

Do Press Publishers Need Additional Copyright Protections? Reading the Copyright Office's Report on Protections for Press Publishers

Andrew Foglia *

INTRODUCTION

In June 2022, the United States Copyright Office published a report on copyright protections for press publishers.¹ The report was the product of a year-long study focused on whether press publishers in the United States need additional statutory protections against online news aggregators. The report concluded that they do not. This essay will discuss the history of the Copyright Office's report and summarize its findings. Part I describes the origins and method of the study. Part II turns to the report itself, beginning with its historical background on the internet and press publishers, the rise of online news aggregators, and recent legislative efforts to buttress press publishers' finances through copyright or competition law. Part III covers the Report's key findings that press publishers already have significant protections under U.S. copyright law, that these protections are subject to some important limitations, but that the most important limitation is not a matter of copyright but bargaining power between press publishers and the largest search and social media platforms. Part IV briefly summarizes the report's conclusions and recommendations.

* Deputy Director of Policy and International Affairs, U.S. Copyright Office. This article represents the author's personal views and not those of the U.S. Copyright Office. The author would like to thank Kimberly Isbell, Melinda Kern, Shira Perlmutter, Maria Strong, and Chris Weston, who contributed their time and energy to the report that this article discusses. The author would also like to thank the editors of the *Columbia Journal of Law & the Arts* for their thoughtful edits. Finally, the author would like to thank Jane Ginsburg for her incisive comments on the Copyright Office report and for inviting the author to participate in this symposium.

1. U.S. COPYRIGHT OFFICE, *COPYRIGHT PROTECTIONS FOR PRESS PUBLISHERS* (2022), <https://www.copyright.gov/policy/publishersprotections/202206-Publishers-Protections-Study.pdf> [<https://perma.cc/435W-SM4U>] [<https://web.archive.org/web/20230128015422/https://www.copyright.gov/policy/publishersprotections/202206-Publishers-Protections-Study.pdf>] [hereinafter *Publishers' Protections Report*].

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I. STUDY PROCESS

Since 2000, declining newspaper circulation and revenues have incited several large-scale inquiries into the future of journalism in the United States.² The topic arose anew in the context of Senate Judiciary Committee hearings on reforms to digital copyright law. Witnesses for news media groups lamented online news aggregators' practice of reproducing publishers' original reporting without compensation (or credit to the authors). They called the Committee's attention to the new "press publishers' right" in the European Union, which gave publishers the ability, with some limitations, to exclude commercial aggregators from reproducing the publishers' news materials.³

Following on these hearings, in May 2021, a group of six United States senators asked the Copyright Office to conduct a study that would: (a) "[a]ssess the viability of adding specific ["ancillary copyright"]⁴ protections to U.S. Copyright law similar to those . . . being implemented in Europe[;]"⁵ (b) analyze the scope of the potential new right and how it might affect existing rights of authors; and (c) discuss relevant copyright exceptions and international treaty implications.⁶

2. See, e.g., DANA A. SCHERER & CLARE Y. CHO, CONG. RSCH. SERV., R47018, STOP THE PRESSES? NEWSPAPERS IN THE DIGITAL AGE (2022), <https://crsreports.congress.gov/product/pdf/R/R47018> [<https://perma.cc/JAD4-4KAL>] [<https://web.archive.org/web/20220823002026/https://crsreports.congress.gov/product/pdf/R/R47018>]; STEVEN WALDMAN, FED. COMM'NS COMM'N, THE INFORMATION NEEDS OF COMMUNITIES (2011), <https://www.fcc.gov/sites/default/files/the-information-needs-of-communities-report-july-2011.pdf> [<https://perma.cc/86SU-H73J>] [<https://web.archive.org/web/20220823002030/https://www.fcc.gov/sites/default/files/the-information-needs-of-communities-report-july-2011.pdf>]; See PENELOPE MUSE ABERNATHY, CTR. FOR INNOVATION & SUSTAINABILITY IN LOC. MEDIA, THE RISE OF A NEW MEDIA BARON AND THE EMERGING THREAT OF NEWS DESERTS 20–21 (2016), http://newspaperownership.com/wp-content/uploads/2016/09/07.UNC_RiseOfNewMediaBaron_SinglePage_01Sep2016-REDUCED.pdf [<https://perma.cc/4YW2-VFPS>] [https://web.archive.org/save/http://newspaperownership.com/wp-content/uploads/2016/09/07.UNC_RiseOfNewMediaBaron%20_SinglePage_01Sep2016-REDUCED.pdf].

3. Directive 2019/790 of the European Parliament and of the Council of Apr. 17, 2019, on Copyright and Related Rights in the Digital Single Market and Amending Directives 96/9/EC and 2001/29/EC, art. 15, 2019 O.J. (L 130/92) [hereinafter *Directive 2019/790*].

4. The term "ancillary copyright" generally refers to copyright-like protections belonging to press publishers in the material that they publish. See *Publishers' Protections Report*, *supra* note 1, at 1 (explaining that ancillary copyright protections "would require online news aggregators to pay publishers for excerpts of content they provide for others to view"); Giovanni Maria Riccio, *Ancillary Copyright and Liability of Intermediaries in the EU Directive Proposal on Copyright*, SSRN (Mar. 1, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3149363 [<https://perma.cc/5N5U-UE9K>] [https://web.archive.org/web/20230325063024/https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3149363] (In the E.U., for example, "whenever a subject uses parts of a journalistic article (including . . . so-called snippets) he is expected to pay the above ancillary rights to publishers.").

5. Ancillary copyright protections "would require online news aggregators to pay publishers for excerpts of content they provide for others to view." *Publishers' Protections Report*, *supra* note 1, at 1. In the E.U., for example, "whenever a subject uses parts of a journalistic article (including . . . so-called snippets) he is expected to pay the above ancillary rights to publishers." Giovanni Maria Riccio, *Ancillary Copyright and Liability of Intermediaries in the EU Directive Proposal on Copyright*, SSRN (Mar. 1, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3149363 [<https://perma.cc/5N5U-UE9K>] [https://web.archive.org/web/20230325063024/https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3149363].

6. Letter from Senators Leahy, Tillis, Cornyn, Hirono, Klobuchar, and Coons to Shira Perlmutter, Register of Copyrights 1 (May 3, 2021) (on file with the Copyright Office). The Letter followed a prior suggestion for a Copyright Office study of ancillary copyright that was included in a discussion draft of the

The Copyright Office's study proceeded in three phases. First, we canvassed past studies, academic articles, and popular press in order to set the scope of the study and help frame questions for public comments. Second, we gathered views from the public. In the fall of 2021, we published two notices of inquiry in the Federal Register to solicit public comments.⁷ We received approximately forty-seven responsive comments in total.⁸ And on December 9, 2021, we held a public roundtable for members of the public to further communicate their views.⁹ We then reviewed all the comments and all the documents cited in the comments.¹⁰ Third, and finally, we wrote the Report.

II. THE REPORT'S BACKGROUND

A. "THE INTERNET HAS USHERED IN AN ERA OF DISRUPTION AND TRANSFORMATION"¹¹

Our Report began with a brief history of the press publishing industry in the internet era. Although this history bore only glancing relevance on the legal status of aggregation, we found it helpful to place aggregation in the context of a larger story about the digitization of press publishing.¹² Focusing narrowly on aggregation might give a misleading impression of the harms caused by aggregation and the good that one could reasonably hope to achieve by limiting the practice.

The base line facts are brutal. Between 2008 and 2018, newspaper ad revenue plunged by sixty-two percent.¹³ Classified advertisers fled to free, online platforms like

Digital Copyright Act. Digital Copyright Act, Sec. 8 (Discussion Draft 12/18), <https://www.tillis.senate.gov/services/files/97A73ED6-EBDF-4206-ADEB-6A745015C14B> [<https://perma.cc/3YU8-A7CV>] [<https://web.archive.org/web/20230214143745/https://www.tillis.senate.gov/services/files/97A73ED6-EBDF-4206-ADEB-6A745015C14B>] ("The Register of Copyrights shall study the costs, benefits, and viability of adding ancillary copyright for press publishers to Federal law. The Register shall, not later than 12 months after the date of the enactment of this Act, submit to the Congress a report on the evaluation, including any legislative recommendations the Register may have."). Notably, neither the Digital Copyright Act draft nor the senators' request mentioned antitrust policy, but antitrust policy would play a central role in comments on the Copyright Office study as it developed.

