



LIBRARY COPYRIGHT ALLIANCE COMMENTS ON PUBLISHERS' PROTECTION STUDY

The Library Copyright Alliance (“LCA”) appreciates this opportunity to comment on the publishers’ protection study. As discussed below in greater detail in response to the Copyright Office’s questions, LCA opposes the adoption of a press publishers’ right in the United States. In brief:

- 1) Although the decline of local newspapers is a serious problem for all Americans, news aggregators have not caused this decline, and the creation of a press publishers’ right will not reverse it.
- 2) Press publishers have sufficient legal means of preventing news aggregators from using their content, including copyright law, section 1201 of the Digital Millennium Copyright Act, the Computer Fraud and Abuse Act, trespass to chattel, and contract law. Press publishers choose not to use these forms of protection because they want news aggregators to use their content. In effect, they want news aggregators to pay them for the privilege of sending them customers.
- 3) A press publishers’ right likely violates the quotation right under Article 10(1) the Berne Convention.
- 4) The serious concerns about the constitutionality of *sui generis* database protection raised during Congress’s eight-year consideration of that legislation apply with equal force here. A press publishers’ right in unoriginal facts and headlines cannot be created under the Intellectual Property Clause; and the Commerce Clause cannot be employed to create a right impermissible under the Intellectual Property Clause.

The Copyright Office’s Notice of Inquiry (“NOI”) appears directed at commercial news aggregators, not the aggregation of links by libraries or educators. But it should be noted that an online bibliography—a core work product of librarians, educators, and students—could infringe a press publishers’ right, depending on how broadly it were drafted. Even if a press publishers’ right applied only to commercial uses, it still would serve as a dangerous precedent for a broader press publishers’ right.¹

Moreover, commercial news aggregators provide an important service that significantly enhances individuals’ access to information, and thus such services are consistent with libraries’ mission. Of course, press publishers also significantly enhance public access to information. Because we do not believe that news aggregators undermine the ability of press publishers to

¹ The repeated expansion of the copyright law with respect to subject matter and term of protection suggests that a new right could easily be extended beyond its original contours.

perform their valuable function, we see do not see any contradiction between our support for both press publishers and news aggregators.

RESPONSES TO SPECIFIC QUESTIONS IN THE NOI

I. 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?

Aggregation of news content in the online environment typically requires the aggregator to copy news content into a search database using web-crawling software. In response to a search query, the aggregator would use the search database to provide the user with headlines linking to the original news content responsive to the query. Alternatively, the aggregator might automatically provide the user with headlines (and links) the aggregator believes the user might be interested in, based on the user's prior search history. The creation of the search database is clearly a fair use under decisions such as *Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015); *Authors Guild v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014); *A.V. ex rel. Vanderhuy v. iParadigms, LLC*, 562 F.3d 630, 640 (4th Cir. 2009); *Perfect 10 v. Amazon.com, Inc.*, 508 F.3d 1146, 1165 (9th Cir. 2007); and *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 818 (9th Cir. 2003). *See also* U.S. Register of Copyrights, *Section 1201 Rulemaking: Eighth Triennial Proceeding to Determine Exemption to the Prohibition on Circumvention, Recommendation of the Register of Copyrights* 107-117 (2021).

Of course, if the news publisher places its content behind a paywall, or otherwise prevents the aggregator from crawling the publisher's site, fair use might not allow the aggregation of the content. Moreover, if the aggregator circumvents technological protections, the aggregator might violate section 1201 of the Digital Millennium Copyright Act ("DMCA"). These comments will focus on the aggregation of news content posted on sites that are freely accessible to the public.

The act of providing the user with headlines typically would not raise any copyright issues because short phrases do not receive copyright protection. A long headline might contain some copyrightable expression, but the copyright would be "thin" because it would contain unprotectable facts; and in any event, the copying of such a long headline likely would be fair use under the case law cited above. This display of the lede sentence likewise would not infringe copyright. If the aggregator displayed significantly more content, such as the first paragraph or two of an article, the fair use analysis might yield a different result. Arguably, copying that much content might harm the market for the article under the fourth fair use factor. *See Fox News v. TV Eyes*, 883 F.3d 169 (2d Cir. 2018).

In short, the aggregation of news content in the United States does not require a license, to the extent that the aggregator does not display an unreasonable amount of copyrighted content. Certainly, the display of headlines and thumbnail images does not require a license. Nor should it. As discussed below in more detail, there is no justification for requiring aggregators to license

news content, and requiring them to do so would likely violate the Constitution and treaty obligations.

