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 KUFFERSCHMID, Copyright Alliance
KATE SHEERIN, Google
DANIEL TAKASH, Niskanen Center
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
NZENGA 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
MR. FOGLIA: Hello, everyone, and thank you for joining us at the public roundtables for the U.S. Copyright Office's Publishers' Protection Study. You will now hear opening remarks from the Register of Copyrights and Director of the U.S. Copyright Office, Shira Perlmutter.

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

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

So some of the questions we'll explore include the scope of existing copyright protection for news publications, the economic effects of online aggregation of news content, whether additional protections such as those adopted in the EU would be
appropriate here and, if so, what form they should
take, and how they would interact with existing
constitutional or other rights held by other parties
with copyright exceptions and limitations and with
international treaty obligations.

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

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

MR. WESTON: Thank you, Shira.

So a few instructions before we begin. Just
to review the format, Copyright Office staff will be
posing questions for the panelists to answer.
Panelists should use Zoom's "Raise Hand" feature to
indicate that they would like to respond to a
question. We will try to let panelists speak in the
order that they raise their hands. Panelists' remarks
are being transcribed by a court reporter, and they
will be posted on the Copyright Office website, along with a video of the event.

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

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

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

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

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

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

    MR. WESTON: And then Danielle?

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

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


    MR. WESTON: And Keith?

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

    FEMALE VOICE: Recording in progress.

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

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

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

    MR. WESTON: Okay. Well, thank you,
everybody. I'm going to start with a question. A lot of the comments talked about fair use, and I'm going to ask a general question to everyone. To what extent does fair use permit news aggregation of press publisher content, such as headlines or short snippets of an article? Danielle, and then Jane.

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

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

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

MS. GINSBURG: There's a predicate question, which is the extent to which the content is protected
in the first place before you get to fair use, so I hope you will address that as well, but since this question is about fair use, of course, it's extremely fact intensive, but I think that, in many instances, the argument that news aggregation is transformative is rather weak because it's simply repackaging the news and delivering it to the public for the same purpose.

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

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

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

MR. WESTON: Okay. Mr. Kupferschmid?

MR. KUPFERSCHMID: Yeah, usually people go
by first name, but it's okay. So, look, I just want
to reiterate and support what Jane said. I mean, as
we all know, fair use is determined on a case by case
basis that's fact intensive, and so I think it's
important to keep that in mind.

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

MR. WESTON: Thank you. Wayne?

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

And I'm an economist, so I'm looking at this
from an economic framework, and I think the bigger
question is, is there a decoupling that's going on,
and is fair use the proper tool to address that kind
of question?
MR. WESTON: Okay, thank you. I believe that's everyone who had their hand up, and I just, as a logistical matter, if people could take their hands down once they've answered the question just because otherwise I think that you've raised your hand a second time. Oh, I'm sorry, Jane did raise her hand a second time.

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

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

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

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

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

MR. WESTON: Thank you. Just another
logistical matter. Myself, Andrew Foglia, and Melinda Kern will be taking turns asking questions. So Andrew is next to ask a question.

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

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

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

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

And while I have my hand raised, I just also
want to address some of the questions about transformativeness. I think what we're excluding is the immense public benefit that comes from news aggregation, the access to information, the diversity of news sources that users have access to, and how much news aggregation helps the public in finding information that they care about most. So I just wanted to register that as an additional point.

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

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

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

I would actually agree. I think that the internet has done amazing things for, you know, the aggregation and dissemination of valuable information,
including quality news content.

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

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

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

So that's something that we may get into later, and I can expand on that and give examples, but
I wanted to raise that as being a fundamental part of what we're discussing as well. Thank you.

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

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

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

But I think it's wrong to say that it's a substitute or that individual users are not actually clicking through to the news publisher websites, because they are.
MR. FOGLIA: Thank you. Keith?

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

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

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

But, to get to the original question, as we'll probably talk about that linking aspect a little bit more later, which was about the copyrightability, I was upset about, you know, in going through some of the comments and hearing some of the comments here about the fact that people say, well, news content is not creative, it's not expressive, right? Because that's obviously a significant part of copyrightability, and it's just the facts.
Well, my response to that is, if it's just the facts, then write your own darn story, right? I mean, it is absolutely the people who and the organizations who are taking these stories and pushing them out, aggregating them, clearly are taking them because their writing is expressive and good, there are editorial decisions that are being made. This is valuable storytelling, is what it is. And, otherwise, then don't take that. Just, you know, create your own story. So I'll stop there.

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

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

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

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

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

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

And so what they were looking for was what was in your neighborhood, whether your schools were opening, whether the businesses were closing, so on and so forth, the health information in your neighborhood, so forth. And that became very granular.
and only provided by local news reporters, who were deemed essential employers by CISA and still on the beat, stayed open, and our audiences spiked. It was through the roof.

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

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

So the news industry, the news publishers across our country, are suffering, yet they're providing this valuable content to communities who
rely on it that nobody else will produce. And when it's used and it's aggregated and it contributes to the revenue of those who distribute it, it's protected content. It's copyrightable content.

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

MS. KERN: Thank you. Wayne?

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

But, when digital platforms came along, that link was separated, and between classifieds going to places like eBay or Craigslist or Indeed.com, to retailers wanting to buy more accurate, more profitable digital advertisings that are more
targeted, more beneficial, the traditional market that we're talking about for journalism has fundamentally changed. And that is an economic question, and I think it's better suited, if there are problems in that market, to use the tools of economic policy rather than the tools of copyright to try and look at those problems if there are identifiable market failures in that market.

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

MS. KERN: Thank you. Keith?

MR. KUPFERSCHMID: Thanks, Melinda. So the way the current digital market, digital environment is set up makes it exceedingly difficult for press publishers to continue their important societal endeavors at the level they demand and the public
demands, and I think we've touched upon this already
that the primary reason for this is that online
platforms and news aggregators cull and click news
content without licensing the content from the
publisher, okay?

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

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

So the content created by press publishers
at great cost, at great expense, at great risk is the
lure that attracts users to these platforms and helps
platforms grow exponentially in profit, audience, and
influence. So, in short, press publishers and their
employees put in all the long hours, they take all the
risks, they have all the experience, they spend all
the money, sometimes millions of dollars, to create, facilitate, and deliver timely news content.

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

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

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

So I'll just say one final comment. Look, I think, and I hope everyone on this panel and the other
panels, we can all agree that what the news publishers
do in getting out trusted, reliable information is
essential to our society, okay? And the press
publishers, they're dwindling, you know, over time,
and I know NMA and others can go into more detail
about this. We need to do something to stop the
bleeding, okay? Whatever that is that, you know, we
can figure out later, I guess, but something needs to
be done here. And I'll stop there.

MS. KERN: Thank you. Daniel?

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

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

I think it's particularly important when you
look at one of the trends that's really accelerated
the decline in local news is a large wave of mergers,
acquisitions, and then subsequent layoffs and
consolidation.
So I think, you know, we were talking about market structures not just in terms of aggregators but in terms of advertisers, everything like that, I think it's important to consider the possibility of direct support for such local outlets in a way where the wide proliferation via aggregators would strictly be a positive sum and they don't have to rely on that as a part of their business model because they can rely on some form of direct support.

MS. KERN: Thank you. And Kate?

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

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

Publishers have control of how their content appears in our services. If it was a substitute, one would think the news publishers would decide not to have their content appear. For the most part, they do not decide that. They decide to have their content
appear in our services and other similar services, and I think that there is a benefit there.

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

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

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

I also wanted to mention that we keep referring to "news content," and I think, unless we're specific about what "news content" means, we're all approaching this conversation from a different angle.
So being precise with the language that we're using and that the Office uses in the study when they put it out, I think, is extremely important.

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

MS. COFFEY: Yeah, I just want to

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

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

So, when we have our content scraped, accessed through an HTTP request, we allow Google to come on our site, and then what shows up in Google
search is a myriad of ways that our content is cut and pasted.

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

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

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

Adding insult to injury, when you give your content for AMP -- because that is -- it's a Hobson's choice. You want to be found. So, going back to the original question which I'm responding to, which is we choose to have our content appear. It's not a choice.
I think that's my point. It's not a choice. So it's a false choice. So, when we give our content to AMP, the terms of service are so onerous, meaning Google gets to host it, I could read it to you, but let's just say it gives them the ability to use it in any other way that they would like to.

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

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

We're responsible parties when it comes to using their information. We have these longstanding relationships with our readers where they can trust
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our brand, they love us or they hate us, especially in
the local communities, and we've found success through
the internet.

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

MR. WESTON: Okay, thanks. Keith?

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

It's not like press publishers have been
sitting on their hands and go woe is me. They have
invested heavily in digital transition. They've
developed novel and profitable ways to respond to the
new ways that the public wants to consume news
content. Many of them have explored digital
subscription models and other reader-based sources of
revenue. But, at the end of the day, ad revenue is
still the primary driver of revenue, and that ad revenue is now going mostly to the aggregators and not to the news publishers.

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

MR. WESTON: Thank you. Wayne?

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

You sort of decouple the subscription and ad sides completely, and that means that, I think -- and, you know, as some of the commenters said, the news industry is struggling, and it's trying to find its footing in this new world. And I think the more we can promote finding a better model for -- an economic model, not a copyright model, in terms of how do you address some of these concerns -- but, basically,
we're in a world where the price of information has fallen almost to zero, so any consumer out there has access to more information than they've ever had at any time.

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

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

MR. WESTON: Thank you. Jane is next.

MS. GINSBURG: Since you asked me to respond, I'm not an expert in the business models of the media industries, but I did want to agree with the
basic point that this is at least as much a
competition law question as a copyright question.

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

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

   I also agree that photographs have been a
bit overlooked in this, and photographs unquestionably
being copyrightable works of their own perhaps should
be analyzed differently from headlines and ledes. But
I agree that we should be a little more precise in what we're referring to.

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

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

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

There's an upfront cost that they're able to overcome at least far more easily that smaller outlets may not be able to capitalize. This was discussed in the Senate report that came out earlier this year or late last year. I can't recall which. Which, to that extent, I think there is a competition policy angle to
this certainly, especially with advertisements, things like that. But, at the end of the day, I do believe that if this is something we want to subsidize, though not necessarily protect or restrict access to, it's a fiscal policy question.

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

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

MR. WESTON: Thank you. Kate?