7. *Publishers' Protections Report*, *supra* note 1, at 6; *Publishers' Protections Study: Notice and Request for Public Comment*, 86 Fed. Reg. 56,721 (Oct. 12, 2021); *Publishers' Protections Study: Request for Additional Comments*, 86 Fed. Reg. 62,215 (Nov. 9, 2021).

8. *Id.*

9. *Publishers' Protections Report*, *supra* note 1, at 7.

10. These comments, and the sources they cite, are extraordinarily helpful in informing the Copyright Office's policy analysis. It bears mentioning, however, that the comment process does not necessarily furnish the Office with complete arguments and rebuttals on every point of interest. Sometimes only one commenter chooses to address a particular issue in any detail and the Office is left without the benefit of opposing viewpoints.

11. *Publishers' Protections Study: Notice and Request for Public Comment*, 86 Fed. Reg. 56, 721 (Oct. 12, 2021).

12. As we put it in the Report: "The copyright issues associated with news aggregation are part of a longer discussion about the viability of legacy press publishers and, more broadly, the survival of journalism in the internet era, dating back to the early 2000s." *Publishers' Protections Report*, *supra* note 1, at 5.

13. *Id.* at 8 (citing Elizabeth Grieco, *Fast Facts about the Newspaper Industry's Financial Struggles as McClatchy Files for Bankruptcy*, PEW RSCH. CENTER (Feb. 14, 2020), <https://www.pewresearch.org/fact-tank/>

Craigslist and Facebook,¹⁴ and display advertisers likewise shifted their focus online.¹⁵ Circulation numbers (though not revenues) fell to their lowest point since 1940,¹⁶ as digital distribution abetted the “unbundling” of popular features like sports box scores, weather reports, or movie showtimes¹⁷ and simultaneously terminated city papers’ local monopolies by giving all news outlets effectively limitless geographic reach.¹⁸ From 2004 to 2018, total newspaper revenue fell fifty-two percent.¹⁹ Staff cutbacks and paper closings were equally severe.²⁰

Of course, there are other, less bleak stories to tell about journalism in the internet age. The flipside to local papers facing more competition is that readers have access to more news outlets than ever before.²¹ And the same low distribution costs that allow *The Guardian* to reach readers in Peoria also enable individuals to share news or analysis

2020/02/14/fast-facts-about-the-newspaper-industrys-financial-struggles [https://perma.cc/E6CT-M4YD] [https://web.archive.org/web/20230214145317/https://www.pewresearch.org/fact-tank/2020/02/14/fast-facts-about-the-newspaper-industrys-financial-struggles].

14. *Id.*

15. SCHERER & CHO, CONG. RSCH. SERV., R47018, STOP THE PRESSES? NEWSPAPERS IN THE DIGITAL AGE 5–6. Overall digital advertising revenue skyrocketed during this period, but “half of all digital [display] revenue went to just two tech companies,” Facebook and Google. Michael Barthel, *5 Key Takeaways About the State of News Media in 2018*, PEW RSCH. CENTER (July 23, 2019), <https://www.pewresearch.org/fact-tank/2019/07/23/key-takeaways-state-of-the-news-media-2018> [https://perma.cc/3N6C-6E29] [https://web.archive.org/web/20230214145527/https://www.pewresearch.org/fact-tank/2019/07/23/key-takeaways-state-of-the-news-media-2018].

16. Michael Barthel & Kirsten Worden, *Newspapers Fact Sheet*, PEW RSCH. CENTER (June 29, 2021), <https://www.journalism.org/fact-sheet/newspapers> [https://perma.cc/J5AK-LGXT] [https://web.archive.org/web/20230214145742/https://www.pewresearch.org/journalism/fact-sheet/newspapers].

17. See Neil Weinstock Netanel, *Mandating Digital Platform Support for Quality Journalism*, 34 Harv. J.L. & Tech. 473, 491 (2021) (“In print newspapers, investigative reporting is bundled together with light entertainment. As a result, print advertising revenues and subscriptions effectively cross-subsidize investigative reporting even if readers spend far more time reading entertainment. But digital technology greatly diminishes newsrooms’ ability to bundle.”).

18. *Publishers’ Protections Report*, *supra* note 1, at 10–11.

19. ACCENTURE, USA NEWS MEDIA LANDSCAPE TRENDS 5 (2021), https://newsmedia-analysis.com/wp-content/uploads/2021/06/accenture_analysis_USAnewsmedia.pdf [https://perma.cc/Z3YY-QRHG] [https://web.archive.org/web/20230214145957/https://newsmedia-analysis.com/wp-content/uploads/2021/06/accenture_analysis_USAnewsmedia.pdf] (“Between 2004 and 2018 total newspaper revenues fell by \$30 billion, to \$27.4 billion. This amounted to a 52% fall.”).

20. *Publishers’ Protections Report*, *supra* note 1, at 10 (“[t]he combination of increased competition, dwindling revenue, and high debt overhangs, led to a wave of bankruptcies, consolidations, and leveraged buyouts among local newspapers. From 2008 to 2019, the number of newspaper newsroom employees dropped by more than 40%, and one in five papers closed.”); see Elizabeth Grieco, *Fast Facts about the Newspaper Industry’s Financial Struggles as McClatchy Files for Bankruptcy*, PEW RSCH. CENTER (Feb. 14, 2020), <https://www.pewresearch.org/fact-tank/2020/02/14/fast-facts-about-the-newspaper-industrys-financial-struggles> [https://perma.cc/E6CT-M4YD] [https://web.archive.org/web/20230214145317/https://www.pewresearch.org/fact-tank/2020/02/14/fast-facts-about-the-newspaper-industrys-financial-struggles]; 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> [https://perma.cc/B3LZ-8M2W] [https://web.archive.org/web/20230214150654/https://www.nytimes.com/2019/12/21/reader-center/local-news-deserts.html].

21. *Publishers’ Protections Report*, *supra* note 1, at 7 (“Readers have access to high-quality journalism from around the globe”).

via blog, newsletter, or social media platform.²² Aggregation itself may add value for news consumers by helping them to discover articles they would not otherwise encounter or to share common points of reference.²³ There is, according to one commenter on the Copyright Office's study, "some sense" in which "the 21st century is a golden age of journalism."²⁴

Moreover, the 21st century's ugly revenue and circulation numbers do call for some additional context. The disruptions brought on by the internet echo previous technology-led shifts in the news industry, transforming both distribution and content—for better and for worse.²⁵ In the 20th century, radio and television brought news to new audiences and in new formats, but drew consumers and advertisers away from print media.²⁶ "Foreshadowing some of the concerns heard today, print journalists complained that radio stations often lifted copy directly from newspapers, aired stories that didn't go into depth, and hired inexperienced reporters."²⁷

A wider historical perspective also shows that the enormous profit margins newspapers enjoyed at the end of the 20th century were, in some respects, an aberration. From 1975 to 1990, press publishers leveraged market consolidation, efficient management, and spiking ad rates to increase profits.²⁸ "[A]s more newspapers became monopolies, rates skyrocketed 253 percent (compared with 141 percent for general consumer prices)."²⁹ By the 1990s, despite years of declining circulation, the industry's average cash flow margins were twenty-nine percent.³⁰

22. *Id.* at 7–8.

23. See generally Engine Comments Submitted in Response to U.S. Copyright Office's Nov. 9, 2021 Notice of Inquiry (Jan. 5, 2022) [hereinafter *Engine Second-Round Comments*] (discussing benefits of aggregation to startup companies); Reddit, Comments Submitted in Response to U.S. Copyright Office's Nov. 9, 2021 Notice of Inquiry (Jan. 5, 2022) [hereinafter *Reddit Second-Round Comments*] (describing web communities that have developed around sharing and discussion of news stories).