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

There is no need for an aggregator to negotiate a license to aggregate news content from an open website.

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

Aggregators might license content behind paywalls, *e.g.*, content from the *New York Times* or the *Wall Street Journal*.

(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?

A publisher could use technological protections to prevent an aggregator from crawling its website. Circumvention of a technological protection measure could lead to liability under section 1201 of the DMCA as well as the Computer Fraud and Abuse Act, 18 U.S.C. § 1050, and state versions of the CFAA. Publishers could also employ bot exclusion headers to prevent unauthorized crawling. While ignoring this digital “Do Not Enter” sign would not constitute circumventing an effective technological measure under section 1201, it might satisfy the requirements of the CFAA. In any event, most search engines and news aggregators respect bot exclusion headers.

A publisher could also use a “browsewrap” license to prevent unauthorized aggregation. In addition to liability for breach of contract, crawling a website in violation of a browsewrap license (or a bot exclusion header) could constitute trespass to chattel. *See Register.com v Verio*, 356 F.3d 393 (2d Cir. 2004).

The bottom line is that publishers have ample means of preventing aggregators from using their content if they wished to do so. But most publishers don’t use those means because they desperately want the aggregators to use their content. They want the aggregators to send traffic their way. At the same time, the publishers cynically want the aggregators to pay for the privilege of sending them customers. As the NOI notes, after an ancillary copyright regime was adopted in France, Google announced that it would no longer display results from European press publishers as part of search results in France, unless a publisher opted in to the display free of charge. French press publisher unions sued Google, and France’s competition authority declared that Google had to include the results from the European publishers, and had to negotiate remuneration to press publishers in “good faith.”² Similarly, the Australian regime includes a nondifferentiation provision, under which a platform that provide news content

² NOI, 86 Fed. Reg. 56721, 56725 n.43.

(broadly defined) from outside Australia must submit to the regime for licensing content from Australian publishers.

In essence, the press publishers seek a “must-carry” regime; but unlike the must-carry rules under our communications laws, where the broadcaster cannot charge the cable television provider license fees for the programming they must carry, the press publishers want the news aggregators to pay for the news content they are forced to aggregate. In any event, the Internet is easily distinguishable from the cable television environment. At the time Congress enacted the must-carry rules, cable television systems had limited capacity and there was a risk that local stations might be excluded in favor of remote stations. The Internet does not have comparable capacity limits, and the aggregators aren’t the pipes by which the news content reaches the consumer. Rather, they are like the TV guide which helps the consumer find the programming. Moreover, local television stations are heavily regulated. Presumably press publishers are not requesting similar regulation.

II. 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?

The copyright systems in other countries apply to press publishers in a similar manner as the U.S. system. However, as the NOI indicates, ancillary copyright regimes have been established in the EU and Australia.

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

A press publishers’ right should not be established in the United States. It won’t solve any identifiable problem, it likely would be unconstitutional, and it would violate our treaty obligations. The latter two issues are discussed below; here we address the first point: a press publishers’ right won’t solve an identifiable problem.

There is no doubt that the Internet has had an enormously disruptive impact on press publishers in the United States. Some press publishers, such as *The New York Times*, have benefitted from the disruption, and are more dominant than ever before. Most press publishers, however, have suffered. As the NOI recognizes, the revenue of many press publishers has fallen, and newspapers have contracted or even closed their doors.

Significantly, there is no conclusive evidence that news aggregators have caused this decline in revenue. Press publishers historically have had two sources of revenue: advertising and subscriptions. While the Internet has disrupted these revenue sources, the news aggregation segment of the Internet is not to blame.³

³ For a detailed discussion of the various causes for the decline of newspapers, including the emergence of Internet, see Steven Waldman, *The Information Needs of Communities*, Federal

Press publishers once derived significant revenue from classified and other forms of advertisements in the newspaper. If you wanted to sell your house or car, if you needed to hire an employee, or if you wanted to promote an event, you (or your agent) placed an ad in the newspaper. The Internet has eviscerated newspaper advertising, classified ads in particular. There now are online platforms devoted to various market segments, from Craigslist to eBay to Zillow to Monster. Additionally, advertisers have bypassed newspapers through social media marketing. In essence, newspaper have lost their monopoly on certain advertising markets. But news aggregators are not the Internet-based competition for most of these advertising dollars.

