chapter on its implementation has yet to be written. Whatever its ultimate impact, the EU and American legal systems are very different. The EU Publisher’s Right is most salient in the U.S. as a reflection of a fundamental principle regarding the value of news content to be attained through some vehicle, even if not in the exact manner as the EU. Certainly, the EU’s adoption of a Publisher’s Right underscores the legitimate nature of the news publishers’ concerns reflected in this paper and the necessity for action.

Another EU legal development may provide more concrete possibilities for U.S. legislation that would provide redress for the news publishers’ concerns with Google. In France, Belgium, Germany and other jurisdictions, there are laws governing the abuse of economic dependence, which focus on situations in which one party has a significant share of the relevant market⁵⁵ and abuses its power over those highly reliant on it as a supplier. The French law broadly prohibits “the abusive exploitation by a company . . . of the state of economic dependence” (Article L. 420-2 of the Code de Commerce) – listing as examples a refusal to sell, tied selling or discriminatory practices. The German abuse of economic dependence provisions have an even greater sweep and are not confined to prohibiting practices such as those listed above that affect overall competition.⁵⁶ More broadly speaking, commentators have proposed and analyzed potential Platform-to-Business (P2B) regulations in recognition of the superior bargaining position often held by platforms in relation to their business users, which can lead to unfair practices.⁵⁷ Notably, French news publishers recently raised the laws against abuse of economic dependence in the above-described April 2020 case before the French Competition Authority finding that Google was abusing its monopoly position in the general online search market to

⁵⁴ Newsmediaalliance.org, *The Effects of the Ancillary Right for News Publishers in Spain and the Resulting Google News Closure* (Nov. 2019), available at http://www.newsmediaalliance.org/wp-content/uploads/2019/10/Final-Revised-Spain-Report_11-7-19.pdf (last visited June 3, 2020).

⁵⁵ As the French Competition Authority recently summarized: “In order to characterize a situation of economic dependence, it is . . . necessary to assess whether the following four criteria are met: (i) the brand of the respondent enjoys sufficient notoriety; (ii) the latter has a significant market share in the relevant market; (iii) its share in the turnover of the company possibly in a situation of economic dependence is significant; and (iv) the said company does not have an alternative solution under comparable technical and economic conditions.” See Decision no. 20-MC-01 of the Autorité de la Concurrence of 9 April 2020 concerning the requests for provisional remedies submitted by the Syndicat des editeurs de las presse magazine, Alliance de la press d’information generale inter alia, and Agence France-Press.

⁵⁶ See, e.g., Inge Graef, *Differentiated Treatment in Platform-to-Business Relations: EU Competition Law and Economic Dependence*, OXFORD ACADEMIC: YEARBOOK OF EUROPEAN LAW (Nov. 12, 2019), Vol. 38 at pp. 448 – 499, available at <https://academic.oup.com/yel/article/doi/10.1093/yel/yez008/5622729> (hereinafter “Graef,”).

⁵⁷ *Id.*

circumvent the French version of the Publisher’s Right – although the abuse of economic dependence claim was not ultimately decided in that decision.⁵⁸

The “abuse of economic dependence” concept goes to the heart of the problem between Google and the American news publishers and has some of the same strains as unfair competition law in the United States. While U.S. antitrust laws do not currently recognize exploitative abuse of economic dependence, this concept could be used in U.S. legislation to protect news publishers who are in a state of economic dependence on Google on two fronts: traffic and advertising. As evidenced by the history set forth above, Google’s superior bargaining power as the dominant market player is so out sized that it has made it effectively impossible for the newspapers to enforce their rights under the Copyright Act, especially as Google plays one publisher off another. They have been forced to consent in one fashion or other to use of their conduct beyond the boundaries of fair use without remuneration. In short, intellectual property law has become an ineffectual protection in the face of Google’s market power abuse and many newspapers are being hampered in their ability to provide the reporting that plays a critical role in our democracy. While legislation built on concepts of “abuse of economic dependence” and unfair competition would be somewhat novel in its approach, it is worth considering such legislation in the context of platform use of news content since it is both appropriate and critical for Congress to directly address Google’s market power abuse outlined here. Such legislation could define and target specific practices that constitute exploitative abuse of news content by market dominant platforms, including some of the objectionable practices highlighted in this paper. Further, these concepts could well inform broader principles to be employed by anti-trust regulators, as well as negotiations between the news publishers and Google under the proposed safe harbor legislation discussed below.

B. News Media Alliance Recommendations

The News Media Alliance makes the following recommendations for action by the United States Congress and federal and state Attorneys General:

- Antitrust enforcers must remain vigilant and address Google’s abuse of market power. In 2019, the U.S. Department of Justice and an unprecedented working group of 50 state attorneys general each announced broad antitrust investigations of Google. It is imperative that these investigations explore and address the root causes of Google’s market power. Enforcers must take steps to curb Google’s abuses and, if necessary, impose structural and/or other remedies to ensure that publishers have the ability to negotiate fairly and benefit from competition for the distribution and monetization of their news. Among other things, antitrust enforcers should examine Google’s conduct regarding AMP, including Google’s uses of its dominant search results page to enforce its unilateral AMP standard and Google’s use of the AMP standard to access key consumer data. Federal and

⁵⁸ See Decision no. 20-MC-01 of the Autorité de la Concurrence of 9 April 2020 relating to the requests for provisional measures presented by the Syndicat des éditeurs de la presse magazine, Alliance de la presse d’information générale inter alia, and Agence France-Press, AUTORITÉ DE LA CONCURRENCE (Apr. 9, 2020), available at <https://www.autoritedelaconcurrence.fr/fr/decision/relative-des-demandes-de-mesures-conservatoires-presentees-par-le-syndicat-des-editeurs-de>.

state enforcers should investigate and address Google’s practices that force publishers to flatten their content in a manner that supports Google’s business model by commoditizing content, discouraging innovation in the presentation of content, and devaluing the differentiated and immersive experience offered by publishers. The News Media Alliance believes that the issues presented by the news industry are among the most critical posed, given the important role of newspapers, including local newspapers, in a functioning democracy, and the perilous state of the legacy news industry. As the European Publishers Council and its allies eloquently stated, “Press freedom is not just a function of the law. It also depends on a market that can generate sufficient returns for the huge financial investments required, and to cover the enormous legal and commercial risks of the news media business.”

- Second, the News Media Alliance advocates the passage of legislation it has proposed allowing news publishers to bargain collectively with Google. The perverse current state of affairs is that Google can use its massive and unchecked market power to negotiate with publishers, but publishers cannot join forces to negotiate collectively. The bipartisan legislation, the Journalism Competition and Preservation Act, was introduced as H.R. 2054, with an identical Senate version (S.1700) to address this extreme market and legal failure. Copyright reform alone will not work if Google can use its market power to extract exploitative, exclusionary, and anticompetitive terms from publishers. News publishers face a collective action problem and cannot negotiate effectively – indeed, at all -- in one-off negotiations with Google. An appropriately tailored safe harbor – like the Journalism Competition and Preservation Act – will help begin to restore some semblance of a balance of power by giving publishers the ability to begin offsetting Google’s power as a market dominant player in search and news aggregation. The time has come for antitrust law to work by addressing Google’s Standard Oil-sized market power, not by penalizing or restraining the smaller businesses attempting to offset Google’s power through limited collective negotiations.
- Third, news publishers should be compensated for their content, and Congress should explore various means toward that end. The News Media Alliance encourages Congress to strengthen the intellectual property rights of news publishers, including revisiting federal copyright preemption to establish rules allowing state misappropriation claims to survive in a narrowly prescribed manner. Congress should also consider legislation that would facilitate licensing of digital content. The News Media Alliance also calls on the Copyright Office to issue regulations providing for a practical process for the registration of copyright for dynamic digital content such as that contained on digital news properties.

Further, the News Media Alliance calls on Google to adopt the following principles, and for Congress, courts, antitrust enforcers, and regulators likewise to act based on the following principles:

- Google should genuinely treat news publishers as strategic players in a mutually dependent ecosystem, recognizing that without their critical content, Google would be significantly impaired. Broadly speaking, Google should consider the impact on the news industry of all of its actions in order to ensure that all stakeholders in the ecosystem will prosper.
- Google should base its actions on the principle that news publishers have the right to control the specific uses of their content by Google and should not be forced to “consent” or accede to unknown or undesired uses of their articles and photographs by being presented with untenable alternatives.
- Google should stop using features or benefits necessary to secure high search rankings to coerce agreement to other undesired terms, or condition search rankings on publisher participation in any other Google products.
- Google should pay news publishers a fair share of the value of their content to Google. There are many ways this could be structured, so long as the total consideration accurately represents an equitable distribution given Google and the news publishers’ respective contributions and the enormous value to Google of the data it collects in news searches, rather than the structural imbalance between Google and the news industry in terms of negotiation power.
- Google should share more user data with the news publishers.
- Google should not use its power over news publishers to collect and use data that users would be providing to publishers, as it does with Google Subscribe.
- Google should revise the user interfaces for Google Search results, Google Discover and the Google News app in a manner that will increase the chances that users will click on news links, rather than increasing the chances that the consumer will use these Google products as a substitute for the original news publication.
- Google should adopt a completely new approach for its terms of service and other agreements with news publishers, and renounce reliance on all such prior documents. In order to foster fair negotiations and a true “meeting of the minds” with genuine consent, Google should:
 - Inform the news publishers of intended desired uses of newspaper content in sufficient detail to permit knowledgeable negotiations;
 - Engage in a meaningful “give and take” with the news industry to address their concerns, rather than effectively forcing them to agree to non-negotiable contracts of adhesion;

- Negotiate agreements pertaining to one product, not multiple products
- Cease any tying arrangements or other provisions that require news publishers who want to consent to one use of their content to agree to other uses of their content, including features within a given product.
- Revise its “grant of rights” clauses significantly, so that they are both circumscribed and clear.
- Cease the use of any provisions providing in sum or substance that “Google may add or remove functionalities or features at any time,” and that “Google may modify the agreement at any time.”
- Agree to a fairer distribution of risk through more equal indemnification provisions.
- Google should engage in transparent and fair negotiations with news publishers regarding any uses of their content in Google Voice and artificial intelligence.

In conclusion, long ago the courts gave Google certain limited legal protections, believing that it was engaged in good faith, fair uses of third-party content, and ultimately acting in the public interest. Now, the balance is upset, leading to significant societal ramifications and harm to the free press. The News Media Alliance calls upon both the government and Google to address these urgent problems.

APPENDIX: PART 2

Minimum and Maximum Protection Under International Copyright Treaties

Jane C. Ginsburg*

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INTRODUCTION

This Comment addresses minimum and maximum substantive international protections set out in the Berne Convention and subsequent multilateral copyright accords. While much scholarship has addressed Berne minima,¹ the maxima have

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1. See, e.g., SAM RICKETSON & JANE C. GINSBURG, *INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS: THE BERNE CONVENTION AND BEYOND* ch. 8–12, at 399–754 (2d ed. 2006); SILKE VON LEWINSKI, *INTERNATIONAL COPYRIGHT LAW AND POLICY* ¶¶ 5.94–5.147 (2008); PAUL GOLDSTEIN & BERNT HUGENHOLZ, *INTERNATIONAL COPYRIGHT: PRINCIPLES, LAW, PRACTICE* ch. 9, at 303–56 (3d ed. 2013); Paul Edward Gellar, *International Copyright: The Introduction*, in 1 *INTERNATIONAL COPYRIGHT LAW AND PRACTICE INT-1*, § 5, at INT-139 to -188 (Lionel Bently ed., 2018), <https://perma.cc/4FAX-QNU6>.

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generally received less attention.² It first discusses the general structure of the Berne Convention,³ TRIPS,⁴ and the WCT⁵ regarding these contours, and then analyzes their application to the recent “press publishers’ right” promulgated in the 2019 EU Digital Single Market Directive.⁶

I. THE TWO PILLARS OF INTERNATIONAL COPYRIGHT TREATIES

The Berne Convention and subsequent multilateral copyright accords rest on two pillars: national treatment and supranational substantive obligations. National treatment is a rule of non-discrimination: A member state may not accord foreign authors less protection than it grants its own. But a second principle buttresses the first: Whatever level of protection national law provides, a treaty member state must grant foreign authors protection commensurate with the treaties’ substantive standards. Most often that obligation means that member states whose domestic laws fall below the treaty minima must accord more protection to foreign authors than they do to their own. Berne’s drafters anticipated that the political precariousness of such an outcome would result in a general raising of the level of domestic protection as well.⁷ In the case of Berne maxima, in theory, a member state could deny foreign Berne works protections that it extends to local authors, if that coverage concerns subject matter the treaties exclude or rights that a mandatory exception mitigates. But, as the drafters also may have anticipated, most national laws are likely to incorporate Berne’s mandatory exclusions and exceptions, so that a downward discrepancy between local law and Berne norms seems improbable. Or did, until the

2. There are notable exceptions. *See, e.g.*, Annette Kur & Henning Grosse Ruse-Khan, *Enough Is Enough—The Notion of Binding Ceilings in International Intellectual Property Protection*, in *INTELLECTUAL PROPERTY RIGHTS IN A FAIR WORLD TRADE SYSTEM: PROPOSALS FOR REFORM OF TRIPS 359* (Annette Kur & Marianne Levin eds., 2011) [hereinafter Kur & Ruse-Khan, *Enough Is Enough*, INT’L PROP. RTS.]; Annette Kur & Henning Grosse Ruse-Khan, *Enough Is Enough—The Notion of Binding Ceilings in International Intellectual Property Protection* (Max Planck Inst. for Intell. Prop., Competition & Tax Law Research Paper Series, Paper No. 09-01, 2008), <https://perma.cc/GE6G-53LM> [hereinafter Kur & Ruse-Khan, *Enough Is Enough*, Max Planck Inst.]; TANYA APLIN & LIONEL BENTLY, *GLOBAL MANDATORY FAIR USE: THE NATURE AND SCOPE OF THE RIGHT TO QUOTE COPYRIGHT WORKS* (2020) (a monumental study of the Berne Article 10 quotation right). *See also* Susy Frankel, *Challenging TRIPS-Plus Agreements: The Potential Utility of Non-Violation Disputes*, 12 J. INT’L ECON. L. 1023, 1030, 1031 n.31 (2009) (acknowledging that TRIPS allows member states to legislate TRIPS-plus levels of protection, but suggesting that maxima may be implicit in the structure and purpose of TRIPS, as “higher levels of protection ought to have limits consistent with the wording of the TRIPS Agreement, in light of its object and purpose, its structure and the benefits that can be expected from it”; but expressing skepticism about the ability of specific substantive maxima to respond to technological change). The brief discussion of Berne maxima at RICKETSON & GINSBURG, *supra* note 1, ¶ 6.110 will be substantially augmented in the forthcoming third edition.

3. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, *as revised* July 24, 1971, *and as amended* Sept. 28, 1979, S. Treaty Doc. No. 99-27 (1986) [hereinafter Berne].

4. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [hereinafter TRIPS].

5. WIPO Copyright Treaty, Dec. 20, 1996, 36 I.L.M. 65 (1997) [hereinafter WCT].

6. Directive (EU) 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) [hereinafter DSM Directive].

7. RICKETSON & GINSBURG, *supra* note 1, ¶ 6.90, at 311.

passage of the Digital Single Market (DSM) Directive's Article 15 on press publishers' rights called that assumption into question.

A. MEANINGS OF “MINIMA” AND “MAXIMA”

First, let's consider minima. The Berne Convention contains many mandatory obligations regarding minimum subject matter and rights. These are the provisions denoted by “shall.” Regarding protected subject matter, see, for example, Article 2(1): “The expression ‘literary and artistic works’ shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression” Or Article 2(3): “Translations, adaptations, arrangements of music and other alterations of a literary or artistic work shall be protected as original works without prejudice to the copyright in the original work.”⁸ By contrast, some subject matter provisions clearly signal their optional character. For example, Article 2(4): “*It shall be a matter for legislation in the countries of the Union to determine the protection to be granted to official texts of a legislative, administrative and legal nature, and to official translations of such texts.*” The formulation “[i]t shall be a matter for legislation in the countries of the Union” tells us that protection for the object is permitted, not required (nor prohibited).⁹

With respect to minimum rights, the same expressions identify the right or exception as mandatory or left to local legislation. Hence, for example, Article 8 proclaims: “Authors of literary and artistic works protected by this Convention *shall enjoy* the exclusive right of making and of authorizing the translation of their works throughout the term of protection of their rights in the original works.”¹⁰ But Article 11bis(2) states: “*It shall be a matter for legislation in the countries of the Union to determine the conditions under which the rights mentioned in the preceding paragraph [various forms of communication to the public] may be exercised*”¹¹

Now consider maxima. Berne and subsequent treaties allow member states to create exceptions and limitations to exclusive rights, generally subject to a variety of conditions. With one exception, Berne does not impose any mandatory restrictions

8. For mandatory protected subject matter, see Berne, art. 2(1) (“literary and artistic works”); Berne, art. 2(3) (derivative works [without prejudice to underlying work]); Berne, art. 2(5) (collections of literary and artistic works [without prejudice]); Berne, art. 18 (restoration of copyright in foreign works in public domain in newly acceding member state); TRIPS, art. 10(1) (computer programs protected as literary works under Berne); TRIPS, art. 10(2) (compilations of data if intellectual creations); WCT, art. 4 (computer programs); WCT, art. 5 (compilations of data).

9. For optional protected subject matter, see Berne, art. 2(4) (official texts); Berne, art. 2(7) (applied art); Berne, art. 2bis(1) (political speeches).

10. For mandatory protected rights, see Berne, art. 6bis (moral rights); Berne, art. 7 (duration); Berne, art. 8 (derivative works); Berne, art. 9(1) (reproduction); Berne, arts. 11, 11bis, 11ter, 14 (public performance and communication to the public); Berne, art. 12 (translation); Berne, art. 16 (border seizure); TRIPS, art. 11 (rental, under certain conditions); WCT, art. 6 (distribution of hardcopies); WCT, art. 7 (rental, under certain conditions); WCT, art. 8 (making available to the public); WCT, arts. 11–12 (technological protection measures and copyright management information).

11. Berne Article 11bis(2) nonetheless constrains the freedom allowed member states: “[B]ut these conditions shall apply only in the countries where they have been prescribed. They shall not in any circumstances be prejudicial to the moral rights of the author, nor to his right to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority.”

on the scope of exclusive rights.¹² Because these derogations from exclusive rights are optional, they are not maxima. We will return to the one rights restriction that Berne prefaces with “shall”—a rights maximum—after considering maximum subject matter.

TRIPS and the WCT expressly incorporate the “idea/expression dichotomy,” that is, the exclusion of ideas, methods, and processes from the subject matter of copyright.¹³ The Berne Convention does not explicitly adopt this rule, though it may be implicit in the overall concept of “literary and artistic works,” or through state practice, given that most or all member states are likely, by text and/or by case law, to exclude these elements from the scope of protection.¹⁴ The Berne Convention goes further than the later accords in also removing facts from protection (though this exclusion may also be implicit in those agreements). Article 2(8) states: “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.” As a result, a member state may not grant copyright protection to the ideas or facts (as opposed to their expression) contained within the works of foreign authors, thus establishing the maximum scope of subject matter protection for foreign authors. Again, the Berne minima and maxima apply only to works of foreign Berne origin, while “[p]rotection in the country of origin is governed by domestic law.”¹⁵

Turning back to maximum rights under Berne, the Article 10(1) quotation provision is a “shall” clause, qualified by a variety of conditions, but on its face is a

12. For permissible, but not mandatory exceptions and limitations, see Berne, art. 2bis(2) (press use of public lectures); Berne, art. 9(2) (exceptions to reproduction right, “three-step test”); Berne, art. 10(2) (uses as illustrations for teaching); Berne, art. 10bis(1) (press use of press articles); Berne, art. 10bis(2) (incidental use in reporting current events); Berne, art. 11bis(3) (ephemeral recordings); TRIPS, art. 13 (implicitly authorizes exceptions and limitations to all exclusive rights, but “confines” them to the three-step test); WCT, art. 10(1) (may provide for exceptions to WCT rights, subject to three-step test); WCT, art. 10(2) (shall confine exceptions or limitations on Berne Convention rights to three-step test). The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, June 27, 2013, 52 I.L.M. 1312 (2013), is an extra-Berne treaty imposing mandatory exceptions, both domestically and internationally, on Berne subject matter. Its consistency with Berne norms is a matter of some controversy. See, e.g., Sam Ricketson & Jane C. Ginsburg, *The Berne Convention: Historical and Institutional Aspects*, in INTERNATIONAL INTELLECTUAL PROPERTY: A HANDBOOK OF CONTEMPORARY RESEARCH 3–36 (Daniel Gervais ed., 2015); ASSOCIATION LITTÉRAIRE ET ARTISTIQUE INTERNATIONALE (ALAI), REPORT OF THE ALAI AD HOC COMMITTEE ON THE PROPOSALS TO INTRODUCE MANDATORY EXCEPTIONS FOR THE VISUALLY IMPAIRED (2010).

13. See TRIPS, art. 9(2) (“Copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such.”); WCT, art. 2 (“Copyright protection extends to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such.”).

14. On “state practice” and the interpretation of the Berne Convention, see, for example, RICKETSON & GINSBURG, *supra* note 1, ¶¶ 5.21, 5.24, 5.57; JANE C. GINSBURG & EDOUARD TREPOZZ, INTERNATIONAL COPYRIGHT LAW: U.S. AND E.U. PERSPECTIVES 103–09 (2015).

15. Berne, art. 5(3). Under EU law, however, facts and expression merged with facts are also excluded. See Case C 469/17 *Funke Medien NRW GmbH v. Bundesrepublik Deutschland*, ECLI:EU:C:2019:623, ¶ 24 (July 29, 2019) (stating that military reports are not “works” because they are “essentially determined by the information which they contain, so that such information and the expression of those reports become indissociable and that those reports are thus entirely characterised by their technical function”).

direction to member states to permit the making of “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.” This Comment does not explore Article 10(1) in depth,¹⁶ but examines the premise that it establishes a mandatory quotation “right” within its purview. Absent a mandatory character, Article 10(1) would not be a true “maximum,” and any ceiling it imposes would in fact be retractable.¹⁷

Tanya Aplin and Lionel Bently contend that there are several indications that this provision imposes a mandatory requirement for member states to provide for a quotation exception.¹⁸ First, the text: The language “*shall* be permissible” indicates that the quotation provision is obligatory.¹⁹ That interpretation is bolstered by the contrasting language used in other, optional provisions. With the exception of Article 10(1), Berne allows member states to institute copyright limitations and exceptions but does not impose them. For example, the very next provision of Article 10 specifies that limitations related to certain educational uses “shall be a matter for legislation in the countries of the Union.”²⁰ Second, the records of the Stockholm Conference of 1967, where the present language of Article 10(1) was adopted, also support the notion that Article 10(1) is mandatory.²¹ The language of Article 10(1) was initially proposed by the 1963 Study Group, which repeatedly referenced the “*right* of quotation” and the “*right* to make quotations,” again suggesting that the exception is required.²² Finally, Aplin and Bently point to existing commentary interpreting Article 10(1) as mandatory.²³ Amongst these, some commentators have

16. Tanya Aplin and Lionel Bently have extensively undertaken that task. See APLIN & BENTLY, *supra* note 2.

17. Mihály Ficsor notes that Article 10(1) is unique in that it establishes a directly applicable limitation/exception in countries where the Berne treaty is self-executing, whereas all other exceptions and limitations in Berne expressly call for national implementation. See MIHÁLY FICSOR, *GUIDE TO THE COPYRIGHT AND RELATED RIGHTS TREATIES ADMINISTERED BY WIPO* ¶ BC-10.3, at 61 (2003) [hereinafter FICSOR, 2003 WIPO GUIDE]. Nonetheless, as discussed below, Ficsor concludes that the Article 10(1) quotation right is not in fact obligatory on member states, at least in principle.

18. Tanya Aplin & Lionel Bently, *Displacing the Dominance of the Three-Step Test: The Role of Global, Mandatory Fair Use 2–5* (Univ. of Cambridge Faculty of L. Research Paper, Paper No. 33/2018), <https://perma.cc/H9AL-EEER> [hereinafter Aplin & Bently, *Three-Step Test*].

19. *Id.* at 2. It has also been pointed out that, in this respect, the French text is perhaps even clearer. There, Article 10(1) provides, “Sont licite les citations . . .” which indicates that quotations are *permitted* rather than merely *permissible*. See FICSOR, 2003 WIPO GUIDE, *supra* note 17, ¶ BC-10.2.

20. Berne, art. 10(2). Similarly, Berne, art. 10bis(1) allows member states to “permit the reproduction by the press . . . of articles published in newspapers or periodicals on current economic, political or religious topics,” provided the source is clearly indicated.

21. Aplin & Bently, *Three-Step Test*, *supra* note 18, at 2–3.

22. 1 WIPO, RECORDS OF THE INTELLECTUAL PROPERTY CONFERENCE OF STOCKHOLM, JUNE 11 TO JULY 14, 1967, at 116–17 [hereinafter WIPO, STOCKHOLM] (emphases added).

23. Aplin & Bently, *Three-Step Test*, *supra* note 18, at 3–4. For commentators interpreting Article 10(1) as mandatory, see, for example, GOLDSTEIN & HUGENHOLTZ, *supra* note 1, § 11.4.1, at 392 (“Article 10(1) of the Berne Paris Text obligates members to permit quotations . . .”); RICKETSON & GINSBURG, *supra* note 1, ¶ 13.53; Kur & Ruse-Khan, *Enough Is Enough*, INTELL. PROP. RTS., *supra* note 2, at 380; Annette Kur, *Of Oceans, Islands, and Inland Water—How Much Room for Exceptions and Limitations*

suggested that the exceptional mandatory status of Article 10(1) reflects its dual operation: It is a limitation that curbs one author's right in order to benefit not only the general public, but also other authors, who in many fields rely upon the ability to quote other works.²⁴ This rationale, however, does not explain why permitted exceptions, many of which also further downstream authorship, should not also be mandatory.²⁵

Nonetheless, not all commentators agree that Article 10(1) is mandatory; some contend that the provision merely permits rather than requires a quotation right.²⁶ Mihály Ficsor, for example, has argued that because Berne expressly provides that member states can enter into agreements providing higher levels of protection,²⁷ Article 10(1) is not obligatory, at least in principle.²⁸ Ficsor also notes that the practice of member states, specifically the European Union, has been to interpret Article 10(1) as optional.²⁹ In particular, the InfoSoc Directive expressly provides that "Member States *may* provide for exceptions and limitations" as to

quotations for purposes such as criticism or review, provided that they relate to a work or other subject-matter which has already been lawfully made available to the public, that, unless this turns out to be impossible, the source, including the author's name, is indicated, and that their use is in accordance with fair practice, and to the extent required by the specific purpose.³⁰

Aplin and Bently also acknowledge that the practice of EU Member States has not been to treat Article 10(1) as obligatory, with Sweden being one of the very few, and perhaps the only, country that has enacted domestic legislation that fully implements Article 10(1)'s requirements.³¹ They contend, however, that the EU's seemingly

Under the Three-Step Test?, 8 RICH. J. GLOB. L. & BUS. 287, 290 (2009); Kur & Ruse-Khan, *Enough Is Enough*, Max Planck Inst., *supra* note 2, at 18.

24. Kur & Ruse-Khan, *Enough Is Enough*, Max Planck Inst., *supra* note 2, at 18, 38–39.

25. *Id.* at 18 (distinguishing optional limitations such as teaching or news reporting, which they characterize as relying only on "public interests").

26. See MIHÁLY FICSOR, *THE LAW OF COPYRIGHT AND THE INTERNET* ¶ 5.09 (2002); JØRGEN BLOMQUIST, *PRIMER ON INTERNATIONAL COPYRIGHT AND RELATED RIGHTS* 159–60 (2014). See also VON LEWINSKI, *supra* note 1, ¶ 5.163 (indicating that support exists for both positions).

27. For example, Berne, art. 19 states: "The provisions of this Convention shall not preclude the making of a claim to the benefit of any greater protection which may be granted by legislation in a country of the Union." Similarly, Berne art. 20 provides that "[t]he Governments of the countries of the Union reserve the right to enter into special agreements among themselves, in so far as such agreements grant to authors more extensive rights than those granted by the Convention."

28. FICSOR, 2003 WIPO GUIDE, *supra* note 17, ¶ BC-10.3. Ficsor emphasizes that Article 10(1) is not mandatory, but only *in principle*. As a practical matter, the ability to quote is "indispensable" as it "follows from a basic human freedom—the freedom of free speech and criticism." *Id.* ¶ BC-10.4.

29. *Id.* at 130 n.57.

30. Directive 2001/29 of the European Parliament and of the Council of 22 May 2001 on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society, art. 5(3)(d), 2001 O.J. (L 167) [hereinafter InfoSoc Directive] (emphasis added).

31. See Lionel Bently & Tanya Aplin, *Whatever Became of Global, Mandatory, Fair Use? A Case Study in Dysfunctional Pluralism*, in *IS INTELLECTUAL PROPERTY PLURALISM FUNCTIONAL?* 8, 16 (Susy Frankel ed., 2019). For a review of European implementation of Article 10(1), see Martin Senftleben, *Bridging the Differences Between Copyright's Legal Traditions—The Emerging EC Fair Use Doctrine*, 57 J. COPYRIGHT SOC'Y U.S.A. 521 (2010).

optional implementation of a quotation exception in the InfoSoc Directive is not necessarily in conflict with Article 10(1)'s requirement, as the Directive covers both Berne and non-Berne works: "The form of Article 5 is optional because it encompasses both an option and a duty: a duty to recognize a right of quotation from Berne works, but an option to recognize (or not) such a right in respect of neighboring rights."³²

In any event, while the scholarship is somewhat divided, the weight of authority seems to favor the interpretation that Article 10(1) is mandatory.³³ Even amongst the commentators who agree that the quotation right is obligatory, however, there remains some disagreement about the right's implementation. Professors Goldstein and Hugenholtz, for example, argue that "[a]lthough Article 10(1) is mandatory rather than permissive, national legislatures presumably are free to prescribe the conditions on which quotation is permitted," and thus see no conflict in principle or practice with the InfoSoc Directive.³⁴ For purposes of this Comment, we will grant the premise that Article 10(1) is mandatory, and will therefore consider its application to the new EU press publishers' right.