24. The R Street Institute ("R Street") and Niskanen Center ("Niskanen"), Joint Comments Submitted in Response to U.S. Copyright Office's Oct. 12, 2021 Notice of Inquiry, 4 (Nov. 26, 2021) [hereinafter *R Street/Niskanen Joint Initial Comments*].

25. In the 1830s, reductions in the cost of ink and paper enabled newspapers to pursue a mass-market audience, which changed their incentives from pleasing party patrons to avoiding political affiliation, leading to a new focus on independent reporting. STEVEN WALDMAN, FED. COMM. COMMISSION, THE INFORMATION NEEDS OF COMMUNITIES 34 (June 9, 2011), <https://www.fcc.gov/document/information-needs-communities> [https://perma.cc/7B9S-JS54] [https://web.archive.org/web/20230214152112/https://www.fcc.gov/document/information-needs-communities]. Railroad construction and then the telegraph supported the growth of national corporate brands, and the owners of those brands realized they could save money by "dealing with a few large papers instead of a bevy of small ones." *Id.* at 34.

26. *Id.* at 35 ("Along with readers went advertisers. Between 1929 and 1941, newspaper ad revenue dropped 28 percent overall and national advertising fell 42 percent.")

27. *Id.* During the same time period, the newspaper industry rapidly consolidated: in 1910, nearly sixty percent of cities had competing daily papers; by 1971, that figure had fallen to two percent. As of 1977, 170 newspaper groups owned two-thirds of the country's 1,700 daily papers. SUZANNE M. KIRCHOFF, THE U.S. NEWSPAPER INDUSTRY IN TRANSITION, CONG. RSCH. SERV. 3 (2010), <https://sgp.fas.org/crs/misc/R40700.pdf> [https://perma.cc/5CKF-L7TX] [https://web.archive.org/web/20221025231553/https://sgp.fas.org/crs/misc/R40700.pdf].

28. WALDMAN, *supra* note 25, at 35.

29. *Id.* at 36.

30. *Id.*

None of this is to say that concern over shrinking news revenue and staffing rates are misplaced. As a 2011 FCC report put it, “[a]n abundance of media outlets does not translate into an abundance of reporting.”³¹ Citizen journalists and hyperlocal blogs may serve their communities in some unique ways without adequately replacing the benefits of healthy local newspapers.³² And, so far, new local and hyperlocal initiatives are concentrated in major metropolitan areas, not the sites of America’s growing news deserts.³³

On the contrary, it is clear that the internet “has shaken the foundations of newspaper financing.”³⁴ But history should make us cautious about treating press publishers’ 1990s peaks as a baseline or believing that the 1990s publishing ecosystem can be recreated when its technological foundations have crumbled.³⁵

31. *Id.* at 6.

32. At the public roundtable, a representative of the News Media Alliance argued that citizen journalism does not merit the name “journalism:” “[w]here a Facebook poster goes out and takes pictures on their phone[,] that’s not journalism because there’s a method and there’s a Code of Conduct that we adhere to ensure . . . that people can rely on it. . . . [D]o we want citizen medicine practice on the streets?” Publishers’ Protections Study Roundtable Transcript at 64:18–65:20 (Dec. 9, 2021) (Danielle Coffey, News Media Alliance), <https://www.copyright.gov/policy/publishersprotections/211209%20Publishers%20Protections%20Transcript.pdf> [<https://perma.cc/2HVY-TZAX>]. [<https://web.archive.org/web/20220705065233/https://www.copyright.gov/policy/publishersprotections/211209%20Publishers%20Protections%20Transcript.pdf>] [hereinafter *Transcript*]; see also Darren Smith, *Media Ethics and Guerilla Warfare*, THOUGHT LEADER (Oct. 31, 2007), <https://thoughtleader.co.za/media-ethics-guerilla-warfare> [perma.cc link unavailable] [<https://web.archive.org/web/20230214153643/https://thoughtleader.co.za/media-ethics-guerilla-warfare>] (noting the troubling implications of an undisciplined army of citizen journalists); Vincent Mahler, *Citizen Journalism is Dead*, Media in Transition (captured Sept. 24, 2006), <https://web.archive.org/web/20060924125946/http://nml.ru.ac.za/maher/?p=6> (“[C]itizen journalism is potentially devoid of any form of ethical accountability other than the legislative environment in which the individual operates. So, on the level of routine practice, there is very little control, especially in terms of accuracy.”), *comments revised and expanded* in Vincent Mahler, *Towards a Critical Media Studies Approach to the Blogosphere*, NEW MEDIA LAB (Feb. 2, 2006), <https://web.archive.org/web/20060924145309/http://nml.ru.ac.za/maher/papers/VMO-01.pdf>; Jesse Singal, *Citizen Journalism’ Is a Catastrophe Right Now, and It’ll Only Get Worse*, N.Y. MAG. (Oct. 19, 2016), <https://nymag.com/intelligencer/2016/10/citizen-journalism-is-a-catastrophe-itll-only-get-worse.html> [<https://perma.cc/3UCD-PR77>] [<https://web.archive.org/web/20230214154411/https://nymag.com/intelligencer/2016/10/citizen-journalism-is-a-catastrophe-itll-only-get-worse.html>] (arguing that citizen journalism spreads misinformation faster than professional journalists can correct it); Carina Tenor, *Hyperlocal News: After the Hype*, THE LONDON SCH. OF ECON. AND POL. SCI. (2018), <https://www.lse.ac.uk/media-and-communications/assets/documents/research/Polis-Hyperlocal-News-report-Jul-2018.pdf> [<https://perma.cc/WSS8-BY2Y>] [<https://web.archive.org/web/20230214154619/https://www.lse.ac.uk/media-and-communications/assets/documents/research/Polis-Hyperlocal-News-report-Jul-2018.pdf>].

33. Clare Malone, *Is There a Market for Saving Local News?* THE NEW YORKER (Feb. 3, 2022), <https://www.newyorker.com/news/annals-of-communications/is-there-a-market-for-saving-local-news> [<https://perma.cc/449L-DGDQ>] [<https://web.archive.org/web/20221128162137/https://www.newyorker.com/news/annals-of-communications/is-there-a-market-for-saving-local-news>].

34. *Publishers’ Protections Report*, *supra* note 1, at 8.

35. To be clear, no commenters on the study suggested that the U.S. government could restore the press publishing business to the 1990s. What they asked was for the Office to recommend changes that (a) they believe are justified as a matter of fairness and (b) might arrest what they view as a terminal decline. See, e.g., News Media Alliance, Comment Submitted in Response to U.S. Copyright Office’s Oct. 12, 2021 Notice of Inquiry 5 (Nov. 26, 2021) (“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

B. “NEWS AGGREGATORS, INCLUDING SEARCH ENGINES AND SOCIAL MEDIA PLATFORMS, HAVE NOW BECOME THE PREFERRED OR INITIAL SOURCE OF NEWS FOR A MAJORITY OF DIGITAL NEWS CONSUMERS”³⁶

In addition to undercutting newspapers’ advertising business, the internet also fostered a set of distributors that “aggregate” news content from others’ original reporting. The term “news aggregator” can apply to a wide variety of services, including search and social media platforms, that distribute links to or snippets of third-party news articles,³⁷ but the Copyright Office’s Report focused on one type of aggregation: the unlicensed reproduction of headlines and lede sentences.

Compared to the collapse of classified ad sales, the Copyright Office found no conclusive evidence that the rise of online news aggregators,³⁸ specifically, has reduced newspapers’ profits.³⁹ Commenters generally disagree on whether aggregators’ reproduction of headlines and ledes tends in the aggregate to *substitute* for the original articles, depriving the original publisher of expected profits, or *supplement* the original articles by driving more traffic to the publisher’s website than the story would otherwise have obtained.⁴⁰ It is clear that news aggregators drive a great deal of traffic to news publishers’ sites,⁴¹ probably more than the sites would otherwise receive,⁴² but traffic to individual articles may be less valuable to the publisher than traffic to the home page,⁴³ and aggregation broadly may still hurt publishers by undermining the

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.”)

