

## IS “LINK TAX” AN ENDING OF ONLINE FREEDOM? COMPARISON WITH THE U.S. AND E.U. NEW DIRECTIVE

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### ABSTRACT

*With the rapid development of the Internet, new media technologies have provided us with convenient channels for obtaining information. They have also created new problems. News aggregators, such as Google News, collect the works from press publications, showing titles, snippets, and pictures that may already offer users enough information. Even if a company, like Google, does not rely on direct advertisements, it is still able to attract users. Authors' creations are freely used by a company like Google. To vigorously protect original content, the E.U. promulgated a new copyright directive for the Digital Single Market in 2019, giving news publishers more rights to protect their original works. This article examines the E.U.'s new copyright directive and compares this new law with the current U.S. law. The author challenges the current U.S. copyright law, thinking it is unjustified for news publications. As the fair use doctrine and the U.S. utilitarian background currently exist, courts may grant more protection to news aggregators. Under the current U.S. copyright law, it is ambiguous whether the news aggregators' conduct should be considered as infringement. Based on comparative research on the content of the E.U.'s new copyright law and the United States' legislative*

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*Is "Link Tax" an Ending of Online Freedom? Comparison with the U.S. and E.U. New Directive*   **385**

*purpose, the author proposes that the United States ought to update its copyright laws, granting more rights to press publications and limiting news aggregators' free use of their works.*

Abstract.....	384
I. Introduction.....	386
II. The Controversy Over the E.U. Directive .....	390
A. Press Publications and News Aggregators.....	391
1. Press Publications .....	392
2. News Aggregator– Google News .....	392
B. The E.U.'s "Link Tax" and New Rights for Press Publications Online.....	393
1. Interpretation of Article 15 .....	394
2. The New Rights of Publishers of Press Publications.....	395
3. Google News' Response to Article 15.....	396
4. French Media's Lawsuit Against Google .....	397
C. Comparison with the U.S. Approach to Copyright and News Aggregators.....	398
1. Interpretation of "Fair Use" Doctrine .....	399
2. Field v. Google, Inc. ....	400
3. Perfect 10, Inc. v. Amazon.com, Inc. ....	401
4. Summary of the United States' Situation of Press Publications.....	402
D. The Dispute in Implementing the Article 15 .....	403
1. Why the Press Publication Should be Protected .....	404
2. End Online Freedom, or Fit the Digital Age ..	405

III. Proposal for the U.S. to Update Its Copyright Law	408
A. Proposal of an Adapting Way Applied to Press Publications and News Aggregators	409
1. The Proposal Explanation in General	411
2. Definition	412
3. Exceptions	412
B. Reasons to Adapt this Proposal	415
1. Better Protect Endangered Traditional Publications	415
2. Harmonization	416
IV. Criticisms of this Proposal	417
A. Exacerbate Internet Information Inequities	418
B. Not the Right Balance—Violating Utilitarianism for Copyright	419
V. Conclusion	421

## **I. INTRODUCTION**

With the development of technology and science, people are getting more and more used to seeing this world on a tiny screen. Reading whole passages is no longer a quick way to know what is happening right now. We only like to read short notifications instead of clicking on longer articles. Besides, newsworthy events can make headlines in minutes and spread online to millions of readers worldwide. This aspect of digital communications explains why print and ink newspapers are endangered. In order to give more protection to traditional press publications, the European Parliament passed a controversial part of the new Digital

Single Market (Article 15) on 26 March 2019.<sup>1</sup> When the European Parliament drafted the framework of this new copyright directive, some big internet enterprises announced that they would shut down their news services in the E.U. for the sake of showing their opposition to this new directive.<sup>2</sup>

The problem is that the news aggregators collect the works from press publications, showing titles, snippets, and pictures that may already offer users enough information. In fact, many users do stop searching at this step without accessing the further web pages.<sup>3</sup> Many ISPs (Internet Service Providers) are extremely opposed to the new Digital Single Market due to its implementation becoming a serious problem.<sup>4</sup> Why did the E.U. consider that press publications need to be protected? Aggregators like Google and Facebook have earned a lot of profit from using only “snippets” of an original work. This may potentially make some authors’ creations freely used by companies like Google, though. So even if Google does not directly advertise on webpages, it can still attract users. Further, they can ask users to spend money to buy more personalized news push services and earn even greater benefits from the free use of these works. This new directive faces the new

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<sup>1</sup> Directive 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 PE/51/2019/REV/1, art. 15, 2019 O.J. (L 130) 92–125 [hereinafter Copyright Directive].

<sup>2</sup> See, e.g., Saman Javed, *European Publishers condemn Google decision against Article 15*, TRADEMARK BRANDS ONLINE (Feb. 10, 2019), <https://www.trademarksandbrandsonline.com/news/european-publishers-condemn-google-decision-against-article-15-5546> [https://perma.cc/KB4U-2TXS].

<sup>3</sup> Matthew Karnisching & Chris Spillane, *Plan to Make Google Pay for News Hits Rocks*, POLITICO (Feb. 15, 2017), <https://www.politico.eu/article/plan-to-make-google-pay-for-news-hits-rocks-copyright-reform-european-commission/> [https://perma.cc/RYK6-WFNR].

