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STUDY ROUNDTABLE)

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1220 L Street, N.W., Suite 206
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IN THE MATTER OF:)
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PUBLISHERS' PROTECTIONS)
STUDY ROUNDTABLE)

Remote Roundtable
Suite 206
Heritage Reporting Corporation
1220 L Street, N.W.
Washington, D.C.

Thursday,
December 9, 2021

The parties met remotely, pursuant to notice, at
9:05 a.m.

PARTICIPANTS:

COPYRIGHT OFFICE ATTENDEES:

CHRIS WESTON
ANDREW FOGLIA
MELINDA KERN
SHIRA PERLMUTTER
MARIA STRONG

Session 1: The Effectiveness of Current
Protections for Publishers

WAYNE BROUGH, R Street Institute
DANIELLE COFFEY, News Media Alliance
JANE GINSBURG
KEITH KUPFERSCHMID, Copyright Alliance
KATE SHEERIN, Google
DANIEL TAKASH, Niskanen Center

Heritage Reporting Corporation
(202) 628-4888

PARTICIPANTS: (Cont'd.)

Session 2: Whether Additional Protections are Desirable

RICHLY ASTHENIC, Southlaw Ent.
ANNEMARIE BRIDY, Google
CATHY GELLIS, Copia Institute
OLE JANI, Axel Springer
ELIZABETH KENDALL, Meta Platforms
JOSHUA LAMEL, Re:Create
PETER ROUTHIER, Internet Archive
JESSICA SILBEY, Boston University
HAL SINGER, Econ One
NZENGHA WASEME, Artworks Legal Incubator
MATTHEW WILLIAMS, News Media Alliance

Session 3: How Any New Protections Might Affect Existing Rights, Limitations, and Obligations

JONATHAN BAND, Library Copyright Alliance
JOHN BERGMAYER, Public Knowledge
EDWARD HASBROUCK, National Writers Union
CARLO LAVIZZARI, Lenz Caemmerer
ERIC SCHWARTZ, News Media Alliance
ALI STERNBURG, Computer & Communications Industry Association

P R O C E E D I N G S

(9:05 a.m.)

1
2
3 MR. FOGLIA: Hello, everyone, and thank you
4 for joining us at the public roundtables for the U.S.
5 Copyright Office's Publishers' Protection Study. You
6 will now hear opening remarks from the Register of
7 Copyrights and Director of the U.S. Copyright Office,
8 Shira Perlmutter.

9 MS. PERLMUTTER: Good morning, everyone, and
10 welcome to the Copyright Office's virtual roundtable
11 in support of our study of protections for publishers.
12 The topic today is the effectiveness of current
13 copyright rights for publishers in the United States
14 and whether any type of additional protection is
15 called for.

16 And in requesting that the Copyright Office
17 conduct this study, Congress noted the new ancillary
18 copyright protections that the European Union has
19 adopted for press publishers with respect to the use
20 of their content by online intermediaries.

21 So some of the questions we'll explore
22 include the scope of existing copyright protection for
23 news publications, the economic effects of online
24 aggregation of news content, whether additional
25 protections such as those adopted in the EU would be

1 appropriate here and, if so, what form they should
2 take, and how they would interact with existing
3 constitutional or other rights held by other parties
4 with copyright exceptions and limitations and with
5 international treaty obligations.

6 So I am sure this will be a lively and
7 informative discussion, and I look forward to hearing
8 everyone's valuable input. Joining me from the
9 Copyright Office are Maria Strong, Associate Register
10 of Copyrights and Director of Policy and International
11 Affairs, along with Senior Counsels for Policy and
12 International Affairs, Andrew Foglia and Chris Weston,
13 and our Barbara Ringer Fellow, Melinda Kern.

14 So I will now turn the proceedings over to
15 Chris Weston to provide more information and to
16 introduce the first session.

17 MR. WESTON: Thank you, Shira.

18 So a few instructions before we begin. Just
19 to review the format, Copyright Office staff will be
20 posing questions for the panelists to answer.
21 Panelists should use Zoom's "Raise Hand" feature to
22 indicate that they would like to respond to a
23 question. We will try to let panelists speak in the
24 order that they raise their hands. Panelists' remarks
25 are being transcribed by a court reporter, and they

1 will be posted on the Copyright Office website, along
2 with a video of the event.

3 We ask that panelists keep their remarks on
4 any one question to two minutes to allow other people
5 time to speak. We also ask that when you are not
6 speaking you keep your microphone muted.

7 For audience members, please understand that
8 the panel sessions do not include audience
9 participation. At 3:15 p.m. Eastern Time, after the
10 panels are completed, audience members who signed up
11 to offer comments will be invited to do so, but during
12 the panels, please use Zoom's Q&A function only if you
13 have a technical problem with the call that you would
14 like to bring to the Office's attention.

15 With that, I would like to thank both our
16 panelists and our audience members for joining us
17 today. I'm now going to start the first panel. So,
18 if the people on the first panel could turn their
19 cameras on and also my co -- my colleagues in the
20 Copyright Office who will be asking questions along
21 with me, Andrew Foglia and Melinda Kern.

22 We're going to start the first panel on
23 existing copyright protections for publishers. So
24 we're going to start by asking each panelist to
25 introduce themselves just very briefly with your name

1 and your affiliation, and we can go alphabetically,
2 starting with Wayne Brough.

3 MR. BROUGH: Thank you. My name is Wayne
4 Brough, and I am the Tech and Innovation Director at
5 the R Street Institute.

6 MR. WESTON: And then Danielle?

7 MS. COFFEY: Danielle Coffey, News Media
8 Alliance, EVP and General Counsel, representing
9 publishers across the country and in Europe.

10 MR. WESTON: Thank you. And Professor
11 Ginsburg? I'm sorry, you're muted.

12 MS. GINSBURG: Sorry. Jane Ginsburg,
13 Columbia Law School but appearing as a consultant for
14 the News Media Alliance.

15 MR. WESTON: And Keith?

16 MR. KUPFERSCHMID: Keith Kupferschmid, CEO
17 for the Copyright Alliance.

18 FEMALE VOICE: Recording in progress.

19 MS. SHEERIN: Kate Sheerin, public policy
20 work at Google.

21 MR. WESTON: Thank you. And finally,
22 Daniel?

23 MR. TAKASH: Hi, I'm Daniel Takash,
24 regulatory policy fellow at the Niskanen Center.

25 MR. WESTON: Okay. Well, thank you,

1 everybody. I'm going to start with a question. A lot
2 of the comments talked about fair use, and I'm going
3 to ask a general question to everyone. To what extent
4 does fair use permit news aggregation of press
5 publisher content, such as headlines or short snippets
6 of an article? Danielle, and then Jane.

7 MS. COFFEY: I'm going to cheat and somewhat
8 answer your question but also use just a minute to say
9 that the news industry right now is doing, just to set
10 the stage since this is about an industry that I
11 represent, they are providing news and information
12 that is vital to communities, especially because of
13 the pandemic. Our audiences are through the roof. So
14 the determination of how much our content is protected
15 throughout these panels today is critical to that
16 information continuing to be provided to communities
17 across our country. And I just wanted to thank you
18 and say that this is an important issue.

19 To answer your question how is it protected,
20 not adequately, but the laws are there. And I'll stop
21 there. Thank you.

22 MR. WESTON: Okay. Jane Ginsburg was the
23 next person who had their hand up.

24 MS. GINSBURG: There's a predicate question,
25 which is the extent to which the content is protected

1 in the first place before you get to fair use, so I
2 hope you will address that as well, but since this
3 question is about fair use, of course, it's extremely
4 fact intensive, but I think that, in many instances,
5 the argument that news aggregation is transformative
6 is rather weak because it's simply repackaging the
7 news and delivering it to the public for the same
8 purpose.

9 And the fourth factor, which courts have
10 recently been paying heightened attention to, I think
11 the economic effects of news aggregation are
12 deleterious to the extent that they substitute for
13 consultation of the source site, and they displace the
14 advertising for the aggregator and away from the
15 source sites.

16 MR. WESTON: Okay. Thank you. I believe
17 that Kate Sheerin was next.

18 MS. SHEERIN: Hi, thank you for having me.
19 I actually wanted to just take a step back, as Jane
20 did in the beginning, and say news content, as defined
21 by the Office, as links and snippets and headlines is
22 excluded from copyright law under the core copyright
23 doctrines in U.S. law.

24 MR. WESTON: Okay. Mr. Kupferschmid?

25 MR. KUPFERSCHMID: Yeah, usually people go

1 by first name, but it's okay. So, look, I just want
2 to reiterate and support what Jane said. I mean, as
3 we all know, fair use is determined on a case by case
4 basis that's fact intensive, and so I think it's
5 important to keep that in mind.

6 Jane mentioned the first and fourth factors;
7 I'll mention the third. So, in the third factor, we
8 look at how much is taken. I think, in this instance,
9 when we're talking about fair use, I think, obviously,
10 we look at the quantity of what's taken, but I think
11 it's especially important that we look at the quality
12 of what is taken because, at the essence, I think
13 that's one of the most significant problems that's
14 taking place here.

15 MR. WESTON: Thank you. Wayne?

16 MR. BROUGH: Thank you. Yeah, and I would
17 state that my starting premise is that there is plenty
18 of reasons that it is a fair use, and I think some
19 other have mentioned that the concern is the role of
20 ad revenues in this whole bigger picture.

21 And I'm an economist, so I'm looking at this
22 from an economic framework, and I think the bigger
23 question is, is there a decoupling that's going on,
24 and is fair use the proper tool to address that kind
25 of question?

1 MR. WESTON: Okay, thank you. I believe
2 that's everyone who had their hand up, and I just, as
3 a logistical matter, if people could take their hands
4 down once they've answered the question just because
5 otherwise I think that you've raised your hand a
6 second time. Oh, I'm sorry, Jane did raise her hand a
7 second time.

8 MS. GINSBURG: Yes. Since I raised the
9 predicate question and Kate addressed it, I think I
10 ought to address it as well, and I hope that I'm not
11 out of order, which is the words and short phrases
12 doctrine. Is it true that the content that is being
13 aggregated, consisting of headlines, ledes, and
14 photographs, is not protected? And I think that's
15 actually incorrect. Photographs, quite clearly, are
16 protected. The headlines and ledes certainly can be
17 highly original in their presentation of unprotected
18 facts.

19 And as to the question of whether they are
20 too short, what's actually being copied, I think,
21 probably isn't even under Copyright Office rules, but
22 I wanted to say something about the words and short
23 phrases doctrine because I've looked now at all the
24 cases that apply the doctrine and also at the origins
25 of the doctrine in the Sara Lee case, which is the

1 only case cited in the Compendium.

2 In fact, those cases are all about
3 originality. They're not about brevity. Lots of
4 courts simply say "short phrases," but the content at
5 issue in all of those cases was considered to be
6 trite, commonplace, formulaic, not original. Even
7 those courts that say things like "short" phrases that
8 are creative still aren't protected because they're
9 "short", the content at issue in the actual case
10 wasn't original content.

11 So what we don't have, notwithstanding the
12 words and short phrases bar, is a true prohibition on
13 the copying of original, albeit succinct, phrases, and
14 I think it's very important to take a closer look at
15 the words and short phrases doctrine.

16 Finally, I will point out that there is a
17 difference between lack of protection and inability to
18 register, because we're not talking about registering
19 a headline. We're talking about the systematic
20 copying of headlines, ledes, and photographs. And
21 even if a headline standing alone may not be
22 registerable, that doesn't mean that it's not a
23 substantial part for purposes of the analysis of
24 substantial similarity.

25 MR. WESTON: Thank you. Just another

1 logistical matter. Myself, Andrew Foglia, and Melinda
2 Kern will be taking turns asking questions. So Andrew
3 is next to ask a question.

4 MR. FOGLIA: Sure. Well, I'd actually like
5 to follow up on that point and ask whether anyone
6 else, Kate included, wanted to respond to Professor
7 Ginsburg's discussion of the copyrightability
8 question? If the answer is no, then I can ask a
9 different question.

10 MR. WESTON: It looks like she's raised her
11 hand.

12 MS. SHEERIN: I think it's clear that
13 there's a fundamental disagreement here, and I think a
14 lot of people have weighed in on the potential impact
15 of applying the right this way on the way that the
16 open internet works.

17 You know, the founders of the internet, Vint
18 Cerf, Tim Berners Lee have weighed in on this
19 question. They said breaching this fundamental
20 principle by requiring payment for links would
21 undermine content online. And I think, while I
22 respectfully disagree with Jane, I think that there is
23 a lot of debate here, and I'm sure you'll hear from a
24 number of panelists today on that.

25 And while I have my hand raised, I just also

1 want to address some of the questions about
2 transformativeness. I think what we're excluding is
3 the immense public benefit that comes from news
4 aggregation, the access to information, the diversity
5 of news sources that users have access to, and how
6 much news aggregation helps the public in finding
7 information that they care about most. So I just
8 wanted to register that as an additional point.

9 MR. FOGLIA: Thank you. I think Jane next
10 and then Danielle.

11 MS. GINSBURG: Thanks. I just wanted to
12 point out we're not talking about linking but about
13 cutting and pasting. The excerpts that are copied
14 have links back to the original sources. Those are
15 more than welcome. The problem is that people don't
16 click back on the links. But what we're talking about
17 is not linking. We're talking about extracting,
18 reproducing, and re disseminating the actual content.

19 MS. COFFEY: I would agree with that last
20 comment, and I will also add too as a response to
21 something that Kate said, which was that aggregation
22 is a public service and a public good.

23 I would actually agree. I think that the
24 internet has done amazing things for, you know, the
25 aggregation and dissemination of valuable information,

1 including quality news content.

2 What we're talking about here is the ability
3 to protect that content and the ability to have an
4 exchange of value with those who disseminate the
5 content on our behalf.

6 In this case, I think that one of the
7 important things to raise is the impediment to
8 enforcement that we haven't gotten into yet, and I
9 don't know if we plan to in the questions, I know it
10 was in the NOI, but it has to do with what are some of
11 the impediments to that licensing.

12 And even if we had standing and there wasn't
13 this disagreement on fair use, a prima facie case
14 requires a showing that you did not authorize the use.
15 And so, in the case that we're in now where we have
16 two dominant platforms distributing on our behalf and
17 it's a Hobson's choice whether or not to provide that
18 information because everybody wants to be found, even
19 for the little amount of revenue that we receive from
20 those clicks, the consent part of the equation is
21 flawed because we are forced to waive our ability to
22 enforce our rights because of the dominance of the
23 platforms.

24 So that's something that we may get into
25 later, and I can expand on that and give examples, but

1 I wanted to raise that as being a fundamental part of
2 what we're discussing as well. Thank you.

3 MR. FOGLIA: Kate, I think you were next,
4 and then Keith.

5 MS. SHEERIN: Yeah, I just wanted to respond
6 and say that people do click through to the news
7 publishers' sites. We send about 24 billion clicks a
8 month to news publishers, including the short extracts
9 that are up to the news publishers who opt in. They
10 have granular controls about how their content appears
11 on our services, as Danielle just referenced. So it's
12 up to them, the length of the snippet, how it appears,
13 whether thumbnails are included, whether they appear
14 on Google News, whether they appear on Google Search.

15 Those controls are extremely important.
16 We've always respected those controls, and I think the
17 important part is that Google Search and Google News
18 have proven to the news industry that they're an
19 important part of reaching their audience, and we're
20 glad to partner up with them and further collaborate
21 on ways that they can do that.

22 But I think it's wrong to say that it's a
23 substitute or that individual users are not actually
24 clicking through to the news publisher websites,
25 because they are.

1 MR. FOGLIA: Thank you. Keith?

2 MR. KUPFERSCHMID: Yeah, once again, I think
3 we find ourselves going down this path where we're
4 talking in generalities, which, obviously, in the
5 nature of the beast, we have to.

6 Obviously, let me just address linking for a
7 second. Whether somebody links through or not is
8 going to depend on a whole bunch of things: how much
9 information is presented, how that information is
10 presented, things like that.

11 I had seen one statistic that showed that
12 people clicked on the link only .08 percent. That's a
13 minuscule amount, .08 percent of the time. Now,
14 granted, that's in one particular instance. There are
15 other types of scenarios. So I want to be clear
16 that's not across the board, of course.

17 But, to get to the original question, as
18 we'll probably talk about that linking aspect a little
19 bit more later, which was about the copyrightability,
20 I was upset about, you know, in going through some of
21 the comments and hearing some of the comments here
22 about the fact that people say, well, news content is
23 not creative, it's not expressive, right? Because
24 that's obviously a significant part of
25 copyrightability, and it's just the facts.

1 Well, my response to that is, if it's just
2 the facts, then write your own darn story, right? I
3 mean, it is absolutely the people who and the
4 organizations who are taking these stories and pushing
5 them out, aggregating them, clearly are taking them
6 because their writing is expressive and good, there
7 are editorial decisions that are being made. This is
8 valuable storytelling, is what it is. And, otherwise,
9 then don't take that. Just, you know, create your own
10 story. So I'll stop there.

11 MR. FOGLIA: Thanks. Jane, I see your hand
12 is up.

13 MS. GINSBURG: I just wanted to draw your
14 attention to the comments that I filed, which include
15 an appendix of a variety of news items reported
16 differently, even just through the headlines and the
17 ledes by a variety of different news sources. So one
18 could say in the abstract that different news outlets
19 tell the story different ways, but the appendix that I
20 submitted, I think, gives concrete illustrations to
21 how the same event can be presented quite differently
22 in even a very short number of words.

23 MR. FOGLIA: Thank you. I'm going to turn
24 it over to Melinda Kern for the next question.

25 MS. KERN: Thank you, Andrew. So, just to

1 follow up on fair use, this kind of tracks a question
2 that we asked in our NOI. I just wanted to hear what
3 your guys' thoughts were on basically the market
4 impact that news aggregation is having on press
5 publishers. So Ms. Coffey?

6 MS. COFFEY: I guess I could have saved some
7 of the remarks that I made at the beginning for this
8 portion because it really does reflect a lot of what
9 we're experiencing right now.

10 Like I was saying earlier, the pandemic has
11 shown us a lot of what's -- it's magnified the
12 situation that's happening with the news industry.
13 During the past couple of years, in the first year,
14 there was a tremendous amount of information and we
15 had a giant spike in our readership and our audience
16 because what we were providing became the only source
17 of the type of information people were seeking because
18 everybody was very local in nature. It was a
19 pandemic. Your geography became -- everybody
20 quarantined.

21 And so what they were looking for was what
22 was in your neighborhood, whether your schools were
23 opening, whether the businesses were closing, so on
24 and so forth, the health information in your
25 neighborhood, so forth. And that became very granular

1 and only provided by local news reporters, who were
2 deemed essential employers by CISA and still on the
3 beat, stayed open, and our audiences spiked. It was
4 through the roof.

5 We took down a lot of our paywalls because
6 it was critical information, we wanted people to get
7 it. And what happened was we closed newsrooms across
8 the country. We laid off about 37,000 people,
9 including those who were furloughed. It was another
10 bloodbath, I hate to say, but among our industry, who
11 was providing critical information during a period
12 that was -- and this was global. At the same time,
13 Australia experienced the same thing. Europe
14 experienced the same thing.

15 It's when they accelerated their laws that
16 ultimately required payment for news publication
17 because it was so clear -- it became so clear that
18 this problem is -- what the cause of it is, and it's
19 that we, you know, with the 35 percent who do click
20 through, we still don't get the advertising revenue
21 because the dominant platforms have a monopoly in
22 that. It's evidenced by the litigation.

23 So the news industry, the news publishers
24 across our country, are suffering, yet they're
25 providing this valuable content to communities who

1 rely on it that nobody else will produce. And when
2 it's used and it's aggregated and it contributes to
3 the revenue of those who distribute it, it's protected
4 content. It's copyrightable content.

5 Articles are copyrightable, full stop.
6 Extractions from those are what we're discussing, and
7 a ton of resources, people, human capital, and
8 importance goes into what we're producing, and it
9 needs to be protected, and it needs to be compensated.

10 MS. KERN: Thank you. Wayne?

11 MR. BROUGH: Yeah, I would just say on your
12 question of the market impacts and fair use, I think
13 this is fundamentally an economic question. It's not
14 a question of copyright and fair use. The sector that
15 we're talking about of online or even print journalism
16 has gone through tremendous changes, the biggest
17 being, you know, this is one of the early examples of
18 what a two sided market was, where you balance your
19 readership with your ads to come up and maximize your
20 profits.

21 But, when digital platforms came along, that
22 link was separated, and between classifieds going to
23 places like eBay or Craigslist or Indeed.com, to
24 retailers wanting to buy more accurate, more
25 profitable digital advertisements that are more

1 targeted, more beneficial, the traditional market that
2 we're talking about for journalism has fundamentally
3 changed. And that is an economic question, and I
4 think it's better suited, if there are problems in
5 that market, to use the tools of economic policy
6 rather than the tools of copyright to try and look at
7 those problems if there are identifiable market
8 failures in that market.

9 So I'd be very careful to expand, you know,
10 try to expand the role of fair use or minimize the
11 role of fair use in order to change or control that
12 market. It's an economic market that's in flux. All
13 the participants in that market have been changing
14 over the last few years. The bigger online players
15 are now getting into the digital advertising
16 marketplace. So there are changes that are going on,
17 and I don't believe that fair use changes or changes
18 in copyright law are the most appropriate way to
19 address the concerns that we see in this market space.

20 MS. KERN: Thank you. Keith?

21 MR. KUPFERSCHMID: Thanks, Melinda. So the
22 way the current digital market, digital environment is
23 set up makes it exceedingly difficult for press
24 publishers to continue their important societal
25 endeavors at the level they demand and the public

1 demands, and I think we've touched upon this already
2 that the primary reason for this is that online
3 platforms and news aggregators cull and click news
4 content without licensing the content from the
5 publisher, okay?

6 Platforms and aggregators will display the
7 text, the headlines, photographs, which we haven't
8 really touched upon yet, and other content in a way
9 that results in the aggregated content acting as a
10 substitute for the press publishers' original content,
11 and that's where the problem lies.

12 Platforms, without permission, scrape
13 publishers' websites, reproduce and display content,
14 disseminate it through their platforms and mobile
15 applications, and, most importantly, take advertising
16 dollars and subscription revenue from press publishers
17 that could otherwise be funding the creation of more
18 reliable news content to the public.

19 So the content created by press publishers
20 at great cost, at great expense, at great risk is the
21 lure that attracts users to these platforms and helps
22 platforms grow exponentially in profit, audience, and
23 influence. So, in short, press publishers and their
24 employees put in all the long hours, they take all the
25 risks, they have all the experience, they spend all

1 the money, sometimes millions of dollars, to create,
2 facilitate, and deliver timely news content.

3 And then these platforms come along and they
4 spend no time, have no experience, and spend no money,
5 and swoop in to steal all the rewards. Last time I
6 checked, that is the exact type of behavior that the
7 law, especially intellectual property law, is intended
8 to prevent. Unfortunately, U.S. IP laws are not
9 adequately doing that, and they're not adequately
10 protecting these press publishers from these type of
11 activities.

12 So what we're talking about here in terms of
13 market impact, and I imagine we'll go into this in a
14 little bit more detail later, we're talking about loss
15 of online subscription revenue, loss of overall
16 advertising revenue, loss of opportunity for branding
17 and marketing.

18 If we're talking about indirect and economic
19 -- sorry, indirect economic and non-economic loss,
20 we're talking about loss of readership, harm to brand,
21 loss of advertising, loss of critical audience data,
22 which should not be ignored, loss of engagement with
23 the readers and, to some extent, loss of trust.

24 So I'll just say one final comment. Look, I
25 think, and I hope everyone on this panel and the other

1 panels, we can all agree that what the news publishers
2 do in getting out trusted, reliable information is
3 essential to our society, okay? And the press
4 publishers, they're dwindling, you know, over time,
5 and I know NMA and others can go into more detail
6 about this. We need to do something to stop the
7 bleeding, okay? Whatever that is that, you know, we
8 can figure out later, I guess, but something needs to
9 be done here. And I'll stop there.

10 MS. KERN: Thank you. Daniel?

11 MR. TAKASH: Yes. I think it's very
12 important, obviously, that news be produced and
13 proliferated. I think this is especially true when
14 you look at what is a crisis facing local journalism
15 specifically.

16 However, I think there's an important
17 distinction to be made that protecting it via
18 intellectual property laws or policies resembling
19 intellectual property is different from subsidy, which
20 can take many different forms.

21 I think it's particularly important when you
22 look at one of the trends that's really accelerated
23 the decline in local news is a large wave of mergers,
24 acquisitions, and then subsequent layoffs and
25 consolidation.

1 So I think, you know, we were talking about
2 market structures not just in terms of aggregators but
3 in terms of advertisers, everything like that, I think
4 it's important to consider the possibility of direct
5 support for such local outlets in a way where the wide
6 proliferation via aggregators would strictly be a
7 positive sum and they don't have to rely on that as a
8 part of their business model because they can rely on
9 some form of direct support.

10 MS. KERN: Thank you. And Kate?

11 MS. SHEERIN: Thank you. And I just wanted
12 to say I agree with Keith. I think we can all agree
13 that we support high quality journalism across the
14 board on this panel and want to see a healthy and
15 sustainable news industry.

16 What I disagree with is the concept of
17 substitution through news aggregation. There isn't
18 evidence that suggests that at all. As I mentioned
19 before, users are clicking through to news publishers'
20 sites to get information.

21 Publishers have control of how their content
22 appears in our services. If it was a substitute, one
23 would think the news publishers would decide not to
24 have their content appear. For the most part, they do
25 not decide that. They decide to have their content

1 appear in our services and other similar services, and
2 I think that there is a benefit there.

3 When we talk about what has happened to the
4 news industry, I think that, you know, as Wayne said,
5 there are a variety of factors. There are more places
6 for advertisers on the web. Ad revenues are spread
7 among more publishers than ever before.

8 The decline of classifieds has also played a
9 factor in the news industry's revenue models. But
10 Daniel mentioned something earlier about the ad
11 revenues that they get through our services and
12 others, and I just wanted to say, on average, we
13 looked at this and we found that news publishers keep
14 over 95 percent of the digital advertising revenue
15 they generate when they use Google Ad Manager.

16 And so I think that we should start from a
17 place of understanding that there may be disagreements
18 here, but we should understand what is having an
19 impact, what other things are happening in the
20 ecosystem, and what is exactly related to copyright
21 law.

22 I also wanted to mention that we keep
23 referring to "news content," and I think, unless we're
24 specific about what "news content" means, we're all
25 approaching this conversation from a different angle.

1 So being precise with the language that we're using
2 and that the Office uses in the study when they put it
3 out, I think, is extremely important.

4 MS. KERN: Thank you. And lastly, Danielle?

5 MS. COFFEY: Yeah, I just want to

6 MR. WESTON: Actually, before you answer, I
7 just wanted to ask a targeted question to you and
8 maybe Keith and Jane, which is, you know, what other
9 factors -- this has been mentioned a couple of times,
10 and I'm curious, from your perspective, what other
11 factors have impacted the viability of U.S. press
12 publishers in the digital area? And, you know, is
13 singling out aggregators, does that reflect the
14 reality of the various types of impacts that, you
15 know, maybe are affecting press publishers?

16 MS. COFFEY: Okay. Thank you, Chris. I'll
17 address that, but, first, I just wanted to, while it's
18 fresh, I wanted to address some of the things that
19 Kate was saying. And I think it's important to
20 understand how our content is used not just from an
21 analysis of whether or not it's fair use perspective
22 but in the business, how it's used.