MS. SHEERIN: Hi. So just one quick note on AMP, which Danielle mentioned. I think, just as news publishers have control over if and how their news...
content appears in our services, they also have
decisions about whether they want to use AMP or not.
Many do, but you don't need to use AMP to appear in
our services. So I just wanted to clarify that.

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

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

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

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

MR. WESTON: Yeah.

MS. COFFEY: It's just real quick. It's
numbers, and we don't have expert witnesses here.
We're not in court. So I'm just going to say that
from an advertising -- I just need to be on record,
from an advertising perspective, the findings that we take 90 percent, we actually find that we take closer to 30 percent. The findings that there are 36 percent, I believe you said, or rather, 2 percent of searches on Google, we find that there's 36 percent. So, if we're talking numbers, I just wanted to be on record with that even though we're not going to, obviously, deliberate that here. Thank you.

MR. WESTON: Thanks.

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

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

MR. FOGLIA: Yes.

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

MR. FOGLIA: That's right.

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

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

Our members got -- our member news publishers got letters saying that you could no longer register through representative pages. And so then the question became, what's going to now replace what we used to be able to protect our content by?
Some of the claims that I hear, that we have a paper copy, so that should stand in place so that a dynamic web copy actually is not accurate because, in many cases, you have a lot of web content that not only changes but that's only web content that you don't have a paper article for.

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

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

MR. FOGLIA: Keith, go ahead.

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

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

We have been talking to the Copyright Office for a long, long time about this. There has been -- no -- this is no easy solution, so I don't want to just put this burden on you guys. That system needs to change because, if news publishers and others who
want to register their website content can't do that, they can't get statutory damages, they can't -- because they can't register their works -- and they can't get into a court to enforce their copyrights.

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

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

MR. FOGLIA: Professor Ginsburg?

MS. GINSBURG: I just wanted to add another aspect of concern piling onto why this is a real problem that needs some kind of solution. To the extent that some courts are saying that the work is
what's in the registration and, therefore, if what your claim concerns is not in the registration, then you're out, that's very problematic to the extent that there may well be differences between the dynamic digital version and some print version.

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

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

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

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

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

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

Most short phrases aren't going to be original, which is why the case law, such as it is, rejects protection, not because it's short but because the content claimed is not original. I think it would
be much more helpful to focus on originality rather than word count.

MS. KERN: Thank you. Kate?

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

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

So this is a public use. The public uses headlines and short extracts to find information they need. Extending a copyright in this way would have detrimental impacts. We've talked a lot about the dynamics here, of course, between the news industry and Google, but I think, when we think about this, copyright doesn't necessarily mean a right to payment.
at all. And so, if the question is about giving news publishers control over how their content appears, that already exists on our services today.

MS. KERN: Thank you. Danielle?

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

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

As far as the opting in, going back to that, it's a Hobson's choice. So, in a competitive environment, we would have the ability to work with multiple parties. We believe that would be a healthier marketplace where it would be functional so that we could determine the fate of our content and
how it's used and how it's disseminated and also be
able to have a return on that investment, going to
very good points that were made and will be made later
in the roundtable about our market share and being
able to recoup that from those who are distributing
our content.

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

MS. KERN: Daniel?

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

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

However, I think, should that specific
protection be extended, you would necessarily run into
an interesting dynamic relative to what we're talking
or compared to what we're talking about today, where
you would have competing news publishers reporting on
the same story and potentially -- and even if it turns
out to not be infringing at all -- potentially running into a scenario where they make editorial decisions purely based on concerns about litigation, or litigation should emerge between publishers that would simply prevent the proliferation.

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

MS. KERN: Thank you. And Kate?

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

But I do think we believe we provide tremendous value to the news industry, 24 billion clicks per month for free. We provide services that are useful to the public, useful to the news industry.
And so I think Danielle and I will continue to disagree about these fundamental principles, but I just wanted to point out that I think it's not a Hobson's choice. It's a disagreement about the value exchange.

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

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

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

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

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

MS. KERN: Thank you. Chris?

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

Jane?

MS. GINSBURG: Whether it leads to lawsuits,
I think, turns on the registration issue that we've
been talking about. But I would expect that the clarification of the positive copyright law could improve bargaining, but I don't know how much it could improve bargaining.

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

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

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

I mean, we've seen what's happened in Europe. There's not been an easy resolution to this question. Even the arbitration approach in Australia is problematic. So I think, if you go down that road,
there are going to be problems that ultimately provide
a disservice to consumers and more consumer harm than
benefit.

MR. WESTON: Thanks. Daniel?

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

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

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

MR. WESTON: Thank you. Keith?
MR. KUPFERSCHMID: Yeah, just briefly. I mean, I think it's good that we're talking about potential solutions here. As I said earlier, clearly, something needs to be done. I won't go into any detail in terms of what the best or preferred solution is or anything like that, but just simply saying no, let's keep the status quo is not a solution, is not an answer. Something needs to be done, whether it's copyright, antitrust, I mean, unfair competition. There's a whole bunch of different possibilities here. And I think it's good, and I thank the Copyright Office for holding this roundtable and kind of beginning these discussions because, clearly, we need a solution. We can't keep on going down this path. Otherwise, we'll see ourselves years from now, and we won't be complaining about aggregators taking news publishers' content because there will be no content. So I think it's good that we start talking about solutions, but I know that's predominantly for Panels 2 and 3, so I'll stop there.

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

MR. FOGLIA: Sure. This one may be more targeted to the economists, but I was wondering to what extent the problems we're discussing in the
current economics of news publishing are different for
local news organizations or smaller news organizations
than larger ones. Wayne, I think I saw you.

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

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

MR. FOGLIA: Thanks. Daniel?

MR. TAKASH: Yes, I think one of the issues
which face local publishers or at least you see a
decline in the number of local papers and the rise of
what are called "news deserts" is a large trend
towards financialization, where you have hedge funds
and other largely financial firms acquiring
newspapers, stripping for parts, leading to layoffs.
And I think that's an issue which is entirely separate
from the discussion, certainly deserves its own
scrutiny, but for the purposes of this conversation is
neither here nor there.

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

And then the final point I would make is
that there is a problem -- again, this is part of
national, cultural, consumer preference trends, which
are hard to get around -- of the nationalization of
the news. There are only so many hours in the day.
You know, every minute I spend reading a national
outlet is a minute I do not spend reading my local
paper. So these are issues that are separate from
discussions of copyright and require a more creative
approach than leaning into an intellectual property
exclusivity-based model.

MR. FOGLIA: Thanks. Danielle?

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

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

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

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

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

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

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

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

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

That being said, I think one of the issues
is that if even -- take whatever your preferred
distribution is in order as it relates to revenue per click or whatever or appearance in aggregation, I think it rewards virality, and I think it rewards sensationalizing, you know, eye grabbing, where, you know, it's an old joke, but it's a serious problem that people read the headlines, they don't read the actual content of the stories.

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

So I think we need to lean more on an independent financial support model where people depend less on eye grabbing and more on substantive work that will, maybe not today, you know, maybe not all the time, but eventually inform serious public policy or, at a bare minimum, serve as a deterrent towards corruption in local officials. When local
papers go under, municipal bond ratings go up. So it's not even necessarily a question of people catching the eyes, it's a question of someone actually watching, is a long winded answer to what hopefully at least addresses some of your question.

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

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

MR. FOGLIA: Daniel, and then Melinda.

MR. TAKASH: Yeah. Sorry, I don't want to necessarily give the impression -- first, I would argue that it's the production and the existence of these institutions that matter. Again, it matters as a function of, like, local state policy where it would make sense, you know, just for the sake of their credit rating.
However, if we are concerned about, you know, distribution of the rents going forward, I think a tax on advertising more broadly would be an acceptable solution. I speak only for myself on that matter. So, if the concern is about payment, I think that's a perfectly acceptable solution. But, again, this is something which should be funded, general fund revenue, a further excise tax on alcohol -- whatever it should be, it's the existence and proliferation that matters the most.

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

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

Through the Google News Initiative, we've supported 7,000 news partners, 450,000 journalists, and provided over 300 million in global funding. We are a committed and long term partner of the news industry for over two decades. And so I think I just wanted to reiterate we are committed to this work. We
support high quality journalism. We want a sustainable and healthy news ecosystem going forward.

MR. FOGLIA: Thank you. Melinda?

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

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

MS. KERN: Thank you. And Danielle?

MS. COFFEY: We do receive traffic. However, when the traffic comes through, the problem is that because there's dominance -- and this is being
litigated; I won't get into this -- Google owns the buy side and the sales side of the advertising ecosystem so that, in addition to the arbitrage that has been found and the low take rates that we are finding, which contradict Kate's, it's an inadequate return on what value we're providing to the increased revenue of the platforms that we're not getting in return and is not only hurting our ability to produce quality journalism, but also the anti competitive conduct squeezes out other competitors, so that leads to the Hobson's choice that we've been talking about.

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

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

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

MR. WESTON: Thanks, Melinda. So my
question is the concept of "quality journalism" has
come up a few times in the comments and then in our
conversation today, and I wanted to ask, to what
degree is the preservation or the promotion of quality
journalism, as opposed to other kinds of journalism or
quasi journalism, a concern of copyright law? You
know, does the constitutional command of the progress
of science, does that have anything -- does that have
any implications for the type of works that we want to
courage through copyright law? Danielle?

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

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

Whether you agree with the content that is
created and whether the viewpoints, you believe it to
be factual or not, if there's a fact-checking process
and citation to multiple sources, so on and so forth,
the objective criteria, and Society for Professional
Journalism has a code, a standard Code of Conduct that
all of our news publications adhere to, in addition to
having to their own newsroom standard Code of Conduct
for the creation of news and putting our name on it, we believe that that ensures that it's what we would deem to be quality versus what some are calling "citizen journalism," and that would be where a Facebook poster goes out and takes pictures on their phone.

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

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

MR. WESTON: Thanks. Thanks, Danielle.

Jane, you're next.

MS. GINSBURG: Yeah, I'd like to reply at a slightly higher level of generality with respect to the relationship of copyright to quality creativity,
and I'd like to cite Lord Macaulay, who is often incompletely cited as having said that copyright is exceedingly bad because it is a tax on readers for the benefit of authors. He did say that, but he also said some other things that are at least as important. He said that we must have a supply of good books and the best way to achieve that objective is by liberally remunerating authors.

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

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

And the copyright system is designed to create an ecosystem that will support creativity. Not
all of it will be high quality. Indeed, copyright
eschews making quality judgments, but if you have a
system that as a whole makes it possible to earn a
living by creating works, you will get a lot of works,
and many of them will, in fact, be quite good.