36. *Publishers’ Protections Report*, *supra* note 1, at 14.

37. *Id.* at 11–13.

38. The term “news aggregator” can apply to a wide variety of services, including search and social media platforms. *Id.* at 11–13. The Copyright Office’s Report focused on one type of aggregation: the unlicensed reproduction of headlines and lede sentences. *Id.*

39. *Id.* at 15–16.

40. *Id.* at 14.

41. *Id.* at 14 (citing NEWMAN ET AL., REUTERS INST. DIGITAL NEWS REPORT 2018 14–15 (Apr. 2018); Doh-Shin Jeon, *Economics of News Aggregators* 1–2 (Toulouse Sch. of Econ., Working Paper No. 18-912, 2018), https://www.tse-fr.eu/sites/default/files/TSE/documents/doc/wp/2018/wp_tse_912.pdf [<https://perma.cc/X6LV-BBL2>] [https://web.archive.org/web/20221026171312/https://www.tse-fr.eu/sites/default/files/TSE/documents/doc/wp/2018/wp_tse_912.pdf]).

42. *Publishers’ Protections Report*, *supra* note 1, at 15 (citing Jeon, *supra* note 39 (reviewing empirical literature and concluding that Google News and Facebook increase overall traffic to news sites); OLMSTEAD ET AL., NAVIGATING NEWS ONLINE: WHERE PEOPLE GO, HOW THEY GET THERE AND WHAT LURES THEM AWAY, PEW RSCH. CENTER (2011), <https://www.pewresearch.org/wp-content/uploads/sites/8/legacy/NIELSEN-STUDY-Copy.pdf> [<https://perma.cc/PC9M-D9WV>] [<https://web.archive.org/web/20220516210657/https://www.pewresearch.org/wp-content/uploads/sites/8/legacy/NIELSEN-STUDY-Copy.pdf>]).

43. *Publishers’ Protections Report*, *supra* note 1, at 15–16 (citing Jeon, *supra* note 41, at 18 (“[N]ews aggregators reduce traffic to newspaper home pages while increasing traffic to individual news articles. Even if all empirical articles agree on the statement that the business-stealing effect is dominated by the readership-expansion effect, if this comes with a reduced traffic to home pages, it can have a long-term consequence that is not captured by the empirical studies.”)); *see also Transcript* at 107:1–5 (Dec. 9, 2021) (Hal Singer, Econ One, consultant to NMA).

connection between popular stories and the publishers' overall brand reputation.⁴⁴ The Copyright Office did not attempt to resolve this debate in the economics literature, noting only that the empirical data is "thin."⁴⁵

C. "OUT OF CONCERN FOR THE CONTINUED VIABILITY OF THEIR NEWS INDUSTRIES, SEVERAL NATIONAL AND REGIONAL LEGISLATURES HAVE IN RECENT YEARS CONSIDERED OR ENACTED NEW FORMS OF LEGAL PROTECTIONS FOR PRESS PUBLISHERS."⁴⁶

The headwinds facing traditional press publishers are not a U.S. phenomenon. A number of countries have attempted to shore up their press publishing industries by granting publishers new rights sounding in copyright or in competition law. In keeping with the senators' request to assess protections "similar to those now being implemented in Europe," the Copyright Office looked at these international models for new press publishers' rights. The record, although sparse, played a significant role in the Office's final recommendations.

In the 2010s, Spain and Germany legislated additional protections for press publishers. Germany's law granted publishers an exclusive right for commercial uses of their texts.⁴⁷ The right did not extend to individual words or "very short excerpts," and it did not apply to mere linking.⁴⁸ The law fomented a wave of legal challenges, and the Court of Justice of the European Union ultimately struck it down due to a procedural defect in its enactment.⁴⁹

Spain took a different approach from Germany, granting news publishers not an exclusive right but a non-waivable right to equitable payment.⁵⁰ In other words, press publishers could not prevent aggregators from reproducing snippets of their articles, but the aggregators did need to pay for the use.⁵¹

44. *Publishers' Protections Report*, *supra* note 1, at 15–16 (citing Neil Weinstock Netanel, *Mandating Digital Platform Support for Quality Journalism*, 34 HARV. J.L. & TECH. 473, 482 (2021)).

45. *Id.* at 14.

46. *Id.* at 17.

47. *Id.* at 17 (citing Gesetz über Urheberrecht und verwandte Schutzrechte [Urheberrechtsgesetz] [UrhG] [Copyright Act], Sept. 9, 1965, BGBl I at 1273, as amended by Achten Gesetz zur Änderung des Urheberrechtsgesetzes, May 7, 2013, BGBl I at 1161, § 87f (Ger.)).

48. *Id.*

49. *Id.* at 18–19; *see also* Case C-299/17, VG Media v. Google, ECLI:EU:C:2019:716 (Sept. 12, 2019).

50. *Publishers' Protections Report*, *supra* note 1, at 20 (citing Ley 21/2014, de 4 de noviembre, por la que se modifica el texto refundido de la Ley de Propiedad Intelectual, aprobado por Real Decreto Legislativo 1/1996, de 12 de abril, y la Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil [Law 21/2014, of November 4, Amending the Consolidated Text of the Law on Intellectual Property, approved by Royal Legislative Decree 1/1996, of April 12, and Law 1/2000, of January 7, on Civil Procedure] (B.O.E. 2014, 11404), https://www.congreso.es/constitucion/ficheros/leyes_espa/L_021_2014.pdf [<https://perma.cc/XPB7-XYRU>] [https://web.archive.org/web/20230214160235/https://www.congreso.es/constitucion/ficheros/leyes_espa/L_021_2014.pdf]).

51. *Id.*

Spain's law famously led Google News to exit Spain.⁵² Some of the empirical literature on aggregation arises from this natural experiment. Studies found that news sites lost traffic and that smaller publishers were the hardest hit.⁵³ While the Office chose not to draw large inferences from a small set of studies, we concluded that at the very least the evidence from Spain did not clearly indicate that the law helped Spanish publishers.⁵⁴

The most important antecedent ancillary copyright law was, however, the one mentioned in the letter requesting the study: Article 15 of the European Directive on Copyright and Related Rights. Article 15 provides EU publishers an exclusive right to authorize the reproduction or making available of press publications by online service providers.⁵⁵ It does not apply to individual words or "very short extracts."⁵⁶ Nor does it apply to mere linking, mere facts, or to any other use permitted by EU copyright law.⁵⁷

A key point about Article 15 is that it arose in response to uncertainty about publishers' rights across the EU. Unlike in the United States, where the work made for hire doctrine ensures that publishers will generally own the copyright in the articles they publish, some EU publishers faced "the burden of having to prove ownership of copyright in each journalistic output" before they could license or enforce rights in the digital environment.⁵⁸

52. *Id.* at 20 (citing Richard Gingras, *Novedades acerca de Google Noticias en España* [*News About Google News in Spain*], GOOGLE: BLOG OFICIAL DE GOOGLE ESPAÑA (Dec. 11, 2014) (Spain), <https://europe.googleblog.com/2014/12/an-update-on-google-news-in-spain.html> [<https://perma.cc/9RCU-BLHB>] [<https://web.archive.org/web/20230309124958/https://europe.googleblog.com/2014/12/an-update-on-google-news-in-spain.html>].

53. See Joan Calzada & Ricard Gil, *What Do News Aggregators Do? Evidence from Google News in Spain and Germany*, SSRN, Dec. 1, 2018, at 9 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2837553 [<https://perma.cc/NP4Z-CVW6>] [https://web.archive.org/web/20230214160648/https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2837553]; PEDRO POSADA DE LA CONCHA ET AL., NERA ECONOMIC CONSULTING, IMPACTO DEL NUEVO ARTICULO 32.2 DE LA LEY DE PROPIEDAD INTELECTUAL [Impact of the New Article 32.2 of the Spanish Intellectual Property Law] 46–7 (2015), <https://www.asktheeu.org/en/request/3176/response/11308/attach/2/AnnexI.pdf> [<https://perma.cc/J4VW-YNUH>] [<http://web.archive.org/web/20230122015552/https://www.asktheeu.org/en/request/3176/response/11308/attach/2/AnnexI.pdf>]; Matthew Ingram, *External Traffic to Spanish News Sites Plummets After Google Move*, GIGAOM (Dec. 16, 2014), <https://research.gigaom.com/2014/12/16/traffic-to-spanish-news-publishers-plummets-after-google-move> [<https://perma.cc/LJA2-54H7>] [<http://web.archive.org/web/20230122015708/https://research.gigaom.com/2014/12/16/traffic-to-spanish-news-publishers-plummets-after-google-move>].