The newspapers' monopoly on certain types of advertising was a subset of the newspapers' broader monopoly as a provider of information needed by subscribers to function in society. This information monopoly drove subscriptions. A subscriber needed a newspaper not only to look for an apartment or a job, but also to learn television programming, movie listings, sport scores, and weather forecasts. To be sure, a subscriber could find some of this information from other sources, but the newspaper typically was the most efficient and cost-effective means for the subscriber to get all this information, even if the subscriber had little interest in the news of the day. With the Internet, subscribers now have many other potential sources for this information, and are no longer as dependent on newspapers.

Additionally, even among people who wanted the breadth and depth of news coverage provided by newspapers, preferences shifted towards online news sites. Soon, most newspapers had an online presence. But as the NOI acknowledges, Internet distribution has dramatically increased the competition faced by local and regional newspapers. Every newspaper in the country now competes with the *New York Times* and the *Washington Post*, as well as with every other newspaper in the country.⁴ This competition means that most newspapers site cannot employ paywalls, which in turn means that former newspaper subscribers can now get their news for free.⁵

Moreover, the Internet has blurred the lines between historically distinct channels for news distribution. Cable news providers now post prose articles on their websites, as do radio

Communications Commission 35-43 (2011), <https://www.fcc.gov/sites/default/files/the-information-needs-of-communities-report-july-2011.pdf>. This FCC report also explains that the industry consolidation that occurred in the 1990s was fueled by debt. When advertising revenue dropped in the 2000s, many newspapers could not service their debt even though they were still profitable. This led to the shrinking of newsrooms and bankruptcies.

⁴ See NOI, 86 Fed. Reg. at 56722 (“Digital distribution exposed city papers that once enjoyed close to local monopolies to national competition from well-heeled newsrooms like *The New York Times*.”).

⁵ Newspaper also have made strategic errors with their news sites. For example, the decision to restrict or eliminate user comments on articles led to less user engagement on news sites, less user time on news sites, and a decrease in advertising revenue. Elizabeth Djinis, *Don't read the comments? For news sites, it might be worth the effort*, Poynter (Nov. 4, 2021), <https://www.poynter.org/ethics-trust/2021/dont-read-the-comments-for-news-sites-it-might-be-worth-the-effort/>.

networks and periodicals. Accordingly, it is no surprise that total newspaper circulation has fallen. Again, news aggregators have not caused this drop in circulation.⁶

The Internet has disrupted press publishers overseas as well. There, too, news aggregators haven't contributed to the disruption. But news aggregators have become a convenient target of foreign press publishers and regulators. The news aggregation services are often owned by U.S. firms that have profited greatly from other Internet-related services. The press publishers have convinced themselves that they are entitled to compensation by these successful Internet firms because these firms are “free-riding” on their content, even though none of these firms' services, including in particular news aggregation, have caused the press publishers any harm. The absurdity of the free-riding argument is made manifest by the press publishers' demand that their content be included when the aggregators have attempted to stop using it.

Although there is no shortage of news reporting on national and international stories, the decline of local and regional newspapers has created a void of coverage of local stories—or the impact of national policies at the local level.⁷ Some of these stories still are being written and posted on news-oriented websites with a local focus, but they do not have the visibility that the local newspaper physically delivered to virtually every household once had. Other stories, such as those that require substantial investment in investigative journalism, are not being written.⁸ This could have a serious adverse impact on all Americans. LCA strongly supports a thorough exploration of possible solutions to the decline of local press publishers. But a press publishers' right clearly would be an ineffective solution to that problem. The vast majority of license fees

⁶ As the NOI notes, supporters of a press publishers' right claim that news aggregation sites have a substitution effect by providing readers with enough news so that they don't follow the links back to the press publishers' site. Proponents of this position assume that but for the news aggregation sites, the readers would visit the press publishers' site. However, in the Internet environment, there are a plethora of competing information sources. Users will find the sources that meet their specific needs, and those sources often won't be press publishers' sites.

⁷ 200 counties in the United States do not have a local newspaper, and two thirds of the counties do not have a daily newspaper. Penelope Muse Abernathy, *News Deserts and Ghost Newspapers: Will Local News Survive?* 11 (2020), <https://www.usnewsdeserts.com/>.