   MR. WESTON: Thanks very much. Wayne?

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

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

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

   MR. FOGLIA: Thanks, Chris. So we've heard
today a number of times that whatever causes of action
news publishers may have, they may not be effective
for competition related reasons. Nonetheless, I'd
like to ask about one more cause of action, and I'm curious to hear whether the panel thinks hot news misappropriation is still a viable cause of action and whether it has any application in this context.

Thanks. Danielle?

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

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

However, that continues to relate back to the ability to withhold our content, and any one publisher who would withhold their content individually would be meaningless. They've tried.
To be able to collectively do that and have an enforcement mechanism to ensure compensation because of that withholding based on the access to the content is something that would result in a successful payment for the value that's being received and the increase of revenue, incremental revenue, due to that value of the content that's being received by the news content creator.

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

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

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

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

MR. FOGLIA: Thanks. Melinda?

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

MS. COFFEY: Only because it was in our comments, I would just reiterate -- well, first, I would reiterate the importance of what we're talking about. I started with that, I'd like to end with that because what we're talking about is something that has an impact on the democratic process and getting information to citizens of our country. So I think it's important, and I think everybody -- I think we all agree on that, which is a good thing. And, again,
thank you for holding this roundtable because it is such an important issue, and we appreciate you taking the time to -- and also would like to thank Senator Tillis in this respect for actually prompting the discussion. His leadership is notable.

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

MR. WESTON: Okay, thanks. And Kate?

MS. SHEERIN: Thank you so much for putting together this panel and thank you for having me. I just wanted to emphasize something that many of us have said today and Andrew also just referenced in his last question. A lot of the discussion today has not been about copyright law or ancillary copyright, it has been about other issues of law, other types of
interventions. And so I think that we should keep
that in mind as we move forward about what this study
is looking at. Are we looking at copyright issues?
What is the scope here? Where are we focused? And
thank you for all the work and thank you for inviting
us to participate.

MR. WESTON: Thank you. Keith?

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

MR. WESTON: Thanks very much. So that
brings Panel 1 to an end, so I will ask Panel 1
panelists to mute yourself and turn off your cameras,
and then we will move you to being audience members.
And then we have a 10 minute break coming up, starting
when I'm done talking, and then Panel 2 will start at
10:45. If, during that break, if Panel 2 panelists could log on for audio and video checks. Thank you very much.

(Whereupon, a brief recess was taken.)

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

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

I'm going to go through the instructions just as we did at the top of last panel. Copyright Office staff will be posing questions for the panelists to answer. Panelists should use Zoom's "Raise Hand" feature to indicate that they would like to respond to a question. We will try to let panelists speak in the order they raise their hands. The first time you speak, please state your name and affiliation, if any. Panelists' remarks are being transcribed by a court reporter, and they will be posted on the Copyright Office website, along with a
video of the event. We ask that panelists keep their
remarks on any one question to two minutes to allow
other panelists time to speak. We would also ask that
while you are not speaking you keep your microphone
muted.

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

With that, I want to thank our panelists and
our audience members for joining us today. So I'm
going to start with two questions actually. In
response to the Office's Notice of Inquiry on this
topic, we received a number of comments. One thing
the comments seemed to agree on was the troubling
state of press publishing in terms of revenue lost,
jobs cut, and papers closed. How much of publishers'
current woes, if any, is attributable to third party
use of news content?
And relatedly, a recurring theme in the comments and in the first panel was that additional copyright protections would not be sufficient to make press publishers' protections effective or to reverse their fortunes. Would additional protections be necessary? Thanks. And I will start with Annemarie.

Annemarie, I'm sorry, you're muted.

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

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

MR. FOGLIA: Thanks, Annemarie. Mr. Jani?

Sorry if I'm pronouncing your name wrong.

MR. JANI: That's okay. Let's keep with

first names if you're good with this. So first name

is pronounced Ole. Yeah, my name is Ole Jani. Just
to briefly introduce myself, I'm a lawyer and partner

at CMS, based in Berlin, Germany, and today I'm

speaking on behalf of Axel Springer, which is an

international technology and media company based in

Berlin but active in more than 40 countries, including

in the U.S., in the U.S. notably through the recent

acquisition of Politico, which some of you might know.

Now, to the question whether it is desirable
to have additional protection in place, I believe the

answer really to this question must clearly be yes,

and the answer is in the first panel today because, as

we've seen, this discussion has made it quite clear

that press publications are being used by digital

services, such as aggregators, in a way they have not

been used in the pre digital days, notably by the use

of what we tend to call snippets, headlines, et

cetera. So these new forms of use have given press

publications and these small extracts new value.

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

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

MR. FOGLIA: Professor Silbey?

MS. SILBEY: Yeah, hi, everyone. Thank you for convening this roundtable. I'm very glad to be here. I'll just be very brief. As a copyright scholar and an IP scholar, I think we should take a page from -- we should learn from history and look at
how expansion or strengthening of IP rights has helped
or hurt certain industries over time and particularly
the public interest, which is what copyright is for.

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

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

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

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

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

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

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

MR. FOGLIA: Joshua?

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

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

I mean, we even have an esteemed antitrust
expert here today in Hal, and, you know, the question
becomes, when you get at new rights, are we dealing
with an intellectual property issue, a copyright
issue, or are we dealing with what is largely an
antitrust issue, an economic issue, and I think we
need to take that step, you know, back and ask, and I know you didn't ask for this study, but, like, is this the right forum for this? Should it be at the FTC? I think there's real conversations that need to be had in terms of expertise.

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

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

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

MR. FOGLIA: Thanks. Elizabeth?

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

So there are a lot of folks that you've heard from on the first panel and on this one, and I'm sure on the one to come, who give a variety of different perspectives on why the copyright and competition discussions are unwise. But I'd like to
just clarify a few things about the Facebook platform because I think I've seen some misconceptions. I can only speak for one platform, but I think I would also take this moment to point out how varied and diverse the universe is.

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

The second -- and I can refer you all for more information to the submission that we made -- we are a free platform, and we provide free tools to publishers. We drive a tremendous amount of value to them. That's why they're so many of our important users. We, notably, as kind of has been discussed by various folks here, we drive traffic, we expand reach,
and we supply significant engagement with new as well as established readers.

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

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

MR. FOGLIA: Nzengha?

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

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

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

But do we want to overhaul copyright law, as I think it was Jessica Silbey said, do we want to do that for one industry? Is that really necessary? So now we go into, is it desired? Yeah. Is it necessary? I'm not so sure. If we want to do this big overhaul, do we need to study it? Yes. I think the Copyright Office is clear on that, saying there's not enough information and we want to go and do a study and decide, at least put out some information so the public is aware, which is, you know, crucial and to the soul of our country as a democratic process. So I would say yes.
And the other piece of it is, and it was discussed a lot on the first segment, whether or not copyright law, right, needs to be expanded in such a dramatic way, or can we find remedies, you know, in antitrust? Is this more an economic issue? Is this more about competition? And we know, particularly following or in the midst of the pandemic, the tech industry has gone through the roof, and that's affected how we receive or desire to receive news.

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

MR. FOGLIA: Thanks. Peter?

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

On the question of whether it's necessary or
desirable, it seems to me there's a predicate

tion, which is the extent to which it is

permissible in view of the current structure of

copyright and the U.S. Constitution.

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

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

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

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

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

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

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

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

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

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

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

It is built off of a similar concept as to Section 1201(a) of the DMCA. It's an access-based statute. It doesn't get into what can someone do with
content that they have lawful access to. It doesn't
get into fair use, which, as we all know, doesn't
apply to the DMCA access right. It's a very narrowly
tailed statute to address a very specific problem.

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

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

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

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

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

I want to talk quickly about the private harms to newspapers and the social harms. In the private harms, there's two things that newspapers are complaining about. The first is that when Google scrapes newspaper content and offers detailed snippets, they can monetize this content without paying the content creators. They call this the reframing and curation, and the reframing and the
curation decreases the likelihood of a user clicking on the article and thereby deprives the news publisher of those clicks while at the same time enriching the dominant platforms. What we're complaining about is that they do not, users do not click on the links. This has nothing to do with the links. It's the headlines and summaries and snippets that are being taken and pictures. Now the reframing and curation also decreases the need for the user to subscribe to the newspaper in the first place. So those are the private harms.

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

Now, as newspaper ad revenue was siphoned off to the dominant platforms over the last decade, we saw employment among newspapers fall from 71,000 in 2008 to 31,000 in 2020. That's according to Pew Research. So, to answer your question, Andrew -- that was a long preamble -- intervention is desirable. It's absolutely necessary. And the solution here is what's embodied in the JCPA. It's not to change the
copyright laws. It's to permit newspapers to bargain collectively, and if that bargain doesn't result in a voluntary arrangement, there will be some sort of a structural bargain or a backstop to make sure that payment is achieved.

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

I just want to say one last thing and I'll surrender the mic, I promise, but Kate Sheerin of Google said something really important on that first panel that I just want to amplify. She says that Google wants to collaborate with news publishers, but they want to negotiate these deals individually, and, of course, that serves Google's interests. It serves Facebook's interests. But, to me, it was an admission of the value creation by the news publishers. But given that power imbalance, these individual negotiations will ensure that the payment will never be anywhere near the marginal revenue product at the competitive levels of the newspaper, and the reason
why is that, you know, Google doesn't need the Fort
Worth Star Telegram, but the Star Telegram needs
Google. So a long winded way of saying that
intervention is absolutely necessary, and it's going
to take the form of a solution to a competition
problem, not a copyright problem.

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

MS. SILBEY: Hi, thanks. I'd just say very
briefly that, you know, the question about what is
desirable, I mean, of course, news journalism needs to
be funded, and everyone's in agreement with that. The
question is how the funding happens. And, I mean, if
you think -- I mean, one of the things we're talking
about is that the richest among us, whether it's the
individuals or the corporations, need to pay their
fair share to support the public interest in accurate
and diversified news at the local and national level.
The question of whether copyright solves that problem
feels deeply myopic. It's like the law of the
instrument. You know, we're holding a hammer with a
whole lot of people here and we think copyright is the
nail.
And so I'm very supportive of the idea of a competition -- that this is a problem of competition. It's also a question of funding what's in the public interest. And it's just -- I know it's a scary idea to think that, you know, we have to sort of engage in some form of distributive justice modeling here, but the funds for what we need in society, whether it's vaccine or education or infrastructure, rarely comes from intellectual property effectively, effectively.