23 So, when we have our content scraped,
24 accessed through an HTTP request, we allow Google to
25 come on our site, and then what shows up in Google

1 search is a myriad of ways that our content is cut and
2 pasted.

3 The first way is AMP, Accelerated Mobile
4 Pages. It's where we give out content, we put it in
5 WordPress, it's hosted by Google, so that's where we
6 get to -- that's where we incur a lot of the lack of
7 data, advertising dollars, ability to get subscribers.

8 The evidence is found from our companies
9 that, through AMP, we have less ability to get the
10 three things that I just mentioned than organic
11 search. Underneath AMP is "featured snippets," then
12 you have "ask more questions," then you have
13 advertisements, then you finally get to "organic
14 search."

15 So you have all of these ways in which
16 Google acquires and uses our data. And it's not 2009
17 anymore where Larry Page said we just want to get the
18 user to where they want to be. It is such a rich
19 experience, it does become a substitute, and that's
20 why 35 percent only click through.

21 Adding insult to injury, when you give your
22 content for AMP -- because that is -- it's a Hobson's
23 choice. You want to be found. So, going back to the
24 original question which I'm responding to, which is we
25 choose to have our content appear. It's not a choice.

1 I think that's my point. It's not a choice. So it's
2 a false choice. So, when we give our content to AMP,
3 the terms of service are so onerous, meaning Google
4 gets to host it, I could read it to you, but let's
5 just say it gives them the ability to use it in any
6 other way that they would like to.

7 So those are terms of service. These are
8 contracts of adhesion. These are ways in which we're
9 pushed to give our content. This is not a choice. I
10 just wanted to address that.

11 And then, also addressing the question that
12 you just asked, Chris, other ways that we -- what are
13 other factors that have affected our business. So,
14 like I said, during the pandemic really magnified the
15 situation. The internet has brought -- it's not the
16 internet, it's the distribution platforms that we are
17 concerned by and that have impacted our revenue stream
18 because the internet itself has brought our news
19 publishers tremendous audience in ways of connecting
20 with our users and our readers in figuring out what it
21 is in personalization and figuring out what it is they
22 want to read more of.

23 We're responsible parties when it comes to
24 using their information. We have these longstanding
25 relationships with our readers where they can trust

1 our brand, they love us or they hate us, especially in
2 the local communities, and we've found success through
3 the internet.

4 However, the broken marketplace, which is
5 what we're somewhat addressing here through copyright,
6 but I think, in many ways, it's more addressed through
7 competition law because those who reap the reward on
8 our behalf -- the two main distributors, Google and
9 Facebook -- it's a broken marketplace. So I could add
10 on later, but for right now, I'll just stop there.

11 MR. WESTON: Okay, thanks. Keith?

12 MR. KUPFERSCHMID: Yeah, just to directly
13 respond to your question, you know, clearly, you know,
14 the news aggregators are not the only problem or
15 causing news publishers problems, but they are the
16 primary means. And as I said earlier -- or primary
17 reason -- the market has obviously changed over time.

18 It's not like press publishers have been
19 sitting on their hands and go woe is me. They have
20 invested heavily in digital transition. They've
21 developed novel and profitable ways to respond to the
22 new ways that the public wants to consume news
23 content. Many of them have explored digital
24 subscription models and other reader-based sources of
25 revenue. But, at the end of the day, ad revenue is

1 still the primary driver of revenue, and that ad
2 revenue is now going mostly to the aggregators and not
3 to the news publishers.

4 The data that would be collected on the
5 readers so that the news publishers can figure out
6 exactly, you know, what their readership is most
7 interested in and many other factors that go into
8 editorial decisions, that loss of data also, of
9 audience data, consumer data, is also essential, and
10 that is because of the aggregators. And so it's not
11 the only reason, but it is the primary reason.

12 MR. WESTON: Thank you. Wayne?

13 MR. BROUGH: Yeah, I think the question you
14 asked is a great question, and I do think you have to
15 look at this market much more broadly than just the
16 question of aggregators because the market today is
17 fundamentally different than it was 20 years ago.

18 You sort of decouple the subscription and ad
19 sides completely, and that means that, I think -- and,
20 you know, as some of the commenters said, the news
21 industry is struggling, and it's trying to find its
22 footing in this new world. And I think the more we
23 can promote finding a better model for -- an economic
24 model, not a copyright model, in terms of how do you
25 address some of these concerns -- but, basically,

1 we're in a world where the price of information has
2 fallen almost to zero, so any consumer out there has
3 access to more information than they've ever had at
4 any time.

5 So not only are these newspapers competing
6 with each other, they're competing with blog posts,
7 they're competing with -- you know, eyeballs can go
8 anywhere, and I admit it's a real challenge for this
9 industry right now. But, in terms of addressing that
10 challenge, I think, again, I think it is competition
11 policy. I think it's a broader look at the underlying
12 economic market structure, which is fundamentally
13 different today than it was 20 years ago.

14 And I think changes in fair use or changes
15 in copyright law are not going to address those
16 fundamental differences at the more basic level in
17 this industry. So, you know, I'm happy to hear the
18 news media is adopting new approaches to advertising
19 and new approaches to news, and I admit it's a
20 challenge, but I think the challenge is an economic
21 challenge, not a copyright challenge.

22 MR. WESTON: Thank you. Jane is next.

23 MS. GINSBURG: Since you asked me to
24 respond, I'm not an expert in the business models of
25 the media industries, but I did want to agree with the

1 basic point that this is at least as much a
2 competition law question as a copyright question.

3 All the copyright protection in the world is
4 not going to help if the copyright owners have no
5 choice but to agree to contractual terms that are very
6 unfavorable to them, which is why Australia took the
7 approach of having basically an antitrust measure
8 which requires the parties to bargain fairly with
9 media arbitration, baseball arbitration if the
10 negotiations don't work out, because I think, in
11 Australia, they recognize that this is a question of
12 market power and market dominance at least as much as
13 a copyright question.

14 Finally, back to something Kate said, I
15 completely agree that we should be precise about what
16 we're talking about because "news" is rather
17 amorphous, right? So I think we should be specific.
18 Are we talking about entire articles? Are we talking
19 about paragraphs, substantial chunks, more substantial
20 than what I've been referring to, which is headlines
21 and ledes and photographs.

22 I also agree that photographs have been a
23 bit overlooked in this, and photographs unquestionably
24 being copyrightable works of their own perhaps should
25 be analyzed differently from headlines and ledes. But

1 I agree that we should be a little more precise in
2 what we're referring to.

3 MR. WESTON: Thanks, Jane. Daniel was next.

4 MR. TAKASH: Thank you. I think, with
5 respect to media outlets and news -- I will use the
6 phrase broadly "news publishers," those who
7 proliferate every subset of what we would call it -- I
8 think there has been tremendous innovation in terms of
9 their distribution models pre pandemic, but,
10 certainly, the pandemic accelerated adaptation to the
11 internet.

12 But one of the concerns I face, and this is
13 related to the nationalization of news where,
14 unfortunately, we run sort of into a problem of
15 consumer choice, which is much harder to overcome than
16 changes to policy, is that you see a superstar effect
17 where large national outlets are better able to
18 leverage these tools, in no small part due to their
19 size and revenue.

20 There's an upfront cost that they're able to
21 overcome at least far more easily than smaller outlets
22 may not be able to capitalize. This was discussed in
23 the Senate report that came out earlier this year or
24 late last year. I can't recall which. Which, to that
25 extent, I think there is a competition policy angle to

1 this certainly, especially with advertisements, things
2 like that. But, at the end of the day, I do believe
3 that if this is something we want to subsidize, though
4 not necessarily protect or restrict access to, it's a
5 fiscal policy question.

6 You know, of all the horrible things that
7 have happened in the past couple of years, I think
8 we've seen some very creative applications of fiscal
9 policy via direct support to covering payroll or
10 direct support to individuals.

11 And if we can suggest a policy change that
12 leans less on protection and what we normally
13 associate with copyright and more on direct financing,
14 such that particularly smaller outlets can simply put
15 their stuff out into the world, benefit aggregators,
16 and simply not care whether, you know, how widely it's
17 shared or how widely it's copied, I think that would
18 be a far preferable avenue to explore than to lean
19 onto a model that would disproportionately benefit
20 larger, more established media, despite those --
21 certainly not to disparage the work that they do.

22 MR. WESTON: Thank you. Kate?

23 MS. SHEERIN: Hi. So just one quick note on
24 AMP, which Danielle mentioned. I think, just as news
25 publishers have control over if and how their news

1 content appears in our services, they also have
2 decisions about whether they want to use AMP or not.
3 Many do, but you don't need to use AMP to appear in
4 our services. So I just wanted to clarify that.

5 Secondly, there's been a lot of conversation
6 about news aggregators and the money they're making
7 from news content. News websites are a very small
8 slice of all the information on the internet, and last
9 year we took a look, and news related queries on
10 Search accounted for just 2 percent of the total
11 queries on Google Search globally.

12 We don't show ads or make money on the
13 majority of searches, and we don't run ads on Google
14 News or in the News results tab in Google Search. So
15 I just wanted to clarify those two points as they were
16 raised as part of this discussion.

17 MR. WESTON: I'm muted, sorry. I will turn
18 it over to Andrew for the next question.

19 MS. COFFEY: Actually, can I just respond to
20 a couple of points?

21 MR. WESTON: Yeah.

22 MS. COFFEY: It's just real quick. It's
23 numbers, and we don't have expert witnesses here.
24 We're not in court. So I'm just going to say that
25 from an advertising -- I just need to be on record,

1 from an advertising perspective, the findings that we
2 take 90 percent, we actually find that we take closer
3 to 30 percent. The findings that there are 36
4 percent, I believe you said, or rather, 2 percent of
5 searches on Google, we find that there's 36 percent.
6 So, if we're talking numbers, I just wanted to be on
7 record with that even though we're not going to,
8 obviously, deliberate that here. Thank you.

9 MR. WESTON: Thanks.

10 MR. FOGLIA: So I want to turn the topic
11 slightly to an issue that came up in a few of the
12 comments, and that is, how significant are current
13 registration practices in publishers' abilities to
14 protect their works? So, Danielle, if your hand is
15 still up for that, feel free to start.

16 MS. COFFEY: It was up from the last one,
17 but I think you asked about -- I'm sorry, you asked
18 about registration practices?

19 MR. FOGLIA: Yes.

20 MS. COFFEY: Okay. And I'm going to assume
21 that you're talking about registration of our articles
22 and the headlines, that you're not talking about
23 registration that was in the NOI, the question with
24 regard to how do we acquire the license from an
25 article that -- the compilation that the publisher

1 requires, is that correct?

2 MR. FOGLIA: That's right.

3 MS. COFFEY: Okay. With the Copyright
4 Office? I'm glad you raised this because registration
5 has -- we've worked a long time together with the
6 Copyright Office, a couple decades now, to figure out
7 how to register our content with the Copyright Office,
8 not just for mandatory deposits, and we finally came
9 to a very good resolution just a few years ago that I
10 would commend you for that the registration of our
11 content through a PDF as opposed to microfilm was
12 overcome, and we can do that. Now we register our
13 articles with PDFs. So thank you for that.

14 With regard to dynamic web registration, so
15 the web content that we have, we used to be able to,
16 many of our publishers, register their web content and
17 the articles, the dynamic articles that change on the
18 websites, through representative pages that you would
19 file and show through the Copyright Office
20 registration system.

21 Our members got -- our member news
22 publishers got letters saying that you could no longer
23 register through representative pages. And so then
24 the question became, what's going to now replace what
25 we used to be able to protect our content by?

1 Some of the claims that I hear, that we have
2 a paper copy, so that should stand in place so that a
3 dynamic web copy actually is not accurate because, in
4 many cases, you have a lot of web content that not
5 only changes but that's only web content that you
6 don't have a paper article for.

7 So you will have more and more content going
8 unprotected for the purposes of enforcement.
9 Obviously, that's another issue that we've been
10 discussing, so being able to enforce it at all. But
11 we do need to be able to protect our articles,
12 especially the dynamic web content that we produce
13 through our digital website since our news publishers
14 are becoming more -- and I probably should have said
15 that at the beginning -- all of them are moving to
16 digital.

17 However, it's also interesting because --
18 another note I'll add is that we are making more of
19 our money, our revenue, through print. Our print
20 circulation for most of our news publishers continues
21 to financially support the digital production of
22 content. That's when you know you've got a broken
23 marketplace. So registration is something that we'd
24 like to see improved at the Copyright Office, and we
25 look forward to working with you and have some

1 suggestions on how to go about doing that. Thank you.

2 MR. FOGLIA: Keith, go ahead.

3 MR. KUPFERSCHMID: Thanks. Yeah, I'm
4 really, really glad you asked this question. I know I
5 and others have spoken to the Copyright Office before
6 about this issue. The registration system does not
7 work for dynamic content and website content, and
8 that's not, frankly, unique to news publishers, right?
9 For news publishers who put -- more and more, these
10 days, their content is not appearing in print or is
11 appearing in print and also on the website, but
12 there's a ton of information and news articles that
13 are appearing just on the website, right?

14 And it's not like they just update the
15 website once during the course of the day. It's not
16 like they put out an article and that article is
17 static. It will change, presumably, as new
18 information comes along. How do you register that?
19 How do you register all the news that's on the
20 website?

21 We have been talking to the Copyright Office
22 for a long, long time about this. There has been --
23 no -- this is no easy solution, so I don't want to
24 just put this burden on you guys. That system needs
25 to change because, if news publishers and others who

1 want to register their website content can't do that,
2 they can't get statutory damages, they can't --
3 because they can't register their works -- and they
4 can't get into a court to enforce their copyrights.

5 So, when people are using these articles
6 illegally, they're really, frankly, screwed compared
7 to a lot of other copyright owners and creators.
8 That's got to change, and if there's one thing that
9 the Copyright Office can do itself, frankly, without
10 any outside assistance of Congress or anyone else,
11 it's to fix the registration system so this system
12 works.

13 And if the Copyright Office thinks that it
14 needs congressional, like, needs some kind of
15 legislative change to do this, then let's start
16 talking about this. But this is a change whose time
17 has come and, frankly, passed. I mean, websites are
18 not a new thing. There needs to be a way to register
19 dynamic and voluminous website content, and there just
20 isn't, and that's a huge, huge problem.

21 MR. FOGLIA: Professor Ginsburg?

22 MS. GINSBURG: I just wanted to add another
23 aspect of concern piling onto why this is a real
24 problem that needs some kind of solution. To the
25 extent that some courts are saying that the work is

1 what's in the registration and, therefore, if what
2 your claim concerns is not in the registration, then
3 you're out, that's very problematic to the extent that
4 there may well be differences between the dynamic
5 digital version and some print version.

6 I think it's quite problematic because, of
7 course, the work is the creation. It isn't the
8 registration as a matter of the 1976 copyright law.
9 And so I think that those courts may well be wrong.
10 But, to the extent that there is a case law that says
11 the work is what's in the registration, I think that's
12 another reason why there needs to be a way of having
13 the registration cover the dynamic aspect of these
14 websites, whether they are news media websites or any
15 other kind of dynamic website.

16 MR. FOGLIA: Thank you. Melinda, you have
17 the next question.

18 MS. KERN: So, going along similar lines,
19 for short phrases that are not protectable under
20 copyright, would it be wise for us to consider
21 extending copyright protection to short phrases,
22 however original?

23 And then also, the second question is, is
24 there any situation where you can see that a headline
25 could be copyrightable and register? Professor

1 Ginsburg?

2 MS. GINSBURG: Okay. As mentioned earlier,
3 I think that's actually somewhat inaccurate to say
4 that short phrases aren't protectable. As I mentioned
5 earlier, the cases don't actually support that. They
6 turn on originality and not on the number of words.
7 There isn't a brevity threshold. And it has been
8 recognized in cases, that even short phrases, when
9 original, can be protected, whether one looks at them
10 in isolation or more often and more accurately as part
11 of a work.

12 So I think that the positive law,
13 notwithstanding the regulation, the compendium, and
14 the circular, should be understood as concerning
15 originality and not some kind of unspecified word
16 count. And, under that approach, there may well be
17 many headlines that are original and therefore are
18 protectable, even under the current state of the law,
19 notwithstanding the words and short phrases doctrine,
20 because there is, in fact, no actual per se bar to the
21 protection of a short phrase if it is original.

22 Most short phrases aren't going to be
23 original, which is why the case law, such as it is,
24 rejects protection, not because it's short but because
25 the content claimed is not original. I think it would

1 be much more helpful to focus on originality rather
2 than word count.

3 MS. KERN: Thank you. Kate?

4 MS. SHEERIN: I just wanted to take a note
5 about the reason that news publishers allow the use of
6 headlines and short extracts in search and in Google
7 News regardless of the copyrightability.

8 While we don't think they are copyrightable,
9 as I mentioned before and throughout this panel, news
10 publishers are opting in to allow this content to
11 appear, and that's because, for users, right, who are
12 looking for information on the web, the short extracts
13 and headlines help them identify which news article is
14 the one they want to look at, right? It helps them
15 find the information they are looking for and click
16 through to the news publishers where the news
17 publishers can gain revenues through ads or
18 subscriptions.

19 So this is a public use. The public uses
20 headlines and short extracts to find information they
21 need. Extending a copyright in this way would have
22 detrimental impacts. We've talked a lot about the
23 dynamics here, of course, between the news industry
24 and Google, but I think, when we think about this,
25 copyright doesn't necessarily mean a right to payment

1 at all. And so, if the question is about giving news
2 publishers control over how their content appears,
3 that already exists on our services today.

4 MS. KERN: Thank you. Danielle?

5 MS. COFFEY: I just, again, have to be on
6 the record. We would not characterize our
7 relinquishing of our news content as opting in. To
8 us, it's a Hobson's choice. It's like asking someone
9 if they want air. Without it, we would receive no
10 revenue, no exposure when our members have tried to
11 pull off of certain aspects of Google, and it is
12 Google that we're talking about because they do have
13 the dominant market share.

14 We would love to have a competitive
15 environment. We would love to have Bing and Search,
16 and then we could have our fair market share and there
17 could be -- right now, the dominant party does take a
18 hundred percent of the market share because we are not
19 compensated.

20 As far as the opting in, going back to that,
21 it's a Hobson's choice. So, in a competitive
22 environment, we would have the ability to work with
23 multiple parties. We believe that would be a
24 healthier marketplace where it would be functional so
25 that we could determine the fate of our content and

1 how it's used and how it's disseminated and also be
2 able to have a return on that investment, going to
3 very good points that were made and will be made later
4 in the roundtable about our market share and being
5 able to recoup that from those who are distributing
6 our content.

7 But I just do have to be on the record that
8 it's not -- I wouldn't characterize that it's opting
9 in with a dominant monopoly. Thank you.

10 MS. KERN: Daniel?

11 MR. TAKASH: Thank you. Yes. So, if I
12 understand your question correctly, as to the
13 desirability of extending the ability for short
14 phrases, headlines, to be available for copyright
15 protection, I would consider it undesirable.

16 As Professor Ginsburg said, I think there
17 would be, even if that were to happen, there would be
18 significant questions about originality, which would
19 not necessarily implicate an exclusive right.

20 However, I think, should that specific
21 protection be extended, you would necessarily run into
22 an interesting dynamic relative to what we're talking
23 or compared to what we're talking about today, where
24 you would have competing news publishers reporting on
25 the same story and potentially -- and even if it turns

1 out to not be infringing at all -- potentially running
2 into a scenario where they make editorial decisions
3 purely based on concerns about litigation, or
4 litigation should emerge between publishers that would
5 simply prevent the proliferation.

6 So you'd run into a weird dynamic where,
7 right now, we're talking about rent sharing between
8 aggregators, platforms, and news publishers, but we
9 certainly wouldn't want to create a scenario where the
10 latter side are fighting among themselves, to answer
11 that question.

12 MS. KERN: Thank you. And Kate?

13 MS. SHEERIN: I just wanted to respond to
14 Danielle about the Hobson choice. I think, really, it
15 is a disagreement about the value exchange that is
16 happening here, and I think you all have heard
17 throughout this panel and will continue to hear
18 throughout the day that there are differences of
19 opinions, different studies, different evidence here.
20 There is not agreement between the parties, and that
21 will kind of come through.

22 But I do think we believe we provide
23 tremendous value to the news industry, 24 billion
24 clicks per month for free. We provide services that
25 are useful to the public, useful to the news industry.

1 And so I think Danielle and I will continue
2 to disagree about these fundamental principles, but I
3 just wanted to point out that I think it's not a
4 Hobson's choice. It's a disagreement about the value
5 exchange.

6 MS. KERN: Thank you. And then, Ms. Coffey,
7 did you have a response or --

8 MS. COFFEY: Yeah, I would just say two
9 things real quick just on the last point only because
10 it was recently raised and I just heard "for free,"
11 and that would be -- we would have to ignore the other
12 side of the equation where revenue is produced for the
13 party that is producing that traffic.

14 And the traffic, again, we don't believe
15 that to be of significant value when the ad tech tax,
16 as it's colloquially called, is so high that we don't
17 believe we do get an adequate return on our
18 investment, and that's because there's an anti
19 competitive market on both the distribution side as
20 well as the ad technology side, which is evidenced
21 through litigation that I won't go into.

22 The other thing that I wanted to say is we
23 have been talking a lot about the competition law.
24 We've been talking about this being really about the
25 dominant platforms and the consent and whether or not

1 we have that.

2 And if there is an acknowledgment that there
3 is an opt in -- that we have an opt -- we're opting
4 into this and we do have choices and that it is a
5 competitive market, then I would think that we would
6 all would be supportive of legislation that's pending
7 in Congress, the Journalism Competition Act, that
8 acknowledges that it's anti competitive and allows the
9 remuneration for the value that is received by news
10 content. So, if there is that value exchange today,
11 which is what I'm hearing, then everybody on this
12 panel should be supporting the JCPA. Thank you.

13 MS. KERN: Thank you. Chris?

14 MR. WESTON: Yes. Just returning to sort of
15 pure copyright issues, assuming that Jane's view
16 prevails that there is copyright protection for
17 creative short phrases, including headlines, and that
18 the use that aggregators are making is not fair, what
19 is -- where does that get us? What is the -- you
20 know, what follows from that? Does that lead to
21 lawsuits? I'm just trying to figure out what the
22 practical implication of that sort of conclusion is.
23 Jane?

24 MS. GINSBURG: Whether it leads to lawsuits,
25 I think, turns on the registration issue that we've

1 been talking about. But I would expect that the
2 clarification of the positive copyright law could
3 improve bargaining, but I don't know how much it could
4 improve bargaining.

5 That brings us back to the question of
6 market dominance because, as I said earlier, even if
7 you have uncontroverted copyright protection, if you
8 can't effectively bargain, that's not going to get you
9 very far. Also, even if you could sue, there's the
10 question of litigation costs and how long the lawsuit
11 can go on. The situation is not at all comparable,
12 but I'll just point out that the Google Books
13 litigation went on for over 10 years. That's not
14 ideal either.

15 MR. WESTON: Okay. Thank you. Wayne, you
16 were next.

17 MR. BROUGH: Yeah. I would just add the
18 alternative to lawsuits is simply less aggregation.
19 If, in fact, platforms just decide they don't want to
20 deal with it, it's actually a disservice to consumers.
21 And I think solving that problem is difficult.

22 I mean, we've seen what's happened in
23 Europe. There's not been an easy resolution to this
24 question. Even the arbitration approach in Australia
25 is problematic. So I think, if you go down that road,

1 there are going to be problems that ultimately provide
2 a disservice to consumers and more consumer harm than
3 benefit.

4 MR. WESTON: Thanks. Daniel?

5 MR. TAKASH: I wholeheartedly agree with
6 Wayne's comments. The only way I would add is that,
7 you know, should negotiation or litigation be the
8 avenue that is pursued, be it under current laws or
9 under some new regime, there is simply -- you know, we
10 need to be prepared for the possibility that these
11 operations would shut down.

12 And whether or not you agree that the share
13 of revenue or the distribution of rents is equitable
14 under a current system, you need to be -- you know,
15 it's entirely possible that these operations will for
16 one reason or another simply disappear.

17 And to that extent, I'll just once again
18 point out that the way you prevent this is to do an
19 end run around the regulatory policy and copyright and
20 view it purely as a fiscal policy direct financial
21 support solution where the producers of news content
22 simply can become, you know, largely indifferent to
23 the status of their copyrights and are simply happy to
24 see it proliferated.

25 MR. WESTON: Thank you. Keith?

1 MR. KUPFERSCHMID: Yeah, just briefly. I
2 mean, I think it's good that we're talking about
3 potential solutions here. As I said earlier, clearly,
4 something needs to be done. I won't go into any
5 detail in terms of what the best or preferred solution
6 is or anything like that, but just simply saying no,
7 let's keep the status quo is not a solution, is not an
8 answer. Something needs to be done, whether it's
9 copyright, antitrust, I mean, unfair competition.
10 There's a whole bunch of different possibilities here.

11 And I think it's good, and I thank the
12 Copyright Office for holding this roundtable and kind
13 of beginning these discussions because, clearly, we
14 need a solution. We can't keep on going down this
15 path. Otherwise, we'll see ourselves years from now,
16 and we won't be complaining about aggregators taking
17 news publishers' content because there will be no
18 content. So I think it's good that we start talking
19 about solutions, but I know that's predominantly for
20 Panels 2 and 3, so I'll stop there.

21 MR. WESTON: Okay. Thanks. I will turn it
22 over to Andrew for the next question.

23 MR. FOGLIA: Sure. This one may be more
24 targeted to the economists, but I was wondering to
25 what extent the problems we're discussing in the

1 current economics of news publishing are different for
2 local news organizations or smaller news organizations
3 than larger ones. Wayne, I think I saw you.

4 MR. BROUGH: Yeah. Thanks. I think it's a
5 greater burden on the local producers because those
6 are the ones, if, in fact, you move into some system
7 of trying to arbitrate, you know, who's getting paid
8 for what taxes, chances are the local news providers
9 are going to be the ones that suffer. It's going to
10 be much easier to run the articles from a large
11 nationwide publisher. There's probably potentially
12 more revenue involved in that on the ad side of
13 things.

14 So, if, in fact, we move to this world where
15 there's more protection and more abilities to sort of
16 shift the sharing of rent, those on the platform and
17 those publishers, I think, are going to end up
18 shifting towards the larger publications and making it
19 even more difficult for local producers to provide the
20 revenues they need for local news.

21 MR. FOGLIA: Thanks. Daniel?

22 MR. TAKASH: Yes, I think one of the issues
23 which face local publishers or at least you see a
24 decline in the number of local papers and the rise of
25 what are called "news deserts" is a large trend

1 towards financialization, where you have hedge funds
2 and other largely financial firms acquiring
3 newspapers, stripping for parts, leading to layoffs.
4 And I think that's an issue which is entirely separate
5 from the discussion, certainly deserves its own
6 scrutiny, but for the purposes of this conversation is
7 neither here nor there.

8 I think the other issue we see with local
9 publication is -- and this is, you know, very
10 difficult to change via the law -- consumer
11 preferences. Pew Research put out that most folks
12 simply do not know that their local publisher and that
13 local outlets are seriously struggling. And I think,
14 to a certain extent, being made aware of that problem
15 could inspire a certain civic duty in local citizens
16 to support their newspaper, which wouldn't necessarily
17 solve the problem all on its own, but it would go a
18 long way.

