



U.S. Copyright Office

[Docket No. 2021-5]

Publishers' Protections Study: Notice and Request for Public Comment

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

ACTION: Notice of Inquiry.

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

DATES: Comments are due on or before [INSERT 45 DAYS AFTER PUBLICATION IN FEDERAL REGISTER].

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

contact the Office using the contact information below, for special instructions.

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

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

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

I. Introduction

A. The Internet, Press Publishers, and News Aggregators

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

¹ See Michael Barthel & Kirsten Worden, *Newspapers Fact Sheet*, Pew Research Center (June 29, 2021),

revenues plummeted 62% between 2008 and 2018.² Total newspaper circulation, already declining before the internet-era, in 2020 fell to its lowest point since 1940.³ Digital distribution exposed city papers that once enjoyed close to local monopolies to national competition from well-heeled newsrooms like *The New York Times*. The combination of increased competition, dwindling revenue, and high debt overhangs led to a wave of bankruptcies, consolidations,⁴ and leveraged buyouts.⁵ From 2008 to 2019, the number of newspaper newsroom employees dropped by more than 40%,⁶ and one in five papers closed.⁷

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

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

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

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

⁴ The post-2000 consolidations accelerated a trend that began early in the 20th century. See Penelope Muse Abernathy, *The Rise of a New Media Baron and the Emerging Threat of News Deserts* 20–21 (2016), http://newspaperownership.com/wp-content/uploads/2016/09/07.UNC_RiseOfNewMediaBaron_SinglePage_01Sep2016-REDUCED.pdf.

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

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

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

⁸ See Eric Alterman, *Out of Print: The Death and Life of the American Newspaper*, New Yorker (Mar. 24,

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

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

2008), <https://www.newyorker.com/magazine/2008/03/31/out-of-print> (describing, among other things, the rise of Huffington Post and other news aggregators).

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

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

¹¹ See Eleonora Rosati, *The German ‘Google Tax’ Law: Groovy or Greedy?* 8(7) *J. Intel. Prop. L. & Prac.* 497, 497 (2013); Chrysanthos Dellarocas, Juliana Sutanto, Mihai Calin & Elia Palme, *Attention Allocation in Information-Rich Environments: The Case of News Aggregators*, 62(9) *Mgmt. Sci.* 2543, 2543 (2015);

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

Empirical data available to date on the relationship between aggregators and news sites is thin. Aggregators appear to drive a significant amount of traffic to news websites, and therefore their activities may serve to expand the market for press publishers.¹³ But their referrals may lead to a relatively narrow range of news sites,¹⁴ and they tend to drive traffic to individual articles rather than homepages.¹⁵ So it is also possible that their offerings substitute to some degree for the market for newspapers as a whole, even while stimulating traffic to specific articles. This concern has spurred policymakers in several

Directive 2019/790, of the European Parliament and of the Council of 17 April 2019 on Copyright and Related Rights in the Digital Single Market and Amending Directives 96/9/EC and 2001/29/EC, 2019 O.J. (L 130) 92, 103–04, <https://eur-lex.europa.eu/eli/dir/2019/790/oj> (“Publishers of press publications are facing problems in licensing the online use of their publications to the providers of those kinds of services, making it more difficult for them to recoup their investments.”).

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

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

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

¹⁵ See Doh-Shin Jeon, *Economics of News Aggregators* 18 (Toulouse Sch. of Econ., Working Paper No. 18-912, 2018), https://www.tse-fr.eu/sites/default/files/TSE/documents/doc/wp/2018/wp_tse_912.pdf. (“[N]ews aggregators reduce traffic to newspaper home pages while increasing traffic to individual news articles. Even if all empirical articles agree on the statement that the business-stealing effect is dominated by the readership-expansion effect, if this comes with a reduced traffic to home pages, it can have a long-term consequence that is not captured by the empirical studies.”).

countries to consider legislation aimed at maintaining the viability of their news industry, including by expanding press publishers' rights in the content they publish.