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

So I guess I would just -- I think, if we think about how the copyright system works to diversify the expression, that originality standard is so low on purpose and for a constitutional reason,
anyone can be a copyright author. That doesn't mean that all copyright authors make money or get paid. It's just, that's an intolerable system actually. And then it just begs the question about what's copyrightable in the first place. And so I guess I'm just in full throated agreement that this is a law of the instrument problem, and copyright is not the nail.

MR. FOGLIA: Thank you. Ole?

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

And we have a situation where certain businesses are taking a free ride on other people's assets, and this is clear. The news aggregators are using press publications, private press publications
to fuel their own engines and to create the
environment, which they are then able to monetize.
This is not a bad thing if they use third party
content. This is the essence of copyright law, that
there are producers and there are distributors, but it
has to be balanced and this balance is only guaranteed
through an effective and enforceable legal system.
And our impression is and our experience is that there
is a lack of clarity in terms of what is protected and
that there may be even a lack of protection. And we
have made this experience in Europe and we have found
answers to this question in Europe.

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

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

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

MR. FOGLIA: Thank you. Joshua?

MR. LAMEL: Thank you. So Ole and I agree. I want to thank him for actually just making the point he made because he just said what Re:Create's members have been arguing for a while, which is the JCPA inherently has to have some form of a copyright. And Re:Create's members have been negotiating on the JCPA in good faith for a while, and one of the issues we brought up is that the JCPA, you're saying it doesn't
invoke or force some sort of new copyright or copyright like provision. We think it's kind of not usable without that.

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

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

But, in the United States, like, Hal's an economist, in the United States, mandatory arbitration would mean compelled speech, and the government cannot compel a website to carry other parties' content in
the United States. We're not France, where you can do that, right? That's what happened in France. We're not Germany, right? We're not Australia. It is fundamentally a violation of the First Amendment to compel a website to carry another website's speech. And so, while it might be a good or strong economic idea, right, it doesn't solve the constitutional problem. Matter of fact, I think it would be on its face unconstitutional because it's compelled speech.

MR. FOGLIA: Thanks. Annemarie?

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

To Hal's point and also to Ole's points about sort of free riding and value exchanges, Google drives substantial value to news publishers, right, as evidenced by the fact that they opt in to inclusion in both News and Search and not only do they opt in,
right, they control the length of snippets. They control the size of thumbnail photos. And generally speaking, they opt in to have more of that content rather than less displayed on our services because they understand the value that we provide when users engage with that content on our services and can see enough about it to know that they want to go and click through to see the news publishers' sites. And every time they click through to those sites, news publishers have an opportunity to monetize that through advertising, right, and also to attract subscribers and get additional subscription revenue. So the representation that this is free riding or that there's not a meaningful and profound exchange of value that's happening here is just a complete misrepresentation.

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

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

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

But I want to ask actually something that Ole brought up. Is there evidence to suggest that ancillary copyright protections standing alone, so
without also having competition protections, have benefitted publishers in the countries that have adopted those protections, and does the effect vary with the size of the publisher? So I'm thinking obviously about Article XV but also the experience in Spain and Germany before that. So, Matt, you can answer that question, or you can fold it into whatever you were going to say previously.

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

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

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

What someone means by ancillary protection could be a matter of semantics. But I think what we are asking for is that the Office digest everything that's been filed and that will be filed and said in this proceeding, conclude there is a problem, conclude
that the JCPA would do a very good job of addressing that problem, perhaps without entirely solving it, and then we've asked for some very specific clarifications of copyright law, not changes to copyright law, and those were discussed in the previous panel but include registration practices, words and short phrases, clarifying that essentially the circular and other documents out there, as Jane Ginsburg testified, do not really line up with the case law, and we would love for you to walk through the fair use analysis and ideally opine that what's going on is not a fair use.

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

So what the JCPA would allow is an exception to the antitrust laws so that press publishers could talk together about the best way to use those rights to get to a place where we're operating in a world of fairness where monies could flow to press publishers and authors in a way that would sustain valuable
journalism, from high level publications that everyone might know the name of to the very local oriented publications. And so it's a targeted statute that does not alter underlying copyright law but is built on existing statutory provisions that people do not refer to as copyright per se, the 1201 provisions, and so I think it's entirely within the scope of the study.

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

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

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

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

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

On the question of opt in, I think that's false. Newspapers don't have anywhere to go. Google has monopolized search and Facebook has monopolized social media and collectively they've monopolized digital ad markets.
And finally, to Annemarie's point, she talks about substantial value coming back in the other direction from the platforms. But, as Danielle mentioned earlier today, that flow, that traffic flow is being taxed at a monopoly rate by Google. In fact, Google's conduct is already the subject of an antitrust litigation for the exclusionary practices it performs in the ad tech space.

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

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

MR. LAMEL: Sure. Thank you. So the response, what I want to make to just, like, all this you asked me is, you know, what has been the experiences, you know, of other countries, right? When Spain created an ancillary copyright, the end result of that was, you know, if Google News basically stopped, you know, aggregating the news, right, and if
the end result here, if the desirable end result from
a public interest perspective is not having news
aggregation occurring anymore, like, I'll accept that.
I mean, my members -- you know, I don't know -- I
personally, not speaking on behalf of members, me
personally, don't think that, like, an end result of
no more news aggregation is a bad result. An end
result of news not showing up in search results is a
terrible result from a purely public interest
perspective.

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

So, in Spain, they walked away, publishers
complained, ancillary copyright, you know, they moved
past that. In France, they said, yeah, we don't want
to carry it. They had an antitrust suit brought
against them for saying we don't want to carry that
content, right? Like, I mean, that's compelled
speech, right, because of the First Amendment. You
can't do that in the United States because that would compel the carry of news content, would compel the platforms to have something on their platform.

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

MR. WESTON: Thank you. Ole?

MR. JANI: Yeah, thank you, Chris. To your question then, following up again on Joshua regarding the examples in Spain and Germany, I reckon it is very much a myth that the approach that's taken in Spain and Germany didn't work. It was about power play in the end. It was again a monopolized market where for those who were previously able to use third party content for free suddenly were asked to pay a price, and so they tried to say, well, in that case, we pull out of the market. And in Germany, there was some litigation on that then German ancillary right, and that was well underway with promising results in courts, and for very formal reasons, the right was
then not enforceable. But this was a very formal
reason. I'm not going into details here. And Spain
was simply a market too small.

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

And this is now the second part of your
question, only about 10 member states of the European
Union have transposed this Article XV into their
national laws. But we already see that this Article
XV being enforced and being partially transposed into
national laws is giving the industry and the press
publishers the tailwind they need because they have
gotten large players to the table and they are
negotiating and it will take its time, but we're
seeing the scene is changing because of the law.
And your second question, Chris, whether this law benefits large publishers rather than small publishers, this is definitely not the case. It benefits them all, and it's then a matter of how to enforce it. And in Europe, as you well know, we have a legal framework which across the board, through -- it's not specific for particular media. Rightsholders can bargain collectively and they can pool their rights in collective management organizations.

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

MR. WESTON: Okay, thank you. Thank you.

Cathy was next.

MS. GELLIS: Thank you. You know, at a very superficial way, speaking on behalf of Techdirt, we should benefit. We are a small publisher. As Ole
said, this is for everybody. It isn't for us. We
won't benefit. Smaller publishers live in the long
tail, and revenue doesn't follow all the way through,
down to the long tail, certainly not on an equal
basis, but it goes to the bigger players who are able
to sort of have all this gravitational pull that takes
most of the money and sends it to them and there's a
lot less left behind. We know it was bad for
independent publishers in Spain. Techdirt has
reported on this.

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

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

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

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

MR. WESTON: Thank you. Nzengha?

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

Now, for those of you that got a piece of
the earlier segment, that segment was chock full of
industry professionals and everybody had something
different to say. Everyone had contradictory stats.
So what that does -- what that tells us all when we
talk about public interest is, one, yeah, we need to
say this a little bit more, but, two, at a minimum,
what Matt was saying, I think it boils down to a PSA,
you know, where we're talking about letting the public
know, letting everyone know what the standards are,
not necessarily expanding the rights, but what are the
standards first and also interoffice tweaking of what
the protocols are, like we talked about registration.
You know, those things can be tweaked without an
expansion of the copyright -- of rights to publishers
specifically. It could be -- you know, when we talk
about one size fits all, tweaking the registration
process would be a one size fits all. But, yeah, I'm definitely, you know, going
to reiterate what the Copyright Office has said, we
need to study it. The industry itself, just as
evidenced by this panel, as well as the one earlier,
the industry is not on the same page, so it needs to
be studied.

MR. WESTON: Thank you. Annemarie?

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

So copyright's exclusive rights have always
been understood both in the U.S. and globally as
rights to exclude uncompensated uses of protected
works, right? They're not rights to demand and
collect payment for compelled uses. So, consistent
with the principle of freedom of contract, copyright
licenses aren't compulsory for those who choose not to
make compensable uses of covered works, right? In
other words, remuneration for rightholders does not
necessarily flow from the creation or existence of a
right to exclude, right, and I think folks recognize that by saying we're not really asking for anything in copyright.

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

MR. WESTON: Okay, thank you. Elizabeth?

MS. KENDALL: Thanks. I wanted to echo some of the things -- the points that have been raised, in particular that there really is a diverse landscape of publishers, of platforms, of users, and people who will be affected by any change to the status quo. And I think that that's something that I hope the Copyright Office will address in its study because I think it's clear from this panel in particular that there's maybe not a consensus about what problem is being examined and how. And so welcome any additional guidance prior to the submission of rebuttal comments
from the Office about the particular aspects of the ancillary copyright and what types of again definition of the problem you're seeking so that we can help.

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

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

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

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

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

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

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

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

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

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

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

MR. WILLIAMS: Yeah. Thank you. I'll try and be brief since I ran over last time. I just completely disagree that the JCPA is somehow outside the scope of this study. I tried to refer before to what does ancillary mean. The fact that we're right
now at least not asking for an EU publishers' right
does not mean that we're not asking for something that
isn't purely copyright law but that would do great
benefit for a copyright dependent industry and is
something I think the Office is fully qualified to
endorse if it so chooses. And that statute only
applies on the platform side to platforms with a
billion monthly active users. So this notion that
somehow it's going to negatively impact the growth of
smaller platforms that might compete with those
dominant platforms, I think, is misguided.