54. *Publishers' Protections Report*, *supra* note 1 at 22.

55. *Directive 2019/790*, *supra* note 3, at art. 15.

56. *Id.* at arts. 15; 31–32.

57. *Id.*

58. *Publishers' Protections Report*, *supra* note 1, at 22–23 (quoting EUROPEAN COMMISSION, DIRECTORATE GENERAL FOR INTERNAL POLICIES OF THE UNION, POLICY DEPARTMENT FOR 'CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS, STRENGTHENING THE POSITION OF PRESS PUBLISHERS AND AUTHORS AND PERFORMERS IN THE COPYRIGHT DIRECTIVE 15 (2017), https://www.europarl.europa.eu/RegData/etudes/STUD/2017/596810/IPOL_STU%282017%29596810_EN.pdf [<https://perma.cc/7L4H-KZQ4>] [[https://web.archive.org/web/20220901044436/https://www.europarl.europa.eu/RegData/etudes/STUD/2017/596810/IPOL_STU\(2017\)596810_EN.pdf](https://web.archive.org/web/20220901044436/https://www.europarl.europa.eu/RegData/etudes/STUD/2017/596810/IPOL_STU(2017)596810_EN.pdf)].

Implementation of Article 15 is still underway, and so the Copyright Office could not assess its impact.⁵⁹

D. “DEVELOPMENTS IN THE UNITED STATES AND ABROAD HAVE HIGHLIGHTED OTHER, COMPETITION-BASED APPROACHES TO ADDRESSING THE RELATIONSHIP BETWEEN NEWS PUBLISHERS AND LARGE NEWS AGGREGATORS”⁶⁰

In addition to these ancillary copyright approaches, the Office also looked to examples where countries used competition (in the U.S., antitrust) law to try to protect publishers. The most salient of these is Australia’s News Media and Digital Platforms Mandatory Bargaining Code of 2021.⁶¹ The Code enabled press publishers to notify designated digital platforms—at the time, just Google and Facebook—of their intent to bargain over payment for use of the publishers’ materials on the digital platforms.⁶² Platforms that failed to reach an agreement with publishers would face the threat of binding arbitration.⁶³

59. *Id.* at 23; see also Christina Angelopoulos, “Comparative Report on the National Implementations of Articles 15 & 17 of the Directive on Copyright in the Digital Single Market – Part 1,” KLUWER COPYRIGHT BLOG (Nov. 29, 2022), <http://copyrightblog.kluweriplaw.com/2022/11/29/comparative-report-on-the-national-implementations-of-articles-15-17-of-the-directive-on-copyright-in-the-digital-single-market-part-1> [<https://perma.cc/F4Q6-DLCL>] [<http://web.archive.org/web/20230122015854/http://copyrightblog.kluweriplaw.com/2022/11/29/comparative-report-on-the-national-implementations-of-articles-15-17-of-the-directive-on-copyright-in-the-digital-single-market-part-1>].

60. *Publishers’ Protections Report*, *supra* note 1, at 23.

61. Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2021 (Cth) (Austl.), https://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/r6652_aspassed/toc_pdf/20177b01.pdf [<https://perma.cc/5WKN-EBFG>] [https://web.archive.org/web/20221209232107/http://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/r6652_aspassed/toc_pdf/20177b01.pdf]. The Report also described decisions of the French competition authority to sanction Google for failure to bargain with press publishers in good faith. See *Publishers’ Protections Report*, *supra* note 1, at 25–26.

62. *Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2021*, *supra* note 61, at sec. 52ZE.

63. *Id.* at sec. 52ZIA. One important feature of Australia’s News Media and Digital Platforms Mandatory Bargaining Code is that because it is a competition law and not a copyright law, it applies in theory to all news content and not just the content that is protected by copyright law. *Publishers’ Protections Report*, *supra* note 1, at 25.

Australia's approach has proven attractive to policymakers in other countries.⁶⁴ A Canadian equivalent is advancing through Parliament.⁶⁵ In the United States, the latest version of the Journalism Competition and Preservation Act (JCPA)⁶⁶ introduced an Australia-like mandatory bargaining component.⁶⁷ Out of deference to the agencies tasked with enforcing antitrust law, the Copyright Office did not assess the merits of these antitrust approaches.⁶⁸

Two points bear mentioning. First, the popularity among policymakers of Australia's bargaining code may reflect a broader turn in this area from copyright or neighboring right approaches to antitrust approaches. Many commenters on the Copyright Office's study argued that it was not copyright but competitive imbalance that needed addressing.⁶⁹

64. See Andy Blatchford, *Canada Wants Digital Giants To Compensate Local News Outlets*, POLITICO (Apr. 5, 2022, 3:20 PM), <https://www.politico.com/news/2022/04/05/canada-digital-giants-compensate-local-news-00023113> [<https://perma.cc/7RP9-JDFF>] [<https://web.archive.org/web/20230124011837/https://www.politico.com/news/2022/04/05/canada-digital-giants-compensate-local-news-00023113>]; William Turvill, *Canada's News Industry Expects up to \$150m Annual Windfall from Australia-style Big Tech Crackdown*, PRESS GAZETTE (Dec. 2, 2021), <https://pressgazette.co.uk/canada-google-facebook-regulation-news-industry> [<https://web.archive.org/web/20230124012309/https://pressgazette.co.uk/news/Canada-google-facebook-regulation-news-industry>] ("Prime minister Justin Trudeau (pictured) has pledged to introduce a news media bargaining code for Canada within the next two months."); Theano Karanikioti, *Following in Australia's Footsteps: EU To Make Google and Facebook Pay for News?*, THE PLATFORM L. BLOG (Feb. 12, 2021), <https://theplatformlaw.blog/2021/02/12/following-in-australias-footsteps-eu-to-make-google-and-facebook-pay-for-news> [<https://perma.cc/BR4V-89RH>] [<https://web.archive.org/web/20230124012840/https://theplatformlaw.blog/2021/02/12/following-in-australias-footsteps-eu-to-make-google-and-facebook-pay-for-news>] ("Members of the European Parliament are eager to follow in Australia's footsteps and force Google and Facebook to pay for news, the Financial Times reported. MEPs working on the Digital Services Act ('DSA') and the Digital Markets Act ('DMA') could consider amending these instruments to reflect aspects of the proposed Australian News Media and Digital Platforms Mandatory Bargaining Code").

65. C-18, An Act respecting online communications platforms that make news content available to persons in Canada, 1st Sess., 44th Parl., 2023 (at second reading), <https://www.parl.ca/legisinfo/en/bill/44-1/c-18> [<https://perma.cc/5G9Q-UU87>] [<https://web.archive.org/web/20230214164255/https://www.parl.ca/legisinfo/en/bill/44-1/c-18>]; *MPs pass bill mandating internet giants pay for news. Meta threatens to block content*, CBC (Dec. 14, 2022), <https://www.cbc.ca/news/politics/bill-c18-internet-news-meta-1.6686447> [<https://perma.cc/3QLZ-L7M6>] [<https://web.archive.org/web/20230124014029/https://www.cbc.ca/news/politics/bill-c18-internet-news-meta-1.6686447>].

66. Journalism Competition and Preservation Act of 2022, S. 673, 117th Cong. (2022).

67. *Id.* at § 4.

68. *Publishers' Protections Report*, *supra* note 1, at 24.