19 And then the final point I would make is
20 that there is a problem -- again, this is part of
21 national, cultural, consumer preference trends, which
22 are hard to get around -- of the nationalization of
23 the news. There are only so many hours in the day.
24 You know, every minute I spend reading a national
25 outlet is a minute I do not spend reading my local

1 paper. So these are issues that are separate from
2 discussions of copyright and require a more creative
3 approach than leaning into an intellectual property
4 exclusivity-based model.

5 MR. FOGLIA: Thanks. Danielle?

6 MS. COFFEY: It's really just a description
7 of our membership and the news publishers across the
8 country, which is also different from, obviously,
9 Australia and Europe. Actually, that's not true.
10 Some member countries -- member states in Europe do
11 look like the U.S., meaning the landscape of
12 newspapers in the U.S. is very -- if there was a
13 pyramid and you had the large publications, we would
14 be very bottom heavy, meaning across our country we
15 have 7 to 10,000, depending on how you define them,
16 newspapers, small and local newspapers. covering very
17 small corners of our country.

18 And that's different from, say, Australia,
19 where you have larger publications. They do have
20 regional small publications. It's just we have a
21 tremendous amount. If you're looking at that pyramid,
22 it's much more bottom heavy. And we have a few
23 national publications, and then we have metropolitan,
24 regional, and then just a ton of small and hyperlocal
25 coverage. To your question, though, they invest in

1 reporters and newsrooms.

2 And, of course, notwithstanding the
3 proportionality of what you would ever see the clicks
4 coming -- the articles being posted from whether it's
5 a national and also the national interest in the
6 coverage from those publications versus a smaller
7 local publication would obviously -- notwithstanding
8 the proportionality, the investments in the newsrooms
9 and the reporters is significant at the local level.

10 And so the last thing that I'll say is that
11 in any solution that we come up with -- and I agree
12 with Keith, there has to be a solution. We can't just
13 keep saying what doesn't work. We have to figure out
14 a way to make something work here.

15 Any solution that we come up with does, I
16 would say -- that I feel strongly that it needs to
17 reward the reporters and the newsrooms investments
18 because, if we're rewarding clicks, that leads to an
19 ecosystem that we're headed towards today where the
20 quality of the content is going to hurt society. It's
21 going to hurt the next generation because it's just
22 not the quality journalism that we're used to where
23 you rely on the brand. There's only so many -- you
24 know when there's a tabloid in the newsstand when
25 you're leaving the grocery store, and you can tell the

1 difference. You know when an alien is not coming out
2 of somebody's head, that's a tabloid.

3 But now we just can't tell anymore because
4 everything is merged and compiled together on search
5 and social. And we need to maintain that standard for
6 a civil society. Thank you.

7 MR. FOGLIA: Thanks. Daniel, before you
8 answer, I'm going to actually add on one more question
9 for you to also address potentially because what
10 Danielle just mentioned about potential sort of brand
11 and reputational dilution through aggregation,
12 something that came up in a few comments, this concern
13 that as the news content is aggregated, readers no
14 longer distinguish or reward newspapers for developing
15 a particular reputation for, you know, trustworthiness
16 or something like that. What evidence do we have that
17 that sort of dilution is happening, and what evidence
18 do we have that it's happening because of aggregation?

19 MR. TAKASH: So, with respect to the
20 question about dilution of quality, I think, to a
21 certain agree, sensationalism and bias in reporting
22 has always been with us. It's a problem that, I
23 think, is difficult around.

24 That being said, I think one of the issues
25 is that if even -- take whatever your preferred

1 distribution is in order as it relates to revenue per
2 click or whatever or appearance in aggregation, I
3 think it rewards virality, and I think it rewards
4 sensationalizing, you know, eye grabbing, where, you
5 know, it's an old joke, but it's a serious problem
6 that people read the headlines, they don't read the
7 actual content of the stories.

8 And I think a model that leans more on
9 collecting revenue from the specific practice of
10 aggregation, that would be problematic. Again, my
11 specific solution would be something like, as
12 suggested in one of the comments, something like a
13 fourth estate fund that goes to either publications
14 or, ideally, as Professor Silbey noted in her
15 comments, towards individual journalists because
16 there's no guarantee that simply because the funds go
17 to the news publishers, that will trickle down to the
18 people who are actually working.

19 So I think we need to lean more on an
20 independent financial support model where people
21 depend less on eye grabbing and more on substantive
22 work that will, maybe not today, you know, maybe not
23 all the time, but eventually inform serious public
24 policy or, at a bare minimum, serve as a deterrent
25 towards corruption in local officials. When local

1 papers go under, municipal bond ratings go up.

2 So it's not even necessarily a question of
3 people catching the eyes, it's a question of someone
4 actually watching, is a long winded answer to what
5 hopefully at least addresses some of your question.

6 MR. FOGLIA: It does. Thank you. Keith,
7 and then I'm going to turn it to Melinda for the next
8 question.

9 MR. KUPFERSCHMID: Yeah, I just very quickly
10 wanted to point out that we're hearing a lot of
11 different solutions from the tech side of things that
12 propose a variety of sources of paying for news
13 production, like we just heard from Daniel, except one
14 group that's left out, which is the actual technology
15 companies that are using the content, right? They
16 don't want to pay, but let someone else pay. I just
17 -- that's bizarre to me. That's all I want to say.

18 MR. FOGLIA: Daniel, and then Melinda.

19 MR. TAKASH: Yeah. Sorry, I don't want to
20 necessarily give the impression -- first, I would
21 argue that it's the production and the existence of
22 these institutions that matter. Again, it matters as
23 a function of, like, local state policy where it would
24 make sense, you know, just for the sake of their
25 credit rating.

1 However, if we are concerned about, you
2 know, distribution of the rents going forward, I think
3 a tax on advertising more broadly would be an
4 acceptable solution. I speak only for myself on that
5 matter. So, if the concern is about payment, I think
6 that's a perfectly acceptable solution. But, again,
7 this is something which should be funded, general fund
8 revenue, a further excise tax on alcohol -- whatever
9 it should be, it's the existence and proliferation
10 that matters the most.

11 MR. FOGLIA: Thanks. And Kate, actually, I
12 do want to give you a chance to get in, so please go
13 ahead.

14 MS. SHEERIN: Yeah. Thank you for just
15 letting me answer this before you move on, but Keith
16 said that technology companies are not contributing
17 here. I strongly disagree. Along with the value I've
18 mentioned throughout my remarks today, I wanted to
19 point out the Google News Initiative.

20 Through the Google News Initiative, we've
21 supported 7,000 news partners, 450,000 journalists,
22 and provided over 300 million in global funding. We
23 are a committed and long term partner of the news
24 industry for over two decades. And so I think I just
25 wanted to reiterate we are committed to this work. We

1 support high quality journalism. We want a
2 sustainable and healthy news ecosystem going forward.

3 MR. FOGLIA: Thank you. Melinda?

4 MS. KERN: Thank you. Some of the comments
5 touched on this, and I believe we heard a little from
6 Kate, but I just wanted to know what the benefits that
7 accrue to press publishers are from current
8 aggregation practices. I know that some of the
9 comments had mentioned increased audience, but I
10 didn't know if anybody else had experience with any
11 benefits that they were currently facing? Kate?

12 MS. SHEERIN: I just wanted to mention,
13 alongside the value of traffic, we also provide a
14 number of tools. One I wanted to mention is
15 "Subscribe with Google" that helps drive subscriptions
16 for news publishers. Since our launch, we've driven
17 over 500,000 subscriptions for our partners around the
18 world, 90,000 in the last six months alone. We're
19 investing in tools across the board and collaborating
20 closely with the news industry beyond just the traffic
21 we send.

22 MS. KERN: Thank you. And Danielle?

23 MS. COFFEY: We do receive traffic.

24 However, when the traffic comes through, the problem
25 is that because there's dominance -- and this is being

1 litigated; I won't get into this -- Google owns the
2 buy side and the sales side of the advertising
3 ecosystem so that, in addition to the arbitrage that
4 has been found and the low take rates that we are
5 finding, which contradict Kate's, it's an inadequate
6 return on what value we're providing to the increased
7 revenue of the platforms that we're not getting in
8 return and is not only hurting our ability to produce
9 quality journalism, but also the anti competitive
10 conduct squeezes out other competitors, so that leads
11 to the Hobson's choice that we've been talking about.

12 Another example that I would give of what we
13 would like to receive -- so sorry, Melinda; it's the
14 opposite of your question -- what we would like to
15 receive is the examples that I gave before. And when
16 we do work within the verticals and also the analytics
17 and the tools and all the things that are offered by
18 Google, we are at a detriment, and we found that
19 through evidence of looking at our publications and
20 what they've experienced when they use, like I said,
21 the perfect example is Accelerated Mobile Pages, which
22 is -- and I'm doing air quotes to say "voluntary"
23 because it really isn't. Like I said, if you want to
24 be found at the top of Search, it's really a Hobson's
25 choice. Of course, you're going to want to be at the

1 top of Search before you have all of the other ways
2 that they display our content.

3 So, in AMP, like I said before, we incur --
4 we don't have as much data, we don't get as many
5 subscribers, and we don't have as much advertising
6 dollars as we do with organic search. So we are at a
7 disadvantage. We are taking less revenue when we are
8 using Google and Google's aggregation and tools and
9 services, so we are not getting an adequate return on
10 our investment. And notwithstanding GNI and some of
11 these other grant programs, what we're looking for is
12 a fair exchange of the value that we're providing at
13 fair market value, which is, by definition, impossible
14 when there's a monopoly and why laws are supposed to
15 fix that. Thank you.

16 MS. KERN: Thank you. I think that is the
17 only question I had at this moment. So, Chris?

18 MR. WESTON: Thanks, Melinda. So my
19 question is the concept of "quality journalism" has
20 come up a few times in the comments and then in our
21 conversation today, and I wanted to ask, to what
22 degree is the preservation or the promotion of quality
23 journalism, as opposed to other kinds of journalism or
24 quasi journalism, a concern of copyright law? You
25 know, does the constitutional command of the progress

1 of science, does that have anything -- does that have
2 any implications for the type of works that we want to
3 encourage through copyright law? Danielle?

4 MS. COFFEY: Okay. That's asked a lot, and
5 Jane will have a lot to say on this as well. That
6 comes up a lot. What is news? What is protected
7 here? What's quality? Because it's difficult to
8 define news, it's kind of like a you know it when you
9 see it sort of a thing.

10 Another way to look at it is the objective
11 criteria that goes into the creation of news. So, if
12 you look at you hire reporters, you have a
13 fact-checking process, you have an error correction
14 method, and the fact that we put our names on our
15 products, the fact that you know who to complain to,
16 that's what sets news publications and quality
17 journalism apart.

18 Whether you agree with the content that is
19 created and whether the viewpoints, you believe it to
20 be factual or not, if there's a fact-checking process
21 and citation to multiple sources, so on and so forth,
22 the objective criteria, and Society for Professional
23 Journalism has a code, a standard Code of Conduct that
24 all of our news publications adhere to, in addition to
25 having to their own newsroom standard Code of Conduct

1 for the creation of news and putting our name on it,
2 we believe that that ensures that it's what we would
3 deem to be quality versus what some are calling
4 "citizen journalism," and that would be where a
5 Facebook poster goes out and takes pictures on their
6 phone.

7 That's not journalism because there's a
8 method and there's a Code of Conduct that we adhere to
9 to ensure that quality, to ensure that people can rely
10 on it and the credibility -- love us or hate us, agree
11 with what's being reported or not -- a reporter is
12 still sitting in City Hall and reporting on the facts
13 of what's taking place and editorializing on that
14 content. Whether you agree with it or not, you know,
15 is in addition to what we do.

16 And just on the citizen journalism, do we
17 want citizen medicine practice on the streets? I
18 mean, there has to be some sort of a standard of care
19 to create these pieces that consumers rely on. Thank
20 you.

21 MR. WESTON: Thanks. Thanks, Danielle.
22 Jane, you're next.

23 MS. GINSBURG: Yeah, I'd like to reply at a
24 slightly higher level of generality with respect to
25 the relationship of copyright to quality creativity,

1 and I'd like to cite Lord Macaulay, who is often
2 incompletely cited as having said that copyright is
3 exceedingly bad because it is a tax on readers for the
4 benefit of authors. He did say that, but he also said
5 some other things that are at least as important. He
6 said that we must have a supply of good books and the
7 best way to achieve that objective is by liberally
8 remunerating authors.

9 And the three models he posed were authors
10 who were independently wealthy who could support
11 themselves -- that's a small group -- patronage, which
12 he loathed and for a variety of reasons, including
13 that it makes the author beholden to the patron, and
14 under those circumstances, two cheers for copyright --
15 he didn't say it that way -- but that copyright is the
16 best way to achieve a diversity of creators and to
17 ensure that they can continue to be creators.

18 I'd like to advert back to something that
19 Danielle said, which is there's nothing wrong with
20 crowdsourcing, and that's a very nice adjunct, but you
21 can't have a reliable and consistent supply of
22 creativity if you rely on people's spare time and
23 spare income.

24 And the copyright system is designed to
25 create an ecosystem that will support creativity. Not

1 all of it will be high quality. Indeed, copyright
2 eschews making quality judgments, but if you have a
3 system that as a whole makes it possible to earn a
4 living by creating works, you will get a lot of works,
5 and many of them will, in fact, be quite good.

6 MR. WESTON: Thanks very much. Wayne?

7 MR. BROUGH: Yeah, I mean, I'd agree that
8 having a professional class of journalists is of
9 value, but in today's digital world, there's plenty of
10 sources of quality reporting that come from law
11 professors doing blogs -- it's across the board.

12 And I think, if we start saying copyright is
13 different for, say, a law professor with a blog than a
14 journalist doing something in a publication, I think
15 we're going into territory where we've got some First
16 Amendment issues, and I'd be very concerned about
17 trying to distinguish between the two.

18 MR. WESTON: Okay, thanks. Andrew is next,
19 and I don't want to say this is our very last
20 question, but I guess depending upon the extent of the
21 answers, it may be.

22 MR. FOGLIA: Thanks, Chris. So we've heard
23 today a number of times that whatever causes of action
24 news publishers may have, they may not be effective
25 for competition related reasons. Nonetheless, I'd

1 like to ask about one more cause of action, and I'm
2 curious to hear whether the panel thinks hot news
3 misappropriation is still a viable cause of action and
4 whether it has any application in this context.
5 Thanks. Danielle?

6 MS. COFFEY: I believe that this is a
7 subject for another panel, so I won't go into it much,
8 but I will say that it has equally been eroded by the
9 courts, the hot news doctrine. It is still viable in
10 the states. However, because of a string of court
11 cases, it is not a useful tool, nor is it, at the
12 federal level, if it were to be utilized, you noted in
13 your question the competition issues.

14 And a right to protect your property is
15 where we are utilizing or where we've been active in
16 competition law because it does protect the right to
17 access your content. I don't want to get into it too
18 much, but, currently, we have the ability to do that
19 today. Under 1201 of the DMCA, we can actually
20 protect access to our content, notwithstanding whether
21 or not that content is protected by fair use.

22 However, that continues to relate back to
23 the ability to withhold our content, and any one
24 publisher who would withhold their content
25 individually would be meaningless. They've tried.

1 To be able to collectively do that and have
2 an enforcement mechanism to ensure compensation
3 because of that withholding based on the access to the
4 content is something that would result in a successful
5 payment for the value that's being received and the
6 increase of revenue, incremental revenue, due to that
7 value of the content that's being received by the news
8 content creator.

9 And, again, that's the JCPA, but, again,
10 that's not in this panel, and Jane is an expert on the
11 sui generis and which hot news is an example of, so
12 I'll just stop there. Thank you.

13 MR. FOGLIA: Jane, I see your hand's up.

14 MS. GINSBURG: I thought I saw Keith as
15 well. I just want to say that as a matter of current
16 positive law, the hot news doctrine wouldn't really be
17 applicable to news aggregation because, while some of
18 its elements, notably, the threat to the business of
19 the source of the content, is present, at least many
20 so say, the essential hotness, heat or timeliness
21 which underlies the hot news doctrine isn't really at
22 issue here. We're not talking about the right to be
23 the first to disseminate the news. That's what the
24 actual INS case was about, and the more recent
25 incarnations of hot news give a very, very short

1 window of exclusivity.

2 But I think the problem with news
3 aggregation is not beating the source site to the
4 punch. It's putting up the content of the source site
5 in a persistent way even after its initial
6 dissemination. So hot news at least as it currently
7 exists and, indeed, was formulated back in 1918 by the
8 Supreme Court doesn't quite map on to what's going on
9 here.

10 MR. FOGLIA: Thanks. Melinda?

11 MR. WESTON: Actually, I'm going to jump the
12 queue and say that we're almost done, but I want to
13 give everybody 30 seconds or so to offer any closing
14 remarks you'd like to offer. That's optional, you
15 don't have to, but this is an opportunity for anybody
16 to do that who wishes. Danielle?

17 MS. COFFEY: Only because it was in our
18 comments, I would just reiterate -- well, first, I
19 would reiterate the importance of what we're talking
20 about. I started with that, I'd like to end with that
21 because what we're talking about is something that has
22 an impact on the democratic process and getting
23 information to citizens of our country. So I think
24 it's important, and I think everybody -- I think we
25 all agree on that, which is a good thing. And, again,

1 thank you for holding this roundtable because it is
2 such an important issue, and we appreciate you taking
3 the time to -- and also would like to thank Senator
4 Tillis in this respect for actually prompting the
5 discussion. His leadership is notable.

6 I would just at this point reiterate what we
7 asked in our comments of the Copyright Office, which
8 is to recommend, at the end of the day, to recommend
9 that reproduction and display of our content is
10 infringing, to allow the registration process of
11 dynamic web content and improve upon that, to consider
12 national treatment with regard to the EU publishers'
13 right, Article 15, that was promulgated. And then,
14 lastly, to endorse the Journalism Competition
15 Preservation Act, as I think that we've proven across
16 the board this is really a competition issue to ensure
17 the compensation that is deserved here. Thank you.

18 MR. WESTON: Okay, thanks. And Kate?

19 MS. SHEERIN: Thank you so much for putting
20 together this panel and thank you for having me. I
21 just wanted to emphasize something that many of us
22 have said today and Andrew also just referenced in his
23 last question. A lot of the discussion today has not
24 been about copyright law or ancillary copyright, it
25 has been about other issues of law, other types of

1 interventions. And so I think that we should keep
2 that in mind as we move forward about what this study
3 is looking at. Are we looking at copyright issues?
4 What is the scope here? Where are we focused? And
5 thank you for all the work and thank you for inviting
6 us to participate.

7 MR. WESTON: Thank you. Keith?

8 MR. KUPFERSCHMID: Yeah, my last comment
9 isn't so much as a summary or conclusory comment but
10 more of just a reminder of something I said at the
11 very beginning of this panel, which is please let's
12 not forget about photojournalists and photojournalism.
13 We've talked a lot about news publishers, obviously,
14 and the content of the stories itself, but
15 photojournalism can't be ignored here. And in any
16 solutions that we talk about, and, hopefully, we will
17 move forward talking about different solutions that
18 might work here, hopefully, they'll be included in
19 those discussions.

20 MR. WESTON: Thanks very much. So that
21 brings Panel 1 to an end, so I will ask Panel 1
22 panelists to mute yourself and turn off your cameras,
23 and then we will move you to being audience members.
24 And then we have a 10 minute break coming up, starting
25 when I'm done talking, and then Panel 2 will start at

1 10:45. If, during that break, if Panel 2 panelists
2 could log on for audio and video checks. Thank you
3 very much.

4 (Whereupon, a brief recess was taken.)

5 MR. FOGLIA: Welcome back. For those of you
6 who are just joining us, the first panel discussed
7 existing protections for press publishers. We are
8 about to begin the second panel, which will explore
9 whether additional protections for press publishers
10 are desirable.

11 My name is Andrew Foglia. I'm a Senior
12 Counsel with the Office of Policy and International
13 Affairs. With me are Chris Weston, also a Senior
14 Counsel, and Melinda Kern, a Barbara Ringer Fellow.

15 I'm going to go through the instructions
16 just as we did at the top of last panel. Copyright
17 Office staff will be posing questions for the
18 panelists to answer. Panelists should use Zoom's
19 "Raise Hand" feature to indicate that they would like
20 to respond to a question. We will try to let
21 panelists speak in the order they raise their hands.
22 The first time you speak, please state your name and
23 affiliation, if any. Panelists' remarks are being
24 transcribed by a court reporter, and they will be
25 posted on the Copyright Office website, along with a

1 video of the event. We ask that panelists keep their
2 remarks on any one question to two minutes to allow
3 other panelists time to speak. We would also ask that
4 while you are not speaking you keep your microphone
5 muted.

6 For audience members, please understand that
7 the panelist sessions do not include audience
8 participation. At 3:15 p.m., after the panels are
9 complete, audience members who signed up to offer
10 comments will be invited to do so. A link to that
11 sign up is available on the Copyright Office website
12 and in the chat. But, during the panels, please use
13 Zoom's Q&A function only if you have a technical
14 problem with the call that you would like to bring to
15 the Office's attention.

16 With that, I want to thank our panelists and
17 our audience members for joining us today. So I'm
18 going to start with two questions actually. In
19 response to the Office's Notice of Inquiry on this
20 topic, we received a number of comments. One thing
21 the comments seemed to agree on was the troubling
22 state of press publishing in terms of revenue lost,
23 jobs cut, and papers closed. How much of publishers'
24 current woes, if any, is attributable to third party
25 use of news content?

1 And relatedly, a recurring theme in the
2 comments and in the first panel was that additional
3 copyright protections would not be sufficient to make
4 press publishers' protections effective or to reverse
5 their fortunes. Would additional protections be
6 necessary? Thanks. And I will start with Annemarie.
7 Annemarie, I'm sorry, you're muted.

8 MS. BRIDY: Sorry about that. So I think an
9 important question to ask sort of anterior to the
10 question of whether protections are desirable or
11 necessary is whether they're constitutionally
12 permissible, you know, and I think there are some very
13 serious questions about that, right? The study
14 defines "news content" as "links and snippets," you
15 know, and copyright law has a number of
16 constitutionally dictated limiting doctrines that, you
17 know, prohibit the protection of facts and that
18 prohibit the protection of ideas.

19 You know, and so I think that those things
20 are not original under copyright law, and they
21 wouldn't be protectable under the Supreme Court's
22 decision in Feist. And so, you know, I do think there
23 are some serious not just copyright doctrinal problems
24 but problems that track back to constitutional ones
25 when it comes to adopting an ancillary right for press

1 publishers here in the U.S.

2 MR. FOGLIA: Thanks, Annemarie. Mr. Jani?
3 Sorry if I'm pronouncing your name wrong.

4 MR. JANI: That's okay. Let's keep with
5 first names if you're good with this. So first name
6 is pronounced Ole. Yeah, my name is Ole Jani. Just
7 to briefly introduce myself, I'm a lawyer and partner
8 at CMS, based in Berlin, Germany, and today I'm
9 speaking on behalf of Axel Springer, which is an
10 international technology and media company based in
11 Berlin but active in more than 40 countries, including
12 in the U.S., in the U.S. notably through the recent
13 acquisition of Politico, which some of you might know.

14 Now, to the question whether it is desirable
15 to have additional protection in place, I believe the
16 answer really to this question must clearly be yes,
17 and the answer is in the first panel today because, as
18 we've seen, this discussion has made it quite clear
19 that press publications are being used by digital
20 services, such as aggregators, in a way they have not
21 been used in the pre digital days, notably by the use
22 of what we tend to call snippets, headlines, et
23 cetera. So these new forms of use have given press
24 publications and these small extracts new value.

25 Now the value is harvested by those who use

1 it, and the value is not allocated to those who
2 produce it, which is the press publishers, and there
3 is apparently a lack of protection, or at least there
4 is uncertainty to what degree such small extracts are
5 protected. And we have seen the same challenge and
6 the same situation in Europe, obviously, because
7 technology and the business models are global, so the
8 challenges and the questions coming from these new
9 strategies are global.

10 And Europe has found an answer to this, and
11 the answer is to close the value gap and the
12 protection gap by introducing new legislation and to
13 give publishers, press publishers, additional
14 protection of their asset for this specific type of
15 use. And so, apparently, wherever there is a similar
16 situation, and we see that the situation is comparable
17 in the U.S. because of the circumstances described and
18 discussed in the first panel, that there should be
19 additional protection introduced in the U.S. too.

20 MR. FOGLIA: Professor Silbey?

21 MS. SILBEY: Yeah, hi, everyone. Thank you
22 for convening this roundtable. I'm very glad to be
23 here. I'll just be very brief. As a copyright
24 scholar and an IP scholar, I think we should take a
25 page from -- we should learn from history and look at

1 how expansion or strengthening of IP rights has helped
2 or hurt certain industries over time and particularly
3 the public interest, which is what copyright is for.

4 The remuneration right is an intermediary
5 benefit that is supposed to promote the progress of
6 science, but, also, copyright rights don't always help
7 the owners. In fact, most copyright authors do not
8 benefit from copyright at all. And the idea that we
9 should have just more private rights at the expense of
10 the public interest, history has suggested, is really
11 not a very good idea. So I think, as we consider
12 whether to expand or particularize copyright for one
13 particular industry over others, we might worry that
14 there are unintended consequences to the public
15 interest that we are trying to serve.

16 And the United States has a very particular
17 history of that. I think we need to distinguish it
18 from other market systems in Europe, for example, that
19 have other values and other systems in place to
20 support different kinds of creators and industries.
21 The United States is different, and I think our
22 copyright history is different as well, and we need to
23 take that into consideration.

24 MR. FOGLIA: I'm going to switch to first
25 names, as was suggested, so I don't botch your titles

1 and names. Cathy?

2 MS. GELLIS: Okay. By way of introduction,
3 I'm Cathy Gellis. I'm an attorney in private
4 practice, and I'm here today representing the Copia
5 Institute, which is a thinktank and a publisher of the
6 Techdirt news site that comments on these sorts of
7 technology and legal policy issues.

8 To get back to part A of that first
9 question, I want to point out, speaking as a publisher
10 here, that as a publication, we can only succeed
11 economically and expressively when we can connect with
12 audiences. So I think we're not alone among news
13 outlets to say we can only succeed when we can connect
14 with audiences, and that's what these third party
15 services are doing, to help us connect with audiences.

16 It's doing everything we could have ever
17 hoped for. So it's a weird thing to resent and want
18 to say no to or make impossible, but a proposal like
19 this threatens to do that. It's giving us what we
20 need to be able to then succeed. And the issue
21 appears to be that these third party services are
22 independently benefitting from part of this
23 relationship, but that doesn't mean we're losing.
24 It's just we're both benefitting.

25 And I think, to get back to what Jessica

1 said, we have to think about what the cost would be
2 if, all of a sudden, these third party services are
3 deterred from helping us connect to these audiences
4 that we really need if we're going to succeed in any
5 capacity as news publishers.

6 MR. FOGLIA: Joshua?

7 MR. LAMEL: Thank you, Andrew. My name is
8 Joshua Lamel. I am the Executive Director of
9 Re:Create. Like Cathy, I also have the pleasure of
10 saying I am a journalist as well. I'm trained as a
11 journalist and was a journalist before I went to law
12 school and became a copyright attorney. I also do
13 write for Techdirt as well.

14 As we look at these issues, I think the most
15 important -- you know, the first panel got a lot into
16 copyrightability, a lot about what's happening here.
17 I think it's important to note that the first panel,
18 largely, a lot of the issues were focused on
19 competition policy.