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

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

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

MS. SILBEY: Yeah, I'll be very brief. I just want to address the question about the EU experience, and I just want to caution us, as we look around the world and see how these things are playing out in different places, we cannot ignore the background conditions, the cultural attitudes, the social networks, the welfare systems, the industry structures, and the individual constitutional mandates that shape how the directive is playing out in different places. Like, I appreciate wanting to look around and see the diversity experiences in a laboratory kind of way, but the EU in particular and Australia also, they're very, very different social and political systems, and to say that their experience is going to be like ours or not like ours requires us to really understand those other ways.
And I'll just say, like, the cost of living, for example, and how things get funded, tax statutes, I mean, they're just so different, and they all implicate, I think, how this would play out on the ground.

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

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

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

MS. KERN: Ole?

MR. JANI: Thank you. Let me just for the
record make one clarification because, from Hal's comment, I gather that there was a misunderstanding or there may be a misunderstanding. When I referred to the JCPA, all I was going to say is that we believe, I believe personally, that the JCPA is a great approach and a great initiative, and whether there is anything to bargain about under present U.S. law is beyond my own competence. I'm not talking about this and talking about the access right. I understand there is, of course, something that can be bargained and there is protection, but talking about the access right. That's all I was trying to say, was that additional copyright legislation or copyright protection would amplify this, and I didn't mean to say that there was nothing to bargain about. So just to make this crystal clear, I guess this is important because there were comments here on the panel which suggested that there was a misunderstanding.

Now what can Congress -- what could Congress learn? In Europe, we have certain principles which govern the publishers' right, and the most -- the two most important principles are there is no registration requirement, which heard this in the first panel today, in particular, because we're talking about dynamic content. We're talking about very fast
distribution and creation of the content. It would be
a prohibitive burden and threshold if there was a
registration requirement. So this is number one,
there should be no registration requirement whatsoever
regarding the protection in the first place and the
ability to litigate.

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

So these are the two principles, I guess,
which should be most importantly looked at, no
registration requirement and no originality threshold,
and this is, of course, part of the concept of
ancillary rights in Europe, which protect investment
rather than creativity, so we could very easily transpose the concept for the protection of press publishers from music companies, broadcasters, et cetera.

MS. KERN: Thank you very much. Peter?

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

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

I've heard a lot of people talking about the
JCPA and asking the Copyright Office to bless the JCPA. I would suggest that the appropriate thing for the Copyright Office to be considering are copyright considerations, the Copyright Office is housed within the Library of Congress, are library and user considerations. Now those considerations have to include not what the economic circumstances of the publishers lead them to desire and demand and prefer vis a vis European law but what's available under United States law, in particular, United States constitutional law.

MS. KERN: Thank you. Next is Joshua.

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

And in this case, when you're dealing with dynamic content, as well as content that is behind what I would describe as dead links and disappears
unless the United Archive archives it or some other library, but we're dealing with a huge challenge in people using the content knowing whether it exists or not, right, and so any type of registration requirements that you start to bring into dynamic content, content that disappears from its publishing source on the web, it's not like it was printed in a newspaper, right, creates all sorts of complications in the value of that registration, what that looks like. So it would need to be considering, you know, well beyond your question, Melinda, and I apologize, but I just, with the registration being talked about, felt the need to state that.

The other thing I would say, and Jessica made this point much more brilliantly than I ever could, but, you know, in the United States, copyright is to incentivize creativity. That's its purpose. That's why we have it. It's a very different model than Europe. And I may have misheard Ole, but what I heard him talking about was the importance of protecting the investment. Well, that's not why we have copyright law in the United States. That's a very European approach. So, if there's something to be learned from Europe in this, is Europe views copyright law as protecting investment, and that's
okay. Europe can think that. But that very clearly
goes against Article I, Section 8, Clause 8. It very
clearly goes against over two centuries of court
interpretation of why we have copyright law in the
United States. And so, to me, that's a really
important thing to take away from the European model.
The European model is based on protecting investment,
not incentivizing your creation.

MS. KERN: Thank you, Joshua. Annemarie?

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

MS. KERN: And Matt?

MR. WILLIAMS: Thank you. Yeah, quickly, on
that last point, what we proposed in our comments in
no way asked the Office to try to do away with the originality requirement. What we did ask is for the Office to revisit some statements made in various documents, like circulars and the compendium that we don't think accurately reflects the state of the law. And Professor Ginsburg talked some about that in the first panel, so I won't belabor it.

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

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

On what was said about fair use and Section 1201 and constitutionality, if anyone can cite me an opinion that says 1201 is unconstitutional despite the fact that fair use clearly is not a defense to that statute, I'd love to hear it. There's the long list of cases that say otherwise. There's one Green v. DOJ
that's now on appeal to the D.C. Circuit that the trial court judge handled it quite well and rejected the notion that 1201 is unconstitutional. I think the courts across the board have rejected the notion that fair use is a defense to 1201.

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

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

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

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

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

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

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

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

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

Number two, I just want to point out that we're three hours and eight minutes into this and Substack hasn't come up yet. And I think that's
important just to point out, you know, just how
dynamic things are right now, right? Like, despite
this, like, feeling of staticness, right, Substack for
journalists, a lot of journalists are leaving the
newspaper model and moving to the Substack-based model
of practicing our trades. I just want to point that
out. I'm not saying it's a good thing, a bad thing,
that's not it, but it's just how evolving things are.
And when you try to place, you know, or try to fit
things into existing regimes into those markets, you
know, there can be challenges to that. And Substack
is a threat to the news media ones and their members.
I think it absolutely is. That doesn't mean it's not
journalism and not news.

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

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

MS. BRIDY: Yeah. No, I mean, I would just
in closing say that, you know, keeping a healthy and
sustainable and diverse news industry is obviously a valuable goal. It's critical to our democracy. It's not something that Google or any entity can or should have to tackle alone. You know, it's a shared responsibility across publishers, tech companies, government, civil society, you know, and that we at Google are committed, as we've always been, to playing our role in a deep and meaningful way in supporting that goal and that, you know, as many other panelists have already said, that copyright is really pretty clearly the wrong tool for this job.

MR. FOGLIA: Thank you. Ole?

MR. JANI: Yeah, thank you. Now just as a final remark, obviously, the copyright systems in Europe and in the U.S. are different in detail. And so the European approach, as we have it now with Article XV, certainly could not be a blueprint and should not be considered a blueprint for anything that might happen in the U.S. But what it could be is sort of a source of inspiration, and it gives some answers to the questions we believe are universal because the situation and the challenges for press publishers in the tech environment we have been discussing today are global. So, with this said, I'd be happy to follow up and continue this discussion and to contribute if the
Office feel that it might be helpful. We can share our experience and our views from Europe with you for further steps in the U.S. Again, thank you very much.

MR. FOGLIA: Thank you. Jessica?

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

MR. FOGLIA: Thank you. Cathy?

MS. GELLIS: Thanks. One quick point to touch on, I just want to note for the record how silly the accusation that I'm here parroting Google is. There's no reason for us to parrot Google. We're on
the record having actually been unhappy with Google for making its ad service unusable. What drives us to be here is essentially recognizing that we're not going to solve the competition problem by focusing on increasing monopoly power.

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

We shouldn't be looking at -- we shouldn't be pretending that these schemes are something new and something that's benign. We know they've hurt them.
before. We can't just turn a blind eye to how they
hurt them and pretend that this time might magically
be different. It's not going to be different. We
know better, and we need to be really, really careful,
especially in speaking on behalf of one of the small
publishers, whose interests absolutely are as equally
tantamount as any of the larger entities who are here
today.

MR. FOGLIA: Thank you. Nzengha?

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

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

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

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

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

MR. FOGLIA: Thank you. Elizabeth?

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

MR. FOGLIA: Thanks. Matt?

MR. WILLIAMS: Yes. I also want to thank the Office staff for putting the work in here and also members of Congress and their staff for paying attention to this issue, which, for my client, News Media Alliance, is really of critical importance, beyond critical importance at this point. And I also want to thank the other panelists in all the roundtables. I think having all the diverse
viewpoints in front of you should help the Office, using its experience, come up with the right recommendations to Congress. So I really appreciate the opportunity to be here.

MR. FOGLIA: Thanks. Peter?

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

MR. FOGLIA: And, Hal?

MR. SINGER: Yeah, just quickly. You know, again, to this point that the JCPA, by allowing collective bargaining, would somehow discourage entry by news aggregators, just, I can't see the nexus here as an economist. Let me just say too that the regulations -- this might not be understood -- that the regulations that we're talking about, which is collective bargaining, would only apply to dominant
platforms. So it wouldn't even touch a small news aggregator. So I don't, I just don't understand as an economic matter how it would discourage news aggregators.

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

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

Thanks, everyone.

(Whereupon, at 12:20 p.m., the roundtable in the above entitled matter recessed, to reconvene at 1:30 p.m. this same day, Thursday, December 9, 2021.)
A F T E R N O O N S E S S I O N

(1:30 p.m.)

MS. KERN: Hello, everyone and welcome back to the Copyright Office's roundtable on ancillary copyright protections for publishers. This is now the third session, where we will be discussing the interaction between any new protections and existing rights, exceptions and limitations, and international treaty obligations. Since some of you are just joining us for the first time, I'll go over a couple of logistics, but if all the panelists on this session could just make sure their cameras are on for me, that would be great.

So a few logistics. The Copyright Office staff, myself, Chris Weston, and Andrew Foglia, will be posing questions for the panelists. If the panelists would like to respond, just please use the "Raise Hand" function on Zoom, but please keep your mics muted if you're not speaking. Also, if you could please limit your answers to about one to two minutes.

And then just as a quick plug and reminder, we are going to be having an audience participation session that starts at 3:15. If you would like to participate in that, there will be a link which will be put in the chat below. Requests to participate in
that session should be submitted by 2 p.m. Eastern Standard Time.

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

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

MS. KERN: Thank you. Mr. Bergmayer?

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

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

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

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

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

MS. KERN: And Mr. Schwartz?

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

MS. KERN: And Ms. Sternburg?

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

MS. KERN: All right. I think that covers all the panelists we have on Panel 3 for today. So the first question that I would like to pose to the panelists are -- so several of the comments had mentioned Berne Article 10(1), so I wanted to ask, what impact do the panelists think Berne 10(1) has on
a potential press publishers' right? And, Mr. Band,
it looks like you had your hand up first, so go ahead.

