

January 5, 2022

*Submitted via regulations.gov Docket No. 2021-5*

Ms. Shira Perlmutter  
Register of Copyrights and Director of the U.S. Copyright Office  
United States Copyright Office  
101 Independence Avenue, S.E., LM 404  
Washington, D.C. 20559

**Re: News Media Alliance Written Comments in Response to U.S. Copyright Office's Publishers' Protection Study: Request for Additional Comments, 86 Fed. Reg. 62,215 (Nov. 9, 2021)**

Dear Register Perlmutter:

The News Media Alliance (the “Alliance” or “NMA”) welcomes the opportunity to provide these additional comments to the United States Copyright Office (the “Office” or the “Copyright Office”) in response to the Request for Additional Comments on Publishers’ Protections Study, Docket No. 2021-5, 86 Fed. Reg. 62,215 (Nov. 9, 2021). These comments follow and build upon our initial comments, filed on November 23, 2021, and also discuss the written comments filed by other participants, as well as the discussions during the Copyright Office’s public roundtable on December 9, 2021 (“Roundtable”).

The Alliance is a nonprofit organization representing the interests of nearly 2,000 news media organizations in the United States and around the world, ranging from large national news organizations to small local newspapers. The Alliance diligently advocates for our members before the federal government on issues that affect today’s media organizations, including protecting newspapers’ intellectual property in a fast-moving, digital media environment.

The Alliance is grateful for having had the opportunity to participate in the Roundtable and the chance to submit these follow-up comments to expand on some of the issues raised and to make additional recommendations to the Office. We believe it is particularly important to address and dispel some of the arguments made by the online platforms and aggregators, and their supporters, in the initial comments and during the Roundtable because some of their claims do not accurately represent the current state of the news media industry or the online ecosystem in which press publishers operate or the practices (and their effects) of the online platforms and aggregators. In addition to addressing some of these issues, we will also provide additional recommendations for the Copyright Office to consider, including in its recommendations to Congress.

Senator Thom Tillis’ letter requesting this Study asked the Copyright Office to opine on the need for a Publisher’s Right equivalent to Article 15 of the European Union’s Directive on Copyright in the Digital Single Market.<sup>1</sup> In order to address whether new rights such as those in the EU are necessary, NMA suggests that the Office should analyze whether the existing protections and exclusive rights in the U.S. Copyright Act – including the rights of reproduction, adaptation, distribution, and public display – provide protections to press publishers equivalent to those required by the Directive. Also, the Office should analyze whether existing exceptions, limitations and defenses available under U.S. law are being read and applied too broadly by the courts and/or news aggregators, thus impacting the ability of rightsholders (publishers and individual creators) to properly invoke and enforce their rights.

In brief, the Alliance believes that current U.S. rights are equivalent in many critical ways to Article 15 without the need for the adoption of new ancillary rights. However, in practice, the interpretation of existing exceptions, limitations, and defenses, especially fair use, call this conclusion into question. For example, court opinions often articulate and apply overly-broad interpretations of fair use, and certainly the news aggregators advocate for even broader interpretations to justify their massive daily takings of copyright-protected material. We therefore believe that addressing the issues highlighted in our initial comments regarding the delineation of rights, and clarifications about the limited scope of exceptions, as well as our additional recommendations here, regarding revisions to Copyright Office statements on words and short phrases and recommendations for Congressional action, would further ensure substantial equivalency between the two regions. As a priority, we urge that the Office’s Study should present an analysis of the state of the law and confirm that the substantial and systematic takings of partial or entire photographs, articles and headlines is unlikely, in most instances, to be fair use. We also urge the Office to implement our proposals concerning changes to the Office’s registration procedures and policy statements to assist publishers with the enforcement of their existing rights. The NMA believes that the Office will conclude, as press publishers have, that even if the proper exclusive rights exist, the current market crisis is likely to continue unless (1) the courts properly understand and apply the Copyright Act and existing precedents (regarding both rights and exceptions), and (2) Congress steps in to recalibrate the market dominance problems that deny rightsholders their ability to exploit their rights. Finally, we support the exploration of additional measures that Congress could enact to protect press publishers’ content from misappropriation that should be considered beyond what copyright and other laws provide today.

## **I. RESPONSES TO INITIAL COMMENTS AND ROUNDTABLE CONTRIBUTIONS**

As discussed in detail in our initial comments, the news media industry is in crisis – press publisher revenues have plummeted in the last fifteen years, causing tens of thousands of newsroom employees to lose their jobs and thousands of communities to lose their newspapers. This is a fundamental challenge – largely fueled by the online platforms’ devaluing of journalism

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<sup>1</sup> Letter from Senator Thom Tillis et al. to Register of Copyrights Shira Perlmutter (May 3, 2021) *available at* <https://www.copyright.gov/policy/publishersprotections/letter-to-the-copyright-office.pdf> (“To assist us as we consider what legislative reforms, if any, should be taken in this area of copyright law, we request that your office conduct a study on this issue. This study should assess the viability of adding specific protections to U.S. copyright law similar to those now being implemented in Europe.”).

– not only for our communities’ continued access to high-quality journalism but also for a healthy democracy. As the 2021 Nobel Prize co-winner Maria Ressa, a professional journalist from the Philippines, noted in her acceptance speech, the online platforms “are biased against facts, biased against journalists” with “the era of competition for news” being dead due to social media companies spreading lies and misinformation initially circulated by others.<sup>2</sup> While some parties in the first round of comments to the Copyright Office or at the Roundtable recognized the fundamental concerns regarding the future of journalism in America, far too many are seemingly unwilling to support systemic changes and disregard the role online platforms and news aggregators play in exacerbating the situation.

The appended recent article by journalist Margaret Sullivan highlights the urgency of the crisis facing journalism and its detrimental effect on American society.<sup>3</sup> The loss of local journalism has directly led to decision makers being less accountable to the electorate and tax dollars being wasted without proper, independent oversight. Sullivan’s article demonstrates some of the ways these effects manifest themselves, including the loss of ability by local newsrooms to cover vital meetings and events in the community, reducing transparency and accountability that were previously accomplished by the presence of journalists being in the room when decisions were made. Similarly, the loss of local newspapers causes civic engagement to suffer and political polarization to increase, among other things making people less likely to vote and more likely to do so solely along party lines if they do.

The importance of local news is also highlighted by the trust readers place in their local newspapers, while other forms of media struggle with lower levels of trust. Local newspapers, therefore, are both the exception to the overall trend of mistrust and are also most threatened by the current distorted marketplace. In addition to emphasizing the importance of local journalism, Sullivan’s article also alludes to one of the main reasons against addressing the local news crisis through direct government financing, as proposed by some commentators.<sup>4</sup> Not only would such a solution be of limited utility, it would arguably also put at risk the very principle that a free press works to serve the people independent of government influence and potentially further public distrust in the media, which is a cornerstone of our republic.<sup>5</sup>

The solutions offered by the online platforms are no panacea either. While the online platforms and news aggregators highlight many of the ways they claim to work to promote high-

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<sup>2</sup> Valerie Hopkins, *Nobel-Winning Journalists Denounce War Talk and Online ‘Toxic Sludge’*, N.Y. TIMES (Dec. 10, 2021), <https://www.nytimes.com/2021/12/10/world/europe/nobel-prize-journalism-ceremony.html>.

<sup>3</sup> Margaret Sullivan, *What Happens to Democracy When Local Journalism Dries Up?*, WASH. POST (Nov. 30, 2021) <https://www.washingtonpost.com/magazine/2021/11/30/margaret-sullivan-the-local-news-crisis/?itid=hp-top-table-main> [hereinafter *Sullivan*].

<sup>4</sup> See e.g. R Street Institute and Niskanen Center, Initial Written Comments in Response to U.S. Copyright Office’s Publishers’ Protection Study: Notice and Request for Public Comment, 86 Fed. Reg. 56721, at 7 (Oct. 12, 2021) (“In Europe, public financing of news outlets is common and such outlets are generally well trusted and reliable sources of news for citizens. Direct funding to local newsrooms could be provided via general fund revenues, though financing such spending via an advertising tax could be used to finance this directly.”).

<sup>5</sup> *Sullivan*, *supra* note 3.

quality information and elevate professional journalism on their platforms,<sup>6</sup> it is often unclear how these practices benefit press publishers rather than simply helping platforms keep users captured within their own commercial services. For example, elevating news content to help users to “better orient themselves to a topic and easily explore related ideas”<sup>7</sup> does not guarantee any significant benefits to press publishers, despite many potential benefits to Google and its users at the expense of the publishers, while programs and efforts that would provide meaningful benefits and adequately compensate press publishers are few and far between.

In defense of the aggregators’ use of protected news content, some of the commenters opposing any additional changes in practices or protections for press publishers made substantially inaccurate statements that have the effect of obscuring the truth in an effort to circumvent long-established U.S. copyright jurisprudence, as well as case-by-case fair use analysis. These arguments fell roughly in two camps: the assertion that the use of news content – whether it be of photographs, ledes or headlines – is fair use, and that short phrases are automatically not protected in the first place, so that the use of excerpts by aggregators is therefore not infringing. However, the notion that “there are no circumstances under which a license should be required for the use of links and snippets”<sup>8</sup> is a blatant attempt to over-simplify the law, and to mischaracterize the nature of what is reproduced, disseminated and/or publicly displayed by aggregators. It simultaneously devalues the protectable content press publishers produce and makes the content that news aggregators, who engage in not only linking, but also in cutting and pasting, appropriate. Moreover, the argument that short excerpts “are not within the scope of any copyright holder’s exclusive rights under the copyright law”<sup>9</sup> is also overly simplistic and fails to capture the ways in which such content can be protected (not to mention that it ignores the taking of entire photographs or substantial portions in quality or quantity of the news article itself). Indeed, repeatedly calling ledes and excerpts from articles “short phrases” and “snippets” is an attempt to use belittling language to downplay the significance of their taking by making the material taken appear to be nominal and not substantive.

Even when platforms acknowledge that some of their services may use copyright-protected content, they argue their use is justified by fair use or by other defenses and therefore not infringing. This analysis, however, relies on false excuses, including that their uses are close to being *de minimis*, that their uses are highly transformative, and that their services are either not a substitute for press publishers’ websites or that platforms’ dissemination of publishers’ works increases the value of news content.<sup>10</sup> These arguments do not recognize how the multifaceted

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<sup>6</sup> See generally Google, Initial Written Comments in Response to U.S. Copyright Office’s Publishers’ Protection Study: Notice and Request for Public Comment, 86 Fed. Reg. 56721 (Oct. 12, 2021) [hereinafter *Google Initial Comments*]; Meta, Initial Written Comments in Response to U.S. Copyright Office’s Publishers’ Protection Study: Notice and Request for Public Comment, 86 Fed. Reg. 56721 (Oct. 12, 2021).

<sup>7</sup> *Google Initial Comments*, *supra* note 6, at 1.

<sup>8</sup> *Id.* at 3.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 4; Computer and Communications Industry Association and Internet Association, Initial Written Comments in Response to U.S. Copyright Office’s Publishers’ Protection Study: Notice and Request for Public Comment, 86 Fed. Reg. 56721, at 4 (Oct. 12, 2021) [hereinafter *CCIA Initial Comments*] (“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

uses of news content by aggregators negatively impact existing and potential markets for news. NMA, which exists in part to advocate for free speech, and its members believe strongly in a healthy fair use defense, which is central to the press publishing business. However, that defense should not be read or applied to undermine the incentives the Copyright Act was designed to provide to press publishers whose primary business is to generate and disseminate new copyrighted works on a daily basis, to great public benefit.

As to the *de minimis* argument, aggregators regularly display photographs in full, in addition to the reproduction of news articles or parts thereof, including ledes and headlines. While the picture may be a different size than on the publisher’s website, the aggregators display enough of the photograph in good enough resolution to capture the value of displaying the photograph (not just indexing it) to viewers. Further, the size of the reproduced image should not play a dispositive role in the fair use analysis in the case of news aggregators, just as a magazine or newspaper publisher that prints a small version of a photograph is not allowed to forgo a license and enhance the news story itself without permission or a fee. Similarly, photographers regularly sell separate licenses for publishers to use an image in an article and a smaller reproduction in the index. Online aggregators should not be permitted to get away with a similar practice just because of their dominant market position or the fact that they do business in the digital ecosystem. They should abide by the same laws and play by the same rules as press publishers.

Further, some commenters’ claims do not recognize the fact that the heart and value of news articles can often be captured by short excerpts – the unauthorized use of which can strip such content of the benefits of copyright protection. Press publishers’ experience this real-world loss of value every day. While the *Google Books* decision<sup>11</sup> is often used to support their argument that, regardless of the amount copied, the use of news content by aggregators is transformative, in fact, the use in *Google Books* was materially different from the kind of substitutional use the aggregators engage in today, which is not (or is at most modestly) transformative, as discussed in detail in the initial comments from NMA and Professor Ginsburg.<sup>12</sup>

News aggregators are also not, as implied by some commenters during the proceedings, simply copying facts and information gathered from news articles, thereby not infringing on any copyrightable content.<sup>13</sup> In practically all cases, news aggregators use publishers’ creative content,

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profoundly transformative.”); Re:Create, Initial Written Comments in Response to U.S. Copyright Office’s Publishers’ Protection Study: Notice and Request for Public Comment, 86 Fed. Reg. 56721, at 3 (Oct. 12, 2021) (“Using a small snippet of a work, especially one that enhances the value of the underlying work and drives revenue to the publisher in the form of new readers, is about as clear and obvious fair use as one would find.”).

<sup>11</sup> *Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015).

<sup>12</sup> See generally Jane C. Ginsburg, Initial Written Comments in Response to U.S. Copyright Office’s Publishers’ Protection Study: Notice and Request for Public Comment, 86 Fed. Reg. 56721 (Oct. 12, 2021); News Media Alliance, Initial Written Comments in Response to U.S. Copyright Office’s Publishers’ Protection Study: Notice and Request for Public Comment, 86 Fed. Reg. 56721 (Oct. 12, 2021) [hereinafter *NMA Initial Comments*].