20 I mean, we even have an esteemed antitrust
21 expert here today in Hal, and, you know, the question
22 becomes, when you get at new rights, are we dealing
23 with an intellectual property issue, a copyright
24 issue, or are we dealing with what is largely an
25 antitrust issue, an economic issue, and I think we

1 need to take that step, you know, back and ask, and I
2 know you didn't ask for this study, but, like, is this
3 the right forum for this? Should it be at the FTC? I
4 think there's real conversations that need to be had
5 in terms of expertise.

6 You know, the other thing I would say is, is
7 when you get into -- you know, I heard a lot of talk
8 about journalists and what journalists want on that
9 first panel and a lot of talk about how newsrooms
10 work, and I think, you know, journalism is evolving,
11 right? Like, it's what is and what is not journalism
12 is constantly evolving. What is and what is not news
13 aggregation is constantly evolving as we look at this.

14 I mean, Ole, you purchased a wonderful
15 publication where I'm friends with a lot of the
16 journalists and work with a lot of the journalists at
17 Politico. I'm a Politico subscriber. You do great
18 work. Your biggest value to me is often your news
19 aggregation, as a purchaser and to a lot of similarly
20 situated people in the D.C. marketplace who have one
21 place where they can get most of the news they need to
22 get, where you have trusted journalists acting as
23 curators and aggregators of what other journalists are
24 writing is of immense value to me. It's a public
25 good. I pay for that public good, but it is a public

1 good.

2 So I do want to bring up that, like, you
3 know, we're getting into some very complicated as we
4 delve into this issues of what is and what is not
5 journalism, who should be defining that, what is and
6 what is not news aggregation, who should be defining
7 that, and as we look at these rights, those
8 definitional issues, I think, are almost like the
9 predecessor to even beginning to be able to discuss
10 should we have rights, what should those rights be.
11 You know, figuring out how and who to apply them is
12 very perilous here, and it's an important point.

13 MR. FOGLIA: Thanks. Elizabeth?

14 MS. KENDALL: Hi. My name is Elizabeth
15 Kendall, and I'm here on behalf of Meta Platforms,
16 Inc., formerly Facebook. And to get to your question,
17 I do not think that publishers need more protections.
18 I think that the question included a reference to the
19 problem that's being faced by publishers, and I don't
20 think that's been fully diagnosed or really clarified.

21 So there are a lot of folks that you've
22 heard from on the first panel and on this one, and I'm
23 sure on the one to come, who give a variety of
24 different perspectives on why the copyright and
25 competition discussions are unwise. But I'd like to

1 just clarify a few things about the Facebook platform
2 because I think I've seen some misconceptions. I can
3 only speak for one platform, but I think I would also
4 take this moment to point out how varied and diverse
5 the universe is.

6 But, from my perspective, there are two
7 things that I just kind of want to clarify for this
8 debate, and number one is we are an opt in social
9 media platform. The publishers who choose to use
10 Facebook create their pages on Facebook. Then they
11 post links to their content. They even include
12 Facebook sharing buttons on their own website. The
13 link appears as a default with a snippet that
14 publishers create and control. This notion of control
15 is one that I think that has been very central to
16 copyright discussions as well as other policy
17 discussions and I think is something that really needs
18 to be understood.

19 The second -- and I can refer you all for
20 more information to the submission that we made -- we
21 are a free platform, and we provide free tools to
22 publishers. We drive a tremendous amount of value to
23 them. That's why they're so many of our important
24 users. We, notably, as kind of has been discussed by
25 various folks here, we drive traffic, we expand reach,

1 and we supply significant engagement with new as well
2 as established readers.

3 We also have invested in specific programs
4 for the publishing industry, and we also periodically
5 invest in innovating new experiences for our users,
6 including those users who are interested in news,
7 which is a subset, and one of those has been the tab
8 product, Facebook News, that is described further in
9 my written submission.

10 So that's one perspective, but I think what
11 I really want to communicate is that we have been in
12 partnership with publishers. We treat them as
13 important users just like we treat the broader
14 community that we serve, and we think that we have
15 been able to deliver value and control. And we're
16 proud to be able to help those publishers who choose
17 to use us, and we want to continue this conversation.
18 I think it only gives us better insight into how to
19 continue to do that. So thank you.

20 MR. FOGLIA: Nzengha?

21 MS. WASEME: So, yeah, to answer, I concur
22 pretty much with a lot of what you said. You gave a
23 lot of really great information, particularly for
24 Facebook, right? So that's something that the public
25 -- all those little details right there the public

1 needs to be aware of.

2 But, on behalf of Artworks, to answer the
3 question is it necessary or is it desired to expand
4 the rights, anybody that was on that first segment
5 would say yes, it's absolutely desired. It's
6 absolutely desired.

7 And as I stated, I'm here on behalf of
8 Artworks. Artworks is a nonprofit legal service
9 provider that focuses almost exclusively to creatives,
10 content creators. And I would think that our
11 constituents would say absolutely yes, you know, those
12 rights need to be expanded, absolutely yes, or they
13 might say heck yeah.

14 But do we want to overhaul copyright law, as
15 I think it was Jessica Silbey said, do we want to do
16 that for one industry? Is that really necessary? So
17 now we go into, is it desired? Yeah. Is it
18 necessary? I'm not so sure. If we want to do this
19 big overhaul, do we need to study it? Yes. I think
20 the Copyright Office is clear on that, saying there's
21 not enough information and we want to go and do a
22 study and decide, at least put out some information so
23 the public is aware, which is, you know, crucial and
24 to the soul of our country as a democratic process.
25 So I would say yes.

1 And the other piece of it is, and it was
2 discussed a lot on the first segment, whether or not
3 copyright law, right, needs to be expanded in such a
4 dramatic way, or can we find remedies, you know, in
5 antitrust? Is this more an economic issue? Is this
6 more about competition? And we know, particularly
7 following or in the midst of the pandemic, the tech
8 industry has gone through the roof, and that's
9 affected how we receive or desire to receive news.

10 So that's what I would say to those two
11 questions. Is it desirable? Absolutely. Is it
12 necessary, meaning needed, we must do it? I'm not so
13 quick to give a definitive answer to that. I agree
14 that there needs to be more study. I agree with, you
15 know, I think it was Joshua Lamel had said about maybe
16 this isn't necessary about copyright; maybe this is
17 about industry, and maybe that industry needs to be
18 more part of the study and inform a little bit more of
19 what we're talking about here today.

20 MR. FOGLIA: Thanks. Peter?

21 MR. ROUTHIER: Thanks. Good morning. Peter
22 Routhier with Internet Archive, and thank you to the
23 Copyright Office for holding this event, and thanks to
24 the participants for being here.

25 On the question of whether it's necessary or

1 desirable, it seems to me there's a predicate
2 question, which is the extent to which it is
3 permissible in view of the current structure of
4 copyright and the U.S. Constitution.

5 I was struck a little bit this morning on
6 the first panel by the absence of consideration of a
7 couple of things. One is the user's rights, the
8 rights that belong to users, whether they be libraries
9 like ours or just ordinary citizens.

10 And the other point was the constitutional
11 questions and the constitutional implications of the
12 things that are being discussed here, and I was happy
13 to hear some of those beginning to be addressed in a
14 little more detail on this panel.

15 You know, from our perspective, users have
16 affirmative rights grounded in the Constitution.
17 Those rights include the right to cite, quote, and
18 their modern equivalent, to link. Under existing
19 copyright law, those rights are vindicated through,
20 among other things, the fair use doctrine and the
21 idea-expression dichotomy.

22 Those rights cannot be impinged by any new
23 copyright right, and because it appears to us that
24 virtually all the models under study would impinge
25 upon those rights, I don't believe they're available

1 in the United States.

2 MR. FOGLIA: Thanks. And I'm going to get
3 to Matt in a second, but I want to give two
4 clarifications.

5 First, we are going to have a third panel
6 later that will address both users' rights and
7 constitutional questions.

8 And second, when I asked if ancillary
9 copyright protections were necessary, what I mean is
10 many of the comments both to the NOI and the other
11 panel previously mentioned that, for example, you
12 could give all the copyright law in the world and it
13 wouldn't do anything unless competition aspects were
14 addressed. And so it seemed to me that the
15 competition aspects were doing a lot of the work in
16 the analysis of the comments. If that's the case,
17 what work is ancillary copyright protection even
18 doing?

19 With that said, I'm going to turn it over to
20 Matt.

21 MR. WILLIAMS: Yeah, thank you very much.
22 This is Matt Williams. I'm a partner at Mitchell
23 Silberberg & Knupp, and I'm representing the News
24 Media Alliance here today.

25 The first panel was very interesting, and to

1 some degree, I think there's a misconception of what's
2 in our lengthy comments that we filed. We have not
3 asked for changes to copyright law at this point.
4 There are a few clarifications that we think are
5 necessary or would be helpful that were already
6 discussed along the lines of registration practice,
7 words and short phrases. We'd love for the Office to
8 do a full fair use analysis and give its opinion on
9 whether or not what's going on is likely or unlikely
10 to be fair use.

11 But we, in our comments and at this stage,
12 have not asked for any changes to copyright law. The
13 primary ask that we have is that the Office look at
14 the data being submitted and decide that there's a
15 problem, as Keith and others articulated earlier, and
16 that the JCPA legislation is a great way to address
17 that problem. That statute, if it was to be enacted,
18 doesn't change copyright law at all. It is a statute
19 designed to address the competition problem that
20 exists in the marketplace. It allows for collective
21 negotiation amongst news publishers to try to address
22 the marketplace imbalance.

23 It is built off of a similar concept as to
24 Section 1201(a) of the DMCA. It's an access-based
25 statute. It doesn't get into what can someone do with

1 content that they have lawful access to. It doesn't
2 get into fair use, which, as we all know, doesn't
3 apply to the DMCA access right. It's a very narrowly
4 tailored statute to address a very specific problem.

5 And so, in our comments and to date in this
6 process, we have not asked for a change to copyright
7 law. We have not asked for an EU's publisher's right.
8 We've asked for the Office to consider the data,
9 endorse the JCPA and the access-based right that it is
10 built upon. And I'm happy to answer any follow up
11 questions to that.

12 But just to quickly address what's been said
13 by previous commenters on this panel, the 1201(a)
14 access right has been consistently upheld as
15 constitutional by courts. The fair use provisions do
16 not apply to it.

17 Nevertheless, the First Amendment does not
18 invalidate that statute, and so the JCPA builds upon
19 that foundational law, is completely constitutional,
20 specifically designed to address the primary problem
21 at this stage, is a time limited statute, and so,
22 happy to answer follow ups, but I think there's some
23 maybe misunderstanding or misdirection as to what we
24 proposed in our comments.

25 MR. FOGLIA. Thank you for that

1 clarification. At this point, I'm going to jump ahead
2 to Hal, who has not spoken yet, and then I'm going to
3 ask people who currently have their hands up to very
4 briefly finish responding to the previous question
5 before I turn it over to Chris Weston for the next
6 question. So, Hal?

7 MR. SINGER: Hi, everyone. I'm Hal Singer.
8 I'm an economist at Econ One and I'm a consultant to
9 the News Media Alliance in this proceeding. And to an
10 economist, what we're dealing with here is a massive
11 power imbalance in which value added by content
12 creators to newspapers is being appropriated by a
13 dominant platform. In a competitive input market,
14 these input providers would capture something closer
15 to what an economist would call a marginal revenue
16 product or the competitive level. So this is a
17 competition problem. It is not a copyright problem.

18 I want to talk quickly about the private
19 harms to newspapers and the social harms. In the
20 private harms, there's two things that newspapers are
21 complaining about. The first is that when Google
22 scrapes newspaper content and offers detailed
23 snippets, they can monetize this content without
24 paying the content creators. They call this the
25 reframing and curation, and the reframing and the

1 curation decreases the likelihood of a user clicking
2 on the article and thereby deprives the news publisher
3 of those clicks while at the same time enriching the
4 dominant platforms. What we're complaining about is
5 that they do not, users do not click on the links.
6 This has nothing to do with the links. It's the
7 headlines and summaries and snippets that are being
8 taken and pictures. Now the reframing and curation
9 also decreases the need for the user to subscribe to
10 the newspaper in the first place. So those are the
11 private harms.

12 Turning to the social harms, there are many
13 social harms that flow from underpayments to the
14 newspapers, including but not limited to two I'm going
15 to focus on, employment effects in journalism and the
16 important role that newspapers play in preserving the
17 democratic process.

18 Now, as newspaper ad revenue was siphoned
19 off to the dominant platforms over the last decade, we
20 saw employment among newspapers fall from 71,000 in
21 2008 to 31,000 in 2020. That's according to Pew
22 Research. So, to answer your question, Andrew -- that
23 was a long preamble -- intervention is desirable.
24 It's absolutely necessary. And the solution here is
25 what's embodied in the JCPA. It's not to change the

1 copyright laws. It's to permit newspapers to bargain
2 collectively, and if that bargain doesn't result in a
3 voluntary arrangement, there will be some sort of a
4 structural bargain or a backstop to make sure that
5 payment is achieved.

6 Now I can't speak to what that structured
7 bargain is going to look like yet. The JCPA is in
8 motion, but I will point out that in Canada there's a
9 piece of legislation that would provide for baseball
10 style arbitration if the collective bargaining in the
11 first phase, the voluntary phase, fails to reach an
12 agreement.

13 I just want to say one last thing and I'll
14 surrender the mic, I promise, but Kate Sheerin of
15 Google said something really important on that first
16 panel that I just want to amplify. She says that
17 Google wants to collaborate with news publishers, but
18 they want to negotiate these deals individually, and,
19 of course, that serves Google's interests. It serves
20 Facebook's interests. But, to me, it was an admission
21 of the value creation by the news publishers. But
22 given that power imbalance, these individual
23 negotiations will ensure that the payment will never
24 be anywhere near the marginal revenue product at the
25 competitive levels of the newspaper, and the reason

1 why is that, you know, Google doesn't need the Fort
2 Worth Star Telegram, but the Star Telegram needs
3 Google. So a long winded way of saying that
4 intervention is absolutely necessary, and it's going
5 to take the form of a solution to a competition
6 problem, not a copyright problem.

7 MR. FOGLIA: Thanks. I'm going to go with
8 Jessica, then we'll let in Joshua, then Annemarie, who
9 was next, and then we're going to move to the next
10 question, okay? So, Jessica?

11 MS. SILBEY: Hi, thanks. I'd just say very
12 briefly that, you know, the question about what is
13 desirable, I mean, of course, news journalism needs to
14 be funded, and everyone's in agreement with that. The
15 question is how the funding happens. And, I mean, if
16 you think -- I mean, one of the things we're talking
17 about is that the richest among us, whether it's the
18 individuals or the corporations, need to pay their
19 fair share to support the public interest in accurate
20 and diversified news at the local and national level.
21 The question of whether copyright solves that problem
22 feels deeply myopic. It's like the law of the
23 instrument. You know, we're holding a hammer with a
24 whole lot of people here and we think copyright is the
25 nail.

1 And so I'm very supportive of the idea of a
2 competition -- that this is a problem of competition.
3 It's also a question of funding what's in the public
4 interest. And it's just -- I know it's a scary idea
5 to think that, you know, we have to sort of engage in
6 some form of distributive justice modeling here, but
7 the funds for what we need in society, whether it's
8 vaccine or education or infrastructure, rarely comes
9 from intellectual property effectively, effectively.

10 And so more copyright or specified
11 copyright, I mean, the history of our society has told
12 us that intellectual property doesn't do those things.
13 It's an industry model. It's a competition model. It
14 has to do with staffing. And so paying the people who
15 make the news, the employees, for example, and the
16 staff, it rarely comes -- we have to have a fund. But
17 the idea that it comes from the payment through
18 copyright is just not borne out by the history of how
19 copyright industries work, except for a few copyright
20 industries, very, very few, and journalism has never
21 been one of those actually.

22 So I guess I would just -- I think, if we
23 think about how the copyright system works to
24 diversify the expression, that originality standard is
25 so low on purpose and for a constitutional reason,

1 anyone can be a copyright author. That doesn't mean
2 that all copyright authors make money or get paid.
3 It's just, that's an intolerable system actually. And
4 then it just begs the question about what's
5 copyrightable in the first place. And so I guess I'm
6 just in full throated agreement that this is a law of
7 the instrument problem, and copyright is not the nail.

8 MR. FOGLIA: Thank you. Ole?

9 MR. JANI: Thank you. I would just like to
10 make two additional comments. The first one is to
11 follow up on what Joshua said and just to avoid any
12 doubts, this debate and this call for additional or
13 better protection of press publications does not mean
14 it's against news aggregation. News aggregation, of
15 course, is not a bad thing per se. But what we have
16 to be clear about is that news aggregators are not
17 philanthropists. They are not running a business
18 because they want to do good to society. They are
19 running a business because they want to earn money,
20 and these business models are essentially run on third
21 party contact and this is the point.

22 And we have a situation where certain
23 businesses are taking a free ride on other people's
24 assets, and this is clear. The news aggregators are
25 using press publications, private press publications

1 to fuel their own engines and to create the
2 environment, which they are then able to monetize.
3 This is not a bad thing if they use third party
4 content. This is the essence of copyright law, that
5 there are producers and there are distributors, but it
6 has to be balanced and this balance is only guaranteed
7 through an effective and enforceable legal system.
8 And our impression is and our experience is that there
9 is a lack of clarity in terms of what is protected and
10 that there may be even a lack of protection. And we
11 have made this experience in Europe and we have found
12 answers to this question in Europe.

13 And this leads me to my second remark. It
14 is not a competition question or a copyright question.
15 It's both, right? They complement one another.
16 Leveraging bargaining power, increasing bargaining
17 power through, for example, the JCPA, which we believe
18 is a great thing, it's a great initiative, and it
19 would be very helpful if that became the law. But
20 better bargaining power is of no value if there is
21 nothing to bargain about, right? And if you have no
22 enforceable rights, if you don't have any specificity
23 on your assets and on your property, if people can
24 just use it, there is no bargaining situation in the
25 first place.

1 So these two initiatives have to go hand in
2 hand: adequate legal protection which secures the
3 assets and which enables the publisher to put a price
4 tag on his assets and then having a legal framework
5 which guarantees adequate and balanced bargaining.

6 And in Europe, we have done the copyright
7 step before the competition law step. We have
8 introduced the Article XV publishers' right with a DSM
9 directive, and currently legislation is underway in
10 the Digital Services Act and the Digital Markets Act,
11 which will complement this IP approach with a
12 competition law aspect in Europe. So my perception is
13 that it would be the other way around in the U.S. But
14 the point I want to make is it has to be both. It has
15 to be two parts of that chain: competition, enhancing
16 competition, and improving copyright law.

17 MR. FOGLIA: Thank you. Joshua?

18 MR. LAMEL: Thank you. So Ole and I agree.
19 I want to thank him for actually just making the point
20 he made because he just said what Re:Create's members
21 have been arguing for a while, which is the JCPA
22 inherently has to have some form of a copyright. And
23 Re:Create's members have been negotiating on the JCPA
24 in good faith for a while, and one of the issues we
25 brought up is that the JCPA, you're saying it doesn't

1 invoke or force some sort of new copyright or
2 copyright like provision. We think it's kind of not
3 usable without that.

4 But, if you're saying that, then put a
5 copyright savings clause into the JCPA. Make it clear
6 for -- you know, the News Media Alliance, we've asked,
7 our members have asked multiple times, make it clear
8 that copyright, that there's no type of copyright,
9 intellectual property, or other type of right that's
10 created by the JCPA, and that ask has been denied.
11 And, actually, this, the letter, if you want to
12 understand the kind of history and why we're all here
13 today, the letter to the Copyright Office requesting
14 this study was the next thing that came after the ask
15 for the copyright savings clause.

16 So, honestly, I find it cynical in some ways
17 that folks will say, well, the JCPA doesn't, you know,
18 invoke some sort of a copyright because, you know, the
19 reality is, for it to work, it has to, or you need an
20 economic idea, like Hal's mandatory arbitration
21 provision, right?

22 But, in the United States, like, Hal's an
23 economist, in the United States, mandatory arbitration
24 would mean compelled speech, and the government cannot
25 compel a website to carry other parties' content in

1 the United States. We're not France, where you can do
2 that, right? That's what happened in France. We're
3 not Germany, right? We're not Australia. It is
4 fundamentally a violation of the First Amendment to
5 compel a website to carry another website's speech.
6 And so, while it might be a good or strong economic
7 idea, right, it doesn't solve the constitutional
8 problem. Matter of fact, I think it would be on its
9 face unconstitutional because it's compelled speech.

10 MR. FOGLIA: Thanks. Annemarie?

11 MS. BRIDY: Thank you. So I am a copyright
12 lawyer for Google -- I'm sorry, I didn't introduce
13 myself before -- and in that capacity, I'd like to
14 correct some misconceptions I'm hearing from some
15 other panelists about Google's products and how they
16 work. And so, first, to Matt's point about access
17 rights, newspapers opt in to appear in Google Search
18 and News, right, so we don't breach any pay walls or
19 impinge on publisher access rights when we aggregate
20 content for Search and News.

21 To Hal's point and also to Ole's points
22 about sort of free riding and value exchanges, Google
23 drives substantial value to news publishers, right, as
24 evidenced by the fact that they opt in to inclusion in
25 both News and Search and not only do they opt in,

1 right, they control the length of snippets. They
2 control the size of thumbnail photos. And generally
3 speaking, they opt in to have more of that content
4 rather than less displayed on our services because
5 they understand the value that we provide when users
6 engage with that content on our services and can see
7 enough about it to know that they want to go and click
8 through to see the news publishers' sites. And every
9 time they click through to those sites, news
10 publishers have an opportunity to monetize that
11 through advertising, right, and also to attract
12 subscribers and get additional subscription revenue.
13 So the representation that this is free riding or that
14 there's not a meaningful and profound exchange of
15 value that's happening here is just a complete
16 misrepresentation.

17 And I just also want to emphasize, you know,
18 how much we're hearing here about things that are
19 totally extrinsic to copyright, right? So this is a
20 study about copyright and ancillary copyright for
21 press publishers, and probably half of the time I'm
22 hearing is taken up by other things that are outside
23 the scope of the study, and I think that that's just
24 an important point to make. Thanks.

25 MR. FOGLIA: Thank you. I see that Matt and

1 Hal's hands are up. I'm going to ask you to briefly
2 hold your thoughts and I'm going to turn Chris to ask
3 the next question. If you, as part of answering the
4 next question, you want to fold in whatever you were
5 currently going to say, please do so. I also want to
6 remind the panelists to please try to keep answers
7 brief, under two minutes if possible, so that more
8 people have a chance to speak. Thank you. Chris?

9 MR. WESTON: Thanks, Andrew. You know, I
10 think that given the drift of the conversation, as
11 Annemarie mentioned, towards competition law, I should
12 just remind everybody that what Congress asked us to
13 do was to study ancillary copyright protection for
14 publishers. So, to the degree that there are other
15 things, then we definitely want to know about that.
16 But, in terms of the point about if all you have is a
17 hammer, everything looks like a nail, you know, we
18 were given a hammer, so to speak. But we will
19 definitely take in all of the comments about, you
20 know, whether or not that hammer is the right hammer.
21 I don't want to -- I'm stretching the metaphor beyond
22 sense.

23 But I want to ask actually something that
24 Ole brought up. Is there evidence to suggest that
25 ancillary copyright protections standing alone, so

1 without also having competition protections, have
2 benefitted publishers in the countries that have
3 adopted those protections, and does the effect vary
4 with the size of the publisher? So I'm thinking
5 obviously about Article XV but also the experience in
6 Spain and Germany before that. So, Matt, you can
7 answer that question, or you can fold it into whatever
8 you were going to say previously.

9 MR. WILLIAMS: Oh, I'm sorry, I thought you
10 started by saying that you wanted Ole to address the
11 question about the EU rights.

12 MR. WESTON: No. I was just invoking his
13 answer as a way to bring it in.

14 MR. WILLIAMS: Okay. Yeah. So I'll try to
15 answer that and also address a couple of the things
16 that have been said. As you said, Congress has asked
17 you to look into ancillary protections for press
18 publishers. And as I said before in our comments, we
19 did not ask the Office to endorse verbatim some kind
20 of EU publishers' right in the United States.

21 What someone means by ancillary protection
22 could be a matter of semantics. But I think what we
23 are asking for is that the Office digest everything
24 that's been filed and that will be filed and said in
25 this proceeding, conclude there is a problem, conclude

1 that the JCPA would do a very good job of addressing
2 that problem, perhaps without entirely solving it, and
3 then we've asked for some very specific clarifications
4 of copyright law, not changes to copyright law, and
5 those were discussed in the previous panel but include
6 registration practices, words and short phrases,
7 clarifying that essentially the circular and other
8 documents out there, as Jane Ginsburg testified, do
9 not really line up with the case law, and we would
10 love for you to walk through the fair use analysis and
11 ideally opine that what's going on is not a fair use.

12 But, to what Joshua said about there needing
13 to be a copyright backbone, I think, for the JCPA,
14 that could also be a matter of semantics, but it's an
15 important one. It is built, as I said, on an access-
16 based 1201(a) oriented concept, and 1201(a) already
17 allows preclusion of access to content. There is no
18 fair use defense to that statute, and the courts have
19 upheld that as constitutional.

20 So what the JCPA would allow is an exception
21 to the antitrust laws so that press publishers could
22 talk together about the best way to use those rights
23 to get to a place where we're operating in a world of
24 fairness where monies could flow to press publishers
25 and authors in a way that would sustain valuable

1 journalism, from high level publications that everyone
2 might know the name of to the very local oriented
3 publications. And so it's a targeted statute that
4 does not alter underlying copyright law but is built
5 on existing statutory provisions that people do not
6 refer to as copyright per se, the 1201 provisions, and
7 so I think it's entirely within the scope of the
8 study.

9 I think I was just called both cynical and
10 Anne said that I was making misrepresentations.
11 Neither of those things are true, and that was not my
12 intent. And so there's a lot of detail related to the
13 EU publishers' right, but we are not asking at this
14 time for an endorsement of that or incorporation of
15 that into U.S. law. So I still feel at this moment in
16 time like that is a distraction.

17 And I just want to emphasize there is
18 something to bargain for here. There was someone who
19 said there's nothing to bargain for. The access is
20 something to bargain for by itself, and the reason
21 that right now those rights can't be effectively used
22 is the competition issues that are laid out in our
23 comments. I think Danielle said in the previous panel
24 it's like asking someone if they want air, and that's
25 the situation that the publishers find themselves in

1 right now.

2 MR. WESTON: Okay, thanks. I will move to
3 Hal next, but I also want to remind everybody to try
4 and keep your remarks brief just so we can get as much
5 information as we can. So, Hal, you are up next.

6 MR. SINGER: Thanks, Chris, I'll go really
7 fast. I think Ole said that we need something else
8 besides the competition, and I don't think that's
9 right. We're not asking for anything to be done with
10 copyright laws. NMA thinks that it has everything it
11 needs. News articles are already covered by
12 copyright.

13 To Josh's point that mandatory arbitration
14 is compelled speech, I'd say that's respectfully
15 wrong. There's nothing in the JCPA that would require
16 Google or Facebook to post content on its pages or for
17 Google to put our new stories anywhere special in
18 their search. The arbitration is designed to get a
19 fair market value for the access to the newspaper
20 content.

21 On the question of opt in, I think that's
22 false. Newspapers don't have anywhere to go. Google
23 has monopolized search and Facebook has monopolized
24 social media and collectively they've monopolized
25 digital ad markets.