<sup>4</sup> See, e.g., Javed, *supra* note 2.

digital age, aiming to protect original works and stimulate innovation. Further, it encourages internet services like news aggregators to work with press publications to create win-win situations.<sup>5</sup> Until now, this dispute has caused a heated debate, which has led to some opponents dubbing this directive the “link tax.”<sup>6</sup>

In the U.S., many scholars assert this rule could not be applied domestically.<sup>7</sup> Under the Fair Use Doctrine and First Amendment of the Constitution, the government’s intent is to protect freedom of speech.<sup>8</sup> These both support the notion that the U.S. copyright law loses its control to ideas and facts.<sup>9</sup> And the doctrine formulated four factors of fair use to achieve this fair use defense.<sup>10</sup> Also, when arguing whether something is fair use, all four elements shall be proven, but you can interpret one or two more important factors and show why.<sup>11</sup> The U.S. copyright law aims to help share values and interests and to promote innovative expressions of creation.<sup>12</sup> Some courts have insisted on the importance of conversion and have used it to determine whether the digital use of copyrighted works constituted fair use.<sup>13</sup> The problem was that transformative use is subject to

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<sup>5</sup> See generally Copyright Directive, *supra* note 1.

<sup>6</sup> See Mike Smith, *Will the EU’s Link Tax Change the Web Forever?*, COMPANYDEBT (Dec. 3, 2020), <https://www.companydebt.com/articles/will-the-eus-link-tax-change-the-web-forever/> [https://perma.cc/8229-P9VJ].

<sup>7</sup> Andrew Tyner, *The EU Copyright Directive: “Fit For the Digital Age” or Finishing it*, 26 J. INTELL. PROP. L. 275, 276 (2019).

<sup>8</sup> See generally *id.*

<sup>9</sup> Patrick H.J. Hughes, *Q&A: Copyright expert Christopher Beall on the European Union Copyright Directive*, IPDBRF 0089 (2018).

<sup>10</sup> 17 U.S.C. § 107 (1992).

<sup>11</sup> See *id.*

<sup>12</sup> See generally JULIE E. COHEN & LYDIA PALLAS LOREN, COPYRIGHT IN A GLOBAL INFORMATION ECONOMY 564 (4th ed. 2015).

<sup>13</sup> See, e.g., *Field v. Google, Inc.*, 412 F. Supp. 2d 1106, 1113–14 (D. Nev. 2006); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1174 (9th Cir. 2007).

a variety of interpretations.<sup>14</sup> The courts often support the “deployment of original works for different commercial purposes,” rather than new techniques for creating new works,<sup>15</sup> so if the court always granted “a different commercial use” to achieve transformative use, then the result should be more beneficial to the public.<sup>16</sup>

Although the digital age puts forth a more impersonal environment, any freedom of using or speaking cannot stand above the rights protected by law. Everything is easily made available online; therefore, this access should be balanced with a level of protection and reasonable reward for creating parties.<sup>17</sup> In Article 15 of the Copyright Directive, the final rule explicitly demonstrates that “[t]he rights provided for in the first subparagraph shall not apply to private or non-commercial uses of press publications by individual users.”<sup>18</sup> The text continues, stating “[t]he 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.”<sup>19</sup> Also, the section excludes hyperlinks.<sup>20</sup> These exceptions preserve individual online free-speaking rights and the principle of “fair use.” It is a reasonable criterion instead of a limitation.

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<sup>14</sup> Matthew D. Bunker, *Eroding Fair Use: The “Transformative” Use Doctrine After Campbell*, 7 COMM. L. & POL’Y 1, 9 (2002).

<sup>15</sup> See generally Raymond T. Nimmer, *Information Wars and the Challenges of Content Protection in Digital Contexts*, 13 VAND. J. ENT. & TECH. L. 825 (2010–2011).

<sup>16</sup> See Bunker, *supra* note 14, at 9.

<sup>17</sup> Council of the EU, *Copyright rules for the digital environment: Council agrees its position*, EUROPEAN COUNCIL/COUNCIL OF THE EUROPEAN UNION (May 20, 2018, 5:52 PM), <https://www.consilium.europa.eu/en/press/releases/2018/05/25/copyright-rules-for-the-digital-environment-council-agrees-its-position/> [https://perma.cc/AD3A-JNM3].

<sup>18</sup> Copyright Directive, *supra* note 1.

<sup>19</sup> *Id.*

<sup>20</sup> See *id.*

This article is intended to explore how the United States may update its copyright laws to better protect journalism via the Internet. Part I of the article analyzes the controversy over the E.U. Digital Single Market Directive’s news aggregators or search engines, and further illustrates some concepts mentioned in Article 15. Also, this Part examines a similar situation under U.S. law, interpreting related cases applied with the principle of “fair use.” The end of this part discusses the dispute about implementing the new directive, as well as whether the U.S. needs to have similar law to protect press publications. Part II proposes to add a new statute to distinguish search engines and news aggregators in order to achieve equilibrium between press publications and news aggregators. Part III states some objections, which point out the proposal in Part II may be inconsistent with the legislative purposes of the U.S.

## **II. THE CONTROVERSY OVER THE E.U. DIRECTIVE**

The problem is that news aggregators collect the works from press publications, only showing titles, snippets and pictures that may already offer users enough information. In fact, many users do stop searching at this step, without accessing the further web pages. In the U.S., the courts may not adequately consider this situation, which substantially is an infringement of copyright. Therefore, many traditional media outlets have publicly called for correcting the considerable imbalance between Internet companies and traditional media.<sup>21</sup> Industry analysts say that traditional media organizations are facing severe

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<sup>21</sup> See generally Cory Doctorow, *The European Copyright Directive: What Is It, and Why Has It Drawn More Controversy Than Any Other Directive In EU History?*, EFF (Mar. 19, 2019), <https://www.eff.org/zh-hans/deeplinks/2019/03/european-copyright-directive-what-it-and-why-has-it-drawn-more-controversy-any> [https://perma.cc/V92E-DWFA].

challenges under the new, digital business model, and this newly-adopted draft is a new type of right that the E.U. has given to news publishers.<sup>22</sup> This lopsided relationship between Internet companies and traditional media also exists in the U.S. However, a drawback of U.S. copyright law, as applied here, is the excessive protection of public interests, which has caused publishers to lose some of their fundamental rights related to the ownership of their original works.