<sup>13</sup> See *Google Initial Comments*, *supra* note 6, at 3 (“...‘[N]ews content’ does not refer to expressive news material or to significant excerpts of such material. It does not mean, for example, whole or partial newspaper articles, investigative reporting, feature stories, or any other form of protectable, compensable expression that copyright law recognizes as authorship within news publications. Rather, it means only links and snippets, including headlines, which fall into categories of subject matter – facts, ideas, titles, and short phrases – that are uniformly recognized as unprotectable in the Copyright Act and the relevant case law.”); and *CCIA Initial Comments*, *supra* note 11, at 4

including ledes or other excerpts, photographs and headlines, to communicate expression of the essence of stories to the public and to keep users captive within their platforms. Indeed, (except perhaps when the platforms copy and store news articles for artificial intelligence training purposes, as discussed in more detail below), the platforms do not produce and disseminate their own, new works based on the content they copy from the articles – they just use the publishers’ content.

On the subject of fair use, it is also important for the Copyright Office to note, when performing its analysis, the substantial equivalence between the U.S. and European legal regimes, including that both systems have copyright exceptions that apply to any protections afforded to press publishers.<sup>14</sup> While the Alliance is not advocating for the United States to adopt a right identical to that created by Article 15 of the EU Copyright Directive – with American publishers already holding substantially similar rights as European publishers under the new Directive, notwithstanding enforcement issues – it is important to reiterate that the European publishers’ right is subject to similar exceptions as those established under U.S. fair use precedents to protect innovation, commentary, and consumers.<sup>15</sup>

As for the threshold question of copyrightability, some of the initial submissions to the Copyright Office and participants at the Roundtable espoused the idea that news excerpts, including ledes and headlines, are not protected content.<sup>16</sup> This is a mistaken belief largely based on the Copyright Office’s longstanding statement that “words and short phrases” may not be registered, thus confusing registration practices and copyrightability. Moreover, this argument fails to address the use of entire photographs and large story excerpts.

As discussed during the Roundtable by the Alliance and Professor Ginsburg, these statements conflate two separate concepts – originality and brevity – and the case law does not support such an overarching conclusion regarding the copyrightability of short phrases.<sup>17</sup> The platforms and aggregators’ reliance on the supposed unprotectability of short phrases to justify their uncompensated and unauthorized use of news content illustrates the need for the Copyright

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(“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...”).

<sup>14</sup> This is contrary to what Google implied in its comments. *Google Initial Comments*, *supra* note 6, at 6 (“Countries that have adopted ancillary copyright for press publishers also often differ from the United States in that their copyright laws do not embrace the right of fair use for innovators acting as transformative secondary users of copyrighted works.”).

<sup>15</sup> See Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, Art 15 (3), 2019 O.J. (L 130) 92-125 (indicating that the provisions in the EU Directive 2001/29/EC regarding “limitations and exceptions” (Article 5), “technological protection measures” (Article 6), “rights management information” (Article 7) and “sanctions and remedies” (Article 8) all “apply mutatis mutandis” to the new publishers’ rights in the DSM Directive).

<sup>16</sup> See *CCIA Initial Comments*, *supra* note 11, at 7; *Google Initial Comments*, *supra* note 6, at 4; Transcript of Roundtable at 195-196 (Sternburg), Library of Congress, In the Matter of: Publishers’ Protections Study Roundtable, (Dec. 9, 2021) [hereinafter *Roundtable Transcript*].

<sup>17</sup> See *Roundtable Transcript*, *supra* note 16, at 10-11, 43 (Ginsburg), 103-104 (Williams), 154-155, 195 (Schwartz).

Office to revise its broad statements contained in the Compendium and Circular 33, as discussed in more detail below.

Some of these misinterpretations of the law may be exacerbated by an apparent misunderstanding of the realities of the online ecosystem and the news publishing industry as a whole. Some commenters noted that press publishers have consented to the use of their content by the platforms, particularly as they have decided not to opt-out from such use via the robots.txt exclusion protocol.<sup>18</sup> This, however, is a false choice that, if taken, would remove the publisher's content from even simple search results, making it harder for users to find the publisher's website in the first place.

Similarly, while publishers do have the ability to limit access under Section 1201 of Title 17, absent collective action, the use of such technologies puts a publisher at risk of losing significant traffic in comparison to competitors, making that choice an unrealistic one for most publishers. While we do not dispute that the platforms provide the majority of news publishers' referral traffic, the onerous terms and limited return is what makes withholding content a Hobson's choice. In effect, therefore, as discussed in more detail in our initial comments, publishers are forced into an all-or-nothing choice between allowing the use of their content by the platforms in any way the platforms choose or sacrificing their visibility vis-à-vis other publishers.

The situation is made worse by the unequal negotiating power of the relevant parties, which makes obtaining freely negotiated and fair licenses with online platforms and news aggregators almost impossible. Suggesting the contrary disregards the systemic challenges posed by the dominant platforms in the online marketplace and the reality that publishers' licensing revenues from such services are minimal.<sup>19</sup> This failure to grasp the situation is further highlighted by Google's assertion that due to the advances in the online marketplace, "media companies no longer need expensive physical printing presses and distribution networks."<sup>20</sup> This statement dismisses the facts of the high costs associated with field-gathering news, and then editing and producing high-quality journalism for local communities, as well as the reality that thousands of people still prefer to read print newspapers and that print subscriptions still form a major part of publisher revenues.

Notwithstanding some commenters' assertions, taking the steps requested by NMA would not cause harmful or unintended consequences for the broader news media industry or to the public's access to high-quality journalism. Consumers would not have to pay for the ad-based news that aggregators currently provide to them if the aggregators began to pay the news publishers for using their copyright-protected content. Plus, it is incorrect that the protections for which NMA advocates would only benefit large, national and regional publishers.<sup>21</sup> Increased leverage would simply enable all publishers to negotiate on equal footing with the online platforms, while preserving the ability of publishers to provide their content to news aggregators for free, if they

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<sup>18</sup> See generally *CCIA Initial Comments*, *supra* note 11; *Google Initial Comments*, *supra* note 6.

<sup>19</sup> See *CCIA Initial Comments*, *supra* note 11, at 6 ("There are no obstacles to press publishers and aggregators negotiating licenses for the use of news content beyond that permitted by fair use.").

<sup>20</sup> *Google Initial Comments*, *supra* note 6, at 4.

<sup>21</sup> See *id.* at 6; *CCIA Initial Comments*, *supra* note 11, at 10.

choose to do so. Evidence from Australia and Europe also supports the conclusion that the Australian Media Bargaining Code and the EU publishers' right have not only benefited the biggest players but also small, local publishers.<sup>22</sup>

Attacks on the relatively modest requests presented by NMA in this proceeding are at odds with the most fundamental of copyright principles – that copyright owners are entitled to fair compensation and control over the use of their works. Striking the right balance between copyright protection and the ability of others to learn from, build upon, and generate new works based, in part, on preexisting works, is of fundamental importance. But currently, the balance between the platforms and press publishers is askew, posing an existential threat to the incentives to invest in original journalism. To restore a better balance between users and rightsholders, it is essential to restore the ability of publishers to receive fair compensation for the use of their content online by dominant platforms and aggregators.

Should online platforms recognize the value of news to their services and negotiate with publishers in good faith, the result would be more public access to high-quality journalism, because the increased revenues would provide press publishers with the resources to invest in more original journalism and could provide publishers with more collaborative partners to advance new methods of digital dissemination of content.

It is unfortunate to see that the arguments and tactics employed by those opposing effective protections for press publishers in the U.S. reflect the same threats and scare tactics employed by some of the same big tech companies and their advocates in Europe and Australia prior to the adoption of additional protections in those countries. Despite overwhelming evidence of publishers benefiting in both countries – and the internet and the platforms still working with minimal, if any, changes to the reader experience – the platforms use these arguments to undermine this fundamental shift in public policy globally in an effort to protect their dominant position in the United States and elsewhere.

## II. FURTHER RECOMMENDATIONS TO IMPROVE THE SUSTAINABILITY OF HIGH-QUALITY JOURNALISM

In our initial comments, the Alliance asked the Office to make four recommendations in its Study: (1) concluding that, in most cases, the reproduction, distribution and/or public display of news content by aggregators is likely infringing;<sup>23</sup> (2) implementing changes to registration

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<sup>22</sup> See Jo Printz, *Small News Publishers Band Together In Negotiations With Tech Giants Google, Facebook, ABC CENTRAL VICTORIA* (Nov. 29, 2021), <https://www.abc.net.au/news/2021-11-30/independent-publishers-begin-negotiations-with-tech-giants/100660660>; Callum Jaspan, *Country Press Australia Pens Agreement With Google On Showcase Program*, MUMBRELLA (Sep. 3, 2021), <https://mumbrella.com.au/country-press-australia-pens-agreement-with-google-on-showcase-program-701608>; France24, *Google And French Publishers Sign Landmark Copyright Agreement* (Jan. 21, 2021), <https://www.france24.com/en/business/20210121-google-and-french-publishers-sign-landmark-copyright-agreement>.

<sup>23</sup> During the Roundtable, a platform-aligned panelist suggested that the Office should not, as part of its Study, conduct a fair use analysis of news aggregators' uses of works. *Roundtable Transcript*, *supra* note 16, at 160 (Band) (“The second point I wanted to make had to do with, you know, this issue of, oh, we just want the Copyright Office to give a legal opinion on fair use, right? Well, that's not the appropriate role of the Copyright Office...”). We counter that such analysis should be the heart of the Study. The Office routinely opines on fair use issues in its policy studies. See e.g., SECTION 1201 OF TITLE 17 A REPORT OF THE REGISTER OF COPYRIGHTS (Jun. 2017),

practices that would help protect press publishers; (3) recommending the adoption of strong national treatment provisions in any bilateral agreements with the EU to ensure American publishers can benefit from the protections afforded to European publishers under Article 15 of the European Union Digital Single Market Directive; and (4) endorsing the Journalism Competition and Preservation Act of 2021 (“JCPA”).<sup>24</sup>

After reviewing the written and Roundtable comments to date, we believe that in order to address the fundamental imbalance that exists between press publishers and online platforms, additional recommendations on specific issues are warranted. In these additional comments, we discuss four such issues: (1) Copyright Office policies and guidance with regard to the copyrightability of “words and short phrases”; (2) systematic use of news content by commercial actors; (3) considerations of additional *sui generis* protections; and (4) potential challenges posed by artificial intelligence.

Despite American publishers having, in theory, similar protections to European publishers, we believe that these issues, together with those highlighted in our initial comments, need to be addressed in order to provide American press publishers with protections substantially equivalent to those in the European Union. In particular, we believe that in order to achieve substantial equivalency, it is vital for the Copyright Office to recommend and implement, to the extent possible without Congressional action, the proposals discussed in our initial comments as well as the changes to Copyright Office policies and guidance highlighted in these additional comments. Together, these suggestions would strengthen the publishers’ ability to continue investing in original journalism. Furthermore, as discussed below, additional measures and clarifications if enacted by Congress would ensure protection of quality journalism today and for the future protection of quality news.

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SOFTWARE-ENABLED CONSUMER PRODUCTS: A REPORT OF THE REGISTER OF COPYRIGHTS (Dec. 2016), ORPHAN WORKS AND MASS DIGITIZATION: A REPORT OF THE REGISTER OF COPYRIGHTS (Jun. 2015), SECTION 108 OF TITLE 17: A DISCUSSION DOCUMENT OF THE REGISTER OF COPYRIGHTS (Sep. 2017). Even if the Office were to decline to opine on the likely outcome of a fair use defense with respect to the present conduct of news aggregators, the Office could clarify that the Copyright Act and existing precedents do not squarely endorse the notion that such conduct is lawful and that significant questions exist with respect to this conduct.

<sup>24</sup> During the Roundtable, certain panelists contended that consideration of the JCPA is outside the scope of the Office’s Study. *See e.g., Roundtable Transcript, supra* note 16, at 101 (Bridy), 162-163 (Band), 181-182, 207 (Sternburg). We disagree, because the Copyright Office called for the discussion of laws beyond the Copyright Act as part of this Study. *See Publishers’ Protections Study: Request for Additional Comments*, 86 Fed. Reg. 62215, 62216, (Nov. 9, 2021) (“The United States Copyright Office is undertaking a public study at the request of Congress to evaluate current copyright protections for publishers. Among other issues, the Office is considering the effectiveness of publishers’ existing rights in news content, including under the provisions of title 17 of the U.S. Code, as well as other federal and state laws; whether additional protections are desirable or appropriate; the possible scope of any such new protections, including how their beneficiaries could be defined; and how any such protections would interact with existing rights, exceptions and limitations, and international treaty obligations.”) (emphasis added).

## A. CHANGES TO COPYRIGHT OFFICE POLICIES AND DOCUMENTS – PROTECTABILITY OF “WORDS AND SHORT PHRASES”

As noted during the Roundtable and in Professor Ginsburg’s appended additional comments,<sup>25</sup> the Copyright Office has in multiple instances, including the Compendium and the Copyright Office Circular 33, noted that “words and short phrases, such as names, titles, and slogans, are not copyrightable because they contain a *de minimis* amount of authorship,” going as far as saying that the “Copyright Office cannot register...brief combinations of words, even if the word or short phrase is novel or distinctive or lends itself to a play on words.” The related regulations, 37 C.F.R. § 202.1, reflect these broad statements. While these statements list out some potential examples of such short phrases, they do not include a specific mention of headlines or ledes. However, the Office’s Notice of Inquiry of October 12, 2021, explicitly sweeps headlines into this so-called unprotected group.<sup>26</sup>

These statements do not, however, accurately reflect the Copyright Act, the Constitution, or the relevant case law. And, they are misused by those seeking to justify the unauthorized use of news content by the dominant platforms and aggregators. The Office’s statements conflate two concepts, brevity and originality, which may in some situations be related but are fundamentally different and of which only one – originality – is a condition based in the Copyright Act and the Constitution. Indeed, neither the statute nor the Constitution itself conditions copyright protection on the length of a work, with both the statute and the Constitution instead focusing solely on originality.

