

Before the
United States Copyright Office
Washington, DC

In re

Publishers' Protections Study: Notice and
Request for Public Comment

Docket No. 2021-5

**COMMENTS OF
COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION
AND INTERNET ASSOCIATION**

Pursuant to the notice of inquiry (“NOI”) published by the U.S. Copyright Office in the Federal Register at 86 Fed. Reg. 56721 (Oct. 12, 2021), the Computer & Communications Industry Association (“CCIA”)¹ and Internet Association² submit the following comments responding to selected topics, as identified by the numbering provided in the Federal Register notice, regarding copyright protections for press publishers.

Industry has long had serious concerns with the threat of new publisher subsidies styled as so-called “neighboring rights” (related to copyright)³ that may be invoked against online news

¹ CCIA is an international, not-for-profit trade association representing a broad cross section of communications and technology firms. For nearly fifty years, CCIA has promoted open markets, open systems, and open networks. CCIA members employ more than 1.6 million workers, invest more than \$100 billion in research and development, and contribute trillions of dollars in productivity to the global economy. A list of CCIA members is available at <https://www.ccianet.org/members>.

² Internet Association represents 40 leading global internet companies on matters of public policy. The Association’s mission is to foster innovation, promote economic growth, and empower people through the free and open internet. See <https://internetassociation.org/>.

³ CCIA has long argued that snippet taxes and *sui generis* or ancillary rights to domestic industries serve as a trade barrier and violate international copyright commitments — long-standing international law that prohibits nations from restricting quotation of published works. See, e.g., CCIA Comments, Docket No. USTR-2012-0022 (Feb. 8, 2013), [https://www.ccianet.org/wp-content/uploads/library/CCIA%20Comments%20on%20Special%20301%20\[2013\].pdf](https://www.ccianet.org/wp-content/uploads/library/CCIA%20Comments%20on%20Special%20301%20[2013].pdf); CCIA Comments, Docket No. USTR-2014-0025 (Feb. 6, 2015), <https://www.ccianet.org/wp-content/uploads/2015/02/CCIA-Special-301-Comments-2015.pdf>; CCIA Comments, Docket No. 2015-0014 (Oct. 2, 2015), <http://www.ccianet.org/wp-content/uploads/2015/10/CCIA-NTE-2016.pdf>; CCIA, *The Ancillary Copyright For News Publishers: Why It’s Unjustified And Harmful* (May 2016), https://www.ccianet.org/wp-content/uploads/2016/05/CCIA_AncillaryCopyright_Paper_A4-1.pdf; CCIA Comments, Docket No. 2017-0013 (Oct. 25, 2017), <https://www.ccianet.org/wp-content/uploads/2017/10/CCIA-Comments-for-2018-NTE-1.pdf>; CCIA Comments, Docket No. USTR-2017-0024 (Mar. 14, 2018), https://www.ccianet.org/wp-content/uploads/2018/03/CCIA_2018-Special-301_Review_Post-Hearing-Submission.pdf; CCIA Comments,

search and aggregation services — and, as the U.S. Trade Representative has noted, raise concerns from a trade perspective.⁴ A U.S. International Trade Commission report also observed that these laws tend to have “generated unintended consequences” to small online publishers.⁵

As the NOI indicates, under established principles of copyright law, news search and aggregation services generally do not constitute copyright infringement. Publishers nonetheless argue that service providers of online search, news aggregation, and social media platforms should be compelled by changes in law to pay for the “privilege” of quoting from news publications. This is often referred to as a “snippet tax” or a “link tax.” It is also at times formally described as “ancillary copyright” in that it is allegedly an “ancillary” IP right — yet it is in fact inconsistent with international IP law, stands in sharp tension with United States constitutional protections, violates international trade obligations, and constitutes a TRIPS-violating barrier to trade. Industry encourages U.S. policymakers to carefully evaluate the implications of imposing ancillary rights in the United States. Nor should the United States follow the example of the recent international initiatives discussed in the NOI, which are based on flawed understanding of market dynamics between online news content and online aggregators, and especially in the case of Australia, narrowly targeted to apply to just two U.S. firms.

Docket No. USTR-2019-0023 (Feb. 6, 2020), https://www.cciagnet.org/wp-content/uploads/2020/03/CCIA_2020-Special-301_Review_Comments.pdf.

⁴ Office of the U.S. Trade Rep., 2018 National Trade Estimate Report on Foreign Trade Barriers, <https://ustr.gov/sites/default/files/files/Press/Reports/2018%20National%20Trade%20Estimate%20Report.pdf>, at 199-200; Office of the U.S. Trade Rep., 2018 Fact Sheet: Key Barriers to Digital Trade (2018), <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2018/march/2018-fact-sheetkey-barriers-digital>.

⁵ U.S. Int’l Trade Comm’n, Global Digital Trade 1: Market Opportunities and Key Foreign Trade Restrictions (Aug. 2017), <https://www.usitc.gov/publications/332/pub4716.pdf>, at 291-92 (“Small online publishers have been reluctant to demand fees from online platforms because they rely on traffic from those search engines, and industry experts have stated that ancillary copyright laws have not generated increased fees to publishers; rather, they have acted as a barrier to entry for news aggregators.”).

THE EFFECTIVENESS OF CURRENT PROTECTIONS FOR PRESS PUBLISHERS

(2) Third-party uses of news content.

- (a) **Under what circumstances does or should aggregation of news content require a license? To what extent does fair use permit news aggregation of press publisher content, or of headlines or short snippets of an article?**

The only circumstance in which aggregation of news content requires a license is if the aggregator displays more copyright-protected content than is permitted under fair use. A headline generally does not rise to the level of originality required for copyright protection. The lede sentence or paragraph may in some cases contain expression that is not merged with the facts conveyed, but display of the lede by a news aggregator would in most cases constitute a fair use. Similarly, fair use typically permits the display of an image for news reporting purposes.