B. POLICY UNDERLYING BERNE MAXIMA AND ITS PRECLUSIVE EFFECT

A concern to maintain the free international flow of basic elements of information appears to animate and unite the Berne maxima. These provisions offer the Berne Convention's strongest expression of solicitude for the broader public interest, notwithstanding the Convention's overall goal to protect the rights of authors. The Convention cannot prevent a member state from locally privatizing information its own authors generate—that is the consequence of Article 5(3)—but it can require that member states preserve the freedom of these excluded elements when the works that contain them traverse borders. Thus, if national legislation purports to grant protection to Berne Union authors in such cases, this must be contrary to the Convention.

Nor would Berne Article 19 change that conclusion. That provision declares that "[t]he provisions of this Convention shall not preclude the making of a claim to the benefit of any greater protection which may be granted by legislation in a country of the Union." It addresses protection for works of authorship, and therefore still comes within the general Berne framework. Under Article 5(1), authors enjoy rights "in respect of works for which they are protected under this Convention" Works, or elements of works, omitted or excluded from Berne subject matter thus fall outside the ambit of Article 19, and Union authors therefore have no treaty entitlement to protection for such subject matter. But the concept of Berne maxima goes farther, in that it would deny member states the option of according foreign Union authors copyright protection to certain subject matter (including the news of the day). By the same token, while Article 19 clearly extends to rights in protected subject matter that are not specified among conventional mandatory minimum rights, it should be

32. Bently & Aplin, *supra* note 31, at 26.

33. See RICKETSON & GINSBURG, *supra* note 1, ¶ 13.38.

34. GOLDSTEIN & HUGENHOLTZ, *supra* note 1, § 11.4.1, at 392.

understood as entitling Union authors to claim “greater protection” in member states so long as their domestic law is not inconsistent with Berne norms. Member states may supplement Berne minimum rights, but may not undermine the policies underlying the principle of maximum protection. Whether as a matter of national treatment under Article 5(1), or of claim to greater rights under Article 19 (which, in this respect, reinforces the rule of national treatment to make clear that the rule extends beyond Conventional minima), the effect is the same: If domestic protection is “greater” because, for example, the member state does not provide for quotation rights, that state may not insulate foreign Berne works from acts coming within the scope of Article 10(1) because the member state would thus be rendering impermissible that which Berne declares “shall be permissible.”

This reading of Article 19 can draw on support from Berne Article 20. This provision permits Berne Union members to enter into “special agreements among themselves, in so far as such agreements grant to authors more extensive rights than those granted by the Convention, or contain other *provisions not contrary to this Convention.*” If those agreements exceed Berne maxima, then they contravene Article 20. One might infer a similar limitation in Article 19. Admittedly, one might instead contend, by way of negative inference, that the absence of a similar proviso in Article 19 suggests that Union authors may claim greater protection in a member state even if that state’s domestic protection contravenes Berne. Such a rhetorically permissible reading, however, seems inconsistent with the overall structure and goals of Berne.

On the other hand, the “special agreements” Article 20 references concern authors’ rights; they are *copyright* agreements. If Berne, TRIPS, and the WCT prohibit copyright coverage of ideas and facts, does it follow that member states may not protect those elements by other means, such as a *sui generis* neighboring right (in effect, removing the malodor by applying any other name to the same stinkweed), or by resort to another international norm, such as the Paris Convention’s Article 10bis guarantee of protection against unfair competition?³⁵ Can one derive a Berne/TRIPS/WCT-preclusive effect from those exclusions, or does the path remain open to member states to pursue protection by other means? DSM Directive Article 15 casts those questions into sharp relief, as we will see in the next Part.

II. BERNE/TRIPS/WCT MAXIMA APPLIED: THE CASE OF THE DSM DIRECTIVE ARTICLE 15 PRESS PUBLISHERS’ RIGHT

First, an overview of the provision and its rationale, as set out in the accompanying Recitals. DSM Directive Article 15 provides, in relevant part:

35. Paris Convention Article 10bis provides:

(1)The countries of the Union are bound to assure to nationals of such countries effective protection against unfair competition.

(2)Any act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition.

Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, *as amended* Sept. 28, 1979, 21 U.S.T. 1583, 828 U.N.T.S. 305 [hereinafter Paris Convention].

Protection of press publications concerning online uses

1. Member States shall provide publishers of press publications established in a Member State with the rights provided for in Article 2 and Article 3(2) of Directive 2001/29/EC [reproduction and communication to the public] for the online use of their press publications by information society service providers.

...

The rights provided for in the first subparagraph [of Article 15(1)] shall not apply in respect of the use of individual words or very short extracts of a press publication.

DSM Directive Article 2(4) defines “press publications” as:

a collection composed mainly of literary works of a journalistic nature, but which can also include other works or other subject matter, and which:

- (a) constitutes an individual item within a periodical or regularly updated publication under a single title, such as a newspaper or a general or special interest magazine;
- (b) has the purpose of providing the general public with information related to news or other topics; and
- (c) is published in any media under the initiative, editorial responsibility and control of a service provider.

Periodicals that are published for scientific or academic purposes, such as scientific journals, are not press publications for the purposes of this Directive[.]

A. WHY CREATE A PRESS PUBLISHERS’ RIGHT?

The EU Commission perceived that third-party online services’ practices of news aggregation and other copying from the websites of newspapers and periodicals threatened those publications’ continued existence.³⁶ The Commission therefore provided a two-year³⁷ neighboring right³⁸ of the “the same scope as the rights of reproduction and making available to the public provided for in [the Information Society] Directive” and subject to “the same provisions on exceptions and limitations as those applicable to the rights provided for in [that] Directive, including the exception in the case of quotations for purposes such as criticism or review provided for in Article 5(3)(d) of that Directive.”³⁹ The objective is clear: to insulate press publishers from online services’ predatory practices, and to require remuneration for

36. See DSM 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. In the absence of recognition of publishers of press publications as rightholders, the licensing and enforcement of rights in press publications regarding online uses by information society service providers in the digital environment are often complex and inefficient.”).

37. *Id.* art. 15(4).

38. *Id.* recital 55 (referring to “rights related to copyright”).

39. *Id.* recital 57.

the services' copying and communication to the public.⁴⁰ But DSM Directive Article 15's subject matter coverage is unclear.⁴¹ On the one hand, Recital 57 states: "The rights granted to publishers of press publications should not . . . extend to mere facts reported in press publications." Recital 58 reinforces that exclusion. While extending the neighboring right to "parts of press publications," it cautions:

Such uses of parts of press publications have also gained economic relevance. At the same time, the use of individual words or very short extracts of press publications by information society service providers may not undermine the investments made by publishers of press publications in the production of content. Therefore, it is appropriate to provide that the use of individual words or very short extracts of press publications should not fall within the scope of the rights provided for in this Directive. Taking into account the massive aggregation and use of press publications by information society service providers, it is *important that the exclusion of very short extracts be interpreted in such a way as not to affect the effectiveness of the rights provided for in this Directive*.⁴²

The emphasized phrase suggests that the meaning of "very short extracts" may depend on the significance of the economic impact of their appropriation. In some instances, "the use of individual words or very short extracts of press publications by information society service providers may [might] not undermine the investments made by publishers of press publications in the production of content," but in other cases, service providers' "massive aggregation" of small amounts of content could cumulatively cause economic harm. An effective remedy therefore might need to apply granularly. But would such relief run afoul of Berne's subject-matter limitations?

B. DOES DSM DIRECTIVE ARTICLE 15 BESTOW COPYRIGHT PROTECTION ON BERNE-EXCLUDED SUBJECT MATTER?

To the extent DSM Directive Article 15 provides extra-national copyright protection to the "news of the day" or "mere items of press information," it would violate Berne Article 2(8).⁴³ Whether the rights conferred qualify as copyright—"[t]he protection of [the Berne] Convention"⁴⁴—or are more accurately characterized as a *sui generis* system of protection, is discussed in the following Part. Here, the question is whether "press publications" include the subject matter expressly excluded from protection under Berne Article 2(8).

To begin, it is necessary to determine the scope of Article 2(8)'s exclusions. What qualifies as "news of the day" or "items of press information"? The Berne provision excluding the news of the day and items of press information from protection was

40. Article 15(5) assumes that publishers will be paid by the services, because it provides for revenue-sharing with authors. *Id.* art. 15(5).

41. For a fuller analysis, see Elżbieta Czarny-Drożdżek, *The Subject-Matter of Press Publishers' Related Rights Under Directive 2019/790 on Copyright and Related Rights in the Digital Single Market*, 51 INT'L REV. INTELL. PROP. & COMPETITION L. [IIC] 624 (2020).

42. DSM Directive, recital 58 (emphasis added).

43. Berne, art. 2(8).

44. *Id.*

moved from Article 9 to Article 2 during the 1967 Stockholm Conference revisions.⁴⁵ As the Records of the Conference indicate, “[t]he precise meaning of the provision is far from clear.”⁴⁶ The question of whether the provision could be improved or clarified was first raised by the Permanent Committee at its 1958 session in Geneva, and subsequently discussed by the Study Group in its 1963 Report.⁴⁷ In its report, the Study Group ultimately adopted the following understanding of the provision:

The correct meaning of this provision is that it excludes from protection articles containing news of the day or miscellaneous information, provided that such articles have the character of mere items of news, since news of this kind does not fulfill the conditions required for the admission to the category of literary or artistic works.⁴⁸

Thus, the role of the provision was merely “to recall the general principle whereby the title to protection of articles of this kind, as in the case of other intellectual works, presupposes the quality of literary or artistic works within the meaning of the Convention.”⁴⁹ Note that the Study Group perceived the exclusion to apply to entire articles, and not merely to the information they contained. It appears that the Study Group assumed that the articles would be so devoid of authorship as to fail to qualify as a “literary or artistic work.” As such, the Study Group considered the “news of the day” exclusion to be a “superfluous element,”⁵⁰ but retained the provision nonetheless. Moreover, though there had been some discussion of modifying the provision to improve clarity, the Study Group concluded that no modification was necessary, as “it would be sufficient to discuss the question of interpretation in the documents of the Conference.”⁵¹ That position was reaffirmed in the Study Group’s 1964 Report.⁵²

The report of the Main Committee on the Programme of the Conference reiterates this view, concluding that “the provision only seeks to establish that the Convention does not protect mere items concerning the news of the day or miscellaneous facts (and, *a fortiori*, the news or the facts themselves).”⁵³ The provision was not intended, however, to exclude “articles” or “other journalistic works reporting the news . . . if they can be considered as works within the meaning of the Convention.”⁵⁴ On this point, the Committee believed, it could “hardly be claimed that there [was] any obvious need to clarify the text of the Convention.”⁵⁵ Thus, Article 2(8) appears to function less as a provision of exclusion so much as a reiteration that recitations of facts that do not themselves qualify as intellectual creations, and therefore are not literary or artistic works, are not included.

45. WIPO, STOCKHOLM, *supra* note 22, at 88–89.

46. *Id.* at 115.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 116.

54. *Id.*

55. *Id.*

The commentary on Article 2(8) is in accord. The 1978 Guide to the Berne Convention interprets the provision to exclude not only news and facts, but also “the simple telling of them, since matters of this kind lack the necessary conditions to be considered as falling into the category of literary and artistic works.”⁵⁶ Claude Masouyé, the 1978 WIPO Guide’s author, viewed the provision as merely confirming “the general principle that for a work to be protected, it must contain a sufficient element of intellectual creation.”⁵⁷ Thus, while stories “related with a measure of originality” are protected under Article 2(1), “simple account[s], arid and impersonal, of news and miscellaneous facts” are not.⁵⁸

Given the above understanding, DSM Directive Article 15 would violate Berne Article 2(8) if its protection of press publications extends either to facts themselves or to mere recounting of facts that lack sufficient original expression. As defined in the DSM Directive, press publications are certain collections “mainly composed of literary works of a journalistic nature, but which may include other works *or other subject matter*.”⁵⁹ While “literary works,” and “works” generally, are properly the subject of copyright protection under Berne,⁶⁰ the possibility of inclusion of “other subject matter” within the scope of protection raises a potential conflict with Berne Article 2(8). Specifically, would the “news of the day” and “items of press information” be included within this “other subject matter” and consequently protected? Recital 56 of the DSM Directive provides some elaboration on the scope of protection. In particular, Recital 56 clarifies that “press publications contain mostly literary works, but increasingly include other types of works and other subject matter, in particular photographs and videos.”⁶¹ Though presumably not exhaustive, the illustrative examples of photographs and videos as other types of work and subject matter suggest the Directive is not intended to cover the otherwise unprotectable “news of the day” or “items of press information,” since photographs and videos generally qualify as artistic works. Recital 57 is more explicit—the rights granted to publishers of press publications “should also not extend to mere facts reported in press publications.”⁶² Still, as explained above, Berne Article 2(8) appears to extend slightly beyond the facts themselves and also excludes sterile accounts of facts, regardless of length. Thus, while DSM Directive Article 15 may not protect facts or “individual words or very short extracts of a press publication,”⁶³ to the extent it protects press publications that include factual accounts too lacking in originality to support a copyright,⁶⁴ the Directive may be covering subject matter

56. CLAUDE MASOUYÉ, WIPO GUIDE TO THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS (PARIS ACT, 1971) ¶ 2.27 (1978).

57. *Id.*

58. *Id.* The 2003 Guide, perhaps deferring to the belief of the 1963 Study Group, merely quotes the Conference records provided above. *See* FICSOR, 2003 WIPO GUIDE, *supra* note 17, ¶ BC-2.71.

59. DSM Directive, art. 2(4) (emphasis added).

60. *See* Berne, art. 2(1).

61. DSM Directive, recital 56.

62. *Id.* recital 57.

63. *Id.* art. 15(1).

64. Including, potentially, algorithmically-generated news reports lacking sufficient human authorship to qualify as “works” under Berne.

excluded under Berne Article 2(8). Moreover, as discussed above, the potential for coverage of economically valuable “very short extracts” might create tension with Berne Article 2(8).

C. MAY THE EU PROTECT BERNE-ADJACENT SUBJECT MATTER THROUGH *SUI GENERIS* SYSTEMS?

Berne Article 2(8) excludes certain subject matter from copyright protection, but it generally does not prevent Union members from protecting that subject matter under different regimes, including *sui generis* forms of protection.⁶⁵ An initial question then is whether DSM Directive Article 15 vests publishers with copyrights in press publications or instead establishes a *sui generis* system. Though DSM Directive Article 15(1) nominally provides the same copyright protections as conferred in Articles 2 and 3 of the InfoSoc Directive, it limits those rights in important ways not consistent with other copyright protection. Perhaps most importantly, the primary beneficiary and holder of the right is not necessarily the author(s), but the publisher.⁶⁶ Second, the term of protection is limited to just two years beginning with publication (in contrast to Berne’s minimum fifty years *post mortem auctoris*).⁶⁷ Additionally, the scope of the Article 15 right is limited specifically to “online use[s]” by information service providers and does not apply “to acts of hyperlinking.”⁶⁸ Recital 55 also makes clear that the rights granted are not copyrights per se, but “rights related to copyright.” Finally, the granting of rights is not expressly predicated on the presence of original expression, but rather the “organisational and financial contribution of publishers in producing press publications.”⁶⁹ Given these significant differences from the traditional copyright regime, there is a strong argument that the rights granted in press publications are not just copyright by another name, but instead are genuinely *sui generis*.

One then must ask whether the protection of this Berne-adjacent subject matter through a *sui generis* regime is permissible. As Annette Kur and Henning Grosse Ruse-Khan observe, the ability to protect Berne-excluded subject matter through

65. See discussion *infra* Part II.C.

66. DSM Directive, art. 15(1). However, note that DSM Directive Article 15(5) requires member states to “provide that authors of works incorporated in a press publication receive an appropriate share of the revenues that press publishers receive for the use of their press publications by information society service providers.”

67. *Id.* art. 15(4).

68. *Id.* art. 15(1). The extent to which unauthorized hyperlinking constitutes a copyright-infringing “communication to the public” is uncertain, given the evolving case law of the Court of Justice of the European Union (CJEU). See, e.g., Jane C. Ginsburg & Alain Strowel, *Liability for Hyperlinking*, in RESEARCH HANDBOOK ON INTELLECTUAL PROPERTY AND DIGITAL TECHNOLOGIES (Tanya Aplin ed., 2020); Jane C. Ginsburg & Luke Ali Budiardjo, *Liability for Providing Hyperlinks To Copyright-Infringing Content: International and Comparative Law Perspectives*, 41 COLUM. J.L. & ARTS 153 (2018); Alain Strowel & Vicky Hanley, *Secondary Liability for Copyright Infringement with Regard To Hyperlinks*, in PEER-TO-PEER FILE SHARING AND SECONDARY LIABILITY IN COPYRIGHT LAW 71 (Alain Strowel ed., 2009); Matthias Leistner, *Closing the Book on Hyperlinks: Brief Outline of the CJEU’s Case Law and Proposal for European Legislative Reform*, 39 EUR. INTEL. PROP. REV. [EIPR] 327 (2017).

69. DSM Directive, recital 55.

different means is problematic.⁷⁰ Nonetheless, both the Records of the Stockholm Conference and the commentary on the 1971 Paris text of the Berne Convention agree that such protection is permissible. As described in the Conference Records, one of the utilities of Berne Article 2(8), despite its otherwise superfluous nature, was to “permit the conclusion that if the articles concerned are protected by other legal provisions—for example, by legislation against unfair competition—such protection is outside the field of the Convention.”⁷¹ Similarly, the provision helped to fix “the line of demarcation between copyright and other means of protection.”⁷² Thus, the possibility of other means of protection was expressly contemplated and was accompanied by no signs of disapproval.

Commentary on Berne Article 2(8) also endorses the view that *sui generis* protection is permissible. Paul Goldstein and Bernt Hugenholtz state that “[l]ike ideas, news of the day and data compilations may be protected outside copyright under unfair competition law, neighboring rights, or *sui generis* regimes.”⁷³ Similarly, in the 2003 WIPO Guide, Ficsor notes that the subject matter of Article 2(8) can be protected “on the basis of some legal institutions other than copyright—such as a *sui generis* system for the protection of databases and their contents, or unfair competition”⁷⁴ Other commentators agree.⁷⁵ Indeed, although they acknowledge that the results may be troublesome, Kur and Ruse-Khan emphasize that the relevance of TRIPS Article 1(1) and Berne Article 2(8) “is limited to mandatory exclusion of subject matter from *copyright*, whereas it does not appear as a tenable position to argue that it also applies if information or data are under a *sui generis* regime deliberately established for the purpose of granting such protection.”⁷⁶

The European Union’s adoption of the Database Directive occasioned concrete application of the principle that a *sui generis* right might supply protection withheld by the Berne Convention.⁷⁷ Similarly to Article 15 of the DSM Directive, the Database Directive provides *sui generis* protection with respect to the substantial investment in the compilation of otherwise unprotectable data. While the Database

70. Kur & Ruse-Khan, *Enough Is Enough*, Max Planck Inst., *supra* note 2, at 44.

71. WIPO, STOCKHOLM, *supra* note 22, at 115.

72. *Id.*

73. GOLDSTEIN & HUGENHOLTZ, *supra* note 1, § 6.1.3, at 220.

74. FICSOR, 2003 WIPO GUIDE, *supra* note 17, ¶ BC-2.73.

75. See, e.g., Laurence R. Helfer, *Adjudicating Copyright Claims Under the TRIPS Agreement: The Case for a European Human Rights Analogy*, 39 HARV. INT’L L.J. 357, 358 n.41 (1998) (“Although the treaty ‘shall not apply to news of the day or to miscellaneous facts having the character of mere items of press information,’ and provides that ‘[i]t shall be permissible to make quotations from a work’ under certain conditions, these two isolated provisions do not prohibit states from imposing higher levels of copyright protection in other areas, nor even from protecting news, miscellaneous facts, and quotations under other intellectual property doctrines.”); RICKETSON & GINSBURG, *supra* note 1, ¶ 8.90.

76. Kur & Ruse-Khan, *Enough Is Enough*, Max Planck Inst., *supra* note 2, at 44 (first emphasis added).

77. Directive 96/9/EC of the European Parliament and the Council of 11 March 1996 on the Legal Protection of Databases, 1996 O.J. (L 77) [hereinafter Database Directive].

Directive has incurred both practical and theoretical objections,⁷⁸ these criticisms have not evoked an underlying incompatibility with Berne Article 2(8). Similarly, while a draft treaty proposing international protection for databases was not adopted at the Diplomatic Conference on Certain Copyright and Neighboring Rights Questions in 1996 (or anytime thereafter), there is no record of objections premised on the exclusion of such subject matter from copyright.⁷⁹ Rather, the debate has centered around which form of legal protection—a *sui generis* intellectual property protection or a misappropriation right sounding in unfair competition—was best suited to the task of protecting the investment in compiling databases. Advocates of more expansive and definite protection preferred a *sui generis* right with more precise details, well-defined term of protection, and greater facility for licensing.⁸⁰ Skeptics of the economic benefits or necessity of database protection favored the more limited protection of misappropriation claims.⁸¹ In any event, the ability of Berne members to establish other forms of protection, including *sui generis* intellectual property rights, seems to have gone unquestioned.

III. EVEN WERE A *SUI GENERIS* RIGHT IN BERNE-EXCLUDED SUBJECT MATTER PERMISSIBLE, MUST EXCEPTIONS TO THAT RIGHT BE INTERPRETED CO-EXTENSIVELY WITH THE BERNE ARTICLE 10(1) QUOTATION RIGHT?

In the absence of a full examination of what constitutes a “quotation” under Berne Article 10(1),⁸² one may nonetheless question whether the press publishers’ right is compatible with Berne Article 10(1). DSM Directive Article 15(3) directs that the exceptions set out in the 2001 InfoSoc Directive “shall apply *mutatis mutandis* in respect of the rights provided for in paragraph 1 of this Article.”⁸³ The latter instrument’s incorporation of an optional quotation privilege in terms nearly identical to Berne Article 10(1),⁸⁴ suggests that one may avoid discrepancies between the two

78. See, e.g., Jörg Reinbothe, *The Legal Protection of Non-Creative Databases*, Presentation at Protection of Databases Workshop, WIPO International Conference on Electronic Commerce and Intellectual Property (Sept. 14–16, 1999), <https://perma.cc/9RHK-YYPM>; Herman Cohen Jehoram, *Two Fashionable Mistakes*, 22 EUR. INTELL. PROP. REV. [E.I.P.R.] 103 (2000); J. L. Gaster, *The EC Sui Generis Right Revisited After Two Years: A Review of the Practice of Database Protection in the 15 EU Member States*, 5 TOLLEY’S COMM’NS L. 87–98 (2000); Jane C. Ginsburg, *Copyright, Common Law, and Sui Generis Protection of Databases in the United States and Abroad*, 66 U. CIN. L. REV. 151 (1997).

79. See 1 WIPO, RECORDS OF THE DIPLOMATIC CONFERENCE ON CERTAIN COPYRIGHT AND NEIGHBORING RIGHTS QUESTIONS OF GENEVA 1996 (1999).

80. See, e.g., JÖRG REINBOTHE & SILKE VON LEWINSKI, *THE WIPO TREATIES ON COPYRIGHT* ¶ 13.0.19 (2015).

81. *Id.*

82. See APLIN & BENTLY, *supra* note 2.

83. DSM Directive, art. 15(3). See also *id.* recital 57.

84. InfoSoc Directive Article 5 provides in relevant part:

3. Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases:

...

instruments by interpreting DSM Directive Article 15 coextensively with InfoSoc Directive Article 5(d), which in turn should track Berne Article 10(1). In that event, the copyright-adjacent nature of DSM Directive Article 15, while potentially problematic with respect to covered subject matter, will not immunize the press publishers' right from third parties' quotation rights.

This conclusion comes with two caveats: First, the quotation right in Berne, according to most commentators, is mandatory; member states must allow quotations (within the contours of the right). By contrast, the InfoSoc Directive leaves Berne Article 5(3)'s list of permitted exceptions and limitations up to national adoption (or not). On the other hand, DSM Directive Article 17(7) makes the quotation exception, among others, mandatory with respect to content posted by users to Online Content Sharing Service Providers.⁸⁵ While DSM Directive Article 17, on the liability of Online Content Sharing Service Providers for infringing content posed by their users, addresses a different problem from the one that occasioned DSM Directive Article 15, there may be some overlap between the entities that are "online content-sharing service providers" under DSM Directive Article 17, and the "information society service providers" subject to the press publishers' right. Arguably, the EU may be closely creeping toward substantive equivalence with the Berne norm with respect to its mandatory character.⁸⁶

Second, even assuming third parties will enjoy quotation rights in press publications, the scope of the quotation exception may differ between InfoSoc Directive Article 5(3)(d) and DSM Directive Article 15(3). The same words may mean different things in different contexts, and the requirement that the quotation be "in accordance with fair practice" may impose different constraints on the exercise

(d) quotations for purposes such as criticism or review, provided that they relate to a work or other subject-matter which has already been lawfully made available to the public, that, unless this turns out to be impossible, the source, including the author's name, is indicated, and that their use is in accordance with fair practice, and to the extent required by the specific purpose[.]

Berne Article 10(1) states:

It 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.

85. DSM Directive Article 17(7) states in relevant part:

Member States shall ensure that users in each Member State are able to rely on any of the following existing exceptions or limitations when uploading and making available content generated by users on online content-sharing services:

(a) quotation

86. See Case C-476/17 Pelham GmbH v. Hütter ECLI:EU:C:2018:1002, ¶ 77 (Dec. 12, 2018) (Opinion of Advocate General Szpunar) (suggesting the need to interpret EU copyright exceptions in light of mandatory human rights: "[T]he exclusive rights provided for unconditionally and compulsorily for the Member States in Articles 2 to 4 of Directive 2001/2009 are subject only to the exceptions and limitations listed exhaustively in Article 5(1) to (3) of that directive. . . . It should be noted, however, that that degree of latitude is also limited, since some of those exceptions reflect the balance struck by the EU legislature between copyright and various fundamental rights, in particular the freedom of expression. Failing to provide for certain exceptions in domestic law could therefore be incompatible with the Charter.").

of the quotation right. Given that the practice of news aggregation spurred DSM Directive Article 15's enactment, the size and amount of the "quotations," and their economic impact may bear more heavily on the assessment of incompatibility with fair practice for press publications than courts might tolerate for works of authorship. Thus, interpretation of the two instruments may not be fully coextensive: The principles may be the same, but their application may not yield identical results. (On the other hand, the same might be said of the assessment of "fair practice" across different kinds of works of authorship, or regarding different purposes for the quotations.)

DSM Directive Article 15's adoption of the InfoSoc Directive's exceptions avoids a confrontation between Berne norms and an unbounded *sui generis* right over subject matter that includes works of authorship as well as Berne-excluded content. Recall that DSM Directive Article 2(4) defines press publications to cover "an individual item within a periodical"; that item generally will be a whole article or a substantial extract. (Recital 58 generally excludes "very short extracts," though the meaning of the term may vary with economic impact.) Acknowledging that a neighboring rights regime over Berne-excluded subject matter may coexist with copyright,⁸⁷ one may still inquire whether Berne maxima should exert a preclusive effect when the subject matter of the *sui generis* right includes works of authorship. If, for example, DSM Directive Article 15 covered both copyrightable and non-copyrightable content, but did not also incorporate copyright exceptions, so that a quotation exception would not limit the scope of the press publishers' right, then publishers could invoke the *sui generis* right to prevent quotations from the same copyrightable content to which their rights under copyright must yield.⁸⁸ The argument for a Berne-preclusive effect seems strongest when the *sui generis* right covers both copyrightable and non-copyrightable content. It should not be permissible to end-run the Berne quotation right by resort to *sui generis* protection against copying the same subject matter.

However, Chapter III, "Sui Generis Right," of the 1996 Database Directive may belie that proposition. As we have seen, the Database Directive covers both original and non-original databases, and provides a *sui generis* right against extraction and reutilization of substantial parts (whether or not copyright-infringing) of databases that are the fruit of substantial investment. While Chapter II, "Copyright," of the Directive permits member states to provide for copyright exceptions "traditionally authorized under national law,"⁸⁹ Chapter III sets out three specific exceptions and limitations (which do not include a quotation provision), without Chapter II's open-ended catch-all.⁹⁰ Chapter III's restriction of the extraction right to "insubstantial

87. See discussion *supra* Part II.B.

88. A similar observation has been made regarding the overlap of copyright/*sui generis* rights in the EU Database Directive (discussed more fully *infra*). See Mark Powell, *The European Union's Database Directive: An International Antidote To the Side Effects of Feist?*, 20 FORDHAM INT'L L.J. 1215, 1244 (1997) ("[A]uthors of copyrightable works contained in a database may henceforth elect to invoke their *sui generis* right, rather than their copyright, in order to side-step the fair dealing exception.")

89. Database Directive, art. 6(2)(d).

90. *Id.* art. 9.

parts” of the database will place some quotations outside the ambit of the database holder’s exclusivity.⁹¹ But to the extent that a copyright-permissible “quotation” may be qualitatively or quantitatively substantial,⁹² Chapter III of the Database Directive would appear to grant the right holder a remedy, where Chapter II would allow an exception. If non-copyright material entirely comprises the “quotation,” then once one has admitted the premise that Berne member states may establish *sui generis* rights in copyright-excluded content, perhaps copyright limitations need not constrain the scope of rights in that subject matter (although it seems problematic that sub-copyrightable content would receive more protection than original works of authorship). But if the quotation comprehends a substantial extract of copyrightable expression, then Chapters II and III appear in tension.⁹³

IV. CONCLUSION

Within the universe of multilateral copyright obligations, the Berne maxima, buttressed by the TRIPS and WCT exclusions of protection for ideas, methods, and processes, should promote the free cross-border availability of facts and ideas, as well as of exercise of the quotation right. Individual Berne countries of origin may protect excluded subject matter in their own works of authorship, but not in foreign Berne works. Conversely, those countries must apply the quotation right to foreign Berne works, but need not to their own. Nonetheless, there exist at least two challenges to this equilibrium. The first, as we have seen, concerns the potential for Berne members to protect excluded subject matter, or to avoid the quotation right, by resort to *sui generis* regimes. The second concerns the EU principle of non-discrimination: Berne may limit protection in excess of its maxima to the country of origin, but EU norms require Member States to accord full national treatment, thus granting to works by other EU nationals the same scope of protection as the EU country of origin provides its own authors.⁹⁴ This cornerstone of EU law potentially places EU member states in conflict with their international obligations: On the one

91. *Id.* art. 8.