II. Protections for Press Publishers under U.S. Law

A. Copyright Protection for News Content

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

When a press publisher owns a copyright in either a collective work¹⁹ or in an

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

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

¹⁸ For freelance articles or photographs that are not works-made-for-hire, the author—in whom all exclusive rights initially vest—may transfer her rights to the publisher, either for a limited time or for the duration of the copyright, and the transfer may cover all or some of the exclusive rights. A transfer of rights may take the form of an assignment (meaning that legal title is transferred) or an exclusive license (meaning that exclusive permission to use the right(s) is transferred). *See Minden Pictures, Inc. v. John Wiley & Sons, Inc.*, 795 F.3d 997, 1003 (9th Cir. 2015). For both types of transfers, the transferee gains the right to bring suit for infringement. *See* 3 Melvin B. Nimmer & David Nimmer, *Nimmer on Copyright* sec. 12.02[B][1] (2021). In contrast, if the parties only agree to a nonexclusive license—meaning that the author remains free to license the work to other parties—then the grantee cannot bring an infringement suit. *See Minden Pictures, Inc. v. John Wiley & Sons, Inc.*, 795 F.3d 997, 1003 (9th Cir. 2015).

¹⁹ The relationship between the copyright in a collective work and in a particular contribution to a collective work is spelled out in the Copyright Act, which sets forth three instances where a publisher who

individual article, it has the exclusive right to do or authorize the reproduction, preparation of derivative works, distribution, public performance, and public display of that work.²⁰

These exclusive rights are not absolute. Under U.S. law, several legal doctrines allow the use of news content in certain circumstances without permission or payment.²¹ Most fundamentally, facts and ideas are not copyrightable.²² Nor are titles and short phrases, including headlines.²³ Where there are only a few, limited ways of expressing an idea, the merger doctrine bars protection for the expression in order to avoid giving a backdoor monopoly in the idea itself.²⁴ Even where the content used is protectable, the

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

²⁰ See 17 U.S.C. 106(1)–(5). As the Copyright Office has noted, these exclusive rights cover certain uses of copyrighted materials online, including the making available of copyrighted works for download or viewing via streaming. See generally U.S. COPYRIGHT OFFICE, THE MAKING AVAILABLE RIGHT IN THE UNITED STATES (2016), https://www.copyright.gov/docs/making_available/making-available-right.pdf.

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

²² 17 U.S.C. 102(b) (“In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.”); *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991); see also *Baker v. Selden*, 101 U.S. 99, 103 (1880) (describing idea/expression dichotomy).

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

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

fair use doctrine provides considerable scope for quotation and allows certain other reasonable uses.²⁵

Applying the fair use doctrine, courts have approved some forms of aggregation of news content but not others. For example, fair use has been found to permit the aggregation of copyrighted text or images by search engines or other indexing processes where those services used only snippets or low-resolution images that were unlikely to substitute for the original copyrighted works.²⁶ By contrast, the Second Circuit has held that the aggregation of television news content into a searchable index was not fair use, to the extent that the service enabled users to watch and share ten-minute clips.²⁷ Some news aggregators have sought licenses instead of relying on a fair use defense, presumably either because their use was more extensive than that permitted by fair use or because they wanted to avoid the expense and uncertainty of litigating.²⁸

B. “Hot News” Misappropriation

over the idea itself, in contravention of the statutory command”).

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

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

²⁷ *Fox News Network, LLC v. TVEyes, Inc.*, 883 F.3d 169, 180–81 (2d Cir. 2018); see also *MidlevelU, Inc. v. ACI Information Grp.*, 989 F.3d 1205, 1222–23 (11th Cir. 2021) (denying judgment as a matter of law on fair use defense where aggregated index of blog content also allowed users to view full text of articles without navigating to the original source); *Associated Press v. Meltwater U.S. Holdings, Inc.*, 931 F. Supp. 2d 537, 545 (S.D.N.Y. 2013) (finding news monitoring service’s reproduction and distribution of excerpts of online news articles was not fair use). Cf. *Video Pipeline, Inc. v. Buena Vista Home Entmt.*, 342 F.3d 191, 200 (3d Cir. 2003) (rejecting fair use defense of a service that compiled movie clips into a commercial database of movie trailers).