### **A. *Press Publications and News Aggregators***

Generally, “‘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,”<sup>23</sup> whereas “news aggregator” means a site that collects and presents aggregated third-party news content from traditional media and other websites.<sup>24</sup>

In fact, “European publishers, including the European Magazine Media Association, the European Newspaper Publishers’ Association, New Media Europe and the European Publishers’ Council, have welcomed the changes to copyright law.”<sup>25</sup> “They believe it will prevent

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<sup>22</sup> *See id.*

<sup>23</sup> Copyright Directive, *supra* note 1, at art. 2.

<sup>24</sup> Kevin Skaggs, *What’s New in News Aggregation?*, THE GUARDIAN (July 17, 2012, 05:47 EDT),

<https://www.theguardian.com/media-network/media-network-blog/2012/jul/17/what-is-new-news-aggregation>

[<https://perma.cc/J2GG-CJYN>].

<sup>25</sup> Sam Forsdick, *MEPs Vote in Favour of ‘Link Tax’ as Part of New Copyright Laws Welcomed by European Publishers*, PRESS GAZETTE: DIGITAL JOURNALISM (June 20, 2018), <https://www.pressgazette.co.uk/meps-vote-in-favour-of-link-tax-as-part-of-new-copyright-laws-welcomed-by-european-publisher> [<https://perma.cc/XLE6-GXP8>].



companies, such as Google and Facebook, from ‘free-riding’ on news publishers.’<sup>26</sup>

### **1. Press Publications**

In the past, a traditional news business model was very similar to what news aggregators apply now.<sup>27</sup> Press publications used to collect news and fantastic stories, arranging them in the newspaper to sell to readers.<sup>28</sup> They would make money by selling space for advertisements and from the sale of papers.<sup>29</sup> Nowadays, with the great development of technology and the Internet, the circulation of traditional newspapers has declined largely.<sup>30</sup> These publishers have diverted their traditional business model to the Internet, hiring writers to create good interpretations of the news.<sup>31</sup> However, news aggregators now collect news and information from a large number of publishers and websites. This allegedly, helps the public access information; yet, it also potentially damage the publications themselves.<sup>32</sup> At the very least, the publishers do not have optimized circulations to attract advertising investments.<sup>33</sup>

### **2. News Aggregator– Google News**

Google News is an aggregator, showing news titles, short introductions, and thumbnails to users by computer

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<sup>26</sup> *Id.*

<sup>27</sup> *See generally Reinventing the newspaper*, THE ECONOMIST (July 7, 2011), <https://www.economist.com/special-report/2011/07/09/reinventing-the-newspaper> [<https://perma.cc/7YBA-KEPL>].

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> MICHAEL BARTHEL, PEW RES. CTR., STATE OF THE NEWS MEDIA 2016 9 (June 15, 2016).

<sup>31</sup> *See Reinventing the newspaper*, *supra* note 27.

<sup>32</sup> *See* AMY MITCHELL & JESSE HOLCOMB, PEW RES. CTR., STATE OF THE NEWS MEDIA 2016 48 (June 15, 2016).

<sup>33</sup> *See id.* at 4.

algorithms.<sup>34</sup> When you search for some news via Google News, these algorithms determine which articles, pictures, and videos to display and the order in which they are displayed.<sup>35</sup> Some content will even be shown in a personalized way.<sup>36</sup> Personalization makes it easier to navigate the content of interest. However, aggregators collect news by linking individuals to their articles, then using their technology to automatically select news for users.<sup>37</sup> Aggregators use the original works without any license or consent from their creators.<sup>38</sup> Over time, they have gained large profits from this aggregation with low original output but high advertising investments.<sup>39</sup>

**B. The E.U.'s "Link Tax" and New Rights for Press Publications Online**

"Link tax" is a phrase coined by opponents to the E.U.'s reform.<sup>40</sup> The provisions on "link tax" are found in Article 15.<sup>41</sup> It is true that this phrase only appears once in the entire article. However, the terms related to the protection of original news and other content, as well as the requirement to charge the website for the original news content reprinting fees, were vehemently opposed by Google, Facebook, and other websites. So, the common

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<sup>34</sup> See *Google News*, GOOGLE, <https://news.google.com/about/> [<https://perma.cc/73NJ-NPXL>]

<sup>35</sup> See *id.*

<sup>36</sup> See Doctorow, *supra* note 21.

<sup>37</sup> See *id.*

<sup>38</sup> Zachary Davidson, *The Next Balancing Act: Can the Law Save the Traditional News Media Without Eliminating News Aggregators?*, 85 S. CAL. L. REV. 88, 91 (2012).

<sup>39</sup> *Id.*

<sup>40</sup> Julia Reda, *Extra Copyright For News Sites (Link Tax)*, JULIA REDA (2018), <https://juliareda.eu/eu-copyright-reform/extra-copyright-for-news-sites/> [<https://perma.cc/EH8S-H26E>].

<sup>41</sup> See Copyright Directive, *supra* note 1; see also Reda, *supra* note 40.

term “link tax” is generally accepted by the media.<sup>42</sup> After long-term negotiations, the negotiators of the European Parliament reached a principled consensus with the E.U. countries on copyright law reform which resulted in the new copyright directive.