⁸ Some of these local stories that aren't being covered do not require that much investigation. Edward Durr, the commercial trucker who defeated New Jersey Senate President Steve Sweeney in the November 2021 election, had “a history of posting bigoted, misogynistic and derogatory comments on social media.” Paul Farhi, *How the media missed a New Jersey senate candidate's racist social media posts—until he'd already won*, *The Washington Post* (Nov. 10, 2021), https://www.washingtonpost.com/lifestyle/media/durr-media-blackout/2021/11/09/5e5714f8-400a-11ec-a88e-2aa4632af69b_story.html. However, these comments received no news coverage in the run up to the election. The *Post* explains that “the lack of media scrutiny may tell a larger tale about state and local news reporting. Years of cutbacks and consolidation among news organization have left many communities without vigorous local coverage.” Southern New Jersey, where Durr's district is located, once had four daily newspapers. These four newspapers have merged into one. Relatedly, the number of reporters covering the New Jersey State House has fallen by 75 percent over the past two decades.

paid by news aggregators would flow to the largest press publishers.⁹ They have the best coverage of the broadest range of stories, as well as the most sophistication to optimize their ranking in news feeds. A press publishers' right would generate little, if any, revenue for local press publishers, and thus would not address the problem of the decline of local newspapers.

III. 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?

Granting press publishers additional rights would inevitably have a chilling effect on copyright's limitations and exception. What the press publishers' right seeks to protect is precisely what cannot be protected under copyright: facts, short phrases, and quotations permitted by fair use. Unless the press publishers' right had exceptions and limitations that matched those under copyright, the press publishers' right invariably would restrict the exercise of the copyright exception and limitations. At the same time, if the press publishers' right provided exceptions that matched those of copyright, it would be completely ineffective at accomplishing its intended objective.

(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?

A press publishers' right that has the effect of granting exclusive rights in headlines or short quotations likely would violate the quotation right under the Berne Convention.

Article 10(1) of the Berne Convention provides that:

it shall be permissible to make quotations from a work which already has 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.

A book by Tanya Aplin and Lionel Bently, *Global Mandatory Fair Use: The Nature and Scope of the Right to Quote Copyrighted Works*, makes clear that a press publishers' right violates Article 10(1). Aplin and Bently demonstrate conclusively that Article 10(1) is mandatory: members of the Berne Union must permit the quotation from works.

But Berne concerns copyright and Article 10(1) is a mandatory exception to copyright. A press publishers' right likely would be styled as an ancillary or related right rather than a copyright. This causes Aplin and Bently to ask whether "the mandatory rule under Berne carries with it an

⁹ See NOI, 86 Fed. Reg. 56721, 56722 n.14 ("Fully 69% of visitors to news.google.com ended up 3 places: nytimes.com (14.6%), cnn.com (14.4%) and abcnews.go.com (14.0%).").

ancillary obligation for the holder of such a related right to permit quotation.” *Global Mandatory Fair Use* at 53. They answer that

in any situation where a quotation of an underlying work cannot be effected without involving the related or other right, the Member State is obliged to ensure that the related right does not restrict or inhibit the ability to exercise the quotation right. The freedom granted by Article 10(1) Berne is preemptive.

Id. at 53–54.

Aplin and Bentley then turn to the specific case of the press publishers right provided by Article 15 of the EU CDSM Directive: must EU Member States recognize the Berne Article 10(1) quotation right as an exception to the press publishers’ right? They answer in the affirmative; Member States must “allow for the exercise of the mandatory freedom to quote works under the Berne Convention.” *Id.* at 54–55. Aplin and Bentley elaborate that

in any situation where a person proposes to quote from a published authorial work such as a newspaper article, cartoon or photograph, the press publishers’ right may not be invoked to restrict or prevent such lawful quotation. Were it to do so, there would be a breach of Article 10(1) Berne.

Id. at 55.

Professors Ginsburg and Ricketson agree that “member state laws prohibiting news aggregation ... would appear to clash with international norms.”¹⁰ However, because they believe that the Berne Convention would permit unfair competition remedies “for the systemic taking of time-sensitive information,” they argue that Article 10(1) should not prevent national unfair competition remedies against news aggregation. Even assuming their analysis is correct with respect to hot news misappropriation, a national unfair competition remedy against a news aggregator could be consistent with the Article 10(1) quotation right only if it required the press publisher to show in each case that the news aggregator actually competed unfairly, as in hot news misappropriation cases in the United States. In contrast, the press publishers’ right in the EU and Australia simply assume that news aggregators compete with press publications, and that they do so unfairly. This blanket assumption places them in direct conflict with the Article 10(1) quotation right.

Professors Ginsburg and Ricketson further argue that even if an outright ban on news aggregation would be “incompatible with the policies underlying the article 10(1) quotation right,” a national law that permitted aggregation subject to remuneration may be consistent with Article 10(1). They base this position on their view that use of a quotation with remuneration “should more readily satisfy the requirement of compatibility with fair practice than would a free use.”