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

Separate from copyright, U.S. press publishers have at times asserted “hot news” misappropriation claims to protect against the taking of their time-sensitive news items. This cause of action, established by the Supreme Court in *International News Service v. Associated Press*²⁹ during World War I, bars free riding on a competitor’s investment at the moment in time when the competitor was poised to reap the rewards.³⁰ Because *International News Service* was based on no-longer extant federal common law³¹ and predated the 1976 Copyright Act and modern First Amendment jurisprudence,³² this tort’s continued viability is unclear. In one of the first modern cases to consider a hot news misappropriation claim under New York state law, the Second Circuit in *NBA v. Motorola* held that only a narrow version of the theory survived preemption by the Copyright Act.³³ Indeed, most courts faced with hot news misappropriation claims since *Motorola* have found them to be either preempted or insufficiently proven.³⁴ For example, in *Barclays Capital, Inc. v. Theflyonthewall.com, Inc.*, the Second Circuit held

²⁹ 248 U.S. 215 (1918).

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

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

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

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

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

that the Copyright Act preempted a hot news misappropriation claim under New York law based on the defendant's publication of plaintiff's time-sensitive stock recommendations, notwithstanding the fact that the recommendations at issue may not have been copyrightable.³⁵ This holding suggests that even if a hot news misappropriation claim could be brought against a news aggregator, it would face a significant hurdle in avoiding preemption by the Copyright Act.

III. International Developments

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

A. Ancillary Copyright

In 2019, as part of the Directive on Copyright in the Single Digital Market ("CDSM Directive"), the European Union required Member States to grant press publishers an "ancillary" right in the content of their press publications.³⁶ The EU's approach took inspiration from laws previously adopted in Germany and Spain. The German law, enacted in 2013 and later invalidated on procedural grounds, provided press

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

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

publishers an exclusive right to make their work available to the public for commercial purposes.³⁷ The Spanish law, by contrast, grants press publishers a non-waivable right of remuneration.³⁸

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

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

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

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

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

news publisher.”⁴¹ This focus on news publishers as the beneficiaries resulted from a public consultation “on the role of publishers in the copyright value chain” more broadly.⁴²

EU Member States had until June 7, 2021 to fully implement the CDSM. To date, Article 15 has been implemented by France, the Netherlands, Hungary, Germany, Malta, and Denmark.⁴³ The European Commission has commenced legal proceedings against other member states for failing to implement the CDSM by the deadline.⁴⁴

