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The factual and legal bases for my statements below derive from my empirical research on digital photography, which I have been pursuing since 2007. Published analyses include: *Existential Copyright and Professional Photography*, 95 NOTRE DAME L.R. 263 (2019) (with Peter DiCola and Eva Subotnik); *Contemporary Photography, the Right of Publicity and the First Amendment*, 42 COLUM. J. L. & ARTS 351 (2019); *Justifying Copyright in the Age of Digital Reproduction: The Case of Photographers*, 9 U.C. IRVINE L. R. 405 (2019); *Intellectual Property Harms: A Paradigm for the 21st Century*, 99 B.U.L.R. 366 (2019); THE EUREKA MYTH: CREATORS, INNOVATORS AND EVERYDAY INTELLECTUAL PROPERTY (Stanford University Press 2015). You can find more of my research and writing at <https://www.bu.edu/law/profile/jessica-silbey/>.

My comments below address two questions in the Copyright Office's Request for Public Comment: (2d) What is the market impact of current news aggregation practices on press publishers? And (1) Would granting additional rights to publishers affect authors' ability to exercise any rights they retain in their work?

News aggregation practices negatively affect photojournalists and commercial photographers, who play an integral role in the quality and integrity of press publishers' work. But granting additional rights to publishers will not ameliorate the situation for photojournalists or commercial photographers. Photographers accurately describe their professional challenges as labor and employment problems, not as copyright problems. More or stronger copyright – for press publishers or photojournalists – will not lead to an equitable or efficient redistribution of market power within the internet ecosystem.

Question 2(d): What is the market impact of current news aggregation practices on press publishers?

Digital photographers explain several impacts on their profession from the consumption of on-line news.

Reduction of full-time staff lowers quality of news. One is the reduction of full-time employed staff photographers. As news is now delivered digitally and more rapidly (since the early 2000s), news organizations employ half as many photojournalists on staff as in previous decades. The reliance by news organizations on “citizen photographers” (amateurs and bystanders) and on freelance photography more generally means the standards of the photographs – ethical standards and accuracy standards – are adjusting lower. Professional norms of accuracy and ethics are learned on-site, in employment contexts or other professional settings, and with teachers and mentors. Many younger non-staff photographers that are not educated or trained to be photojournalists – and certain not bystander photographers or citizen photographers -- do not learn to follow or appreciate these norms of accuracy and subject-matter ethics. Moreover, newsrooms do

not vet these photographs the way textual news stories are vetted, in part because they don't have the staff to do so and are not in the practice of doing the vetting, having largely relied on professional norms in the past to maintain accuracy and ethical standards. Several national newspapers have explained to me in the course of my research that the videos and photographs they identify from social media and citizen photographers to repurpose as part of on-line news stories are not fact-checked or evaluated for their accuracy, perspective, or consistency with other journalistic ethics. Finding a photograph on Instagram or Twitter, contacting the poster of the photograph and asking for permission to reuse with attribution is the extent of the due diligence for many newsrooms.

News aggregation practices lead to misinformation. Another impact of on-line news consumption on the quality and accuracy of photojournalism is that photographs when used in digital news are discoverable on-line as separate from the original context of publication (in a news story or on a website). This decontextualization of the photograph may distort the information it conveys (leading to misinformation). The decontextualization also raises the challenges of tracking down the owner of the photograph for permission for reuse and fact-checking.