As examined in more detail in Professor Ginsburg’s appended additional comments,<sup>27</sup> a brevity criterion is largely unfounded and arbitrary, with the cases cited in support of it turning actually on originality, not the length of the works in question. Indeed, as Professor Ginsburg demonstrates,<sup>28</sup> a haiku could be protected despite being composed of only six words in some instances. Furthermore, despite the affirmative and broad statements in the Compendium, regulations, and Circular 33, the Copyright Office has never expounded on the scope of the brevity criterion – *i.e.*, how short is too short? The Alliance strongly believes, as the courts have stated, that any copyrightability analysis should turn on the originality of the work, thus protecting original works regardless of their length.

Furthermore, ledes and substantive excerpts from news articles are not “short phrases” by any reasonable definition of the term. Indeed, in its publications and the Compendium, the Copyright Office cites as examples of “names, titles, or short phrases” such material as individual and business names, titles of works, catchphrases, and mottos and slogans. The examples are more akin to trademarks than substantive content. No example given by the Copyright Office comes

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<sup>25</sup> Jane C. Ginsburg, Additional Written Comments in Response to U.S. Copyright Office’s Publishers’ Protections Study: Request for Additional Comments, 86 Fed. Reg. 62215, 62216, at 2-3 (Nov. 9, 2021) [hereinafter *Ginsburg Additional Comments*].

<sup>26</sup> See Publishers’ Protection Study: Notice and Request for Public Comment, 86 Fed. Reg. 56721, 56723 (Oct. 12, 2021).

<sup>27</sup> See generally *Ginsburg Additional Comments*, supra note 25.

<sup>28</sup> *Id.* at 4-5.

close to the material used by the aggregators. Excerpts from news articles that convey information are much more – in fact and as a matter of copyright law, than “short phrases”.

While the copyrightability (and the separate issues pertaining to registration), of short phrases may seem trivial, the Office’s statements have led the aggregators and others to maintain that copying short excerpts from full articles, even where the underlying articles have been registered and are undisputedly subject to copyright protection, is fair game. Consequently, news aggregators rely on the mistaken assumption that news headlines and ledes are not protected under an unnamed *per se* rule, and therefore their unauthorized, uncompensated use is permissible even if it harms the market for the underlying protected work consisting of not just the headlines, but other text and images.

Especially considering the substantial reliance on this mistaken view of the law – and cites to the Copyright Office documents – to justify the free use of news content online during these proceedings, the Alliance believes it is of vital importance and urgency that the Copyright Office should revise these statements to more accurately reflect the Constitution, the statute and current jurisprudence. In particular, we suggest changing the language in Compendium 313.4(C) and Circular 33 from “[w]ords and short phrases, such as names, titles, and slogans, are not copyrightable because they contain a de minimis amount of authorship” to read “[w]ords and short phrases, such as names, titles, and slogans, are not copyrightable **to the extent that they are not original.**” We believe that changes to this effect should also be made in 37 C.F.R. § 202.1. In addition, we suggest that the Copyright Office amend these documents to include examples of what are not “short phrases”, to avoid confusion and mis-citation.

## **B. CLARIFYING THE LAW AROUND SUBSTANTIAL TAKINGS AND SYSTEMATIC USES OF NEWS CONTENT**

To address some of the issues posed by the news aggregators’ reliance on an expansive interpretation of the fair use doctrine and the ill-assumed belief in the uncopyrightability of short phrases, steps could be taken to address the substantial taking and systematic use of copyrighted (news) content or parts thereof for news aggregation or other commercial purposes.

Congress has previously referred explicitly to the systematic copying of protected works to modify exemptions otherwise allowing for uses by certain stakeholders. Subsection (g)(2) of 17 U.S.C. §108, concerning limitations on exclusive rights with regards to certain uses by libraries and archives, expressly disavows the applicability of the provided limitation on the reproduction and distribution rights if the library or archive “engages in the systematic reproduction or distribution of single or multiple copies or phonorecords” of the protected material. The statute, at 17 U.S.C. §108(f), also includes a provision stating: “Nothing in this section— ... in any way affects the right of fair use as provided by section 107, or any contractual obligations assumed at any time by the library or archives when it obtained a copy or phonorecord of a work in its collections.”

The Copyright Office could recommend in its Study that Congress explore the principles of Section 108 to the effect that systematic use of news content weighs in the analysis of copyright infringement and, while not definitively precluding a fair use defense, weighs against a finding of

fair use.<sup>29</sup> While systematic use is often already considered in courts' fair use analyses,<sup>30</sup> a clarification from the Office and Congress would counter the ability of dominant platforms to abuse their position by forcing publishers to accept the large-scale use of their content. Report language stating that systematic copying tends to weigh against fair use would be beneficial in creating an effective disincentive against misuse of copyrighted material by aggregators, and serve as a caution sign for aggregators. Clarity that systematic takings are distinct would be particularly useful given that, as we discussed in our initial comments, systematic use of news content is unlikely to be highly (if at all) transformative, and is likely to have substantial market impact on press publishers in terms of reduced reader traffic, revenues, and potential licensing markets.

### C. *SUI GENERIS* PROTECTIONS FOR NEWS PUBLISHERS

As discussed in more detail in our initial comments, the "hot news doctrine," first articulated in *International News Service v. Associated Press*,<sup>31</sup> provides a limited set of protections for press publishers in the few states where it is recognized. Not only is the doctrine limited to a few states, but, as recently interpreted, it is also available only in very specific circumstances, failing to provide press publishers with adequate protections and legal certainty. The hot news doctrine was initially developed especially for the situation where a market-substituting competitor misappropriates news content to benefit from the time-value of the information while providing it to users at a lower cost. Over the years it has been cut back to reduce its protections, and while hot news claims are no longer a viable protection for publishers in the

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<sup>29</sup> See 17 U.S.C. §108 (2021).

<sup>30</sup> See, e.g., *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 916 (2d Cir. 1994) ("We consider whether Texaco's photocopying by 400 or 500 scientists, as represented by Chickering's example, is a fair use. This includes the question whether such institutional, systematic copying increases the number of copies available to scientists while avoiding the necessity of paying for license fees or for additional subscriptions."); *Princeton Univ. Press v. Michigan Document Servs., Inc.*, 99 F.3d 1381, 1390 (6th Cir. 1996) ("In its systematic and premeditated character, its magnitude, its anthological content, and its commercial motivation, the copying done by MDS goes well beyond anything envisioned by the Congress that chose to incorporate the guidelines in the legislative history."); *Cambridge Univ. Press v. Patton*, 769 F.3d 1232, 1285 (11th Cir. 2014) (Vinson, J. concurring) ("This case does not involve an individual using a single copyrighted work, nor does it involve a single course, a single professor, or even a one-time use of multiple copies for classroom distribution. Nor, in my opinion, should it be confined to the seventy-four specific instances of infringement that were the focus during trial. Rather, this case arises out of a university-wide practice to substitute 'paper coursepacks' (the functional equivalent of textbooks) that contained licensed copyrighted works with 'digital coursepacks' that contained unlicensed copyrighted works. This was done for the vast majority of courses offered at GSU and, as will be seen, it was done primarily to save money.") (internal citations omitted); *Associated Press v. Meltwater U.S. Holdings, Inc.*, 931 F. Supp. 2d 537, 561 (S.D.N.Y. 2013) ("Meltwater's business model relies on the systematic copying of protected expression and the sale of collections of those copies in reports that compete directly with the copyright owner and that owner's licensees and that deprive that owner of a stream of income to which it is entitled. Meltwater's News Reports gather and deliver news coverage to its subscribers. It is a classic news clipping service. This is not a transformative use. As significantly, the rejection of the fair use defense here will further the ultimate aim of the Copyright Act, which is to stimulate the creation of useful works for the public good."); *Los Angeles Times v. Free Republic*, No. CV 98-7840 MMM(AJWX), 2000 WL 565200, 1, \*14 (C.D. Cal. Apr. 4, 2000) ("Because the copying is verbatim, encompasses large numbers of articles, and occurs on an almost daily basis, the evidence supports a finding that defendants (and visitors to the Free Republic page) engage in extensive, systematic copying of plaintiffs' works.").

<sup>31</sup> 248 U.S. 215 (1918).

new world of systematic, immediate use of news content, no new laws have emerged in response to the new developments and challenges.

Drawing inspiration from the hot news doctrine, the Copyright Office could study further and potentially recommend to Congress options to consider regarding a *sui generis* federal misappropriation right to protect press publishers' investments in professional journalism. There is precedent for such an approach, most noticeably with regards to vessel hull protections and protections for mask works that are managed by the Copyright Office.<sup>32</sup> Such a right would enhance the ability of and incentives for press publishers to continue investing in original journalism.

Any new *sui generis* right could resemble but not replicate the existing hot news doctrine, in addition to incorporating clear safeguards to minimize any potential conflicts with the First Amendment. These safeguards could include a limitation that would protect the information or content only for a limited period of time. The burden of proving the time-sensitivity of the content's value could be placed on the publisher, while the right could be limited to systematic or large-scale copying or reuse that harms the publisher. The time limit would also ensure that the right would not replicate or broaden copyright protections, but instead simply supplement existing protections under copyright law that apply to all press publisher content, thereby having a minimal disruptive effect on the current system. Meanwhile, the term "press publisher" could be defined broadly enough so as not to raise constitutional concerns, as has been done in other instances.<sup>33</sup>

As noted, a *sui generis* right is likely not required to ensure substantial equivalency with the European Union – and it would certainly not provide a panacea to challenges faced by press publishers, but it would instead simply provide a new tool that may provide meaningful additional protections for the publishers' investment in quality journalism and help to ensure continued access to such journalism for the communities they serve. The Copyright Office could recommend that Congress study and conduct hearings into the proposal.

#### **D. ADDRESSING USES OF NEWS CONTENT FOR ARTIFICIAL INTELLIGENCE APPLICATIONS**

The approaches outlined above and in our initial comments focus on addressing the most pressing issues facing press publishers today. However, the Study should not only focus on fixing historical wrongs and imbalances. The Office also should be mindful of challenges posed by emerging technologies like artificial intelligence ("AI") to news publishing and the efficacy of copyright protections for news content. These issues are already prominent and are likely to become even more so in the coming years.<sup>34</sup>

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<sup>32</sup> See 17 U.S.C. §§905, 1301-1332 (2021); 37 C.F.R. §§211, 212 (2021).

<sup>33</sup> See *NMA Initial Comments*, *supra* note 12, at 2, n. 2 (Oct. 12, 2021) (providing several reference points containing definitions of "press publisher" or similar terms for the Office's consideration).

<sup>34</sup> News Media Alliance Written Comments in Response to U.S. Patent and Trademark Office's Request for Comments on Intellectual Property Protection for Artificial Intelligence Innovation, 84 Fed. Reg. 58141 (Oct. 30, 2019), available at [https://www.uspto.gov/sites/default/files/documents/News%20Media%20Alliance\\_RFC-84-FR-58141.pdf](https://www.uspto.gov/sites/default/files/documents/News%20Media%20Alliance_RFC-84-FR-58141.pdf).

Today, online platforms and tech companies already use news content to develop and support their artificial intelligence applications. These uses include training AI systems to provide users with relevant information drawn from publishers' content, with some contemplated uses being clearly in competition with the core business of press publishers. For example, in December 2020, it was reported that Facebook (Meta Platforms) was developing an AI tool called TLDR (standing for "Too Long, Didn't Read") that would summarize news articles in bullet point form with the express purpose that users would not have to read whole articles or click through to the publisher website.<sup>35</sup>

While Facebook's development of a TLDR service was eventually abandoned, TLDR is probably the clearest example of the challenges posed by AI to copyright and to press publishers. It would have ingested (*i.e.*, reproduced) news content en masse while producing summaries with the purpose of diverting readers from the original publishers. Unfortunately, TLDR is not the first – nor almost certainly the last – or only AI application to use news content in this way. Other interactive services and AI applications use news content to serve information to consumers, often without diverting traffic back to the original information source. In addition, massive, for-profit corporations engage in text and data mining of news sites for machine learning purposes, to further develop their services and to increase revenues by keeping users engaged and on their platforms. For example, Google Search often responds to search queries not just by providing links to third party sources (such as news articles) but with a direct answer that draws information from the third party but is presented as if Google itself answered the query.

The use of news content for these purposes raises several concerns similar to those outlined in our initial comments with regards to news aggregation practices. The platforms engage in large-scale, systematic harvesting of news content without compensating publishers. They then use the harvested content to produce services that divert users away from the original source sites. Meanwhile, publishers undertake and bear all of the costs, risks and responsibility for producing the original content, with minimal financial incentives to keep doing so. These concerns are in no way alleviated by the fact that the end-product may look considerably different and be non-infringing in itself or that the copies made of the harvested news content may never be publicly displayed.

The Alliance strongly believes that the copying of news content for these purposes should be considered *prima facie* infringement of the reproduction right, in addition to which the end-products are, depending on the output, a violation of the publishers' rights to reproduce and adapt their copyrighted works. Moreover, we do not believe that the Second Circuit in *Google Books*<sup>36</sup> and *Hathi Trust*<sup>37</sup> meant to create an open season for mass digitization and storage as long as there is no infringing output. Additionally, unlike in those cases, in the news context, the content is already largely digitized and the public benefit, especially considering the potential loss of original journalism, is noticeably smaller.