### **1. Interpretation of Article 15**

“Member States shall provide publishers of press publications established in a Member State with the rights provided for in Article 2 and Article 3(2) of Directive 2001/29/EC for the online use of their press publications by information society service providers.”<sup>43</sup> Neither does it involve the issue of tax payment to the government, nor does it stipulate how much website A must give media B, but it is simply about the fact that media B has the right to claim reasonable compensation from website A for its use of media B’s works.<sup>44</sup>

The concept of “digitally using press publications on the website” is the key to understanding this provision. This new technology can automatically calculate information in digital form, such as text, sound, image or data, commonly referred to as text and data mining.<sup>45</sup> This technology is great for a creative market.<sup>46</sup> However, there is a grey area in the law regarding this technology. In some cases, text and data mining may involve acts protected by copyright and/or proprietary database rights, especially the copying of works or other topics and/or extracting content from databases.<sup>47</sup> “Digital use” here means that a website does not “copy” and “paste” other media reports onto its website, but website A

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<sup>42</sup> See generally Reda, *supra* note 40.

<sup>43</sup> Copyright Directive, *supra* note 1, at arts. 2 & 3(2).

<sup>44</sup> See generally *Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market*, COM (2016) 593 (Sept. 14, 2016).

<sup>45</sup> See *id.*

<sup>46</sup> See *id.*

<sup>47</sup> See *id.*

can introduce the title, individual words, and hyperlinks of media B reports to its website.

## **2. The New Rights of Publishers of Press Publications**

According to the rules applied in Article 15, the European Union has decreased the standard of online infringement by news aggregators.<sup>48</sup> To sum up, new rights provided to the publishers mainly have four parts. First, it describes what press publications are in Article 2.<sup>49</sup> Second, the rule emphasizes news publications have exclusive rights over their works.<sup>50</sup> So, no one could use their work unless they have a pre-license.<sup>51</sup> If the part does not have such a license, the publisher has a right to claim compensation for the use of their work.<sup>52</sup> Third, if society service providers receive revenues by using the publisher's works, the publishers own rights to a share of the resulting revenue.<sup>53</sup> Fourth, Article 15 sets some exclusions.<sup>54</sup> It excludes private or non-commercial uses by individual users, hyperlinking, and individual words or short extracts.<sup>55</sup> Also, it sets a time limit for these rights – two years after the press publication is originally published.<sup>56</sup>

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<sup>48</sup> See Jonathan Griffiths, *Dematerialization, Pragmatism and the European Copyright Revolution*, 1, 3–4 (Queen Mary University of London, Sch. of Law, Legal Stud. Rsch. Paper No. 156/2013, 2013).

<sup>49</sup> See Copyright Directive, *supra* note 1, at art. 2; see also *infra* Part IA.

<sup>50</sup> See *id.* at art. 15.

<sup>51</sup> Davidson, *supra* note 38, at 108–09.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> Copyright Directive, *supra* note 1, at art. 15.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

### 3. Google News' Response to Article 15

Google's long-standing attitude toward Article 15 is firm opposition.<sup>57</sup> After the E.U. Council's announcement of the new copyright proposal, Internet companies represented by Google and Facebook have done a lot of lobbying work in the E.U., hoping to modify this rule.<sup>58</sup> Google also refuses to pay publishers under the first "link tax" legislation.<sup>59</sup> They deliberately published a blog that hinted at their positions and practices. This so-called "link tax" will be applied to abstracts and previews of articles (such as articles used in Google News) but will not extend to hyperlinks or only a few individual words used to describe them.<sup>60</sup> However, Google announced that articles, images, and videos will only appear in search results if the media company agrees to make them available to tech giants for

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<sup>57</sup> See Richard Gingras, *Proposed Copyright Rules: Bad for Small Publishers, European Consumers and Online Services*, VP, NEWS (Dec. 6, 2018), <https://www.blog.google/around-the-globe/google-europe/proposed-copyright-rules-bad-small-publishers-european-consumers-and-online-services/> [<https://perma.cc/J6TG-CWBD>].

<sup>58</sup> Daniel Sanchez, *Google Spent More Than \$36 Million to Scuttle Article 13 & the Copyright Directive*, DIGITAL MUSIC NEWS (July 3, 2018), <https://www.digitalmusicnews.com/2018/07/03/google-article-13-copyright-directive/> [<https://perma.cc/K8JW-UV3G>].

<sup>59</sup> Charlotte Tobitt, *Google Refuse to Pay Publishers In France under First "Link Tax" Legislation*, PressGazette (Sep 26, 2019), <https://www.pressgazette.co.uk/google-refuses-to-pay-publishers-in-france-under-first-link-tax-legislation-european-copyright-directive/#:~:text=Google%20has%20refused%20to%20pay,is%20being%20introduced%20next%20month> [<https://perma.cc/34KA-XMAW>].