News aggregation practices lead to lack of diversity among news and contributes to political polarization and misinformation. A third effect on photography in the digital age is that there is less diversity of photographic images that show up in search results. Certain photographs are used repeatedly (for reasons explained below) leading to the self-fulfilling prophecy that these are the photographs that everyone finds and uses. The features of algorithmic search mean that the photographs that show up on the first page of an internet search and those that are posted by the most-trafficked websites will be clicked on, referenced, and reused the most often. The algorithmic structure of internet search and social media reinforces the virality of certain images over others, further entrenching dominant images at the expense of diversity. Whereas many photographers at an event may lead to many perspectives of that event, more frequently fewer professional photographers are covering events, leading to fewer images produced of that event by professional photographers, which are then posted on prominent news sites. And when only a few photographs of the event are made and used on prominent news sites (whether made by a professional or an amateur), that (or those) photographs becomes viral, the other stories and other explanations, the other bits of information and other perspectives capturable by diverse photographic perspectives are deemphasized, delegitimized, and sometimes also lost. Repetitious use diminishes diversity of expression and reduces the expansion of perspectives. The market for diverse images diminishes and the singularity of images of certain events becomes a self-fulfilling prophecy. Having more photographers make more pictures of the same event or subject pushes against this singularity and opens the conversation and expands perspectives on the facts on the ground. It could lead to more accurate reporting (more perspectives often leads to more refined facts and their analysis) and to a larger market for that reporting (more audience engagement). Without diverse photographs, news images become a singular stream. And the more we are a visual culture – as opposed to a culture of consumers who spend time reading long-form textual news – the thinner and less informative the visual news will become.

Question (1): Would granting additional rights to publishers affect authors' ability to exercise any rights they retain in their work?

More or broader copyright does not solve these problems of consumer culture and lack of employee power. Photographers explain the devaluation of the quality of news photograph as caused by the reduction in willingness to pay professional photographers. Notably, they do not describe this as a copyright problem for them or for news organizations with which they have been affiliated. Photographers identify the cause of the failure of news organizations to pay them as a failure of their power of collective bargaining with employers who have significant leverage and who are also under their own economic stress. The economic stress faced by news organization is explained by the evolving expectation that news on-line is free to readers and the unwillingness of consumers to return to a pay-per-access model.

More or broader copyright for press publishers does not necessary benefit photojournalists or commercial photographers, on whom press publishers depend. If on-line news organizations could earn as much from ad revenue on-line as they did from selling ads in print papers, if revenue from classified advertising had not disappeared, and if readers were willing to pay for quality news once again, we'd still be left with the question of whether news organizations would agree to pay for full-time photographers instead of relying on amateur or citizen photographers and their freely posted photographs. Solutions to these problems are not related to copyrights or neighboring rights of exclusion as much as they are to employment law, professional ethics, and commitment to certain values (investment in accurate and comprehensive reporting and paying employees a sustainable wage to produce it). Granting new rights to publishers won't affect author's ability to exercise their rights, unless one can be assured publishers will share any benefit they derive from the new rights with the authors they employ or with whom they contract. Why would we assume that? It requires us to believe that when companies make more money, they distribute that money to their workers in some proportionate or otherwise meaningful way. Nothing about IP law suggests that such distributive justice follows from the granting of new or stronger rights. Moreover, nothing about copyright law demands it. This is predominantly a labor and employment question, as well as a corporate governance question, not an intellectual property question.

History of copyright expansion demonstrates that stronger and longer copyright does not benefit most authors or owners. In the course of studying digital photographers and speaking with them for many years, they reminded me of the *Tasini v. NYT* Supreme Court decision that resulted in more rights granted to freelancers but did not lead to more leverage or revenue for them vis à vis the news agencies for whom they worked. Instead, employers and news organizations demanded through contract a more expansive transfer of those rights in order for freelancers to be paid what they used to be paid. Photographers explain they make the same fee today as they made twenty years ago (if not a little less accounting for changes in cost of living). This weaker position persists despite having more and broader "rights" to their copyrighted work under current law (thanks to, for example, *Tasini*, *Petrella*, *Eldred*, and the DMCA. Trying the same tactic again

and again (more rights) and hoping for different results (more benefits to individual creators or small businesses) is foolishness.

In sum, the problem of news aggregation services and quality journalism is not a copyright problem. Granting more copyright (or a related right) doesn't automatically give the entity with less power -- be it the photographer, or the news organization -- more power to negotiate for what they need (e.g., higher licensing revenues/wages, control over their goods/work, respect/adherence to professional values, etc.). We need to figure out how to cultivate and sustain demand for professional journalism on both national and local levels. Copyright doesn't create demand. It creates the possibility of a market. But, as history has borne out repeatedly, copyright does very little for the individual creators and employees whose work is vital to the content industries without regulating beyond copyright to the conditions of labor and employment, competition, and professional ethics and standards.