¹⁰ Sam Ricketson and Jane Ginsburg, *Intellectual Property in News? Why Not?*, Research Handbook on Intellectual Property in Media and Entertainment, Megan Richardson & Sam Ricketson, eds. (2016).

To be sure, requiring remuneration for use of a quotation might be more fair to the rights holder, but it certainly wouldn't be more fair to the user. Moreover, interpreting Article 10(1) as permitting a country to require remuneration for use of a quotation would completely undermine the quotation right. Even Professors Ginsburg and Ricketson concede that "there is no mention in article 10(1) of the possibility of uses taking place pursuant to a compulsory license."

Notwithstanding Professors Ginsburg and Ricketson's arguments, a press publishers' right that purports to require remuneration for quotations would violate Article 10(1) of the Berne Convention.

IV. OTHER ISSUES

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

Surprisingly, the NOI does not ask whether a press publishers' right would be constitutional. This was a central issue in the debate over the adoption of database protection between 1996 and 2004. In the wake of the Supreme Court's rejection of "sweat of the brow" protection for compilations in *Feist v. Rural Telephone*, 499 U.S. 340 (1991), and the EU's adoption of a database directive that created *sui generis* protection for non-original databases, large database publishers sought enactment in Congress of legislation creating *sui generis* protection for databases.¹¹ Scholars, the Clinton Administration, and members of Congress questioned the constitutionality of prohibiting the copying of non-original material. These questions would apply with equal force to a press publishers' right.

Congress Does Not Have the Authority to Enact Press Publishers Legislation.

Numerous scholars identified serious constitutional problems with database legislation. *See, e.g.*, Yochai Benkler, *Constitutional Bounds of Database Protection: The Role of Judicial Review in the Creation and Definition of Private Rights in Information*, 15 Berkeley Tech. L. J. 535 (2000); William Patry, *The Enumerated Powers Doctrine and Intellectual Property*, 67 Geo. Wash. L. Rev. 360 (1999); Malla Pollock, *The Right to Know?: Delimiting Database Protection at the Juncture of the Commerce Clause, the Intellectual Property Clause, and the First Amendment*, 17 Cardozo Arts & Ent. L. J. 47 (1999); and Paul J. Heald & Suzanna Sherry, *Implied Limits on Legislative Power: The Intellectual Property Clause as an Absolute Restraint on Congress*, 2000 Ill. L. Rev. 1119 (2000).

These law review articles made the same basic point: Congress could not rely on its power under the Commerce Clause to circumvent a restriction on its power under the Intellectual Property Clause. That was precisely what database legislation sought to do, and that is precisely what the press publishers' right seeks to do.

¹¹ *See* Jonathan Band and Makato Kono, *The Database Protection Debate in the 106th Congress*, 62 Ohio State L.J. 869 (2001); and Jonathan Band, *The Database Debate in the 108th Congress: The Saga Continues*, 27 European Intellectual Property Review 205 (2005), for a more detailed history of the database debate.

In *Feist v. Rural Telephone*, 499 U.S. 340, 353 (1991), the unanimous Court held that “no one may copyright facts or ideas.” The Court rejected the “sweat of the brow” doctrine, under which the copyright in a database extended to the facts it contained. The Court stated that the sweat of the brow doctrine “flouted basic copyright principles,” *id.* at 354, and concluded that “only the compiler’s selection and arrangement may be protected; the raw facts may be copied at will.” *Id.* at 350. Significantly, the *Feist* Court based its ruling not on the Copyright Act, but on the Intellectual Property Clause of the U.S. Constitution. Article I, Section 8, cl. 8 authorizes Congress “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors ... the exclusive Right to their Respective Writings...” From this clause, the Court inferred that “[o]riginality is a constitutional requirement” for copyright protection, *Feist*, 499 U.S. at 346, and held that facts by definition are not original. They are discovered rather than created. *Id.* at 347.

Proponents of database legislation argued that although non-original material could not be protected under the Intellectual Property Clause per *Feist*, Congress could still protect non-original material under the Commerce Clause. However, the law review articles cited above found that the Supreme Court had rejected this approach in *Railway Labor Executives’ Ass’n. v. Gibbons*, 455 U.S. 457 (1982). Congress had enacted a statute pursuant to the Commerce Clause that provided protection to employees of a railroad in bankruptcy. The Court held that the statute was inconsistent with the uniformity requirement of the Bankruptcy Clause. *Id.* at 471. The Court further held that Congress could not avoid the particular requirements of one enumerated power by relying on another power; Congress could not avoid the uniformity requirement of the Bankruptcy Clause by relying on the generality of the Commerce Clause. *Id.* at 468–469.