<sup>60</sup> See generally Richard Gingras, *Nouvelles règles de droit d'auteur en France : notre mise en conformité avec la loi*, FRANCE | GOOGLE BLOG (Sep. 25, 2019) (Fr.), <https://france.googleblog.com/2019/09/comment-nous-respectons-le-droit-dauteur.html> [<https://perma.cc/JX8K-JB5Q>]; see also Tobitt, *supra* note 59.

free. If they refuse, they will only show naked links to the content and title.<sup>61</sup>

People believe that Google can help them find useful and authoritative information from a variety of sources.<sup>62</sup> In order to maintain this trust, search results must be determined by relevance rather than by business partnerships.<sup>63</sup> That is why they do not accept anyone's payments to be included in search results. Google sells ads instead of search results, and every ad on Google is marked.<sup>64</sup> That is why people can read news compilations — the reason they do not pay publishers when we click on their link.<sup>65</sup>

#### **4. French Media's Lawsuit Against Google**

France is the first country of the E.U. to ratify the E.U.'s new copyright law.<sup>66</sup> After the French government implemented this law, Google explicitly refused to pay and would only display naked links and titles.<sup>67</sup> Representatives of French media groups have stated that they are bringing Google to court because "[t]he future of the French and

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<sup>61</sup> See Anne Bagamery, *Google Hit With Harsh Copyright Ruling From Competition Watchdog in France*, LAW.COM (Apr. 10, 2020, 4:17 PM), <https://www.law.com/2020/04/10/for-google-a-harsh-copyright-ruling-from-french-competition-watchdog-403-48838/> [https://perma.cc/9SDJ-KPW7].

<sup>62</sup> See *How Americans Get Their News*, AM. PRESS. INST. (Mar. 17, 2014, 3:00 PM), <https://www.americanpressinstitute.org/publications/reports/surveyresearch/how-americans-get-news> [https://perma.cc/FW64-45HC].

<sup>63</sup> See Gingras, *supra* note 60.

<sup>64</sup> See *id.*

<sup>65</sup> See *id.*

<sup>66</sup> *French Media Groups to Take Google Copyright Fight to Court*, FRANCE24 (Oct. 24, 2019), <https://www.france24.com/en/20191024-french-media-groups-to-take-google-copyright-fight-to-court> [https://perma.cc/N4A6-YF7L].

<sup>67</sup> Sanchez, *supra* note 58; see also Bagamery, *supra* note 61.

European press is at stake,”<sup>68</sup> as they assert that Google is using this to circumvent the copyright law and so nothing has changed.<sup>69</sup> More than 1,000 journalists, photographers, and members of the media signed a letter to the government, declaring that they will not compromise, and the government must ensure Google will respect the law and European sovereignty.<sup>70</sup> Recently, the publishers argued that besides not complying with French copyright laws, Google also tried to violate the E.U. competition law by abusing its market position in online news so that the publishers would relent and agree to let Google use their materials for free.<sup>71</sup> According to lawyers, just before French law came into effect in October, Google made a proposal to French publishers to continue publishing its content, but only if the publishers granted Google a zero-cost license within a week.<sup>72</sup> Google’s actions are more like extortion than honesty, which is why the government rules are so harsh.<sup>73</sup> Thus, they must negotiate with press publications in good faith.

### ***C. Comparison with the U.S. Approach to Copyright and News Aggregators***

When the principle of fair use was introduced in the U.S., it stirred up many controversies. As this rule was entirely new, many cases needed to be decided to further understand its full reach<sup>74</sup> After deciding some cases, the judges gradually got a set of understandings and rules for comprehending the entirety of this fair use doctrine.

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<sup>68</sup> *French Media*, *supra* note 66.

<sup>69</sup> *See id.*; *see also* Gingras, *supra* note 57.

<sup>70</sup> *French Media*, *supra* note 66.

<sup>71</sup> *See generally* Bagamery, *supra* note 61.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *See* Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1105 (1990).

Nevertheless, in order to stimulate and encourage innovation, judges remain more inclined to protect aggregators to increase public access to information.<sup>75</sup> However, courts should instead adopt a similar approach in their decisions on press publications as they have in the decisions to protect works related to the music industry.<sup>76</sup> They should be more active in using copyright law to protect original content from news aggregators, preventing the commercial exploitation of free distribution of these works by aggregators on the Internet.<sup>77</sup> However, under the Fair Use Doctrine as it currently exists, press publications have difficulty proving copyright infringement.<sup>78</sup>

### **1. Interpretation of "Fair Use" Doctrine**

A court's application of the four-factor test of the fair use principle usually involves an extensive analysis of how secondary use affects copyright works.

In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

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<sup>75</sup> See Keiyana Fordham, *Can Newspaper Be Saved? How Copyright Law Can Save Newspapers from the Challenges of New Media*, 20 FORDHAM INTELL. PROP. MEDIA & ENT. L. J. 939, 973 (2010).

<sup>76</sup> *Id.* at 990.

<sup>77</sup> See, e.g., *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005); see also Fordham, *supra* note 75, at 989–90.

<sup>78</sup> See *Metro-Goldwyn-Mayer Studios Inc.*, 545 U.S. at 941.



(4) the effect of the use upon the potential market for or value of the copyrighted work.<sup>79</sup>

In the preamble of section 107, which covers fair use, news reporting is listed as one of the six permissible fair uses of protected works.<sup>80</sup> Courts typically prefer to safeguard the public interest in accessing information over protecting the author’s exclusive right to their copyrighted works.<sup>81</sup> Thus, it satisfies that the alleged infringing work is transformative enough to have a new purpose.

## **2. Field v. Google, Inc.**

Blake Field (Plaintiff) posted his copyrighted work on his own website.<sup>82</sup> Field then sued Google for copyright infringement after Google’s “web crawler” copied the entire site, including the copyrighted work, to create a cached link.<sup>83</sup> Google provided many defenses to this copyright infringement claim, including fair use. The Court believed that it was reasonable for Google to use Blake’s copyrighted works to create “cached” links.<sup>84</sup> First, the Court found transformative use.<sup>85</sup> It also found that Field’s copyrighted works had an artistic purpose while Google’s cached links offered users an efficient access to the copyrighted works online.<sup>86</sup> So, the Google System Cache served a different purpose from that of Plaintiff’s original works. Furthermore, “[w]hen a use is found to be transformative, the ‘commercial’ nature of the use is of less importance in

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<sup>79</sup> 17 U.S.C. § 107 (1992).