As the NOI tacitly recognizes, news aggregation generally does not constitute copyright infringement under long-established law—either because no expression is copied, because what is copied is not protectable, or because the aggregator’s activities qualify as fair use.

It is undisputed that merely linking to an article or other content hosted on a copyright owner’s website is not copyright infringement because, among other things, no expression is being copied or distributed by the linking website. If merely pointing a user to expression hosted elsewhere constituted infringement, a book index would infringe the copyrights of the works listed there.

Even so-called “inline” linking—in which an embedded link retrieves content from the linked-to website and displays it on the linking website by issuing instructions to the user’s computer to fetch the content from servers not under the linking party’s control—has generally been held by courts not to constitute infringement. *See, e.g., Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1160-61 (9th Cir. 2007) (holding that Google’s use of inline linking did not

create a “copy” of the work under the Copyright Act); *Flava Works, Inc. v. Gunter*, 689 F.3d 754 (7th Cir. 2012).

Further, reproducing the headline and opening sentences of an article is unlikely to constitute infringement, because in many instances that content is not copyrightable. As the NOI recognizes, the factual content and ideas embodied in an article—as distinct from expression—are not copyrightable, “[n]or are titles and short phrases, including headlines.” NOI at 56723; *see also CMM Cable Rep., Inc. v. Ocean Coast Props., Inc.*, 97 F.3d 1504, 1519-20 (1st Cir. 1996). The merger doctrine also bars copyright protection where facts (such as a particular newsworthy event) can be expressed only in a few ways.

Even where copyrighted material has actually been copied by a news aggregator, that activity will typically constitute fair use. The four fair use factors strongly favor a finding of fair use for the ordinary operation of news aggregators. As a rule, the aggregator does not reproduce or distribute a substantial portion of linked-to news articles (often only a headline, initial sentences, and in some instances a photograph).

Moreover, the aggregator’s use—enabling users to find articles that they otherwise would not have read, exercising editorial control by assembling collections of articles, and allowing users to share articles, commentary, and thoughts with one another—is profoundly transformative. *ZHT, Inc. v. Zillow Grp., Inc.*, 918 F.3d 723, 740 (9th Cir. 2019) (“In assessing fair use in the context of [certain new technologies], courts have relied heavily on the first fair use factor, and in particular whether and to what extent the new work is transformative.”). Even in instances where full works were copied, such as Google Books, courts have held that the purpose of enabling a public search function was sufficiently transformative to constitute fair use. *See Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014); *Authors Guild v. Google*,

804 F.3d 202 (2d Cir. 2018). *See also Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P.*, 756 F.3d 73, 84 (2d Cir. 2014) (noting the fact that news dissemination “lies at the core of the First Amendment” militates in favor of fair use, and that surrounding reproduction of a work with “commentary or criticism” further supports fair use); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1165 (9th Cir. 2007) (holding that a search engine’s publication of low-resolution, thumbnail copies of copyrighted images was “highly transformative” because the thumbnails were “incorporat[ed] ... into a new work, namely, an electronic reference tool”).

In those cases where courts have found the activities of news aggregators *not* to constitute fair use, defendants generally either copied large segments (or the heart) of a copyrighted work, or engaged in no transformative use at all. *See Fox News Network, LLC v. TVEyes, Inc.*, 883 F.3d 169 (2d Cir. 2018) (rejecting fair use defense where defendant made the ten most relevant minutes of news programs available for viewing); *MidlevelU, Inc. v. ACI Information Grp.*, 989 F.3d 1205, 1222-23 (11th Cir. 2021) (rejecting fair use defense where index of blog articles allowed users to view full text of articles without navigating to the original source); *Associated Press v. Meltwater U.S. Holdings, Inc.*, 931 F. Supp. 2d 537, 554-55 (S.D.N.Y. 2013) (rejecting fair use defense where virtual news clipping service “systematically provide[d] its subscribers with what in most instances will be the essence of the AP article relevant to that reader,” offered no transformative use, and its business model “relie[d] on the systematic copying of protected expression and the sale of collection of those copies in reports that compete directly with the copyright owner”).

In sum, any attempt to redefine the behavior of mainstream aggregators as infringement is fundamentally inconsistent with the current contours of copyright law. Indeed, the NOI tacitly acknowledges that the additional measures discussed are outside the scope of core copyright

doctrine by employing the term “ancillary” copyright for the measures that it discusses. The NOI thus does not identify potential infringement; instead, it asks whether Congress should attempt to solve a competitive industry problem by proposing a new right for press publishers. As discussed below in greater detail, it should not.

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

There are no obstacles to press publishers and aggregators negotiating licenses for the use of news content beyond that permitted by fair use.

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

In the United States, aggregators seek licenses for the use of news content beyond that permitted by fair use or covered by another limitation or exception to copyright.

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

As the NOI recognizes, news aggregators drive significant amounts of traffic to the sites of press publishers, which generate advertising revenue for the press publishers. Additionally, if the news stories are behind a paywall, the directing of users to the press publisher’s site can lead to subscription revenue.

(3) Existing non-copyright protections for press publishers.

(a) What non-copyright protections against unauthorized news aggregation or other unauthorized third party uses of news content are available under state or federal law in the United States? To what extent are they effective, and how often are they relied upon?

Section 1201 of the Digital Millennium Copyright Act (“DMCA”) prohibits the circumvention of technological protection measures that control access to a copyrighted work. Circumvention of a paywall or other technological protection measure could constitute a DMCA

violation. Accessing news content without authorization could also constitute a violation of the federal Computer Fraud and Abuse Act and state-law equivalents. Repeatedly scraping a site could lead to liability for trespass to chattels. *See Register.com v. Verio*, 356 F.3d 393 (2d Cir. 2004). Accessing news content in a manner not permitted by a click-on or browsewrap license could breach a contract. The NOI also discusses the availability of a cause of action for “hot news” misappropriation, to the extent that it is not preempted by the Copyright Act. Finally, separate from legal protections, many major aggregators and news search services allow publishers significant control over whether their articles will appear in search results and aggregations, using tools such as established “robots.txt” protocols which automatically instruct search engines whether or not they can access a website.