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

Now, to be sure, Professor Ginsburg, whom we
heard from in the first panel, she and Professor
Ricketson have come up with a theory as to why it is
not inconsistent, even though she says, well, on the
surface, yeah, it's plainly inconsistent, but she
comes up with a rather complicated explanation as to
why it might not be inconsistent. But her analysis
really hinges on the fact that when the quotation
right was first adopted, that there was, you know, the
history, the legislative history of the Berne
Convention seemed to allow for the possibility of
national regulation of hot news misappropriation,
especially, you know, dealing with the kinds of
misappropriation that was going on in the early 20th
Century involving wire services, so exactly what is
within the scope of hot news misappropriation. So she
-- so their argument that an ancillary right that
would conceivably be permitted would be perhaps
limited, you know, it seems that that's what she's
saying, this really would be hot news
misappropriation.

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

MS. KERN: Thank you. Mr. Lavizzari?

MR. LAVIZZARI: Yeah. I think I would
disagree with Jonathan on this -- I mean, obviously,
Sam Ricketson and Jane Ginsburg are the leading
commentators on the Berne Convention, and they have
written extensively on this and made this available to
the U.S. Copyright Office. Also, even in the EU, the
quotation exception is available even for the ancillary rights, so there is no conflict per se. 

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

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

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

First thing I'd say is that the first question asked is whether or not 10(1) is even a mandatory requirement of Berne. And while some commentators say it is, Mihaly Ficsor, who wrote the guidebook for the WIPO and the former head of the WIPO
Copyright Division, says it's not. So first point is
that there's questions of whether it's even a
mandatory requirement.

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

MS. KERN: Thank you. Mr. Hasbrouck?

MR. HASBROUCK: Well, I'm very glad you
raised this question because implicitly it raises one
of our key concerns, which is Berne 10(3). Any usage
under Berne 10(1) is subject to the requirement of
Berne 10(3), which requires identification not only of
the original source but of the author.
Now one of the problems with the news aggregators is that they systematically and flagrantly violate Berne 10(3). Even the most cursory glance at news.google.com or the Facebook news page will show you that publishers are identified and not the authors except occasionally and incidentally. And they can get away with this because the U.S. has never enacted any law that even purports in any way, shape, or form to implement Berne 10(3).

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

MS. KERN: Thank you. Ms. Sternburg?

MS. STERNBURG: Thank you. I would just echo some of the points that Jonathan Band made when he was mentioning these questions. CCIA's written comments also provide analysis and history of Berne
Article 10(1), some other provisions in the Berne Convention dating back to the 1880s, as well as in 1967, when they chose to delete the word "short" before "quotations." I think it's unambiguous that there's an international obligation around providing this right to quote. And as I don't think Johnathan mentioned, but our comments do as well, provisions of Berne, including Article 10(1), are incorporated in TRIPS, which is part of the WTO agreement. So these -- there are ways of enforcing these international obligations, but would definitely just echo the point that Article 10(1) is really relevant to this context of the importance of the right to quote for the U.S. and other signatories of Berne.

MS. KERN: Thank you. Mr. Bergmayer?

MR. BERGMAYER: Yeah. I would just like to make sure that there's no implication that fair use in the United States, like, somehow has to be justified under the Berne quotation language. I understand fair use to be consistent with Berne's three step test, and it's just a limitation and exception that, you know, the United States is free to offer under Berne, and, furthermore, because fair use is a constitutional requirement, the Constitution trumps Berne. And so I believe that, you know, that is a -- yeah, that's the
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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.
MS. KERN: Well, thank you for all your answers, everyone. I will now turn it over to Chris Weston.

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

So --

So I muted myself, sorry. So my question is actually not about international standards but about the Constitution and about the First Amendment. I know a lot of people wrote in their comments about First Amendment problems with a sui generis or with a change to the copyright law regarding ancillary copyrights. With respect to the news media association's disavowal of wanting to pursue such a thing, would the changes that they are asking for, would they -- do they encounter any First Amendment
questions? I'm thinking of revising what a lot of
people understand as the short phrase restriction on
copyright if you can copyright words and short
phrases. So, if something like that, does that raise
First Amendment questions at all? I'm going to be
informal and use first names. So, Eric, please go
ahead.

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

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

Second, the ask is that the Copyright
Office, as the expert agency, would review existing
law and in detail how it's effectively working or not
working. To the point about the copyrightability of
short phrases, to Jane Ginsburg's point on the first
panel this morning, it's a question of originality.
The blanket statement that is contained in the
Copyright Office's Circular 33 and Compendium, the
question to be looked at, and as the cases have done,
is a question that it's a matter of originality, not
brevity, that drives the question. So there's no
constitutional concern if, in fact, a work, no matter how brief, is deemed to be original. So there's not an issue there.

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

And the last point would be that, you know, if you were to characterize what we've heard in the first two panels this morning and in their filings, it's not a problem necessarily of copyright protection. It's a question of effective enforcement of existing rights. And what the Copyright Office could do most effectively and consistent with, I
think, what Senator Tillis's letter was asking for, is simply to define the scope of existing rights and limitations and exceptions, including fair use, and take a really careful and thoughtful analysis of that and incorporate that into the study, and I think that would be extremely helpful to Congress to understand these rights exist, but they can't be effectively enforced, and the reason is because of market imbalance, as the second panel talked about, which is why the JCPA is necessary to address that market imbalance.

MR. WESTON: Okay. Thank you. Carlo?

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

From a comparative point of view, I would like to draw the Copyright Office and the audience to a trilogy of cases of the Court of Justice in the EU, all decided on 29 July 2019. The three cases deal with the interaction between the European Constitutional Bill of Rights, the National Bill of Rights, and the European Copyright Directive.
Rights of Member States, and the copyright rules of the EU. In one case called Pelham, about music sampling, a snippet of two seconds that was used in samples was found protectable under the equivalent of sound recording protection in the EU. And on the issue of conflict with constitutional rights, the court said, as long as the sample is recognizable, copyright prevails. But, of course, if the sample was changed beyond recognition, then that would be different.

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

Thank you.

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

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

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

And in terms of the constitutional limitations, the arguments that Public Knowledge makes is that because copyright must be subject to both fair use and the idea-expression dichotomy, which I think
is getting a little bit less play here and I think is very relevant in the case of news when, you know, to the extent that there's something valuable, it is information. However, information under the United States Constitution, facts can never be protected by any form of intellectual property, and you can't get around the constitutional limitations on copyright by calling it something different. And I'm fully aware the previous panel discussed some of this and there was discussion about 1201. You know, I'll just leave it there.

MR. WESTON: Thanks. Jonathan Band?

MR. BAND: Sure. So there's a lot to respond to, but I won't respond to everything because I agree with a lot of what John Bergmayer just said. But responding to some of the points that Eric made, so, first of all, at the highest level, you know, even though Eric says his client isn't asking for an ancillary right, I did read the comments very carefully and, in fact, they are asking for it, okay, because they do say that, you know, they're concerned about the fact that there isn't reciprocity so that U.S. publishers might not receive royalties from the ancillary right, and they say one way to take care of that problem is for the U.S. to adopt an ancillary
right. So it is in the comments. I appreciate that
that is not the main ask, and also I appreciate Matt
Williams' very lawyerly description of saying we are
not asking for an ancillary right at this time, so
perfectly, you know, reserving the right to ask for it
tomorrow. But I just wanted to make that clear that
there's, you know, no question that an ancillary right
is in play and not simply because Senator Tillis asked
about it. Also, Axel Springer, right, the whole
comment was about an ancillary right, as News Corp's
was. So, you know, I appreciate your point, Eric,
that that's not the main ask or the current ask, but
it is lurking there in the background.

The second point I wanted to make had to do
with, you know, this issue of, oh, we just want the
Copyright Office to give a legal opinion on fair use,
right? Well, that's not the appropriate role of the
Copyright Office, you know, and especially as we know
here, you know, we can have all the -- you know, we
can line up law professors on each side, you know, and
to give their opinion on whether what Google is doing
in any given situation is a fair use or isn't a fair
use, but, you know -- and even in this proceeding,
right, so you have Jane Ginsburg saying not a fair
use, but then you have Neil Netanel saying, yes, it is
a fair use, right? And so that's just in terms of
what was submitted here. And I'm sure we can do a
poll of copyright professors and then you'd get all
over the map.

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

But the bigger point that really came out of
the -- for both the previous panels is at some point
that's all irrelevant, right, and Professor -- you
know, Jane said this, it's like, well, what difference
does it make if we give publishers more rights because
there's this enforcement issue and, you know, that --
to the extent that it's called a competition issue or
a business issue or an economics issue, I think
there's different ways of characterizing it, but it's
clear that the publishers have no shortage of causes
of action and also, as we heard in the previous panels, right, that, you know, you have these -- you know, that you have these robot.text, you know, there's these bot exclusion headers, right, that Google respects and that in the Facebook case, the publishers are placing the content on Facebook, right, so there's clearly a license, right?

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

MR. WESTON: Thank you. Ali?

MS. STERNBURG: Thank you. Some of the points I wanted to make have been addressed, so I would just echo that the question about the Copyright Office guidance and circulars on short phrases, as
John Bergmayer said, there's constitutional issues in
the intersection of the First Amendment, copyright,
including fair use, but also the idea-expression
dichotomy and the fact that no ownership of facts and
other limitations on the scope of what is protectable
under copyright. So I would agree that there would be
serious First Amendment problems if there were -- and
just that that guidance should remain as it is. It's
really crucial for users and services, I would argue.

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

MR. WESTON: Thanks. Edward?

MR. HASBROUCK: Thank you. You know, I
think the question that you asked, you know, would an
ancillary right be compatible with the First
Amendment, I think this is a red herring. An
ancillary right would no more be a threat to a free
speech and a free press than is copyright itself a
threat to free speech and free press. It's just what
is copyrightable. You know, my right to free speech
ends when I want to reprint the entirety of some
copyrighted work that you've written. That's not a
First Amendment violation. And in the same way, a
carveout from antitrust law for negotiations, which is part of what's contemplated in the JCPA, is not a threat to the First Amendment any more than antitrust law in general is a threat to the First Amendment.

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

MR. WESTON: Thanks. Eric?