Under *Railway Labor*, Congress could not invoke the commerce power to do what the Intellectual Property Clause barred it from doing: granting “exclusive Right[s]” in uncopyrightable subject matter. Congress could not avoid the originality requirement of the Intellectual Property Clause by relying on the general powers of the Commerce Clause. Stated differently, the Intellectual Property Clause constitutes not only a grant of power to Congress but also a limitation on Congress. See *Bonito Boats v. Thundercraft Boats*, 489 U.S. 141, 146 (1989) (“[a]s we have noted in the past, the [Intellectual Property] Clause contains both a grant of power and certain limitations upon the exercise of that power”); *Graham v. John Deere Co.*, 383 U.S. 1, 5–6 (1966) (“[t]he clause is both a grant of power and a limitation. . . . Congress may not authorize the issuance of patents whose effects are to remove existent knowledge from the public domain, or to restrict free access to materials already available.”). The Intellectual Property Clause precluded Congress from providing protection against the copying of facts, and Congress could not use the Commerce Clause to avoid the implicit strictures of the Intellectual Property Clause, as interpreted by the Court in *Feist*.

The Office of Legal Counsel of the Justice Department reached the same conclusion in 1998 when examining database legislation:

If the Intellectual Property Clause precluded Congress from providing protection against the copying of nonoriginal portions of factual compilations, even pursuant to a power other than conferred by that Clause, then Congress would not be able to use the Commerce Clause to avoid the implicit strictures of the Intellectual Property Clause that the Court in *Feist* could be said to have recognized, just as

Congress may not use the Commerce Clause to avoid the Bankruptcy Clause's express requirement that bankruptcy laws be uniform....

Memorandum from William Michael Treanor, Deputy Assistant Attorney General, United States Department of Justice, to William P. Marshall, Associate White House Counsel (July 28, 1998). Congresswoman Zoe Lofgren made a similar argument when the House Judiciary Committee considered the legislation. *See* H.R. Rep. No. 105–525, at 28–31 (1998) (statement of dissenting views of Rep. Zoe Lofgren, Member, House Comm. on the Judiciary).

The reasoning of *Railway Labor* applies with equal force to a press publishers' right. Congress cannot rely on its commerce power to protect non-original material that cannot be protected under the Intellectual Property Clause.

The Lanham Act Is Distinguishable from a Press Publishers' Right.

Database legislation proponents attempted to brush *Railway Labor* aside by observing that Congress enacted the Lanham Act pursuant to its commerce power after the Supreme Court specifically held that Congress could not base trademark protections on the Intellectual Property Clause. A close examination of this precedent reveals that it does not support the database legislation proponents' (and by extension, press publishers') position.

Congress passed the first federal trademark law in 1870. In 1879, the Supreme Court ruled that the 1870 statute was an unconstitutional exercise of the Intellectual Property Clause. The Court reasoned that the Intellectual Property Clause applied to writings and discoveries, but that trademarks were neither. Accordingly, Congress could not regulate trademarks pursuant to the Intellectual Property Clause. Congress subsequently enacted the Lanham Act in 1946 pursuant to its commerce power.

While trademarks are not writings, and thus do not fall within the scope of the Intellectual Property Clause, databases—and news articles—clearly are writings, and unquestionably fall within the scope of the Intellectual Property Clause. (Copyright law, for example, applies to compilations. *See, e.g.*, 17 U.S.C. § 103.) When Congress regulates trademarks under the Commerce Clause, it need not worry about interfering with the provisions and policies of the Intellectual Property Clause, because the Intellectual Property Clause does not apply to trademarks. In contrast, when Congress regulates databases—and news articles—under the Commerce Clause, it must be very careful not to interfere with the provisions and policies of the Intellectual Property Clause, precisely because the Intellectual Property Clause applies to databases and news articles.

Moreover, the Supreme Court has made clear that trademark protection is qualitatively different from the protections afforded under the Intellectual Property Clause:

[I]ts general concern is with protecting consumers from confusion as to source. While that may result in the creation of quasi property rights in communicative symbols, the focus is on the protection of consumers, not the protection of producers as an incentive to product innovation.

Bonito Boats, 489 U.S. at 157.¹²

In other words, trademark law protects consumers, trade secret law protects privacy, but database legislation and the press publishers' right seeks to protect the publisher's incentive. Because it creates the kind of protection otherwise created by the Intellectual Property Clause, database and press publishers' legislation enacted under the Commerce Clause cannot survive constitutional scrutiny.