92. As Aplin and Bently argue it should be. See APLIN & BENTLY, *supra* note 2, at 6.

93. For discussions of this tension, see Matthias Leistner, *Big Data and the EU Database Directive 96/9/EC: Current Law and Potential for Reform* 13–18 (Sept. 7, 2018), <https://perma.cc/NRL7-AJXV> (“[T]he narrow exceptions to the *sui generis* right should at least be aligned and dynamically linked with the exceptions to copyright law under the Information Society Directive. It is therefore of considerable practical interest also to enable, and oblige, Member States to extend, *mutatis mutandis*, the exemptions and limitations applying to works protected under copyright, to *sui generis* protection of non-original databases. The obligation should be phrased so as to establish a dynamic link between both fields, to the effect that limitations set out in new copyright legislation would automatically also become applicable, under suitable terms and circumstances, to the *sui generis* right.”). For comparison of the scope of exceptions to the database right relative to rights under copyright, see Annette Kur, Reto M. Hilty, Christophe Geiger & Matthias Leistner, *First Evaluation of Directive 96/9/EC on the Legal Protection of Databases—Comment by the Max Planck Institute for Intellectual Property, Competition and Tax Law*, *Munich*, 37 INT’L REV. INTEL. PROP. & COMPETITION L. [IIC] 551, 556 (2006).

94. See, e.g., Joined Cases C-92/92 and C-326/92, *Collins v. Imtrat Handelsgesellschaft mbH & Patricia Im- und Export Verwaltungsgesellschaft mbH, Kraul v. EMI Electrola GmbH*, 1993 E.C.R. I-5145; Case C-360/00, *Land Hessen v. G. Ricordi & Co. Bühnen- und Musikverlag GmbH*, 2002 E.C.R. I-5089.

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hand, they may not—by copyright—protect Berne-excluded subject matter in foreign works, including works by EU nationals; on the other hand, EU norms oblige member states to extend to other EU nationals the protections Berne would deny them.

APPENDIX: PART 3

Intellectual Property in News? Why Not?

Sam Ricketson^{*} and Jane Ginsburg^{}**

Abstract

This Chapter addresses arguments for and against property rights in news, from the outset of national law efforts to safeguard the efforts of newsgathers, through the various unsuccessful attempts during the early part of the last century to fashion some form of international protection within the Berne Convention on literary and artistic works and the Paris Convention on industrial property. The Chapter next turns to contemporary endeavors to protect newsgatherers against “news aggregation” by online platforms. It considers the extent to which the aggregated content might be copyrightable, and whether, even if the content is protected, various exceptions set out in the Berne Convention permit its unlicensed appropriation.

I. INTRODUCTION

Just as one asks ‘Intellectual property in news, why not?’, the contrary question ‘why, indeed?’ immediately poses itself. The following chapter attempts to make sense of both questions, considering them from an historical and international perspective as well as from the perspective of modern communications technologies, most notably the internet.

We begin with a consideration of what is meant by ‘news’ and the competing arguments for and against protection. We then move to a consideration of some early national efforts to corral and safeguard the efforts of news gatherers, and the various unsuccessful attempts to fashion some form of international protection during the early part of the last century. We then conclude with an analysis of the way the issue of news protection and international norms presents itself in the networked environment.

II. WHAT IS ‘NEWS’?

We probably approach this question with the same kind of initial certainty as we approach the questions of what is a chair or table, or when we properly describe a man (or woman) as being bald, bearded or possessed of a full head of hair. Our immediate response is, of course, I know one when I see one. Further reflection, however, reveals that there are shades of meaning and degrees of chair and table likeness, baldness, beardedness and

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hairiness which we will all readily recognize in the most obvious cases, but where the drawing of a bright dividing line in the shaded middle is difficult.

In the case of news, the *Shorter Oxford English Dictionary* provides the following definition: ‘Tidings; new information of recent events; new occurrences as a subject of report or talk’.¹ In terms of something of commercial value for which people were prepared to pay, however, it appears that news, and news gathering, are of fairly recent provenance. One historian has even described it as a ‘nineteenth century creation’,² and certainly the rapidly growing popularity of newspapers in this period was linked to increasing literacy rates and the advent of the telegraph that made communication of ‘news events’ from one place to another so much easier. This was particularly so in the case of colonial readers in places far removed from the main sites of political and economic activity in Europe. Thus Lionel Bently, in his detailed study of Australian colonial newspapers and telegraphy in the late nineteenth century, points to a proliferation of daily, bi-weekly and weekly newspapers in the sparsely populated young colonies, particularly in Victoria.³

For example, in Melbourne in 1871, there were 4 daily newspapers for a population of just less than 56 000, while there were regional and country newspapers established throughout the rest of the colony, which was less than 40 years old.⁴ There was an obvious hunger among the colonists for ‘news’, meaning information about current events occurring within their own locality. This is revealed by a brief perusal of the pages of one of the city’s leading daily newspapers, *The Argus*, for Monday, 2 January 1871: these include detailed reports on mining (a significant activity in the colony at that time), markets more generally, company and business meetings, sporting and social activities, political and legislative developments, short items of ‘news’ from other colonies, notices and advertisements of all kinds.⁵ *The Argus*, then, was a much valued means of information exchange within the colony, and this appears to have been the same for its competitors — *The Age*, *The Daily Telegraph*, and *The Herald*. Reports of events outside Australia, however, were few at this time and always stale, because of the obvious delays in communications — sailing, and more recently steam, ships were the main carriers of mail and other material between Europe and Australia (and vice versa, as there was much interest in the former, as well as in North America, in the discoveries of gold in Australia from the mid-1850s).

However, as Bently notes, a large business opportunity was just about to arise, with the pending completion of the Anglo-Australian telegraph, linking Europe to Australia, via North Africa, the Middle East, India, Ceylon, Java, Port Darwin, and finally the southern Australian colonies: this would provide much more immediate access to ‘news’ from abroad, with transmissions occurring within the space of a day rather than weeks or months.⁶ The costs of this new technology were not altogether clear at this stage, nor were its capacities,⁷ but it was certainly evident that it would be expensive to arrange for telegraphic messages to be transmitted from one side of the world to the other, giving rise to the risk that, once the

¹ *Shorter Oxford English Dictionary* (Book Club Associates edn, 1983) vol I, 1400.

² Lucy Brown, *Victorian News and Newspapers* (Oxford University Press 1985) 1.

³ Lionel Bently, ‘Copyright and the Victorian Internet: Telegraphic Property Laws in Colonial Australia’ (2004) 38 *Loyola of Los Angeles Law Review* 71.

⁴ Bently (n 3) 76. Melbourne was founded in 1834.

⁵ Available at ‘Trove: Digitised Newspapers and More’ (*National Library of Australia*) <<http://trove.nla.gov.au/newspaper>>.

⁶ Bently (n 3) 78–80.

⁷ *ibid* 80–88.

information was published in the pages of the local newspaper that had paid for it, competitors might then freely help themselves to the ‘news’ and republish it.

Here, in microcosm, was a classic legal and policy dilemma: new technology was about to make it easier to serve the interests of a news-hungry and demanding public, but those who invested in bringing this about might find themselves robbed of the benefits by third party free riders. Quite apart from any incipient sense of unfairness — reaping without sowing — it could be argued that this might remove the incentive to invest in these new sources of information, at least in the event that ‘first mover’ advantage could not be realized.

In such situations, assertions of the need for legal protection come quickly to the fore — and this was certainly the case in the young Australian colonies. The following questions — which have a striking contemporary resonance — presented themselves for consideration:

- 1) What protection was there already under existing laws for these activities? This was a difficult question to answer and, in fact, underlines the complexities that arise here. Copyright was an obvious candidate, but the putative works were short telegraphic messages of no more than 40 words — classic summaries of facts and events that would be difficult to shoehorn into the existing category of ‘book’ under the relevant imperial or local legislation, even assuming that the registration and publication requirements of these statutes could be met.⁸ More fruitful, perhaps, might be reliance upon notions of common law copyright subsisting in unpublished works, but the status of these doctrines under UK and Victorian law was uncertain.⁹ There were also troubling issues as to the ownership of whatever copyright might subsist in the telegraphic messages, as these would not be originated by the local newspaper proprietors but by agents situated abroad (probably by the Reuters agency, which turned out to be the case¹⁰).
- 2) The real concern of the local newspaper proprietors, however, was with purely temporal issues: their perceived need for protection was only for a short time to enable them to be first into the market; after that time, which might be less than 24 hours, they were not greatly concerned with what happened to their ‘news’ — even in 1871 it became stale very quickly. What was sought here in reality was some kind of unfair competition remedy against misappropriation — the very result that the US

⁸ Copyright Law Amendment Act 1842 (UK) 5 & 6 Vict c 45 (Copyright Act of 1842) s II; Copyright Act 1869 (Vic) 33 Vict No 350, s 14. In this regard, however, it is worth noting one striking instance in which the proprietors of *The Argus* newspaper, which was registered as a newspaper under the Copyright Act 1869 (Vic), were able to gain an injunction preventing a provincial newspaper situated in Gippsland from republishing summaries of telegraphic news items received and paid for by *The Argus*: see *Wilson v Luke* (1875) 1 VLR (E) 127. This protection arose without reference to the then expired Telegraphic Messages Act 1871 (WA), which is discussed in the principal text below. In the memorable words of Molesworth J at 139–40, invoking orthodox copyright principles as to copying:

The defendant represents that he employs a correspondent in Melbourne to collect and send him all the news which is in circulation; and his counsel have argued that the news may be thus learned in Melbourne as a matter of common talk, and sent by the correspondent, and so inserted by the defendant. If that were so I would say that the news was like gas escaped into the atmosphere, the property in which was lost, but here the odour of defendant’s publication is so perfectly identical with the plaintiffs’, that I think it clear that it is as of gas taken from the plaintiffs’ pipes.

For an earlier case before the same judge to similar effect, see *Wilson v Rowcroft* (1873) 4 ALR 57.

⁹ See, for example, the remarks of Molesworth J in *Wilson v Luke* (n 8) 140 and see further the excellent discussion of these various legal avenues of protection in Bently (n 3) 88ff.

¹⁰ See further Bently (n 3) 85ff.

Supreme Court was to adopt in the context of transcontinental transmissions in *International News Service v Associated Press*¹¹ nearly 50 years later.

- 3) There was also a problem of inconsistency that arose in the case of the Australian colonies, in that there already appeared to be a practice whereby newspapers freely copied extracts from the reports appearing in other newspapers with respect to matters occurring within the colony (and possibly in neighbouring ones).¹² This practice was generally not objected to: the burning commercial issue concerned the use of reports emanating from outside — that is, over the new international telegraphic link.

The upshot of these concerns was that three colonies — Victoria, South Australia and Western Australia — legislated to provide short-term protection for telegraphic messages, doing this by way of a ‘copyright’ of between 16 and 48 hours duration.¹³ This was followed by a number of other colonial and self-governing British dominions over the next 50 years.¹⁴ The descriptor ‘copyright’ is, of course, misleading here, as there seems to be no doubt that this was conceived of as a form of protection separate from, and additional to, that already provided to ‘books’. In reality, it was a limited and special statutory protection given to a particular interest group — newspaper publishers, and by no means all of them¹⁵ — against an activity that was characterized as ‘unfair’.

While these early colonial initiatives may now be largely forgotten, they are significant forerunners to subsequent debates that have occurred at the international level over the protection of news. It is to these that we now turn.

III. THE BERNE CONVENTION

¹¹ 248 US 215 (1918). For a recent reinterpretation of this decision, see Shyamkrishna Balganesh, “‘Hot News’: The Enduring Myth of Property in News” (2011) 111 *Columbia Law Review* 419, 496:

[H]ot news misappropriation was developed as an attempt to avoid creating an exclusionary interest in factual news. It was aimed instead at preserving the common property nature of such news, while allowing industry participants to compete on equitable terms in drawing economic value from it. Recognizing that the maintenance and sharing of this common property resource required sustaining the self-organized cooperative framework that newspapers had developed, hot news misappropriation sought to raise the costs of free riding through a private law-based liability regime.

¹² See further Bently (n 3) 121–2.

¹³ See, for example, the Victorian Act, *An Act to Secure in Certain Cases the right of Property in Telegraphic Messages 1871* (Vic) 35 Vict No 414, s 1:

Where any person in the manner hereinafter mentioned publishes in any newspaper any message sent by electric telegraph from any place outside the Australian colonies, no other person shall, without the consent in writing of such first mentioned person or his agent thereto lawfully authorized, print and publish, or cause to be printed and published, during a period of twenty-four hours from the time of such first mentioned publication: Provided that such before mentioned period shall not extend beyond thirty-six hours from the time of receipt of such telegram, Sundays excepted, the whole or any part of any such message, or (excepting the publication of any similar message in like manner sent) of the intelligence therein contained, or any comment upon or any reference to such intelligence, which will in effect be a publication of the same.

It should be added that this Victorian Act was time limited and came to an end on 31 December 1872 before the international telegraph links had been completed.

¹⁴ Bently lists these as the Cape of Good Hope (1880), New Zealand (1882 and 1884), Natal (1895), Ceylon (Sri Lanka) (1898), Straits Settlements (1902), Transvaal (1902), Orange River Colony (1904), Federated Malay States (1911), Union of South Africa (1917), Palestine (1932) and Kenya (1934): Bently (n 3) 167–8. It is equally noteworthy, however, that a number of the Australian colonies refused to adopt such protection, highlighting the fact that local circumstances varied significantly from one colony to another: see further Bently (n 3) 133ff (Tasmania), 143ff (New South Wales) and 154ff (Queensland).

¹⁵ See further the discussion by Bently of the competing interests within Victoria: Bently (n 3) 125ff.

On its face, the current (Paris) Act of the Berne Convention for the Protection of Literary and Artistic Works deals explicitly with the matter of news by providing for an express exclusion in article 2(8):

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.¹⁶

This text has been part of article 2 only since the Stockholm Revision of 1967,¹⁷ but its history goes back to the first Berne Convention of 1886. Adopting an approach that prompts the inference that many Berne countries outside the then British Empire also followed the practice of colonial newspaper copying described above, the original Berne Convention provided that articles from newspapers or periodicals published in any of the countries of the Union might be reproduced in the original or in translation in the other countries of the Union, unless the authors or publishers had expressly forbidden it.¹⁸ The Berne Convention further provided that this prohibition did not ‘in any case’ apply to ‘articles of political discussion or to the reproduction of news of the day or miscellaneous information’.¹⁹

The scope of these provisions — the first, permissive in the absence of express reservation by the author or publisher, and the second an absolute exclusion of protection — was gradually reduced or qualified in subsequent revisions. Thus the exclusion of articles of political discussion was removed in the Berlin Act,²⁰ and the range of articles that might be copied in the absence of reservation was steadily restricted, beginning with the removal of the reference to articles in ‘periodicals’ and the exclusion of ‘serial stories and tales’ from the scope of the expression ‘any newspaper article’.²¹ References to ‘newspapers’ were then removed in the Rome Act, with the scope for reproduction by the press being limited to ‘articles on current economic, political or religious topics’,²² together with a further requirement, added under the Berlin Act, that the source be indicated.²³ Finally, even this facility was removed in the Stockholm Act, which left it now as a matter for national legislation to determine whether articles of this description might be reproduced, broadcast or communicated by wire in the absence of express reservation, subject, of course, to the

¹⁶ Berne Convention for the Protection of Literary and Artistic Works (Paris, 4 May 1896), 1161 UNTS 3, entered into force 5 December 1887, as revised at Paris on 24 July 1971, as amended on 28 September 1979 (Berne Convention), art 2(8).

¹⁷ See Berne Convention for the Protection of Literary and Artistic Works (Paris, 4 May 1896), 828 UNTS 221, entered into force 5 December 1887, as revised at Stockholm on 14 July 1967 (Stockholm Act).

¹⁸ Berne Convention for the Protection of Literary and Artistic Works, Paris Additional Act (Paris, 4 May 1896), entered into force 5 December 1887 (Original Berne Convention), art 7. In the case of periodicals, it was provided that it would be sufficient if this prohibition was ‘indicated in general terms at the beginning of each number of the periodical.’ All translations from the French are ours.

¹⁹ *ibid.*

²⁰ Berne Convention for the Protection of Literary and Artistic Works (Paris, 4 May 1896), entered into force 5 December 1887, as revised at Berlin on 13 November 1908 (Berlin Act), art 9. Under the Rome Act art 9(2), it was stipulated that this indication must be made ‘clearly’, and that the ‘legal consequences of the breach of this obligation [the giving of a clear indication of source] shall be determined by the laws of the country where protection is claimed’: Berne Convention for the Protection of Literary and Artistic Works (Paris, 4 May 1896), entered into force 5 December 1887, as revised at Rome on 2 June 1928 (Rome Act), art 9(2).

²¹ Berlin Act (n 20) art 9.

²² Rome Act (n 20) art 9(2).

²³ Berlin Act (n 20) art 9.

requirement of a clear indication of source.²⁴ Otherwise, newspapers were left to rely upon the quotation right in article 10(1) that had been introduced in the Brussels Act,²⁵ and the three-step exceptions allowable under the new art 9(2) of the Stockholm Act.²⁶ The exclusion of ‘news of the day’ (*nouvelles du jour*) and ‘miscellaneous information’ (*faits divers*) remained a constant throughout these other changes, although the latter expression was qualified by the addition of the words ‘having the character of mere items of news’ (*qui ont le caractère des simples informations de presse*) at the time of the Berlin Revision.²⁷ At the Stockholm Revision, art 9 (where these provisions had appeared since the time of the Berlin Act) was extensively amended with the express recognition, for the first time in the Convention’s text, of the author’s exclusive right to reproduction.²⁸ It was therefore thought more appropriate that the exclusion for news of the day and news items in the previous article 9(3) should now be included in article 2 which dealt with works to be protected, rather than article 9, and it therefore became article 2(8) of the Stockholm and now Paris Acts.²⁹

Viewed in isolation, the wording of article 2(8) makes it difficult to discern its purpose. The latter is important, as it has a significant effect on the interpretation to be given to the terms ‘news of the day’ and ‘miscellaneous information’. Is this a public policy exception to the Convention, in the sense that it excludes news items from the scope of the Convention in the interests of freedom of information? Alternatively, does it embody a juridical conception of the nature of authors’ rights, which excludes protection on the basis that these items are incapable of constituting literary or artistic works in the first place? If the latter is the correct view, it could then be said that such an exclusion is strictly unnecessary as these items are not, in any event, covered by the Convention, as they fall within the category of facts and items of information which cannot be the subject of copyright protection. The expressions ‘news of the day’ and ‘miscellaneous information’ do not in themselves indicate which view is correct, and it has been suggested elsewhere by the authors³⁰ that the following problems of interpretation therefore arise here:

- 1) If article 2(8) is a public policy exception, it could operate to exclude accounts or reports of daily news that would otherwise be capable of being regarded as literary works within the meaning of article 2(1). This might, in turn, be something of a slippery slope, because news reports differ greatly in their form, from the bald ‘telegraphic’ dispatches that featured in the colonial legislation described above to sophisticated analyses of the events reported. Would article 2(8) therefore require that protection be denied in the case of this second kind of article? If it would not, where and how would the line between protectable and non-protectable items be drawn?

²⁴ See Stockholm Act (n 17) art 10*bis*(1). Note that this extends to ‘broadcast works of the same character’ and it still remains a matter for national legislation to determine the legal consequences of a breach of the obligation of indication of source. This could, for example, allow a national law to provide for some consequence other than the withdrawal of the permission to reproduce, broadcast, etc. For example, the consequence might be a fine or even a requirement to pay the author or publisher in question in the form of some kind of compulsory licence.

²⁵ See Berne Convention for the Protection of Literary and Artistic Works (Paris, 4 May 1896), 331 UNTS 217, entered into force 5 December 1887, as revised at Brussels on 26 June 1948 (Brussels Act), art 10(1).

²⁶ Stockholm Act (n 17) art 9(2).

²⁷ Berlin Act (n 20) art 9(3). See further *Actes de la Conférence réunie à Berlin du 14 octobre au 14 novembre 1908* (Bureau de l’Union internationale littéraire et artistique 1909) 249ff.

²⁸ Stockholm Act (n 17) art 9(1).

²⁹ *Records of the Intellectual Property Conference of Stockholm, June 11 to July 14, 1967*, vol 2 (Stockholm Intellectual Property Conference, WIPO 1971) 1155.

³⁰ Sam Ricketson and Jane C Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond*, vol 1 (Oxford University Press 2006) 498–9.

- 2) If the second interpretation is to be preferred, this would not cause as much difficulty, as it simply embodies the basic principle that copyright protection does not extend to facts and information per se, but only to the form in which those facts are presented. Even if such a statement is strictly unnecessary, its inclusion in the Convention could then be defended on two grounds:
- a) As the basic principle is not expressly stated elsewhere in the Convention, its inclusion in article 2(8) provides a useful confirmation that the principle is generally applicable under the Convention.
 - b) If a member country of the Union does, in fact, accord copyright protection to bare items of news and press information, the authors of such items have no right to claim equivalent protection under the Convention in other Union countries. Unlike the other paragraphs of article 2 which lay down the bare minimum of what each country must protect as literary or artistic works, article 2(8) provides a definite exception to this. On the other hand, it only excludes protection under 'this Convention', and this clearly does not prevent member countries from according protection to foreign authors under other heads — for example, under their laws of unfair competition, or even their copyright laws. However, because the Berne Convention excludes this subject matter, its obligation of national treatment does not apply. As a result, in the latter case, a Union country which accords such protection to its own authors would be under no obligation to extend this coverage to authors from other Union countries.

Public policy, in any event, underpins the second 'juridical' interpretation in that the basic principle that copyright protects only the form in which works are expressed is clearly intended to leave ideas, facts and information in the public domain for all to use. However, this is a more limited application of public policy than that suggested under the first interpretation above.

In the face of these conflicting views, it is permissible to have regard to supplementary aids to interpretation in determining which to apply.³¹ Little guidance is to be found in the records of the Berne and Paris Conferences, but at the Berlin Conference the committee of the Conference implicitly indicated its preference for the second view.³² Indeed, the Conference program prepared by the German Government and the International Berne Bureau had proposed that there should be a requirement to identify the source of information for a limited (24 hours) period from first publication of 'news of the day' communicated in telegraphic or telephonic form, 'whether or not they constitute works to be protected'.³³ Although not as sweeping as the earlier colonial prohibitions on third party use, this proposal was clearly going beyond the remit of the Convention, as the Committee of the Conference explained in its final report.

The Committee's view was shown by a significant vote. It had first accepted that the reproduction of news of the day and miscellaneous information should be accompanied by an indication of the source. It ended up by adopting an entirely

³¹ As a matter of customary international law, as codified in art 32 of the Vienna Convention on the Law of Treaties (Vienna, 23 May 1969), 1155 UNTS 331, 8 ILM 679 (1969), entered into force 27 January 1980.

³² *Actes de la Conférence 1908* (n 27) 251ff.

³³ *ibid* 45.

different proposal after a further discussion in which it was asserted in particular that the obligation would be imposed by the idea, not of protecting the copyright, but of protecting a commercial interest, which was just what we had wanted to avoid. Finally, with regard to news of the day and miscellaneous information, the Committee is proposing a formula which differs from those adopted hitherto and which it thinks is more in keeping with the truth. It is not a question of stating that their reproduction is always permitted or cannot be forbidden — which would prevent any claim even in relation to acts which quite obviously constituted unfair competition; we merely declare that the protection of the Convention does not apply here because this does not come within the province of copyright. Commercial questions may arise in this regard but they are outside our sphere.³⁴

These comments make it clear that, by the expressions ‘news of the day’ and ‘miscellaneous information’, the Committee meant only the facts constituting those items, and did not intend to exclude from protection as literary works the articles or reports in which these facts were contained.³⁵ On the other hand, protection analogous to that for literary works was not to be conferred willy-nilly on items of information simply because a ‘commercial interest’ was involved, but neither did the drafters intend to deprive that interest of all protection of any kind — in such instances, it would be a matter for national laws to determine how to proceed, whether by recourse to doctrines of unfair competition or otherwise. The resultant draft, adopted by the Berlin Revision Conference was now placed in the third paragraph of a new article 9, which provided:

The protection of the present Convention shall not apply to news of the day or to miscellaneous information which is simply of the nature of items of news.³⁶

This provision remained unchanged in the subsequent revisions of Rome (1928) and Brussels (1948), now numbered as article 9(3) with a slightly rephrased English translation adopted in the latter (‘miscellaneous information having the character of mere items of news’³⁷). At the same time, as seen above, both those revised texts significantly reduced the flexibility allowed to national laws with respect to the making of reproductions by the press of ‘articles on current economic, political or religious topics’.

However, the issue of news was addressed again in the preparations that were undertaken for the 1967 Stockholm Revision Conference by the Swedish Government and the United International Bureaux for the Protection of Intellectual Property (‘BIRPI’).³⁸ In the view of the 1963 Study Group, the immediate object of article 9(3) (as it then was) was:

to recall the general principle whereby the title to protection of articles of this kind, as in the case of other intellectual works, pre-supposes the quality of literary or artistic works within the meaning of the Convention. At the same time, the provision also permits the conclusion that if the articles are protected by virtue of other legal provisions — for example, by legislation against unfair competition — such protection is outside the field of the Convention. There are grounds, therefore, for

³⁴ *ibid* 251–2.

³⁵ *ibid*.

³⁶ Berlin Act (n 20) art 9.

³⁷ Brussels Act (n 25) art 9(3).

³⁸ *Records of the Intellectual Property Conference of Stockholm, June 11 to July 14, 1967*, vol 1 (Stockholm Intellectual Property Conference, WIPO 1971) 115.

drawing, *inter alia*, a second conclusion: the right to assimilation to national authors established by the Convention does not extend to the protection claimed by virtue of these other rules.³⁹

The Study Group went on to say that, while this provision could be viewed as superfluous from a systematic perspective, it had formed part of the Convention for a long time and was ‘a good expression of a principle from which legislation and jurisprudence . . . [could] take their lead, as well as a reminder of the freedom of information’.⁴⁰ It was therefore useful as it recognized the ‘practical importance of fixing . . . the line of demarcation between copyright and other means of protection’.⁴¹ The Study Group recommended the retention of the article without any change, but with some discussion of its interpretation in the documents of the Conference.⁴² In keeping with this proposal, the following interpretation of what is now art 2(8) of the Stockholm Act was adopted by Main Committee I of the Stockholm Conference in its report to the Conference:

[T]he Convention does not protect mere items of information on news of the day or miscellaneous facts, because such material does not possess the attributes needed to constitute a work. That implies a fortiori that news items or the facts themselves are not protected. The articles of journalists or other ‘journalistic’ works reporting news items are, on the other hand, protected to the extent that they are literary or artistic works. It did not seem essential to clarify the text of the Convention on this point.⁴³

This embodies an authentic interpretation of article 2(8) which can be followed in national legislation. Its distinction between literary and artistic works — the proper subject matter of copyright protection — and facts, information, etc contained in those works — which are not protected — is now amplified in art 2 of the 1996 WIPO Copyright Treaty⁴⁴ which provides the following regarding the scope of protection:

Copyright protection extends to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such.⁴⁵

IV. THE PARIS CONVENTION

Excluded from protection under the Berne Convention, the obvious other place in which to seek international protection for news items was under the Paris Convention for the Protection of Industrial Property,⁴⁶ which had adopted a general obligation to protect Union

³⁹ *ibid.*

⁴⁰ *ibid.*

⁴¹ *ibid.*

⁴² *ibid.*

⁴³ *Records 1967*, vol 2 (n 29) 1155. The wording was proposed in the program for the Conference: *Records 1967*, vol 1 (n 38) 115–18.

⁴⁴ WIPO Copyright Treaty (Geneva, 20 December 1996), 2186 UNTS 121, 36 ILM 65 (1997), entered into force 6 March 2002.

⁴⁵ *ibid* art 2. To similar effect, see TRIPS art 9.2: Agreement on Trade-Related Aspects of Intellectual Property Rights (Marrakesh, 15 April 1994), Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 321 (1999), 1869 UNTS 299, 33 ILM 1197 (1994), entered into force 1 January 1995 (TRIPS), art 9.2.

⁴⁶ Paris Convention for the Protection of Industrial Property (Paris, 20 March 1883), entered into force 7 July 1884, as amended on 28 September 1979 (Paris Convention).

claimants against acts of unfair competition in its Washington Revision of 1911.⁴⁷ New art 10bis of the Washington Act provided:

All the contracting countries undertake to assure to nationals of the Union effective protection against unfair competition.⁴⁸

An obligation expressed in such terms left a great deal of latitude to national laws to interpret and particularize, and subsequent revision conferences⁴⁹ therefore sought to add content to the obligation by providing a general definition of unfair competition as meaning every act of competition ‘contrary to honest practices in industrial or commercial matters’,⁵⁰ as well as listing specific instances of unfair competitive acts that were to be ‘repressed’ by Union countries. Obvious examples were activities involving some form of deceptive, misleading or disparaging conduct,⁵¹ but the issue of news misappropriation also received early attention. The desire of newspapers and news agencies to protect the commercial value and currency of their news reports was as intense in the period following the First World War as at any time previously; indeed, it appeared to be even more emergent with the development of radio communications and public broadcasting. News was more international than ever, and newspapers and news agencies continued to be aggrieved when their news reports were taken and paraphrased without permission by rivals. This led to pressure from international news agencies, in particular, for these practices to be brought within the Paris Convention under the newly adopted article 10bis.⁵²

Initially, such a proposal had figured in the amendments considered for The Hague Revision Conference in 1925,⁵³ but it was then removed from the Conference program before the delegates met, on the basis that the provision would encounter strong resistance and was premature.⁵⁴ It was then revived in an amendment moved by the Serbs-Croats-Slovenes delegation,⁵⁵ which sought to include the unauthorized taking or dissemination of press information and news of the day as an act of unfair competition, so long as such material retained its commercial value. The ground of rejection of this proposal by the Conference appears ironic: having failed previously to make the cut so far as the Berne Convention was concerned, on the basis of its lack of ‘literary’ character, it was now asserted that it did not fit within the objects of the Paris Convention⁵⁶

⁴⁷ Paris Convention for the Protection of Industrial Property (Paris, 20 March 1883), entered into force 7 July 1884, as revised at Washington on 2 June 1911 (Washington Act).