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<sup>35</sup> Ryan Daws, *Facebook Is Developing A News-Summarising AI Called TL;DR*, AI NEWS (Dec. 16, 2020), <https://artificialintelligence-news.com/2020/12/16/facebook-developing-news-summarising-ai-tldr/>.

<sup>36</sup> *Google Books*, 804 F.3d at 202.

<sup>37</sup> *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014).

Recognizing that this is largely an untested area of law, especially within the context of news publishing, the Alliance notes that more certainty in this area would be beneficial and the Office could study whether the issue may be ripe for Congressional attention. Similarly, the Office could consider further guidance on the issue, similar to the fair use analysis requested in our initial comments regarding the use of news content by aggregators, especially considering the noticeable negative market effect common to the two practices.

### III. CONCLUSION

The Alliance very much appreciates the Copyright Office's consideration of how to advance the continued existence and sustainability of high-quality journalism in America. As noted before, we believe that in order to achieve substantial equivalency with regards to the EU's protections for press publishers, there needs to be stronger guidance about and enforcement of the existing rights afforded to press publishers under the Copyright Act, and we have highlighted how to do this in these and our initial comments. In addition, we have discussed additional protections that the Copyright Office may want to consider and recommend to Congress, and we stand ready to discuss these in more detail with you during the process.

Thank you again for your work on this study. We look forward to working and continuing our dialogue with you in the coming months.

Sincerely,



Danielle Coffey  
Executive Vice President and General Counsel  
News Media Alliance

### APPENDIX ATTACHED

(1) Jane C. Ginsburg, *Written Additional Comments in Response to U. S. Copyright Office's Publishers' Protection Study: Request for Additional Comments*, 86 Fed. Reg. 62,215 (Nov. 9, 2021).

(2) Margaret Sullivan, *What Happens to Democracy When Local Journalism Dries Up?*, WASH. POST (Nov. 30, 2021).

## **APPENDIX**

## **APPENDIX: PART 1**

**Jane C. Ginsburg**  
**Morton L. Janklow Professor of**  
**Literary and Artistic Property Law**

**Columbia University Law School**

**Written Additional Comments in Response to U. S. Copyright Office's *Publishers' Protection Study: Request for Additional Comments*, 86 Fed. Reg. 62,215 (Nov. 9, 2021)**

**Submitted via regulations.gov Docket No. 2021-5**

January 5, 2022

*Submitted via regulations.gov Docket No. USTR–2021–0005*

Ms. Shira Perlmutter  
Register of Copyrights and Director of the U.S. Copyright Office  
United States Copyright Office  
101 Independence Avenue, S.E., LM 404  
Washington, D.C. 20559

**Re: Written Additional Comments of Jane C. Ginsburg in Response to U. S. Copyright Office’s *Publishers’ Protection Study: Request for Additional Comments*, Federal Register / Vol. 86, No. 214 / Tuesday, November 9, 2021, page 62,215**

Dear Register Perlmutter:

I make this submission in response to the Federal Register Notice of Inquiry (NOI), referenced above, seeking public input to assist the Copyright Office in the preparation of the “Publishers’ Protection Study” as requested by Congress. I have prepared these Additional Comments in connection with a consultation on behalf of the News Media Alliance.

These Additional Comments address two topics discussed at the December 9, 2021 Publishers’ Protections Study Roundtable: (1) the scope of the “words and short phrases” doctrine and its application to content aggregated from press publishers’ websites; and, (2) a comparison of the EU press publishers’ neighboring right and current protections under U.S. Copyright Law.

### **1. Application of the Words and Short Phrases Doctrine to content aggregated from press publishers’ websites (photographs, headlines and ledes)**

As discussed in other submissions, and as shown in the Appendix to my Initial Comments, news aggregation copies headlines, ledes (i.e. the initial sentences of a news article) and photographs. It is well-established (by statute since 1865, confirmed by the Supreme Court in 1884<sup>1</sup>) that photographs are protectable works of authorship. That a photograph may depict an actual person, object or scene does not reduce the photograph to an unprotectable “fact.” As the Second Circuit recently reminded, in rejecting an argument that Andy Warhol’s treatment of a photograph of the late performer Prince had copied only the “factual” elements of Prince’s features:

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<sup>1</sup> See An Act supplemental to an Act entitled “An Act to amend the several Acts respecting Copyright,” 13 Stat. 540, 38th Cong., 2d sess. Ch. 127 (1865) (amending the copyright statute to include photographs within the subject matter of copyright); *Burrow-Giles Lithographing v. Sarony*, 111 U.S. 53 (1884) (holding photographs “writings” of “authors” within Congress’ constitutional power to protect under copyright).

As applied to photographs, this protection encompasses the photographer's “posing the subjects, lighting, angle, selection of film and camera, evoking the desired expression, and almost any other variant involved.” The cumulative manifestation of these artistic choices — and what the law ultimately protects — is the image produced in the interval between the shutter opening and closing, *i.e.*, the photograph itself. This is, as we have previously observed, the photographer's “particular expression” of the idea underlying her photograph.<sup>2</sup>

To the extent that news aggregators copy photographs, it should be clear that they are reproducing protected subject matter (whether that *prima facie* infringement is nonetheless a fair use is another matter, addressed in my Initial Comments).

With respect to headlines and ledes copied by news aggregators, these convey information, but, like photographs, may nonetheless be original. As illustrated in the Appendix to my Initial Comments, different news sources may select and recount the information in very different ways. That the source articles contain facts does not mean their expression “merges” with the information so that there are too few ways to impart the account. The Appendix belies such contentions.

**This is not to say that all headlines or ledes are always original; rather it is incorrect categorically to exclude them from copyright protection.** But, as contended in the Roundtable,<sup>3</sup> hasn't the Copyright Office foreclosed claims of copyrightability in headlines (not ledes) because the NOI for this Study states:

Under U.S. law, several legal doctrines allow the use of news content in certain circumstances without permission or payment. Most fundamentally, facts and ideas are not copyrightable. Nor are titles and short phrases, *including headlines*. (Emphasis supplied, citations omitted)

Federal Register Vol. 86, No. 194 / Tuesday, October 12, 2021 at 56723.

The basis for this statement – minus the gloss concerning headlines – can be found in Copyright Office Regulations, in the Compendium of Copyright Office Practices (3d ed. updated January 28, 2021), and in Circular 33.

37 CFR § 202.1 Material not subject to copyright, states:

The following are examples of works not subject to copyright and applications for registration of such works cannot be entertained:

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<sup>2</sup> Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith (*Andy Warhol I*), 992 F.3d 99 (2d Cir. 2021), opinion withdrawn and superseded on reh'g, *Andy Warhol II*, 11 F.4th 26, 46 (2d Cir. 2021) (citation omitted).

<sup>3</sup> Roundtable Panel 3, transcript at 195, remarks of Ali Sternburg, Computer & Communications Industry Association.

(a) Words and short phrases such as names, titles, and slogans; familiar symbols or designs; mere variations of typographic ornamentation, lettering or coloring; mere listing of ingredients or contents; . . .

*Compendium* 313.4(C) and Copyright Office Circular 33 state:

Words and short phrases, such as names, titles, and slogans, are not copyrightable because they contain a *de minimis* amount of authorship. See 37 C.F.R. § 202.1(a). The U.S. Copyright Office cannot register individual words or brief combinations of words, even if the word or short phrase is novel or distinctive or lends itself to a play on words. See *Kitchens of Sara Lee, Inc. v. Nifty Foods Corp.*, 266 F.2d 541, 544 (2d Cir. 1959) (concluding that the Office’s regulation barring the registration of short phrases is “a fair summary of the law”).

The first sentence assumes the conclusion that words and short phrases lack adequate authorship. The second sentence appears to go further, to deny the copyrightability of small increments of content that might be original. As we shall see, however, **the caselaw (including caselaw referenced in the NOI) does not support the proposition that a succinct but original phrase is not copyrightable.**

Even were brevity a *per se* impediment to copyright protection, the short phrases doctrine does not state how short is too short, and thus the doctrine, if based solely on brevity, is essentially unworkable. The doctrine espouses a fundamental incoherence: it is too undefined to justify a *per se* bar, but any attempt to articulate a threshold word count (or equivalent in other media) will often prove absurd in application.<sup>4</sup>

Even were word count somehow determinative, it would not comprehensively exclude headlines, much less ledes. The illustrative list in the *Compendium* does not include headlines (unlike the statement in the NOI); most of the listed categories in fact are probably shorter than many headlines and most ledes:

- The name of an individual (including pseudonyms, pen names, or stage names).
- The name of a business or organization.
- The name of a band or performing group.
- The name of a product or service.
- A domain name or URL (e.g., [www.copyright.gov](http://www.copyright.gov)).
- The title or subtitle of a work of authorship.
- The name of a character.
- Catchwords, catchphrases, mottoes, slogans, or other short expressions

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<sup>4</sup> For examples of the absurdity of a specific quantity threshold, see *infra*, note 4.

An *eiusdem generis* appreciation of this list indicates that the excluded subject matter as a group either lacks originality altogether, or is considerably more brief than most headlines and ledes. On its own terms, the Compendium does not justify a blanket exclusion of the content scraped by news aggregators.

For evidence that the exclusion of words and short phrases targets originality rather than verbosity, consider the Haiku (notably absent from the listed exclusions). In its original Japanese incarnation, this poetic form is limited to 17 syllables, arranged in three lines of 5, 7, and 5 syllables. That combination already yields very few words, but English-language Haiku may be even more succinct, e.g.

### **“The Taste of Rain” by Jack Kerouac<sup>5</sup>**

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<sup>5</sup> On Kerouac’s Haiku, see, e.g., <https://briefpoems.wordpress.com/2017/05/29/the-taste-of-rain-american-haiku-by-jack-kerouac/>

Additional 6- and 7-word examples by Kerouac include:

frozen  
in the birdbath  
A leaf

Nightfall,  
boy smashing dandelions  
with a stick.

Birds singing  
in the dark  
—Rainy dawn

For a trove of examples of the American Haiku form known as “Monostich,” see, e.g., <https://briefpoems.wordpress.com/2016/01/07/slates-one-line-poems-monostich/>  
Consider the following:

For sale: baby shoes, never worn. [6 words]  
Ernest Hemingway

White noise carries too many messages. [6 words]  
Ian McBryde

a dixie cup floats down the Nile [7 words]  
Cor van den Heuvel

*The taste*

*Of rain*

—*Why kneel?*

Only 6 words comprise this celebrated poem; not copyrightable *per se*? It is, after all, shorter than many book titles or slogans. But if that conclusion rankles, it is because **a sensible understanding of the words and short phrases exclusion must focus on originality over quantity**. Elsewhere, the *Compendium* manifests this understanding, *see* § 1006.1: “a claim in text or literary authorship does not extend to titles, short phrases, standard navigational text, or *other* insufficiently creative or functional elements” (emphasis supplied). The word “other” indicates that “titles, short phrases, [and] standard navigational text” are all “insufficiently creative or functional.”

Most significantly, an examination of the caselaw applying 37 CFR § 202.1(a) shows that the subject matter at issue lacked originality or was functional. Even when courts recited the brevity bar, plaintiffs’ claims in fact failed because the copied content was not minimally original (not because it fell below some unstated minimum quantum of words). By the same token, when the copied content was original, its brevity did not foreclose a finding of infringement.

These Additional Comments will examine the one decision the *Compendium* cites in support of the short phrases exclusion, and then will address later caselaw construing the exclusion. It concludes that **the brevity bar conflates lack of originality with paucity of content; the cases citing the short phrases exclusion in fact all concerned phrases lacking minimal originality (or, occasionally, if original, not original with the claimant)**. The cases also show that **the more expressive the content, the less its brevity likely precludes an infringement claim. As a result, the caselaw does not in fact support a *per se* exclusion of the copyrightability of headlines and ledes**.

#### *A. Origins of the exclusion*

What is the source of the rule that to be copyrightable, the content must not only be original, but endowed with unspecified heft? The one case the *Compendium* cites, *Kitchens of Sara Lee, Inc. v. Nifty Foods Corp.*, 266 F.2d 541, 544 (2d Cir. 1959), did not involve headlines, titles, mottos or slogans, but rather a photograph of a piece of chocolate cake, and the specific subject matter category under sec. 5(k) of the 1909 Copyright Act of “prints or labels used for articles of merchandise.” The photograph formed part of the product’s packaging, hence the pertinence of sec. 5(k). The Copyright Office definition of this category of copyrightable subject matter imposed the short words and phrases exclusion, Circular No. 46, Copyright In Commercial Prints and Labels (1958). To understand the proper scope of the exclusion, one should examine how the Second Circuit treated

the rule in *Kitchens of Sara Lee*. The Copyright Office definition required that the label contain “an appreciable amount of text or pictorial material,” and “Brand names, trade names, slogans and other short phrases or expressions cannot be copyrighted, even if they are distinctively arranged or printed.” Recounting the definition, the Second Circuit continued, “The Copyright Office does not regard as sufficient to warrant copyright registration ‘familiar symbols or designs, mere variations of typographic ornamentation, lettering or coloring, and mere listings of ingredients or contents.’” The Second Circuit characterized the definition as a “fair summary of the law.” The definition was codified in 24 FR 4956 (June 18, 1959), precursor to the current regulation, 37 CFR § 202.1.

In the context of the definition, and the Second Circuit’s construction of it, the “appreciable amount” goes more to the content’s originality than to the quantum of expression. In the case of “familiar symbols or designs, mere variations of typographic ornamentation, lettering or coloring, and mere listings of ingredients or contents,” these objects lack originality in the first place, so a quantum threshold is irrelevant. With respect to “Brand names, trade names, slogans and other short phrases or expressions cannot be copyrighted, even if they are distinctively arranged or printed,” the definition makes clear that an original arrangement of these items will not make the items themselves copyrightable. But what if these items were original; would their brevity definitively preclude copyright? For news headlines and ledes, it is not necessary absolutely to reject some threshold of quantity, so long as the “short” in “other short phrases or expressions” is understood *eiusdem generis* with the other examples in the definition; such an understanding limits the exclusion to subject matter that falls short of the quantum of expression in most headlines and ledes (and photographs).