***Dastar* Demonstrates That Congress Cannot Overturn *Feist* Using the Commerce Power.**

The Supreme Court's decision in *Dastar v. Twentieth Century Fox*, 123 S.Ct. 2041 (2003), reinforces the forgoing analysis concerning the limits on Congress's power. In *Dastar*, a unanimous Supreme Court ruled that Section 43(a) of the Lanham Act did not create a cause of action for plagiarism—the use of otherwise unprotected works and inventions without attribution. The Court stated that “[t]o hold otherwise would be akin to finding that § 43(a) created a species of perpetual patent and copyright, which Congress may not do.” *Id.* at 2049.

In support of the proposition that Congress cannot create a species of perpetual copyright protection, the Court cited its decision in *Eldred v. Ashcroft*, 537 U.S. 186, 208 (2003). In *Eldred*, the Court held that the Constitution's Intellectual Property Clause prevented Congress from adopting perpetual patent or copyright protection. The *Dastar* Court, therefore, held that § 43(a) cannot not be interpreted to create a cause of action for plagiarism because to do so would in effect create a perpetual patent or copyright, which *Eldred* found is prohibited by the Constitution's Intellectual Property Clause.

Significantly, Congress adopted § 43(a) of the Lanham Act pursuant to its power under the Commerce Clause. Thus, the *Dastar* Court ruled that Congress could not rely on its power under the Commerce Clause to enact legislation that in effect creates a perpetual patent or copyright prohibited by the Intellectual Property Clause.

This analysis can be extended to *Feist* and a press publishers' right. As noted above, in *Feist*, a unanimous Supreme Court held that the Intellectual Property Clause prohibited Congress from extending copyright protection to unoriginal material. Applying the reasoning of *Dastar* to *Feist*, Congress cannot rely on its power under the Commerce Clause to enact legislation that in effect prevents the copying of unoriginal material, which is prohibited by the Intellectual Property Clause. Accordingly, a press publishers' right that prevents the copying of unoriginal material violates the Constitution.

¹² Similarly, the purpose of trade secret protection, as provided by the Economic Espionage Act, is fundamentally different from that of the Intellectual Property Clause: to secure a “most fundamental right, that of privacy, [which] is threatened when industrial espionage is condoned or made profitable.” *Kewanee Oil v. Bicron*, 416 U.S. 470 (1974).

The Supreme Court Would Reject Any Attempt to Resurrect Sweat of the Brow Protection.

The press publishers' right, like database legislation before it, is a naked attempt to resurrect sweat of the brow and prohibit the copying of facts and other unoriginal material. The Supreme Court would see it for what it is, and strike it down. With respect to database legislation, Professor Justin Hughes wrote that "any transparent ruse by Congress...would also fall in the forbidden zone" of the Intellectual Property Clause. Justin Hughes, *How Extra-Copyright Protection of Databases Can be Constitutional*, 28 Dayton L. Rev. 159, 186 (2003). This reasoning would apply to a press publishers' right as well.

Although the Supreme Court would reject a disguised codification of sweat of the brow, during the database protection debate, some argued that codification of the hot news misappropriation doctrine in *International New Service v. Associated Press*, 248 U.S. 215 (1918), and *NBA v. Motorola*, 105 F.2d 841 (2d Cir. 1997), might be permissible. Professor Hughes noted that the Supreme Court in *Feist* mentioned the *INS* decision, and inferred that "Congress might have some power outside the [Intellectual Property] Clause to regulate unfair competitive practices in information products." Hughes, 28 Dayton L. Rev. at 186. Hughes candidly stated that "[i]t is anyone's guess how much space there is for a Commerce Clause-based unfair competition law restricting the flow of publicly disclosed information." *Id.* at 187. After reviewing various judicial opinions and scholarly writings, Professor Hughes concluded that "[a]bsent more evidence, the safest bet is legislation that sticks close to *INS* misappropriation." *Id.* at 189.

Hot news misappropriation as described in *INS* and *NBA* is far narrower than the press publishers' right in the EU or Australia. The Second Circuit identified five elements in a misappropriation claim:

- the plaintiff generates or collects the information at some cost or expense;
- the value of the information is highly time sensitive;
- the defendant's use of the information constitutes free-riding on the plaintiff's costly efforts to generate or collect it;
- the defendant's use of the information is in direct competition with a product or service offered by the plaintiff; and
- the ability of others to free-ride on the efforts of the plaintiff or others would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened.