69. *Id.* at 23 n.107 (citing NEWS MEDIA ALLIANCE, HOW GOOGLE ABUSES ITS POSITION AS A MARKET DOMINANT PLATFORM TO STRONG-ARM NEWS PUBLISHERS AND HURT JOURNALISM 22 (2020), in News Media Alliance, Initial Comments on U.S. Copyright Office's Publishers' Protections Study at Appendix: Part 1 (Nov. 23, 2021), <http://www.newsmediaalliance.org/wp-content/uploads/2018/08/11-23-2021-News-Media-Alliance-Comments-on-USCOs-Publishers-Protections-Study.pdf> [<https://perma.cc/B39P-ANWF>] [<https://web.archive.org/save/http://www.newsmediaalliance.org/wp-content/uploads/2018/08/11-23-2021-News-Media-Alliance-Comments-on-USCOs-Publishers-Protections-Study.pdf>]; Hal Singer, Additional Comments Submitted in Response to U.S. Copyright Office's Nov. 9, 2021, Notice of Inquiry (Dec. 13, 2021), <https://www.regulations.gov/comment/COLC-2021-0006-0038> [[perma.cc link unavailable](https://perma.cc/link/unavailable)] [<https://web.archive.org/web/20230512064404/https://www.regulations.gov/comment/COLC-2021-0006-0038>] [hereinafter *Singer Additional Comments*]; see also News Corporation, Initial Comments on U.S. Copyright Office's Publishers' Protections Study at 16 (Nov. 26, 2021), <https://www.regulations.gov/comment/COLC-2021-0006-0016> [[perma.cc link unavailable](https://perma.cc/link/unavailable)] [<https://web.archive.org/web/>

Second, some have argued that the JCPA does fall within the Copyright Office's expertise because its bargaining right rests on copyright.⁷⁰ A mandatory bargaining provision requires the existence of something to bargain over.⁷¹ In the case of the JCPA, that something is the large digital platforms' ability to aggregate headlines and lede sentences, which is one of the very things the Copyright Office's study set out to analyze. Fortunately for those making this argument, the Copyright Office's Report *does* discuss copyright protections around aggregation and their limitations.

III. FINDINGS

A. "EXISTING U.S. COPYRIGHT LAW GIVES PUBLISHERS SEVERAL MEANS TO PROTECT THEIR NEWS CONTENT."⁷²

The Copyright Office found that press publishers have significant protections under current U.S. copyright law.⁷³ Press publishers typically own the copyright their print

20230512064640/<https://www.regulations.gov/comment/COLC-2021-0006-0016>] ("But any recalibration of copyright and related law . . . likely will prove ineffectual if the current imbalance in negotiating power between publishers and republishers of news content is not remedied."); Electronic Frontier Foundation, Comments Submitted in Response to U.S. Copyright Office's Oct. 12, 2021 Notice of Inquiry at 4–5 (Nov. 26, 2021), <https://www.regulations.gov/comment/COLC-2021-0006-0036> [perma.cc link unavailable] [<https://web.archive.org/web/20230512064935/https://www.regulations.gov/comment/COLC-2021-0006-0036>] ("The harms facing news media are not those of aggregators and copyright. A far bigger factor is monopoly control of online advertising. . . . Until there are more alternatives to the current online advertising market, news media will continue to be at the mercy of large companies like Google and Facebook."); Netanel, *supra* note 17, at 475 ("Several factors have contributed to journalism's tailspin. . . . But in recent years one factor looms particularly large: the overwhelming market power of digital platforms, principally Google and Facebook."); MPA The Association of Magazine Media, Additional Comments Submitted in Response to U.S. Copyright Office's Nov. 9, 2021, Notice of Inquiry at 3 (Jan. 5, 2022), <http://www.newsmediaalliance.org/wp-content/uploads/2018/08/MPA-Reply-Comments-to-the-USCO-on-the-Publisher-Protections-Study-01.05.2022.pdf> [<https://perma.cc/F7KH-REFW>] [<https://web.archive.org/web/20230309132220/http://www.newsmediaalliance.org/wp-content/uploads/2018/08/MPA-Reply-Comments-to-the-USCO-on-the-Publisher-Protections-Study-01.05.2022.pdf>]; National Press Photographers Association, Additional Comments Submitted in Response to U.S. Copyright Office's Nov. 9, 2021, Notice of Inquiry at 4–5 (Jan. 5, 2022), <https://www.regulations.gov/comment/COLC-2021-0006-0053> [perma.cc link unavailable] [<https://web.archive.org/web/20230512064903/https://www.regulations.gov/comment/COLC-2021-0006-0053>]; National Public Radio, Inc., Comments Submitted in Response to U.S. Copyright Office's Oct. 12, 2021, Notice of Inquiry at 8 (Nov. 24, 2021), <https://www.regulations.gov/comment/COLC-2021-0006-0030> [perma.cc link unavailable] [<https://web.archive.org/web/20230512064915/https://www.regulations.gov/comment/COLC-2021-0006-0030>]; Public Knowledge, Comments Submitted in Response to U.S. Copyright Office's Oct. 12, 2021, Notice of Inquiry at 12 (Nov. 26, 2021), <https://www.regulations.gov/comment/COLC-2021-0006-0029> [perma.cc link unavailable] [<https://web.archive.org/web/20230512064935/https://www.regulations.gov/comment/COLC-2021-0006-0029>].

70. See *Transcript, supra* note 43, at 119–20, 130 (M. Williams, News Media Alliance).

71. *Transcript, supra* note 43, at 97:19–25 (Ole Jani, Axel Springer SE) ("But better bargaining power is of no value if there is nothing to bargain about, right? And if you have no enforceable rights, if you don't have any specificity on your assets and on your property, if people can just use it, there is no bargaining situation in the first place.")

72. *Publishers' Protections Report, supra* note 1, at 29.

73. See *id.* at 29–30.

issues and in their websites as collective works.⁷⁴ They also regularly own the copyright in individual articles they publish, whether by assignment from the author or through the work made for hire doctrine.⁷⁵ As mentioned above, the work made for hire doctrine creates different default rules for publishers in the United States compared to pre-Article 15 EU.⁷⁶ The EU's concern that without a new, ancillary right, publishers would struggle to prove ownership of enforceable rights in their journalistic output⁷⁷ does not apply in the United States.

B. "THESE EXCLUSIVE RIGHTS ARE NOT ABSOLUTE, HOWEVER."⁷⁸

Publishers' rights under U.S. copyright law are subject to important limitations. Facts and ideas are not copyrightable.⁷⁹ Journalists' expression of facts and ideas is protectable,⁸⁰ but aggregators remain free to copy purely factual material.⁸¹ As a rule of thumb, the more material that an aggregator reproduces, the more likely it is to capture protected expression.⁸² Whether aggregation of just the headline or lede sentence reproduces original expression may vary from case to case.⁸³

A corollary to the non-copyrightability of facts and ideas is that "where there are only a few, limited ways of expressing an idea, the merger doctrine bars protection for

74. See *id.* at 29 (citing 17 U.S.C. § 101).

75. See *id.* at 29, 29 n.146. The same is not necessarily true for photographs. See *id.* at 30. For that reason, the discussion that follows largely focuses on text articles and not any included photographs.

76. See *Publishers' Protections Report*, *supra* note 1, at 22–23.

77. See *id.*

78. *Id.* at 30.

79. 17 U.S.C. § 102(b).

80. *Publishers' Protections Report*, *supra* note 1, at 29 n.144 ("News articles are literary works under 17 U.S.C. § 102(a)(1); news photographs are pictorial works under 17 U.S.C. § 102(a)(5); and television and radio news broadcasts, when fixed, are audiovisual works under 17 U.S.C. § 102(a)(6) and sound recordings under 17 U.S.C. § 102(a)(7), respectively."); see also *Authors Guild v. Google, Inc.*, 804 F.3d 202, 220 (2d Cir. 2015) ("Those who report the news undoubtedly create factual works. It cannot seriously be argued that, for that reason, others may freely copy and re-disseminate news reports."); *Associated Press v. Meltwater U.S. Holdings, Inc.*, 931 F. Supp. 2d 537, 549 (S.D.N.Y. 2013).