⁴⁸ *ibid* art 10bis.

⁴⁹ Notably those at The Hague (1925), London (1934) and Lisbon (1958): see Paris Convention for the Protection of Industrial Property (Paris, 20 March 1883), entered into force 7 July 1884, as revised at The Hague on 6 November 1925 (The Hague Act), as revised at London on 2 June 1934 (London Act), as revised at Lisbon on 31 October 1958 (Lisbon Act).

⁵⁰ The Hague Act (n 49) art 10bis.

⁵¹ *ibid*; London Act (n 49) art 10bis(3)(1)–(2); Lisbon Act (n 49) art 10bis(3)(1)–(3).

⁵² Resolution of the International Congress of Press Agencies, Berne 1924, reproduced in *Actes de la Conférence réunie à La Haye du 8 octobre au 6 novembre 1925* (Bureau international de l’Union 1926) 100–101.

⁵³ *Actes de la Conférence 1925* (n 52) 253–4. See further Sam Ricketson, *The Paris Convention for the Protection of Industrial Property: A Commentary* (Oxford University Press 2015) 700–702..

⁵⁴ *Actes de la Conférence 1925* (n 52) 254.

⁵⁵ *ibid* 350–51. This followed the proposal advanced in the Resolution that had been adopted by the International Congress of Press Agencies, Berne 1924 (for the text of this resolution, see *Actes de la Conférence 1925* (n 52) 100–101).

⁵⁶ *Actes de la Conférence 1925* (n 52) 478–9 (report of fourth sub-committee).

Attempts to bring such matters within the scope of unfair competition, both at the national and international levels, continued in the years after The Hague Conference, with strongly worded resolutions in favour of protection being adopted by such bodies as the International Chamber of Commerce and the International Association for the Protection of Industrial Property ('AIPPI').⁵⁷ No proposal touching on this was included in the program for the London Revision Conference of 1934 prepared by the British Government and the Paris Union Office, but an amendment advanced by the Czech delegation proposed that there should be protection of news during the period of 24 hours following first publication while its currency gave it commercial value.⁵⁸ A proposal to similar effect was advanced by the German delegation, and this attracted some support from other delegations.⁵⁹ On the other hand, there were those who still thought that this was a matter more properly belonging within the Berne Convention,⁶⁰ while others argued that the proposal was not yet sufficiently 'mature' enough for inclusion in the Paris Convention.⁶¹ All that was achieved therefore was a resolution of the Conference calling for the countries of the Union to 'study' the question of introduction in their legislation of an effective protection against the unauthorized disclosure of press information (news) during its period of commercial value and where such disclosure had occurred without any indication of its source.⁶²

Subsequently, there has been no other proposal to include news items within art 10*bis* of the Paris Convention (at either the 1958 Lisbon or 1967 Stockholm revision conferences), although Ladas recounts other efforts that were made at the international level after 1934 through such bodies as the League of Nations and the International Chamber of Commerce, and later the United Nations and international press organizations post World War II, to agitate for protection, either within the Berne or Paris Conventions or both.⁶³ Perhaps the most significant initiative in this regard came in the late 1950s from the European Alliance of News Agencies, which requested the Paris International Office to convene a committee of experts to study the protection of news. This committee, consisting of experts from AIPPI, the International Chamber of Commerce and the various international press associations, met in Geneva in September 1959 and prepared a draft treaty that would be a special agreement within article 19 of the Paris Convention (article 1(1) of the draft treaty) and with a number of articles that began with a general undertaking for countries to ensure an effective protection of news against any act of unfair competition (article 1(2) of the draft treaty).⁶⁴ This was followed by more specific obligations to prohibit (a) the reproduction and public communication of news without a clear indication of source, (b) the reproduction and public communication of news within an unspecified number of hours following publication, and (c) the systematic reproduction and communication of news, published or communicated to the

⁵⁷ See the resolutions of AIPPI (London 1932), the International Chamber of Commerce (Paris 1932 and 1933, Vienna 1933) and also the 'Conference of Experts on the Press' convened by the League of Nations (Geneva 1927). The texts of these resolutions are collected in *Actes de la Conférence réunie à Londres, du 1 mai au 2 juin 1934* (Bureau international de l'Union pour la protection de la propriété industrielle 1934) 94–6.

⁵⁸ *Actes de la Conférence 1934* (n 57) 289.

⁵⁹ *ibid* 420–21 (report of fourth sub-committee, noting support from the Belgian, Hungarian and Polish delegations).

⁶⁰ *ibid* 421 (in particular, the Spanish and Portuguese delegations: report of fourth sub-committee).

⁶¹ *ibid* 421 (the Danish, Austrian and British delegations: report of fourth sub-committee).

⁶² *ibid* 469 (report of drafting committee), 477 (general report of drafting committee), 592 (text if resolution was adopted).

⁶³ Stephen P Ladas, *Patents, Trademarks, and Related Rights: National and International Protection*, vol 3 (2nd edn, Harvard University Press 1975) 1724–5.

⁶⁴ For the text of the proposed convention, and the report of the committee of experts, see (1959) 75 *La Propriété Industrielle* 184–88.

public, even if the stipulations under (a) or (b) had been met (article 2(2) of the draft treaty).⁶⁵ Ladas comments that ‘nothing came of this project’, mainly because many countries objected to the widely framed obligations in proposed articles 2(2)(b) and (c), and proposals to protect news as part of unfair competition obligations thereafter dropped off the Paris Convention agenda, leaving this therefore as a matter for national regulation.⁶⁶ Nonetheless, there is an interesting link in this 1959 text to an initiative that had been prepared 20 years earlier by another committee of experts, this time in relation to neighbouring rights.⁶⁷ It is to this that we now turn.

V. PROTECTION OF NEWS AS A NEIGHBOURING RIGHT

While successive Berne revision conferences, from Berlin to Stockholm, had made it clear that the protection of news did not fall under the umbrella of authors’ rights, it is noteworthy that one of the draft treaties prepared by a committee of experts convened by a non-Berne body — the International Institute for the Unification of Private International Law (often referred to at this time as the ‘Rome Institute’ and, more commonly today, as UNIDROIT) — at Samedan, Switzerland, in July 1939 dealt specifically with the protection of news or ‘press information’ (*informations de presse*). This was part of a broader exercise that resulted in the drafting of a series of draft treaties on the emerging subject of ‘neighbouring rights’, namely rights for performers, producers of phonograms and broadcasting organizations.⁶⁸ These were rights that, to date, had been denied protection as authors’ rights under the Berne Convention, and which ultimately were to find an international home two decades later in their own separate treaty, the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations.⁶⁹

In the case of press information, the draft treaty (the ‘Samedan draft’) followed closely the model proposed for these other categories of claimants, providing for a *sui generis* form of protection based on national treatment and rights ‘specially accorded by the present

⁶⁵ *ibid* 187–8.

⁶⁶ Ladas (n 63) 1725.

⁶⁷ See here the remarks of Counsellor Ronga at the commencement of the meeting of the committee of experts on 7 September 1959: (1959) 75 *La Propriété Industrielle* 185.

⁶⁸ For the text of the treaties, see (1940) 10 *Le Droit d’Auteur* 109; (1940) 11 *Le Droit d’Auteur* 121; (1940) 12 *Le Droit d’Auteur* 133. Included also was a draft treaty relating to *droit de suite*, although this was subsequently to come into the Berne Convention in 1948 as part of the Brussels revision: see Brussels Act (n 25) art 14*bis*. While this committee did not meet under the auspices of the Berne International Office, the draft treaties it considered were, in fact, prepared by Fritz Ostertag, the recently retired Director of the joint Berne and Paris Union offices, and were published in June 1939 under his name in *Le Droit d’Auteur* with the suggestive heading ‘*Nouvelles propositions pour la Conférence de Bruxelles*’ [‘New Proposals for the Brussels Conference’]: (1939) 6 *Le Droit d’Auteur* 62–72. Ostertag also took a leading role in the meeting of the committee itself and the drafting of the various texts that were adopted, as did his successor as Director, Benigna Mentha: (1940) 12 *Le Droit d’Auteur* 138. As the citations at the commencement of this footnote indicate, the most accessible accounts of the Samedan committee also appeared in *Le Droit d’Auteur*.

⁶⁹ International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (Rome, 26 October 1961), 496 UNTS 43, entered into force 18 May 1964. This treaty was adopted under the auspices of three international organizations: the World Intellectual Property Organization (WIPO, formerly the United International Bureaux for the Protection of Intellectual Property), the United Nations Educational, Scientific and Cultural Organization (UNESCO) and the International Labour Organization (ILO).

convention'.⁷⁰ No definition of *informations de presse* was provided, but the persons entitled to claim protection were identified specifically as the proprietors of newspapers, other periodical publications, and press agencies, with the country of origin being defined as the country in which these enterprises or agencies were headquartered.⁷¹ The rights specifically to be accorded to enterprises and agencies were also spelt out in more detail, albeit in relatively limited terms: to require that their press information should not be reproduced without an indication of its source, and that it should not be reproduced by third parties before publication if obtained by illicit means.⁷² Certain matters were reserved to national legislation, including the right to determine what were illicit means of collecting information,⁷³ and the right to prevent, after publication, the systematic reproduction or broadcasting of such information for profit.⁷⁴ Likewise, matters of duration, the prescription of any formalities, the imposition of compulsory licences, remedies and transitional provisions were left as matters for national legislation to determine.⁷⁵ Curiously, although Berne membership was a prerequisite for joining this proposed agreement (article 9), there was no inclusion of a non-derogation provision in relation to authors' rights protected under the Berne Convention, as in the case of the draft treaties on performers, phonogram producers and broadcasters.⁷⁶ This, perhaps, suggests that the drafting committee did not see the protection of press information as being connected in any way with authors' rights, notwithstanding the requirement of Berne membership; the protection thus envisaged was purely separate, and hardly 'neighbouring'.

VI. FALLING BETWEEN TWO STOOLS?

So far as the 'traditional' intellectual property conventions of Berne and Paris are concerned, the protection of news items appears to fall between the two, while attempts at fashioning an alternative form of international protection under a separate treaty have also failed. Although not excluding the possibility of journalists' articles reporting news items from being protected as original literary works under Berne,⁷⁷ it seems clear that the facts or news items themselves do not fall within the scope of that instrument. However, in the absence of any specific mention in art 10*bis* of the Paris Convention, any unfair competitive aspect that arises when such items are appropriated by rivals therefore remains a matter for national legislation, whether under local unfair competition rules or some other special head of protection.

In this regard, the wry observation of an anonymous commentator in 1926 continues to hold true:

⁷⁰ '[D]es droits spécialement accordés par la present convention': Article 2, *Texte de l'avant-projet de convention assurant la protection des informations de presse* (the 'Samedan draft'), [1940] 12 *Le Droit d'auteur* 136.

⁷¹ Samedan draft), article 2: (1940) 12 *Le Droit d'Auteur* 136.

⁷² Samedan draft, article 5: (1940) 12 *Le Droit d'Auteur* 136.

⁷³ Subject to the proviso that it was always to be considered illicit to make reproductions, without authorization, in whole or in part, of the information bulletins distributed by agencies: Samedan draft, art 6.1: (1940) 12 *Le Droit d'Auteur* 136.

⁷⁴ Samedan draft, article 6.2: (1940) 12 *Le Droit d'Auteur* 136

⁷⁵ Samedan draft, articles 3 and 7: (1940) 12 *Le Droit d'Auteur* 136.

⁷⁶ *Texte de l'avant-projet de convention assurant la protection des artistes interprètes et des artistes exécutants, ainsi que des producteurs de disques phonographiques et d'instruments similaires* [Draft treaty on performers and phonogram producers] arts 5, 7: (1940) 11 *Le Droit d'Auteur* 125; *Texte de l'avant-projet de convention assurant la protection des radioémissions* [Draft treaty on radio-transmissions] art 5: (1940) 12 *Le Droit d'Auteur* 134.

⁷⁷ *Records 1967*, vol 2 (n 29) 1155 (report on the work of Main Committee I).

Items of press information are repudiated by the Union for the protection of literary property, which deems them too commercial, but also by the Union for the protection of industrial property, which finds them too literary. From an international perspective, they therefore are *res nullius*, by virtue of the principle that that which is not expressly forbidden is permitted. It has been necessary to leave to national legislations the task of protecting news items against manifest abuses . . .⁷⁸

VII. FROM THE TELEGRAPH TO THE INTERNET: FREE-RIDING AND NEWS AGGREGATION

International treaties, having failed to keep pace with misappropriation of news communicated by telegraph, may prove more equal to the task of remedying a current-day form of free-riding that may be even more pervasively international than retransmitting content from intercontinental newswires. The internet practice of ‘crawling’ and ‘scraping’ the websites of news organizations — that is, the practice of copying the headlines and sometimes the initial sentence or two from the source website, in order to recommunicate that content on an aggregation service such as Google News (usually with a link back to the source story for the full account of the news item) — has attracted the ire of the news organizations, because the news aggregators generally do not seek licenses or pay for the copied content.⁷⁹ News organizations contend that the services are effectively stealing their content,⁸⁰ and fear that most users do not follow the aggregator-provided link back to the source site, and therefore that the copied material substitutes for reading the story on the source site (and being exposed to its advertisers).⁸¹ In this section we examine the extent to which the norms of the Berne Convention might apply to news aggregation, and briefly consider national case law and statutory responses to the practice.

A. News aggregation as copyright infringement

⁷⁸ ‘*Le droit de reproduction en matière de journaux et de publications périodiques*’ (1926) 7 *Le Droit d’Auteur* 73, 79.

⁷⁹ For a general description of types of news aggregation and of legal theories advanced by news organizations and technology platforms, see, eg, Kimberly Isbell, ‘The Rise of the News Aggregator: Legal Implications and Best Practices’ (2010) Berkman Center for Internet & Society at Harvard University Research Publication 2010–10 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1670339> accessed 5 February 2016.

⁸⁰ See, eg, Bill Keller, ‘All the Aggregation That’s Fit to Aggregate’ *The New York Times Magazine* (New York, 10 March 2011) <www.nytimes.com/2011/03/13/magazine/mag-13lede-t.html> accessed 15 February 2016 (‘[T]oo often it amounts to taking words written by other people, packaging them on your own Web site and harvesting revenue that might otherwise be directed to the originators of the material. In Somalia this would be called piracy. In the mediasphere, it is a respected business model.’); letter from News Corp Chief Executive Robert Thomson to the European Commissioner for Competition (8 September 2014), describing Google as a ‘platform for piracy’, quoted in News Corp, ‘News Corp Opposed Google’s European Commission Settlement Offer; Welcomed Competition Commission Reconsideration’ (Press Release, 17 September 2014) <<http://newscorp.com/2014/09/17/news-corp-opposed-googles-european-commission-settlement-offer-welcomed-competition-commission-reconsideration/>> accessed 5 February 2016.

⁸¹ Whether news aggregation in fact substitutes for the full articles is a matter of some contention. Compare Eleonora Rosati, ‘The German “Google Tax” Law: Groovy or Greedy?’ (2013) 8(7) *Journal of Intellectual Property Law & Practice* 497 (‘According to two studies by the Iowa University and ETH and Boston University respectively, not only are news aggregators unlikely to have complementary effects on the number of visits received by newspapers’ homepages, but rather appear to have a substitution effect, which is said to have contributed to declining online traffic in the past few years.’), with 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) IN3 Working Paper Series, 18–19 <<http://ssrn.com/abstract=2504596>> accessed 4 February 2016 (contending no proof of economic harm).

While international copyright norms establish that the information disclosed within a news report remains free of protection, what of verbatim copying of headlines and initial sentences? If, as discussed above, the Berne art 2(8) exclusion of the ‘news of the day’ rather than remitting all news reporting, whatever its expressiveness, to the public domain, affirms copyright law’s idea/expression (or fact/expression) dichotomy, then news reports may be literary works entitled to protection under the Berne Convention. (Moreover, photographs and other illustrations incorporated in the aggregation will almost certainly be ‘intellectual creations’ within the meaning of Berne art 2(1).) But two series of questions remain. First, regarding the copied literary content, do news aggregators copy too little to infringe? That is, even if a headline may be very expressive (brevity being the soul of wit), is it too short to be protected as a work of authorship? Similarly, where the aggregator has taken more than the headline, but still a very small quantity of content, has it taken too little to infringe the reproduction right? (For photographs, if the aggregators render them in thumbnail form, would courts consider reduced-size, low-resolution images the visual equivalent of *de minimis* takings of text?) Second, even if the copied content is protectable, does either the Berne art 10(1) quotation right, or its art 10*bis*(1) permissible exception for ‘articles published in newspapers or periodicals on current economic, political or religious topics, and of broadcast works of the same character’ apply to insulate news aggregation practices?

The Berne Convention does not set a threshold for the quantum of creativity required for a work to be an ‘intellectual creation’. ‘Literary works’ under article 2(1) include a long list of works, ‘pamphlets’ being the shortest specified example, but one should not thereby infer that ‘literary works’ do not also include shorter works such as poetry, a form that may encompass expressions no less pithy than a news headline and its accompanying first one or two sentences. In other words, subject to the general condition of originality, the Berne Convention appears to leave the question of quantum to national legislation. By the same token, the Berne art 9(1) reproduction right covers ‘any manner or form’, but that phrase does not clearly address the matter of quantity. As the authors have previously indicated:

Berne does not dictate the standard for finding infringement. It does not instruct member states as to whether there is a threshold of substantiality that the defendant’s copying must cross before it can be held liable. Nor does it indicate, if a member state imposes such a threshold, whether any substantiality standard encompasses qualitative as well as quantitative substantiality.⁸²

On these issues, national solutions differ. The US Copyright Office denies registration to ‘words and short phrases’,⁸³ and many US courts’ infringement analyses impose a *de minimis* threshold.⁸⁴ The European Court of Justice, by contrast, has held that 11 consecutive

⁸² Ricketson and Ginsburg (n 30) [11.26].

⁸³ See Copyright Office Regulations, 37 CFR § 202.1:

Material not subject to copyright.

The following are examples of works not subject to copyright and applications for registration of such works cannot be entertained:

(a) Words and short phrases such as names, titles, and slogans . . .

⁸⁴ See, eg, *Newton v Diamond*, 349 F 3d 591 (9th Cir 2003) (musical sample of three notes held *de minimis*); *Ringgold v Black Entertainment Television, Inc*, 126 F 3d 70 (2d Cir 1997) (providing a thorough discussion of the variant uses of the *de minimis* doctrine in copyright, but rejecting the doctrine’s application in that case). See also *Gottlieb Development v Paramount Pictures Corp*, 590 F Supp 2d 625 (SDNY 2008) (holding *de minimis* the fleeting incorporation into the set of the Mel Gibson film *What Women Want* of plaintiff’s ‘Silver Slugger’ pinball machine that depicted copyrighted designs on its front and sides).

words excerpted from a newspaper article may contain sufficient expression to meet the EU's copyright originality requirement that the work be the author's 'own intellectual creation'.⁸⁵ While the European Court of Justice was considering quantity as a matter of infringement, its analysis would appear to apply equally to the question of whether a 'work' could consist of as few as 11 words, or potentially even fewer, so long as their assemblage constituted an 'intellectual creation'. The difference between the US and the EU may be especially pertinent to the protection of headlines, particularly if these are considered works in their own right, rather than components of the news article as a whole, whose total word count is likely to satisfy any quantity threshold.

Whether headlines are separate works, rather than components of the larger articles, matters at the international level because Berne requires national treatment only for works 'for which [authors] are protected under this Convention'.⁸⁶ Thus, if a headline is not an 'intellectual creation', a Berne member state would have no obligation to protect a foreign news site against the 'scraping' of its headlines, even if that member state protected local news sites. By contrast, if headlines are subsumed within the larger articles, then copyright owners of foreign websites would be entitled to the same protection as nationals, but national law will determine whether an infringement occurs only if the defendant has engaged in more than a *de minimis* quantum of copying.

On the first question, then, a delegation to national law to determine quantity thresholds both for protectability and for infringement may produce inconsistent results given the disparities in national approaches. Thus a news aggregator might find its liability engaged with respect to its copying from any given site depending on whether or not the countries to which the aggregation service is made available would find the content protectable and infringed.⁸⁷

On the second question, regarding press exceptions and quotation rights, copying headlines and initial sentences, even if *prima facie* infringing under national law, may be exempted under international norms. In the case of press exceptions, member states may permit the copying by the press of works from other press sources which have not 'expressly reserved' against such copying; in the case of the quotation right, if the use meets the specified criteria, Berne member states must permit qualifying copying from foreign sources. We will consider each exemption in turn.

B. Article 10bis(1) press reporting exception

Article 10bis(1) of the Berne Convention gives member states the option to:

⁸⁵ Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening* [2009] ECR I-656 [48].

⁸⁶ Berne Convention (n 16) art 5(1).

⁸⁷ *Lex loci delicti* (or *protectionis*) being the most prevalent choice of law rule for copyright infringement, this conclusion assumes that the member state to which the aggregation site was made available would apply its own copyright law. See, eg, *Google Inc v Copiepresse, Cour d'appel Bruxelles* [Court of Appeal Brussels], *neuvième chambre* [9th chamber], 2007/AR/1730, 5 May 2011 [13]–[20] <http://www.copiepresse.be/pdf/Copiepresse%20-%20ruling%20appel%20Google_5May2011.pdf> accessed 15 February 2016 (applying the law of the country targeted by news aggregation service; aggregated sources were Belgian news sites, advertisers were Belgian, Belgian law therefore applied). The *Copiepresse* court found the copying of headlines and three lines of text to be substantial. 'Contrary to what Google maintains, "Google News" is not a "signpost" which allows cybernauts to find press articles on a specific subject more efficiently, but is a slavish reproduction of the most important sections of the inventoried articles': at [28].

permit the reproduction by the press, the broadcasting or the communication to the public by wire of articles published in newspapers or periodicals on current economic, political or religious topics, and of broadcast works of the same character, in cases in which the reproduction, broadcasting or such communication thereof is not expressly reserved. Nevertheless, the source must always be clearly indicated; the legal consequences of a breach of this obligation shall be determined by the legislation of the country where protection is claimed.⁸⁸

This provision allows (but does not oblige) member states to permit the reproduction and communication ‘by the press’ of articles on ‘current economic, political or religious topics’.⁸⁹ As we have seen, it represents a significant reduction in the scope of the Convention’s authorization of copying of articles relative to the texts of previous Berne revisions. Nonetheless, as the provision still permits the taking of entire articles where the relevant conditions are met,⁹⁰ it would follow that it also authorizes the reproduction and communication of portions of articles, such as headlines and initial sentences. For news aggregation sites to benefit from state-enacted exceptions of this sort, the content they copy must be limited to ‘current economic, political or religious topics’; the privilege does not appear to extend to human interest stories, coverage of sports or culture, or any topic that is not ‘current’.⁹¹ Article 10bis(1) thus does not authorize the systematic ‘scraping’ of the headlines and first sentences of a news source’s entire contents.

Article 10bis(1) is also not technologically neutral. It covers ‘reproduction by the press, the broadcasting or the communication to the public by wire’ of the relevant articles;⁹² this wording raises the question whether the provision permits communication to the public by means other than broadcasting or by wire. On-demand access by web users is not ‘broadcasting’, and most internet communications today are wireless. Thus, unless ‘reproduction by the press’ is interpreted to imply other modes of communication of the copied articles (but then, why specify two modes of communication?), most news aggregation will not qualify for the exception.

Most importantly for our inquiry, the limitation of article 10bis(1) to uses ‘by the press’ raises the question whether a site that copies from ‘the press’ is itself a member of ‘the press’, particularly if the site carries no self-produced content.⁹³ Legal analysts differ, some doubting that mere aggregation without independent content warrants the ‘press’ denomination,⁹⁴ while others caution against what they fear to be merit-driven distinctions between information sources.⁹⁵ Within the profession of journalism,

⁸⁸ Berne Convention (n 16) art 10bis(1).

⁸⁹ *ibid.*

⁹⁰ Ricketson and Ginsburg (n 30) [13.53].

⁹¹ Some news aggregators do not so confine the targeted topics: see, eg, *Copiepresse* (n 87) [28] (Google News copied headlines and initial sentences from Belgian news sources, and grouped the excerpts in the following categories: ‘the “Google News” page features a summary of three or four suggestions which are all grouped according to different themes, such as “Starred”, “World”, “Belgium”, “Business”, “Sci/Tech”, “Sports”, “Entertainment”, “Health”’).

⁹² Berne Convention (n 16) art 10bis(1).

⁹³ The *Copiepresse* court stated, without elaboration, that Google was not a ‘press organ’: *Copiepresse* (n 87) [32].

⁹⁴ See, eg, Raquel Xalabarder, ‘Google News and Copyright’ in Aurelio Lopez-Tarruella (ed), *Google and the Law: Empirical Approaches to Legal Aspects of Knowledge-Economy Business Models* (Springer 2012) 144–5 (‘Despite [the ample scope of Art. 5(3)(c) EUCD], the exemption of news aggregation under the corresponding national limitations would find many obstacles since most national laws require that the reproduction of news articles be done “by the press” or by other media similar to the original source, and news aggregators hardly

generally speaking, organizations that aggregate journalism but do not produce it themselves — [that is], do not conduct or commission reporting — are not typically thought of as journalism actors or ‘the press.’ That said, not everyone involved in journalism agrees on this, and the definition of the press is certainly in flux today.⁹⁶

Finally, news organizations may override the exception if they ‘expressly reserve’ their exclusive rights of reproduction, broadcasting and communication to the public by wire.⁹⁷ But the Convention does not explain how to make that reservation. At the 1908 Berlin Revision Conference that gave rise to this text, it seems to have been assumed that the reservation would have been made by means of a notice in the newspaper or periodical upon initial publication.⁹⁸ It is unlikely that the drafters envisioned further formalization of the reservation through some kind of governmental filing in the country of origin, much less in multiple countries: such a requirement would have too closely resembled the multiple formalities rejected from the outset of the Berne Union.⁹⁹ But if including a notice of

qualify as “press.”); ‘ALAI Report and Opinion on a Berne-Compatible Reconciliation of Hyperlinking and the Communication to the Public Right on the Internet’ (Report and opinion, Association Littéraire et Artistique Internationale 2015) <www.alai.org/en/assets/files/resolutions/201503-hyperlinking-report-and-opinion.pdf> accessed 5 February 2016 (‘On the other hand, the beneficiaries of this exception are “the press”; as a result not every linking intermediary will qualify. It is not clear, for example, that every news aggregator or every blogger would be considered the “press,” particularly if the former provides no independent content’: at 6).

⁹⁵ See, eg, Institute for Information Law, ‘Study on the Implementation and Effect in Member States’ Laws of Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society’ (Final Report, Institute for Information Law 2007) 52–4 <www.ivir.nl/publicaties/download/605> accessed 14 February 2016. ‘[D]istinguishing between value-added news media that “deserve” to benefit from the exemption, and other media that do not, bears the risk of passing judgment on the social value of the media, and would therefore rest uneasily with freedom of expression’: at 53–4. See also New Zealand Law Commission, *The News Media Meets ‘New Media’: Rights, Responsibilities and Regulation in the Digital Age* (NZLC Report No 128, 2013), <http://r128.publications.lawcom.govt.nz/Chapter+3+-+Defining+news+media+for+the+purposes+of+the+law/Our+proposed+statutory+definition+of+news+media>

(proposing changes to the country’s regulation of the media, specifically, at paras. 3.63 and 3.101, proposing an expansive definition of ‘news media’ that would include aggregators). The government subsequently declined to adopt these recommendations. See New Zealand Parliament, *Government Response to Law Commission Report on The News Media Meets ‘New Media’: Rights, Responsibilities and Regulation in the Digital Age* (Paper presented to the House of Representatives, 2013) <[www.mch.govt.nz/files/News-media-meets-new-media-government-response-to-law-commission-report%20\(D-0503423\).PDF](http://www.mch.govt.nz/files/News-media-meets-new-media-government-response-to-law-commission-report%20(D-0503423).PDF)> accessed 14 February 2016.

⁹⁶ Email from David Hajdu, Professor, Columbia University School of Journalism to Jane Ginsburg (4 January 2016). The denomination debate extends to bloggers who summarize or extract from articles appearing in more traditional journalism venues. See, eg, Mathew Ingram, ‘Are Aggregation and Curation Journalism? Wrong Question’ (*Gigaom*, 22 February 2012) <<https://gigaom.com/2012/02/22/are-aggregation-and-curation-journalism-wrong-question/>> accessed 15 February 2016; Melanie Coulson, ‘The “New Journalist”: The Tale of a Sexy SEO Headline’ (*MelCoulson.com*, 2 February 2012) <<http://melcoulson.com/2012/02/21/the-new-journalist-the-tale-of-a-sexy-seo-headline/>> accessed 14 February 2016 (‘[A]ggregation is *not* journalism. As a curator and aggregator you may well function as an efficient newstand [sic], but you’re not reporting what’s *new*.’ (emphasis in original)).

⁹⁷ Berne Convention (n 16) art 10*bis*(1).