B. Competition Law

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

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

⁴³ See *DSM Directive Implementation Tracker*, Communia (last visited July 28, 2021), <https://www.notion.so/DSM-Directive-Implementation-Tracker-361cfae48e814440b353b32692bba879>. Italy has adopted a “delegation law” implementing the CDSM. As noted above, Spain has a press publisher’s law that predates, but is in some respects inconsistent with, Article 15 of the CDSM. French law requires news aggregators to share with publishers data on how readers use the reproduced press material. Loi 2019-775 du 24 juillet 2019 tendant à créer un droit voisin au profit des agences de presse et des éditeurs de presse [Law 2019-775 of July 24, 2019 on the Creation of Neighboring Rights for the Benefit of Press Agencies and Publishers], Journal Officiel de la République Française [J.O.][Official Gazette of France], July 26, 2019; Diana Passinke, *An Analysis of Articles 15 and 17 of the EU Directive on Copyright in the Digital Single Market: A Boost for the Creative Industries or the Death of the Internet?* (Stanford-Vienna Eur. Union L. Working Paper No. 49, 2020), <http://tlf.stanford.edu>. These laws have continued to provoke controversy. Shortly before France’s implementing law became effective, Google announced that it would no longer display snippets of results from European press publishers as part of search results in France, unless a publisher opts in to the display free of charge. French press publisher unions sued Google, and France’s competition authority declared that Google would have to negotiate remuneration to press publishers in good faith. See Natasha Lomas, *France’s Competition Watchdog Orders Google to Pay for News Reuse*, TechCrunch (Apr. 9, 2020), <https://techcrunch.com/2020/04/09/frances-competition-watchdog-orders-google-to-pay-for-news-reuse/>. Google has since signed contracts with several French publishers. See Tom Hirche, *Google Signs Contracts with a Handful of French Publishers*, IGEL (Nov. 24, 2020), <https://ancillarycopyright.eu/news/2020-11-24/google-signs-contracts-handful-french-press-publishers>. In July of 2021, France’s competition authority fined Google over \$500 million for failure to negotiate in good faith. See Associated Press, *France Fines Google \$592M in a Dispute Over Paying News Publishers for Content*, NPR (Jul. 13, 2021), <https://www.npr.org/2021/07/13/1015596060/france-fines-google-592m-in-a-dispute-over-paying-news-publishers-for-content>.

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

The second, competition-law-based approach to addressing the relationship between news publishers and online intermediaries can take many forms,⁴⁵ but the most-discussed initiative has been Australia’s mandatory bargaining law. In 2021 Australia passed a law requiring Google and Facebook, specifically, to negotiate with press publishers over compensation for the value the publishers’ stories generate on the two companies’ platforms.⁴⁶ Any news organization can notify Google or Facebook of its intent to bargain under the law.⁴⁷ Compensation terms may account for the value the publisher derives from Google’s or Facebook’s use of its material—in other words, Google can argue that its royalty rate should be lower because it drives traffic to the publisher’s site.⁴⁸ If, after three months of bargaining, the parties have not reached an agreement, an arbitration panel makes a binding decision on the rate of remuneration.⁴⁹ Because Australia’s law is not copyright-based, the bargaining right applies to *all* news content, including headlines and snippets, not just material protected by copyright.⁵⁰

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

⁴⁶ Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2021 (Cth) (Austl.), https://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/r6652_aspassed/toc_pdf/20177b01.pdf. The law also included a set of minimum standards for providing advance notice of changes to algorithmic ranking and presentation of news.

⁴⁷ Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2021 (Cth) (Austl.), https://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/r6652_aspassed/toc_pdf/20177b01.pdf.

⁴⁸ Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2021 (Cth) (Austl.), https://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/r6652_aspassed/toc_pdf/20177b01.pdf.

⁴⁹ Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2021 (Cth) (Austl.), https://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/r6652_aspassed/toc_pdf/20177b01.pdf.

⁵⁰ Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2021 (Cth) (Austl.), https://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/r6652_aspassed/toc_pdf/20177b01.pdf. Opponents of Australia’s approach, including Google, have argued that it rests on a misunderstanding of the economic forces affecting press publishers and undermines the “principle of unrestricted linking between websites.”⁵⁰ Mel Silva, *Mel Silva’s Opening Statement to the Senate Economics Committee Inquiry*, Google: The Keyword (Jan. 22, 2021), <https://blog.google/around-the-globe/google-asia/australia/mel-silvas-opening-statement/>. Facebook initially protested the law by blocking news sharing in Australia, but restored service after Australia amended the law to include a two-month mediation period

SUBJECTS OF INQUIRY:

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

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

The Effectiveness of Current Protections for Press Publishers

- 1) Copyright ownership of news content
 - a) For a given type of news publication, what is the average proportion of content in which the copyright is owned by the publisher compared to the proportion licensed by the publisher on either an exclusive or non-exclusive basis?
 - b) For content in which the press publisher owns the copyright, what is typically the basis for ownership: work-for-hire or assignment?