<sup>80</sup> *Id.*

<sup>81</sup> *See, e.g.,* Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 549–50 (1985).

<sup>82</sup> Field v. Google, Inc., 412 F. Supp. 2d 1106, 1113–14 (D. Nev. 2006).

<sup>83</sup> *Id.* at 1110–14; *see also* Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1174 (9th Cir. 2007) (mentioning Google’s “web crawler”).

<sup>84</sup> *Field*, 412 F. Supp. 2d at 1118.

<sup>85</sup> *Id.* at 1119.

<sup>86</sup> *Id.* at 1118.

analyzing the first fair use factor.”<sup>87</sup> The Court held, even though Google is a for-profit corporation, when users accessed Plaintiff’s work, they did not display any advertisement or offer any commercial transaction.<sup>88</sup> The second and third factors could not overcome the Court’s revolutionary conclusions about the use of Google.<sup>89</sup> The Court held that the copyrighted work was creative, but it was also posted on his website, “mak[ing] his works available to the widest possible audience for free.”<sup>90</sup> Since Field provided his work free of charge, there was no evidence that the fourth factor would undermine the market.<sup>91</sup> The case further clarifies how courts would justify reasonable use in the context of technology, facilitating more comprehensive access to information on the Internet.<sup>92</sup>

### **3. Perfect 10, Inc. v. Amazon.com, Inc.**

In response to an image search, Google’s search engine communicates thumbnail versions of images to users.<sup>93</sup> In *Perfect 10, Inc. v. Amazon.com, Inc.*, the Court finally held that Google’s showing of Perfect 10’s images to users was a fair use.<sup>94</sup> When determining whether the work was used reasonably, the Court considered the four factors that are explained above. First, the defendant’s purpose in displaying thumbnails was to direct the user to find the full size of the image.<sup>95</sup> The defendant used the thumbnail as a “pointer,” and they did not intend to provide entertainment

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<sup>87</sup> *Id.* at 1119 (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579, 114 S. Ct. 1164, 1171 (1994)).

<sup>88</sup> *Field*, 412 F. Supp. 2d at 1119–20.

<sup>89</sup> *Id.* at 1123.

<sup>90</sup> *Id.* at 1120.

<sup>91</sup> *Id.* at 1121.

<sup>92</sup> *See id.* at 1117–23.

<sup>93</sup> *See Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1155 (9th Cir. 2007).

<sup>94</sup> *Id.* at 1168.

<sup>95</sup> *Id.* at 1161.

or aesthetic value like the plaintiff's purpose.<sup>96</sup> Thus, the defendant's use was highly transformative.<sup>97</sup> These images were creative works, so the second factor was not conducive to the discovery of fair use.<sup>98</sup> Although the defendant copied the image in its entirety, they reduced the size of the image and allowed the user to identify the image to click to see the full-size version.<sup>99</sup> Thus, the use was reasonable, and the third factor was neutral.<sup>100</sup> As for the fourth factor, thumbnails are usually not a substitute for full-size thumbnails, so they generally do not affect the full-size market.<sup>101</sup> However, when viewing thumbnails on a mobile device, the thumbnails may be equivalent to the full-size images.<sup>102</sup> As a result, Perfect 10's image mobile market may be harmed, and the Court ruled that the factor was neutral.<sup>103</sup> All in all, given the high degree of conversion of thumbnails, the Court held that the defendant's use was a fair use.<sup>104</sup>

#### **4. Summary of the United States' Situation of Press Publications**

In the United States, courts aim to protect the public value and stimulate innovative ways to protect copyright works.<sup>105</sup> However, this allows for little room for copyright owners to argue when there is an infringement of other uses by news aggregators or search engines. First, press publications allege that news aggregators have no transformative uses of the original works, and that the news

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<sup>96</sup> *Id.* at 1165.

<sup>97</sup> *Id.* at 1167.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 1168.

<sup>102</sup> *Id.* at 1166–68.

<sup>103</sup> *Id.* at 1168.

<sup>104</sup> *Id.*

<sup>105</sup> *See* Fordham, *supra* note 75, at 981–82.

aggregators' ultimate goal is just to make profits.<sup>106</sup> Second, even though press publications publish news, which may probably consider to be facts, the writers of these articles add enough self-interpretations to make their works more creative.<sup>107</sup> The third and the fourth fair use factors can be discussed together. News aggregators collect the works from press publications, showing titles, snippets, and pictures that may already offer users enough information. In fact, many users do stop searching at this step, without accessing the further webpages.<sup>108</sup> This potentially harms the publishers' markets. At least, the publishers cannot attract advertising benefits when users do not visit their webpages.

#### ***D. The Dispute in Implementing the Article 15***

As discussed in the cases above, U.S. courts have held that the use of copyrighted works by search engines is transformative with a view of improving access to information on the Internet for public interest.<sup>109</sup> However, the courts should avoid overemphasizing the public interest of technology. Similar to what the E.U. does now, the U.S. should give press publications reasonable rights to claim some profits when others use their works. In the E.U., although the European Commission has already passed the new directive, there are still many parties opposed to the directive. Some even think this will be the end of online free speech. To interpret the new directive, the parliament of the E.U. also addresses many of the controversies.<sup>110</sup>

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<sup>106</sup> See CHRISTOPHER ALAN JENNINGS, AM. L. DIV., CONG. RSCH. SERV., RL31423, FAIR USE ON THE INTERNET 1 (2002).