⁹⁸ See *Actes de la Conférence 1908* (n 27) 253 (quoting the German delegation proposal). In passing, it may be noted that in the Paris Additional Act 1896, provision was made for periodicals, though not newspapers, to the effect that it would be sufficient if the prohibition (reservation) was ‘indicated in general terms at the beginning of each number’: Paris Additional Act (Paris, 4 May 1896), entered into force 9 December 1897, art 2, IV. This provision was deleted in the Berlin Act (n 20).

⁹⁹ On the problem of multiple national formalities before the promulgation of the Berne Convention, see, eg, Ricketson and Ginsburg (n 30) [1.19], [2.05], [2.07]–[2.08], [2.11]; Jane C Ginsburg, “‘With Untired Spirits and Formal Constancy’: Berne Compatibility of Formal Declaratory Measures to Enhance Copyright Title-Searching’ (2013) 28 Berkeley Technology Law Journal 1583, 1588–9.

reservation upon the newspaper's initial publication satisfied the reservation condition in the analog world (it is less clear how the reservation would have been made when the source was a radio broadcast), how may one transpose that solution to the digital context? Perhaps it should suffice to include the reservation on the homepage of the source website, or in its metadata.

A kind of metadata reservation already exists, in the form of 'robots.txt', which instructs search engines not to crawl, and therefore not to copy from, the source website. But robots.txt is a very blunt instrument, since it is an on/off switch; it does not allow the operator of the source website to permit crawling and excerpting, but only under certain conditions, such as where there is payment for copied content. For the moment, search engines ignore more fine-grained instructions, such as those implemented under the Automated Content Access Protocol ('ACAP') favoured by newspaper publishers.¹⁰⁰ It is problematic, to say the least, to leave solely to the news aggregators the determination of which metadata notices of rights reservations they will choose to respect. The legal effectiveness of the news source's reservation of rights should not turn on whether it has complied with technological rules written by potential infringers.¹⁰¹ That said, if the notice is to work in the automated environment of news aggregation, its implementation should not excessively burden the aggregator's operations. It may be necessary for publishers and aggregators to cooperate in developing a technological standard for expressing reservations from the article 10*bis*(1) exception.¹⁰² In the interim, assuming news aggregators qualify for the article 10*bis*(1) exception, and in the absence of treaty specification of how to communicate the rights reservation, member states should refrain from adopting a news aggregation exception under article 10*bis*(1) unless they have also articulated an effective means for news sources to opt out.

C. Article 10(1) quotation right

The Berne Convention art 10(1) provides:

It 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

¹⁰⁰ See, eg, Valérie-Laure Benabou, Joëlle Farchy and Cécile Méadel, Commission du Conseil supérieur de la propriété littéraire et artistique relative au référencement des œuvres sur Internet, *Le référencement des œuvres sur Internet: Rapport du CSPLA* (2013) 88 (comparing robots.txt and ACAP). The granularity that makes ACAP appealing to news publishers incites hostility from technology platforms: see, eg, Jon Stokes, 'European Publishers Want a Law to Control Online News Access' (*Ars Technica*, 10 July 2009) <<http://arstechnica.com/media/news/2009/07/european-publishers-want-news-access-controls-legislated.ars>> accessed 14 February 2016.; Ryan Paul, 'A Skeptical Look at the Automated Content Access Protocol' (*Ars Technica*, 13 January 2008) <<http://arstechnica.com/business/news/2008/01/skeptical-look-at-acap.ars>> accessed 14 February 2016.

¹⁰¹ Accord, *Copiepresse* (n 87) [50], quoting Carine Bernault, 'La tentation d'une régulation technique du droit d'auteur' (2006) *Revue Lamy Droit de l'immatériel* 61:

One should therefore refrain from trying to impose recourse to these technological measures, otherwise one could go so far as to consider that the rightholder who did not use the technological solution available to him to prevent his work from being exploited is deprived of all recourse against the infringer. . . . It would not be acceptable that software programs would become some sort of normalization tool of the so called information society, a technical 'law' that would be imposed surreptitiously!

¹⁰² See Berne Convention (n 16) art 10*bis*(1).

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.¹⁰³

The meaning of ‘quotations’ is subject to considerable debate, particularly regarding whether an entire work can be a quotation.¹⁰⁴ Nonetheless, even concepts of quotations limited to modest (albeit not necessarily ‘short’¹⁰⁵) excerpts would accommodate the copying of an article’s headline and initial one or two sentences — so long as national law did not consider the headlines to be works in themselves. In that event, it still may be possible to avoid a general interpretation of the meaning of ‘quotation’ when entire works are copied, because article 10(1) itself appears to encompass the possibility of quoting full headlines. This possibility derives from the final phrase of article 10(1), authorizing ‘quotations from newspaper articles and periodicals in the form of press summaries’.¹⁰⁶ It seems reasonable to expect that these ‘summaries’ (*revues de presse*’ in the authoritative French version) might include the headlines of the surveyed news stories. Arguably, it would still be permissible under article 10(1) to quote a full headline, even if the quotation served a purpose other than populating a *revue de presse*.

As for whether news aggregation practices produce *revues de presse* within the meaning of the quotation right, the Court of Appeals of Brussels held to the contrary in *Google Inc v Copiepresse*,¹⁰⁷ an action brought by a Belgian press agency and society of journalists alleging that Google News’s systematic copying of headlines and three lines of text infringed the copyrights in the copied articles. The Belgian court interpreted art 21(1) of Belgian copyright law, which closely tracks the Berne Convention art 10(1). The court adopted the French case law definition of a *revue de presse* as ‘a conjunct and comparative presentation of various comments from different journalists on one particular theme or one particular event’.¹⁰⁸ It then articulated criteria for application of a *revue de presse* exception:

the development by a press medium, which could not oppose the reciprocal use of its own articles by other press bodies quoted for their own press reviews;

the classification by theme or event: press reviews must show that a compilation effort was made which attests to classification work . . .¹⁰⁹

Google News failed to meet these criteria, the court held, because Google was not a ‘press organ’. The court inferred a reciprocity requirement: the press organ that copies from another in creating a *revue de presse* should be subject to having its content excerpted for the same purpose by another member of the press. As an aggregator that does not create its own content, Google News, by contrast, takes, but has nothing to give in return. Moreover, held the *Copiepresse* court, Google’s presentation of copied material was more akin to a ‘round

¹⁰³ *ibid* art 10(1).

¹⁰⁴ Ricketson and Ginsburg (n 30) [13.42] (‘length of quotation’).

¹⁰⁵ *ibid* [13.41]–[13.42].

¹⁰⁶ Berne Convention (n 16) art 10(1).

¹⁰⁷ *Copiepresse* (n 87).

¹⁰⁸ *ibid* [32], citing *Cour de cassation France* [Court of Cassation France], 30 January 1978. See also Ricketson and Ginsburg (n 30) [13.41] (A *revue de presse* is ‘a collection of quotations from a range of newspapers and periodicals, all concerning a single topic, with the purpose of illustrating how different publications report on, or express opinions about, the same issue’).

¹⁰⁹ *Copiepresse* (n 87) [32] (the court listed a third requirement that the ‘quotation’ not substitute for the source work; this condition is of general application to Berne article 10(1), see discussion at text at nn. 112-113.).

up’ than a ‘review’ because Google News lacked the comparative and analytical features that characterize a ‘review’:

‘Google News’ is only a reproduction of sections of press articles, classified into sections, and does not contain any comments or links between them. It has even been confirmed that this is automated, and that there is no human intervention involved. It thus follows that these excerpts are not reproduced to illustrate a suggestion, to defend an opinion or to make a summary of a specific topic.¹¹⁰

News aggregation sites that collect headlines and initial sentences from a variety of sources, whose excerpts neither focus on a single topic, nor stress comparisons in how the sources cover the same topic thus do not qualify as *revues de presse*. ‘Specialty aggregator’ sites, however, may fulfill the *revue de presse* criteria. A specialty aggregator ‘is a website that collects information from a number of sources on a particular topic or location’.¹¹¹ These sites, many of which focus on politics or technology, may perform the kind of selection and comparison of news coverage that the *revue de presse* privilege was designed to foster.

In any event, it does not suffice that the use be for purposes of a *revue de presse*, or that the copied content constitute a quotation. Article 10(1) poses the further conditions that the ‘extent’ of the quotations ‘not exceed that justified by the purpose’, and that their ‘making’ be ‘compatible with fair practice’.¹¹² Since the purpose of the news aggregation is to inform internet users of the stories that the ‘scraped’ news sources have published, one might contend that copying the news article’s title is enough to fulfill that informatory purpose. But that assertion may raise matters of fact resistant to bright-line rules. Rather, the principal impediment to the application of the quotation right may be the ‘fair practice’ limitation. If news aggregation unfairly competes with the quoted articles, for example by substituting for recourse to the source website, then the quotation right would not apply.

Arguably, if the aggregation dispenses the user from consulting the full article because the quoted portions convey the essential *facts*, the quotation does not substitute for the article’s *expression*, and it would not be unfair practice, *as a matter of copyright law*, to offer a competing informational substitute. But it may be difficult in this instance to separate the ‘facts’ from their ‘expression’: because the copying is verbatim, perhaps doubts should be resolved in favour of considering the quoted content to be expressive. Moreover, it is not clear that article 10(1)’s ‘fair practice’ restriction is limited to fairness as a matter of copyright law, as opposed to a broader connotation, which would encompass competitive practices more generally.¹¹³

¹¹⁰ *ibid.*

¹¹¹ Isbell (n 79) 3.

¹¹² Berne Convention (n 16) art 10(1).

¹¹³ Ricketson and Ginsburg (n 30) [13.41] states that there is little in the records of the 1967 Stockholm Revision Conference regarding the meaning of ‘compatible with fair practice’, but suggests that ‘the criteria referred to in article 9(2) would appear to be equally applicable here in determining whether a particular quotation is “fair”: does it conflict with a normal exploitation of the work and unreasonably prejudice the legitimate interests of the author?’

Arguably, ‘fair practice’ might also ‘take into account other public interests involved with aggregation and search engines services, such as the fundamental freedom to provide and access to information granted in Art.11 EU Charter and Art.10 ECHR’: Xalabarder (n 81) 31. Despite their surface appeal, invocations of rights of ‘access to information’ are redundant: Berne Convention (n 16) arts 2(8) and 10(1) already serve the goal of access to information; the fair practice condition is more appropriately seen as a constraint on the application of the quotation right rather than a basis for broadening the right’s application. Interpreting ‘fair practice’ as a

A final limitation on the application of the quotation right may also disqualify some news aggregation practices. Article 10(3) of the Berne Convention requires that

Where use is made of works in accordance with the preceding paragraphs of this Article, mention shall be made of the source, and of the name of the author if it appears thereon.¹¹⁴

Thus the quotation right does not apply if the aggregation site does not also include the by-lines of the authors of the quoted articles.

D. Preemptive effect of article 10(1)?

Supposing a given aggregation site met all of article 10's conditions, it would follow that a Berne member state could not, consistently with international norms, provide copyright protection to authors or news publishers whose works originate on foreign news sources against an aggregation site's communication of quoted content from that state. Would the Berne Convention also preclude remedies for foreign authors or publishers under national norms of unfair competition or misappropriation? In other words, does article 10(1) effectively preempt other legal bases of protection, or does its force apply only within the Berne Convention's direct ambit, thus leaving member states free to address news aggregation under other, non copyright, theories of national law?

The recent enactment in Germany and in Spain of 'ancillary copyright' (essentially publisher's neighboring rights) laws granting press publishers exclusive rights (Germany¹¹⁵) or remuneration rights (Spain¹¹⁶) against the commercial making available of aggregated content brings the preemption question to the fore. We have seen that the 1908 Berlin and 1967 Stockholm drafters excluded 'news of the day' from the Berne Convention's ambit, but their rejection of copyright coverage did not imply preclusion of all forms of protection. On the contrary, member states would be free to devise appropriate unfair competition remedies if needed. But, as we have also seen, 'news of the day' implies the facts without their literary

limitation on the application of the quotation right is also consistent with a reading that interprets that term coextensively with the second and third of the art 9(2) three step test.

¹¹⁴ Berne Convention (n 16) art 10(3).

¹¹⁵ The German ancillary copyright law ('*Leistungsschutzrecht*') is codified at §§ 87f and 87g of the German Copyright Act. Section 87f provides in part:

The producer of a press product (press publisher) shall have the exclusive right to make the press product or parts thereof available to the public for commercial purposes, unless this pertains to individual words or the smallest of text excerpts.

See *Gesetz über Urheberrecht und verwandte Schutzrechte (Urheberrechtsgesetz)* [Copyright Act] (Germany) 9 September 1965, *Bundesgesetzblatt* [Federal Gazette] I S 1273, §§ 87f, 87g.

¹¹⁶ The Spanish law, which entered into force 1 January 2015, adds a new provision to art 32 of the 1987 Copyright Act and states:

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 informing, shaping public opinion or entertaining, shall not require authorization, without prejudice to the publisher's right, or if appropriate, other right holders to receive equitable compensation. This right shall be unwaivable and will be given effect by means of intellectual property rights management entities . . .

See *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* (Spain), BOE 2014, 90404; *Ley 22/1987, de 11 de noviembre de 1987 de Propiedad Intelectual* (Spain), BOE 1987, 34163.

reportage. In the case of news aggregation, the copied content may constitute a literary work, and, if the Berne Convention's criteria are met, that work must be subject to the article 10(1) quotation right. Member state laws prohibiting news aggregation therefore would appear to clash with international norms.

On further reflection, however, the analysis requires greater nuance. Granted, international policies promoting freedom of information and expression underlie the article 10(1) quotation right and explain its mandatory character. But those same policies undergird the article 2(8) exclusion of the news of the day, a provision that also has a mandatory character, yet member states may devise non-copyright remedies, notably for the systematic taking of time-sensitive news information. It seems anomalous to conclude on the one hand that member states may provide unfair competition remedies prohibiting internet platforms from *extracting and rewriting* the facts from daily news reports, but on the other hand that member states may not prohibit the systematic extraction of *verbatim* portions of those reports. The latter practice ironically implies less expenditure of resources on the part of the copyist (thus, greater free-riding) than does providing a new account of the copied facts. The practice's insulation from national unfair competition remedies on the ground that the copied expression is copyrightable, but therefore is also mandatorily appropriable, gives the copyist not merely a free ride but first class passage.

Finally, even were member state laws prohibiting news aggregation incompatible with the policies underlying the article 10(1) quotation right, a member state law that instead permits aggregation, but subject to remunerating the authors or the press publisher, may well be consistent with article 10(1). As the authors have posited, with respect to the quotation right's 'fair practice' requirement:

There is no mention in article 10(1) of the possibility of uses taking place pursuant to a compulsory licence, but in principle where a use by way of quotation is remunerated and 'does not exceed that justified by the purpose' . . . this should more readily satisfy the requirement of compatibility with fair practice than would a free use.¹¹⁷

E. National case law and statutes on news aggregation

We have seen that Berne member states Germany and Spain have passed laws prohibiting or requiring compensation for news aggregation. Other member states have reportedly been contemplating similar measures,¹¹⁸ and the European Commission, having acknowledged the 'growing concern about whether the current EU copyright rules make sure that the value generated by some of the new forms of online content distribution is fairly

¹¹⁷ Ricketson and Ginsburg (n 30) [13.41].

¹¹⁸ See, eg, Greg Sterling, 'Sweden the Latest to Consider Google "Link Tax" For Newspapers' (*Search Engine Land*, 10 November 2014) <<http://searchengineland.com/sweden-latest-consider-google-link-tax-207706>> accessed 14 February 2016; Eleonora Rosati, 'An Ancillary Right Over News to be Soon Introduced (Also) Into Spanish Law?' (*IPKat*, 16 February 2014) <<http://ipkitten.blogspot.com/2014/02/an-ancillary-right-over-news-to-be-soon.html>> accessed 14 February 2016 (also discussing possible Italian measures); Nils Rauer, 'Austrian Copyright Reform' (*LimeGreen IP News*, 23 June 2015) <www.limegreenipnews.com/2015/06/austrian-copyright-reform/> accessed 14 February 2016; Nils Rauer, 'Austrian Copyright Reform: No Ancillary Copyright for Publishers' (*LimeGreen IP News*, 9 July 2015) <www.limegreenipnews.com/2015/07/austrian-copyright-reform-no-ancillary-copyright-for-publishers-update/> accessed 14 February 2016.

shared’, is considering ‘whether any action specific to news aggregators is needed, including intervening on rights’.¹¹⁹

In the US, Agence France Presse’s copyright infringement claim against Google News’s aggregation of headlines and initial sentences settled, on undisclosed terms, thus leaving unresolved Google’s contentions that it copied only ‘facts’, or that any copying of expression was fair use.¹²⁰ Extra-copyright claims invoking the tort of misappropriation have not focused on news aggregation, probably because the claim, as devised by the US Supreme Court in *International News Service*,¹²¹ and as interpreted in digital-era case law,¹²² has sought to remedy free-riding competitors’ taking of ‘hot news’ content (that is, of time-sensitive information) in order to ensure that the entity who invested in gathering the news should be the first to disseminate it fully to the public. News aggregators generally do not ‘scoop’ the news source’s dissemination; they do not interfere with the source’s first disclosure of the information to their readers.¹²³ While news aggregators may be free-riders, and their copying may compete with the source sites, their conduct probably does not involve the additional element of time-sensitivity that distinguishes a U.S. ‘hot news’ misappropriation claim from a copyright infringement claim.¹²⁴

VIII. SOME CONCLUDING THOUGHTS

History provides conflicting lessons for those coping with contemporary problems. On the one hand, nothing is ever ‘new’, in the sense that events and circumstances tend to repeat themselves.¹²⁵ On the other hand, it is all too easy to draw misleading analogies from things that look outwardly similar, although widely separated by time, place and other factors.

¹¹⁹ European Commission, ‘Communication From the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Towards a Modern, More European Copyright Framework’ (COM(2015) 626, European Commission 2015) 9–10 <http://ec.europa.eu/newsroom/dae/document.cfm?action=display&doc_id=12526> accessed 15 February 2016.

¹²⁰ Shannon Henson, ‘Google Settles Suit Over News Content’ (*Law360*, 9 April 2007) <www.law360.com/articles/22235/google-settles-suit-over-news-content> accessed 14 February 2016.

¹²¹ *International News Service* (n 11).

¹²² See, eg, *Barclays Capital v Theflyonthewall.com, Inc*, 650 F 3d 876 (2d Cir 2011). The narrow scope left to the ‘hot news’ misappropriation doctrine after the Second Circuit’s copyright preemption analysis has prompted the forecast that the ‘doctrine may well be on the tail-end of its lifecycle’: Shyamkrishna Balganesh, ‘The Uncertain Future of “Hot News” Misappropriation After Barclays Capital v Theflyonthewall.com’ (2012) 112 *Columbia Law Review Sidebar* 134, 145.

¹²³ But see *Associated Press v All Headline Corp*, 608 F Supp 2d 454 (SDNY 2009) (denying a motion to dismiss, the Court recognized AP’s emphasis on ‘timely, breaking news’. In holding that the claim could go forward, the Court gave some support to the argument that All Headline’s aggregation — which differed from the practices of aggregators such as Google News because All Headline published full articles and distributed them to subscribers — included ‘time-sensitive’ materials). The case subsequently settled: see Amanda Ernst, ‘AP Settles “Hot News” Lawsuit with AHN Media’ (*FishbowlNY*, 13 July 2009) <www.mediabistro.com/fishbowlny/ap-settles-hot-news-lawsuit-with-ahn-media_b12121> accessed 15 February 2016. It may also have been superceded by *Flyonthewall* (n 122).

¹²⁴ See *National Basketball Assoc v Motorola*, 105 F 3d 841 (2d Cir 1997) (discussing elements of a misappropriation claim that would survive copyright preemption). For a thorough (and skeptical) consideration of copyright and misappropriation liability under U.S. law for news aggregation, see Robert Denicola, ‘News on the Internet,’ (2012) 23 *Fordham Intell. Prop. Media & Ent. L.J.* 68.

¹²⁵ ‘Those who cannot remember the past are condemned to repeat it’: George Santayana, *The Life of Reason: Introduction and Reason in Common Sense* (Marianne S Wokeck and Martin A Coleman (eds), MIT Press 2011) 172.

As we have seen above, the problems in relation to protection of news that were presented by the advent of the international telegraph in the nineteenth century and the development of internet communications in the late twentieth and early twenty-first centuries seem very similar. On first inspection, there appears to be no satisfactory treatment of these matters under the long established intellectual property conventions, although there have been various unsuccessful attempts to craft some form of special protection for news. Drilling down, however, the problems begin to look somewhat different, and the international solutions less unappealing. If the correct view of the international telegraph was that this was really about temporal concerns and the activity of primary newsgathering, then the abstention of the Berne Convention from intervention appears defensible, both as a matter of principle and policy. It may, however, be regretted that this did not carry into a specific form of unfair competition protection under the Paris Convention, but neither the Paris Convention nor the Berne Convention precluded action at the national level here. Notwithstanding various attempts — at Samedan in 1939 and at Geneva in 1959 — to formulate separate international treaties on the protection of news, this has been left as a matter for national laws to determine for themselves.

By contrast, the activities discussed in the second half of this chapter — news aggregation and dissemination — are qualitatively different, and, unlike news gathering, may attract the application of the international norms of protection and exceptions embodied in the Berne Convention. The scope for the invocation of national unfair competition principles here appears more limited, because the conduct may more often appropriate copyrightable expression. In this situation, while article 10*bis*(1) may provide only limited solace for news aggregators, invocation of the mandatory Berne quotation exception may give rise to what we have suggested above may be an unmerited free ride on their part. On the other hand, everything that goes around comes around again, and the answer to this apparent conundrum may lie in the ‘fair practice’ compatibility requirement of article 10(1) — and in the payment of money, by way of compensation. At the end of the day, the balancing of interests here is not just about rights and freedoms — the rights of owners versus the free flow of information — but is also concerned with adjusting the commercial concerns of the parties involved. Both original news sources and news aggregators perform necessary and important roles in providing news and information to the public — both also profit from these activities. Fairness therefore suggests that both can continue their activities if systematic aggregation is paid for, and this kind of solution is both Berne-compatible and consistent with the role of national (and international) unfair competition regimes.

APPENDIX: PART 4

Addressing the Power Imbalance Between News Publishers and Digital Platforms: A Legislative Proposal for Effectuating Competitive Payments to Newspapers

Hal J. Singer¹

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Introduction and Executive Summary

The purpose of this study is to explore the underpayment to newspapers from Facebook and Google attributable to the power imbalance between individual news publishers and the dominant platforms, and to describe how a pending bill in Congress, the Journalism Competition and Preservation Act (JCPA),² could effectuate competitive payments to news publishers, effectively simulating a world in which the power imbalance were removed. Facebook and Google (the “dominant platforms”) appropriate the value added of news publishers generally—and newspapers specifically³—by reframing articles in rich previews containing headlines, summaries, and photos; and by curating the content alongside advertisements. This reframing and curation decreases the likelihood of a user clicking into the article, thereby depriving news publishers of clicks while enriching the dominant tech platforms.⁴ By exploiting their monopsony power over newspapers, Facebook and Google effectively pay a price of zero for accessing and “crawling” the newspapers’ content.

This study finds that allowing current market forces to dictate the newspapers’ “pay shares”—that is, the portion of platform revenues that redounds to newspaper publishers—ensures that newspapers are compensated at rates significantly below competitive levels. This underpayment results in underemployment of journalists and other news employees, as well as host of social ills associated with local news deserts, including less competent local governments, greater spread of partisanship and misinformation, removal of economic stimulus to

² H. R. 5190 (March 7, 2019), § 3(b)(1)(A).

³ I use the term “news publishers” to refer to any publisher of legitimate news content, through any medium. I use the term “newspapers” to refer to the subset of news publishers in the newspaper industry.

⁴ Damien Cave, *An Australia With No Google? The Bitter Fight Behind a Drastic Threat*, NEW YORK TIMES, Jan. 22, 2021 (citing [Tama Leaver](#), a professor of internet studies at Curtin University in Perth).

local economies, and a reduction in the diversity of viewpoints, particularly among minority populations. The best way to correct this market failure is for the government to permit the news publishers (either newspapers alone, or all news publishers) to coordinate in their dealings with the digital platforms over payment terms and conditions,⁵ as contemplated in the JCPA.

The report is not intended to isolate that portion of the underpayments to news publishers that can be attributable to the platforms' exclusionary conduct. Facebook and Google engage in a host of potentially anticompetitive strategies vis-à-vis news publishers—both within a platform's firm boundaries and across the platform's firm boundaries with third parties—that likely sustain the power imbalance and contribute to the suppression of payments to news publishers. For example, Facebook's algorithm rewards click-worthy stories, an attribute of stories not produced by legitimate news publishers, by moving them to the top of users' news feed.⁶ Facebook also co-mingles sponsored content or ads alongside user-generated content in its news feed, thereby equating the quality of legitimate news and potentially fake news (not all sponsored content is fake news).⁷ Both strategies tend to commodify legitimate news, diminishing its value. Prior to introducing its Instant Articles program, Facebook defaulted users to an in-app browser that degraded the download speeds of news publishers.⁸ News publishers care about download speeds because users are quick to abandon a story that takes too long to download; news publishers can avoid this degradation by complying with Facebook's porting requirement, but at a cost of losing clicks (that would have occurred on their own sites) and thus advertising dollars.⁹ Because legitimate news organizations need advertising revenues to staff reporters and editors, Facebook's

⁵ See, e.g., Sanjutta Paul & Hal Singer, *Countervailing Coordination Rights in the News Sector Are Good for the Public (A Response to Professor Yun)*, COMPETITION POLICY INTERNATIONAL (2019), available at <https://www.competitionpolicyinternational.com/countervailing-coordination-rights-in-the-news-sector-are-good-for-the-public-a-response-to-professor-yun/>.

⁶ Postings with comments and likes on a person's status are given more weight in the Facebook algorithm. See, e.g., *The Facebook Algorithm Explained*, BRANDWATCH, Jan. 9, 2019, available at <https://www.brandwatch.com/blog/the-facebook-algorithm-explained/>. A change to Facebook's algorithm in January 2018 to prioritize content based on audience engagements has been estimated to have decreased referral traffic from Facebook to news publishers' sites by one third. *How Much Have Facebook Algorithm Changes Impacted Publishers?*, MARKETING CHARTS, Apr. 4, 2019, available at <https://www.marketingcharts.com/digital/social-media-107974>.

⁷ Christopher Mims, *Facebook Is Still In Denial About Its Biggest Problem*, WALL STREET JOURNAL, Oct. 1, 2017 ("On a network where article and video posts can be sponsored and distributed like ads, and ads themselves can go as viral as a wedding-fail video, there is hardly a difference between the two."), available at <https://www.wsj.com/articles/facebook-is-still-in-denial-about-its-biggest-problem-1506855607>.

⁸ Sally Hubbard, *Why Fake News Is an Antitrust Problem*, FORBES, Jan. 10, 2017, available at <https://www.forbes.com/sites/washingtonbytes/2017/01/10/why-fake-news-is-an-antitrust-problem/?sh=70b171930f1e> ("In a test by The Capitol Forum, Facebook's in-app browser loaded on average three seconds slower than regular Safari on iOS. Studies show that 40 percent of desktop users and 53 percent of mobile users abandon websites that take more than three seconds to load.").

⁹ See Ryan Mack, *Facebook Said It's Developing A Tool To Read Your Brain*, BUZZFEED NEWS, Dec. 15, 2020, available at <https://www.buzzfeednews.com/article/ryanmac/facebook-news-article-summary-tools-brain-reader>.

policies discriminate in favor of intentionally fabricated news, which has only minimal quality and managerial costs, and against legitimate news. In December 2020, Facebook unveiled an AI assistant tool called “TLDR,” which reportedly “could summarize news articles in bullet points so that a user wouldn’t have to read the full piece,” further depriving news publishers of traffic.¹⁰ Although Facebook has yet to release it, the new tool reportedly could also provide audio narration,¹¹ which conveniently would not include a link to the original article.

Google employs a different set of potentially anticompetitive strategies against news publishers. For example, it inserts snippets of news stories from legitimate news sites on its search results page, which induces some users to forgo clicking on the link and thereby deprives news sites of clicks and the associated advertising revenues.¹² Like Facebook, Google also aggregates news sources with and without editorial oversight; such commodification (or “atomization”) of news can also cause reputational harm to news publishers by signaling no quality difference between replicators of news and the original source.¹³ Google’s placement of news on accelerated mobile pages (AMP) required the creation of costly and otherwise unnecessary parallel websites by publishers that are hosted, stored and served from Google’s servers rather than the publishers.¹⁴ To the extent that Google and news publishers are horizontal competitors for the same readership and advertisers, this conduct can be understood as a form of raising rival’s costs.¹⁵ When a publisher attempts to avoid this AMP-related incremental cost by moving its content behind a paywall, its rise in subscriptions is offset by declines in traffic from Google and other platforms.¹⁶

According to a complaint filed by ten state attorneys general in December 2020, Google and Facebook conspired to prevent the ascendancy of a process called “header bidding,” which was used by news publishers as a workaround to reduce their reliance on Google’s ad platforms and thereby capture a larger pay share on their sites.¹⁷ In particular, header bidding permitted news publishers to solicit bids

¹⁰ Facebook appears to reward content that appears on Instant Articles. *See id.* (“According to Facebook, users click on Instant Articles 20 percent more than other articles, and they share Instant Articles 30 percent more than mobile web articles on average.”).

¹¹ *Id.*

¹² Majority Staff Subcommittee on Antitrust, Commercial and Administrative Law, Investigation of Competition in Digital Markets, Oct. 2020, at 70 (discussing Google’s incentives to minimize outbound referrals) [hereafter *Majority Report*], available at https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf.

¹³ *Id.* at 309.

¹⁴ *Id.* at 308.

¹⁵ Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals’ Costs To Achieve Power Over Price*, 96 YALE L.J. 209 (1986).

¹⁶ *Majority Report* at 308 (citing News Media Alliance white paper). Some news publishers assert that this practice results in inferior rankings in search results as compared to other search platforms.