81. *Publishers' Protections Report*, *supra* note 1, at 30–31. See also *Feist Publ'n, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 348 (1991) ("all facts—scientific, historical, biographical, and news of the day . . . may not be copyrighted and are part of the public domain available to every person."); *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 234 (1918) ("It is not to be supposed that the framers of the Constitution . . . intended to confer upon one who might happen to be the first to report a historic event the exclusive right for any period to spread the knowledge of it."); *Meltwater*, 931 F. Supp. 2d at 549 ("The reporting of facts is not protectable under the Copyright Act since facts are never original to an author." (internal quotation marks omitted)). To put it differently, any news outlet could report on Gerald Ford pardoning Nixon, but the Nation's unlicensed publication of part of Gerald Ford's autobiography describing the pardon decision was copyright infringement. See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 589–90 (1985).

82. See *Publishers' Protections Report*, *supra* note 1, at 32 (citing *Nihon Keizai Shimbun, Inc. v. Comline Bus. Data, Inc.*, 166 F.3d 65, 70 (2d Cir. 1999)).

83. See Alexander Weaver, *Aggravated With Aggregators: Can International Copyright Law Help Save the News Room?*, 26 EMORY INT'L L. REV. 1161, 1184 (2012) (discussing headline originality in context of merger doctrine).

the expression in order to avoid giving a backdoor monopoly in the idea itself.”⁸⁴ In theory, the merger doctrine gives users, including aggregators, leeway to reproduce not just facts contained within a news article but also the article’s expression in cases where there is a limited number ways of to express the facts.⁸⁵ In practice, the Copyright Office did not identify any cases applying the merger doctrine to newspaper headlines or ledes.⁸⁶

A third, related limitation is the short phrases doctrine. “Words and short phrases, such as names, titles, and slogans” are not copyrightable.⁸⁷ The Copyright Office has said this is because they contain a *de minimis* amount of authorship.⁸⁸ The Office could not identify cases applying the short phrases doctrine to headlines or ledes (or instances of anyone attempting to register a headline or lede as an independent work), but the short phrases doctrine nonetheless came in for some criticism in the public comments. Most notably, Professor Jane C. Ginsburg argued the rule should not be interpreted as a blanket prohibition on the protection of original, albeit succinct phrases.⁸⁹ The Report discussed Professor Ginsburg’s argument and offered some potential responses to it,⁹⁰ but for purposes of this essay it suffices to say that the short phrases doctrine remains a potential limitation in this area.

84. *Publishers’ Protections Report*, *supra* note 1, at 33 (citing *N.Y. Mercantile Exch., Inc. v. Intercontinental Exch., Inc.*, 497 F.3d 109, 116–17 (2d Cir. 2007)); *Ets-Hokin v. Skyy Spirits, Inc.*, 225 F.3d 1068, 1082 (9th Cir. 2000); 4 NIMMER ON COPYRIGHT § 13.03[B][3][a].

85. *See N.Y. Mercantile Exch.*, 497 F.3d at 118 (holding that merger doctrine prevented plaintiff for recovering from copying of its settlement prices because “any settlement price for a particular futures contract would be determined based on the same underlying market facts, [and] any dissension would be exceptionally narrow”); *BanxCorp. v. Costco Wholesale Corp.*, 978 F. Supp. 2d 280, 309 (S.D.N.Y. 2013) (holding that a publisher of national interest rate indices could not use copyright law to exclude retailers from republishing interest rate data because the rates were noncopyrightable facts and the publisher’s expression of those facts invariably merged with the idea). Policy considerations weigh heavily in merger analysis, and the inquiry focuses less on the quantity of possible expressions than on the effect of granting copyright protection. *N.Y. Mercantile Exch.*, 497 F.3d at 117 n.9. Press publishers’ critical role in communicating information to the public may create a background concern about the threat of copyright infringement suits chilling the reporting of the news. *Cf. Morrissey v. Proctor & Gamble Co.*, 379 F.2d 675, 679 (1st Cir. 1967) (citing *Baker v. Selden*, 101 U.S. 99, 103 (1880)) (“We cannot recognize copyright as a game of chess in which the public can be checkmated.”).

86. *Publishers’ Protections Report*, *supra* note 1, at 34.

87. 37 C.F.R. § 202.1(a).

88. U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 313.4(C) (3d ed. 2021) [hereinafter *COMPENDIUM (THIRD)*].

89. *See generally* Jane C. Ginsburg, Additional Comments Submitted in Response to U.S. Copyright Office’s Nov. 9, 2021 Notice of Inquiry (Jan. 5, 2022).

90. *Publishers’ Protections Report*, *supra* note 1, at 35–36.

**C. “SOME, BUT NOT ALL, NEWS AGGREGATION IS
LIKELY TO QUALIFY AS FAIR USE.”⁹¹**

By far the most significant copyright limitation for aggregators, however, is fair use.⁹² The Copyright Office, acknowledging the fact-specific nature of the fair use test and the absence of authoritative decisions on news aggregators’ use of headlines and lede sentences, specifically, declined to offer a broad assessment—“aggregating fair” or “aggregating unfair.”⁹³ Instead, the Report drew on roughly analogous cases dealing with news reporting or online indexing to sketch arguments a court would consider in applying the four (non-exclusive) fair use factors to the aggregation of headlines and ledes.

On the first factor, purpose and character of the use, case law offers a few different data points. As a threshold matter, we know that news reporting is not a blanket license to copy. The Report noted that “[a]lthough ‘news reporting’ is one of the illustrative ‘fair’ purposes listed in 17 U.S.C. § 107, and the fair use doctrine often permits quotation in a news reporting context, the mere fact that an entity is engaged in a form of news reporting does not resolve the fair use question.”⁹⁴ To give a simple example, in *Harper & Row*, the defendant, Nation Enterprises, was undoubtedly reporting news when it published unauthorized excerpts from Gerald Ford’s autobiography, but that did not stop the Supreme Court from rejecting Nation Enterprises’ fair use defense.⁹⁵

We know that linking and indexing, which are part of the function of aggregation, can be transformative.⁹⁶ Courts approved Google’s aggregation of photographs⁹⁷ and its digitization of books⁹⁸ as “highly transformative” and fair use.

We also know that reuse of news material without commentary or criticism may weigh against a fair use defense.⁹⁹ In *Los Angeles News Service v. Reuters Television International, Ltd.*, for example, the Ninth Circuit held that retransmission of a rival news service’s footage of the Rodney King riots was not fair where the retransmitter added nothing to the copied footage.¹⁰⁰ But this is not an iron rule. In some cases, “the need to convey information to the public accurately may in some instances make it desirable and consonant with copyright law for a defendant to faithfully reproduce an original work without alteration.”¹⁰¹

91. *Id.* at 44.

92. 17 U.S.C. § 107 (“[T]he fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section [§ 106], for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.”).

93. Publishers’ Protections Report, *supra* note 1, at 39.

94. *Id.* at 39–40.

95. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 561 (1985); *see also Monge v. Maya Mags., Inc.*, 688 F.3d 1164, 1174 (9th Cir. 2012).

96. *Publishers’ Protections Report*, *supra* note 1, at 41.

97. *Perfect 10, Inc. v. Amazon.com*, 508 F.3d 1146, 1168 (9th Cir. 2007).

98. *Authors Guild v. Google, Inc.*, 804 F.3d 202, 220 (2d Cir. 2015).

99. *Publishers’ Protections Report*, *supra* note 1, at 41.

100. *L.A. News Serv. v. Reuters Television Int’l*, 149 F.3d 987, 990 (9th Cir. 1998).

101. *Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P.*, 756 F.3d 73, 84 (2d Cir. 2014).