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

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

And then the question one must ask is, is
the progress clause being properly treated in this
marketplace, which allows for two incentives: one is
the right to create, to incentivize the creation of
new works; the other is to disseminate them, as the
Supreme Court has said in cases, you know, as recent
as Golan. And the fact that these aggregators so
dominate the dissemination market means -- and given
the statistics that NMA included in its filing means
that the marketplace is broken for those that are
creating the material and in essence are forced to use
these disseminators that have such a huge market
influence. It is not working, and it is absolutely
appropriate for the Copyright Office to take a look at it and to take a look at the scope of existing rights and, as Jane did, for instance, in her paper, to use some examples and answer the question, is this cutting and pasting. You know, a lot of the aggregators are referring to it as just headlines. Don't forget the photographs. The taking of an entire photograph with a headline, with ledes, and sometimes the reproduction of entire works in a systematic way, is that fair use? It is absolutely appropriate for the Copyright Office to opine on that not in a particular instance but just in a general instance.

Last point on national treatment, Jonathan, we were not suggesting -- all I was saying legally -- the filing was saying legally is, since the European Union adopted Article 15 as a matter of reciprocity, there are two ways for other countries to enjoy the rights in the European Union. One would be to have equivalent rights and it may be, by the way, that existing U.S. law provides equivalent rights. The other is in trade agreements that simply provide for broad national treatment so that U.S. publishers could enjoy those rights there. That was the ask in the News Media Alliance, the second point, that if there's broad national treatment obligations in any future
trade agreement, as the U.S. did, for instance, in the
U.S.-Canada-Mexico Agreement so that performances in
Canada that don't exist in the United States require
payment for American sound recording producers and
performers in Canada, even though those rights don't
exist in the United States. That's what national
treatment does in a trade agreement. That was that
point.

MR. WESTON: Thank you. Ali?

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

MR. WESTON: Thanks. John Bergmayer?

MR. BERGMAYER: Yeah. I would not say that
a mere antitrust exemption without more at any step
itself violates the First Amendment. We have
antitrust exemptions now. I would say they're bad policy and outside of the Copyright Office to, you know, people who have jurisdiction over antitrust law. We're happy to make that argument all the time. I do appreciate the concession on previous panels that a mere antitrust exemption without more would be ineffective because there needs to be an underlying right in order for people to collectively bargain over. I would -- and our position is that any version of that new right, whether it is created by statute or whether it is sort of assumed to exist by the courts, otherwise why would you pass that antitrust exemption. Any path whatsoever to get you to that new substantive right needs to respect idea expression and fair use. Otherwise it would be unconstitutional. So I'm trying to make our position as clear as possible here.

MR. WESTON: Thanks a lot. Carlo?

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

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

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

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

MR. SCHWARTZ: Well, thanks. I just wanted to address a point that John raised again -- the two Johns, John and Jonathan, my friends, suggesting that somehow there is a seeking of a new right. There's not seeking of a new right with the JCPA. The right already exists. It's a right of access that 1201 provides. And, by the way, without fair use, and its
constitutionality has been upheld, but that was a question, you know, an issue that was discussed a lot in the second panel, so not repeating it. But there's not a new right. It's just the fact that the publishers can't exercise their existing right when it comes to access for the reasons already mentioned about the huge market imbalance, that they have to rely on this dissemination of their own works and that what the JCPA would do is to recalibrate that market imbalance by collective bargaining.

MR. WESTON: Thanks. And Ali?

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

MR. WESTON: Thanks. Andrew?

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

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

So I think there's an important question here which necessarily gets involved not only with
competition law but also, sadly, to further broaden what people are complaining is already too broad and problematic, it also involves labor law because, when you look at the rights that are implicated here, which are really authors’ rights. And so I think, if I may, I want to raise the question here, which is why I think it's appropriate for the Copyright Office, because your mission is the mission of copyright, which is to serve the public interest and the interest of authors and creators. Notwithstanding the legal fiction of work for hire, publishers are not the creators, okay?

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

And so I think, if you are going to address this through an exception to antitrust law, it is equally important not only to recognize that many
journalists today are self publishers and to figure out how they would be incorporated into the publisher category, but also to recognize that many of them are independent journalists and freelancers, not employees who do not benefit from the exception to copyright for labor union organizing. And so any exception to -- excuse me, exception to antitrust. So any exception to antitrust for bargaining with the platforms needs to be accompanied by an exception to antitrust to permit authors and journalists to bargain with the publishers, and that is one of the strongest lessons of the experience in implementation of the EU directive.

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

MR. FOGLIA: Thanks. Carlo?

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

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

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

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

For other reason, I think that the Australian model, to answer your question, would be unconstitutional in the United States for other reasons beyond the stuff I said before about fair use and idea expression. It likely would be unconstitutional because it is a mandatory carriage, because the way that it is structured, it's not really possible for the platforms in Australia to pick and choose what they pay for, so they might as well carry...
it. And I would say that applying Turner and other cases that involve cable television, mostly litigated '90s, early 2000s, that posed similar questions of mandatory carriage by cable systems of broadcast stations and other means, there's a whole number of cases that did not have -- that had, like, a sort of intermediate scrutiny standard, right, so it was easier for the government to justify forms of mandatory carriage in the case of Turner.

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

MR. FOGLIA: Jonathan?

MR. BAND: So this is, in fact, an enormously complicated business/competition/economic
issue, way beyond my ability to comprehend it. I mean, you have -- you know, the Internet is a very big place, and you have, you know, thousands and thousands of people who are distributing news, meaning news sites, maybe tens of thousands, hundreds of thousands, right? It's a vast ocean of people who are providing content, and they're always -- they're competing amongst each other to find someone, you know, to find an audience, okay? And so it doesn't matter whether there were 10 Google News or 100 Google News, and, you know, there probably are.

I mean, there's lots of news aggregators out there that do probably exactly what Google News does, but, you know, I don't know what they -- who they are, but the point is that this is a really complicated problem that, you know, might be beyond, you know, the scope of competition law, right, because I think you could have a lot of competitors, and I think, frankly, if you had a hundred companies -- if Google's market share in the, you know, how ever you want to define what Google News is, if it were -- if there a hundred competing companies, I would submit that that would even be a much worse situation for publishers because then they would be trying to -- each fight over, you know, a hundred -- they would still want to be on all
100 sites, and they would be competing with each other and trying to get themselves elevated, so it would be a worse situation, not a better situation.

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

And just two other quick points. Number one, in terms of, like, what is the problem or what are we really trying to solve here, I don't think that a solution that leads to News Corp or The New York Times or The Washington Post getting a lot more money and local publishers getting a little more money, I don't think that's a good solution. I mean, that's not the -- the problem with any sort of IP type solution is it's blunt. It's a blunt object, and if we really -- and, again, this is my view. The problem
is not that News Corp is having financial problems because it isn't or that The New York Times isn't. I mean, these companies have -- these publishers have all expanded their reach. They're doing great. They're making lots of money.

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

And then the last point here is that part of -- and this really goes to the first point. Part of what's so confusing here is when everyone talks about, oh, the, you know, the bad monopoly or monopsony of, you know, Facebook and Google with respect to the dissemination of news, I think people are sort of
confusing two different things, right? I mean, on the one hand, those companies do -- are in this sort of -- have this distribution function. Separately, those companies have the advertising function, and we need to separate those two functions.

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

MR. FOGLIA: Thanks. Ali?

MS. STERNBURG: Yeah, just to address a few of the questions that were raised. As I think most of us are copyright lawyers, not antitrust lawyers, but my understanding is that for antitrust purposes, a part of what you have to establish is what the relevant market actually is, and so I think there is
some ambiguity about what newspapers own if the
copyright press publisher's rights were to change
because you can't really talk about the relevant
market for rights in an information good until you
establish the contours of the right and the nature of
the good and what competition and in what are you
actually talking about competition in. And so I think
defining the market, as my understanding, is an
important part of conversations about competition and
antitrust, and there's a lot of ambiguity here and
lack of clear definitions.

As to the First Amendment flaws with the
Australian proposal, I know John Bergmayer talked
about some of this, but there are definitely some
concerns in U.S. First Amendment law, including things
around requiring aggregators to carry content, as well
as singling out certain aggregators for differential
treatment. Both of these would trigger heightened if
not -- heightened scrutiny, if not strict scrutiny,
even more so when a regulation is aimed at particular
figures within an industry such as Australia's
measure, which was aimed at two U.S. companies. So I
would raise those as some clear First Amendment
challenges with the Australian approach, which is also
copyright and -- antitrust and not copyright and so
1 not really in the scope of this.
2  
3 MR. FOGLIA: Thanks. Eric?
4  
5 MR. SCHWARTZ: Thanks, Andrew. So, to
6 answer the question you asked about 15 minutes ago or
7 so it seems, should the Copyright Office be looking at
8 competition law, I think I already answered earlier
9 the answer is yes, and here's why. You have a
10 copyright-based industry that is protected by
11 copyright laws basically since the outset of U.S.
12 federal copyright protection, and you've got a system
13 that is broken by the statistics both in the number of
14 papers, local papers that are diminishing, to
15 Jonathan's point, the number of jobs that are being
16 lost, and you have two companies that are dominating
17 dissemination and therefore revenue, both on the --
18 you know, doing damage both on the ad side of what
19 they retain and on the damage to subscription side.
20  
21 You know, the question one might ask is,
22 where is the consumer in all of this? And, really, I
23 think the answer is they're not -- they won't be
24 harmed by the JCPA, which, by the way, to Jonathan's
25 question, the monies, as Hal Singer mentioned in the
26 second panel, would be disseminated both to the bigs
27 and the littles, so I think there is that
28 dissemination, but the point here is you've got
creators that are both in the entire ecosystem, to
Edward's point, the authors and the publishers, you've
got two dominant disseminators, and the question for
consumers is would it harm consumers if those
intermediaries have to pay for the cut and paste and
infringement that they are undertaking on this, you
know, an enormous scale of billions of takings per
day, and the answer is no.

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

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

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

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

And we've raised this issue before in terms of fair use analysis. Before you can begin to assess the fair use factors, you need to know what the normal modes of exploitation of these works are, but there's been almost no inquiry comparable to that into
publishers' business models, of authors' business models, which is a prerequisite to applying fair use tests and I think is also really significant in figuring out how to divide up the pie of revenues from these new uses, these ancillary uses and the ancillary rights.

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

Thank you.

MR. FOGLIA: Melinda?