2) Third-party uses of news content

and to accommodate pre-existing deals between Facebook and news publishers. Elizabeth Dwoskin, *Facebook, Australia Reach Deal to Restore News Pages After Shutdown*, Wash. Post (Feb. 23, 2021), <https://www.washingtonpost.com/technology/2021/02/22/facebook-news-australia-deal/>; see also Kelly Buchanan, *Australia: New Legislation Establishes Code of Conduct for Negotiations between News Media and Digital Platforms over Payments for Content*, Libr. Congress: Global Legal Monitor (Feb. 26, 2021), <https://www.loc.gov/law/foreign-news/article/australia-new-legislation-establishes-code-of-conduct-for-negotiations-between-news-media-and-digital-platforms-over-payments-for-content/>.

- a) Under what circumstances does or should aggregation of news content require a license? To what extent does fair use permit news aggregation of press publisher content, or of headlines or short snippets of an article?
 - b) Are there any obstacles to negotiating such licenses? If so, what are they?
 - c) To what extent and under what circumstances do aggregators seek licenses for news content?
 - d) What is the market impact of current news aggregation practices on press publishers? On the number of readers? On advertising revenue?
 - e) Does the impact of news aggregation vary by the size of the press publisher, or the type of content being published (e.g., national or local news, celebrity news)? If so, how?
 - f) Do third-party uses of published news content other than news aggregation have a market impact on press publishers? What are those uses and what is the market impact? Do such uses require a license or are they permitted by fair use?
- 3) Existing non-copyright protections for press publishers
- a) What non-copyright protections against unauthorized news aggregation or other unauthorized third party uses of news content are available under state or federal law in the United States? To what extent are they effective, and how often are they relied upon?

The Desirability and Scope of Any Additional Protections for Press Publishers

- 1) To what extent do the copyright or other legal rights in news content available to press publishers in other countries differ from the rights they have in the United States?
- 2) In countries that have granted ancillary rights to press publishers, what effect have those rights had on press publishers' revenue? On authors' revenue? On aggregators' revenues or business practices? On the marketplace?

- 3) In countries that have granted ancillary rights to press publishers, are U.S. press publishers entitled to remuneration for use of their news content? Would adoption of ancillary rights in the United States affect the ability of U.S. press publishers to receive remuneration for use of their news content overseas?
- 4) Should press publishers have rights beyond existing copyright protection under U.S. law? If so:
 - a) What should be the nature of any such right – an exclusive copyright right, a right of remuneration, or something else?
 - b) How should “press publishers” be defined?
 - c) What content should be protected? Should it include headlines?
 - d) How long should the protection last?
 - e) What activities or third party uses should the right cover?
 - f) If a right of remuneration were granted, who would determine the amount of remuneration and on what basis? Should authors receive a share of remuneration, and if so, on what basis?
- 5) Would the approach taken by the European Union in Article 15 of the CDSM, granting “journalistic publications” a two-year exclusive right for certain content, be appropriate or effective in the United States? Why or why not?
- 6) Would an approach similar to Australia’s arbitration requirement work in the United States? Why or why not?
- 7) If you believe press publishers should have additional protections, should these or similar protections be provided to other publishers as well? Why or why not? If so, how should that class of publishers be defined and what protections should they receive?

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

- 1) Would granting additional rights to publishers affect authors' ability to exercise any rights they retain in their work? If so, how?
- 2) Would granting additional rights to press publishers affect the ability of users, including news aggregators, to rely on exceptions and limitations? If so, how?
- 3) Would granting additional rights to press publishers affect United States compliance with the Berne Convention or any other international treaty to which it is a party?

Other Issues

- 1) Please provide any statistical or economic reports or studies on changes over time in the economic value of a typical news article following the date of publication.
- 2) Please provide any statistical or economic reports or studies that demonstrate the effect of aggregation on press publishers or the impact of protections in other countries such as those discussed above on press publishers and on news aggregators.
- 3) Please identify any pertinent issues not mentioned above that the Copyright Office should consider in conducting its study.

Dated: October 5, 2021.

Shira Perlmutter,

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

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