Publishers generally don’t need to rely on any of these causes of action, however, because those that don’t want their sites to be scraped or crawled by aggregators can rely with confidence on the robots.txt exclusion protocol, an Internet industry standard that is respected by major search engines and news aggregators. By adding two short lines of code (containing fewer characters than this aside) in the header of a website, website administrators can prevent automated programs from copying headlines, snippets, or any other content from that site. Most publishers do not invoke robots.txt, however, because they benefit from and rely heavily on the traffic that news aggregators direct to them.

THE DESIRABILITY AND SCOPE OF ANY ADDITIONAL PROTECTIONS FOR PRESS PUBLISHERS

- (1) To what extent do the copyright or other legal rights in news content available to press publishers in other countries differ from the rights they have in the United States?**

Putting aside the ancillary copyright regimes in the EU and Australia, press publishers’ legal rights in news content are consistent around the world. Under Article 2(8) of the Berne

Convention, copyright does not extend to “news of the day.” Further, as discussed in greater detail below, Berne Article 10(1) establishes a mandatory quotation right, which includes “quotations from newspaper articles and periodicals in the form of press summaries.”

The mechanism by which the United States implements Article 2(8) is copyright’s originality requirement and 17 U.S.C. § 102(b). The mechanism by which the U.S. implements the quotation right is 17 U.S.C. § 107. Importantly, originality is a constitutional requirement for copyright protection, *Feist Publications, Inc. v. Rural Telephone Serv. Co.*, 499 U.S. 340 (1991); and the Supreme Court has explained that sections 102(b) and 107 are built-in accommodations to the First Amendment that, if they were restricted, would likely raise serious constitutional concerns, as discussed in more detail *infra*. See *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985); *Eldred v. Ashcroft*, 537 U.S. 186, 219-21 (2003); *Golan v. Holder*, 565 U.S. 302, 327-29 (2012).

(4) Should press publishers have rights beyond existing copyright protection under U.S. law? If so:

No, press publishers should not have rights in the United States beyond existing copyright protection. While couched in terms of an intellectual property right, ancillary rights are in fact an instrument of industrial policy. Aimed at rectifying perceived economic imbalances between industries, they act like a private tax or levy (or publishers argue that they should so operate).⁶ The purpose of these “snippet levies” is to compel one group of businesses—Internet businesses—to subsidize another group of businesses—news publishers.⁷

⁶ While ancillary copyright is frequently characterized as a tax (even by its supporters), the term ‘tax’ usually refers to monetary exactions imposed and collected by the state. Ancillary copyrights are monetary exactions imposed by the state but collected by a private actor. Thus, although the term ‘tax’ is accurate in a generic sense, ancillary copyrights may be more specifically characterized as a “levy.”

⁷ Ancillary rights are generally enforced by a “collective management entity,” designated to act on behalf of news publishers and demand payment from regulated online platforms, aggregators and search providers.

International copyright law, however, does not regulate short phrases or facts, and it mandates that the right to quote not be abridged. Moreover, the United States Supreme Court has repeatedly invalidated government action that seeks to favor one group of speakers over another. *See, e.g., Nat'l Inst. of Family & Life Advocates v. Becerra* (“NIFLA”), 138 S. Ct. 2361, 2378 (2018) (holding that the Court has long been “deeply skeptical of laws that distinguish among different speakers”) (citation and brackets omitted).

This notion of a tax or levy on links or quotations (uses permitted under international law) is relatively new. The idea has been prompted by the well-documented difficulties of traditional print media in responding to and competing in the online environment. In the past few years certain publishers’ hostility to news aggregation and social media has grown, even though online services drive considerable traffic to the websites of news publishers, who then monetize that traffic by selling advertisements and/or subscriptions.⁸ To publishers who prefer that their content not be indexed or introduced to social media, long-standing protocols already provide highly granular control, as mentioned in the response to (3)(a) above. Some news publishers, however, want it both ways. They want to maintain the high pageviews and advertising rates associated with high search visibility, and they also want to be paid for the indexing necessary to send that traffic. They insist that online platforms must drive traffic to their sites, but also demand that online platforms pay for the “privilege” of being compelled to do so.

⁸ One study conducted in Europe found that approximately one third of visits to news publisher websites came from users directly navigating to the site (*e.g.*, typing the URL). Two thirds of visits came from users accessing the page from links, blogs, social media, news aggregators, and email. Deloitte, *The impact of web traffic on revenues of traditional newspaper publishers: A study for France, Germany, Spain and the UK* (Mar. 2016), <http://www2.deloitte.com/uk/en/pages/technology-media-and-telecommunications/articles/the-impact-of-web-traffic-on-revenues.html>.

It is not clear precisely which economic problem an ancillary copyright for press publishers would solve. The Max Planck Institute has stressed the symbiotic relationship between online services and press publishers' content online.⁹ Without a clear identification of a specific economic problem, intervention is poised to regulate a business model into continued existence, at the expense of new business models, including those developed by publishers themselves.

Ancillary copyright would have other adverse impacts.

It is a barrier to entry. It is particularly detrimental to technology startups and other smaller online businesses, as they do not have the resources to engage in costly licensing negotiations, pay negotiated licensing fees, or provide some to-be-determined quantum of “fair compensation.” After adoption of ancillary copyright in Spain, certain startups closed down or discontinued some of their offers.¹⁰ Ancillary copyright thus disincentivizes investments into innovative online services.