It is far from clear that linking to an article or quoting its headline would constitute free-riding comparable to that in *INS* or *NBA*, which involved systematic copying of large amounts of information—entire articles or live scoring throughout a sporting event. Further, linking to an article certainly doesn't constitute direct competition, and providing the article's headline probably doesn't either. Also, press publishers would not succeed in showing that the news aggregators' linking to articles or reproducing headlines would "so reduce the incentive to

produce the product or service that its existence or quality would be substantially threatened.” Any harm to the press publishers resulting from news aggregation is completely speculative.¹³

Finally, even a statute targeting hot news appropriation that was adopted pursuant to the Commerce Clause may be unconstitutional. See William Patry, *The Enumerated Powers Doctrine and Intellectual Property: An Imminent Constitutional Collision*, 67 Geo. Wash. L. Rev. 359 (1999).

A Press Publishers’ Right Would Raise Serious First Amendment Questions.

Scholars and the Justice Department stated that database legislation could run afoul of the First Amendment. It is well settled that copyright’s abhorrence of protection for facts has a clear First Amendment dimension. As the Court stated in *Harper & Row, Publishers, Inc. v. Nation Enters.* 471 U.S. 539, 582 (1985):

Our profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open leaves no room for a statutory monopoly over information and ideas. The arena of public debate would be quiet, indeed, if a politician could copyright his speeches or a philosopher his treatises and thus obtain a monopoly on the ideas they contained. A broad dissemination of principles, ideas, and factual information is crucial to the robust public debate and informed citizenry that are the essence of self-government. And every citizen must be permitted freely to marshal ideas and facts in the advocacy of particular political choices.

The Court enlarged on this theme when it observed that the “copyright law contains built-in First Amendment accommodations” such as the idea/expression dichotomy. *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003). Quoting *Harper & Row*, the Court stated that the “idea/expression dichotomy strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting the free communication of facts while still protecting an author’s expression.” *Id.*, quoting 471 U.S. at 556. The Court concluded that “[d]ue to this distinction, every ... fact in a copyrighted work becomes instantly available for public exploitation at the moment of publication.” *Id.*

Professor Yochai Benkler wrote that database legislation failed to pass the intermediate level of scrutiny mandated for content-neutral regulation of speech. This is so “because there is no basis

¹³ See Kimberly Isbell, *The Rise of the News Aggregator: Legal Implications and Best Practices* (2010) Berkman Center for Internet & Society at Harvard University Research Publication 2010-10, available at ssrn.com, for a discussion of the application of the hot news doctrine to news aggregators. Professors Ginsburg and Ricketson stated that new aggregation would not meet the standards of hot news misappropriation: “News aggregators generally do not ‘scoop’ the news source’s dissemination; they do not interfere with the source’s first disclosure of the information to their readers...[News aggregators’] conduct probably does not involve the additional element of time-sensitivity that distinguishes a U.S. ‘hot news’ misappropriation claim from a copyright infringement claim.” Ricketson & Ginsburg, *Intellectual Property in News? Why Not?*

to believe that the important government interest claimed by its drafters really exists, and because even if there were such a basis, it regulates speech much more broadly than necessary to attain its stated goal.” Yochai Benkler, *Constitutional Bounds of Database Protection: The Role of Judicial Review in the Creation and Definition of Private Rights in Information*, 15 Berkeley Tech. L. J. 535, 599 (2000).

A press publishers’ right would be similarly flawed.¹⁴ To the extent that a press publishers’ right had a “must-carry” dimension requiring a news aggregator to include a press publication, the must-carry obligation likely would violate the aggregator’s First Amendment rights. In *Turner Broadcasting System v. FCC*, 520 U.S. 180 (1997), the Supreme Court subjected the must-carry provisions of the Cable Television Consumer Protection and Competition Act of 1992 to intermediate First Amendment scrutiny: a content-neutral regulation will be sustained if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests. To be sure, the government has a significant interest in promoting local press publishers. But a must-carry obligation that includes mandatory license fees would impose a burden on news aggregators that is not congruent to the benefit it would afford. The vast majority of the license fees would not go to local publishers, but to the dominant news sites, *e.g.*, nytimes.com, cnn.com, and abcnews.com.

LCA members are sympathetic to the problem of local press publishers. They support finding and implementing a solution that would actually ensure that local press publishers thrive.

Respectfully,

Jonathan Band
Counsel
jband@policybandwidth.com

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¹⁴ Isbell at 18 (“Since the hot news misappropriation doctrine contemplates restrictions on or liability for the publication of truthful information on matters of public concern, even when lawfully obtained, the doctrine as currently articulated raises First Amendment concerns.”).