On the second factor, the nature of the copyrighted work, the Report said little.¹⁰² The case law is clear that news materials, being factual, enjoy “thinner” copyright protection,¹⁰³ and it is equally clear that this thinner protection rarely affects the outcome.¹⁰⁴

The third fair use factor, the amount and substantiality of the portion used in relation to the copyrighted work as a whole, offers a few more data points. We know that the more you take of the original work, the higher a risk you run of taking a substitutional amount.¹⁰⁵ In *Fox News Network, LLC v. TVEyes, Inc.*, the Second Circuit distinguished an index that enabled users to watch ten-minute news clips (unfair, “in many . . . situations [this] suffices for a user to view an entire news segment”)¹⁰⁶ from Google Books’ fair display of short snippets (giving “just enough context surrounding the searched term to help [a searcher] evaluate whether the book falls within the scope of her interest . . . without revealing so much as to threaten the author’s copyright interests”).¹⁰⁷ How a court might apply these precedents to headlines and ledes is less certain. As a quantitative percentage of an article, a headline and a lede sentence may not be much. On the other hand, they may in a qualitative sense represent the heart of the work.¹⁰⁸

The fourth factor, market harm, raises two additional considerations. First, *Authors Guild v. Google* tell us that we have to consider whether the harm inflicted on the original work was connected with a protectable interest. If market substitution occurs because a reader is looking for a pure, unprotectable fact, finds it in a headline, and so does not need to read the article, that is not the kind of harm to the original publisher’s copyright interest and should not weigh against fair use.¹⁰⁹ This brings us back to the argument over whether aggregators substitute for original publications or supplement them.

Second, courts have to ask what would happen if this kind of copying were systematic, which of course it is in the case of news aggregation. This brings us back to unresolved arguments over whether aggregated headlines and ledes substitute for the original articles or expand the market for them.¹¹⁰ “If aggregation provides a substitute that satisfies most demand for the full original[] and decreases the resources available for original news reporting, this would cut against a finding of fair use.”¹¹¹

102. *Publishers’ Protections Report*, *supra* note 1, at 42.

103. *Google L.L.C. v. Oracle Am. Inc.*, 141 S. Ct. 1183, 1197–98 (2021); *see also* 4 NIMMER ON COPYRIGHT § 13.05[A] [2][a].

104. *Authors Guild v. Google, Inc.*, 804 F.3d 202, 220 (2d Cir. 2015) (citing WILLIAM F. PATRY, PATRY ON FAIR USE § 4.1 (2015)). The Report noted *Oracle Am. Inc.*, 141 S. Ct., at 1201–02, as a recent exception. *Publishers’ Protections Report*, *supra* note 1, at 42 n.225.

105. *See Swatch Grp. Mgmt. Servs. Ltd.*, 756 F.3d at 90 (describing the general rule while ultimately finding the reproduction of an entire recording did not weigh against fair use).

106. *Fox News Network, LLC v. TVEyes, Inc.*, 883 F.3d 169, 180–81 (2d Cir. 2018).

107. *Authors Guild*, 804 F.3d at 218.

108. Jane C. Ginsburg, Comments Submitted in Response to U.S. Copyright Office’s Oct. 12, 2021, Notice of Inquiry at 2 (Nov. 23, 2021).

109. *Publishers’ Protections Report*, *supra* note 1, at 43–44 (citing *Authors Guild*, 804 F.3d at 224).

110. *See* Ginsburg, *supra* note 108.

111. *Publishers’ Protections Report*, *supra* note 1, at 45 (internal quotation marks and citation omitted).

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In all, these guideposts indicated to the Copyright Office that some but not all news aggregation would likely qualify as fair use.

**D. “PROTECTIONS ARE DIFFICULT TO ASSERT EFFECTIVELY
FOR REASONS UNRELATED TO COPYRIGHT LAW.”¹¹²**

The Report also noted that publishers have some protections outside of copyright law. Most significantly, they can use paywalls to limit access to their articles or use the robots.txt exclusion protocol to prevent search engines from indexing their sites.¹¹³

The limitation on these non-copyright protections, and the fundamental weakness of all publishers’ protections, in the view of many commenters, is that publishers broadly cannot afford to keep aggregators out.¹¹⁴ They depend on Google and Facebook for traffic.¹¹⁵ They would just like Google and Facebook to pay them for their content.¹¹⁶ In other words: the issue is not copyright law, but bargaining power.¹¹⁷

IV. CONCLUSIONS

The Copyright Office drew three key conclusions from these findings. First, adopting a new right modeled on Article 15 is not necessary because publishers in the United States already enjoy similar protections under copyright law via the work made for hire doctrine.¹¹⁸ Second, a new right would probably be ineffective without changes in the competitive landscape to empower publishers to enforce those rights against the largest digital platforms.¹¹⁹ With their current lack of bargaining power vis-à-vis

112. *Id.* at 51 (emphasis omitted).

113. *Id.* at 46.

114. *Id.* at 51.

115. *Id.*; see also *id.* at 49 (“Reports from the U.S. House Judiciary Committee and from Australia’s Competition and Consumer Commission both described Google and Facebook as ‘gateways’ to online news media. Even some of the largest and best-known publishers claim they depend on Google ‘for up to 80–95% of their traffic.’”) (citing STAFF OF SUBCOMM. ON ANTITRUST, COMMERCIAL AND ADMINISTRATIVE LAW, H. COMM. ON THE JUDICIARY, 116TH CONG., MAJORITY STAFF REP. ON INVESTIGATION OF COMPETITION IN DIGITAL MARKETS 63 (Comm. Print 2020); AUSTL. COMPETITION & CONSUMER COMM’N, DIGITAL PLATFORMS INQUIRY: FINAL REPORT 206 (2019), <https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf> [<https://perma.cc/K3Q8-Y6B7>] [<https://web.archive.org/web/20230214172303/https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf>]).

116. Publishers’ Protections Report, *supra* note 1, at 51. This question of compensation of course looks different depending on whether you believe aggregators are fundamentally adding value to the publishers by bringing traffic to them or taking value by substituting for traffic, data, and ad sales the publishers would otherwise retain.

117. *Transcript*, *supra* note 43, at 33:3–6 (Dec. 9, 2021) (Jane C. Ginsburg, consultant to NMA) (“All the copyright protection in the world is not going to help if the copyright owners have no choice but to agree to contractual terms that are very unfavorable to them.”). This is an important story about the Report. When the study started, it was about ancillary copyright in the sense of EU Article 15. But by the time we were receiving comments, media comments were far more focused on antitrust approaches like Australia’s News Media Bargaining Code or the JCPA than on ancillary copyright.

118. Publishers’ Protections Report, *supra* note 1, at 52.

119. *Id.* at 52–54.

Google and Facebook, trying to protect publishers with new rights would be, in Cory Doctorow's memorable formulation, "like trying to protect a bullied child by giving them more lunch money."¹²⁰

Third, new rights would raise constitutional and policy concerns.¹²¹ The limits of publishers' existing copyright protections—e.g., fair use, the idea/expression dichotomy—are "built-in First Amendment accommodations" in copyright law.¹²² To expand on existing protections, Congress would need to override those limitations, triggering First Amendment scrutiny.¹²³

Based on these conclusions, the Copyright Office recommended against adopting ancillary copyright protections in the United States. The research we gathered and the public comments we received painted a clear picture that the internet has devastated the traditional, advertising-supported method of financing high-quality press publications. But we did not see evidence that copyright law is the problem or likely to be the solution.

120. Aaron Swartz Day, *Cory Doctorow—Aaron Swartz Day 2022*, YOUTUBE (Dec. 17, 2022), <https://www.youtube.com/watch?v=xf0QWycmn0s> [<https://perma.cc/EW8G-2C66>] [<https://web.archive.org/web/20230214172623/https://www.youtube.com/watch?v=xf0QWycmn0s>] (describing the ineffectiveness of giving new copyright protections to creative workers facing structural power imbalances).

121. *Publishers' Protections Report*, *supra* note 1, at 54–55.

122. *Id.* at 54 (citing *Eldred v. Ashcroft*, 537 U.S. 186, 219–21 (2003); *Golan v. Holder*, 565 U.S. 302, 329 (2012)).

123. A press publishers' right that did not include a fair use defense might also raise questions about consistency with the Berne Convention's right of quotation. See *Publishers' Protections Report*, *supra* note 1, at 56.