The Second Circuit’s examination of the photograph’s originality is instructive. The court did not in fact explicitly inquire into the quantum of original expression manifested in the photograph, even though it acknowledged “the force of arguments questioning the copyrightability of pictures of these homely and domestic articles of food.” Nonetheless, “such obvious copying as here occurred is not to be encouraged. Plaintiff has put time, some creative thought and money into its pictorial representations of its cakes and for the copying it is entitled to damages.” 266 F.2d at 545.

The pictures of the cakes used by plaintiff on its labels although possibly not achieving the quality of a Leonardo “Still Life” nevertheless have sufficient commercial artistry to entitle them to protection against obvious copying [citation omitted]. Therefore, plaintiff under the particular facts here involved may have relief as to the pictures but not as to the circular, rectangular or octagonal shapes or the serving directions or the ingredients.

*Id.* The Court’s care to eliminate uncopyrightable elements, such as the ingredients (also included among the Copyright Office’s exclusions), shows that the court distinguished original from non original content, and found sufficient authorship in the remainder. Without detailing how much expression the photograph embodied, the court perceived the photograph to enjoy a thin copyright

sufficiently robust to be asserted successfully against “obvious copying.” The parallels with massive aggregation of headlines, ledes and photographs are manifest.<sup>6</sup>

*B. Subsequent application of the short phrases exclusion: CMM Cable Rep., Inc. v. Ocean Coast Props., Inc.*, 97 F.3d 1504, 1519–20 (1st Cir. 1996)

The NOI cites *CMM Cable Rep* in support of the exclusion of headlines, although footnote 23 describes the decision as standing for the proposition “(titles and short phrases uncopyrightable).”<sup>7</sup> The case did not concern headlines. The plaintiff asserted that the defendant, a rival radio broadcaster, had appropriated its idea for a contest, and had closely copied portions of the brochure describing the contest. While the 1<sup>st</sup> Circuit cited the words and short phrases doctrine, its careful review of the copied content makes clear that the court focused on the content’s originality.

It is axiomatic that copyright law denies protection to "fragmentary words and phrases" and to "forms of expression dictated solely at functional considerations" on the grounds that these materials do not exhibit the minimal level of creativity necessary to warrant copyright protection. . . .

Here, the phraseology about which CMM claims infringement involves clichéd language that is typically used to convey the idea of employment. . . . Furthermore, we cannot disregard the fact that, while perhaps not "dictated solely at functional considerations," the phraseology is nonetheless inescapably functional . . .

Copyright protection does not extend to [CMM’s] ordinary employment phraseology which lacks the minimal level of originality.

Among the cases the *CMM* court cited in support of the exclusion of short phrases was *Arica Institute v. Palmer*, 970 F.2d 1067 (2d Cir. 1992), but that decision in fact acknowledged that, given sufficient creativity, short phrases can be protectable.<sup>8</sup> (Indeed, even *CMM* recognized this: “Of course, we recognize that not all short, simple, declarative sentences fall within the meaning of 31 CFR §

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<sup>6</sup> For other decisions finding short phrases protectable in the context of blatant commercial copying, see, e.g., *Universal City Studios v. Kamar Industries, Inc.*, 217 U.S.P.Q. (BNA) 1165 (S.D. Tex 1982) (phrase “E.T. Phone home” on coffee mugs); *DC Comics, Inc. v. Crazy Eddie, Inc.*, 205 U.S.P.Q. (BNA) 1177 (S.D. N.Y. 1979) (phrase, “Look! . . . Up in the sky! . . . It’s a bird! . . . It’s a plane . . . It’s [Crazy Eddie]” used in advertisement for an electronics store).

<sup>7</sup> Footnote 23 also cites an unpublished, *per curiam* opinion in *Aryelo v. Am. Int’l Ins. Co.*, No. 95–1360, 1995 WL 561530 at \*1 (1st Cir. Sept. 21, 1995) (*per curiam*, table, unpublished) (“The non-copyrightability of titles in particular has been authoritatively established”). As we shall see, this is an overstatement; the published opinion the following year in *CMM Cable* is more authoritative, but also does not in fact support the proposition that short phrases are not copyrightable merely because of their brevity.

<sup>8</sup> See also *Ventures Educ. Sys. Corp. v. Pro. Dev. Assocs., Inc.*, No. 07 CIV. 223 (WHP), 2008 WL 3166667, at \*3 (S.D.N.Y. July 31, 2008) (citing *Arica v. Palmer* for the proposition that “However, short phrases may be protectable where they take their meaning from the context of the whole and serve the same purpose as the copyrighted work.”)

201.1(a),” 97 F.3d at 1520, n.20.) Citing its decision *Salinger v. Random House*, 811 F.2d 90 (2d Cir. 1987), the Second Circuit recognized instances of copying the “‘sequence of thoughts, choice of words, emphasis and arrangement’ in such a way as to make actionable the use of single words and short phrases.” 970 F.2d at 1073. While in *Salinger*, the Second Circuit acknowledged that “[A] cliché or an ‘ordinary’ word-combination by itself will frequently fail to demonstrate even the minimum level of creativity necessary for copyright protection,” 811 F. 2d at 98, it found the phrases at issue sufficiently original. In *Arica*, the court found that the copied portions “do not exhibit the minimal creativity required for copyright protection.” In other words, plaintiff’s claim in *Arica* failed not because the passages it paraphrased were brief, but because those passages lacked originality.

**It also is important to keep in mind that the issue in the case of news aggregation is not whether headlines and ledes can be registered individually as works of authorship (which is the province of the *Compendium*) but whether copying them infringes the work in which they are incorporated.** The Southern District of New York recognized the distinction in *May v Sony Music Ent.*, 399 F. Supp. 3d 169, 184-85 (S.D.N.Y. 2019). The court rejected the defendant’s motion for summary judgment, in connection with its copying of the lyric “We Run Things, Things Don’t Run We.” The court characterized the short phrases doctrine as focusing on originality. It also emphasized that the likelihood that the Copyright Office would not register the phrase in contention does not preclude protection of the phrase as a “constituent element” of the copyrighted song.

The Court agrees that if May applied for copyright protection for the Phrase alone, he likely would be denied. But that is not what May did. He applied for, and obtained, registration for his song of which the Phrase is an original (for purposes of this motion as explained above) "constituent element." *Feist*, 499 U.S. at 361 (1991); see also *Estate of Smith*, 253 F. Supp.3d at 744 (same). Where written works, including lyrics, are at issue, although an "'ordinary' [i.e., uncopyrightable] phrase may be quoted without fear of infringement, a copier may not quote or paraphrase the sequence of creative expression that includes such a phrase." *McDonald*, 138 F. Supp.3d at 455, citing (*Salinger v. Random House, Inc.*, 811 F.2d 90, 98 (2d Cir. 1987)). Although May does not claim that Defendants' song as a whole infringes his song as a whole, the protection afforded to May should be considered in the context of his having obtained a copyright for the song in which the Phrase appears.

Indeed, several cases in this Circuit have addressed copyright infringement claims based on allegations of improperly using a lyrical phrase previously incorporated into a copyrighted song. The varied procedural posture and outcome of those cases confirm that use of a lyrical phrase from one song in another song may in some instances be the basis for an infringement claim.

...

Drawing all reasonable inferences in favor of May, as the Court must at this juncture, the Court cannot conclude that the Phrase lacks the requisite originality and cannot serve as the basis for May's claim.

Compare *Whitney v. Ross Jungnickel, Inc.*, 179 F. Supp. 751, 753 (S.D.N.Y. 1960):

Here, only two lines are claimed to have been appropriated from plaintiffs' lyric, . . . *This would not prevent recovery if the lines claimed to have been appropriated constitute an important and vital part of the two compositions* rather than being merely incidental or trivial.” (Emphasis supplied.) By contrast, headlines and ledes are indeed “an important and vital part” of the news accounts; as discussed in my Initial Comments, at pp 2-3: “Headlines and ledes capture the heart of the news account. (Indeed, they are designed to engage the reader’s interest, lest the reader not go further in perusing the report.) They convey not only the news source’s selection of information, but also the particular style of the author and the publication.”<sup>9</sup>

*C. Other decisions rejecting the categorical exclusion of short phrases:*

*Green v. Ablon*, 794 F.3d 133, 161 (1<sup>st</sup> Cir. 2015):

The Copyright Office has specified that “[w]ords and short phrases such as names, titles, and slogans” are not subject to copyright. 37 C.F.R. § 202.1(a). However, “much turns on the specific short phrases at issue, as not all short phrases will automatically be deemed uncopyrightable.” *Soc’y of Holy Transfiguration Monastery*, 689 F.3d at 51-52; see 1 Nimmer § 2.01[B] (“[E]ven a short phrase may command copyright protection if it exhibits sufficient creativity.”).<sup>10</sup>

As the district court explained, “[a]lthough the phrase ‘your explanation guides your intervention’ may not seem like a novel expression, such is not required for copyright protection.” *Greene*, 914 F. Supp. 2d at 120. Greene uses this short, punchy statement to summarize a method for handling explosive children. Indeed, the creativity of the phrase is due in part to its succinct articulation of a complex concept. We agree with the district court that, in context, the phrase is substantial and creative enough to warrant copyright protection.

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<sup>9</sup> See also, Roundtable Panel 3, transcript at 168 and 190, remarks of Carlo Lavizzari on the authorship of headlines.

<sup>10</sup> Many courts have cited this passage from Nimmer. In addition to the citations in the text of these Additional Comments, see, e.g., *Steward v West*, 2013 U.S. Dist. LEXIS 194238 (C.D. Cal. September 6, 2013).

In *Heim v. Universal Pictures*, 154 F.2d 480, 487 n. 8 (2d Cir. 1946), Judge Frank posited: “There may be wrongful copying, though small quantitatively; so if someone were to copy the words, ‘Euclid alone has looked on Beauty bare,’ or ‘Twas brillig and the slithy toves.’”

*Fischer v. Forrest*, 2017 U.S. Dist. LEXIS 109682 (S.D.N.Y. July 14, 2017) \*26-\*27 rejected the defense that four phrases from promotional materials for plaintiff’s bee-tending products were not copyrightable:

there is no mechanical rule stating how long a phrase must be to enjoy copyright protection, and even the shortest of phrases may merit protection if particularly creative . . . “it would seem (notwithstanding [37 C.F.R. § 202.1(a)]) that even a short phrase may command copyright protection if it exhibits sufficient creativity.” Citing 1 Nimmer on Copyright § 2.01[B][3] (2017).

*Health Grades, Inc. v. Robert Wood Johnson Univ. Hosp., Inc.*, 634 F. Supp. 2d 1226, 1237-1238 (D. Colo. 2009), explicitly and thoughtfully declining to rule the short phrases doctrine as a categorical exclusion:

RWJ contends, however, that short phrases, even those that are original expressions otherwise subject to copyright, are not entitled to copyright protection as a matter of law. RWJ bases this argument on a long-standing regulation of the United States Copyright Office stating “[t]he following are examples of works not subject to copyright ... words and short phrases such as names, titles, and slogans.” 37 C.F.R. § 202.1(a). It also relies on a Copyright Office circular to the same effect. *See* Def.'s Reply Mem. (Doc. 22), Ex. A (United States Copyright Office, Circular 34, *Copyright Protection Not Available for Names, Titles, or Short Phrases* (2006)). The Tenth Circuit has not had an opportunity to consider the Copyright Office regulation and whether it creates the absolute rule advocated by RWJ. Having reviewed this regulation and other relevant authority, I concur with Judge Roth of the Third Circuit that the proper view of the regulation is that it is only “*a rough starting point for an originality analysis, not a shortcut for avoiding this analysis.* [Emphasis supplied.] Short phrases are typically unprotectable because they are either insufficiently independent or insufficiently creative or both.” *Southco, Inc. v. Kanebridge Corp.* (“*Southco III*”), 390 F.3d 276, 298 (3d Cir. 2004) (Roth, J. dissenting). Accordingly, “it does not make sense to state categorically that no combination of numbers or words short enough to be deemed a ‘phrase’ can possess ‘at least some minimal degree of creativity’” as required for copyright protection under *Feist. Id.* I also find Judge Roth's further analysis of the scope and application of this regulation persuasive, *see id.* at 298–300, and note with her the paucity of cases holding that an otherwise original expression is uncopyrightable solely because it can be described as a short phrase. In the absence of Supreme Court or Tenth Circuit authority on this issue, I am persuaded by Judge Roth that the Copyright Office's regulation does not strip copyright protection from such original expressions. For all of the reasons stated above, I find Health Grades has alleged sufficient facts to state a claim for copyright infringement.

(For analysis of *Southco v. Kanebridge*, see below, part D.)

*D. Decisions reciting the brevity bar, but in which the content lacked originality*

*Lorenzana v. S. Am. Rests. Corp.*, 799 F.3d 31, 34 (1st Cir. 2015): rejecting protection for title of Pechu chicken sandwich:

As for the “Pechu Sandwich” moniker, we have previously held that “copyright protection simply does not extend to ‘words and short phrases, such as names, titles, and slogans.’” *CMM Cable Rep, Inc. v. Ocean Coast Props., Inc.*, 97 F.3d 1504, 1520 (1st Cir. 1996).

As we have seen however, *CMM* involved non original “phraseology.” Moreover, while *Lorenzana* “christened” the sandwich, there is no originality in titling a chicken breast sandwich a “breast [English translation of “pechu”] sandwich.”

*Clanton v. UMG Recordings, Inc.*, 2021 U.S. Dist. LEXIS 153899 \* (S.D.N.Y., August 16, 2021)

Lyric “I’m tryna make my momma proud” held not protectable on ground of insufficient originality. The court’s analysis, citing other decisions in the S.D.N.Y., characterizes the “short phrases” doctrine as a determination of originality.