¹⁷ Complaint, *The State of Texas, et al. v. Google LLC*, (E.D. Tex.) ¶¶9-14 (filed Dec. 16, 2020) [hereafter *Texas Complaint*]. *See also* Daisuke Wakabayashi and Tiffany Hsu, *Behind a Secret Deal Between Google and Facebook*, NEW YORK TIMES, Jan. 17, 2021, available at

for ad placements from multiple ad exchanges at once. In March 2017, Facebook announced it was testing a header-bidding program with several major publishers; but by September 2018, those plans were abandoned, as Google and Facebook entered into an agreement not to compete for news publishers.¹⁸ As part of the agreement, Facebook allegedly received special information and speed advantages to help it succeed in the auctions, as well as a guarantee that Facebook would win a fixed percentage of auctions that it bid on, in what appears to be a market-allocation scheme.¹⁹

Although these strategies and restraints are consistent with the claim that Facebook and Google enjoy monopsony power vis-à-vis news publishers,²⁰ and although they likely support the platforms' ability to underpay news publishers, isolating the incremental harms flowing from a *particular* anticompetitive restraint is outside the scope of this report.²¹ In contrast to an antitrust matter, which would focus on a set of restraints, this report focuses on the underpayments to news publishers flowing from the power imbalance between the platforms and individual news publishers *generally*, whether achieved by natural barriers or artificial barriers (restraints) or some combination of the two. In a competitive input market for online news content, where news publishers enjoyed free agency and could play one platform against another, payments to news publishers would approach the incremental contribution of news publisher content (legitimate news) to the platforms' advertising revenues.

This report is organized as follows. **Part I** assesses the significant buying (monopsony) power of Facebook and Google in the acquisition of news publisher content generally. Monopsony is the flip side to monopoly, or selling power in the output market. The relevant question here is whether Facebook or Google (or both) possess monopsony power in the acquisition of news content for their respective

<https://www.nytimes.com/2021/01/17/technology/google-facebook-ad-deal-antitrust.html?referringSource=articleShare>.

¹⁸ *Behind a Secret Deal*, *supra*.

¹⁹ *Id.*

²⁰ Other regulators have found that Facebook and Google enjoy significant buying power vis-à-vis newspapers. *See, e.g.*, Australian Competition & Consumer Commission, Draft News Media Bargaining Code, Q&As: Draft news media and digital platforms bargaining code, *available at* <https://www.accc.gov.au/focus-areas/digital-platforms/draft-news-media-bargaining-code> (“The code seeks to address the fundamental bargaining power imbalance between Australian news media businesses and major digital platforms.”).

²¹ Indeed, the Department of Justice and Federal Trade Commission recently sued Google and Facebook, respectively, under the antitrust laws, alleging restraints in support of monopolization in some of the same markets (such as advertising and search advertising) as those studied here. Complaint, U.S. et al. v. Google LLC, Oct. 20, 2018, ¶1 (“For many years, Google has used anticompetitive tactics to maintain and extend its monopolies in the markets for general search services, search advertising, and general search text advertising—the cornerstones of its empire.”) [hereafter *Google Complaint*]; Complaint, Federal Trade Commission v. Facebook Inc., Dec. 9, 2020, ¶28 [hereafter *Facebook Complaint*] (“By monopolizing personal social networking, Facebook thereby also deprives advertisers of the benefits of competition, such as lower advertising prices and increased choice, quality, and innovation related to advertising.”).

platforms. As it turns out, for many of the same reasons that end users and advertisers lack substitution opportunities to Facebook and Google, input providers such as merchants (for Amazon), app developers (for Apple and Google) and news publishers (for Google and Facebook) lack substitution possibilities, and thus are beholden to these platforms. The input providers are chasing the set of customers assembled by the platforms; by locking in customers, the platforms simultaneously lock in the suppliers. Accordingly, evidence of Facebook's and Google's selling power in their respective output markets is also evidence of their buying power in their respective input markets. The platforms' massive buying power can be demonstrated *indirectly*, via evidence of high market shares combined with high barriers to entry. For example, Facebook and Google accounted for over half of U.S. digital display advertising in 2019;²² combined shares in excess of 50 percent are consistent with collective market power under U.S. antitrust jurisprudence. Buying power also can be proven *directly* via evidence of payments below competitive levels or the ability to exclude rivals. Direct evidence of the platforms' buying power includes: (1) payments to news publishers significantly below competitive levels, (2) news publishers are compelled to accept these take-it-or-leave-it terms by the platforms, indicating the power imbalance; (3) the platforms have used exclusive agreements with third parties to exclude horizontal rivals, and they have prevented rivals from acquiring news content via acquisition.

Part II explores how payments to newspapers would be measured in a "but-for" world where the platforms' buying power were removed, thereby making the news content (input) market competitive. Economic theory dictates that in competitively supplied input markets, input providers tend to capture 100 percent of their marginal revenue product (MRP). Fortunately, the three measures of incremental revenue generated by newspapers for the platforms serve as a reasonable approximation for the newspapers' collective MRP. By compelling the dominant platforms to pay newspapers the fair-market value of their value added, Congress could replicate payments to news publishers in a world absent Google and Facebook's buying power. Newspapers are a "must-have" input for the platforms, as news drives most of the conversation. Must-have inputs, such as broadcasting and sports networks, command something closer to their MRP, as their selling power counteracts a portion of cable's buying power. These must-have input providers capture pay shares of between seven and eleven percent of the cable operators' total revenue; pay shares that vastly exceed the pay shares currently captured by newspapers from Google and Facebook.

In **Part III**, I assess the myriad social harms of newspapers not receiving competitive compensation. The news industry has incurred losses in advertising revenue every year since 2006,²³ around the time that the platforms solidified their

²² eMarketer, Leading Digital Display Ad Sellers in the US, June 2020, *available at* <https://www.emarketer.com/chart/238193/leading-digital-display-ad-sellers-us-by-net-revenue-share-2019-2022-of-us-digital-display-ad-spending>

²³ *Id.*

market power over digital advertising. This is not to say that Facebook’s and Google’s domination of digital advertising came entirely at the expense of newspapers. Rather, it is to provide context as to how *any* underpayment to newspapers can exacerbate an environment that is already quite dire. The effect of shrinking advertising revenues—in part caused by underpayment from dominant platforms—is less cash flow to support journalists, a clear employment effect flowing from the exercise of monopsony power by the dominant platforms. Employment among newspaper employees fell from 71,000 in 2008 to 31,000 in 2020.²⁴ As a result of the deteriorating news media landscape described above, hundreds of local newspapers have been acquired or declared bankruptcy.²⁵ The elimination of local news threatens democracy. Another critical role of traditional news outlets is providing fact-based journalism in the face of disinformation campaigns. The reduction in traditional newspapers has coincided with more Americans using social media platforms to access news. Moreover, the negative employment trends among newspapers, exacerbated by underpayments from the dominant platforms, can have ripple effects throughout local economies. When reporters, correspondents, and broadcasts news analysts, along with the other supporting employees at a publishing firm, lose their jobs, they lose incomes to spend at grocers, restaurants, and other local businesses. This reduction in spending can have a multiplier effect that ripples throughout a local economy and removes stimulus that was once there. Finally, there are also social harms of news publisher closure on a community, including the lack of social cohesion and a reduction in the diversity of viewpoints.

These findings support a proportionate intervention to effectuate competitive payments to newspapers and thereby mitigate these social harms.²⁶ At a high level, and as contemplated by the JCPA, the solution to the power imbalance is to permit newspapers to collectively bargain for payments from platforms, with voluntary negotiations between the platform and newspaper collective, followed by, if necessary, an adequate enforcement mechanism that ensures equitable payment to all news publishers. **Part IV** provides a prebuttal of anticipated economic criticisms of this proposal. Detractors from this proposal, including but not limited to the platforms, will likely argue that: (1) This effort is meant to enrich the largest newspapers; (2) it is better to attack platform power with antitrust intervention; and (3) newspapers derive significant value via referrals from platforms, which

²⁴ Mason Walker, U.S. newsroom employment has fallen 26% since 2008, Pew Research Center, July 13, 2021, available at <https://www.pewresearch.org/fact-tank/2021/07/13/u-s-newsroom-employment-has-fallen-26-since-2008/>.

²⁵ Penelope Muse Abernathy, Univ. N.C. Sch. Of Media And Journalism, *The Expanding News Desert* 33 (2018), available at https://www.cislm.org/wp-content/uploads/2018/10/the-expanding-news-desert-10_14-web.pdf.

²⁶ Social harms are a form of “negative externalities”: costs not fully borne by parties to the transactions at issue—the news publishers and dominant tech platforms—but instead by society at large. Degradation in fact-based news coverage has been found to impose substantial long-term costs to society. See, e.g., Roberto Cavazos, *The Economic Cost Of Bad Actors On The Internet: Fake News In 2019*, available at <https://www.cheq.ai/fakenews> (estimating that “the epidemic of online fake news is costing the global economy \$78 billion each year.”).

should be deducted from the value added by newspapers to platforms when determining compensation. I address each of these arguments and explain why they are not persuasive as a matter of economics or competition policy.

I. Google and Facebook Possess Significant Buying Power in the Acquisition of Newspaper Content

Monopsony, or buying power in the input market, is the flip side to monopoly, or selling power in the output market. Some firms, like single-company towns, might enjoy power on the buying side for labor, but lack selling power in any output market. Other firms, like Apple, might enjoy selling power in the sale of laptops due to brand prestige, but lack buying power over office supplies or any other standard inputs used by thousands of other firms. And still other firms possess both buying power and selling power. The relevant question here is whether Facebook or Google (or both) possess monopsony power in the acquisition of news content for their respective platforms. As it turns out, for many of the same reasons that end users and advertisers lack substitution opportunities to Facebook and Google, input providers such as merchants (for Amazon), app developers (for Apple and Google) and news publishers (for Google and Facebook) lack substitution possibilities, and thus are beholden to these platforms. The input providers are chasing the set of customers assembled by the platforms; by locking in customers, the platforms simultaneously lock in the suppliers. Accordingly, evidence of Facebook's and Google's selling power in their respective output markets is also evidence of their buying power in their respective input markets.

A. Indirect Measures of Buying Power: High Market Shares and Barriers to Entry

In April 2020, Facebook and other social media groups were a source of news for 47 percent of Americans, and 73 percent reported getting news from any online source (including from social media).²⁷ Indeed, Facebook has become the world's most popular source of news.²⁸ According to testimony submitted to the Antitrust Judiciary Subcommittee, news publishers feel extremely beholden to Google and Facebook for accessing viewers and advertisers.²⁹ The Judiciary Report concludes that "several dominant firms have an outsized influence over the distribution and monetization of trustworthy sources of news online, undermining the availability of high-quality sources of journalism."³⁰ A small change in an

²⁷ Oxford University's Reuters Institute for the Study of Journalism, Digital News Report 2020, at 10 available at https://reutersinstitute.politics.ox.ac.uk/sites/default/files/2020-06/DNR_2020_FINAL.pdf.

²⁸ Farhad Manjoo, *The Frightful Five Want to Rule Entertainment. They Are Hitting Limits*, NEW YORK TIMES, Oct. 11, 2017, available at <https://www.nytimes.com/2017/10/11/technology/the-frightful-five-want-to-rule-entertainment-they-are-hitting-limits.html>.

²⁹ *Majority Report* at 62.

³⁰ *Id.* at 62-63.

algorithm by either platform can materially decrease traffic to news publishers sites.³¹

In interviews with staff of the Judiciary Antitrust Subcommittee, “numerous businesses described how dominant platforms [including Google and Facebook] exploit this gatekeeper power to dictate terms and extract concessions that third parties would not consent to in a competitive market.”³² News publishers in particular testified that “dominant firms can impose unilateral terms on publishers, such as take-it-or-leave-it revenue sharing agreements.”³³ This evidence is consistent with monopsony power. In addition to the House Antitrust Subcommittee, which found Facebook is a monopolist over social networks, the UK’s Competition and Markets Authority (CMA),³⁴ the UK’s House of Lords,³⁵ Germany’s Federal Cartel Office,³⁶ and the Australian Competition and Consumer Commission (ACCC)³⁷ have all found Facebook enjoy monopoly power in the output market for social networks. Indeed, the ACCC concluded that Facebook and Google have significant buying power over the distribution of news online: “Google and Facebook are the gateways to online news media for many consumers.”³⁸

As demonstrated below, buying power can be proven directly via evidence of payments below competitive levels or the ability to exclude rivals. Buying power can also be demonstrated indirectly, via evidence of high market shares combined with high barriers to entry.

³¹ *Id.* at 63.

³² *Id.* at 39.

³³ *Id.* at 64 (citing Submission of Source 140).

³⁴ Competition & Mkts. Auth., Online Platforms and Digital Advertising, Market Study Final Report 26 (July 1, 2020) (finding that Facebook’s “market power derives in large part from strong network effects stemming from its large network of connected users and the limited interoperability it allows to other social media platforms.”).

³⁵ House of Lords Communications and Digital Committee, *Breaking News? The Future of UK Journalism*, 1st Report of Session 2019–21 (HL Paper 176) (Nov. 19, 2020) (“This change in the business model of journalism has created an existential threat to the industry, particularly combined with a host of other challenges ranging from a surge in ‘fake news’ to the ability of giant technology platforms such as Facebook and Google to undercut the power of publishers and their revenues.”) available at <https://committees.parliament.uk/publications/3707/documents/36111/default/>.

³⁶ See Bundeskartellamt, B6-22/16, Case Summary, Facebook, Exploitative business terms pursuant to Section 19(1) GWB for inadequate data processing, 8 (Feb. 15, 2019) (“The facts that competitors can be seen to exit the market and that there is a downward trend in the user-based market shares of the remaining competitors strongly indicate a market tipping process which will result in Facebook.com becoming a monopolist.”), available at https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=4.

³⁷ Austl. Competition & Consumer Comm’n Report at 9; 78.

³⁸ *Id.* at 226.

1. High Market Shares

In a competitive market for online search, news publishers could play one platform against another in an effort to extract as high a payment as possible for their input (legitimate news). But there are simply no other viable alternatives, as Google controls the vast majority of searches, and thus eyeballs. As of July 2020, Google accounted for a combined 89 percent of the U.S. desktop search (81 percent) and mobile search (94 percent) markets.³⁹ Impressively, Google has built upon this market share for more than a decade:⁴⁰ A 2009 internal Google document estimated Google's share of general search in the United States to be 71.5 percent, followed by Yahoo with 17.0 percent, and Bing with 7.5 percent.⁴¹ The United Kingdom's CMA estimated that, as of mid-2020, Google's index of the web is three to five times the size of Bing's.⁴² Google's dominance in online search gives it dominance over the search advertising market: As of 2019, Google controlled nearly three quarters of the search advertising market.⁴³

Similarly, Facebook (including its acquisitions of Instagram and WhatsApp) is by far the most popular social networking platform on the planet. As of December 2019, Facebook had 1.8 billion monthly active persons (MAP), WhatsApp had 2.0 billion MAP, and Instagram had 1.4 billion MAP.⁴⁴ Its closest social networking competitors had far fewer monthly active users: Snapchat had 443 million MAP, Twitter had 582 million MAP, and LinkedIn had 260 million MAP.⁴⁵ Facebook reports 2.5 billion daily active users across its family of social networking platforms.⁴⁶ According to an internal report obtained by the House Subcommittee, from September 2017 to September 2018, Facebook alone reached more than 75 percent of U.S. Internet users.⁴⁷ Based on Facebook's production to the

³⁹ *Id.* at 78 (citing Desktop & Mobile Search Engine Market Share United States Of America, January 2009 to September 2020, Statcounter, available at <https://gs.statcounter.com/search-engine-market-share/desktop-mobile/unitedstates-of-america/#monthly-200901-202009>).

⁴⁰ *Id.* at 177.

⁴¹ *Id.* at 179 (citing Marissa Mayer email).

⁴² Competition & Mkts. Auth. Report at 89.

⁴³ Megan Graham, *Amazon Is Eating into Google's Most Important Business: Search Advertising*, CNBC (Oct. 15, 2019), available at <https://www.cnbc.com/2019/10/15/amazon-is-eating-into-googles-dominance-in-search-ads.html>).

⁴⁴ *Majority Report* at 132.

⁴⁵ *Id.* at 92. The House Report does not consider TikTok to be a social media platform. *Id.* at 93 ("Although it meets the broad definition of social media as a social app for distributing and consuming video content, TikTok is not a social network."). And LinkedIn has been relegated to a "niche strategy" of appealing to professional connections. *Id.* at 91. It bears noting that the FTC's recent antitrust complaint against Facebook does not include LinkedIn in the relevant market definition. *Facebook Complaint* ¶ 58 ("Personal social networking is distinct from, and not reasonably interchangeable with, specialized social networking services like those that focus on professional connections."). I nonetheless reference LinkedIn's statistics here to be over-inclusive.

⁴⁶ *Id.* at 132.

⁴⁷ *Id.* at 137 (citing Cunningham Memo).

Subcommittee, social media users spent more time on Facebook (48.6 minutes per day) than on Snapchat (21 minutes) or Twitter (21.6 minutes) in 2018.⁴⁸

The two platforms monetize access to their users via the sale of advertising. Given their control over end users, the market for digital advertising also is highly concentrated. According to eMarketer, Facebook accounted for 42.2 percent U.S. digital display advertising in 2019, while Google accounted for 10.6 percent.⁴⁹ The UK's CMA similarly found that Facebook and Instagram generated over half of display advertising revenues in 2019 in the United Kingdom.⁵⁰ Combined shares in excess of 50 percent are consistent with collective market power under U.S. antitrust jurisprudence.⁵¹ Moreover, their combined shares are growing: As of 2017, Google and Facebook accounted for 99 percent of year-over-year growth in U.S. digital advertising revenue.⁵² According to Morgan Stanley, in the first quarter of 2016, 85 cents of every new dollar spent in online advertising went to Google or Facebook.⁵³ This level of dominance implies that the two platforms can push down payments to news publishers below competitive levels.

Facebook and Google have leveraged their platform power into vertical markets that match advertisers to publishers, formerly occupied by independent “ad tech” intermediaries such as LiveRamp. CMA estimates that Google captures over 50 percent of the search and digital display advertising market across the ad tech stack.⁵⁴ This power over the ad tech stack allows Google to exercise buying power

⁴⁸ *Id.* at 138.

⁴⁹ eMarketer, Leading Digital Display Ad Sellers in the US, June 2020, available at <https://www.emarketer.com/chart/238193/leading-digital-display-ad-sellers-us-by-net-revenue-share-2019-2022-of-us-digital-display-ad-spending>

⁵⁰ Competition & Mkts. Auth. Report at 10.

⁵¹ The concept of collective market power is well-understood in antitrust. *See, e.g.*, Remarks of J. Thomas Rosch Commissioner, Federal Trade Commission, June 1, 2009 (“But firms who are participants in a duopoly or a tight oligopoly market collectively enjoy power that is akin to monopoly power in the sense that they have the power to increase prices and reduce output in the market as a whole.”); Daniel Crane, 90 *Market Power Without Market Definition*, NOTRE DAME LAW REV. 31-79 (2014) (“The Justice Department’s high-profile case against Apple²²⁰ and five major book publishers concerning e-book pricing rests on seemingly obvious evidence of the exercise of collective market power creating anticompetitive effects.”); Einer Elhauge, *How Horizontal Shareholding Harms Our Economy—And Why Antitrust Law Can Fix It*, HARVARD BUS. LAW. REVIEW 207-286 (2020) (“To whatever extent one thinks managers do pay attention to vote share or re-election odds, this new economic analysis mathematically proves that prices will be increased by high levels of horizontal shareholding across a set of firms that have collective market power.”).

⁵² Alex Heath, *Facebook and Google Completely Dominate the Digital Ad Industry*, BUSINESS INSIDER, Apr. 26, 2017, available at <https://www.businessinsider.com/facebook-and-google-dominate-ad-industry-with-a-combined-99-of-growth-2017-4/>; Sarah Sluis, *Digital Ad Market Soars To \$88 Billion, Facebook And Google Contribute 90% Of Growth*, AD EXCHANGER (May 10, 2018), <https://adexchanger.com/online-advertising/digital-ad-market-soars-to-88-billion-facebookand-google-contribute-90-of-growth>.

⁵³ John Herrman, *Media Websites Battle Faltering Ad Revenue and Traffic*, NEW YORK TIMES, Apr. 17, 2016, available at https://www.nytimes.com/2016/04/18/business/media-websites-battle-falteringad-revenue-and-traffic.html?_r=0.

⁵⁴ Competition & Mkts. Auth. Report at 10.

vis-à-vis all publishers, including news publishers, as noted at the Senate Judiciary Committee Hearing in September 2020.⁵⁵ And in December 2020, ten states brought an antitrust suit against Google alleging monopolization of the ad tech stack.⁵⁶ The House Antitrust Judiciary Subcommittee attributes these high shares of digital advertising to high barriers to entry, specifically to behavioral data online, which can be used in targeted advertising; advertisers can only access these data through engagement with Facebook’s and Google’s ad tech.⁵⁷ Their advantage also derives from the aforementioned network effects—the larger the platform, the more efficient for the advertiser who can measure frequency to particular consumers and can buy larger segments efficiently.

2. Barriers to Entry

The discussion in the Introduction pertained to artificial barriers to entry or tactics employed by the dominant platforms, some of which likely contribute to the power imbalance between platforms and news publishers. Other barriers to entry that limit outside options for news publishers derive from natural forces. For example, Facebook and Google enjoy strong network effects that keep would-be rival social network platforms at bay. As the number of users on Google’s online search platform increases, advertisers gain access to a larger trove of consumer data, which cannot be offered by a rival. And as more users engage with Facebook’s social network, rival social networks have a harder time attracting customers, as no one wants to be alone on a network. Social network platforms must attract a critical mass of users to become attractive to advertisers.⁵⁸ Social *network* platforms “facilitate their users finding, interacting, and networking with other people they already know online;” in contrast, social *media* platforms “facilitate the distribution and consumption of content.”⁵⁹ Unlike a social media sites such as YouTube, social *network* platforms have a “robust social graph” connecting content among a group of friends—that graph is extremely difficult to assemble for a social networking entrant.⁶⁰ Accordingly, the Majority Report concludes that YouTube and other social *media* sites do not compete against Facebook in any meaningful sense.

Switching costs also prevent competition for these platforms vis-à-vis news publishers. Facebook’s users cannot take their photos and personal information to an upstart.⁶¹ Google and Facebook also enjoy strong data advantages arising from their incumbency, providing further user lock-in.⁶² Because website performance degrades with additional “crawlers” obtaining data to create a webpage index, most

⁵⁵ Stacking the Tech: Has Google Harmed Competition in Online Advertising? Hearing Before S. Subcomm. on Antitrust and Consumer Rights of the S. Comm. on the Judiciary, 116th Cong. (2019).

⁵⁶ *Texas Complaint, supra*.

⁵⁷ *Majority Report* at 131.

⁵⁸ *Id.* at 89.

⁵⁹ *Id.* at 91.

⁶⁰ *Id.* at 91.

⁶¹ *Id.* at 144 (citing Omidyar Network Report and Production of Facebook).

⁶² *Id.* at 43-44.

websites only allow one crawler, which is Google’s “Googlebot,” blocking any new search engine crawler.⁶³ The only English-language search engines that maintain their own comprehensive webpage index are Google and Bing; Yahoo and DuckDuckGo purchase access to the index from Google or Bing.⁶⁴ Finally, online search and social networking markets are prone to tipping towards monopoly because incumbents can exploit economies of scale and scope. Facebook can spread its fixed costs over a billion worldwide monthly active users,⁶⁵ a massive scale economy. Because Google offers complementary services in addition to general search (e.g., maps, local business answers, news, images, videos, definitions, and “quick answers”), Google enjoys additional scope economies; a rival search engine would have to offer a similar suite of products to compete effectively.

B. Direct Measures of Monopsony Power: Ability to Push Payments to Publishers Below Competitive Levels or Exclude Rival Search Engines (Google) or Rival Social Network Platforms (Facebook)

At the Judiciary Antitrust Subcommittee’s sixth hearing, Rep. Pramila Jayapal (D-WA) noted that Google’s control over both the buy-side and sell-side of the ad stack allowed Google to “set rates very low as a buyer of ad space from newspapers, depriving them of their ad revenue, and then also to sell high to small businesses who are very dependent on advertising on your platform.”⁶⁶ In Part II.C., I review the actual payments and offers made by Facebook and Google to newspapers to date; that the two platforms are able to impose payments significantly below competitive levels (in many cases, a payment of zero) and below the pay shares for other “must-have” input providers in comparable industries is direct evidence of their monopsony power.

In 2020, the ACCC found that the power imbalance between platforms and news publishers has “resulted in news media businesses accepting *less favourable* terms for the inclusion of news on digital platform services than they would otherwise agree to.”⁶⁷ That news publishers are compelled to accept these take-it-

⁶³ *Id.* at 79 (citing research by Zack Maril).

⁶⁴ *Id.* at 79.

⁶⁵ Statista, Leading Countries Based on Facebook Audience Size as of October 2020, *available at* <https://www.statista.com/statistics/268136/top-15-countries-based-on-number-of-facebook-users/> (estimating 2.7 billion monthly active users worldwide and 190 million in the United States). The House Judiciary Committee estimates Facebook has 1.8 billion “monthly active persons” (MAPs), not including the MAPs of Instagram and WhatsApp. *Majority Report* at 92 (“The social network marketplace is highly concentrated. Facebook (1.8 billion users) and its family of products—WhatsApp (2.0 billion users), Instagram (1.4 billion users)— have significantly more users and time spent on its platform than its closest competitors, Snapchat (443 million users) or Twitter (582 million users).”).

⁶⁶ CEO Hearing Transcript at 169 (Rep. Pramila Jayapal (D-WA), Member, Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm on the Judiciary).

⁶⁷ AUSTRAL. COMPETITION & CONSUMER COMM’N, DRAFT NEWS MEDIA BARGAINING CODE, July 31, 2020, *available at* <https://www.accc.gov.au/focus-areas/digital-platforms/draft-news-media-bargaining-code> (emphasis added).

or-leave-it terms is also consistent with the claim that platforms' enjoy significant buying power; if news publishers had alternative pathways to advertisers and viewers, and if other parameters of the contract such as pricing were held constant, they might not accept these "less favorable" terms.

Another form of direct evidence of monopsony power is the ability to exclude rival platforms, which would otherwise put upward pressure on payments to news publishers. Google has used exclusive agreements to ensure its prime real estate on the browser and home page of the mobile user screen. In particular, Google imposed exclusionary terms in contracts effectively requiring phone and tablet makers that used its Android operating system to pre-install both Chrome and Google Search.⁶⁸ Among desktop browsers, Google Search enjoys default placement in 87 percent of browsers, equal to the sum of Chrome (51 percent of the U.S. browser market), Safari (31 percent), and Firefox (5 percent).⁶⁹ Among mobile phones, Google Search is the default on Android and on Apple's iOS mobile operating system, accounting for nearly all smartphones in the United States.⁷⁰ According to the House Subcommittee's review, as well as antitrust analyses,⁷¹ Google conditioned access to the Google Play Store on Android devices on making Google Search the default search engine, a requirement that gave Google a significant advantage over competing search engines; Google also used revenue-sharing agreements to establish default positions on Apple's Safari browser (on both desktop and mobile) and Mozilla's Firefox.⁷² In October 2020, the Department of Justice Antitrust Division commenced litigation to challenge several of those exclusionary agreements.⁷³

The platforms also excluded rivals from acquiring news content via acquisition. Facebook acquired two large rival social network platforms, Instagram in 2012 and WhatsApp in 2014. According to internal documents produced to the House Subcommittee, Facebook "acquired firms it viewed as competitive threats to protect and expand its dominance in the social networking market."⁷⁴ Similarly, Google acquired DoubleClick in 2007 and AdMob in 2010 in their infancies, both of whom could have evolved into serious horizontal rivals to Google in the market for

⁶⁸ *Majority Report* at 177.

⁶⁹ *Id.* at 81.

⁷⁰ *Id.* at 82.

⁷¹ Benjamin G. Edelman & Damien Geradin, *Android and Competition Law: Exploring and Assessing Google's Practices in Mobile*, 12 EUROPEAN COMPETITION JOURNAL 159-194 (2016) ("... Google's MADA strategy leverages the company's market power in certain services and apps for which there is no clear substitute (most notably Google Play and YouTube) in order to compel device manufacturers wishing to manufacture commercially-viable devices to install other services and apps (including Google Search and Google Maps) for which there are substitutes. This is a clear case of tying.").

⁷² *Majority Report* at 82.

⁷³ Complaint, U.S. v. Google, Case 1:20-cv-03010, Oct. 20, 2020, available at <https://www.justice.gov/opa/press-release/file/1328941/download>.

⁷⁴ *Majority Report* at 149.

digital advertising; indeed, DoubleClick arguably had reached significant scale to impose meaningful price discipline on Google at the time of its acquisition.⁷⁵

Potential horizontal competitors to Facebook often enter as a complement to Facebook's offering by relying on the Facebook's application programming interfaces (APIs) called Facebook's Open Graph. When Facebook detects that an app is too close of a substitute or presents a threat to Facebook's monopoly, it can deny access to its API to foreclose competition. For example, Facebook restricted API access to Pinterest, a visual discovery engine for finding ideas like recipes or style inspiration, and Facebook's CEO admitted that Pinterest was a competitor to Facebook during the House hearings.⁷⁶ Internal documents reveal that Facebook perceived that Vine, a video-sharing app acquired by Twitter, had "replicated Facebook's core News Feed functionality," and cut off Vine's access to Facebook APIs;⁷⁷ Twitter shuttered the app in 2016. Other perceived rivals that lost access to Facebook's API include MessageMe (competing with Facebook Messenger) and Arc (competing with Facebook).⁷⁸

Similarly, the most likely horizontal competitors to Google's search, such as local restaurant reviews, begin as complements in vertical search. When Google spies a potential threat, it can invade the vertical space and use its gatekeeping power to steer searches to its affiliated clone. Not only is this strategy effective at extending its monopoly into the edge for vertical search, but also at preserving its monopoly in general search. Google also demanded that certain verticals permit Google to scrape their user-generated content,⁷⁹ further impairing competition.