<sup>107</sup> See Fordham, *supra* note 75, at 951–53.

<sup>108</sup> Karnitschnig & Spillane, *supra* note 3.

<sup>109</sup> See Fordham, *supra* note 75, at 981–82.

<sup>110</sup> Zsófia Lendvai, *Controversies Around the New Copyright Directive*, 24 No. 7 CYBERSPACE LAWYER NL 2.

## 1. Why the Press Publication Should be Protected

Every trend in the newspaper industry, whether in circulation, income, or employment rate, indicates a crisis of survival.<sup>111</sup> Take the American newspaper industry as an example.

Total paid circulation for U.S. daily newspapers peaked in 1987 at sixty-three million. Circulation in 2009 stood at forty-six million, a twenty-seven percent decline over twenty-two years. Total advertising revenues for newspapers peaked in 2000 at \$49 billion but declined to \$26 billion in 2010, representing a forty-seven percent reduction over half as much time.<sup>112</sup>

Even if they want to increase their income through advertising, they don't seem to be competitive enough.

On the contrary, technology companies such as Google and Facebook have been consistently claiming that the platform shares revenue with copyright parties, but the truth is not as simple as that.<sup>113</sup> Take a Google search as an example. Websites can use the Google banner to separate traffic. Nevertheless, most of Google's revenue happens before it goes to the search result list.<sup>114</sup> Similarly, Facebook, the WeChat friends circle, the Baidu homepage, the new Google homepage, and today's headlines are all in the stream. The advertising fee is their primary source of income, which does not need to be distributed to content providers, as those providers have no valid claim to such

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<sup>111</sup> See Fordham, *supra* note 75, at 943.

<sup>112</sup> Priya Barnes, Note, *The Prospects for Protecting News Content Under the Digital Millennium Copyright Act*, 3 HARV. J. SPORTS & ENT. L. 201, 204 (2012).

<sup>113</sup> See Karnitschnig & Spillane, *supra* note 3.

<sup>114</sup> See *id.*

income.<sup>115</sup> Google argues that the company's search platform has brought more page views to the news industry, which seems to be an obvious benefit.<sup>116</sup> But, an E.U. survey shows that only news links on Google's search sites have fewer than 50% of reader clicks.<sup>117</sup> Most people just read the title and abstract, but Google has successfully sold the stream and the ads on the side of the search page in the process.<sup>118</sup>

Nonetheless, Apple News uses a different business model. They offer services like page design for individual users, and they only show titles from the original papers.<sup>119</sup> Besides, they offer users thousands of digital magazines in exchange for joining their membership.<sup>120</sup> In this way, Google could adopt a similar model to make sure they have money to get licenses from press publications; they also could offer their users more services and diverse online magazines to read. This model could result in a win-win situation for both news aggregators and press publications.

## **2. End Online Freedom, or Fit the Digital Age**

Traditional news publications face so many problems, so even though the new directive directly gives them an avenue to request profits from news aggregators, there still are some negative aspects of the new directive. Without implementation, we do not have enough case law to form a harmonized standard. Even though nothing can be perfect, everything needs to be balanced. Importantly, Internet technology giants such as Google and Facebook

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<sup>115</sup> Javed, *supra* note 2.

<sup>116</sup> Karnitschnig & Spillane, *supra* note 3.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Read the latest headlines in the Apple News app*, APPLE: SUPPORT (July 15, 2020), <https://support.apple.com/en-us/HT202329> [<https://perma.cc/AEE4-NYPE>].

<sup>120</sup> *See generally id.*

have long held a strong position in the European market; there is no Internet company in Europe that has a competitive edge.<sup>121</sup> The commercial powers, traditional content publishers, and media organizations face severe challenges under the impact of the former business model.<sup>122</sup> The struggle for copyright reform in the European Union is a game between European Internet innovation forces and international Internet technology giants.<sup>123</sup> It is also a dispute between European intellectual property improvement appeals and the Internet giant's platform in the digital content era.<sup>124</sup>

Some opponents of the directive have declared that one of the most direct problems is that the directive does not go far enough, i.e., it will not break up the monopoly of technology giants that cause these problems.<sup>125</sup> In turn, some small aggregate websites will be the ones most affected by the new E.U. copyright law. Article 15 requires aggregators to purchase copyrighted content, which can result in huge expenses.<sup>126</sup> The European Parliament has also taken this into account, so small companies were exempted in the final version.<sup>127</sup>

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<sup>121</sup> See Sanchez, *supra* note 58.

<sup>122</sup> See *id.*

<sup>123</sup> See *id.*

<sup>124</sup> See *id.*

<sup>125</sup> See David Lowery, *The Google Funded Astroturf Group that Hacked The EU Copyright Vote (In Pictures)*, THE TRICHORDIST (July 28, 2018), <https://thetrichordist.com/2018/07/28/the-google-funded-astroturf-group-that-hacked-the-eu-copyright-vote-in-pictures/> [https://perma.cc/828A-H8EA].

<sup>126</sup> Copyright Directive, *supra* note 1.

<sup>127</sup> See Brussels, *Questions and Answers – European Parliament's vote in favour of modernised rules fit for digital age*, EUROPEAN COMMISSION (Mar. 26, 2019), [https://ec.europa.eu/commission/presscorner/detail/en/MEMO\\_19\\_1849](https://ec.europa.eu/commission/presscorner/detail/en/MEMO_19_1849) [https://perma.cc/4CJU-DSU9].