It undermines media pluralism. Most of the revenue generated by an ancillary copyright regime would flow to the established press publications which have the most traffic, benefitting national outlets at the expense of small and local ones and exacerbating the problem of “news deserts.”¹¹

Many news publishers oppose it. Major news publishing houses like SPIEGEL-Verlag and ZEIT Verlagsgruppe did not join the VG Media collecting society in Germany. Others

⁹ Max-Planck-Institut für Immaterialgüter- und Wettbewerbsrecht, Stellungnahme zum Gesetzesentwurf für eine Ergänzung des Urheberrechtsgesetzes durch ein Leistungsschutzrecht für Verleger (2012), https://www.ip.mpg.de/fileadmin/ipmpg/content/stellungnahmen/leistungsschutzrecht_fuer_verleger_01.pdf.

¹⁰ NERA Economic Consulting, *Impact on Competition and on Free Market of the Google Tax or AEDE fee*, Report for the Spanish Association of Publishers of Periodical Publications (AEEPP 2017), [https://clabe.org/pdf/Informe_NERA_para_AEEPP_\(INGLES\).pdf](https://clabe.org/pdf/Informe_NERA_para_AEEPP_(INGLES).pdf).

¹¹ See Tom Stites, *A quarter of all U.S. newspapers have died in 15 years, a new UNC news deserts study found*, Poynter (June 24, 2020), <https://www.poynter.org/locally/2020/unc-news-deserts-report-2020/>.

voiced strong concerns with the European Commission over a potential EU-wide ancillary copyright.¹²

It is antithetical to business models based on open publishing and Creative Commons. A mandatory extraction of payments for use of content prevents publishers who affirmatively choose to license their content freely from spreading their content as widely as possible on terms of their own choosing.

(5) Would the approach taken by the European Union in Article 15 of the CDSM, granting “journalistic publications” a two-year exclusive right for certain content, be appropriate or effective in the United States? Why or why not?

The approach taken in Article 15 of the Directive on Copyright in the Digital Single Market (“CDSM”) would not be appropriate in the United States. Contrary to U.S. law and current commercial practices, Article 15 requires search engines, news aggregators, applications, and platforms to enter into commercial licenses before including snippets of content in search results, news listings, and other formats. Article 15 applies to all “information society service providers” and thus has an even broader sweep than “news aggregators” as described in the NOI. The exception for “short excerpts” and single words is highly unlikely to provide any real certainty for Internet services who wish to continue operating aggregation services, and conflicts with the current practice of many U.S. providers offering such services. Some press publishers have taken the position that an article’s headline exceeds the short excerpt exception, but this approach is problematic because, among other things, it would mean that users are not afforded

¹² See Statement on Digital Single Market (Dec. 4, 2015), http://clabe.org/pdf/151204_Statement_on_Digital_Single_Market_FINAL.pdf (letter to European Commission signed by a dozen publishers across the EU expressing “concerns with recent developments which directly target the sharing, linking and aggregation of news online with a new form of ‘ancillary right’ triggering mandatory payments. . . . When the dust settles and the Spanish and German laws come into full force, it may be too late to realise that they are bad for journalism and European news publishing.”).

enough context to understand the content of the article and so will not know what they are clicking on, which risks user harm and encourages clickbait. The one positive feature of Article 15 is that it does not apply to the act of hyperlinking.

As EU states implement the new copyright rules into their national law, some governments are reinterpreting key provisions leading to potentially far-reaching and problematic consequences for users, publishers, and platforms alike. One of the latest examples of this trend can be found in Croatia. While the European Commission, and Commissioner Breton have specified “that Member States are not allowed to implement Article 15 (...) through a mechanism of mandatory collective management,” the Croatian law includes a provision which could make it mandatory for all publishers to license these rights collectively. Austria is following the same path as Croatia. This creates new barriers and challenges for U.S. companies when complying with national rules.

France also has implemented Article 15 in a problematic manner. After the implementation of Article 15 in French law, Google announced that it would change the way articles appear in search results instead of signing licensing agreements. In October 2019, the French competition authority opened an investigation into Google’s compliance with the French law, and in April 2020, the competition authority ordered Google to continue to display content from press publications and to pay French publishers for this involuntary use. In October 2020 Google and the “Alliance de la Presse d’Information Générale”, which represents newspapers such as Le Monde, announced that future licensing agreements would be based on criteria such as the publisher’s audience, non-discrimination and the publisher’s contribution to political and general information. However, in July 2021, the French competition authority imposed a €500 million fine on Google as it considered that the company did not negotiate “in good faith” with

the press industry over licensing fees. Google appealed this decision, considering the fine disproportionate to their efforts to reach an agreement. The French implementation of Article 15 thus leads to a financial obligation completely out of the platform's control. It can't pull out of the market, and it must pay whatever price the regulator imposes.

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

The Australian approach also is not appropriate for the United States. In February 2021, the Australian Government passed the News Media and Digital Platforms Mandatory Bargaining Code. Under the Code, designated platform services companies are required to engage in negotiations with Australian news publishers for online content. Motivated by a desire to empower domestic news publishers, the new rules would dictate that online services negotiate and pay Australian news publishers for online content, and also disclose proprietary information related to private user data and algorithms.

Before enacting the Bargaining Code, the Australian Government made it clear that it would initially apply only to two companies — both American. In light of that position, both companies have entered into deals with Australian publishers.

Industry has significant concerns with the Australian approach from a copyright perspective, as well as trade, competition, and procedural perspectives.¹³ Most jurisdictions view displaying a short quotation or snippet to be permissible because it may be too short to qualify for copyright protection; it may fall under an exception to copyright law like fair use or fair

¹³ See, e.g., *Australian Regulations Detrimental to the Digital Economy: Intellectual Property (Part 4)*, Disruptive Competition Project (Oct. 9, 2020), <https://www.project-disco.org/intellectual-property/100920-australian-regulations-detrimental-to-the-digital-economy-intellectual-property-part-4/>; CCIA Submission in Response to the ACCC's Draft Code of Conduct (Aug. 28, 2020), <https://www.ccianet.org/wp-content/uploads/2020/09/ACCC-Draft-Code-of-Conduct-final-comments-from-CCIA-1.pdf>; CCIA Submission in Response to the ACCC's paper on "Mandatory News Media Bargaining Code" (June 5, 2020), <https://www.ccianet.org/wp-content/uploads/2020/06/CCIA-Submission-in-Response-to-the-ACCC%E2%80%99s-paper-on-%E2%80%9CMandatory-News-Media-Bargaining-Code%E2%80%9D-2.pdf>.

dealing, including exceptions mandated by Article 10(1) of the Berne Convention, which prohibits nations from restricting the right to quote. Creating a right to payment for content used in news aggregation services is likely in violation of this international obligation under Berne. Additionally, as discussed below in greater detail, a press publishers' right would violate the First Amendment.