Words and short phrases, including titles and slogans, rarely if ever exhibit sufficient originality to warrant copyright protection.” [*McDonald v. West*, 138 F. Supp. 3d [448] at 454 [S.D.N.Y. 2015] (citing *Bell v. Blaze Magazine*, 2001 U.S. Dist. LEXIS 2783, 2001 WL 262718, at \*2 (S.D.N.Y. Mar. 16, 2001) . . .

The question before the Court is whether the expression “I’m tryna make my momma proud” possesses the requisite “minimal degree of creativity,” or “scintilla of creativity” to be “original” and correspondingly protectable as a matter of law. The Court concludes that it is not.

*Winstead v Jackson*, 509 Fed. Appx. 139, 142 (3d Cir. 2013)

In addressing *Winstead*'s contention that direct phrases from his book appear in both *Jackson*'s album/CD and film, the District Court reasoned that commonly used words and short phrases are excluded from copyright protection. The language that *Winstead* referred to — “putting the work in,” one's name “ringing in the streets,” and “get the dope, cut the dope,” amounted to *nothing more than generic words and phrases that were common in hip hop music*. (Emphasis supplied)

See generally, *Brandon v. New Power Generation*, 2017 U.S. Dist. LEXIS 109046 (S.D. Fla. April 13, 2017) \*13-\*15: The court summarized the short phrases caselaw; while the court recited the

brevity bar, all the listed examples in fact concerned unoriginal (or in the court’s oft-used characterization, “ordinary”) phrases:

“Words and short phrases” are not copyrightable. 37 C.F.R. § 202.1(a). The overwhelming weight of authority recognizes this to mean that short phrases or common or ordinary words are not copyrightable. For example, in *Prunte v. Universal Music Grp., Inc.*, 699 F. Supp. 2d 15, 25-30 (D.D.C. 2010), the Court found that the phrases “fire in the hole,” “so high,” “get it poppin,” “wish a muthafugga would,” “just running their mouths,” “shoot to kill,” “I’m a maniac,” and “that’s what’s up,” which were contained in the plaintiff’s musical compositions, were simple, short, common phrases not subject to copyright protection. Likewise, in *Takeall v. Pepsico, Inc.*, 14 F.3d 596 (4th Cir. 1993), No. 93-1237, 1993 WL 509876, at \*8 (4th Cir. Dec. 8, 1993), the Fourth Circuit found that the phrase “You Got the Right One, Uh-Huh” “fail[ed] to evince the requisite degree of originality to entitle it to copyright protection and is a short expression of the sort that courts have uniformly held uncopyrightable.” See also *Chapman v. Universal Motown Records Grp.*, No. 08 CIV. 3255 (LAP), 2010 U.S. Dist. LEXIS 11015, 2010 WL 517480, at \*4 (S.D.N.Y. Feb. 4, 2010) (phrase “lean back” in musical composition was not subject to copyright).

Other courts considering similar phrases and guided by Section 202.1 of the Code of Federal Regulations, have reached the same conclusion—short, ordinary words, phrases, or slogans, are not entitled to copyright protection. See, e.g., *Edwards v. Raymond*, 22 F. Supp. 3d 293, 298-99 (S.D.N.Y. 2014) (the phrase “caught up” which was the title of plaintiffs’ song “is not eligible [for] copyright protection” because it was a common phrase and because it was not original to the plaintiffs but rather “used in everyday speech in a variety of contexts”); *Boone v. Jackson*, 206 F. App’x 30, 33 (2d Cir. 2006) (phrase “holla back” in musical composition was a common phrase not subject to copyright protection); *Alberto-Culver Co. v. Andrea Dumon, Inc.*, 466 F.2d 705, 711 (7th Cir. 1972) (finding that the phrase “most personal sort of deodorant” was not copyrightable because it was “merely a ‘short phrase or expression’ which hardly qualifies as an ‘appreciable amount of original text.’”) (quoting *Kitchens of Sara Lee, Inc. v. Nifty Foods Corp.*, 266 F.2d 541, 544 (2d Cir. 1959)); *Narell v. Freeman*, 872 F.2d 907, 911 (9th Cir. 1989) (affirming summary judgment because “ordinary phrases” such as “crawling with alligators” and “cow path” are “not entitled to copyright protection.”); *Syrus v. Bennett*, 455 F. App’x 806, 809 (10th Cir. 2011) (phrases “Go Thunder” and “Let’s Go Thunder” were not entitled to copyright protection, even though they appeared in plaintiff’s original composition, because they were ordinary phrases); *Salinger v. Random House, Inc.*, 811 F.2d 90, 98 (2d Cir. 1987) (“[A] cliché or an ‘ordinary’ word-

combination by itself will frequently fail to demonstrate even the minimum level of creativity necessary for copyright protection.”).<sup>11</sup>

*Southco, Inc. v. Kanebridge Corp.*, 390 F.3d 276 (3d Cir. 2004):

This 3d Circuit *en banc* decision may offer the strongest support of any of the cases for a rule that brevity bars copyrightability, independently of originality. The facts of the case, however, undermine the affirmation, because the court first held the subject matter – parts numbers – “purely functional” and lacking in originality.<sup>12</sup> The majority then offered an additional basis for the outcome: “The Southco part numbers are also excluded from copyright protection because they are analogous to short phrases or the titles of works.”<sup>13</sup> The majority cited the Solicitor General’s support for the rule; the Government’s arguments, however, emphasized absence of creativity and functionality.<sup>14</sup> The Government expressed particular concern at the prospect that companies could use copyright to monopolize parts-numbering systems. In other words, to support an autonomous *formal* “short phrases” bar, *Southco* relied on the same reasoning evoked to justify *substantive* bases for denial of protection.

Judges Becker, Roth and Chertoff disagreed with the majority’s deference to the Copyright Office’s “long-standing practice” of excluding short phrases. Judge Roth’s reasoning regarding short phrases was quoted and followed by *Health Grades, Inc. v. Robert Wood Johnson Univ. Hosp., Inc.*, 634 F. Supp. 2d 1226, 1237-1238 (D. Colo. 2009), *supra*.

Judge Becker queried whether the brevity bar was workable:

In order for any test that purports to distinguish between short phrases and copyrightable compositions to be viable it would have to identify the point at which a title or short phrase becomes a descriptive narrative. Presumably the length of the writing in question informs

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<sup>11</sup> See also, *Finazzle Corp/USA v. Freebairn & Co.*, 2006 U.S. Dist. LEXIS 109981 (N.D. Ga. Sept 28, 2006). This is the rare case to involve an arguably original short phrase; but the phrase may not have been original to the claimant.

\*39 Additionally, short phrases, such as "Make it dazzle with Finazzle," are not usually subject to protection. See 37 C.F.R. § 202.1 (stating that "words and short phrases such as names, titles and slogans" are not subject to copyright protection).

n. 4 This phrase, in any event, is not original to Freebairn, as Finazzle used the phrase in its other commercials prior to its relationship with Freebairn.

<sup>12</sup> 390 F.3d at 284-85: “we hold that the Southco part numbers are not protected by copyright because they are mechanically produced by the inflexible rules of the Southco system.”

<sup>13</sup> *Id.* at 285.

<sup>14</sup> See, *Id.*: “The government suggests that this practice serves at least two purposes. First, the government notes that “[a] short phrase such as a part number typically lacks any creativity whatsoever.” U.S. Amicus Br. at 11. Second, the government suggests that extending copyright protection to part numbers would unduly interfere with the legitimate use of the numbers in question. *Id.* at 15. . . . In light of the huge number of part and product numbers (and other analogous numbers) that now exist, this prospect gives reason for concern.”

this determination, but what else? The majority does not specify the test, and this is not a situation, I respectfully submit, where we ‘know it when [we] see it.’<sup>15</sup>

He also perceived that the bar ultimately came down to originality:

Whatever the test, I think the inquiry would inevitably draw us back to the constitutional requirement of originality--the presence of the "creative spark" from *Feist Publications, Inc. v. Rural Telephone Service Co.*, [citation]. But to do that is to render the short phrases notion nothing more than an unhelpful way of restating the problem.<sup>16</sup>

Judge Becker also expressed his agreement with Judge Roth’s critique of the short phrases rule.<sup>17</sup>

Consistently with the findings of these Additional Comments, Judge Roth emphasized:

In fact, it appears that *no court* has relied on § 201.1(a) to hold that an *otherwise original expression* was uncopyrightable just because it was brief enough to be deemed a short phrase. Rather, courts typically invoke § 201.1(a) in support of a determination that a particular work lacks any "creative spark," *Feist*, 499 U.S. at 345, not as a substitute for that analysis.<sup>18</sup>

*Southco*’s majority ruling does not change that analysis: **there still appears to be no decision in which a court held succinctly-phrased content to be original, yet nonetheless ruled it too short to be protected, whether on its own, or – as would be more pertinent regarding news aggregation – as part of a larger whole.**

#### *E. Distinguishing brevity from lack of creativity*

**In short, the short phrases doctrine conflates brevity with lack of creativity, but in fact, the two are distinct.** It may be true, as one roundtable participant pointed out, that “shorter phrases are simply less likely to be original,”<sup>19</sup> but **brevity should not serve as a proxy for lack of originality; moreover, as we have seen, courts do consider actual creativity.**

As we have also seen, the caselaw applying the doctrine often recites the brevity bar, but the cases concerned inadequately creative expressions. Even where a court stated explicitly that the short phrases doctrine excludes even content that is not clichéd or stereotypic, *Magic Marketing, Inc. v.*

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<sup>15</sup> *Id.* at 289.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 290.

<sup>18</sup> *Id.* at 298 (emphases supplied).

<sup>19</sup> Roundtable, panel 3, Transcript at 192, Remarks of John Bergmayer, Public Knowledge (“It’s like shorter phrases are simply less likely to be original.”).

*Mailing Services of Pittsburgh, Inc.*, 634 F. Supp. 769, 771 (W.D. Pa. 1986) (even “colorful descriptions, such as advertising slogans, are not accorded copyright protection”), the facts disclose that the expressions actually at issue were threadbare (in *Magic Marketing*, the copied phrases were “PRIORITY MESSAGE: CONTENTS REQUIRE IMMEDIATE ATTENTION” and “GIFT CHECK ENCLOSED”).

*F. Where the content is succinct but original, the short phrases doctrine does not bar infringement claims:*

We have seen multiple judicial affirmations that short phrases, if sufficiently original, are protected against unauthorized commercial copying (whether or not they also would be registrable as stand-alone works). In addition to the decisions cited above, *AP v. Meltwater* is another significant counter example to the short phrases rule. The defendant “scraped” AP’s and others’ websites and offered the content to paying subscribers.

Each search result in the News Report generally includes the following text: (1) the headline or title of the article and a hyperlink to the URL for the website from which the article was indexed; (2) information identifying the article's source, such as the publisher and the country of origin; and (3) usually two excerpts from the article. The first excerpt consists of up to 300 characters (including white space) from the opening text of the article or lede. The second excerpt is shorter and is known as the “Hit Sentence.” It is approximately 140 characters (not including white spaces) “surrounding a single, algorithmically chosen appearance of one of the customer's matched search keywords.” If the keyword appears in the lede, then the lede is repeated twice.

931 F. Supp. 2d 537, 545 (S.D.N.Y. 2013). Although the quantities taken may seem small, the “short phrases” doctrine figured nowhere in the court’s opinion, and the defendant did not contest the originality of what it copied. Instead, it contended – unsuccessfully – that its copying was fair use.

## **2. DSM Directive art. 15 – Comparison with U.S. law**

How does the DSM Directive, art. 15, establishing a neighboring right for press publishers, differ from current U.S. law? In many respects, the rights it establishes resemble those afforded under U.S. copyright law. By contrast, art. 15 effects a major departure from prior EU copyright law with respect to rights ownership: the neighboring rights vest in the press publisher, rather than in the creators of the separate works. This Part of the Additional Comments will compare art. 15 with current U.S. law with respect to the following issues:

Rights ownership

Duration  
Scope of rights and exceptions  
Subject matter of protection

While the last two at first blush present the greatest prospect of incompatibility with U.S. law, the differences, on closer inspection, may dwindle in practice.

### *Rights ownership*

We can see that the ownership issue was a significant motivation for the EU right by looking at Recitals 54 and 55, which state in relevant part:

Recital 54: “In the absence of recognition of publishers of press publications as rightholders, the licensing and enforcement of rights in press publications regarding online uses by information society service providers in the digital environment are often complex and inefficient.”

Recital 55 “The organisational and financial contribution of publishers in producing press publications needs to be recognised and further encouraged to ensure the sustainability of the publishing industry and thereby foster the availability of reliable information.”

In the U.S., however, the works for hire doctrine vests most press publishers with copyright *ab initio*. As result, a principal rationale for establishing a neighboring right in the EU is a non-issue in the US.

The press publishers’ neighboring right differs from U.S. rules of copyright ownership in mandating a set-aside for authors (arts. 15(5) and 16).

### *Duration*

The art. 15(4) two-year duration of the neighboring right (counting from January 1 following publication) is significantly shorter than U.S. copyright’s 95 years from publication term for works made for hire. Moreover, the EU protection “shall not apply to press publications first published before 6 June 2019.”

### *Exceptions and limitations to the scope of rights*

According to the Directive art. 15(1), press publications enjoy the same rights as set out in arts. 2 and 3 of the 2001 Information Society Directive (these are reproduction and communication to the public) and are subject to the same exceptions and limitations as established in art. 5. Unlike the open-ended fair use exception in U.S. law, InfoSoc Directive art. 5 gives member states a “closed list” of exceptions and limitations from which they may choose to enact (apart from the art. 5(1)

mandatory exception for copies made as part of transitory online communications). On the other hand, many of the specific exceptions are quite open-ended, or have been interpreted generously by the Court of Justice of the European Union. Notably, that court’s construction of the art. 5(3)(k) parody exception is considerably broader than the scope of a parody exception under U.S. fair use caselaw.<sup>20</sup> In addition, the CJEU’s case law on “proportionality” has resulted in limitations on the scope of exclusive rights even when no specific exception applies.<sup>21</sup> In other words, it is at least arguable that any gap between the EU exceptions and limitations and the U.S. fair use doctrine has considerably narrowed over the last decade.