1 And finally, to Annemarie's point, she talks
2 about substantial value coming back in the other
3 direction from the platforms. But, as Danielle
4 mentioned earlier today, that flow, that traffic flow
5 is being taxed at a monopoly rate by Google. In fact,
6 Google's conduct is already the subject of an
7 antitrust litigation for the exclusionary practices it
8 performs in the ad tech space.

9 So the discussion today is how to get
10 newspapers compensated for the value they create for
11 the platforms, right? We're trying to get
12 compensation for the value and flow in that direction.
13 That payment is occurring at below competitive levels.
14 The payment that Annemarie is focused on is already --
15 Google's already being compensation for. In fact,
16 it's being compensated for at monopoly rates.

17 MR. WESTON: All right, thank you. I
18 believe Joshua had his hand up next.

19 MR. LAMEL: Sure. Thank you. So the
20 response, what I want to make to just, like, all this
21 you asked me is, you know, what has been the
22 experiences, you know, of other countries, right?
23 When Spain created an ancillary copyright, the end
24 result of that was, you know, if Google News basically
25 stopped, you know, aggregating the news, right, and if

1 the end result here, if the desirable end result from
2 a public interest perspective is not having news
3 aggregation occurring anymore, like, I'll accept that.
4 I mean, my members -- you know, I don't know -- I
5 personally, not speaking on behalf of members, me
6 personally, don't think that, like, an end result of
7 no more news aggregation is a bad result. An end
8 result of news not showing up in search results is a
9 terrible result from a purely public interest
10 perspective.

11 But, if you're not going to have a must
12 carry obligation, right, if there's an ability for the
13 news aggregators to walk away, what we saw in Spain
14 and in France and in Australia is they were going to
15 walk away and then the government had to compel them
16 to negotiate and create a must carry right or they
17 undid the law, right, because they realized walking
18 away was not in the public interest.

19 So, in Spain, they walked away, publishers
20 complained, ancillary copyright, you know, they moved
21 past that. In France, they said, yeah, we don't want
22 to carry it. They had an antitrust suit brought
23 against them for saying we don't want to carry that
24 content, right? Like, I mean, that's compelled
25 speech, right, because of the First Amendment. You

1 can't do that in the United States because that would
2 compel the carry of news content, would compel the
3 platforms to have something on their platform.

4 In the case of Australia, again, right, it
5 was a forced negotiation. You could not -- Facebook
6 said, oh, we're not -- you know, we're going to walk
7 away. And I'll leave for Elizabeth and Annemarie to
8 talk about the experiences of their platforms in these
9 situations, but -- is news aggregation becomes not
10 profitable, it probably ends. We've seen them walk
11 away, and that's not good for the public interest.

12 MR. WESTON: Thank you. Ole?

13 MR. JANI: Yeah, thank you, Chris. To your
14 question then, following up again on Joshua regarding
15 the examples in Spain and Germany, I reckon it is very
16 much a myth that the approach that's taken in Spain
17 and Germany didn't work. It was about power play in
18 the end. It was again a monopolized market where for
19 those who were previously able to use third party
20 content for free suddenly were asked to pay a price,
21 and so they tried to say, well, in that case, we pull
22 out of the market. And in Germany, there was some
23 litigation on that then German ancillary right, and
24 that was well underway with promising results in
25 courts, and for very formal reasons, the right was

1 then not enforceable. But this was a very formal
2 reason. I'm not going into details here. And Spain
3 was simply a market too small.

4 And one of the rationales behind the
5 European approach was simply to say, okay, we have to
6 create leverage also on this stage. We have to -- the
7 common market is large. It's 500 million users and
8 members of the European Union, and we have to just put
9 this onto a next level so that we are not talking
10 about individual jurisdictions, here Spain, there
11 Germany, Latvia, whatever, you name them, but one
12 unified Europe with one uniform legal system. So it
13 is a myth that it didn't work. It was just, it would
14 be far too early to judge on whether it worked or not.
15 It was then replaced by the European approach.

16 And this is now the second part of your
17 question, only about 10 member states of the European
18 Union have transposed this Article XV into their
19 national laws. But we already see that this Article
20 XV being enforced and being partially transposed into
21 national laws is giving the industry and the press
22 publishers the tailwind they need because they have
23 gotten large players to the table and they are
24 negotiating and it will take its time, but we're
25 seeing the scene is changing because of the law.

1 And your second question, Chris, whether
2 this law benefits large publishers rather than small
3 publishers, this is definitely not the case. It
4 benefits them all, and it's then a matter of how to
5 enforce it. And in Europe, as you well know, we have
6 a legal framework which across the board, through --
7 it's not specific for particular media. Rightholders
8 can bargain collectively and they can pool their
9 rights in collective management organizations.

10 And this is not only an answer to the
11 competition question, to create bargaining leverage,
12 but it's also to create a one stop shop. And this, of
13 course, this one stop shop, which will benefit the
14 small publishers because they can then team up with
15 the larger one, they can pool their portfolios, and
16 they can approach potential users through this
17 collective rights management organization and join
18 forces. So there is no evidence that this is a law
19 only for large companies. In fact, it benefits the
20 entire industry.

21 MR. WESTON: Okay, thank you. Thank you.
22 Cathy was next.

23 MS. GELLIS: Thank you. You know, at a very
24 superficial way, speaking on behalf of Techdirt, we
25 should benefit. We are a small publisher. As Ole

1 said, this is for everybody. It isn't for us. We
2 won't benefit. Smaller publishers live in the long
3 tail, and revenue doesn't follow all the way through,
4 down to the long tail, certainly not on an equal
5 basis, but it goes to the bigger players who are able
6 to sort of have all this gravitational pull that takes
7 most of the money and sends it to them and there's a
8 lot less left behind. We know it was bad for
9 independent publishers in Spain. Techdirt has
10 reported on this.

11 And speaking for myself, having litigated in
12 the webcasting royalty rate scheme, I've also seen how
13 it hurts particularly independent publishers because
14 it also then hurts independent facilitators. The
15 services that this is ostensibly supposed to target
16 for, if you're making money directing traffic to us,
17 you should share it.

18 So what we keep hearing, the reason we fall
19 back to competition is on the one hand -- you know, on
20 the one hand, we're hearing how dare you facilitating
21 service make money from sending us traffic; on the
22 other hand, we're also hearing, you know, we need more
23 competition for the services that are out there, like
24 there should be more Googles.

25 Well, how are we going to get more Googles

1 when we're making it so economically inhospitable to
2 get more Googles? Because we're not just talking
3 about, oh, this is all cream and you should be sharing
4 it on top. When you start to impose the types of
5 revenue sharing schemes that this is all animated by,
6 you create enormous costs: transactional costs,
7 compliance costs. If we want another Google, we
8 should not be making it economically irrational for a
9 service to go into this business of facilitating and
10 driving audience traffic when, ultimately, yes, for
11 every publisher, what you need most of all is to have
12 your audience traffic.

13 And instead of saying thank you for giving
14 us these viewers, we're punishing them for actually
15 having succeeded and daring to actually have made some
16 money on the side by now poisoning it so nobody can
17 make money, and that's not going to be good for
18 anybody, certainly not the services, and if the
19 services go away, it will not be good for the
20 publishers. And we certainly know it's not going to be
21 good for us and we think others similarly situated
22 with us, including our larger incumbent neighbors.
23 Thank you.

24 MR. WESTON: Thank you. Nzengha?

25 MS. WASEME: Yes. So, in the interest of

1 time, which we are focusing on right now, I don't want
2 to repeat or be duplicative of what Joshua said. I'll
3 just say ditto to that, as well as what Hal said,
4 ditto to that. I do want to also I guess ditto what
5 Cathy just said, talking about it not being a one size
6 fits all. It's not. Artworks also represents the
7 smaller publishers, and so it wouldn't be fair to make
8 a statement like that. And I don't believe it's true.

9 Now, for those of you that got a piece of
10 the earlier segment, that segment was chock full of
11 industry professionals and everybody had something
12 different to say. Everyone had contradictory stats.
13 So what that does -- what that tells us all when we
14 talk about public interest is, one, yeah, we need to
15 say this a little bit more, but, two, at a minimum,
16 what Matt was saying, I think it boils down to a PSA,
17 you know, where we're talking about letting the public
18 know, letting everyone know what the standards are,
19 not necessarily expanding the rights, but what are the
20 standards first and also interoffice tweaking of what
21 the protocols are, like we talked about registration.
22 You know, those things can be tweaked without an
23 expansion of the copyright -- of rights to publishers
24 specifically. It could be -- you know, when we talk
25 about one size fits all, tweaking the registration

1 process would be a one size fits all.

2 But, yeah, I'm definitely, you know, going
3 to reiterate what the Copyright Office has said, we
4 need to study it. The industry itself, just as
5 evidenced by this panel, as well as the one earlier,
6 the industry is not on the same page, so it needs to
7 be studied.

8 MR. WESTON: Thank you. Annemarie?

9 MS. BRIDY: So I'm hearing a lot of
10 conclusions of law being thrown around here about
11 issues that are currently being disputed in litigation
12 related to competition, and so I just want to take a
13 second to recenter the conversation on copyright law
14 and to say a few things about how copyright law works
15 and has always worked, right.

16 So copyright's exclusive rights have always
17 been understood both in the U.S. and globally as
18 rights to exclude uncompensated uses of protected
19 works, right? They're not rights to demand and
20 collect payment for compelled uses. So, consistent
21 with the principle of freedom of contract, copyright
22 licenses aren't compulsory for those who choose not to
23 make compensable uses of covered works, right? In
24 other words, remuneration for rightholders does not
25 necessarily flow from the creation or existence of a

1 right to exclude, right, and I think folks recognize
2 that by saying we're not really asking for anything in
3 copyright.

4 But I just want to emphasize, right, that
5 payment is conditioned on a willing licensee's use of
6 that rightholder's covered work, right? And so, you
7 know, this isn't a roundtable, I don't think, about
8 the JCPA. Again, it's not about competition. You
9 know, those issues are being litigated, and I think
10 it's not prudent for me to comment on them. It's also
11 not really helpful or appropriate for folks on the
12 panel to offer conclusions of law that haven't yet
13 been reached in court and may not be reached in court.

14 MR. WESTON: Okay, thank you. Elizabeth?

15 MS. KENDALL: Thanks. I wanted to echo some
16 of the things -- the points that have been raised, in
17 particular that there really is a diverse landscape of
18 publishers, of platforms, of users, and people who
19 will be affected by any change to the status quo. And
20 I think that that's something that I hope the
21 Copyright Office will address in its study because I
22 think it's clear from this panel in particular that
23 there's maybe not a consensus about what problem is
24 being examined and how. And so welcome any additional
25 guidance prior to the submission of rebuttal comments

1 from the Office about the particular aspects of the
2 ancillary copyright and what types of again definition
3 of the problem you're seeking so that we can help.

4 And then just to speak again on behalf of
5 Meta, one of the things that I think is a pragmatic
6 challenge with the idea of an Article XV type approach
7 in the United States that hopefully will be addressed
8 by the next panel as well is how you define news
9 publisher and how you define news. And I can speak as
10 a platform, not only are those very challenging
11 questions, but we have to have some way to recognize
12 that at scale with a huge and welcome diversity of
13 voices. And I think that to really understand how
14 some of these concepts would be applied in practice,
15 taking into account the size and variability of the
16 actors requires attention to all of those contributors
17 and potential people who are impacted.

18 I personally am not sure how the government
19 could create a definition of news. I think it
20 implicates a variety of First Amendment issues, as
21 well as just very challenging social ones. Thank you.

22 MR. WESTON: Thanks. I'm going to go with
23 Hal next and then Matt and Jessica. I believe Joshua
24 and Ole have already weighed in on this question. So,
25 after Matt and Jessica, I'm going to hand it over to

1 Melinda to ask the next question. Matt, go ahead.

2 MR. SINGER: Sorry, I thought you said Hal.

3 MR. WESTON: I'm sorry, Hal. I did. The
4 cubes are moving around on my screen and where one
5 person was.

6 MR. SINGER: Okay. All right. Well, I want
7 to respond to something that Cathy said about the
8 smalls won't benefit from the JCPA. And it is a bit
9 surprising to me, I've got say, that a news publisher
10 like Techdirt is parroting back a Google line that the
11 JCPA is all about benefitting the large newspapers.
12 And I deal with this argument in part 4A of my paper,
13 which is posted to the Copyright Office.

14 Let me just explain that small newspapers or
15 small entities in any union are always going to
16 benefit by more than the large entities in the union,
17 right? The largest don't necessarily need the union,
18 but the smalls do. And so, if the JCPA produces a pot
19 of money, then approximates the fair market value
20 contribution of all newspapers, including the smalls
21 and the large, right, then the smalls will get a
22 portion of that pot based on their pro rata share of
23 however the coalition wants to break it up. One
24 obvious allocation would be to break it up based on
25 the pro rata share of traffic they generate or the pro

1 rata share of employment that they have in the
2 newspaper industry. So the smalls would be
3 unequivocally better off relative to the status quo.

4 And Cathy asked, you know, will the JCPA, by
5 giving the smalls the ability to join this union and
6 bargain collectively, discourage entry and search, I
7 think that is really far fetched. In fact, Microsoft
8 has already announced publicly that they're happy to
9 enter the search market and compete with these
10 regulations.

11 And then, finally, the last point, is that
12 Cathy says we should be worried about entry and
13 search. We should be worried -- we should be more
14 worried about entry and investment in journalism. We
15 have journalists, the employment in journalism has
16 fallen in half. We want to encourage investment
17 there, and that's precisely what the JCPA is intended
18 to fix.

19 MR. WESTON: Thank you. Matt, now it's your
20 turn.

21 MR. WILLIAMS: Yeah. Thank you. I'll try
22 and be brief since I ran over last time. I just
23 completely disagree that the JCPA is somehow outside
24 the scope of this study. I tried to refer before to
25 what does ancillary mean. The fact that we're right

1 now at least not asking for an EU publishers' right
2 does not mean that we're not asking for something that
3 isn't purely copyright law but that would do great
4 benefit for a copyright dependent industry and is
5 something I think the Office is fully qualified to
6 endorse if it so chooses. And that statute only
7 applies on the platform side to platforms with a
8 billion monthly active users. So this notion that
9 somehow it's going to negatively impact the growth of
10 smaller platforms that might compete with those
11 dominant platforms, I think, is misguided.

12 I also find it a bit ironic that a lot of
13 the commentary in this study, both in the written
14 submissions and today, is about, well, we want free
15 information for everybody and that's our business
16 model. But then, when it comes to do we have to make
17 small payments to press publishers, the threat is
18 we'll just go dark on you and you won't be available
19 anymore and then you'll realize you need us. That
20 gets to the heart of the competition problem and also
21 is a bad thing for copyright and a bad thing for
22 access to public information. There's huge profits
23 being made. Kicking back some of that to the people
24 that create the content shouldn't be an issue.

25 And now, on the definition of news, just

1 very quickly, we did not try to say there's only one
2 way to approach that. We referenced a few different
3 statutes, including the JCPA legislation that defines
4 who that statute would cover. And so we think there's
5 plenty of ways for the Office to look through those
6 definitions and make a good decision for itself about
7 what it thinks that definition should be.

8 MR. WESTON: Thank you. Jessica and then
9 Melinda with the next question.

10 MS. SILBEY: Yeah, I'll be very brief. I
11 just want to address the question about the EU
12 experience, and I just want to caution us, as we look
13 around the world and see how these things are playing
14 out in different places, we cannot ignore the
15 background conditions, the cultural attitudes, the
16 social networks, the welfare systems, the industry
17 structures, and the individual constitutional mandates
18 that shape how the directive is playing out in
19 different places. Like, I appreciate wanting to look
20 around and see the diversity experiences in a
21 laboratory kind of way, but the EU in particular and
22 Australia also, they're very, very different social
23 and political systems, and to say that their
24 experience is going to be like ours or not like ours
25 requires us to really understand those other ways.

1 And I'll just say, like, the cost of living, for
2 example, and how things get funded, tax statutes, I
3 mean, they're just so different, and they all
4 implicate, I think, how this would play out on the
5 ground.

6 MR. WESTON: Thank you. I'm going to hand
7 it to Melinda Kern for the next question.

8 MS. KERN: Thank you. Jessica got to my
9 question a little bit, but given a lot of other
10 countries have implemented an ancillary copyright or a
11 press publishers' right, what can Congress learn from
12 this and those experiences if it decides to grant a
13 press publishers' right or something similar? And I
14 see that Matt Williams and Cathy Gellis still have
15 their hands up, so I don't know if that's particularly
16 to answer the question or if you just still had your
17 hands up.

18 MR. WILLIAMS: I just still had my hand up.
19 I would just say quickly we tried to lay out in our
20 written comments the problems facing various different
21 categories of publishers and how helping them protect
22 their existing rights through something like the JCPA
23 would benefit them.

24 MS. KERN: Ole?

25 MR. JANI: Thank you. Let me just for the

1 record make one clarification because, from Hal's
2 comment, I gather that there was a misunderstanding or
3 there may be a misunderstanding. When I referred to
4 the JCPA, all I was going to say is that we believe, I
5 believe personally, that the JCPA is a great approach
6 and a great initiative, and whether there is anything
7 to bargain about under present U.S. law is beyond my
8 own competence. I'm not talking about this and
9 talking about the access right. I understand there
10 is, of course, something that can be bargained and
11 there is protection, but talking about the access
12 right. That's all I was trying to say, was that
13 additional copyright legislation or copyright
14 protection would amplify this, and I didn't mean to
15 say that there was nothing to bargain about. So just
16 to make this crystal clear, I guess this is important
17 because there were comments here on the panel which
18 suggested that there was a misunderstanding.

19 Now what can Congress -- what could Congress
20 learn? In Europe, we have certain principles which
21 govern the publishers' right, and the most -- the two
22 most important principles are there is no registration
23 requirement, which heard this in the first panel
24 today, in particular, because we're talking about
25 dynamic content. We're talking about very fast

1 distribution and creation of the content. It would be
2 a prohibitive burden and threshold if there was a
3 registration requirement. So this is number one,
4 there should be no registration requirement whatsoever
5 regarding the protection in the first place and the
6 ability to litigate.

7 Second, we need to get -- this is at least
8 what we did in Europe -- we got rid of the originality
9 threshold because snippets and headlines, at least in
10 Europe, it is unclear whether and to what extent they
11 are protected as a work of authorship. If you take
12 something small from a copyrighted work, because of
13 its brevity, it may be below the originality
14 threshold. But, since aggregators, search engines
15 typically use very small parts and headlines, the
16 question as to whether it is copyrighted because it's
17 a work of authorship, because it's original, and this
18 answer can only be given on a case by case basis, this
19 again would be prohibitive because we need a legal
20 framework which is sort of -- which covers everything.

21 So these are the two principles, I guess,
22 which should be most importantly looked at, no
23 registration requirement and no originality threshold,
24 and this is, of course, part of the concept of
25 ancillary rights in Europe, which protect investment

1 rather than creativity, so we could very easily
2 transpose the concept for the protection of press
3 publishers from music companies, broadcasters, et
4 cetera.

5 MS. KERN: Thank you very much. Peter?

6 MR. ROUTHIER: Thank you. Yes. I'm not
7 sure we can learn that from the European perspective
8 at least in any sense that's really relevant to this
9 undertaking here. I think we can learn that that was
10 something that the press publishers at Axel Springer
11 wanted and obtained in the EU. But I'm not sure what
12 that tells us about the matter under consideration
13 here, which I think has to be sitting in the Copyright
14 Office, responding to an inquiry from some Senators
15 about copyright, what we can do with copyright law in
16 the United States against the background of existing
17 rights and, as I started with, existing rights that
18 users have in the United States under copyright law.

19 I don't think it's enough to say, oh, it's
20 okay, there is no fair use or First Amendment
21 exception to 1201. I don't think that's accurate. I
22 don't think that record's been set, and I think that's
23 the kind of thing that I would expect this study to
24 look into.

25 I've heard a lot of people talking about the

1 JCPA and asking the Copyright Office to bless the
2 JCPA. I would suggest that the appropriate thing for
3 the Copyright Office to be considering are copyright
4 considerations, the Copyright Office is housed within
5 the Library of Congress, are library and user
6 considerations. Now those considerations have to
7 include not what the economic circumstances of the
8 publishers lead them to desire and demand and prefer
9 vis a vis European law but what's available under
10 United States law, in particular, United States
11 constitutional law.

12 MS. KERN: Thank you. Next is Joshua.

13 MR. LAMEL: Sure. I just want to make a
14 couple quick points. On the registration front,
15 right, I mean, I don't have to tell the Copyright
16 Office why registration exists and all the different
17 reasons for registration and why registration should
18 be encouraged in terms of informing the public about
19 what is -- you know, what people are going to claim
20 copyright in, but there is no registration in the
21 United States that's not a copyright. And I just want
22 to, you know, state that pretty clearly.

23 And in this case, when you're dealing with
24 dynamic content, as well as content that is behind
25 what I would describe as dead links and disappears

1 unless the United Archive archives it or some other
2 library, but we're dealing with a huge challenge in
3 people using the content knowing whether it exists or
4 not, right, and so any type of registration
5 requirements that you start to bring into dynamic
6 content, content that disappears from its publishing
7 source on the web, it's not like it was printed in a
8 newspaper, right, creates all sorts of complications
9 in the value of that registration, what that looks
10 like. So it would need to be considering, you know,
11 well beyond your question, Melinda, and I apologize,
12 but I just, with the registration being talked about,
13 felt the need to state that.

14 The other thing I would say, and Jessica
15 made this point much more brilliantly than I ever
16 could, but, you know, in the United States, copyright
17 is to incentivize creativity. That's its purpose.
18 That's why we have it. It's a very different model
19 than Europe. And I may have misheard Ole, but what I
20 heard him talking about was the importance of
21 protecting the investment. Well, that's not why we
22 have copyright law in the United States. That's a
23 very European approach. So, if there's something to
24 be learned from Europe in this, is Europe views
25 copyright law as protecting investment, and that's

1 okay. Europe can think that. But that very clearly
2 goes against Article I, Section 8, Clause 8. It very
3 clearly goes against over two centuries of court
4 interpretation of why we have copyright law in the
5 United States. And so, to me, that's a really
6 important thing to take away from the European model.
7 The European model is based on protecting investment,
8 not incentivizing your creation.

9 MS. KERN: Thank you, Joshua. Annemarie?

10 MS. BRIDY: Yes. So my comment is basically
11 a plus one to what Josh just said, right? Like, we
12 know that the Supreme Court in Feist said that, you
13 know, copyright does not protect sweat-of-the-brow
14 investments in the industrious collection of
15 information, right? Even if we wanted to dispense
16 with the originality requirement, which I guess was a
17 viable policy choice for them to make in Europe, I
18 don't know, but we can't do that here, right?
19 Originality is a constitutional requirement. The
20 Supreme Court has expressly repudiated
21 sweat-of-the-brow doctrine. So that's just not really
22 a policy choice that Congress is free to make here.

23 MS. KERN: And Matt?

24 MR. WILLIAMS: Thank you. Yeah, quickly, on
25 that last point, what we proposed in our comments in

1 no way asked the Office to try to do away with the
2 originality requirement. What we did ask is for the
3 Office to revisit some statements made in various
4 documents, like circulars and the compendium that we
5 don't think accurately reflects the state of the law.
6 And Professor Ginsburg talked some about that in the
7 first panel, so I won't belabor it.

8 But the issue from our point of view is not
9 getting rid of an originality requirement for the
10 copyright law but clarifying that things like
11 headlines, especially when incorporated into longer
12 works, can be original, can be protectable, and the
13 Constitution says nothing about how many words have to
14 be stated for something to be protectable, and I think
15 we'll add to that in the reply round.

16 I'll also quickly just say the progress
17 clause is not the only clause through which Congress
18 has power and it has acted through other clauses to
19 address copyright adjacent issues in the past.

20 On what was said about fair use and Section
21 1201 and constitutionality, if anyone can cite me an
22 opinion that says 1201 is unconstitutional despite the
23 fact that fair use clearly is not a defense to that
24 statute, I'd love to hear it. There's the long list
25 of cases that say otherwise. There's one *Green v. DOJ*

1 that's now on appeal to the D.C. Circuit that the
2 trial court judge handled it quite well and rejected
3 the notion that 1201 is unconstitutional. I think the
4 courts across the board have rejected the notion that
5 fair use is a defense to 1201.

6 And so this notion of what's in or outside
7 the bounds of the study and whether the Office has the
8 authority to talk about access right related issues, I
9 think, is a red herring because the Office has been
10 assigned for years and years something I worked on all
11 the time, the 1201 rulemaking, which critics of 1201
12 love to call it para copyright. They've always said
13 it's not really copyright. Well, the Office is tasked
14 with the authority of handling that provision, and
15 that provision provides an exclusive right of access
16 upon which the JCPA is based.

17 So that's essentially what I wanted to get
18 through, is the notion that the Office can't speak to
19 the JCPA because maybe people here didn't anticipate
20 that that would be called an ancillary right, I think,
21 is bogus and a distraction.

22 MS. KERN: Thank you. So I'm going to have
23 Hal speak next, and if the other panelists that have
24 their hands raised wouldn't mind holding their
25 thoughts until closing remarks, which we will have

1 after Hal speaks.

2 MR. SINGER: Thank you. Just two really
3 quick responses to your question about what's the
4 lesson from Europe. And I think the first lesson is
5 that intervention in these markets can positively
6 effectuate social change, and the newspapers got paid
7 and they're about to be paid in Canada. This is a
8 good thing. We get more journalists and we get more
9 democracy. We should all be in favor of those things.

10 And the second point is related, is that we
11 can't allow market forces to dictate the split of the
12 pie here as monopolists like Google and Facebook will
13 pay the content creators well below the competitive
14 level so long as these deals can be negotiated
15 individually. So that's why the ask here is that
16 these deals no longer be negotiated individually but
17 instead collectively via a coalition of newspapers so
18 that they can extract something closer to fair market
19 value of what they are creating for the platforms.

20 MR. FOGLIA: Thanks, Hal. We're going to
21 turn now to closing questions, and before we do that,
22 I just want to caution that just because we didn't get
23 to every question we could have asked or that you
24 wanted to discuss, it's not because we're not
25 interested in those questions. We just have little

1 time and a lot of panelists and a lot to talk about.
2 We still have comments open for second round comments
3 for our Notice of Inquiry. We would appreciate any
4 further thoughts you have on those.

5 With that, I'm going to ask for closing
6 remarks. If everybody could keep their remarks to one
7 minute if possible because we're going to run over
8 time. And I'll start with Joshua. I think he had his
9 hand up first.

10 MR. LAMEL: Sure, thanks, Andrew. Just a
11 couple quick things. Number one, I just want to
12 quickly respond to Matt's point about 188 and
13 constitutionally. I looked at the -- I mean, I'm not
14 an expert on this, but I know there is a long
15 established record from your previous database
16 protection inquiry on that issue, and I think the
17 record on that would disagree with that point and
18 would say that because we're dealing with
19 copyrightable -- underlying copyrightable content, the
20 newspaper article itself, right, not a link or
21 snippet, that, you know, that's the 188, when 188
22 applies.