- (7) If you believe press publishers should have additional protections, should these or similar protections be provided to other publishers as well? Why or why not? If so, how should that class of publishers be defined and what protections should they receive?**

Because additional protections for press publishers are unwarranted, there is no reason to provide similar protections to other publishers.

THE INTERACTION BETWEEN ANY NEW PROTECTIONS AND EXISTING RIGHTS, EXCEPTIONS AND LIMITATIONS, AND INTERNATIONAL TREATY OBLIGATIONS

- (2) Would granting additional rights to press publishers affect the ability of users, including news aggregators, to rely on exceptions and limitations? If so, how?**

Yes. Because the entire point of a press publishers' right is to fill the perceived "holes" left by limitations such as the originality requirement, section 102(b), and fair use, it invariably would conflict with these limitations to the detriment of users who rely upon them. Adopting new rights for press publishers that so openly conflict with existing, structural, and constitutional limitations on the copyright monopoly threatens to undermine those limitations for all users and in other contexts.

(3) Would granting additional rights to press publishers affect United States compliance with the Berne Convention or any other international treaty to which it is a party?

Granting additional rights to press publishers would contravene U.S. compliance with the Berne Convention. Since its inception, Berne has guaranteed the right to quote from newspaper articles.¹⁴ Article 10(1) of the Berne Convention provides:

It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries.¹⁵

Notably, the placement of “quotations” and “press summaries” after the provisos illustrates that these two items cannot be limited by the fair practice or ‘exceeding the purpose’ requirement. Rather, they are inherently exemplary of what satisfies these requirements. This interpretation is reaffirmed in the preparatory documents to the 1967 Stockholm Conference discussed further below. There, experts concluded after “exhaustive discussion” that these uses be included “by way of an example” of what was unambiguously permissible.

This interpretation also flows from the heading of Article 10, which refers to “Free Uses of Works.” “Free,” of course, is distinct from the “Permissible But Remunerated” uses contemplated by compulsory license schemes.¹⁶ Consistent with this, the World Intellectual Property Organization (“WIPO”) characterized Article 10(1) as permitting use “without the authorization of the owner of the copyright, and without payment of compensation.”¹⁷

¹⁴ See Berne Convention (as of 1886), Art. 7. The right originally authorized reproduction of entire articles.

¹⁵ Berne Convention, Art. 10(1) (emphasis supplied).

¹⁶ See, e.g., Sam Ricketson, WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment, WIPO Standing Committee on Copyright and Related Rights, SCCR/9/7 (Apr. 5, 2003) at 27 (“It is therefore clear that exceptions under Article 9(2) may take the form of either free uses or compulsory licenses, depending essentially on the number of reproductions made.”).

¹⁷ See WIPO, Summary of the Berne Convention for the Protection of Literary and Artistic Works (1886), http://www.wipo.int/treaties/en/ip/berne/summary_berne.html.

The negotiating history of the Berne Convention confirms this interpretation. In the first diplomatic conference on the Convention in the 1880s, the delegations referred to a “right” of quotation.¹⁸ The history of the Berne Convention also illustrates that the quotation right should be interpreted broadly. Whereas prior to 1967 the right existed only to make “short quotations,” the 1967 revision consciously deleted the word “short.” This was not accidental; the change was specifically recommended by nations’ international copyright experts. They reported:

Sufficient direction in these various fields [referring to ‘politics, economics, religion, and cultural life’] cannot be achieved unless it is possible to reproduce, in certain cases, fairly considerable portions of articles which constitute the contributions of other newspapers to public discussion.¹⁹

The diplomatic conference minutes from 1967 reveal an unsuccessful French-Swiss proposal to re-insert the word “short” before “quotation.” Diplomats considered and then overwhelmingly rejected the proposal, reaffirming the experts’ recommendation that the quotation right should not be limited to “short” quotes.²⁰ The West German diplomat, one Mr. Reimer, said that his

country could not support the proposal to insert the adjective “short” before the word quotations, because cases occurred in which quotations were permissible when they were not short; Article 51 of the Law which was in force in Germany was drafted on those lines and it placed no restriction on quotations in scientific or literary works, for instance, or on quotations from musical works. The Delegation of the Federal Republic of Germany thought it should be possible to delete the phrase “compatible with fair practice” or to replace it by some other phrase corresponding to the English term “fair use” or “fair dealing.”²¹

These records demonstrate that the views of West Germany in 1967 — which were not openly contested at the time — were that quotations should not be restricted, and moreover, that

¹⁸ See, e.g., World Intell. Prop. Org., Berne Convention Centenary: 1886-1986, at 120 (1986) (referring to a “right” in an 1885 draft of the Convention to reproduce materials “excerpted from newspapers or periodical journals published in one of the countries of the union”).

¹⁹ World Intell. Prop. Org., 1 Records of the Intellectual Property Conference of Stockholm, June 11 to July 16, 1967, at 116 (1971).

²⁰ *Id.*, vol. 2, at 860.