In addition to adopting *mutatis mutandis* InfoSoc Directive art. 5’s exceptions and limitations, DSM Directive art. 15(1) sets out specific exceptions:

“The rights provided for in the first subparagraph shall not apply to private or non-commercial uses of press publications by individual users.”

“The protection granted under the first subparagraph shall not apply to acts of hyperlinking.”

While the U.S. fair use doctrine would likely produce a result equivalent to the first of these two exceptions, the *per se* exclusion of hyperlinking probably sweeps more broadly than current U.S. copyright law. CJEU caselaw does not distinguish between types of hyperlinking, and therefore treats embedding like any other kind of linking, which it has generally exempted from the scope of the right of communication to the public, unless the copyright owner has taken steps to prevent the links.<sup>22</sup> By contrast, U.S. caselaw, particularly in the last 5 years, is more nuanced, and at least in the S.D.N.Y. clearly considers embedding to come within the 106(5) right of public display.<sup>23</sup> The caselaw so far has not resolved whether or not a prima facie violation of that right might be excused under sec. 107 because the cases have come up on motions to dismiss or for summary judgment, and fair use still remains fact-intensive and therefore frequently resistant to preliminary adjudication.

### *Subject matter*

DSM Directive art. 2(4) defines a press publication as:

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<sup>20</sup> Compare Case C-201/13, *Deckmyn v. Vandersteen*, ECLI:EU:C:2014:2132, ¶ 33 (Sept. 3, 2014) (holding that “the concept of ‘parody’ . . . is not subject to the condition[] that the parody . . . relate to the original work itself or mention the source of the parodied work”), with, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 580 (1994) (“the heart of any parodist’s claim to quote from existing material, is the use of some elements of a prior author’s composition to create a new one that, at least in part, comments on that author’s works”).

<sup>21</sup> See, e.g., Xalabarder, R. *The Role of the CJEU in Harmonizing EU Copyright Law*. IIC 47, 635–639 (2016). <https://doi.org/10.1007/s40319-016-0509-2>; Fischman Afori, Orit, *Proportionality -- A New Mega Standard in European Copyright Law* IIC (2015), Available at SSRN: <https://ssrn.com/abstract=2500232>

<sup>22</sup> See, e.g. See Case C-348/13, *BestWater Int’l GmbH v. Michael Mebes, Stefan Potsch*, October 21, 2014; Case C-392/19, *VG Bild-Kunst v Stiftung Preußischer Kulturbesitz*, March 3, 2021.

<sup>23</sup> See, e.g., *Goldman v. Breitbart News Network, LLC*, 302 F.Supp.3d 585 (S.D.N.Y. 2018); *Nicklen v. Sinclair Broadcast*, 2021 WL 3239510 (S.D.N.Y. July 30, 2021).

‘press publication’ means a collection composed mainly of literary works of a journalistic nature, but which can also include other works or other subject matter, and which:

- (a) constitutes an individual item within a periodical or regularly updated publication under a single title, such as a newspaper or a general or special interest magazine;
- (b) has the purpose of providing the general public with information related to news or other topics; and
- (c) is published in any media under the initiative, editorial responsibility and control of a service provider [term not defined].

Periodicals that are published for scientific or academic purposes, such as scientific journals, are not press publications for the purposes of this Directive;<sup>24</sup>

What is an “individual item”? Certainly a particular news story. Recital 58 clarifies that “The use of press publications by information society service providers can consist of the use of entire publications or articles but also of parts of press publications.” But what is an actionable “part”? Art. 15(1) tells us that “The rights provided for in the first subparagraph shall not apply in respect of the use of individual words or very short extracts of a press publication.” The meaning of “very short extract,” however, seems to depend not on objective quantitative measurement, but, according to Recital 58, on the economic consequences for press publishers of the copying of the extract(s). Recital 58 continues:

the use of individual words or very short extracts of press publications by information society service providers may not<sup>25</sup> undermine the investments made by publishers of press publications in the production of content. Therefore, it is appropriate to provide that the use of individual words or very short extracts of press publications should not fall within the scope of the rights provided for in this Directive. *Taking into account the massive aggregation and use of press publications by information society service providers, it is important that the exclusion of very short extracts be interpreted in such a way as not to affect the effectiveness of the rights provided for in this Directive.*” (Emphasis supplied.)

In other words, as a general matter, the use of words or very short extracts is not economically harmful, and therefore does not infringe the neighboring right. But, in the context of massive aggregation, the taking of individually very small amounts may be economically detrimental. As a result, systematic copying of individually small quantities that undermines press publishers’ rights is not exempted under the rubric of copying “very short extracts.” Hence “very short” really means “economically insignificant.” Subject to this important limitation: Recital 57 states that the rights granted to press publishers “should also not extend to mere facts reported in press publications.” The

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<sup>24</sup> U.S. Copyright law does not include this categorical exclusion, but it is not clear in any event whether scientific journals are the subject of commercial news aggregation comparable to the massive “scraping” of general news publications.

<sup>25</sup> Although the phrasing is ambiguous, “may not” appears to be a descriptive rather than a prescriptive statement.

extraction of “mere facts” without more therefore does not violate the neighboring right, notwithstanding economic impact.

How does this compare with U.S. law? The EU press publishers’ right does not require that the copied content be original, or in EU terms, that it be “the author’s own intellectual creation.”<sup>26</sup> (Since the right vests in the publisher, it may not make sense to characterize the subject matter in terms of human authorship in any event.) Like U.S. copyright law, however, the EU press publishers’ right excludes “mere facts.” On the other hand, the EU right might reach small extracts that would lack sufficient originality to be protected under U.S. law. Suppose the aggregation of small extracts that were clichéd or too generically-phrased to meet U.S. (or EU) standards of originality, but nonetheless were economically significant – apart from the facts the extracts convey. If such copying would violate the press publishers’ right, then the EU right would protect content unprotected in the US. But it is not clear that there is any meaningful universe of short extracts that are economically significant not for the information they convey, but for the trite and commonplace way in which they convey it. In other words, the absence from the press publishers’ right of an explicit originality requirement may be a red herring.

One might rejoin that short excerpts actionable under art 15 would not be protectable in the U.S. by virtue of the U.S. “words and short phrases” doctrine. That claim, however, assumes a U.S. standard that would require more verbiage (or equivalent for other media) than the threshold for protection under art. 15. In neither case, in fact, is there any fixed star to guide the determination when a short excerpt is too short. We have seen in Part 1 of these Additional Comments, that the “words and short phrases” doctrine is (properly) understood as targeting originality rather than mere brevity, and that succinct statements can nonetheless be original. While under art. 15, deleterious economic impact rather than explicit reference to originality determines whether a short extract is treated as a protectable “part” or instead as non-actionably “very short,” we have seen that in the US, economic considerations may also influence the assessment of the thickness of the copyright. Recall that in *Kitchens of Sara Lee*, which is the one decision the *Compendium* cites in support of the words and short phrases doctrine, the Second Circuit equated originality with economic value: “such obvious copying as here occurred is not to be encouraged. Plaintiff has put time, some creative thought and money into its pictorial representations of its cakes and for the copying it is entitled to damages. . . . The pictures of the cakes used by plaintiff on its labels although possibly not achieving the quality of a Leonardo “Still Life” nevertheless have sufficient commercial artistry to entitle them to protection against obvious copying.”

In other words, after careful examination and comparison, it is not clear that the EU press publishers’ neighboring right in fact protects press content that current U.S. copyright law would leave uncovered. As to the points of greatest divergence between the EU right and U.S. copyright, duration and hyperlinking, the EU right affords *less* protection than current U.S. copyright law. Taken as a whole, this analysis has shown that under U.S. copyright law, properly understood, press publishers

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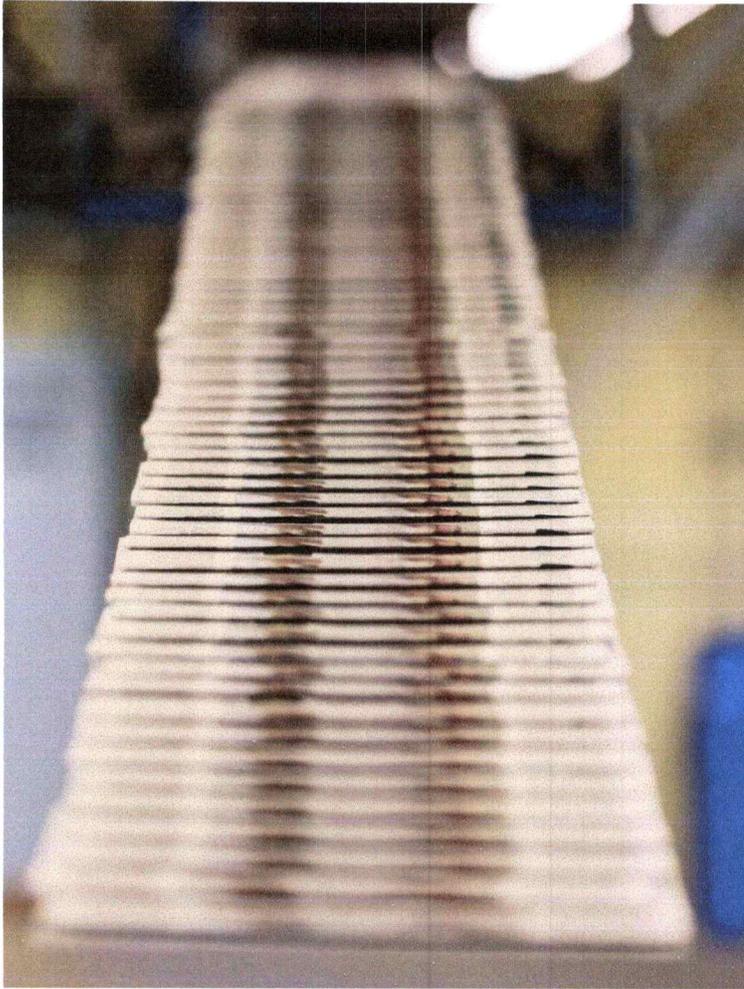
<sup>26</sup> See, e.g., Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights, OJ L 372, 27.12.2006, art. 6.

already enjoy substantially equivalent protection for their copyrightable content including for original headlines and ledes (and, *a fortiori*, photographs).

Jane C. Ginsburg

January 5, 2022

## **APPENDIX: PART 2**



The Lost Local News Issue

# What Happens to Democracy When Local Journalism Dries Up?

The end result is disastrous.

The Vindicator newspaper rolls off the presses in Youngstown, Ohio, in 2019. The 150-year-old paper closed in August that year. (Tony Dejak/AP)

By [Margaret Sullivan](#)

NOVEMBER 30, 2021



**I**t has been our great privilege to bring you news from Stoneham and Woburn over the years,” read the announcement. “We regret to inform you that this will be the final edition of the Sun-Advocate newspaper.”

The Massachusetts weekly, as of August, is no more.

It is an increasingly familiar story across the United States. Already in a sharp downward spiral, the local news industry was hit hard by the covid-19 pandemic. The worst blows were

taken by newspapers — businesses that, as a group, had never recovered from the digital revolution and the 2008 recession. Between 2005 and the start of the pandemic, about 2,100 newspapers closed their doors. Since covid struck, at least 80 more papers have gone out of business, as have an undetermined number of other local publications, like the California Sunday Magazine, which folded last fall — and then won a Pulitzer Prize eight months later.