MS. KERN: Thank you, Andrew. So I believe Mr. Bergmayer touched on this a little bit, but we've heard a lot about why, I guess, an ancillary copyright is not constitutional or would not be constitutional, but I wanted to dive a little deeper on the point of,
is there a version of ancillary copyright that you think would be constitutional? I think what was mentioned earlier was preserving fair use and other limitations, but I wanted to, like I said, dive a little deeper on that point and get a couple other perspectives if anyone has any. Mr. Bergmayer?

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

MS. KERN: Thank you. Mr. Band?

MR. BAND: Sure. So -- and this is again something that we talk about in much greater detail in our comments, but to the extent that what is going on is an effort to protect something that is not -- that is unoriginal, then that just can't be done constitutionally. The Supreme Court precedent is very clear that the IP clause is both access -- both authorizes -- you know, both creates rights but also limits rights. It's a floor and a ceiling, and the ceiling is, you know, that you can't protect -- you can't give protection to something that's not original when you're dealing with copyrightable -- with writings with copyrightable subject matter, and what that means is that you can't rely on the Commerce Clause or another power to do something that the IP clause prohibits.
And, you know, this all came out in great detail in the context of the database legislation debate, which I had the misfortune of spending eight years of my life involved with, but this issue was explored in great detail, and there were -- you know, the DOJ weighed in and they agreed that you can't rely on the Commerce power to do something that would not be permitted under the IP power. You know, Congresswoman Lofgren wrote a, you know, wrote an opinion on this and so forth. So, you know, there's a lot of case law that the -- and a lot of analysis that the Copyright Office should dig into to inform its analysis, but it's pretty clear that you can't rely on the Commerce Clause to do anything to protect anything that is not original, so, you know -- and I'll stop there, and we can go into more detail if you want.

MS. KERN: Thank you. Mr. Lavizzari?

MR. LAVIZZARI: Yes, thank you.

Essentially, for copyright, what is protectable and what is subject to fair use, they're both really involving policy judgments and are different sides of the same coin, and when you look at it that way, I think the premise perhaps that is being given here that, you know, a news article under Feist is not protectable and that's almost like a tablet from
ancient Rome, it is what it is, but if you look at the modern articles, the articles of the future, they are really "knowledge stacks". They have really evolved. And I think the situation today is quite comparable to when, in 1972, the USA decided to protect sound recordings previously protectable under common law under U.S. state law, and perhaps the same or similar discussions were taking place then and people said how could you protect sound recordings. That's an ancillary right to a performance and a musical composition. Well, now you have it, and you have had it for a long time, and the world hasn't broken in. The Internet's not broken. The Constitution is still there.

So I think it's the same now. An article of the 1970s and an article, digital article of today, is completely different, so I think one has to look at the rationale for such a right, what is it supposed to do, and that is exactly why it's so important you're studying these questions. Does it recognize the value and unique quality of trusted news information? Does it help to give the head start that copyright is about to the fresh, intelligent, creative impulse that comes from use that is so needed nowadays? Does it assist in actually claiming damages and objecting to mass
infringement, where you have, I think, one could summarize some of the things that were said previously that there are a few actors who are simply too big to infringe, and would this ancillary right change the balance there, and I think it would. Would it help to protect and give protection to an object that can be safeguarded against unfair competition from third party aggregators? Yes, it could.

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

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

MS. STERNBURG: Thanks, Melinda. To go back to your question of is there a version of ancillary copyright that would be constitutional, I agree with John and Jonathan that no, I don't think it could be under the First Amendment and all the Supreme Court precedent about traditional contours and about 107,
102(b), ideas, facts, so many limitations on the scope
of copyright that are constitutional that I think
would prevent there from being a version of ancillary
copyright that could possibly be constitutional.

Thank you.

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

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

MR. LAVIZZARI: Yeah, just as I mentioned
earlier in that Chancery Division case of Meltwater,
which is a media monitoring organization operating
globally and having been sued successfully globally by
many newspaper publishers, it was revealed that there
very often are, in fact, competing headlines crafted by different authors from the authors of the articles, so you can look at that case decided in 2010 where Meltwater was found liable and that absolutely these headlines are worth protecting, as sometimes are creative titles of books.

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

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

    MR. WESTON: Thanks. John?

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

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


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

And I would just submit that if a person is satisfied by the headline, that obviously indicates that the person only wanted the facts, wasn't interested in the expression, certainly not in the expression in the underlying article, and also not the expression that may exist, if any, in the headline. They simply wanted to know, what was the score of the Wizards game last night? You know, they simply want to know, you know, who, you know, who allegedly won an election. They're not interested in anything else because, if they're satisfied by the headline and don't click through, that's all they want, and that seems to me to indicate -- it suggests that certainly that it would be a fair use, right, in that case?
If the person is satisfied by simply seeing
the Wizards, you know, all they wanted to know is not
even -- they didn't care about the score. They simply
wanted to know did the Wizards win last night and
that's all they need, right? And they're not going to
click through. Then, clearly, their purposes simply
is factual, but even beyond that, I mean, that really
does indicate the fact that the audience can be
satisfied by purely factual information suggests that
in the analysis that at least in that particular use
that it is a merger.

MR. WESTON: Thanks. Eric?

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

To the first question, first of all, it's
the broad strokes in some of the filings that somehow
news is not copyright protectable, you know, digging
deep into the question of whether a particular
headline may be. Again, as happened in the cases that
have looked at with short phrases, it's a question of
originality in a short phrase and some may rise to the
level of originality and some may not, but the bigger
problem, of course, is it's not just headlines that
are taken, it's entire photographs, so it's again
misrepresenting what the problem is from the point of
view of the creators, the authors and publishers.
It's the taking of the headline plus the lede plus an
entire photograph, which certainly has copyrightable
expression, and incorporating that in a cut-and-paste
way into the aggregator's site.

MR. WESTON: Thank you. Ali?

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

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

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

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

MR. HASBROUCK: Thank you. I realize it's probably, you know, out of scope, but given the invitation, we would reiterate our belief that there is a continued need for moral rights legislation. I earlier alluded to the need for legislation to
implement Berne 10(3).

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

It's our position that registration should be eliminated, but even without doing that, while we appreciate very much the modest reform that was made in implementing group registration for multiple articles published online, that still doesn't come close to addressing the bigger problem of the effective impossibility of registering dynamic web content, which remains essentially a flat bar to meaningful copyright protection. So, if you're going to go down the path of, well, either some of this is
outside the scope of the Copyright Office or this is
an enforcement problem, the place where you can really
do something within the Office is to reform the
procedures for registration of web content. Thank you
very much.

MR. WESTON: Thank you. Jonathan?

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

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

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

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

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

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

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

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

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

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

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

MR. FOGLIA: Thanks. Eric?

MR. SCHWARTZ: So, as just closing remarks, just want to say to Chris, Andrew, Melinda and everyone at the Copyright Office thank you very much,
first of all, for undertaking this study. To repeat
something that's, you know, sort of a theme of mine in
this panel then, that from the News Media Alliance's
point of view, we do think it would be very helpful to
restate and clarify the scope of existing rights and
protection and the nature of fair use in this
particular instance.

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

Perhaps a pre registration type system of a
paper only initially followed by a subsequent deposit
copy, something that -- something has to be better
than the current system, and it is important if
enforcement is the theme of this panel for my point of
view, it's certainly important to have an effective
and easy registration system both for standing to sue and for effective remedies in Section 412, statutory damages and attorneys' fees. Thank you.

MR. FOGLIA: Ali?

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

Just to raise one more element of U.S. copyright law that hasn't really been mentioned a lot but was mentioned in the Office's NOI is the merger doctrine. We talked a bit about idea-expression, but just to quote from the Office's NOI itself, the merger doctrine bars protection - "where there are only a few, limited ways of expressing an idea, the merger doctrine bars protection for the expression in order to avoid giving a backdoor monopoly to the idea itself," so I just mention that as yet another reason under U.S. copyright law that the scope of protectability and other limitations and exceptions like fair use, just one more reason why there are
concerns on behalf of industry and the public interest. Thanks again.

MR. FOGLIA: Thanks. Jonathan?

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

And so, you know, the Office really needs to focus on that. To the extent that it's, you know, there's this, you know, narrative that now we're hearing about how the news aggregators somehow are siphoning off traffic and somehow benefitting even though that's kind of hard to see exactly how they benefit, but, you know, to the extent that they do benefit by people simply stopping at Google News, which has no ads, but, you know, and the argument that somehow there's a substitution effect, again, the
Office really needs to look deep, and I think the ultimate answer is going to be there will be no conclusive evidence that there is a meaningful substitution effect of the people.

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

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

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

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

MR. BERGMAYER: News is a public good. Public Knowledge agrees that there's a challenge particularly with local news, and we think that a
vigorous public policy response from the government is warranted. However, putting the constitutional arguments, I've said enough aside, I think that a property right-based approach is simply the wrong approach. It is a square peg in a round hole. I don't think it would work, and it would have many unintended consequences.

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

MR. FOGLIA: Thanks. And I see Edward and Ali have their hands up. We are five minutes over, so I will ask each of you to keep it to 30 seconds if
possible, and I'll start with Ali since she had her hand up first.

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

MR. FOGLIA: Thanks. Edward?

MR. HASBROUCK: More than anything else, the future of journalists depends on whether -- journalism -- depends on whether journalists can continue to make a living as journalists and continue to practice that profession, so I hope that you will center your
concerns going forward on the rights, the livelihoods, the business models of those journalists and how to make sure that they remain viable. Thank you.

MR. FOGLIA: Thanks. Melinda?

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

(Whereupon, a brief recess was taken.)

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

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

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

MR. WESTON: Okay. Thank you very much.

MR. PEACE: Thank you. Thank you.

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

(No response.)

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

MS. SHOCKED: Thank you for following through on Senator Tillis's request to conduct this study and for the different points of view that were represented, but if there's anything I can do to amplify the point of view represented by Edward Hasbrouck and the public commenter that just spoke,
we're independent creators, and I don't know how often our voices are represented or heard in these conversations, but this is an opportunity to let you know that we're really struggling out here, and we're relying on the Copyright Office to find a remedy given all of the factors that are destroying our livelihoods. Thank you.

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

(Whereupon, at 3:20 p.m., the roundtable in the above entitled matter adjourned.)
REPORTER'S CERTIFICATE

CASE TITLE: Publishers' Protections Study Roundtable
HEARING DATE: December 9, 2021
LOCATION: Washington, D.C.

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.

Date: December 9, 2021

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Publishers' Protections Study Roundtable

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