²¹ *Id.*

the interpretation of “fair practice” should closely resemble fair dealing and fair use, which are unremunerated. This is consistent with WIPO’s interpretation today that the phrase “free use” means without remuneration.²²

Consistent with this conclusion, Berne Art. 2(8) similarly states that its protection “shall not apply to news of the day or to miscellaneous facts having the character of mere items of press information.” WIPO construed this limitation to mean that

[t]he correct meaning of this provision is to exclude from protection articles containing news of the day or miscellaneous information, provided such articles have the character of simple press information, since news of this kind does not fulfil [sic] the conditions essential for admission to the category of literary or artistic works.²³

More recently, the United Nations Educational, Scientific and Cultural Organization (“UNESCO”) and WIPO collaborated on the development of a “model” law to aid nations in drafting copyright legislation that would comply with these international obligations: the Tunis Model Law on Copyright.²⁴ Article 7 of the Tunis instrument outlines “fair use” exceptions, including one for the quotation of news “without the author’s consent.”²⁵ (Several countries have already implemented very similar exceptions in their copyright statutes.)

Because established international copyright rules prohibit nations from restricting the right to quote, national legislation that contradicts these obligations breaches commitments made

²² See WIPO, Summary of the Berne Convention for the Protection of Literary and Artistic Works (1886), http://www.wipo.int/treaties/en/ip/berne/summary_berne.html.

²³ See World Intell. Prop. Org., 1 Records of the Intellectual Property Conference of Stockholm, June 11 to July 16, 1967, at 116 (1971), vol. 1, at 115.

²⁴ UNESCO & WIPO, Tunis Model Law on Copyright (1976), http://portal.unesco.org/culture/en/files/31318/11866635053tunis_model_law_en-web.pdf/tunis_model_law_en-web.pdf.

²⁵ Article 7(i)(b)(“[T]he following uses of a protected work, either in the original language or in translation are permissible without the author’s consent: [i]n the case of any work that has been lawfully published... the inclusion, subject to the mention of the source and the name of the author, of quotations from such work in another work, provided that such quotations are compatible with fair practice and their extent does not exceed that justified by the purpose, *including quotations from newspaper articles and periodicals in the form of press summaries.*” (emphasis added)).

under the World Trade Organization (“WTO”).²⁶ This is because the provisions of Berne discussed here are incorporated in the Agreement on Trade-Related Aspects of Intellectual Property (“TRIPS”),²⁷ which is part of the WTO Agreement. Thus, WTO Members have a mandatory, affirmative obligation to permit anyone to quote from a work that is already lawfully publicly available.²⁸ An ancillary right or any other form of snippet tax would abrogate this right in violation of TRIPS obligations.

If there were any doubt that Berne obligations were enforceable under the WTO, that doubt was erased by a dispute brought by the European Union against the United States in 1999.²⁹ European copyright holders objected to Section 110(5) of the U.S. Copyright Act, which permits the public performance of music and television in certain public places (chiefly, small businesses, bars, and restaurants), without any royalty being paid. European trade authorities took up the complaint at the WTO, arguing that the provision violated Berne, and therefore TRIPS. While the U.S. Government argued that Section 110(5) was consistent with Berne, a

²⁶ See Raquel Xalabarder, *The Remunerated Statutory Limitation for News Aggregation and Search Engines Proposed by the Spanish Government - Its Compliance with International and EU Law*, IN3 Working Paper Series (Sept. 30, 2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2504596.

²⁷ TRIPS Agreement, Art. 9 (“Members shall comply with Articles 1 through 21 of the Berne Convention (1971)”).

²⁸ This position has been advanced previously by CCIA in the USTR Special 301 process. See, e.g., Comments of CCIA, Dkt. No. USTR-2010-003, filed Feb. 16, 2010, at 5, <http://www.cciainet.org/wp-content/uploads/library/CCIA-2010-Spec301-cmts.pdf> (if a Berne Contracting Party “were to prohibit the making of quotations from newspaper articles, for example, this would constitute denial of ‘adequate and effective protection’ under § 2242(a)(1), possibly necessitating identification as ‘acts, policies, or practices’ having actual or potential impact on relevant United States products.”); see also Comments of CCIA, Dkt. No. USTR-2012-0022, filed Feb. 8, 2013, at 11-12, [http://www.cciainet.org/wp-content/uploads/library/CCIA%20Comments%20on%20Special%20301%20\[2013\].pdf](http://www.cciainet.org/wp-content/uploads/library/CCIA%20Comments%20on%20Special%20301%20[2013].pdf) (“By virtue of Berne’s incorporation in TRIPS, Article 10(1) imposes a mandatory, affirmative obligation on WTO Members to permit anyone to quote from a work that is already lawfully publicly available”).

²⁹ Panel Report, United States -- Section 110(5) of US Copyright Act, WT/DS160/R, adopted July 27, 2000, ¶ 6.63 (finding not only that certain articles of the Berne Convention are incorporated into the TRIPS Agreement by way of Article 9.1, but also certain elements of the Berne Convention’s *acquis*).

WTO dispute resolution panel disagreed, and the United States agreed to pay \$3.3 million to the European Union to seek to resolve the dispute.³⁰

The fact that the EU and Australia have adopted ancillary copyright regimes does not demonstrate that such regimes are permitted under international law. It is only a matter of time before these regimes are challenged in the EU and Australian courts, as well as before the WTO, on the basis that they violate TRIPS.

OTHER ISSUES

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

Any attempt to create a new right to favor publishers or restrict the activities of news aggregators—in line with the EU or Australia measures—would raise serious First Amendment concerns and appear unlikely to satisfy constitutional scrutiny.

The Supreme Court has long recognized that although copyright operates as a restriction on speech, the safety valves embodied in current copyright law and copyright's role in fostering *additional* speech are what render it compatible with the First Amendment. *See Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985) (rejecting First Amendment challenge “[i]n view of the First Amendment protections already embodied in the Copyright Act’s distinction between copyrightable expression and uncopyrightable facts and ideas, and the latitude for scholarship and comment traditionally afforded by fair use”); *Eldred v. Ashcroft*, 537 U.S. 186, 219-21 (2003) (rejecting proposition that copyright is “immune from challenges under the First Amendment,” but holding that “copyright’s built-in free speech safeguards” of

³⁰ Office of the U.S. Trade Representative, Section 110(5) of US Copyright Act Dispute Settlement Proceeding Summary, <https://ustr.gov/issue-areas/enforcement/dispute-settlement-proceedings/united-states-%E2%80%94-section-1105-us-copyright-ac>.

idea/expression dichotomy and fair use were “generally adequate” to address constitutional concerns).