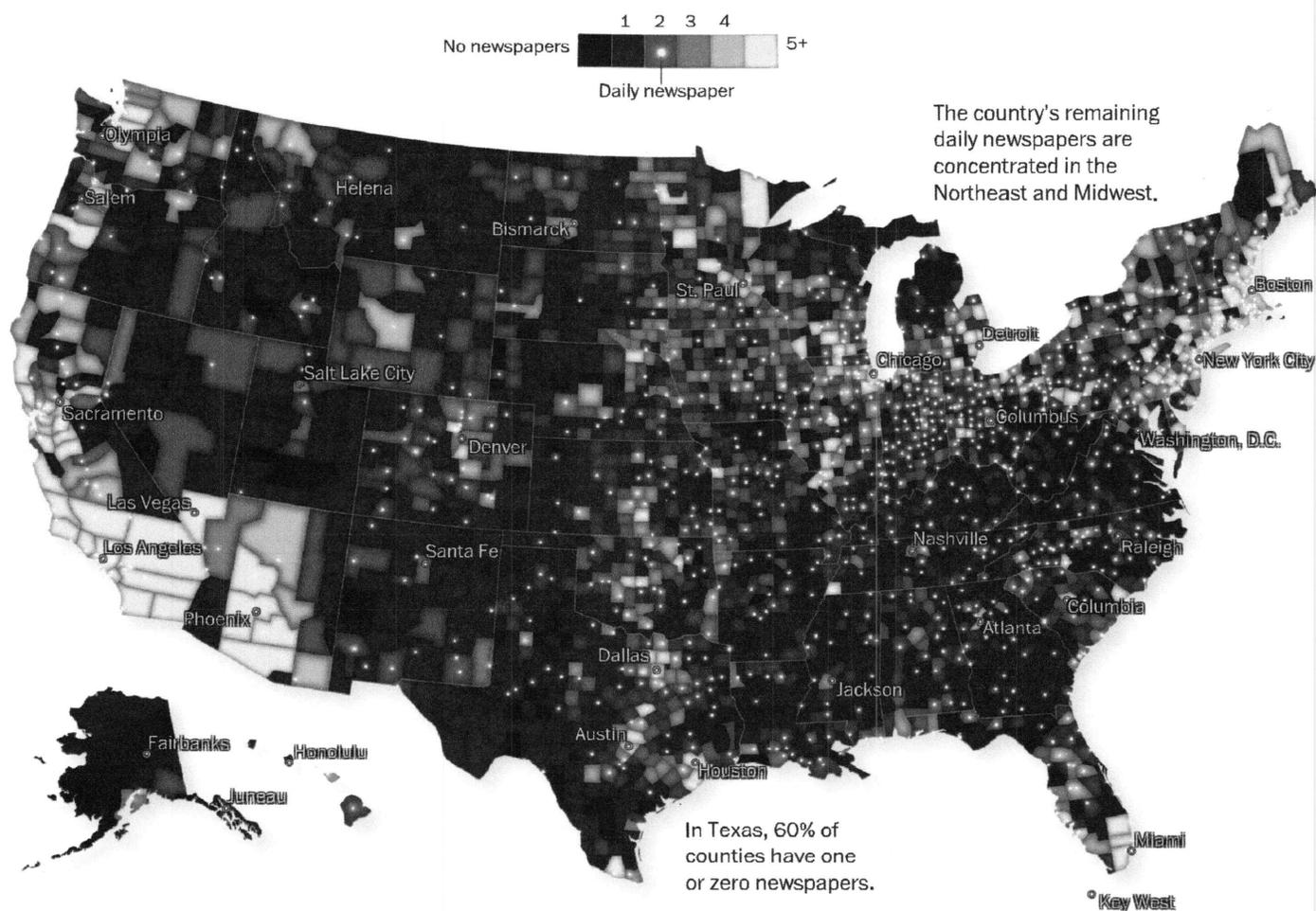
Those papers that survived are still facing difficult straits. Many have laid off scores of reporters and editors — according to [Pew Research Center](#), the newspaper industry lost an astonishing 57 percent of its employees between 2008 and 2020 — making these publications a mere specter of their former selves. They are now “ghost newspapers”: outlets that may bear the proud old name of yore but no longer do the job of thoroughly covering their communities and providing original reporting on matters of public interest.

Dan Kennedy, a Northeastern University journalism professor, describes the loss of the Sun-Advocate in Massachusetts as “a grim picture but not nearly as catastrophic as in some parts of the country.” After all, he told me, there are other news organizations nearby, including the [Daily Times Chronicle](#) in Woburn and [WickedLocal.com](#), a digital site run by Gannett that serves swaths of Massachusetts. (Gannett had owned the Sun-Advocate until its closure.)

By contrast, in many regions of the country, there is no local news coverage at all, or next to none. These areas have come to be known as “news deserts” — a term used by academics and researchers to refer to areas where coverage of the community by local news outlets is minimal or nonexistent. It’s in such places that the collapse of local news is being felt most dramatically. Then again, even if you don’t live in a defined news desert, you may have noticed that your regional paper long ago ditched actively covering your community if it is outside the immediate city and first-ring suburbs.

## A Vast Landscape of Lost Newspapers

Between January 2005 and December 2020, about a quarter of U.S. local print newspapers ceased publishing, according to data that Northwestern professor Penny Muse Abernathy collected while at the University of North Carolina. By 2020, out of the 3,000-plus U.S. counties, half had just one local print newspaper of any kind. Only a third had a daily newspaper. Over 200 counties had no newspaper whatsoever.



Sources: Penny Muse Abernathy, UNC Hussman School of Journalism and Media

JOE FOX/THE WASHINGTON POST

This trend in local news has been life-changing, of course, for the employees who lose their jobs and incomes. But even more concerning is what happens to the communities they used to serve — and, more broadly, what happens to our society and our ability to self-govern when local news dries up.

An extreme case of the withering of local news over the past decade is Youngstown, Ohio, where the beloved 150-year-old daily newspaper, the Vindicator, abruptly went out of business in 2019. The death of “the Vindy” made Youngstown — just minutes from the former General Motors manufacturing plant in Lordstown — the biggest U.S. city without its own daily newspaper. (A neighboring city’s newspaper began putting out a Vindicator edition, plus a small group of former staffers launched a digital news site, Mahoning Matters. But it is not the same as a dedicated newsroom of 40 journalists.)

As I researched my 2020 book, “[Ghosting the News: Local Journalism and the Crisis of American Democracy](#),” I traveled to Youngstown just after the shocking announcement. Residents had gathered at a quickly called public meeting, and many were in tears as they contemplated the future of their city and region without this institution.

#### **The Lost Local News Issue**

Since 2005, about 2,200 local newspapers across America have closed. Here are some of the stories in danger of being lost — as told by local journalists.

**ALABAMA** [A Sculptor’s Legacy](#)

**ALASKA** [Erosion Threatens a School](#)

**COLORADO** [Facebook and a Political Firestorm](#)

**GEORGIA** [This Group Fights Racial Injustice](#)

**IDAHO** [A Grizzly Mystery](#)

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**KANSAS** [How to Save the Prairie](#)

**MISSISSIPPI** [A Home Renovation Dream Realized](#)

**NEW MEXICO** [One Judge’s Radical Approach](#)

**OREGON** [Burying Unclaimed Remains](#)

**UTAH** [A Dust-Up Over Roads](#)

**WEST VIRGINIA** [One Pastor’s Distinctive Congregation](#)

**MARGARET SULLIVAN:** [What happens to society — and our democracy — when community and regional journalism dries up](#)

I spent some time with Bertram de Souza, the paper’s editorial page editor, who had been at the Vindicator for 40 years. As a reporter, he helped reveal the corruption of James Traficant, who was expelled from Congress and sent to prison in 2002 after being convicted of racketeering, taking bribes and using his staff to do chores at his home and on his houseboat. Youngstown “is absolutely the kind of place that needs watchdog reporting,” de Souza told me, “and this newspaper was committed to exposing corruption.” The problem, going forward, is that when it comes to revealing malfeasance, you don’t know what you don’t know: If there’s no one to keep public officials honest, citizens might never find out how their faith is being broken and their tax dollars squandered.

Mark Brown, the paper’s general manager and a member of the family that owned it, said something I found poignant as he recalled the Vindy’s heyday, when editors were able to send a reporter or freelancer to all of the municipal board and school

board meetings in a three-county area. Public officials knew journalists were present, Brown said, “and they behaved.”

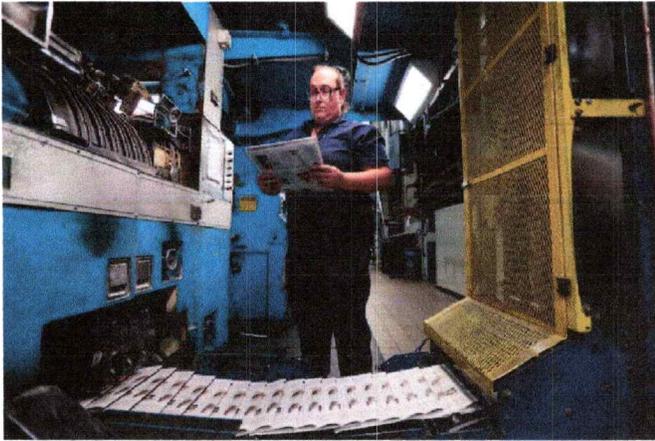
What happened to the Vindicator was a particularly notable version of an oft-repeated story: There just wasn’t enough money anymore to keep the paper afloat and pay the staff. Brown told me that the Vindy had lost money for 20 of the 22 years before its closing because of shrinking circulation, limited advertising revenue and rising costs.

While it was still in business, the Vindicator was relatively lucky because it was owned by a local family for 132 years. Many other newspapers have fallen out of local hands and under the control of large chains, some owned by private equity firms or hedge funds. One of these, Alden Global Capital (sometimes known as Digital First Media), perhaps the worst of the so-called vulture capitalists, earlier this year [snapped up](#) the storied Chicago Tribune, the Baltimore Sun and others in the well-regarded Tribune chain.

From a journalism perspective, this was widely — and rightly — [regarded as a disaster](#). “Devastating” is how Ann Marie Lipinski, the Tribune’s former top editor, now curator of Harvard’s Nieman Foundation for Journalism, characterized the development to me in an interview. And tech journalist Karl Bode commented darkly on [Twitter](#): “we’re slowly replacing a functional press with PR spam, hedge fund dudebros, trolling substack opinion columnists, foreign and domestic disinformation, brand-slathered teen influencers, and hugely consolidated dumpster fires like Sinclair Broadcasting.” (Sinclair Broadcast Group, the second-largest owner of local television stations in the country, has at times required its news anchors to read scripts with a [strong conservative bent](#) on the air.)

It’s not just watchdog journalism that suffers when news organizations shrink or die. The decline affects civic engagement and political polarization, too. Studies show that people who live in areas with poor local news coverage are less likely to vote, and when they do, they are more likely to do so

strictly along party lines. To put it bluntly, the demise of local news poses the kind of danger to our democracy that should have alarm sirens screeching across the land.



LEFT: Press operator Robin Yeager reads an issue of the Vindicator in August 2019. (Tony Dejak/AP) RIGHT: Bertram de Souza, the Vindicator's editorial page editor, in the newsroom in 2019. He had been at the paper for 40 years. Youngstown "is absolutely the kind of place that needs watchdog reporting," de Souza said, "and this newspaper was committed to exposing corruption." (Tony Dejak/AP)

Then there's the matter of public trust. In general, people trust the mainstream news media — or as I prefer to call it, the reality-based press — far less now than they did several decades ago. Around the time of The Washington Post's landmark reporting of the Watergate scandal, and the publication of the Pentagon Papers (the secret history of the Vietnam War) by the New York Times and The Post, the vast majority of citizens basically believed what they heard and read in the traditional media. CBS's Walter Cronkite was known as "the most trusted man in America."

Most studies show that there is one exception to this steady decline in trust: Americans find their local news sources significantly more credible than national news sources. Yet these are the very same outlets that are rapidly disappearing. That's especially worrisome at a time when conspiracy theories and misinformation are rampant.

Timothy Snyder, a Yale history professor and author of "[On Tyranny: Twenty Lessons From the Twentieth Century](#)," has called the loss of local news "the essential problem of our republic." It is nothing less than a crisis, he says, and a deepening one. "The only way we can talk to other people is

with some common understanding of the facts, for example whether or not our water is polluted or whether or not the teachers in our school are on strike,” Snyder told [E-International Relations](#). We don’t have to *like* what we learn about our communities through local news reporting, he noted, but it benefits us nonetheless. “When local news goes away, then our sense of what is true shifts from what is helpful to us in our daily lives to what makes us ‘feel good,’ which is something entirely different,” Snyder said. And, I would add, something very troubling.

This crisis, to be sure, is not just about newspapers, and certainly not just about newspapers in their printed incarnations. What’s important is the journalism, not the precise form it comes in. Local newspapers have been the center of most regions’ media ecosystems for many years because historically they have employed the most journalists and as a result produced the majority of original news. But they aren’t the only way to provide local news, by any means. Public radio, local television and digital-only news sites — often newly formed nonprofits — are increasingly part of the equation. And if there is a future, it surely is a mostly digital one.

But digital news sites, too, have struggled, and many have closed during the pandemic, including the well-regarded [Bklyner](#), whose Brooklyn-based editor and publisher Liena Zagare wrote a heart-rending note in late August announcing a September end to publication. “Since I never figured out how to get paid regularly for the many hats I still wear ... I cannot hire someone to fill in while I take the time off that I need to make sure that I, too, can be sustainable,” she explained. Among her roles: assigning stories, fact-checking, editing, reporting, writing, copy-editing, publishing, social media, tech, subscriptions, ad sales and handling payroll.

All of this leaves many localities — from rural areas to New York City’s most populous borough — struggling for answers. And yet, while the situation is undeniably troubling, some partial solutions are beginning to take shape. Digital news outlets are getting help through organizations such as the

[American Journalism Project](#), which raises money to fund and guide nonprofit, nonpartisan newsrooms. Just weeks ago, the group and a coalition of Cleveland-based organizations announced the [Ohio Local News Initiative](#) to bolster regional reporting in the state, starting next year with a newsroom in Cleveland. [Report for America](#), based loosely on Teach for America, puts young journalists in underserved communities to shore up the staffs of existing news organizations.

Well-established local outlets are coming up with collaborations too, as when the Texas Tribune joined forces with national investigative powerhouse ProPublica to cover the Lone Star State, or when several Pennsylvania news organizations decided to share their resources through Spotlight PA, with a particular focus on statehouse coverage. In Chicago, a rare bit of good news recently came along to balance the sale of the Tribune: The long-struggling Sun-Times newspaper and Chicago Public Media's WBEZ radio station are planning to combine as a nonprofit newsroom; it would be one of the largest in the nation. Meanwhile, there is bipartisan support in Congress for the [Local Journalism Sustainability Act](#), which would grant tax credits to outlets for every local reporter on their payroll.

No one can doubt the idealism behind these various efforts. However, the path forward remains uncertain. In many cases, where newspapers already have closed their doors, or shrunk beyond recognition, help may be arriving too late. What's more, any government action, or public funding, means treading carefully; the journalism industry has, for good reasons, long prided itself on independence.

There is no single answer to this crisis. Any solution, if there even is a solution, will require a multifaceted approach. But before local news can be saved, or successfully reinvented, one thing is absolutely necessary: American citizens must understand the existential threat local outlets are facing — and the incalculable value that their journalism brings to our democracy.



The Chicago Tribune newsroom moved from the landmark Tribune Tower in 2018 after 93 years. The daily paper was bought by Alden Global Capital this year. (Kiichiro Sato/AP)

*Margaret Sullivan is the media columnist for The Washington Post.*

### Read more from The Lost Local News Issue

Since 2005, about 2,200 local newspapers across America have closed. Here are some of the stories in danger of being lost — as told by local journalists.

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