II. Newspapers Would Capture Nearly All of Their Incremental Revenue Contribution in the Absence of the Platforms' Buying Power

This section demonstrates, using economic theory, that newspapers would capture something close to their MRP in the absence of Facebook's and Google's buying power. Using standard economic principles, I show how a buyer of news, such as Facebook or Google, can still earn substantial profit from the deployment of news, even when it obliged to compensate newspapers at a competitive rate, defined by the MRP.

⁷⁵ See, e.g., Robert Hahn & Hal Singer, An Antitrust Analysis of Google's Proposed Acquisition of DoubleClick, AEI-Brookings Joint Center Related Publication No. 07-24, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1016189.

⁷⁶ Hal Singer, *Top 10 Admissions from Tech CEOs Secured at the Antitrust Hearing*, PROMARKET, July 30, 2020.

⁷⁷ *Majority Report* at 167.

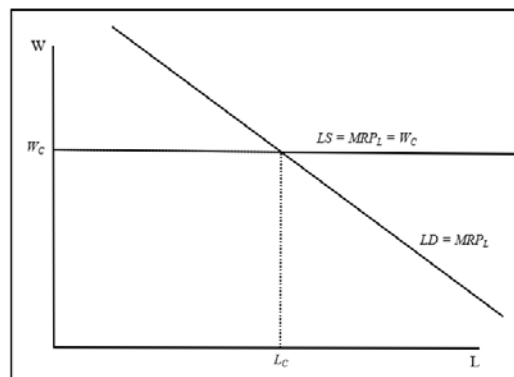
⁷⁸ *Id.* at 168-69.

⁷⁹ *Id.* at 84.

A. Payments to Input Providers Under Competitive Conditions

Under competitive conditions, standard economic models predict that each input to production receives compensation (the “factor price”) equal its MRP, which in turn predicts the share of revenue paid to that input.⁸⁰ As illustrated in Figure 1 below, a firm that lacks monopsony power faces a *horizontal* (or “perfectly elastic”) supply curve for each factor of production. For example, if the factor in question is labor—meaning that the employer is buyer—and if the employer faces a perfectly competitive labor market, then the employer takes the market wage as given, and can hire as much labor as it requires at the market wage, w_c . Accordingly, the price of labor cannot be affected by changes in the quantity demanded (purchased) by the employer, LD . As illustrated in Figure 1, the buyer has a downward-sloping demand curve for the factor of production, reflecting declining marginal productivity as more and more of the factor is used. As long as the demand curve for the factor is above the (horizontal) supply curve, it is economically rational for the employer to continue purchasing more of the factor, because the marginal benefits of doing so exceed the marginal costs.

FIGURE 1: COMPETITIVE (“PERFECTLY ELASTIC”) FACTOR SUPPLY CURVE



The same principles apply to any perfectly fungible, competitively supplied factor of production, such as paper clips: Virtually any businesses can presumably purchase as many perfectly interchangeable paper clips as it requires at the market price. Because the supply of paperclips is (from the point of view of any individual buyer) effectively unlimited, an individual business cannot bid up the market price of paperclips by purchasing “too many” of them, nor can it suppress the market price of paperclips by purchasing “too few.”

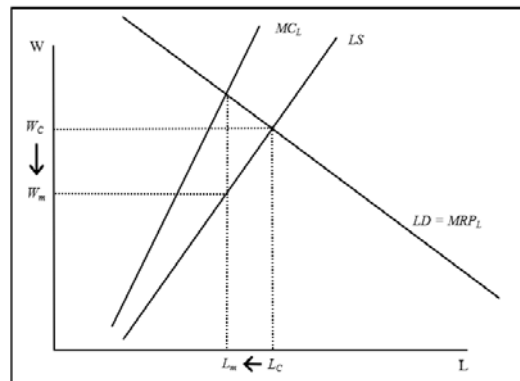
⁸⁰ Elementary economics shows that competitive firms pay labor a share of revenue commensurate with labor’s productivity, based on the marginal product of labor. *See, e.g.,* ROY RUFFIN & PAUL GREGORY, PRINCIPLES OF MICROECONOMICS 331-36 (Harper Collins 5th ed. 1993) (explaining that standard economic theory makes predictions regarding the share of payments made to labor that are borne out in the data; economic theory explains why the share of payments going to labor remained relatively constant over several decades (from 1948 to 1990) even though the capital stock more than doubled over this time period). *See also* MICHAEL KATZ & HARVEY ROSEN, MICROECONOMICS 264-265 (Irwin McGraw-Hill 3rd ed. 1998)

Importantly, that the factor price is equal to MRP does not necessarily imply that the buyer earns zero profit from the factor. As illustrated in Figure 1, whenever the factor demand curve is downward-sloping, the buyer can earn profit on the *inframarginal* units of the factor (to the left of competitive output along the labor demand curve, where the buyer is willing to pay more than the competitive wage). Even under perfect competition, the inframarginal units of the factor generate more revenue than they are paid. The buyer's profit on the inframarginal units is given by the area of the triangle under the factor demand curve. It bears noting that even if newspapers were to capture 100 percent of their incremental revenue contribution under a regulated outcome, the platforms would continue to earn margins—equal to the difference between MRP and payments—on all of the other (non-newspaper) input providers to their platform.

B. Payments to Input Providers Under Monopsony Conditions

In markets with monopsony power, buyers maximize profits by depressing factor prices below the MRP. This means that there is a gap between the amount that a factor is compensated and the amount of revenue the factor generates for the buyer at the margin. The more monopsony power that a buyer has, the larger is the gap, and the more compensation is suppressed below the competitive level.

FIGURE 2: IMPERFECTLY COMPETITIVE (UPWARD-SLOPING) FACTOR SUPPLY CURVE



As illustrated in Figure 2, a buyer with monopsony power faces an *upward-sloping* factor supply curve. The extent to which a buyer can push down factor prices is dictated by its monopsony power. Monopsony power can be measured using the elasticity of supply, which measures the responsiveness of the quantity of the factor supplied to changes in the factor price. A lower elasticity of supply implies a greater exercise of monopsony power—that is, a greater gap between a worker's wage and her MRP. To illustrate, note that the degree of factor price suppression in Figure 2 depends on how steep the factor supply curve is. Steeper factor supply curves are

associated with lower supply elasticities, and thus greater suppression of factor prices.⁸¹

There is a direct parallel between a monopolist—a *seller* with market power—and a monopsonist—a *buyer* with market power. Just as the monopolist's optimal markup over marginal cost varies inversely with the elasticity of consumer *demand*, the monopsonist's optimal markdown below MRP is inversely related to the elasticity of factor *supply*. The solution to the monopolist's problem of what price to charge is given by $(p-c)/p = 1/E_D$, where p is the price, c is the marginal cost, and E_D is the elasticity of consumer demand. By symmetry, the solution to the monopsonist's problem of what factor price to pay is $(MRP-w)/w = 1/E_S$, where w is the factor price, MRP is the worker's marginal revenue product, and E_S is the elasticity of factor supply.⁸² Buyers can suppress factor prices below (or further below) competitive levels by engaging in conduct that has the effect of dampening the factor supply elasticity.

C. Evidence That Payments to Newspapers Are Below Competitive Levels

In a competitive factor market, economic theory dictates that newspapers' compensation would approach their MRP. That is clearly not happening today, as indicated by public records of payments to newspapers.

1. Current Payments to Newspapers

Facebook SEC Form 10-Ks show its maximum payment for content across all content providers, including newspapers. The 10-K includes information of Facebook's "cost of revenue," which includes, among other things, costs associated with partner arrangements, including traffic acquisition and content acquisition costs, credit card and other transaction fees related to processing customer transactions, and cost of consumer hardware device inventory sold. Between 2016 and 2018, Facebook's cost of revenue ranged between 13 and 17 percent of its total revenue.⁸³ Accordingly, Facebook's payment for content acquisition, a subset of this share, was *less* than 13 to 17 percent of its revenues. And Facebook's payment for newspaper content would be even smaller.

Facebook reportedly made a deal in 2019 with a number of newspapers to pay "trusted news sources" an undisclosed amount for their services. According to *MarketWatch*, these deals could range from a couple hundred thousand dollars for smaller, regional publications to \$3 million for larger, national publications.

⁸¹ For a linear factor supply curve such as that depicted in Figure 2, the elasticity of supply varies with movements along the curve. Nevertheless, for any given point on the curve, an increase in the steepness of the curve implies a lower supply elasticity.

⁸² See, e.g., ROGER BLAIR, *SPORTS ECONOMICS* 354 (Cambridge University Press 2012).

⁸³ Securities and Exchange Commission, Form 10-K, Facebook Inc. 2018, available at <https://www.sec.gov/Archives/edgar/data/1326801/000132680119000009/fb-12312018x10k.htm>.

According to the *Wall Street Journal*, Facebook was only offering payment to roughly 50 out of the 200 news providers on Facebook News.⁸⁴

Google reportedly offered a total of \$1 billion over three years to a number of news providers in Germany, Brazil, Argentina, Canada, the U.K., and Australia. While many companies accepted this deal, one major German news source, Axel Springer, refused.⁸⁵ In the cases of France and Belgium, Google made indirect deals by putting money into a “Special Fund for French Media” and through supposedly buying ads on Belgian media websites as a fix to Belgian demands for copyright fees. Neither of these cases suggests an outright deal or offer to publishers.⁸⁶ Following France’s implementation of a new rule enacted under a recent European Union law that creates “neighbouring rights,” in February 2021, Google agreed to pay \$76 million over three years to a group of 121 French news publishers to settle a dispute.⁸⁷ In October 2021, Facebook reached an agreement with the French press alliance to pay national and regional newspapers for “using excerpts of their articles when they are shared on the social network.”⁸⁸

2. Converting Payment Levels to Pay Shares

Economists recognize that “[i]n a world of perfect competition, the output contribution of individual production factors equals their respective revenue shares.”⁸⁹ Thus, under competition, the share of total revenue that each factor receives is proportional to the relative importance of that factor in generating output. When factor markets are less than perfectly competitive, the share of revenue paid to the noncompetitive factor(s) may fall because (1) a monopsonist pays compensation below the competitive level; and (2) a monopsonist uses less of the factor than would be employed under competition.

⁸⁴ Lucas Alpert, *Facebook, Wall Street Journal publisher and others reach deal for news section*, MARKET WATCH, Oct. 10, 2019, available at <https://www.marketwatch.com/story/facebook-wall-street-journal-publisher-and-others-reach-deal-for-news-section-2019-10-18>; Paris Marineau, *Facebook Tries Again With News, This Time Paying Publishers*, WIRED, Oct. 25, 2019, available at <https://www.wired.com/story/facebook-tries-again-news-paying-publishers/>.

⁸⁵ David Meyer, *Why Google’s \$1 billion deal with news publishers isn’t the end of their war*, FORTUNE, Oct. 1, 2020, available at <https://fortune.com/2020/10/01/google-billion-dollar-news-showcase-axel-springer/>.

⁸⁶ Harro Ten Wolde & Eric Auchard, *Germany’s top publisher bows to Google in news licensing row*, REUTERS, Nov. 5, 2014, available at <https://www.reuters.com/article/us-google-axel-sprngr/germanys-top-publisher-bows-to-google-in-news-licensing-row-idUSKBN0IP1YT20141105>; Jeffrey Roberts, *Did Google pay Belgian newspapers a \$6M copyright fee? Sure looks like it*, GIGAOM, Dec. 13, 2012, available at <https://gigaom.com/2012/12/13/did-google-pay-belgian-newspapers-a-6m-copyright-fee-sure-looks-like-it/>.

⁸⁷ [Mathieu Rosemain](#), *Google’s \$76 million deal with French publishers leaves many outlets infuriated*, REUTERS, Feb. 12, 2021, available at <https://reut.rs/3jrG74t>.

⁸⁸ Benoit Berthelot, *Facebook Will Pay French Newspapers for Using Their News*, YAHOO! FINANCE, Oct. 21, 2021, available at <https://yhoo.it/3E75YX9>.

⁸⁹ Sabien Dobbelaere & Jacques Mairesse, *Panel Data Estimates of the Production Function and Product and Labor Market Imperfections*, 28 JOURNAL OF APPLIED ECONOMETRICS 1-46, 2 (2013).

For example, noted economist Professor Alan Manning has explained that, in professional sports, there is “a clear link between the removal of anti-competitive labor practices and rises in the share of revenue going to athletes.”⁹⁰ The same principles can be applied to the broader economy. A 2013 paper observes that “the constancy of the share of income that flows to labor has been taken to be one of the quintessential stylized facts of macroeconomics,”⁹¹ but that in recent years “prominent measures of labor’s share in the United States have declined significantly.”⁹²

More recent research has reached similar conclusions for both labor *and* capital, two critical inputs to production: A recently published paper in the *Journal of Finance* concludes that, in sectors throughout the economy, “the shares of both labor and capital are declining and are jointly offset by a large increase in the share of pure profits,” and that observed “increase[s] in industry concentration can account for most of the decline in the labor share.”⁹³ Similarly, a 2020 study published in the *Quarterly Journal of Economics* concludes that rising market power “can account for a number of secular trends in the past four decades, most notably the declining labor and capital shares as well as the decrease in labor market dynamism.”⁹⁴

Conversion of newspaper payments to pay shares is straightforward. Google’s annual U.S. advertising revenues in 2020 was roughly \$49 billion.⁹⁵ Facebook’s annual U.S. advertising revenues in 2020 was roughly \$22 billion.⁹⁶ Accordingly, a one percent pay share for U.S. newspapers would amount to annual payments of \$490 million by Google and annual payments of \$220 million by

⁹⁰ Manning (2020) at 10.

⁹¹ Michael Elsby, Bart Hobijn, & Aysegul Sahin, *The Decline of the U.S. Labor Share*, BROOKINGS PAPERS ON ECONOMIC ACTIVITY, 1-42, 2 (2013).

⁹² *Id.* at 2.

⁹³ Simcha Barkai, *Declining Labor and Capital Shares*, 75(5) JOURNAL OF FINANCE, 2421-2463, 2421 (2020).

⁹⁴ Jan De Loecker & Jan Eeckhou, *The Rise of Market Power and the Macroeconomic Implications* 135 QUARTERLY JOURNAL OF ECONOMICS (2020).

⁹⁵ Per Google’s 10-K, total Google Search ad revenue in 2019 is \$98 billion globally and \$45 billion in the US, meaning 46% of Google Search ad revenues come from the US. Using Google’s quarterly 10-Q filings, I obtain actual quarterly revenues for Q1-3 2020 and estimate Q4 based on previous Q4 performance, implying forecasted 2020 global Google Search ad revenues of \$107 billion. I multiply this figure by the 46% share of global Google Search revenues that stem from the US to obtain \$49 billion for 2020.

⁹⁶ Per Facebook’s 10-K, total U.S. and Canada advertising revenue in 2019 is \$33.5 billion, and the total active users for U.S. and Canada is \$245.5 million, implying average revenue per user of \$136.4. Facebook also states that there are 220 million US users in 2019. Multiplying this figure by the ARPU from the U.S. and Canada aggregate, this implies U.S.-only advertising revenues of \$30 billion. Statista reports that in 2019, 31.8 percent of Facebook’s advertising revenues come from Instagram, to which newspapers make no contribution. To net out the advertising revenues from Instagram, I multiply \$30 billion by (1-0.318) to obtain US only, Facebook (non-Instagram) 2019 revenues of \$20.5 billion. Using Facebook’s quarterly reports for 2020 Q1-3, I perform a similar calculation and arrive at \$21.9 billion in U.S. (non-Instagram) advertising revenues for 2020.

Facebook. Based on the reported payments to U.S. newspapers reviewed above, it is reasonable to assume that the current pay shares are less than one percent. In the next section, I examine the pay shares in comparable industries.

3. Regulatory Benchmarks

Benchmarking is a common tool used by economic scholars and practitioners.⁹⁷ A benchmark is more informative when it reflects attributes with the “but-for world” envisioned here—that is, everything is the same except for the power imbalance between newspapers and platforms. The salient characteristics of that but-for world include (1) the group seeking fair-market compensation constitutes only one of several input providers for the dominant platform; (2) the payment to the input provider is governed directly or indirectly by an enforcement mechanism as opposed to being set entirely through market forces; and (3) the group seeking fair-market value bargains collectively. Even imperfect benchmarks, which satisfy one or two of the criterion of the but-for world, can offer insight as to the reasonableness of the implied pay shares that are sought here. Table 1 presents an overview of potential benchmarks, discussed below, including the associated pay shares for the input providers.

TABLE 1: PAY SHARES IN POTENTIAL BENCHMARKS

Potential Benchmark	Pay Shares	Protected Class Represents Only One of Many Inputs	Regulated Allocation	Collective Bargaining
Artists and Publishers Under Music Streaming Royalties	65-70%	x	✓	✓
Broadcasters Under Retransmission Consent	~11%	✓	✓	x
Regional Sport Networks	~7%	✓	x	x
Athletes in Professional Sports Leagues	50-60%	x	x	✓

As Table 1 shows, none of the potential benchmarks satisfies all three salient characteristics of the but-for world. The derivation of these pay shares are provided in Appendix 1. While broadcasters and regional sports networks (RSNs) represent only one of many inputs on their respective platforms, making them a close comparable, broadcasters cannot bargain collectively vis-à-vis cable operators, and

⁹⁷ See e.g., Justin McCrary & Daniel Rubinfeld, *Measuring benchmark damages in antitrust litigation*, 3(1) JOURNAL OF ECONOMETRIC METHODS 63-74, 63 (2014) (“We have found the benchmark approach to be the most commonly used damages methodology.”).

RSN licensing fees are not set in a regulated environment. Yet the pay shares for broadcasters (approximately eleven percent of cable revenues) and RSNs (approximately seven percent of cable revenues) vastly exceed the pay shares currently captured by U.S. newspapers from Google and Facebook (less than one percent). Relative to these comparables, this deficit in pay shares indicates that newspapers are not capturing anything close to competitive rates, and is thus indicative of Google's and Facebook's buying power vis-à-vis newspapers.

The pay shares for music rightsholders (65 to 70 percent) and athletes in professional sports leagues with unions and free agency (60 percent) likely overstate the fair-market value of pay shares here, as those input providers account for the totality of the relevant inputs in the production process in their respective fields. Nevertheless, those benchmarks are informative of a related but-for world in which *all* content providers, including but not limited to newspapers, broadcasters, bloggers, and video services, could achieve fair-market value for their revenue contributions to the platforms. In other words, if the platforms' monopsony power over all content providers were vanquished, Facebook and Google could be forced to pay content providers more than half of their advertising revenues.

III. Underpayment to Newspapers Results in Myriad Social Harms

This section reviews the social harms flowing from the underpayments to news publishers. There are myriad social harms flowing from underpayments to newspapers, beginning with employment effects in the input market (e.g., journalism jobs).

A. Employment (Output) Effects in the Input Market

The net effect of shrinking advertising revenues—in part caused by underpayment from dominant platforms—is less cash flow to support journalists, a clear employment effect flowing from the exercise of monopsony power by the dominant platforms. Employment among newspaper employees fell from 71,000 in 2008 to 31,000 in 2020.⁹⁸ The Bureau of Labor Statistics predicts that over the next decade, the total employment of reporters, correspondents, and broadcast news analysts will continue to decline.⁹⁹

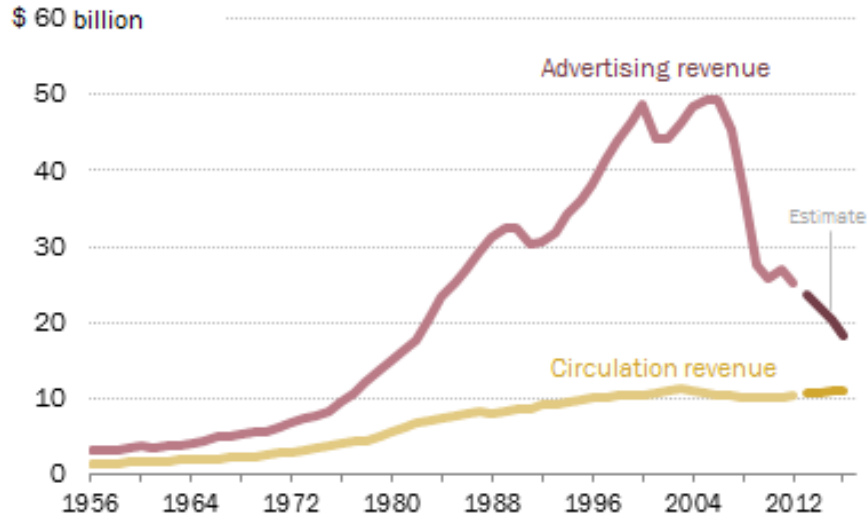
The decline in newspaper advertising revenue coincides with the rise of platform power. From 1956 through 2005, advertising revenue for U.S. newspapers

⁹⁸ Mason Walker, U.S. newsroom employment has fallen 26% since 2008, Pew Research Center, July 13, 2021, available at <https://www.pewresearch.org/fact-tank/2021/07/13/u-s-newsroom-employment-has-fallen-26-since-2008/>.

⁹⁹ Occupational Outlook Handbook: Reporters, Correspondents, and Broadcast News Analysts, U.S. Dep't Of Labor: Bureau of Labor Statistics, available at <https://www.bls.gov/ooh/media-and-communication/reporterscorrespondents-and-broadcast-news-analysts.htm>.

steadily increased, peaking around \$50 billion in 2005.¹⁰⁰ The rise of platform power was assisted by favorable legislation in the 1990s and early aughts.¹⁰¹ In the mid-aughts, Facebook and Google began to consolidate their power, with competitors MySpace (Facebook’s precursor), and Infoseek, Lycos, and Altavista (Google’s precursors) steadily disappearing. Since 2006, U.S. newspaper advertising revenue declined from \$49 billion in 2006 to \$18 billion in 2016.¹⁰² Figure 3 shows the rise and fall of newspaper advertising revenues since 1956.

FIGURE 3: TOTAL ADVERTISING REVENUES FOR U.S. NEWSPAPERS, 1956-2016



Source: Pew Research, available at <https://www.pewresearch.org/fact-tank/2017/06/01/circulation-and-revenue-fall-for-newspaper-industry/>.

Platforms have contributed to shrinking newspaper advertising revenues in two ways. Platforms are not only a direct competitor to newspapers for advertising dollars (a horizontal relationship), but platform dominance can also be used to squeeze newspapers (a vertical relationship) for lower input prices. In 2016, the news industry incurred losses in total weekday circulation, despite gains for certain top-selling sites.¹⁰³ The news industry also incurred losses in advertising revenue in 2016, marking a steady decline since 2006.¹⁰⁴ According to one news publisher’s testimony to the Antitrust Subcommittee, “digital subscription revenues remain a

¹⁰⁰ Michael Barthel, Despite Subscription Surges for Largest U.S. Newspapers, Circulation and Revenue Fall for Industry Overall, Pew Research Center: Facttank (June 1, 2017), <https://www.pewresearch.org/fact-tank/2017/06/01/circulation-and-revenue-fall-for-newspaper-industry>.

¹⁰¹ For example, Congress passed the Communications Decency Act in 1996 and the Digital Millennium Copyright Act in 1998, shielding platforms from certain liabilities, and gave the new platforms generous tax incentives.

¹⁰² *Id.*

¹⁰³ Barthel, *supra*.

¹⁰⁴ *Id.*

minor revenue stream and do not appear to be on a path to replace the decline in print subscriptions” for the vast majority of newspapers.¹⁰⁵

Since dominant platforms aggregate content on their sites, newspapers have little choice but to permit sharing their content this way, as they are dependent on the platforms for traffic. But by providing snippets of content, the platforms permit users to obtain the news without clicking through to the underlying source, depriving the publisher of traffic and its associated ad revenues.¹⁰⁶ This, in turn, also creates less of a need to subscribe to the newspaper platform. The platforms do not compensate newspapers for this lost traffic.

B. Removal of Economic Stimulus to Local Economies

The negative employment trends among newspapers, exacerbated by underpayments from the dominant platforms,¹⁰⁷ can have ripple effects throughout local economies. When reporters, correspondents, and broadcasts news analysts, along with the other supporting employees at a publishing firm, lose their jobs, they lose incomes to spend at grocers, restaurants, and other local businesses. This reduction in spending can have a multiplier effect that ripples throughout a local economy and removes stimulus that was once there.¹⁰⁸

Local newspapers also provide a valuable service to local businesses by creating a way to connect with community members and advertise their products and services.¹⁰⁹ When underpayments intensify news publisher closure, local businesses no longer have access to this mode of communication and advertising. Furthermore, research has shown that there is a causal link between local newspaper closures and higher municipal borrowing costs, likely due to the reduction in independent oversight.¹¹⁰ This translates into an approximate increase of \$650,000 per average municipal bond issuance.¹¹¹ Higher borrowing costs are

¹⁰⁵ Submission from Source 220, to H. Comm. on the Judiciary, 7 (Oct. 14, 2019) (on file with Comm.).

¹⁰⁶ News Media Alliance, *How Google Abuses Its Position As A Market Dominant Platform To Strong-Arm News Publishers And Hurt Journalism* 2, 12 (2020), available at <http://www.newsmediaalliance.org/wpcontent/uploads/2020/06/Final-Alliance-White-Paper-June-18-2020.pdf>.

¹⁰⁷ See Part III.B.1

¹⁰⁸ Josh Bivens, *Updated employment multipliers for the U.S. economy*, ECONOMIC POLICY INSTITUTE, January 23, 2019, available at <https://www.epi.org/publication/updated-employment-multipliers-for-the-u-s-economy/>.

¹⁰⁹ *The benefits of local newspapers*, COVINGTON NEWS, available at <https://www.covnews.com/nie/benefits-local-newspapers/#:~:text=Small%20business%20owners%20often%20connect,strengthen%20local%20schools%20and%20infrastructure>.

¹¹⁰ Pengjie Gao, Chang Lee, and Durmot Murphy, *Financing dies in darkness? The impact of newspaper closures on public finance*, 135(2) JOURNAL OF FINANCIAL ECONOMICS (2020).

¹¹¹ *Id.* at 446.

ultimately borne by local taxpayers, thereby reducing real disposable incomes and removing further stimulus from local economies.¹¹²

C. Threats to Democracy from News Deserts

As a result of the deteriorating news media landscape described above, hundreds of local newspapers have been acquired or declared bankruptcy.¹¹³ One study estimates that the United States has lost nearly 1,800 newspapers since 2004 either to closure or merger, leaving the majority of counties in America beholden to a single publisher of local news, and 200 counties are without any paper.¹¹⁴

The elimination of local news threatens democracy. A critical function of a local newsroom is coverage of local and state government affairs.¹¹⁵ Without this coverage, Americans are more likely to rely on national news and partisan heuristics to make political decisions.¹¹⁶ A robust local news business is also a natural pipeline by which government officials effectively communicate to an electorate (and vice versa). Research shows that in areas with higher local news coverage, voters are better informed on their congressmen and that politicians more actively pursue their constituents' interests through moderating their partisan voting, more frequently standing witness to committee hearings, and generating more federal funding for their districts.¹¹⁷ Local newsrooms may also provide a check on local government corruption and mismanagement.¹¹⁸ Moreover, robust local news coverage is positively correlated with higher rates of voter turnout,¹¹⁹ more support for local services,¹²⁰ and greater levels of social cohesion.¹²¹

¹¹² Dermot Murphy, *When local papers close, costs rise for local governments*, COLUMBIA JOURNALISM REVIEW, June 27, 2018, available at https://www.cjr.org/united_states_project/public-finance-local-news.php.

¹¹³ Penelope Muse Abernathy, Univ. N.C. Sch. Of Media And Journalism, *The Expanding News Desert* 33 (2018), available at https://www.cism.org/Wp-Content/Uploads/2018/10/The-Expanding-News-Desert-10_14-Web.Pdf.

¹¹⁴ Penelope Muse Abernathy, Univ. N.C. Sch. of Media and Journalism, *The Expanding News Desert* 10-11 (2018), https://www.cism.org/wp-content/uploads/2018/10/The-Expanding-News-Desert-10_14-Web.pdf.

¹¹⁵ Free and Diverse Press Hearing at 3-4 (statement of Kevin Riley, Editor, The Atlanta Journal-Constitution).

¹¹⁶ Joshua P Darr, Matthew P Hitt, & Johanna L Dunaway, *Newspaper Closures Polarize Voting Behavior*, 68(6) JOURNAL OF COMMUNICATION 1007-1028 (2018).

¹¹⁷ James M. Snyder & David Strömberg, *Press Coverage and Political Accountability*, 118(2) JOURNAL OF POLITICAL ECONOMY 355-408 (2010).

¹¹⁸ Mary Ellen Klas, *Less Local News Means Less Democracy*, Nieman Reports (Sept. 20, 2019), available at <https://niemanreports.org/articles/less-local-news-means-less-democracy/>.

¹¹⁹ Matthew Gentzkow, et al., *The Effects of Newspaper Entry and Exit on Electoral Politics*, 101 AM. ECON. REV. 2980 (2011); Danny Hayes & Jennifer L. Lawless, *As Local News Goes, So Goes Citizen Engagement: Media, Knowledge, and Participation in U.S. House Elections*, 77 JOURNAL OF POLITICS 447, 447 (2014).

¹²⁰ Noah Smith, *Goodbye Newspapers. Hello, Bad Government*, BLOOMBERG (June 1, 2018), available at <https://www.bloomberg.com/opinion/articles/2018-06-01/goodbye-newspapers-hello-bad-government>.