23 Number two, I just want to point out that
24 we're three hours and eight minutes into this and
25 Substack hasn't come up yet. And I think that's

1 important just to point out, you know, just how
2 dynamic things are right now, right? Like, despite
3 this, like, feeling of staticness, right, Substack for
4 journalists, a lot of journalists are leaving the
5 newspaper model and moving to the Substack-based model
6 of practicing our trades. I just want to point that
7 out. I'm not saying it's a good thing, a bad thing,
8 that's not it, but it's just how evolving things are.
9 And when you try to place, you know, or try to fit
10 things into existing regimes into those markets, you
11 know, there can be challenges to that. And Substack
12 is a threat to the news media ones and their members.
13 I think it absolutely is. That doesn't mean it's not
14 journalism and not news.

15 And then the third thing is just to harp
16 back on, like, we're dealing with non-copyrightable
17 content here and creating some sort of new right,
18 right, like, has so many problems from a fundamentals
19 of copyright perspective, and I just want to, you
20 know, remind that point which was made in the first
21 panel.

22 MR. FOGLIA: Thanks, Joshua. Annemarie, I
23 think I saw your hand up previously.

24 MS. BRIDY: Yeah. No, I mean, I would just
25 in closing say that, you know, keeping a healthy and

1 sustainable and diverse news industry is obviously a
2 valuable goal. It's critical to our democracy. It's
3 not something that Google or any entity can or should
4 have to tackle alone. You know, it's a shared
5 responsibility across publishers, tech companies,
6 government, civil society, you know, and that we at
7 Google are committed, as we've always been, to playing
8 our role in a deep and meaningful way in supporting
9 that goal and that, you know, as many other panelists
10 have already said, that copyright is really pretty
11 clearly the wrong tool for this job.

12 MR. FOGLIA: Thank you. Ole?

13 MR. JANI: Yeah, thank you. Now just as a
14 final remark, obviously, the copyright systems in
15 Europe and in the U.S. are different in detail. And
16 so the European approach, as we have it now with
17 Article XV, certainly could not be a blueprint and
18 should not be considered a blueprint for anything that
19 might happen in the U.S. But what it could be is sort
20 of a source of inspiration, and it gives some answers
21 to the questions we believe are universal because the
22 situation and the challenges for press publishers in
23 the tech environment we have been discussing today are
24 global. So, with this said, I'd be happy to follow up
25 and continue this discussion and to contribute if the

1 Office feel that it might be helpful. We can share
2 our experience and our views from Europe with you for
3 further steps in the U.S. Again, thank you very much.

4 MR. FOGLIA: Thank you. Jessica?

5 MS. SILBEY: Yeah. I just wanted to take
6 the opportunity to sort of cheerlead the Copyright
7 Office and just say you are the experts in the
8 Copyright Office's administration and the way
9 copyright has been working and you have a history and
10 you have records. And I just feel like you can tell
11 Congress that this is not -- that copyright is really
12 the wrong tool here. I mean, we're here to inform
13 you, but I'm getting the sense -- I mean, I just want
14 to -- I want to suggest that you can tell Congress
15 that thank you for asking us this question, but in all
16 of our deep, profound experience and given the case
17 law and the history and the administrability of all
18 these different rules, this is not best suited for
19 copyright, and I just wanted to support that
20 possibility for you.

21 MR. FOGLIA: Thank you. Cathy?

22 MS. GELLIS: Thanks. One quick point to
23 touch on, I just want to note for the record how silly
24 the accusation that I'm here parroting Google is.
25 There's no reason for us to parrot Google. We're on

1 the record having actually been unhappy with Google
2 for making its ad service unusable. What drives us to
3 be here is essentially recognizing that we're not
4 going to solve the competition problem by focusing on
5 increasing monopoly power.

6 When we play out the mechanics of what would
7 happen with a policy scheme like this, we know that it
8 would hurt us, and we know this because we've seen it
9 before. We've seen the dynamic of what happened.
10 We've seen what happens in Europe where audience
11 facilitating services go out of the audience
12 facilitating service business, and we know that hurts
13 small publications. We know -- and I know personally
14 what I brought up with my experience in the webcasting
15 space, where I was representing a service, and I know
16 firsthand how expensive it is, particularly for
17 smaller upstart services, to try to comply with
18 ancillary copyright regimes like this. It can be
19 debilitating. It drives out the services, and if you
20 drive out the services, you lose that facilitation
21 benefit that they're going to deliver, which all
22 outlets need but especially small outlets need.

23 We shouldn't be looking at -- we shouldn't
24 be pretending that these schemes are something new and
25 something that's benign. We know they've hurt them

1 before. We can't just turn a blind eye to how they
2 hurt them and pretend that this time might magically
3 be different. It's not going to be different. We
4 know better, and we need to be really, really careful,
5 especially in speaking on behalf of one of the small
6 publishers, whose interests absolutely are as equally
7 tantamount as any of the larger entities who are here
8 today.

9 MR. FOGLIA: Thank you. Nzengha?

10 MS. WASEME: Well, I mean, I want to thank
11 the Copyright Office for hosting this roundtable. The
12 conversation, the conversation itself, even though
13 there have been a lot of contradictory remarks or
14 contradictory stats thrown out there, the conversation
15 itself is valuable. And I'll extend that to the panel
16 itself and the meaningful commentary that we've been
17 kind of chewing on.

18 And I really love what Joshua said about
19 cultural differences. I mean, honestly, arguably, the
20 only reason we're here is because of what Europe is
21 doing, right, not necessarily because the industry in
22 the U.S. has gotten on the same page, right? So I
23 appreciate what Annemarie said to further clarify that
24 with regard to cultural difference but also what our
25 U.S. Constitution will allow, you know. So I think

1 that's very important.

2 And for my closing remarks, I do think the
3 Copyright Office, as I said before, could improve its
4 process and that this is not necessarily about
5 expanding copyright law or copyrights or copyright
6 rights or the fair use doctrine. I think it's more
7 about modernizing the way the Copyright Office
8 processes things in regard to registration and this
9 ever changing digital world, you know, and I believe
10 it could also continue to study, particularly
11 following the roundtable today, to study as well as
12 take in industry commentary.

13 For me, I believe that will preserve the
14 integrity of the Copyright Office and its role,
15 including this study subsequent to this roundtable, as
16 well as seeing how it can be included. I think it was
17 Jessica that said it a second ago about having the
18 authority to make that recommendation to Congress
19 based on whatever the study shows and making that
20 recommendation to be integrated in some way with the
21 JCPA or, you know, presenting to Congress, okay, these
22 are our findings and maybe, possibly, we believe that
23 the copyright law is not necessarily the remedy here.

24 So I thank everyone. I've had a really good
25 time, and I look forward to see what the studies say

1 and what those recommendations are.

2 MR. FOGLIA: Thank you. Elizabeth?

3 MS. KENDALL: I'll be quick. I know we're
4 at time. I think, first, I'd just like to echo if
5 we're going to cheerlead the Copyright Office, I've
6 been working with you guys for most of my career, and
7 I never want to miss an opportunity to do that. I
8 appreciate that you've hosted us and included a lot of
9 very different points of view and, you know, I really
10 just would like to offer to the Office and to the
11 other panelists on this panel and the others myself as
12 a resource. I think there are still some big open
13 factual and legal questions about sort of where this
14 effort goes, and, you know, there may be other things
15 that we can do to advance that dialogue, so would just
16 like to continue this conversation. Thank you.

17 MR. FOGLIA: Thanks. Matt?

18 MR. WILLIAMS: Yes. I also want to thank
19 the Office staff for putting the work in here and also
20 members of Congress and their staff for paying
21 attention to this issue, which, for my client, News
22 Media Alliance, is really of critical importance,
23 beyond critical importance at this point. And I also
24 want to thank the other panelists in all the
25 roundtables. I think having all the diverse

1 viewpoints in front of you should help the Office,
2 using its experience, come up with the right
3 recommendations to Congress. So I really appreciate
4 the opportunity to be here.

5 MR. FOGLIA: Thanks. Peter?

6 MR. ROUTHIER: Yeah, thank you. I just echo
7 the thanks to all the panelists and to the Office.
8 And I'll just make one very quick point, which is I
9 think that, you know, as I've said throughout, it's
10 really important that we keep the public interest in
11 mind and that one of those things that I was glad to
12 hear a little bit about was registration deposit.
13 Registration deposit serves really important public
14 interest functions. As you know, I mean, the Office
15 spends a lot of time on that. That's not something we
16 should be abandoning here. Thank you very much.

17 MR. FOGLIA: And, Hal?

18 MR. SINGER: Yeah, just quickly. You know,
19 again, to this point that the JCPA, by allowing
20 collective bargaining, would somehow discourage entry
21 by news aggregators, just, I can't see the nexus here
22 as an economist. Let me just say too that the
23 regulations -- this might not be understood -- that
24 the regulations that we're talking about, which is
25 collective bargaining, would only apply to dominant

1 platforms. So it wouldn't even touch a small news
2 aggregator. So I don't, I just don't understand as an
3 economic matter how it would discourage news
4 aggregators.

5 The last point I just want to say in terms
6 of it being like an onerous requirement, I would
7 submit that we shouldn't be too worried about Google
8 or Facebook exiting the search or social media
9 industry. I think they're doing just fine. I think
10 that Google can afford to hire a lawyer, an evaluation
11 expert, maybe an economist to go before this
12 arbitrator and argue what the value, fair market
13 value, is that the newspapers are bringing to their
14 platforms, and they will be just fine. You know,
15 don't lose any sleep over what we're contemplating
16 here with respect to Google and Facebook. I'll just
17 leave it at that.

18 MR. FOGLIA: Okay. Well, thank you to all
19 the panelists for your participation today, and many
20 of you submitted comments as well. We thank you for
21 those. We are now going to break for lunch, and we'll
22 return at 1:30 p.m. Eastern for Panel 3, which will
23 concern the effect any additional rights on -- or any
24 additional protections on existing rights for users or
25 authors, as well as copyright limitations or trade

1 obligations, and the constitutional issues as well.

2 Thanks, everyone.

3 (Whereupon, at 12:20 p.m., the roundtable in
4 the above entitled matter recessed, to reconvene at
5 1:30 p.m. this same day, Thursday, December 9, 2021.)

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1 that session should be submitted by 2 p.m. Eastern
2 Standard Time.

3 So I guess, just really quickly, if the
4 panelists could please just go around and introduce
5 themselves and any affiliation they have. We'll go in
6 alphabetical order and let me see who that starts
7 with. I believe that starts with Jonathan Band.

8 MR. BAND: Hi. Happy to be here. I'm
9 Jonathan Band. I represent the Library Copyright
10 Alliance, which consists of the American Library
11 Association, the Association of Research Libraries,
12 and the Association of College and Research Libraries.

13 MS. KERN: Thank you. Mr. Bergmayer?

14 MR. BERGMAYER: Hi there. I'm John
15 Bergmayer. I'm the Legal Director of Public
16 Knowledge, a consumer group here based in Washington,
17 D.C. We work on intellectual property, as well as
18 antitrust and competition law.

19 MS. KERN: And Mr. Hasbrouck? Please
20 correct me if I'm pronouncing that wrong as well.

21 MR. HASBROUCK: Got it right. I'm Edward
22 Hasbrouck, representing the National Writers Union,
23 whose membership includes writers and journalists in
24 all genres and media. I'm also the NWU representative
25 on the Authors' Rights Expert Group of the

1 International Federation of Journalists.

2 MS. KERN: Thank you. And Mr. Lavizzari?

3 MR. LAVIZZARI: Hello. My name is Carlo
4 Lavizzari. I'm a lawyer from Basel, Switzerland, and
5 I'm licensed to practice in Switzerland, England and
6 Wales, and in South Africa. I've been representing
7 publishers in many fora, and here I am, however, just
8 as an independent lawyer joining this panel. Thank
9 you very much for allowing so.

10 MS. KERN: And Mr. Schwartz?

11 MR. SCHWARTZ: Thank you, Melinda. I'm Eric
12 Schwartz. I'm a partner in the law firm of Mitchell
13 Silberberg & Knupp here in Washington, D.C. And today
14 I'm here representing the News Media Alliance.

15 MS. KERN: And Ms. Sternburg?

16 MS. STERNBURG: Hi. I'm Ali Sternburg,
17 Senior Policy Counsel at the Computer & Communications
18 Industry Association, CCIA, also in Washington, D.C.
19 Thanks for having me.

20 MS. KERN: All right. I think that covers
21 all the panelists we have on Panel 3 for today. So
22 the first question that I would like to pose to the
23 panelists are -- so several of the comments had
24 mentioned Berne Article 10(1), so I wanted to ask,
25 what impact do the panelists think Berne 10(1) has on

1 a potential press publishers' right? And, Mr. Band,
2 it looks like you had your hand up first, so go ahead.

3 MR. BAND: Well, this is a very technical
4 issue and we dig into it deeply in our comments. But
5 just at a very high level, Article 10(1) of the Berne
6 Convention creates a quotation right. It has been
7 interpreted to be mandatory, so that means all
8 countries must have -- must allow for quotations, and
9 several international copyright law scholars have
10 interpreted the quotation right in Berne as being
11 inconsistent with an ancillary -- with the ancillary
12 copyright regime established in the EU.

13 Now, to be sure, Professor Ginsburg, whom we
14 heard from in the first panel, she and Professor
15 Ricketson have come up with a theory as to why it is
16 not inconsistent, even though she says, well, on the
17 surface, yeah, it's plainly inconsistent, but she
18 comes up with a rather complicated explanation as to
19 why it might not be inconsistent. But her analysis
20 really hinges on the fact that when the quotation
21 right was first adopted, that there was, you know, the
22 history, the legislative history of the Berne
23 Convention seemed to allow for the possibility of
24 national regulation of hot news misappropriation,
25 especially, you know, dealing with the kinds of

1 misappropriation that was going on in the early 20th
2 Century involving wire services, so exactly what is
3 within the scope of hot news misappropriation. So she
4 -- so their argument that an ancillary right that
5 would conceivably be permitted would be perhaps
6 limited, you know, it seems that that's what she's
7 saying, this really would be hot news
8 misappropriation.

9 But that's not what is in the EU. The EU is
10 much broader than hot news misappropriation. So, you
11 know, to the extent that anything would be allowed on
12 an ancillary regime, it seems that it would have to be
13 limited to hot news misappropriation, and even there,
14 you know, that might not be correct, and so we get
15 into that in more detail. But, in any event, that is
16 much, much narrower than an ancillary right regime
17 like what we have -- what was set up in the EU and in
18 Australia.

19 MS. KERN: Thank you. Mr. Lavizzari?

20 MR. LAVIZZARI: Yeah. I think I would
21 disagree with Jonathan on this -- I mean, obviously,
22 Sam Ricketson and Jane Ginsburg are the leading
23 commentators on the Berne Convention, and they have
24 written extensively on this and made this available to
25 the U.S. Copyright Office. Also, even in the EU, the

1 quotation exception is available even for the
2 ancillary rights, so there is no conflict per se.

3 I would also like to say that the issue
4 really here is one of fragile fresh content being made
5 available by journalists and publishers for the
6 benefit of society as a whole, and the issue is should
7 intermediaries and aggregators be able to benefit from
8 this for free. The question is, therefore, not
9 necessarily one of injunctive relief of making it
10 impossible to quote, but rather whether these
11 intermediaries shouldn't play fair and compensate the
12 benefit that they get?

13 MS. KERN: Thank you. And, Mr. Schwartz?

14 MR. SCHWARTZ: Well, thank you. First thing
15 to just clarify, my clients aren't seeking, as the
16 last panel noted several times, an ancillary right, so
17 it's sort of a moot point for purposes of the comments
18 and the ask of the American News Media Alliance. So I
19 think this is only a question then for whether or not
20 the European Union is in compliance with Berne.

21 First thing I'd say is that the first
22 question asked is whether or not 10(1) is even a
23 mandatory requirement of Berne. And while some
24 commentators say it is, Mihaly Ficsor, who wrote the
25 guidebook for the WIPO and the former head of the WIPO

1 Copyright Division, says it's not. So first point is
2 that there's questions of whether it's even a
3 mandatory requirement.

4 But I would say that overall, the question
5 of 10(1) and EU's compliance with it as an ancillary
6 right is, frankly, from the aggregators' point of
7 view, looking at the question from what I'd call the
8 wrong end of the telescope. Article 10(1) says that
9 the quotation right applies but must be applied in
10 accordance with fair practice. So the real question
11 in the United States is whether, when fair practice,
12 for instance, being fair use, whether or not the
13 takings, the copy/pasting, which we've heard about in
14 the first two panels, that the aggregators are
15 undertaking is even compatible with the Berne
16 exception for quotations, and, obviously, the News
17 Media Alliance and news publishers would say it is not
18 being undertaken in accordance with fair practices.

19 MS. KERN: Thank you. Mr. Hasbrouck?

20 MR. HASBROUCK: Well, I'm very glad you
21 raised this question because implicitly it raises one
22 of our key concerns, which is Berne 10(3). Any usage
23 under Berne 10(1) is subject to the requirement of
24 Berne 10(3), which requires identification not only of
25 the original source but of the author.

1 Now one of the problems with the news
2 aggregators is that they systematically and flagrantly
3 violate Berne 10(3). Even the most cursory glance at
4 news.google.com or the Facebook news page will show
5 you that publishers are identified and not the authors
6 except occasionally and incidentally. And they can
7 get away with this because the U.S. has never enacted
8 any law that even purports in any way, shape, or form
9 to implement Berne 10(3).

10 So, if there is going to be reliance on
11 Berne 10(1), that could take place only after Congress
12 enacts, as we have long called for, legislation to
13 implement Berne 10(3), which it should do anyway, but
14 I think this proceeding highlights the importance of
15 that. And this is especially problematic because it
16 adds insult to injury for authors, who are told that
17 they should accept this aggregation and republication
18 for exposure when even the minimal black letter treaty
19 right to be named in that news aggregation is being
20 systematically and flagrantly violated.

21 MS. KERN: Thank you. Ms. Sternburg?

22 MS. STERNBURG: Thank you. I would just
23 echo some of the points that Jonathan Band made when
24 he was mentioning these questions. CCIA's written
25 comments also provide analysis and history of Berne

1 Article 10(1), some other provisions in the Berne
2 Convention dating back to the 1880s, as well as in
3 1967, when they chose to delete the word "short"
4 before "quotations." I think it's unambiguous that
5 there's an international obligation around providing
6 this right to quote. And as I don't think Johnathan
7 mentioned, but our comments do as well, provisions of
8 Berne, including Article 10(1), are incorporated in
9 TRIPS, which is part of the WTO agreement. So these
10 -- there are ways of enforcing these international
11 obligations, but would definitely just echo the point
12 that Article 10(1) is really relevant to this context
13 of the importance of the right to quote for the U.S.
14 and other signatories of Berne.

15 MS. KERN: Thank you. Mr. Bergmayer?

16 MR. BERGMAYER: Yeah. I would just like to
17 make sure that there's no implication that fair use in
18 the United States, like, somehow has to be justified
19 under the Berne quotation language. I understand fair
20 use to be consistent with Berne's three step test, and
21 it's just a limitation and exception that, you know,
22 the United States is free to offer under Berne, and,
23 furthermore, because fair use is a constitutional
24 requirement, the Constitution trumps Berne. And so I
25 believe that, you know, that is a -- yeah, that's the

1 basic point I wanted to make. Very short.

2 MS. KERN: And, lastly, Mr. Schwartz?

3 MR. SCHWARTZ: Yeah. Just, I didn't want to
4 overstep my time in the first intervention. One, I
5 think Jonathan mischaracterized Jane's conclusions,
6 Jane Ginsburg's conclusions in her article about
7 whether the Article 15 is or isn't compliant with
8 Berne. She did not conclude that it is not compliant.

9 And, secondly, the qualification in 10(1),
10 you know, is a qualification of compliance with fair
11 practice. That's the point. It's not -- it's not a
12 question of fair use.

13 And third point, we're talking about, as
14 happens with Berne, this is obligations that Berne
15 members have to apply to foreign Berne works and Berne
16 country members, not in the case of the United States
17 American authors. These are -- Berne minima are only
18 obligations that are applied for other than American
19 works or U.S. works, however you define them.

20 So, again, this is all sort of a moot point
21 for my clients because, really, the question, Melinda,
22 that you asked is, is the EU in compliance with Berne,
23 and since my clients aren't asking for an ancillary
24 right, that's really the only question, I think, that
25 you're posing.

1 MS. KERN: Well, thank you for all your
2 answers, everyone. I will now turn it over to Chris
3 Weston.

4 MR. WESTON: Hi. Thanks, Melinda. Chris
5 Weston, Senior Counsel for Policy and International
6 Affairs at the Copyright Office. Just before I ask a
7 question, I just want to respond to something that
8 Eric mentioned. With respect to your client's
9 interests, they may or may not dovetail with what
10 Congress asked us to look into, which was specifically
11 whether or not something like the Article 15 would be
12 feasible in the United States. So I definitely
13 appreciate your client's interest, but we also do have
14 to investigate that question.

15 So --

16 So I muted myself, sorry. So my question is
17 actually not about international standards but about
18 the Constitution and about the First Amendment. I
19 know a lot of people wrote in their comments about
20 First Amendment problems with a sui generis or with a
21 change to the copyright law regarding ancillary
22 copyrights. With respect to the news media
23 association's disavowal of wanting to pursue such a
24 thing, would the changes that they are asking for,
25 would they -- do they encounter any First Amendment

1 questions? I'm thinking of revising what a lot of
2 people understand as the short phrase restriction on
3 copyright if you can copyright words and short
4 phrases. So, if something like that, does that raise
5 First Amendment questions at all? I'm going to be
6 informal and use first names. So, Eric, please go
7 ahead.

8 MR. SCHWARTZ: Okay. Well, sort of let me
9 recharacterize what News Media Alliance comments did
10 say and didn't say.

11 First of all, I think most helpful for the
12 News Media Alliance would be for the Copyright Office
13 to describe the nature and scope of the problem,
14 there's a significant problem.

15 Second, the ask is that the Copyright
16 Office, as the expert agency, would review existing
17 law and in detail how it's effectively working or not
18 working. To the point about the copyrightability of
19 short phrases, to Jane Ginsburg's point on the first
20 panel this morning, it's a question of originality.
21 The blanket statement that is contained in the
22 Copyright Office's Circular 33 and Compendium, the
23 question to be looked at, and as the cases have done,
24 is a question that it's a matter of originality, not
25 brevity, that drives the question. So there's no

1 constitutional concern if, in fact, a work, no matter
2 how brief, is deemed to be original. So there's not
3 an issue there.

4 And third, with regard to your point, Chris,
5 about the European Union right as an ancillary right,
6 I think it would be helpful for the Copyright Office
7 to take a good look at Article 15 and a side by side
8 with existing U.S. law. Yes, the EU adopted an
9 ancillary right. But, if you pull back from that and
10 take a look at what rights already exist for
11 publishers in the United States -- reproduction,
12 distribution, public display -- you'll see that they
13 -- that a lot of what the European Union did lines up
14 very neatly with what was already existing U.S. law.
15 The main difference and the main motivator for the
16 European Union is ownership questions. The European
17 Union doesn't have work for hire, whereas the U.S. law
18 does.

19 And the last point would be that, you know,
20 if you were to characterize what we've heard in the
21 first two panels this morning and in their filings,
22 it's not a problem necessarily of copyright
23 protection. It's a question of effective enforcement
24 of existing rights. And what the Copyright Office
25 could do most effectively and consistent with, I

1 think, what Senator Tillis's letter was asking for, is
2 simply to define the scope of existing rights and
3 limitations and exceptions, including fair use, and
4 take a really careful and thoughtful analysis of that
5 and incorporate that into the study, and I think that
6 would be extremely helpful to Congress to understand
7 these rights exist, but they can't be effectively
8 enforced, and the reason is because of market
9 imbalance, as the second panel talked about, which is
10 why the JCPA is necessary to address that market
11 imbalance.

12 MR. WESTON: Okay. Thank you. Carlo?

13 MR. LAVIZZARI: Yeah. So, I mean, copyright
14 is an engine of free speech, and so there is not
15 really a conflict between copyright or an ancillary
16 right with the desire to have more free expression.
17 The question is who in the distribution chain should
18 compensate and enable effectively this fuel that feeds
19 the free expression.

20 From a comparative point of view, I would
21 like to draw the Copyright Office and the audience to
22 a trilogy of cases of the Court of Justice in the EU,
23 all decided on 29 July 2019. The three cases deal
24 with the interaction between the European
25 Constitutional Bill of Rights, the National Bill of

1 Rights of Member States, and the copyright rules of
2 the EU. In one case called Pelham, about music
3 sampling, a snippet of two seconds that was used in
4 samples was found protectable under the equivalent of
5 sound recording protection in the EU. And on the
6 issue of conflict with constitutional rights, the
7 court said, as long as the sample is recognizable,
8 copyright prevails. But, of course, if the sample was
9 changed beyond recognition, then that would be
10 different.

11 The second case on that day is Spiegel
12 Online and also very much found that the exceptions
13 and limitations are sufficient to balance the concerns
14 of free expression. As part of that case, similar to
15 the parody rationale in U.S. law, the court found that
16 where a defendant cannot reasonably be asked to
17 request permission, a free use is justified due to the
18 fundamental rights position. I think that is very
19 sensible, but I would argue that news aggregators are
20 routinely in the position to request permission in the
21 form of licensing. And also perhaps even though there
22 are many competition law issues associated with
23 dominant platforms, in Europe, there is a broader
24 theory of collective management of rights, which also
25 facilitates an efficient way of securing adequate

1 permissions that allow free expression and allow
2 reinvestment in creative and useful content.

3 Thank you.

4 MR. WESTON: Thank you. John, John
5 Bergmayer?

6 MR. BERGMAYER: Yeah. To answer your
7 question, you know, the shorter the phrase, the less
8 likely it is to be original. So I don't really see
9 these as like these, like, wildly divergent ways of
10 looking at things. And, furthermore, not only that,
11 the shorter the phrase, also the more likely it is
12 that it's going to be subject to some other limiting
13 doctrine in copyright. For example, like merger
14 doctrine, if a man bites a dog and you say man bites
15 dog, even if you just posit that it is original and
16 copyrightable, other people are allowed to say man
17 bites dog if a man bites a dog.

18 In terms of enforcement of existing rights,
19 you know, I just would say the Copyright Office
20 obviously does not define what copyright is. It maybe
21 describes the outcomes of various court decisions.

22 And in terms of the constitutional
23 limitations, the arguments that Public Knowledge makes
24 is that because copyright must be subject to both fair
25 use and the idea-expression dichotomy, which I think

1 is getting a little bit less play here and I think is
2 very relevant in the case of news when, you know, to
3 the extent that there's something valuable, it is
4 information. However, information under the United
5 States Constitution, facts can never be protected by
6 any form of intellectual property, and you can't get
7 around the constitutional limitations on copyright by
8 calling it something different. And I'm fully aware
9 the previous panel discussed some of this and there
10 was discussion about 1201. You know, I'll just leave
11 it there.

12 MR. WESTON: Thanks. Jonathan Band?

13 MR. BAND: Sure. So there's a lot to
14 respond to, but I won't respond to everything because
15 I agree with a lot of what John Bergmayer just said.
16 But responding to some of the points that Eric made,
17 so, first of all, at the highest level, you know, even
18 though Eric says his client isn't asking for an
19 ancillary right, I did read the comments very
20 carefully and, in fact, they are asking for it, okay,
21 because they do say that, you know, they're concerned
22 about the fact that there isn't reciprocity so that
23 U.S. publishers might not receive royalties from the
24 ancillary right, and they say one way to take care of
25 that problem is for the U.S. to adopt an ancillary

1 right. So it is in the comments. I appreciate that
2 that is not the main ask, and also I appreciate Matt
3 Williams' very lawyerly description of saying we are
4 not asking for an ancillary right at this time, so
5 perfectly, you know, reserving the right to ask for it
6 tomorrow. But I just wanted to make that clear that
7 there's, you know, no question that an ancillary right
8 is in play and not simply because Senator Tillis asked
9 about it. Also, Axel Springer, right, the whole
10 comment was about an ancillary right, as News Corp's
11 was. So, you know, I appreciate your point, Eric,
12 that that's not the main ask or the current ask, but
13 it is lurking there in the background.