The Court has warned, however, that “further First Amendment scrutiny is unnecessary” only where “Congress has not altered the traditional contours of copyright protection.” *Eldred*, 537 U.S. at 219-21. The measures discussed in the NOI would do just that, regardless of whether they take the form of an amendment to the Copyright Act or a new ancillary right. And they would do so in ways that reduce or eliminate precisely the “build-in free speech safeguards” that the Court suggested were critical to copyright law’s compatibility with the First Amendment. *Id.*

In addition to the copyright-specific flaws, all of the measures discussed in the NOI have multiple features that have repeatedly led courts to strike down regulation under the First Amendment.

1. Government action that impinges upon editorial discretion faces heightened First Amendment scrutiny. It has long been established that regulation of “the selection of news stories [and] the choice of editorial position” are subject to heightened First Amendment scrutiny. *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 391 (1973); *see also Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (“The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials . . . constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.”); *see also Washington Post*, 944 F.3d at 518 (enjoining

Maryland law that, by regulating political advertisements, “intru[des] into the function of editors and forces news publishers to speak in a way they would not otherwise”).

At a minimum, courts apply intermediate scrutiny to restrictions that impinge on editorial discretion. *See, e.g., Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 661-62 (1994) (“*Turner I*”); *Time Warner Cable Inc. v. FCC*, 729 F.3d 137, 155 (2d Cir. 2013). A regulation survives intermediate scrutiny if it (1) “advances important governmental interests unrelated to the suppression of free speech” and (2) “does not burden substantially more speech than necessary to further those interests.” *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 189 (1997) (“*Turner II*”).

The First Amendment flaw is equally great whether any new regulation is seen as impinging on the editorial freedom of *aggregators*, or instead of limiting the editorial freedom of *their users* who make choices regarding the content to be shared. And to the extent that any regulation is intended to disfavor aggregators—and particularly any content-based regulations or those that would compel aggregators to carry content with which they disagree—it would, under current Supreme Court doctrine, face strict scrutiny. Under strict scrutiny, a regulation survives “only if narrowly tailored to a compelling government interest.” *Turner I*, 512 U.S. at 653.

2. Government action that singles out a particular media segment for disfavored treatment faces heightened First Amendment scrutiny. Under the First Amendment, “[w]hen speakers . . . are similarly situated, the State may not pick and choose.” *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 55 (1983). The Supreme Court has thus long been “deeply skeptical of laws that ‘distinguis[h] among different speakers.’” *NIFLA*, 138 S. Ct. at 2378 (citation omitted); *see also Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011).

This is especially true of speakers who disseminate news and information. Because the “press plays a unique role as a check on government abuse,” *Leathers v. Medlock*, 499 U.S. 439, 447 (1991), laws “that discriminate among media, or among different speakers within a single medium, often present serious First Amendment concerns.” *Turner I*, 512 U.S. at 659.

Laws singling out some element of the press for special treatment “are always subject to at least some degree of heightened First Amendment scrutiny.” *Id.* at 640-41 (applying heightened scrutiny to must-carry provisions applicable only to cable operators). Legislation that singles out news aggregators for differential treatment would thus trigger heightened First Amendment scrutiny—and almost certainly strict scrutiny. That is even more true where regulation was aimed at *particular* speakers within an industry, such as the Australia measure’s application solely to Google and Facebook. *See Sorrell*, 564 U.S. at 564 (applying strict scrutiny and striking down law that “disfavors specific speakers, namely pharmaceutical manufacturers”).

3. Laws that discriminate based on content face strict scrutiny. The Supreme Court has made clear that if application of a law turns to any extent on the content of the speech regulated, the law is “presumptively unconstitutional,” subject to strict scrutiny. *See, e.g., Reed v. Town of Gilbert*, 576 U.S. 155, 163-171 (2015); *Barr v. American Ass’n of Political Consultants, Inc.*, 140 S. Ct. 2335, 2347 (2020) (holding that robocall restriction was “directed at certain content and [] aimed at particular speakers” and was thus subject to strict scrutiny). Accordingly any attempt to restrict the scope of regulatory changes to categories of content such as “news” or to apply it only to parties such as “news publishers” thus would undoubtedly trigger strict scrutiny. *See also Washington Post v. McManus*, 944 F.3d 506, 513 (4th Cir. 2019) (enjoining Maryland law that targeted online political advertisements as obviously content-based and unconstitutional).

At least one of the measures discussed in the NOI obviously suffers from this flaw. Article 15 of the CDSM “applies only to ‘journalistic publications’ and not to ‘websites, such as blogs, that provide information’ not under the control of a ‘news publisher.’” NOI at 56725. That is blatant content-based regulation incompatible with United States constitutional law.

4. Laws that compel speech face heightened First Amendment scrutiny. Any attempt to *require* aggregators to carry content would be additionally problematic from a First Amendment perspective. Such a requirement—particularly one requiring the carrying of content related to politics, religion, or other matters of public concern—would almost certainly be subject to strict scrutiny. *See Riley v. Nat’l Fed’n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 797 (1988); *NIFLA*, 138 S. Ct. at 2371 (2018).

The Australia measure discussed in the NOI exhibits this flaw. So too does the decision by France’s competition authority punishing Google for declining to publish European press publishers as search results in France. *See* NOI at 56725 n.43. These flaws are only exacerbated where an aggregator might disagree with particular content, such as a liberal aggregator being forced to publish the content of *Breitbart News*, or a conservative aggregator being required to carry *Mother Jones*. The same is true where an aggregator is forced to carry news content that they affirmatively believe to be false, such as potential conspiracy theories or vaccine misinformation.