D. The Rise of Fake News and Disinformation Campaigns

As professional news dwindles, fake news fills the void. The House Judiciary Report notes that “the gap created by the loss of trustworthy and credible news sources has been increasingly filled by false and misleading information.”¹²² This comes as no surprise since the dominant platforms “face little financial consequence when misinformation and propaganda are promoted online.”¹²³ Instead, these platforms incentivize publishers to gain the most attention possible, regardless of the methods or integrity.¹²⁴ Using preference-based algorithms, the platforms create echo chambers in which fragmented views of the news are reinforced, leading to further mistrust.¹²⁵ This is in contrast to traditional news outlets, which focus instead on forming audience relationships and building a reputation for quality and trust.¹²⁶

The reduction in these traditional newspapers has coincided with more Americans using social media platforms to access news.¹²⁷ This shift is expected to lead to a greater spread of both partisanship and misinformation,¹²⁸ leading to significant social harms. For instance, misinformation could have resulted in hastening the COVID-19 epidemic by influencing citizens’ behavior and response to government countermeasures.¹²⁹ In an August 2020 survey, “relatively high levels of misperception” could be found among those receiving news information from social media sources, while the “lowest levels of misperceptions” was found among those receiving information from “local television news, news websites or apps, and community newspapers[.]”¹³⁰ Underpayment to these trusted news sources has contributed to their lower prevalence, proliferating this shift to less reliable sources.

¹²¹ Amy Mitchell, et al., Civic Engagement Strongly Tied to Local News Habits, Pew Research Center (Nov. 3, 2016), available at <https://www.journalism.org/2016/11/03/civic-engagement-strongly-tied-to-local-news-habits>.

¹²² *Majority Report* at 62.

¹²³ *Id.* at 67.

¹²⁴ Michael Clay Carey, *Local News and Community Resiliency in Appalachia*, CENTER FOR JOURNALISM & LIBERTY, 23-24, Sept. 22, 2020.

¹²⁵ *Id.*

¹²⁶ Comments of News Media Alliance Before the Federal Trade Commission Regarding the Hearings on Competition and Consumer Protection in the 21st Century, August 20, 2018, 15, available at https://www.ftc.gov/system/files/documents/public_comments/2018/08/ftc-2018-0048-d-0088-155244.pdf.

¹²⁷ Peter Suci, *More Americans Are Getting Their News From Social Media*, FORBES, October 11, 2019, available at <https://www.forbes.com/sites/petersuci/2019/10/11/more-americans-are-getting-their-news-from-social-media/?sh=1eebb4723e17>.

¹²⁸ Robert Faris, et al., *Partisanship, Propaganda, and Disinformation: Online Media and the 2016 U.S. Presidential Election*, BERKMAN KLEIN CENTER FOR INTERNET & SOCIETY AT HARVARD UNIVERSITY, No. 2017-6, available at <https://cyber.harvard.edu/publications/2017/08/mediacloud>.

¹²⁹ Matteo Cinelli, et al., *The COVID-19 social media infodemic*, 10(16598) SCI REP (2020).

¹³⁰ Matthew Baum, et. al., *The State of the Nation: A 50-State COVID-19 Survey, Report #14: Misinformation and Vaccine Acceptance*, THE COVID-19 CONSORTIUM FOR UNDERSTANDING THE PUBLIC’S POLICY PREFERENCES ACROSS STATES (a joint project of Northeastern University, Harvard University,

E. Harms to Community and Culture

There are also social harms that can be harder to quantify—such as the negative impacts of news publisher closure on a community. A well-functioning media creates a shared understanding of the world. It creates a way for residents to become more active in their community and to learn about what their neighbors care about. Being informed on events like local theater productions, carnivals, and community events allow residents to not only be in close *physical* proximity to those in our area, but to be in close *social* proximity as well.¹³¹

Furthermore, the absence of local news reduces the diversity of viewpoints. For example, minority owned media outlets have historically focused on issues that larger news providers do not cover or have underreported.¹³² However, while there are over 100 African American-owned newspapers, only one has a circulation above 50,000.¹³³ Small, community-oriented, local news sources are integral for reporting on issues that impact minority groups. Underpayment to these local news sources can amplify their chance of shutting down or result in consolidation, which can also general social ills. According to former Harvard Law School dean and professor, Martha Minow, “Concentrated ownership displaces local control of media and shifts editorial decisions to people without a stake in particular local communities.”¹³⁴ Ultimately, the reduction of local news leaves a gap in the diversity of opinions.

IV. The Likely Arguments Against Assigning Coordination Rights to News Publishers Are Unavailing

This section anticipates and “prebuts” three economic arguments that the platforms are likely to make in opposition to this proposal offered here.

A. Argument One: The Effort Is Meant to Enrich the Largest Newspapers

One of the favorite talking points of the bill’s detractors is that it would consolidate power among the largest news publishers at the expense of new

Rutgers University, and Northwestern University), September 2020, at 11, available at <http://www.kateto.net/covid19/COVID19%20CONSORTIUM%20REPORT%2014%20MISINFO%20SEP%202020.pdf>

¹³¹The benefits of local newspapers, COVINGTON NEWS, available at <https://bit.ly/3og6gU2>.

¹³²Barack Obama & John F. Kerry, *Media consolidation silences diverse voices*, POLITICO, Nov. 7, 2007, available at <https://www.politico.com/story/2007/11/media-consolidation-silences-diverse-voices-006758>.

¹³³Sara Atske, Michael Barthel, Galen Stocking, & Christine Tamir, *7 facts about black Americans and the news media*, PEW RESEARCH CENTER, Aug. 7, 2019, available at <https://www.pewresearch.org/fact-tank/2019/08/07/facts-about-black-americans-and-the-news-media/>.

¹³⁴Judith Miller, *News Deserts: No News is Bad News*, MANHATTAN INSTITUTE, Ch.4, 60, 2018, available at https://media4.manhattan-institute.org/sites/default/files/MI_Urban_Policy_2018.pdf#page=71.

publishers.¹³⁵ Although it is true that large newspapers benefit by coordinating with smaller newspapers in their dealings with Google, smaller newspapers benefit by even more, as small newspapers would be subjected to even greater levels of exploitation if they were compelled to deal with Google unilaterally. A handful of the very largest newspapers have a modicum of countervailing bargaining power against the platforms. This is not so for the vast majority of newspapers. Accordingly, the largest beneficiaries of this proposal are the smallest newspapers.

The argument that this proposal is meant to enrich the largest newspapers also ignores the likely allocation mechanism of a collective, which would prevent large publishers from appropriating the entirety of the award. Even if the allocation were done purely in proportion to a newspaper's pro-rata share of clicks, no single newspaper would achieve all of the payments, as the allocation of clicks across newspapers is well distributed. To the extent newspapers elect to distribute some portion of funds according to full-time journalists, high-quality news sites that deliver informative yet non-clickworthy news could achieve payments in excess of their pro-rata share of clicks.

Finally, large news publishers are hardly flush with cash, yet deliver large social benefits. Absent any intervention, we are heading towards a dystopia in which citizens rely exclusively on tech platform for all news. The effort is not meant to enrich large publishers, but instead meant to address a power imbalance that is producing communication distortions and too few journalists.

B. Argument Two: It Is Better to Attack Platform Power with Antitrust Intervention

The resistance to allocating coordination rights to small agents in their dealing with dominant platforms is emanating from surprising quarters, including the American Antitrust Institute (AAI).¹³⁶ AAI argues that a better approach to dealing with the power imbalance is through vigorous enforcement of the antitrust laws against the platforms:

Today, it is the news content providers seeking an industry-specific exemption from the antitrust rules to countervail the power of Big Tech. But, if they are successful, other industries will follow. Such industry-specific exemptions should be resisted. Instead of reacting to innovation that is upending traditional business models by abandoning competition, we must

¹³⁵ See, e.g., Matthew Boyle, *House GOP Leader Kevin McCarthy Slams Establishment Media-Pushed Journalism Act: 'Antithesis of Conservatism'*, BREITBART, Apr. 1, 2021 ("the system [the JCPA] would create that essentially allows the creation of establishment media cartels that would hurt new media companies.").

¹³⁶ See, e.g., Laura Alexander, *Countervailing Power: a Comprehensive Assessment of a Persistent but Troubling Idea*, American Antitrust Institute, Oct. 15, 2020, available at <https://www.antitrustinstitute.org/work-product/new-aa-i-white-paper-analyzes-the-pitfalls-of-countervailing-power-as-a-response-to-rising-market-concentration/>.

instead adapt our competition laws, enforcement strategies, and policies to ensure they can effectively safeguard and promote competition in new and changing markets. To do otherwise risks converting the antitrust laws from a tool to foster competition into a tool for creating and maintaining monopolistic market structures.¹³⁷

Ignoring the slippery-slope argument, AAI's suggestion that antitrust enforcement can eviscerate the power imbalance between the platforms and newspapers is naive, and if embraced by lawmakers, would effectively grant the platforms a free pass to appropriate newspaper value with impunity. A Sherman Act Section 2 complaint against a platform would require plaintiffs to (1) challenge a restraint of trade, preferably in a contract with a third-party publishers or advertiser; and (2) establish a causal connection between said restraint and the underpayment to newspapers. While restraints in contracts with publishers or advertisers might be contributing to lower newspaper pay shares at the margin, there are myriad factors, including network effects, customer lock-in, and other natural barriers to entry, also contributing to the power imbalance. At best, a successful lawsuit challenging a platform's restraints would raise payments from that platform by the increment attributable to the restraints, but not necessarily to competitive levels. And a successful suit against (say) Google would provide zero relief for publishers in their dealings with Facebook. Moreover, a successful antitrust lawsuit against Google or Facebook would require several years to adjudicate, and the appeals might not be resolved for nearly a decade. In the interim, newspapers would be left twisting in the wind. Given the newspapers' precarious financial state, it is not clear how long many could survive without an intervention today. Finally, the strategies of antitrust litigation and intervention (based on coordination rights) are complements, not substitutes. There is no reason not to pursue the platforms via antitrust while permitting collective bargaining among atomistic input providers.

C. Argument Three: Newspapers Derive Significant Value Via Referrals from Platforms, Which Should Be Deducted from the Value Added by Newspapers to Platforms When Determining Compensation

The dominant platforms might argue that they are generating traffic for newspapers, and they are thus owed payments by the newspapers, or at least such incremental benefits should be deducted from the value added by newspapers to platform advertising revenues. But the platforms are reframing news stories in rich previews containing headlines, summaries, and photos. And they are also curating the content alongside advertisements. This reframing and curation decreases the likelihood of a user clicking into the article, thereby depriving news publishers of clicks while enriching the dominant tech platforms.¹³⁸ Put differently, the platforms permit users to obtain the news without clicking through to the underlying source,

¹³⁷ *Id.* at 20.

¹³⁸ Damien Cave, *An Australia With No Google? The Bitter Fight Behind a Drastic Threat*, NEW YORK TIMES, Jan. 22, 2021 (citing Tama Leaver, a professor of internet studies at Curtin University in Perth).

depriving the news publisher of traffic and its associated ad revenues.¹³⁹ This reframing and curation also creates less of a need for users to subscribe to the newspaper platform. The platforms are not compensating newspapers for any of this lost traffic or lost subscription revenues. Rather than considering these harms to newspapers from the platforms' reframing and curation, or the alleged benefits to newspapers from platform-based traffic generation, the proper focus of the inquiry should be the incremental platform advertising revenues generated by the newspapers. After all, this value added to the platforms would be the payments to newspapers in a competitive input market. Offsets in either direction should be ignored.

Conclusion

Allowing current market forces to dictate the newspapers' pay shares ensures that newspapers are compensated at rates significantly below competitive levels. This underpayment results in underemployment of journalists and other news employees, as well as host of social ills associated with local news deserts, including less competent local governments, greater spread of partisanship and misinformation, removal of economic stimulus to local economies, and a reduction in the diversity of viewpoints, particularly among minority populations. The best way to correct this market failure is for the government to permit the news publishers (either newspapers alone, or all news publishers) to coordinate in their dealings with the digital platforms over payment terms and conditions, followed by an enforcement mechanism to ensure that fair market value is being paid for the access being granted to the publishers' content.

¹³⁹ News Media Alliance, *How Google Abuses Its Position As A Market Dominant Platform To Strong-Arm News Publishers And Hurt Journalism* 2, 12 (2020), *available at* <http://www.newsmediaalliance.org/wpcontent/uploads/2020/06/Final-Alliance-White-Paper-June-18-2020.pdf>.

Appendix 1: Pay Shares in Comparable Industries

A. Pay Shares for Music Rightsholders

Like the newspaper industry, the music industry was disrupted by new forms of digital consumption, which caused traditional revenue sources to decline significantly.¹⁴⁰ Music industry stakeholders (such as music publishers, record labels) worked with digital streaming platforms to establish a sustainable monetization system, which has greatly improved the health of the industry and benefited content providers.¹⁴¹ Compensation for music publishers is driven by royalty rates set by the Copyright Royalty Board (CRB), a tribunal that sets rates for five-year periods. Digital streaming platforms must pay music publishers per the rates defined by the CRB. Accordingly, this benchmark entails a regulated allocation that permits collective bargaining among input providers to a dominant platform. Unlike the but-for world contemplated here, the protected stakeholders (record labels, artists, publishers, and songwriters) constituted the totality of input providers to the platform.¹⁴²

Once collected, music publisher royalty rates result in a lump sum payout that is distributed to artists and publishers proportionally to the consumption of their music. The mechanical royalty rates for music publishers apply to all publishers simultaneously—that is, the publishers do not have to negotiate individually with the platforms covered by the statutes. In that sense, the bargaining is collective. According to the late economist Alan Krueger, streaming services such as Spotify typically pay 65 to 70 percent of their revenue in royalties to music right holders.¹⁴³

B. Pay Shares for Broadcasters in Retransmission Consent Arrangements

In the 1980s, cable subscribers grew rapidly to more than 50 million, but cable operators did not compensate broadcasters for what has been widely

¹⁴⁰ See ALAN B. KRUEGER, *ROCKONOMICS: A BACKSTAGE TOUR OF WHAT THE MUSIC INDUSTRY CAN TEACH US ABOUT ECONOMICS AND LIFE* 31 (Crown Publishing 2019) (showing declining record industry revenue beginning in 2000).

¹⁴¹ See, e.g., Katie Jones, *Cents and Sounds: How Music Streaming Makes Money*, VISUAL CAPITALIST, Dec. 20, 2019, available at <https://www.visualcapitalist.com/how-music-streaming-money/>.

¹⁴² Federal Register, *Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords III)*, A Rule by the Copyright Royalty Board on 02/05/2019, available at <https://www.federalregister.gov/documents/2019/02/05/2019-00249/determination-of-royalty-rates-and-terms-for-making-and-distributing-phonorecords-phonorecords-iii>.

¹⁴³ KRUEGER, *supra*, at 181 (Crown Publishing 2019) (“Streaming services such as Spotify typically pay 65 percent to 70 percent of their revenues in royalties to music rights holders (record labels, artists, publishers, and songwriters).”). See also Jem Award & Janko Roettgers, *With 70 Million Subscribers and a Risky IPO Strategy, Is Spotify Too Big to Fail?*, *Variety*, Jan. 24, 2018 (“One way to get there would be more favorable deals with labels. Its business model calls for paying out around 70% of its annual revenue in royalties.”).

considered “must-have” programming.¹⁴⁴ Instead, cable operators were offering customers local broadcast stations via their cable subscription with no remuneration for the local broadcasters. Congress grew worried that broadcasters were subsidizing the growth of their competitors, and that the potential long-term health of the U.S. television industry could be impaired. As a result, Congress enacted retransmission consent rules in the 1992 Cable Act. Sections 531 through 537 of the Act established a regulatory mechanism to compensate broadcasters for carriage of their broadcast signals by cable operators and direct broadcast satellite providers.

The new law required all multichannel video distributors, including cable operators and digital broadcast satellite providers, to obtain permission from broadcasters before carrying their programming. It provided that once every three years, broadcast stations could elect between must-carry and retransmission consent; if the cable operator rejects the broadcaster’s proposal, the station can prohibit the cable operator from retransmitting its signal. In essence, these rules altered the bargaining dynamic between a dominant platform and input providers, thereby affecting payments to input providers; thus, this benchmark can be considered a regulated allocation. But unlike the but-for world contemplated here, broadcasters—presumably because they are not atomistic relative to cable operators—were not allowed to coordinate in their dealings against cable operators.

While popular network-affiliated stations tended to opt for a retransmission fee, unaffiliated local stations tended to choose must carry and profited from advertisements only. For those that choose retransmission fees, broadcasters negotiate directly with the cable company; the Federal Communications Commission (FCC) does not specify fees or get involved in disputes.¹⁴⁵ Between 1992 and 2005, broadcasters were primarily paid in kind (e.g., providing advertising spots, carrying affiliate channels) by cable operators. Yet retransmission fees grew rapidly from \$0.2 billion in 2006 to \$12.2 billion in 2020.¹⁴⁶ The cable companies’ revenues are estimated at \$116.8 billion in 2020.¹⁴⁷ Accordingly, the broadcasters’ implied pay share in 2020 is approximately 11 percent.¹⁴⁸

¹⁴⁴ See, e.g., Federal Communications Commission, General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee, for Authority to Transfer Control, MB Dkt. No. 03-124, Memorandum Opinion and Order (released Jan. 14, 2004) ¶¶ 87, 201 (finding that regional sports programming and local broadcast programming were “must-have” inputs, which if were denied to distribution rivals, would impair their ability to compete effectively).

¹⁴⁵ See, e.g., Jeffrey Eisenach, *The Economics of Retransmission Consent*, Mar. 31, 2009, at 24.

¹⁴⁶ Justin Nielson, *Broadcast Investor Retrans Projections Update: Sub Rates Continue To Rise*, Jul. 25, 2019, <https://www.spglobal.com/marketintelligence/en/news-insights/research/retrans-projections-update-sub-rates-continue-to-rise>

¹⁴⁷ Wayne Friedman, *Total U.S. MVPD Revs Up, OTT Rising Faster*, Media Post, Mar. 14, 2017. (“BMO Capital Markets says there will be 1% revenue growth for U.S. MVPDs (multichannel video program distributors) to \$116.8 billion in 2020, from \$115.5 billion in 2015.”)

¹⁴⁸ Equal to \$12.2B / \$116.8B.

C. Pay Shares for Regional Sports Networks

Staying in the cable space, another must-have input for cable operators is local sports programming,¹⁴⁹ often supplied by independent regional sports networks (RSNs). Although there is no requirement that cable operators carry RSNs, independent RSNs can (and have) submitted discrimination complaints to the FCC pursuant to section 616 of the Cable Act, asserting that a cable operator that is vertically integrated into competing content afforded the RSN inferior carriage due to its lack of affiliation and horizontal rivalry. These protections also (weakly) alter the bargaining dynamics between cable operators and RSNs relative to pure market forces, and thus can be considered a regulated allocation. Unlike the but-for world contemplated here, RSNs cannot coordinate in their dealings with cable operators. Because RSNs, like broadcasters, account for only one of several input providers to a dominant platform, this benchmark can be informative. According to Kagan, the RSNs' affiliate fees averaged approximately \$6 per subscriber per month in 2017,¹⁵⁰ while the average revenue per user per month for Comcast was \$85 around the same period,¹⁵¹ implying a pay share of roughly seven percent. While RSN are must-have inputs and thus have some countervailing power, RSNs' pay shares are likely deflated relative to a competitive equilibrium due to the lingering power imbalance between cable operators and RSNs that was not sufficiently addressed in the 1992 Act.

D. Pay Shares for Athletes in Professional Sports Leagues

De-unionization has been cited as a contributing factor in the long-term decline in the labor share in the U.S. economy.¹⁵² Economists recognize that “[t]he bargaining power of unions tends to increase workers' share of the surplus generated in the production process.”¹⁵³ Athletes in the major U.S. professional

¹⁴⁹ See, e.g., John Ourand, *Comcast's Burke takes on critics of company's dual strategies*, SPORTS BUSINESS JOURNAL, Apr. 13, 2009.

¹⁵⁰ Ben Munson, *Total U.S. TV retransmission fees expected to reach \$12.8B by 2023, Kagan says*, FIERCE VIDEO, June 20, 2017 (“Kagan anticipated seven RSNs—YES Network (\$6.74), FOX Sports Detroit (\$6.69), MSG Network (\$5.69), SportsNet LA (\$5.60), FOX Sports Arizona (\$5.48), Comcast SportsNet Philadelphia (\$5.32) and Spectrum SportsNet/Deportes (\$5.08)—are projected to come in above the \$5 mark.”).

¹⁵¹ Comcast video average revenue per user (ARPU) from 1st quarter 2010 to 4th quarter 2018, Statista, available at [https://www.statista.com/statistics/778799/comcast-video-arpu/#:~:text=Comcast's%20video%20ARPU%20\(average%20revenue,in%20the%20same%20time%20period](https://www.statista.com/statistics/778799/comcast-video-arpu/#:~:text=Comcast's%20video%20ARPU%20(average%20revenue,in%20the%20same%20time%20period).

¹⁵² Anne Stansbury and Lawrence Summers, *Declining worker power and American economic performance*, Brookings Papers on Economic Activity, Spring 2020, available at <https://www.brookings.edu/bpea-articles/declining-worker-power-and-american-economic-performance/>.

¹⁵³ See, e.g., Barry Hirsch, *Unions, Dynamism, and Economic Performance*, in RESEARCH HANDBOOK ON THE ECONOMICS OF LABOR AND EMPLOYMENT LAW (Edward Elgar Series of Research Handbooks in Law and Economics 2012).

sports leagues, by contrast, are unionized. Moreover, they have acquired free agency, which allows them to play one team against another in the quest to capture as much of their MRP as possible.¹⁵⁴ Scully calculated compensation as a share of revenue for Major League Baseball, the National Basketball Association, the National Football League, and the National Hockey League; for each sport, he found that compensation increased substantially to around 50 percent of league revenue after free agency was introduced.¹⁵⁵ Similarly, Vrooman, another sports economist, explains that “[a]s the result of internal competition among sportsman owners, monopsonistic exploitation has virtually vanished over the last decade in all [major professional sports] leagues. All leagues have similar carrying capacities for player costs at *two-thirds of revenues* and current payroll cap percentages are almost identical at about 60 percent.”¹⁵⁶ In contrast, athlete compensation as share of revenue is substantially lower among (non-unionized) mixed martial arts (MMA) athletes,¹⁵⁷ or among collegiate athletes,¹⁵⁸ neither of which are unionized or permit free agency. Although this benchmark captures two elements of the but-for world contemplated here—regulated allocation and collective bargaining—athletes represent most if not all of the inputs (save things like venues and entertainers) into the sports platforms. Accordingly, this benchmark is informative but likely overstates the but-for pay shares for newspapers.

¹⁵⁴ Lawrence Kahn, *The Sports Business as a Labor Market Laboratory*, 14(3) JOURNAL OF ECONOMIC PERSPECTIVES 75-94, 81 (2000) (“[B]aseball salaries as a percentage of team revenues rose from 17.6 percent in 1974 to 20.5 percent in 1977 to 41.1 percent in 1982, further suggesting that free agency has had a structural effect on baseball salary determination.”).

¹⁵⁵ Gerald Scully, *Player Salary Share and the Distribution of Player Earnings*, 25(2) MANAGERIAL AND DECISION ECONOMICS, 77-86, 77-78 (2004) (“Is 50% or so as the player share the upper bound in professional team sport? One suspects that it is not... If all players were free agents, salary as a share of revenues would rise substantially.”).

¹⁵⁶ John Vrooman, *Theory of the Perfect Game: Competitive Balance in Monopoly Sports Leagues*, 34(1) REVIEW OF INDUSTRIAL ORGANIZATION 5-44, 42 (2009) (“[a]s the result of internal competition among sportsman owners, monopsonistic exploitation has virtually vanished over the last decade in all [major professional sports] leagues. All leagues have similar carrying capacities for player costs at two-thirds of revenues and current payroll cap percentages are almost identical at about 60 percent.”)

¹⁵⁷ See, e.g., John Nash, *What we now know about the UFC's finances*, BLOODY ELBOW, Sept. 9, 2019, available at <https://www.bloodyelbow.com/2019/9/9/20851990/what-we-now-know-about-the-ufc-finances>.

¹⁵⁸ See, e.g., *White v. NCAA*, 2006 WL 8066803, Class Certification Order, at *5 & n.4 (C.D. Cal. Oct. 19, 2006) (“[P]layer costs are less than 15.5 percent of revenues of NCAA member institutions. This percentage is extremely low... In the NBA and NFL, player compensation is approximately 55-65 percent of total revenues. These percentages offer a reasonable comparison and estimate of player inputs in the production of sports entertainment.”)

APPENDIX: PART 5

November 23, 2021

Submitted via regulations.gov Docket No. 2021-5

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

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

Dear Register Perlmutter:

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

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

Prima facie infringement

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

Photographs

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

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

Text: headlines and ledes

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

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

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

² 11 F.4th 26, 38 (2021).

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

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

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

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

Fair use

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

*The statutory factors*⁶

Factor 1: Nature and purpose of the use

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

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

⁶ 17 USC sec.107:

Limitations on exclusive rights: Fair use

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

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

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

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

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

Is news aggregation “transformative”?

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

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

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

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

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

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

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

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

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

Factor 2: Nature of the copyrighted work

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

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

¹³ 883 F.3d 169 (2d Cir. 2018).

¹⁴ *TVEyes*, 883 F.3d at 177–78.

¹⁵ *Id.* at 181.

¹⁶ *Id.* at 180–81.

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

¹⁸ 141 S. Ct. 1183 (2021).

¹⁹ *Id.* at 1202.

²⁰ See *id.*

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

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

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

Factor 3: Amount and substantiality of the copying

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

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

²³ 471 US 539 (1985).

²⁴ *Id.* at 565.

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

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

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

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

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

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

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

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

²⁸ *Google*, 141 S. Ct. at 1205.

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

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

One might counter that any substitution effect is not cognizable because news aggregation satisfies the public demand for the *information*, not for the expression, contained in news reports.³⁷ 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

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

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

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

³² *Id.* at 224.

³³ *Id.* at 223.

³⁴ *Id.*

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

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

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

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

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

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

Respectfully submitted,
/s/
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Morton L. Janklow Professor of
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Columbia University Law School

³⁸ *Google v Oracle* at 1208.

³⁹ *Id.*

⁴⁰ See *id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

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

APPENDIX A

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

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

Biden Declared Winner

 USNews.com

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

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

Nov 7, 2020



 Reuters

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

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

Nov 7, 2020



 Boston 25 News

AP: Joe Biden declared winner of 2020 presidential election

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

Nov 7, 2020



 The New York Times

Biden Wins Presidency, Ending Four Tumultuous Years Under Trump

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

Nov 8, 2020



 CNN

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

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

Nov 7, 2020



 The Conversation

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

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

Nov 7, 2020



First Cases of COVID


 CNBC

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

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

Jan 8, 2020




 Vox

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

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

Jan 7, 2020



 Wall Street Journal

New Virus Discovered by Chinese Scientists Investigating Pneumonia Outbreak

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

Jan 8, 2020



Kamala Harris Announced as VP

 Vox

Kamala Harris announced as Joe Biden's VP pick

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

Aug 11, 2020



 AP News

Biden picks Kamala Harris as running mate, first Black woman

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

Aug 11, 2020



 CNN

Joe Biden picks Kamala Harris as his running mate

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

Aug 11, 2020



Prince Harry and Meghan Markle

F Forbes

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

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

Jan 8, 2020



G The Guardian

Prince Harry and Meghan to step back from royal family

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

Jan 8, 2020



NBC NBC News

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

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

Jan 8, 2020



DB The Daily Beast

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

...

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

Jan 8, 2020



COP26 Methane Deal

ABC7 Chicago

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

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

2 weeks ago



The Week

Biden unveils sweeping methane emission rules at COP26 climate summit

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

2 weeks ago



BBC

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

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

2 weeks ago



USA Today

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

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

2 weeks ago



Murder Hornets

 Capital Journal

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

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

May 4, 2020

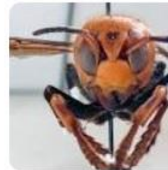


 WITN

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

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

May 4, 2020

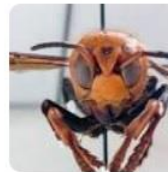


 WVLT

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

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

May 4, 2020



 ABC11

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

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

May 4, 2020



 KHOU

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

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

May 4, 2020



 The Virginian-Pilot

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

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

May 4, 2020



 100.7 WITL

'Murder Hornets' Have Been Spotted in the United States

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

May 4, 2020



Death of Soleimani

 NPR

Trump Ordered US Strike That Killed Iranian Military Leader

...

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

Jan 2, 2020



 Wall Street Journal

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

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

Jan 3, 2020



SpaceX Launch

 The New York Times

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

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

May 31, 2020



 SciTechDaily

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

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

May 30, 2020



 Wall Street Journal

Elon Musk's SpaceX Launches NASA Astronauts Into Orbit

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

May 30, 2020



Trump Acquitted

 The Washington Post

In historic vote, Trump acquitted of impeachment charges

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

Feb 5, 2020

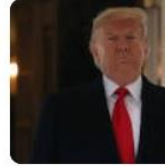


 Fortune

Trump acquitted of all impeachment charges and will remain in office

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

Feb 5, 2020

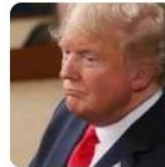


 Politico

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

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

Feb 5, 2020



 USA Today

President Trump acquitted on both impeachment charges, avoids removal

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

Feb 5, 2020



 Fortune

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Feb 5, 2020



 USA Today

President Trump acquitted on both impeachment charges, avoids removal

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

Feb 5, 2020



Weinstein Convicted

AP AP News

Harvey Weinstein found guilty in landmark #MeToo moment

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

Feb 24, 2020



NPR NPR

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

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

Feb 24, 2020



WABE 90.1 WABE 90.1

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

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

Feb 24, 2020



January 6 Insurrection

 BuzzFeed News

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

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

Jan 6, 2021



 New York Magazine

Mob of Trump Supporters Seize Capitol in Stunning Attack on Democracy

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

Jan 6, 2021



 Los Angeles Times

Pro-Trump mob breaches Capitol, forces lawmakers to flee

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

Jan 6, 2021



 New York Post

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

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

Jan 6, 2021



 Wall Street Journal

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

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

Jan 6, 2021