14 The second point I wanted to make had to do
15 with, you know, this issue of, oh, we just want the
16 Copyright Office to give a legal opinion on fair use,
17 right? Well, that's not the appropriate role of the
18 Copyright Office, you know, and especially as we know
19 here, you know, we can have all the -- you know, we
20 can line up law professors on each side, you know, and
21 to give their opinion on whether what Google is doing
22 in any given situation is a fair use or isn't a fair
23 use, but, you know -- and even in this proceeding,
24 right, so you have Jane Ginsburg saying not a fair
25 use, but then you have Neil Netanel saying, yes, it is

1 a fair use, right? And so that's just in terms of
2 what was submitted here. And I'm sure we can do a
3 poll of copyright professors and then you'd get all
4 over the map.

5 But, in any event, the deeper point, of
6 course, is that every headline is going to be
7 different, right? You know, it depends on the
8 headline and, you know, whether or not there may -- it
9 may or may not be fair use with respect to that
10 specific headline, even though I would tend to be of
11 the view that the vast majority of headlines would be
12 fair use, if not all of them. But, you know,
13 conceivably, there would be, you know, one headline
14 that, you know, for some reason, it might not be a
15 fair use.

16 But the bigger point that really came out of
17 the -- for both the previous panels is at some point
18 that's all irrelevant, right, and Professor -- you
19 know, Jane said this, it's like, well, what difference
20 does it make if we give publishers more rights because
21 there's this enforcement issue and, you know, that --
22 to the extent that it's called a competition issue or
23 a business issue or an economics issue, I think
24 there's different ways of characterizing it, but it's
25 clear that the publishers have no shortage of causes

1 of action and also, as we heard in the previous
2 panels, right, that, you know, you have these -- you
3 know, that you have these robot.text, you know,
4 there's these bot exclusion headers, right, that
5 Google respects and that in the Facebook case, the
6 publishers are placing the content on Facebook, right,
7 so there's clearly a license, right?

8 So there's no question that there's plenty
9 of rights there. There's a question as to why the
10 publishers aren't enforcing those rights, and, that's
11 you know, ultimately, you know, again, it's a
12 competition/business/economics issue which really is
13 beyond the scope of this study. You know, I think the
14 Copyright Office could really have a one paragraph
15 study. It doesn't need to go into depth and say,
16 well, you know, this isn't the question. It's not
17 about whether there's adequate rights. There's no
18 shortage of rights. It's a question of why they're
19 not being enforced and what are the consequences of
20 that. But, again, that's ultimately not an IP issue.

21 MR. WESTON: Thank you. Ali?

22 MS. STERNBURG: Thank you. Some of the
23 points I wanted to make have been addressed, so I
24 would just echo that the question about the Copyright
25 Office guidance and circulars on short phrases, as

1 John Bergmayer said, there's constitutional issues in
2 the intersection of the First Amendment, copyright,
3 including fair use, but also the idea-expression
4 dichotomy and the fact that no ownership of facts and
5 other limitations on the scope of what is protectable
6 under copyright. So I would agree that there would be
7 serious First Amendment problems if there were -- and
8 just that that guidance should remain as it is. It's
9 really crucial for users and services, I would argue.

10 And I also reiterate a point Jonathan Band
11 just made, that I think the JCPA conversation is
12 outside of the scope of the Copyright Office and
13 copyright law. Thank you.

14 MR. WESTON: Thanks. Edward?

15 MR. HASBROUCK: Thank you. You know, I
16 think the question that you asked, you know, would an
17 ancillary right be compatible with the First
18 Amendment, I think this is a red herring. An
19 ancillary right would no more be a threat to a free
20 speech and a free press than is copyright itself a
21 threat to free speech and free press. It's just what
22 is copyrightable. You know, my right to free speech
23 ends when I want to reprint the entirety of some
24 copyrighted work that you've written. That's not a
25 First Amendment violation. And in the same way, a

1 carveout from antitrust law for negotiations, which is
2 part of what's contemplated in the JCPA, is not a
3 threat to the First Amendment any more than antitrust
4 law in general is a threat to the First Amendment.

5 And from the perspective of an author and as
6 a reader, I think that it is the monopolization and
7 control of channels of digital distribution by a
8 handful of companies that's actually one of the
9 greatest threats today to the rights of free speech
10 and free press. It's meaningless if you can speak
11 freely but only in a closet where nobody can hear you.
12 And if the distribution is monopolized, that strangles
13 the ability to have robust public discourse. And so I
14 actually think that this kind of antitrust reform
15 would be very critical to advancing the goals of the
16 First Amendment.

17 MR. WESTON: Thanks. Eric?

18 MR. SCHWARTZ: Yeah. So lots of issues have
19 been raised and let me just pull back and address, you
20 know, from 30,000 feet the largest one, Jonathan's
21 notion of a one paragraph study. As one who worked
22 for some time in the Copyright Office, I think the
23 Copyright Office and the Copyright employees, you
24 know, absolutely have a duty to take a look at a
25 broken marketplace and ask two questions: one, is

1 there adequate protection, and, two, is there adequate
2 enforcement of the existing rights.

3 To Jonathan's, well, maybe you are asking
4 for ancillary, maybe you're not, no, we're not. I'll
5 address the national treatment question because you
6 mischaracterized that in a minute. But the bigger
7 question is, as the second panel spent a lot of time
8 talking about, Hal Singer in his filing, is market
9 imbalance. And to the point that, well, you
10 authorized the use of your materials, this is you
11 know, Google's monopolization of search and Facebook's
12 monopolization of social media requires that.

13 And then the question one must ask is, is
14 the progress clause being properly treated in this
15 marketplace, which allows for two incentives: one is
16 the right to create, to incentivize the creation of
17 new works; the other is to disseminate them, as the
18 Supreme Court has said in cases, you know, as recent
19 as Golan. And the fact that these aggregators so
20 dominate the dissemination market means -- and given
21 the statistics that NMA included in its filing means
22 that the marketplace is broken for those that are
23 creating the material and in essence are forced to use
24 these disseminators that have such a huge market
25 influence. It is not working, and it is absolutely

1 appropriate for the Copyright Office to take a look at
2 it and to take a look at the scope of existing rights
3 and, as Jane did, for instance, in her paper, to use
4 some examples and answer the question, is this cutting
5 and pasting. You know, a lot of the aggregators are
6 referring to it as just headlines. Don't forget the
7 photographs. The taking of an entire photograph with
8 a headline, with ledes, and sometimes the reproduction
9 of entire works in a systematic way, is that fair use?
10 It is absolutely appropriate for the Copyright Office
11 to opine on that not in a particular instance but just
12 in a general instance.

13 Last point on national treatment, Jonathan,
14 we were not suggesting -- all I was saying legally --
15 the filing was saying legally is, since the European
16 Union adopted Article 15 as a matter of reciprocity,
17 there are two ways for other countries to enjoy the
18 rights in the European Union. One would be to have
19 equivalent rights and it may be, by the way, that
20 existing U.S. law provides equivalent rights. The
21 other is in trade agreements that simply provide for
22 broad national treatment so that U.S. publishers could
23 enjoy those rights there. That was the ask in the
24 News Media Alliance, the second point, that if there's
25 broad national treatment obligations in any future

1 trade agreement, as the U.S. did, for instance, in the
2 U.S.-Canada-Mexico Agreement so that performances in
3 Canada that don't exist in the United States require
4 payment for American sound recording producers and
5 performers in Canada, even though those rights don't
6 exist in the United States. That's what national
7 treatment does in a trade agreement. That was that
8 point.

9 MR. WESTON: Thank you. Ali?

10 MS. STERNBURG: Thanks. So I thought the
11 question earlier was more about First Amendment
12 considerations around changing Copyright Office
13 guidance around short phrases. But, definitely, if
14 there's interest in talking about First Amendment
15 considerations generally regarding ancillary
16 copyright, there's a lot of precedent about free
17 speech rights for digital services users, as well as
18 the rights of news aggregators themselves and how
19 they're engaging in editorial discretion when they're
20 showing what's relevant to users. All that is speech
21 protected by the First Amendment. Thank you.

22 MR. WESTON: Thanks. John Bergmayer?

23 MR. BERGMAYER: Yeah. I would not say that
24 a mere antitrust exemption without more at any step
25 itself violates the First Amendment. We have

1 antitrust exemptions now. I would say they're bad
2 policy and outside of the Copyright Office to, you
3 know, people who have jurisdiction over antitrust law.
4 We're happy to make that argument all the time. I do
5 appreciate the concession on previous panels that a
6 mere antitrust exemption without more would be
7 ineffective because there needs to be an underlying
8 right in order for people to collectively bargain
9 over. I would -- and our position is that any version
10 of that new right, whether it is created by statute or
11 whether it is sort of assumed to exist by the courts,
12 otherwise why would you pass that antitrust exemption.
13 Any path whatsoever to get you to that new substantive
14 right needs to respect idea expression and fair use.
15 Otherwise it would be unconstitutional. So I'm trying
16 to make our position as clear as possible here.

17 MR. WESTON: Thanks a lot. Carlo?

18 MR. LAVIZZARI: Yeah. I just wanted for the
19 benefit of the U.S. audience on the issue of short
20 phrases, say that in the UK Meltwater case from 2010,
21 that topic was dealt with and it was found and
22 advanced by the Queen's Counsel then that often the
23 headlines in newspapers are actually crafted and
24 selected later after multiple headlines have been
25 crafted by people different from the journalists who

1 write the article.

2 And in terms of free expression, it should
3 be -- there should be no bias against people crafting
4 catchy headlines, and if that's the head start, the
5 work gets to an audience, then an aggregator shouldn't
6 be allowed to appropriate it.

7 Also, on the continent, just from book
8 titles, in France, *Les liaisons dangereuses* is
9 copyrightable, *Clochemerle* is copyrightable, *Felix the*
10 *Cat* is copyrightable, *Vol de nuit* ("Nightflight") is
11 copyrightable, *The Heroic Charlie Hebdo* is
12 copyrightable, *Cinquante nuances de Grey* ("50 Shades
13 of Gray") is copyrightable. In Germany, *Der Mensch*
14 *lebt nicht vom Lohn allein* ("Man does not live from
15 salary alone") is copyrightable. Thank you.

16 MR. WESTON: Thanks. I'm going to give it
17 to Eric and then Ali and then give it to Andrew Foglia
18 to ask the next question.

19 MR. SCHWARTZ: Well, thanks. I just wanted
20 to address a point that John raised again -- the two
21 Johns, John and Jonathan, my friends, suggesting that
22 somehow there is a seeking of a new right. There's
23 not seeking of a new right with the JCPA. The right
24 already exists. It's a right of access that 1201
25 provides. And, by the way, without fair use, and its

1 constitutional has been upheld, but that was a
2 question, you know, an issue that was discussed a lot
3 in the second panel, so not repeating it. But there's
4 not a new right. It's just the fact that the
5 publishers can't exercise their existing right when it
6 comes to access for the reasons already mentioned
7 about the huge market imbalance, that they have to
8 rely on this dissemination of their own works and that
9 what the JCPA would do is to recalibrate that market
10 imbalance by collective bargaining.

11 MR. WESTON: Thanks. And Ali?

12 MS. STERNBURG: Thank you. Just wanted to
13 make a quick overarching point that looking at what
14 other countries have done is not always really that
15 instructive to the U.S. because we uniquely have the
16 First Amendment. We have fair use. A lot of our
17 copyright law is based in the Constitution under
18 Article I, Section 8, Clause 8 and promoting progress.
19 So there's a lot of really different motivations in
20 other jurisdictions for why copyright exists and what
21 it's intended to promote and protect that are pretty
22 different from U.S. law. So I just wanted to raise
23 that. Thank you.

24 MR. WESTON: Thanks. Andrew?

25 MR. FOGLIA: Thanks. My question seems

1 likely to call upon a lot of repetition, but, because
2 so many of you were talking again about competition
3 law and because many of your comments discussed
4 competition law and in particular, in addition to the
5 JCPA and Australia's bargaining code, I would like
6 again to ask, even those of you who addressed it
7 before, first, do you think it's appropriate for the
8 Copyright Office to opine on those competition law
9 issues, and, second, what -- do you see any
10 constitutional issues arising from something like
11 Australia's bargaining model or the JCPA? Thanks.
12 And, Edward, I see your hand is already up, so go
13 ahead.

14 MR. HASBROUCK: In terms of, you know, why
15 this is appropriate, let's look back at what the
16 constitutional goals are, which are to protect authors
17 and inventors, not publishers, not distributors, not
18 intermediaries, but authors and inventors. And so I
19 think that's the overarching purpose within which you
20 have to look at this. Any benefit of copyright law to
21 publishers and other intermediaries is incidental to
22 the goal of benefitting creators and users, writers
23 and readers or whatever.

24 So I think there's an important question
25 here which necessarily gets involved not only with

1 competition law but also, sadly, to further broaden
2 what people are complaining is already too broad and
3 problematic, it also involves labor law because, when
4 you look at the rights that are implicated here, which
5 are really authors' rights. And so I think, if I may,
6 I want to raise the question here, which is why I
7 think it's appropriate for the Copyright Office,
8 because your mission is the mission of copyright,
9 which is to serve the public interest and the interest
10 of authors and creators. Notwithstanding the legal
11 fiction of work for hire, publishers are not the
12 creators, okay?

13 So the question -- and this was in the
14 Notice of Inquiry, if I may, if it's not out place to
15 bring it up -- the question you specifically asked
16 was, should authors receive a share of this
17 remuneration, and I think that's really exactly the
18 right question to be asking. And, unfortunately, the
19 problem of disparate bargaining power between a few
20 platforms and many publishers is replicated in the
21 asymmetry of bargaining power between those publishers
22 and the much more numerous volume of creators.

23 And so I think, if you are going to address
24 this through an exception to antitrust law, it is
25 equally important not only to recognize that many

1 journalists today are self publishers and to figure
2 out how they would be incorporated into the publisher
3 category, but also to recognize that many of them are
4 independent journalists and freelancers, not employees
5 who do not benefit from the exception to copyright for
6 labor union organizing. And so any exception to --
7 excuse me, exception to antitrust. So any exception
8 to antitrust for bargaining with the platforms needs
9 to be accompanied by an exception to antitrust to
10 permit authors and journalists to bargain with the
11 publishers, and that is one of the strongest lessons
12 of the experience in implementation of the EU
13 directive.

14 You know, the Australian law relies
15 basically on trickle down for any money from the
16 platforms that goes to publishers to actually get to
17 journalists. The European law includes a mandate for
18 sharing of those revenues and negotiations. Well, in
19 the U.S., that would run afoul of antitrust law. So,
20 if you're going to fulfill this mission, I think
21 there's strong reasons to see that the goals of
22 copyright need to be furthered by an antitrust
23 exemption to permit creators in their roles as self
24 publishers, as freelancers, as independent journalists
25 to negotiate collectively with publishers and

1 distributors at all levels. Thank you.

2 MR. FOGLIA: Thanks. Carlo?

3 MR. LAVIZZARI: Yeah. I think I'd go a very
4 long way towards what Edward just said, that
5 effectively copyright is a monopoly right. Monopoly
6 does sound a lot like competition law to me. It is,
7 of course, a beneficial one that gives the head start
8 to the creators and then, as a consequence, also to
9 publishers. And in Europe, I guess, like Edward just
10 said, we have a big tradition of collective management
11 of rights and of ensuring that fair remuneration is
12 ultimately paid. So the issue that arises now in the
13 imbalance between dominant platforms and news
14 organizations is not all too distant from the general
15 pattern that the Copyright Office has to deal with at
16 least in questions of collective licensing.

17 So, to me, those issues are definitely
18 related. And I do also have a bit of an impression of
19 the kettle calling the pot black when you have these
20 platforms effectively running a business model and a
21 strong bargaining position of an artificial fair use
22 position and then going to say the rightsholders who
23 would like to enforce their rights, now we can't talk
24 about it because of competition law. Thank you.

25 MR. FOGLIA: John?

1 MR. BERGMAYER: Yes. I'm sure that there's
2 other people who are in the queue who are bursting to
3 say this, so, sorry, I get to say it first. The
4 purpose of copyright and all intellectual property is
5 to promote the progress of science and the useful
6 arts, and benefitting authors is the means to that
7 end. I think it's a good means to the end. Like,
8 that is the means to an end that I would support.
9 It's still not the purpose, right? The purpose is
10 right there in black and white in the Constitution,
11 and it's important to never lose sight of that.

12 I'll also say our comments, Public
13 Knowledge's comments, we do have a solution -- we
14 agree generally that there is a problem. We just have
15 a very different idea of the way to solve it. So, you
16 know, other people can speak for themselves.

17 For other reason, I think that the
18 Australian model, to answer your question, would be
19 unconstitutional in the United States for other
20 reasons beyond the stuff I said before about fair use
21 and idea expression. It likely would be
22 unconstitutional because it is a mandatory carriage,
23 because the way that it is structured, it's not really
24 possible for the platforms in Australia to pick and
25 choose what they pay for, so they might as well carry

1 it. And I would say that applying Turner and other
2 cases that involve cable television, mostly litigated
3 '90s, early 2000s, that posed similar questions of
4 mandatory carriage by cable systems of broadcast
5 stations and other means, there's a whole number of
6 cases that did not have -- that had, like, a sort of
7 intermediate scrutiny standard, right, so it was
8 easier for the government to justify forms of
9 mandatory carriage in the case of Turner.

10 So I'll just concede and say, okay, I'll
11 even apply the weaker test to the case of platforms.
12 I believe that it would be unconstitutional under that
13 test even if those cable regulations that were allowed
14 under the test are still allowed. I still think they
15 are, but I think applying that test in other areas
16 such as platforms have a very different background in
17 terms of the market and how people interact with them.
18 I don't think it would be allowed. So, yeah, you
19 know, if you're looking for constitutional reasons not
20 to do Australia, I think that that is a pretty strong
21 one because I do believe that those cable TV cases are
22 fairly on point. Thank you.

23 MR. FOGLIA: Jonathan?

24 MR. BAND: So this is, in fact, an
25 enormously complicated business/competition/economic

1 issue, way beyond my ability to comprehend it. I
2 mean, you have -- you know, the Internet is a very big
3 place, and you have, you know, thousands and thousands
4 of people who are distributing news, meaning news
5 sites, maybe tens of thousands, hundreds of thousands,
6 right? It's a vast ocean of people who are providing
7 content, and they're always -- they're competing
8 amongst each other to find someone, you know, to find
9 an audience, okay? And so it doesn't matter whether
10 there were 10 Google News or 100 Google News, and, you
11 know, there probably are.

12 I mean, there's lots of news aggregators out
13 there that do probably exactly what Google News does,
14 but, you know, I don't know what they -- who they are,
15 but the point is that this is a really complicated
16 problem that, you know, might be beyond, you know, the
17 scope of competition law, right, because I think you
18 could have a lot of competitors, and I think, frankly,
19 if you had a hundred companies -- if Google's market
20 share in the, you know, how ever you want to define
21 what Google News is, if it were -- if there a hundred
22 competing companies, I would submit that that would
23 even be a much worse situation for publishers because
24 then they would be trying to -- each fight over, you
25 know, a hundred -- they would still want to be on all

1 100 sites, and they would be competing with each other
2 and trying to get themselves elevated, so it would be
3 a worse situation, not a better situation.

4 But the point is this is really complicated,
5 and it has nothing to do with intellectual property,
6 and so, you know, maybe if you had a chief economist,
7 maybe he or she would be able to help sort through
8 these issues and what they are, but, you know,
9 frankly, you don't, I don't think, and even so, I
10 think, you know, this is a problem that, you know, all
11 these -- you know, the FTC is reg -- I mean, everyone
12 is sort of reg -- this is a very complicated new kind
13 of market that no one really understands, and so, you
14 know, the Copyright Office certainly seems to be the
15 wrong place to be dealing with that.

16 And just two other quick points. Number
17 one, in terms of, like, what is the problem or what
18 are we really trying to solve here, I don't think that
19 a solution that leads to News Corp or The New York
20 Times or The Washington Post getting a lot more money
21 and local publishers getting a little more money, I
22 don't think that's a good solution. I mean, that's
23 not the -- the problem with any sort of IP type
24 solution is it's blunt. It's a blunt object, and if
25 we really -- and, again, this is my view. The problem

1 is not that News Corp is having financial problems
2 because it isn't or that The New York Times isn't. I
3 mean, these companies have -- these publishers have
4 all expanded their reach. They're doing great.
5 They're making lots of money.

6 The problem is the local news publisher,
7 which is in, you know, the news desert, and so we need
8 to focus on, come up with a solution that is really
9 targeted at that problem and not just say, okay, well,
10 we'll come up with a solution that leads to News Corp
11 and The New York Times and The Washington Post getting
12 \$90 more or \$95 more and then, you know, so that the
13 local publishers get another \$5. That's not a
14 solution that we should, you know, and, frankly, I
15 think even the JCPA would probably lead to that
16 solution, right, that all the money will still go to
17 the big publishers, and then, you know, some crumbs
18 will go to the local publishers, and that's not what
19 we want.

20 And then the last point here is that part of
21 -- and this really goes to the first point. Part of
22 what's so confusing here is when everyone talks about,
23 oh, the, you know, the bad monopoly or monopsony of,
24 you know, Facebook and Google with respect to the
25 dissemination of news, I think people are sort of

1 confusing two different things, right? I mean, on the
2 one hand, those companies do -- are in this sort of --
3 have this distribution function. Separately, those
4 companies have the advertising function, and we need
5 to separate those two functions.

6 If the concern is advertising and, you know,
7 control over advertising, then the focus needs to be
8 on advertising. It just happens here in this case to
9 coincide that there's no -- but to say, if we're
10 worried about insufficient advertising revenue, to say
11 that somehow that has anything to do with the
12 aggregation, I mean, those are again sort of mixing
13 and matching, and so it's really important to sort of
14 separate those two, and it's hard to separate those
15 two because there is this overlap of functions, but
16 there are different -- you know, these are different
17 channels, different parts of the companies, and they
18 really need to be kept separate.

19 MR. FOGLIA: Thanks. Ali?

20 MS. STERNBURG: Yeah, just to address a few
21 of the questions that were raised. As I think most of
22 us are copyright lawyers, not antitrust lawyers, but
23 my understanding is that for antitrust purposes, a
24 part of what you have to establish is what the
25 relevant market actually is, and so I think there is

1 some ambiguity about what newspapers own if the
2 copyright press publisher's rights were to change
3 because you can't really talk about the relevant
4 market for rights in an information good until you
5 establish the contours of the right and the nature of
6 the good and what competition and in what are you
7 actually talking about competition in. And so I think
8 defining the market, as my understanding, is an
9 important part of conversations about competition and
10 antitrust, and there's a lot of ambiguity here and
11 lack of clear definitions.

12 As to the First Amendment flaws with the
13 Australian proposal, I know John Bergmayer talked
14 about some of this, but there are definitely some
15 concerns in U.S. First Amendment law, including things
16 around requiring aggregators to carry content, as well
17 as singling out certain aggregators for differential
18 treatment. Both of these would trigger heightened if
19 not -- heightened scrutiny, if not strict scrutiny,
20 even more so when a regulation is aimed at particular
21 figures within an industry such as Australia's
22 measure, which was aimed at two U.S. companies. So I
23 would raise those as some clear First Amendment
24 challenges with the Australian approach, which is also
25 copyright and -- antitrust and not copyright and so

1 not really in the scope of this.

2 MR. FOGLIA: Thanks. Eric?

3 MR. SCHWARTZ: Thanks, Andrew. So, to
4 answer the question you asked about 15 minutes ago or
5 so it seems, should the Copyright Office be looking at
6 competition law, I think I already answered earlier
7 the answer is yes, and here's why. You have a
8 copyright-based industry that is protected by
9 copyright laws basically since the outset of U.S.
10 federal copyright protection, and you've got a system
11 that is broken by the statistics both in the number of
12 papers, local papers that are diminishing, to
13 Jonathan's point, the number of jobs that are being
14 lost, and you have two companies that are dominating
15 dissemination and therefore revenue, both on the --
16 you know, doing damage both on the ad side of what
17 they retain and on the damage to subscription side.

18 You know, the question one might ask is,
19 where is the consumer in all of this? And, really, I
20 think the answer is they're not -- they won't be
21 harmed by the JCPA, which, by the way, to Jonathan's
22 question, the monies, as Hal Singer mentioned in the
23 second panel, would be disseminated both to the bigs
24 and the littles, so I think there is that
25 dissemination, but the point here is you've got

1 creators that are both in the entire ecosystem, to
2 Edward's point, the authors and the publishers, you've
3 got two dominant disseminators, and the question for
4 consumers is would it harm consumers if those
5 intermediaries have to pay for the cut and paste and
6 infringement that they are undertaking on this, you
7 know, an enormous scale of billions of takings per
8 day, and the answer is no.

9 It's just -- it would just be the
10 intermediaries that would have to pay, and I don't see
11 any difference, and so, for all those reasons, Andrew,
12 I do think it's appropriate for the Copyright Office
13 to take a look at a copyright-based industry that is
14 not operating as it should be or could be and for the
15 public benefit. Having quality journalism matters to
16 the country both for social and economic reasons, and
17 I think that's important for the Office to take a look
18 at both, as I said, under existing rights and without
19 necessarily talking about the necessity for additional
20 rights, just the fact that the existing rights and the
21 existing system is not working.

22 MR. FOGLIA: Thanks. Edward, and then I'm
23 going to turn to Melinda for the next question. Go
24 ahead, Edward.

25 MR. HASBROUCK: Thank you. If I could

1 respond to a couple of points that were made by
2 Jonathan a few minutes ago and in some of the
3 comments, first, there was allusion made to robot.text
4 as something that is widely observed. I can't let
5 that pass without noting that the Internet Archive,
6 which is one of the largest aggregators and infringing
7 reproducers of news content, not just of headlines but
8 of full text, has made a deliberate decision to
9 completely ignore robot.text, so you can't take that
10 as a standard that's generally being abided by.

11 In terms of the question of, you know, do we
12 care whether more money is going to The New York Times
13 or The Washington Post? No, I don't. I care whether
14 more money is going to the journalists, whether
15 they're on the staff of The New York Times, whether
16 they're a stringer, whether they're the self publisher
17 of the blog of record in my hometown who is now the
18 single most influential journalist in that town, a not
19 uncommon phenomenon. Where do their revenues come
20 from?

21 And we've raised this issue before in terms
22 of fair use analysis. Before you can begin to assess
23 the fair use factors, you need to know what the normal
24 modes of exploitation of these works are, but there's
25 been almost no inquiry comparable to that into

1 publishers' business models, of authors' business
2 models, which is a prerequisite to applying fair use
3 tests and I think is also really significant in
4 figuring out how to divide up the pie of revenues from
5 these new uses, these ancillary uses and the ancillary
6 rights.