In one instance, the Supreme Court upheld a law requiring compelled speech—the so-called “must-carry” provisions of the 1992 Cable Act—that might at first glance appear analogous. However, it is unlikely that any measure requiring compelled speech in this context would similarly survive. *See generally* Alfred C. Yen, *A Preliminary First Amendment Analysis of Legislation Treating News Aggregation As Copyright Infringement*, 12 Vand. J. Ent. & Tech.

L. 947, 969 (2010) (discussing differences between potential news-aggregation regulation and must-carry provisions).

Whereas must-carry provisions only compelled speech by cable operations, and generally did not restrict speech, a proposal that prohibited aggregators from disseminating news without permission (or only on paying the copyright owner) would necessarily *restrict* speech. The must-carry provisions had a negligible effect on the speech of cable operators, as they rarely had to drop programming to carry the required signals. *See infra*. Any of the measures discussed in the NOI, however, would fundamentally reshape the speech and editorial decisions of aggregators. Must-carry only increased the amount of information available to the public—whereas the measures discussed in the NOI might well restrict it by deterring or preventing aggregators from disseminating news.

The Court explained that a special feature of broadcast media—the limited bandwidth that provides an “inherent physical limitation on the number of speakers who may use the broadcast medium” requires “some adjustment in traditional First Amendment analysis to permit the Government to place limited content restraints, and impose certain affirmative obligations, on broadcast licensees. *Turner I*, 512 U.S. at 638. No such limitation exists for speech carried on the Internet, however, and thus “[t]his rationale, the Court has made clear, is particular to broadcast communications and does not apply to cable transmissions or material posted on the Internet.” *Washington Post v. McManus*, 355 F. Supp. 3d 272, 288 (D. Md.), *aff’d*, 944 F.3d 506 (4th Cir. 2019); *see Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 868-69 (1997) (“[T]he vast democratic forums of the Internet [have never] been subject to the type of government supervision and regulation that has attended the broadcast industry.”).

Even putting these distinctions aside, First Amendment doctrine has evolved significantly since the Court upheld must-carry, and it is unlikely that a similar law could survive under Supreme Court precedent such as *NIFLA*. In *NIFLA*, the Supreme Court affirmed that a regulation that “alter[s] the content of . . . speech” is necessarily content-based and thus generally subject to strict scrutiny—and strictly construed the few categories of regulation entitled to less exacting review. 138 S. Ct. at 2371-76. And the Court indicated it would look with deep suspicion at any compelled speech regulation that is underinclusive—as any regulation seeking to solve competitive difficulties in the publishing industry by impinging on the First Amendment rights of aggregators and their users necessarily would be.

In short, recent Supreme Court precedents “strongly suggest that courts should view those exceptions [to strict scrutiny] narrowly,” *Washington Post*, 355 F. Supp. 3d at 296 (D. Md.), *aff’d*, 944 F.3d 506 (4th Cir. 2019). Only where a government comes forward with “persuasive evidence of a long (if heretofore unrecognized) tradition” of speech regulations in a particular arena will the Supreme Court “permit governments to impose content-based restrictions on speech”—and none applies here. *NIFLA*, 138 S. Ct. at 2372 (alterations omitted)).

5. The measures discussed in the NOI likely cannot survive heightened constitutional scrutiny. Under any form of heightened scrutiny, a proposal to restrict the speech of aggregators or advantage the speech of publishers is unlikely to survive. Such measures do not appear to serve a sufficiently important governmental interest, nor to be sufficiently tailored to any such interest, to satisfy heightened First Amendment scrutiny.

Under either intermediate or strict scrutiny, the government may not simply identify abstract harms it seeks to prevent. Rather, “[w]hen the Government defends a regulation on

speech as a means to redress past harms or prevent anticipated harms, . . . [i]t must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.” *Turner I*, 512 U.S. at 664.

The NOI appears to contemplate a potential government interest in protecting the revenues of press publishers. It is unlikely this kind of competition-based rationale represents a “compelling” interest for purposes of strict scrutiny, though whether it is an “important” interest may be a closer call. *See Turner II*, 520 U.S. at 191. The government could also assert its interest in ensuring the public have access to a diversity of news material. *See Turner I*, 512 U.S. at 663 (“[A]ssuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment.” (citation omitted)). Whether the government would be able to proffer evidence of the harms it might seek to remedy remains to be seen.

Regardless, it is highly unlikely that legislation disadvantaging news aggregators is sufficiently tailored to the government’s interests. For one, as the NOI recognizes, there are substantial arguments “that news aggregators expand the market by helping readers discover new websites and tempting them to click on more articles than they would otherwise read.” NOI at 56722. More fundamentally, it is improbable that any court would hold that permitting the government to force a news website to carry and pay for certain content not traditionally required by copyright—which threatens core press freedoms—is the least restrictive means to aiding the competitive position of the segment of the press publishing industry that has been disadvantaged by the development of the Internet, i.e., local press publishers. *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (recognizing “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open”); *see also*

Washington Post, 944 F.3d at 522 (enjoining law that required disclosures related to online political advertisements to prevent foreign election interference, because the state had “failed to provide sufficient evidence to justify painting with such a broad brush”).

Indeed, there are almost certainly less restrictive means to achieve any governmental interest in protecting local newspapers. Most obviously, Congress could simply subsidize local press publishers directly, rather than burdening the speech of aggregators. *See NIFLA*, 138 S. Ct. at 2376 (striking down California’s disclosure requirements because the state could have simply disseminated itself through an advertising campaign, rejecting the state’s arguments that past advertising campaigns had not worked because California may have “spent insufficient resources” in the past, and emphasizing that the “First Amendment does not permit the State to sacrifice speech for efficiency”).

Respectfully submitted,

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