7 So there's a very important role, which
8 we've asked for before, and I'd reiterate that call
9 now for the Copyright Office to dig deeper into
10 authors' business models to help provide a framework
11 on which more informed fair use analysis could be
12 based because a lot of times what we find is people
13 are claiming that their use is non-infringing because
14 it's not interfering with those uses they're aware of,
15 but they don't realize the new and innovative ways
16 that authors are actually exploiting their rights that
17 are getting trampled on by these new intermediaries
18 who claim to be benefitting us while screwing us.

19 Thank you.

20 MR. FOGLIA: Melinda?

21 MS. KERN: Thank you, Andrew. So I believe
22 Mr. Bergmayer touched on this a little bit, but we've
23 heard a lot about why, I guess, an ancillary copyright
24 is not constitutional or would not be constitutional,
25 but I wanted to dive a little deeper on the point of,

1 is there a version of ancillary copyright that you
2 think would be constitutional? I think what was
3 mentioned earlier was preserving fair use and other
4 limitations, but I wanted to, like I said, dive a
5 little deeper on that point and get a couple other
6 perspectives if anyone has any. Mr. Bergmayer?

7 MR. BERGMAYER: I'll just say no. Thank
8 you.

9 MS. KERN: Thank you. Mr. Band?

10 MR. BAND: Sure. So -- and this is again
11 something that we talk about in much greater detail in
12 our comments, but to the extent that what is going on
13 is an effort to protect something that is not -- that
14 is unoriginal, then that just can't be done
15 constitutionally. The Supreme Court precedent is very
16 clear that the IP clause is both access -- both
17 authorizes -- you know, both creates rights but also
18 limits rights. It's a floor and a ceiling, and the
19 ceiling is, you know, that you can't protect -- you
20 can't give protection to something that's not original
21 when you're dealing with copyrightable -- with
22 writings with copyrightable subject matter, and what
23 that means is that you can't rely on the Commerce
24 Clause or another power to do something that the IP
25 clause prohibits.

1 And, you know, this all came out in great
2 detail in the context of the database legislation
3 debate, which I had the misfortune of spending eight
4 years of my life involved with, but this issue was
5 explored in great detail, and there were -- you know,
6 the DOJ weighed in and they agreed that you can't rely
7 on the Commerce power to do something that would not
8 be permitted under the IP power. You know,
9 Congresswoman Lofgren wrote a, you know, wrote an
10 opinion on this and so forth. So, you know, there's a
11 lot of case law that the -- and a lot of analysis that
12 the Copyright Office should dig into to inform its
13 analysis, but it's pretty clear that you can't rely on
14 the Commerce Clause to do anything to protect anything
15 that is not original, so, you know -- and I'll stop
16 there, and we can go into more detail if you want.

17 MS. KERN: Thank you. Mr. Lavizzari?

18 MR. LAVIZZARI: Yes, thank you.

19 Essentially, for copyright, what is protectable and
20 what is subject to fair use, they're both really
21 involving policy judgments and are different sides of
22 the same coin, and when you look at it that way, I
23 think the premise perhaps that is being given here
24 that, you know, a news article under Feist is not
25 protectable and that's almost like a tablet from

1 ancient Rome, it is what it is, but if you look at the
2 modern articles, the articles of the future, they are
3 really "knowledge stacks". They have really evolved.

4 And I think the situation today is quite
5 comparable to when, in 1972, the USA decided to
6 protect sound recordings previously protectable under
7 common law under U.S. state law, and perhaps the same
8 or similar discussions were taking place then and
9 people said how could you protect sound recordings.
10 That's an ancillary right to a performance and a
11 musical composition. Well, now you have it, and you
12 have had it for a long time, and the world hasn't
13 broken in. The Internet's not broken. The
14 Constitution is still there.

15 So I think it's the same now. An article of
16 the 1970s and an article, digital article of today, is
17 completely different, so I think one has to look at
18 the rationale for such a right, what is it supposed to
19 do, and that is exactly why it's so important you're
20 studying these questions. Does it recognize the value
21 and unique quality of trusted news information? Does
22 it help to give the head start that copyright is about
23 to the fresh, intelligent, creative impulse that comes
24 from use that is so needed nowadays? Does it assist
25 in actually claiming damages and objecting to mass

1 infringement, where you have, I think, one could
2 summarize some of the things that were said previously
3 that there are a few actors who are simply too big to
4 infringe, and would this ancillary right change the
5 balance there, and I think it would. Would it help to
6 protect and give protection to an object that can be
7 safeguarded against unfair competition from third
8 party aggregators? Yes, it could.

9 Finally, would it be compatible to create
10 such a publisher related ancillary right with the
11 rights of the author? Could there be a fair reward
12 for authors side by side? And I think, again, you
13 have the answer in the sound recordings' creation of
14 copyright, and so I would urge you to study this but
15 not simply look at the news article from the 1970s and
16 say Feist said no. Today's articles are completely
17 different and are worth protecting. Thank you.

18 MS. KERN: Thank you very much. Ms.
19 Sternburg?

20 MS. STERNBURG: Thanks, Melinda. To go back
21 to your question of is there a version of ancillary
22 copyright that would be constitutional, I agree with
23 John and Jonathan that no, I don't think it could be
24 under the First Amendment and all the Supreme Court
25 precedent about traditional contours and about 107,

1 102(b), ideas, facts, so many limitations on the scope
2 of copyright that are constitutional that I think
3 would prevent there from being a version of ancillary
4 copyright that could possibly be constitutional.

5 Thank you.

6 MS. KERN: Thank you. Mr. Band, did you
7 have a response, or did you just -- okay. Thank you.
8 So thank you so much for your responses, and I will
9 turn it back over to Chris Weston.

10 MR. WESTON: Thanks, Melinda. So I wanted
11 to -- something that John Bergmayer mentioned that we
12 maybe have not paid much attention to was the idea-
13 expression dichotomy, and I was thinking about some of
14 the examples that Professor Ginsburg provided of
15 multiple headlines for the same event but that were
16 dramatically different in expression, and I was just
17 wondering what your reaction to that example was in
18 terms of considering whether or not headlines should
19 properly be copyrightable regardless of length. Carlo
20 had his hand up first.

21 MR. LAVIZZARI: Yeah, just as I mentioned
22 earlier in that Chancery Division case of Meltwater,
23 which is a media monitoring organization operating
24 globally and having been sued successfully globally by
25 many newspaper publishers, it was revealed that there

1 very often are, in fact, competing headlines crafted
2 by different authors from the authors of the articles,
3 so you can look at that case decided in 2010 where
4 Meltwater was found liable and that absolutely these
5 headlines are worth protecting, as sometimes are
6 creative titles of books.

7 I would also like to point you to the
8 interesting debate that took place at the Charles
9 Clark lecture in 2017 between Justice Leval and Jon
10 Baumgarten where they discussed, in fact, the Google
11 Books case and the first instance case in the district
12 court as well as the case that Justice Leval was
13 ruling on, and he did, in fact, note that as part of
14 the record of that case, the snippets that Google
15 shows exclude short works. They exclude cookbooks,
16 poems, and other type of look up information from the
17 snippets, so that was not part of that ruling
18 whatsoever even though that case is a mass
19 digitization case, not a mass dissemination case.

20 But it's worth reading into the U.S.
21 Copyright Office that that ruling is no support for
22 not protecting short works. Quite the contrary. The
23 Judge in that discussion implicitly found that the
24 harm caused to short works and short copyrightable
25 phrases is actually greater than for longer works.

1 Thank you.

2 MR. WESTON: Thanks. John?

3 MR. BERGMAYER: Yeah, I just want to make
4 sure that we're distinguishing, I think, two very
5 distinct legal concepts when we're talking about
6 headlines because there's copyrightability and then
7 there's fair use, and, you know, the copyrightability
8 headline question is just similar to what we said
9 before about short phrases. It's like shorter phrases
10 are simply less likely to be original. You know, I
11 agree it is possible in language to convey the same
12 underlying factual information sometimes with
13 different words. That's one question.

14 Then the second question is just fair use.
15 It is very possible to maintain that all things being
16 equal, because they're headlines, because you're
17 linking to something, there's all sorts of reasons to,
18 you know, posit that just regardless of where you come
19 down on copyrightability that the quotation of
20 headlines specifically, not short phrases in the
21 abstract but specifically headlines in this context is
22 much more likely to be found a fair use even if you
23 concede on copyrightability.

24 MR. WESTON: Thanks. Jonathan? You're
25 muted.

1 MR. BAND: Sorry. I decided I knew I needed
2 to do something, so I lowered my hand, but I didn't
3 remember that I also needed to unmute. Too many
4 things at the same time. But the one point I wanted
5 to make to add to what John was saying is that to the
6 extent, you know, the great harm that rightsholders
7 are alleging that is caused by the aggregators is that
8 people are satisfied by seeing the headline and don't
9 click through, right? They want to be found, but they
10 don't want the person, you know, the reader, to stop
11 at the headline and not go further.

12 And I would just submit that if a person is
13 satisfied by the headline, that obviously indicates
14 that the person only wanted the facts, wasn't
15 interested in the expression, certainly not in the
16 expression in the underlying article, and also not the
17 expression that may exist, if any, in the headline.
18 They simply wanted to know, what was the score of the
19 Wizards game last night? You know, they simply want
20 to know, you know, who, you know, who allegedly won an
21 election. They're not interested in anything else
22 because, if they're satisfied by the headline and
23 don't click through, that's all they want, and that
24 seems to me to indicate -- it suggests that certainly
25 that it would be a fair use, right, in that case?

1 If the person is satisfied by simply seeing
2 the Wizards, you know, all they wanted to know is not
3 even -- they didn't care about the score. They simply
4 wanted to know did the Wizards win last night and
5 that's all they need, right? And they're not going to
6 click through. Then, clearly, their purposes simply
7 is factual, but even beyond that, I mean, that really
8 does indicate the fact that the audience can be
9 satisfied by purely factual information suggests that
10 in the analysis that at least in that particular use
11 that it is a merger.

12 MR. WESTON: Thanks. Eric?

13 MR. SCHWARTZ: Yeah, so there's two parts to
14 the question, Chris, I think. You know, one is the
15 predicate question of whether or not there's copyright
16 protectability and then to some of the others who have
17 answered this is the question of fair use. I think,
18 to Jonathan's point that he was just making on click
19 throughs to answer the second point first, the fact
20 that 65 percent of those who go to Google News don't
21 click back to the original source is an indication on
22 a fair use analysis that there's a substitutional use
23 by Google News.

24 To the first question, first of all, it's
25 the broad strokes in some of the filings that somehow

1 news is not copyright protectable, you know, digging
2 deeper into the question of whether a particular
3 headline may be. Again, as happened in the cases that
4 have looked at with short phrases, it's a question of
5 originality in a short phrase and some may rise to the
6 level of originality and some may not, but the bigger
7 problem, of course, is it's not just headlines that
8 are taken, it's entire photographs, so it's again
9 misrepresenting what the problem is from the point of
10 view of the creators, the authors and publishers.
11 It's the taking of the headline plus the lede plus an
12 entire photograph, which certainly has copyrightable
13 expression, and incorporating that in a cut-and-paste
14 way into the aggregator's site.

15 MR. WESTON: Thank you. Ali?

16 MS. STERNBURG: I would just note that the
17 Copyright Office got it right in the NOI where it said
18 that most fundamentally, facts and ideas are not
19 copyrightable, nor are titles and short phrases,
20 including headlines. I think it's important to --
21 yeah, I agree that they should not -- that they're not
22 protectable by copyright and that you don't even need
23 to get to fair use, but there's fair use analysis
24 there as well.

25 I was going to make another point, but I

1 just lost my train of thought. So, yeah, I guess I
2 would just say that the Office -- another point -- I
3 might make it later, but, yeah, I agree the Office is
4 -- oh, so just generally in fair use, I think it's
5 important that the analysis is flexible. We don't
6 want to have to say that a certain amount of words or
7 characters or something is some kind of pseudo-law
8 thing where people -- so, yeah, I think it's important
9 that that remains flexible, but you don't even need to
10 get to fair use because it's not protectable by
11 copyright, as the Office correctly noted in the NOI.

12 MR. WESTON: Thank you. I'm going to move
13 to Andrew now to ask what is probably the last
14 question.

15 MR. FOGLIA: Thanks. Because we are
16 approaching the end of the panel, I want to ask
17 whether there are other rights, whether of users or
18 authors or platforms or treaty obligations, that we've
19 not yet discussed that you would like to raise before
20 we finish the panel? And I'll start with Edward.

21 MR. HASBROUCK: Thank you. I realize it's
22 probably, you know, out of scope, but given the
23 invitation, we would reiterate our belief that there
24 is a continued need for moral rights legislation. I
25 earlier alluded to the need for legislation to

1 implement Berne 10(3).

2 In addition, building on some of the
3 comments in the earlier panels, the biggest barrier --
4 barriers to enforcing our rights are often the
5 registration requirements. And I find it particularly
6 -- whether you want to call it ironic or call it
7 hypocritical, that those who are saying, well, this
8 isn't a copyright problem, this is an enforcement
9 problem are the same ones who want to raise the
10 barriers of registration, which currently are (a) a
11 prohibited formality and a Berne violation and (b) a
12 barrier to enforcement of our rights, even higher.
13 So, if you want to say this is an enforcement problem,
14 there remains a need to reform the registration
15 system.

16 It's our position that registration should
17 be eliminated, but even without doing that, while we
18 appreciate very much the modest reform that was made
19 in implementing group registration for multiple
20 articles published online, that still doesn't come
21 close to addressing the bigger problem of the
22 effective impossibility of registering dynamic web
23 content, which remains essentially a flat bar to
24 meaningful copyright protection. So, if you're going
25 to go down the path of, well, either some of this is

1 outside the scope of the Copyright Office or this is
2 an enforcement problem, the place where you can really
3 do something within the Office is to reform the
4 procedures for registration of web content. Thank you
5 very much.

6 MR. WESTON: Thank you. Jonathan?

7 MR. BAND: I remembered to perform the right
8 function. So just in response to Ed's point, it's not
9 a -- registration is not a Berne violation because it
10 only applies to U.S. citizens.

11 With respect to the question you asked,
12 Andrew, rightsholders have plenty of causes of action
13 in addition to copyright that they could use right now
14 in addition to Section 1201. If they use
15 technological protections, you know, there's the
16 Computer Fraud and Abuse Act, there's trespass to
17 chattel, so Computer Fraud and Abuse is both at the
18 federal level, but then every state just about, I
19 believe, has its own version of a Computer Fraud and
20 Abuse Act which prohibits unauthorized access to
21 information and, again, trespass to chattel. So there
22 are plenty of causes of action that could be used
23 right now, but they're not being used, and so, you
24 know, we've talked about why, you know, the
25 rightsholders say they're not being used because, you

1 know, a gun is being held to their head and there's a
2 Hobson's choice.

3 I would suggest that perhaps if, you know,
4 the right entity did the deep economic analysis, the
5 conclusion is that the value flow is entirely in the
6 direction of the rightsholders and that they benefit
7 so much more, you know, from being included in Google
8 News than not being included in Google News that --
9 you know, so that's why. I mean, they just simply
10 would make an obvious economic choice that this is --
11 that they get a huge benefit from it and that having a
12 must carry -- having a, you know, additional payment
13 would simply -- certainly, for the big guys, would
14 just be, you know, additional gravy.

15 MR. FOGLIA: Thank you. And everyone else,
16 if you can please answer the question and fold in any
17 closing statement you want to offer because we're
18 going to be transitioning to closing statements.
19 Thanks. Carlo?

20 MR. LAVIZZARI: Yes. So I have three points
21 that might be interesting for the Copyright Office to
22 consider. The first one is one that builds around
23 what Jonathan just said. When I have to console
24 clients that their works have been copied, I say,
25 "what's worse than being copied?" -- "Not being

1 copied." It seems to me that that is pretty much what
2 Jonathan said.

3 And it looks to me -- that brings me to my
4 second point, that perhaps the principles around
5 standard essential patents could be interesting where
6 you have large companies doing a holdout, effectively
7 refusing to accept the license. It seems that large
8 news aggregators are effectively doing that. It's a
9 holdout. They could, but they just choose not to.

10 The third and last item is linked to the
11 Berne Convention, but, also, I like in particular the
12 wording of the European Copyright Directive, Article
13 5-3(c). I'm going to read it. It won't take long.

14 It's an exception, but you will see that it
15 holds some interesting comebacks for rightsholders.
16 So it is allowed "to make reproductions by the press,
17 communication to the public or making available of
18 published articles on current economic, political, or
19 religious topics or of broadcast or other subject
20 matter of the same character, in cases where such use
21 is not expressly reserved, and as long as the source,
22 the author is indicated or the use of the works in
23 connection with the reporting of current events, to
24 the extent justified for the informatory purpose as
25 long as the source, including the author's name, is

1 indicated, unless this turns out to be impossible."

2 It seems to me to the extent that these
3 platforms are acting as aggregators, why aren't they
4 simply considered -- I know they fight this status,
5 other organs of the press, in which case they should
6 be held to the same standard? So, to the extent that
7 they curate content, I don't really see why these
8 rules shouldn't apply. They can also be found in
9 Article 10(2) and (3) of the Berne Convention, so I
10 just quoted here the European Copyright Directive, but
11 there is an international standard to the same effect.

12 My last point is linked to the old Times v.
13 Tasini case. In that case where it was about who owns
14 digital rights, a U.S. court eventually refused to
15 grant an injunction to Tasini author against Times
16 saying that it would be a disproportionate remedy but
17 that there would be compensation, and I do wonder if
18 these principles applying to injunctive relief in the
19 U.S. may also in some way contribute to the balance of
20 finding a higher level of copyright protection in the
21 U.S.

22 MR. FOGLIA: Thanks. Eric?

23 MR. SCHWARTZ: So, as just closing remarks,
24 just want to say to Chris, Andrew, Melinda and
25 everyone at the Copyright Office thank you very much,

1 first of all, for undertaking this study. To repeat
2 something that's, you know, sort of a theme of mine in
3 this panel then, that from the News Media Alliance's
4 point of view, we do think it would be very helpful to
5 restate and clarify the scope of existing rights and
6 protection and the nature of fair use in this
7 particular instance.

8 Second, that we are facing primarily, as
9 I've said, an enforcement problem. To sort of build
10 on something Edward just raised to this last question,
11 we did make suggestions about improving internal
12 Copyright Office practices with regard to the
13 registration of dynamic websites, and we would look
14 forward to working with the Copyright Office on ways
15 to do this. I can speak from personal experience
16 having made the first registration for a website, I
17 don't know, 15 or 20 years ago, whenever it was, and
18 those practices haven't changed all that much, but,
19 obviously, the nature of websites has.

20 Perhaps a pre registration type system of a
21 paper only initially followed by a subsequent deposit
22 copy, something that -- something has to be better
23 than the current system, and it is important if
24 enforcement is the theme of this panel for my point of
25 view, it's certainly important to have an effective

1 and easy registration system both for standing to sue
2 and for effective remedies in Section 412, statutory
3 damages and attorneys' fees. Thank you.

4 MR. FOGLIA: Ali?

5 MS. STERNBURG: Yes. Thanks again for the
6 opportunity to participate in this. Just to kind of
7 reiterate some of the points that I made throughout, I
8 think there are a lot of copyright and copyright
9 adjacent and some non-copyright reasons why additional
10 press publisher rights are essentially an ancillary
11 copyright would be really problematic under U.S. law
12 and in international obligations.

13 Just to raise one more element of U.S.
14 copyright law that hasn't really been mentioned a lot
15 but was mentioned in the Office's NOI is the merger
16 doctrine. We talked a bit about idea-expression, but
17 just to quote from the Office's NOI itself, the merger
18 doctrine bars protection - "where there are only a
19 few, limited ways of expressing an idea, the merger
20 doctrine bars protection for the expression in order
21 to avoid giving a backdoor monopoly to the idea
22 itself," so I just mention that as yet another reason
23 under U.S. copyright law that the scope of
24 protectability and other limitations and exceptions
25 like fair use, just one more reason why there are

1 concerns on behalf of industry and the public
2 interest. Thanks again.

3 MR. FOGLIA: Thanks. Jonathan?

4 MR. BAND: Thanks. So two quick points.
5 One is that as the Copyright Office looks at this
6 issue, it really needs to dig into the history and
7 really understand how the Internet generally, not news
8 aggregation specifically, but the Internet generally,
9 has completely eviscerated the historic business model
10 of newspapers in general and local newspapers in
11 particular and how it's the Internet that has, you
12 know, the Internet writ large has basically eliminated
13 the local newspaper's monopoly over advertising, and
14 that is the root cause of the crisis that is facing
15 local newspapers now.

16 And so, you know, the Office really needs to
17 focus on that. To the extent that it's, you know,
18 there's this, you know, narrative that now we're
19 hearing about how the news aggregators somehow are
20 siphoning off traffic and somehow benefitting even
21 though that's kind of hard to see exactly how they
22 benefit, but, you know, to the extent that they do
23 benefit by people simply stopping at Google News,
24 which has no ads, but, you know, and the argument that
25 somehow there's a substitution effect, again, the

1 Office really needs to look deep, and I think the
2 ultimate answer is going to be there will be no
3 conclusive evidence that there is a meaningful
4 substitution effect of the people.

5 There's no way -- you know, a person who
6 simply again wants to know what the score of the
7 Wizards game was last night, to say somehow that if
8 they had gone to the Washington Post's page that they
9 then would have what? Read the article? Spent more
10 time? Clicked on ads? I mean, it's entirely
11 speculative, especially if, again, most -- the people
12 who are stopping at the headline who simply get the
13 fact that they want, they're not going to be clicking
14 on anything, and

15 MR. FOGLIA: Jonathan, we're three minutes
16 over, so if you could conclude.

17 MR. BAND: Right. So I think it's just, you
18 know, there really needs to be digging into the
19 substitution effect issue and not simply accepting it
20 at face value.

21 MR. FOGLIA: Thanks. And sorry to cut you
22 off. John?

23 MR. BERGMAYER: News is a public good.
24 Public Knowledge agrees that there's a challenge
25 particularly with local news, and we think that a

1 vigorous public policy response from the government is
2 warranted. However, putting the constitutional
3 arguments, I've said enough aside, I think that a
4 property right-based approach is simply the wrong
5 approach. It is a square peg in a round hole. I
6 don't think it would work, and it would have many
7 unintended consequences.

8 We are not just saying "no" to everything.
9 Our comments do have -- you know, we do think they're
10 outside the jurisdiction of this Office. Other
11 solutions, and I think it's probably relevant to some
12 of the people here, our policy solution does involve
13 vigorous antitrust enforcement against some of the
14 panelists who are here today, so, you know, I think
15 you can sort of recognize that there is a problem but
16 just profoundly disagree on the means to address the
17 problem, and I would hope that everyone who has
18 participated today, you know, can understand, you
19 know, this is a good faith argument. You know, I
20 respect a lot of the arguments on the other side, and
21 I would hope that, you know, others give the same
22 courtesy to us. Thank you.

23 MR. FOGLIA: Thanks. And I see Edward and
24 Ali have their hands up. We are five minutes over, so
25 I will ask each of you to keep it to 30 seconds if

1 possible, and I'll start with Ali since she had her
2 hand up first.

3 MS. STERNBURG: Thank you. I just wanted to
4 raise one more item and reiterate one thing that I and
5 several other panelists have said throughout today.
6 One thing I didn't really talk about as much, but
7 there's a lot of U.S. copyright precedent around fair
8 use, thumbnail photos, snippets in search engines, so
9 there's a lot of fair use precedent in addition to a
10 lot of copyright protections, scope reasons, but just
11 to reiterate the final point is that this is the
12 Copyright Office, and a lot of what's been discussed,
13 even as John Bergmayer just mentioned, a lot of what's
14 been discussed has been outside of the scope of
15 copyright and more in antitrust and competition and
16 other areas of law that I don't think are within the
17 scope of what Congress asked and what this study is
18 intended to do, so I would encourage staying on topic
19 to copyright. Thank you.

20 MR. FOGLIA: Thanks. Edward?

21 MR. HASBROUCK: More than anything else, the
22 future of journalists depends on whether -- journalism
23 -- depends on whether journalists can continue to make
24 a living as journalists and continue to practice that
25 profession, so I hope that you will center your

1 concerns going forward on the rights, the livelihoods,
2 the business models of those journalists and how to
3 make sure that they remain viable. Thank you.

4 MR. FOGLIA: Thanks. Melinda?

5 MS. KERN: All right. Well, thank you,
6 everyone. That concludes our third and final panel
7 for the Ancillary Copyright Protections for Publishers
8 roundtable. If all the panelists on this panel could
9 just please make sure their microphones are muted and
10 turn their cameras off, we will resume our audience
11 participation session at 3:15 p.m. Eastern Standard
12 Time, so that's in about eight minutes, so thank you
13 so much, and we will see you guys back here at 3:15.

14 (Whereupon, a brief recess was taken.)

15 MR. WESTON: Okay. Welcome back, everybody.
16 It's 3:15, and as announced, we have a open mike
17 session for people who signed up in order to give
18 brief oral comments on the topic at hand, copyright
19 protections for press publishers, so I believe we have
20 two people who have signed up. The first is Jay Leon
21 Peace, Jr., and so I would ask that Mr. Peace be
22 unmuted and he can go ahead and make his comment.

23 MR. PEACE: I apologize. I had a urgent
24 call on the other line there. Yes, I can be heard?

25 MR. WESTON: Yes, we can hear you.

1 MR. PEACE: Okay. Thank you. Just very
2 short, I guess, I'll make it much shorter, is that my
3 request is that the fees for registration, if there's
4 any way to have them lowered for those of us who are
5 independent, freelance, or say non-traditional
6 providers to facilitate our getting access from, I
7 guess, in the -- access to protection for our content,
8 if there's any way to lower those fees. The larger
9 institutions and people that are more established and
10 they have more money aren't as impacted as those of us
11 that do not.

12 MR. WESTON: Okay. Thank you very much.

13 MR. PEACE: Thank you. Thank you.

14 MR. WESTON: Our next speaker or next
15 commenter is Michelle Shocked, and you can go ahead
16 whenever you're ready.

17 (No response.)

18 MR. WESTON: You can go ahead. You're muted
19 right now.

20 MS. SHOCKED: Thank you for following
21 through on Senator Tillis's request to conduct this
22 study and for the different points of view that were
23 represented, but if there's anything I can do to
24 amplify the point of view represented by Edward
25 Hasbrouck and the public commenter that just spoke,

1 we're independent creators, and I don't know how often
2 our voices are represented or heard in these
3 conversations, but this is an opportunity to let you
4 know that we're really struggling out here, and we're
5 relying on the Copyright Office to find a remedy given
6 all of the factors that are destroying our
7 livelihoods. Thank you.

8 MR. WESTON: Thank you very much. So we
9 have no more people who signed up to comment, so I
10 want to close this roundtable by saying thank you to
11 Andrew and Melinda, who joined me in asking questions.
12 Thank you to Steve and Alicia, who helped set all this
13 up and helped manage the Zoom calls. And finally and
14 most of all, thank you to all the panelists, who took
15 time out of their schedule to join us, and thank you
16 to everybody who has and who will submit written
17 comments. With -- I don't believe there's anything
18 else, so I will call this roundtable to a close and
19 wish everyone a good afternoon.

20 (Whereupon, at 3:20 p.m., the roundtable in
21 the above entitled matter adjourned.)

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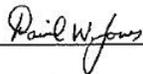
CASE TITLE: Publishers' Protections Study Roundtable

HEARING DATE: December 9, 2021

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I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the Library of Congress.

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David Jones
Official Reporter
Heritage Reporting Corporation
Suite 206
1220 L Street, N.W.
Washington, D.C. 20005-4018

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