[S]mall platforms will benefit from a lighter regime in case there is no authorisation granted by right holders. This concerns online service providers which have less than three years of existence in the Union and which have a turnover of less than 10 million euros and have less than 5 million monthly users. In order to avoid liability for unauthorised works, these new small companies will only have to prove that they have made their best efforts to obtain an authorisation and that they have acted expeditiously to remove the unauthorised works notified by right holders from their platform.<sup>128</sup>

Furthermore, the lobbying group the Computer and Communications Industry Association (CCIA) members, including Google and Facebook, have been publicly criticizing the new copyright law. "We are concerned that this law will not be conducive to European network innovation and growth, and will limit online freedom," said CCIA Vice President Christian Berggren.<sup>129</sup> Sergey Brin, one of Google's founders, announced at the beginning of the company's founding that Google's goal was to "process and understand all the information in the world" with a "perfect search engine."<sup>130</sup> In the past two decades, the existence of Google has promoted free dissemination of information on the Internet and information fairness.<sup>131</sup> "Free" is the best manner to disseminate information. When the platform is constrained by copyrights before generating revenue, the

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<sup>128</sup> *Id.*

<sup>129</sup> Heather Greenfield, EU Copyright Deal Will Harm European Online Innovation and Online Rights, CCIA (Feb. 13, 2019).

<https://www.cciainet.org/2019/02/eu-copyright-deal-will-harm-european-online-innovation-and-online-rights/> [<https://perma.cc/74XH-XGLC>].

<sup>130</sup> Sequoia Capital & Kleiner Perkins, *Google Receives \$25 Million in Equity Funding*, Google News from Google (June 7, 1999), <https://googlepress.blogspot.com/1999/06/google-receives-25-million-in-equity.html> [<https://perma.cc/CP5A-43K4>].

<sup>131</sup> *See id.*



degree of freeness will inevitably change.<sup>132</sup> Today in the United States, where the payment model is popular, large and small media have built paywalls. People who are unwilling or unable to pay ten dollars in monthly subscription fees are basically unable to access first-hand information and further must pay more expensive fees to view information. Information equality is fading, and this began to happen even before the new copyright law.

To sum up, under the digital circumstance, there is a need to find a more balanced way to protect both press publications and news aggregators. In order to establish a fair online environment, giving press publications rights to claim some profits is a good solution. Not only in the E.U., but also in other areas, the emergence of the network news aggregators has undoubtedly brought a huge market impact on the traditional newspaper industry. Although, in the U.S., courts aim to give more protection to innovative expression via the Internet, it is still needed to measure whether these news aggregators gain a lot from using works freely., courts aim to give more protection to innovative expression via the Internet, it is still needed to measure whether these news aggregators gain a lot from using works freely.

### **III. PROPOSAL FOR THE U.S. TO UPDATE ITS COPYRIGHT LAW**

In order to find a more proper way of balancing the interests of press publications and news aggregators, both the U.S. provision of Fair Use Doctrine and the E.U. new copyright directive should be considered. According to Part I in this essay, the same situation occurs in two different areas.<sup>133</sup> In the U.S., when courts determine cases about the

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<sup>132</sup> See Greenfield, *supra* note 129.

<sup>133</sup> See *infra* Part I; see also Paul Farhi, *Don't Blame the Journalism: The Economic and Technological Forces Behind the Collapse of Newspapers*, 30 AM. JOURNALISM REV. 14, 14 (2008) [hereinafter *Don't*

Internet, they often rule and hold that the uses by aggregators constitute a highly transformative use, for they provide more chances for civilians to know the world better.<sup>134</sup> However, in the E.U., strict limitations on adopting articles or news from press publications seem to be implemented.<sup>135</sup> This paper proposes to combine the E.U. approach and some exceptions under fair use, aiming to secure a more balanced way for the U.S. courts to decide these cases.

**A. *Proposal of an Adapting Way Applied to Press Publications and News Aggregators***

Beyond all doubts, the best way to encourage beneficial relationships between copyright owners and technology developers is licensing. Under current U.S. law and judicial precedent, it is not clear whether news aggregators and social media sites violate newspaper's copyrights.<sup>136</sup> To ensure the balance and flexibilities of solving these problems, and to better protect endangered traditional publications, this proposal will offer a new amendment to U.S. copyright law to give publishers basic rights and specify ways that can be considered fair use by

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*Blame the Journalism*] ("The gravest threats include the flight of classified advertisers, the deterioration of retail advertising and the indebtedness of newspaper owners.").

<sup>134</sup> See, e.g., *Field v. Google, Inc.*, 412 F. Supp. 2d 1106, 1118–19 (D. Nev. 2006); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1167 (9th Cir. 2007).

<sup>135</sup> See Catherine Stupp, *Commission Pushes Controversial 'Google Tax' to Save News Publishers*, EURACTIV (Sept. 14, 2016), <https://www.euractiv.com/section/digital/news/commission-pushes-controversial-google-tax-to-save-news-publishers/> [<https://perma.cc/82LK-9H2C>].

<sup>136</sup> See, e.g., Nancy J. Whitmore, *Extending Copyright Protection to Combat Free-Riding by Digital News Aggregators and Online Search Engines*, 24 CATH. UNIV. J. L. & TECH. 1, 55–56 (2015) (arguing for narrowing the fair-use doctrine to protect copyright of newspapers).

adding a new statute in Title 17 of the United States Code. The proposed section reads as follows:

**In general**

Publishers of press publications shall have exclusive rights which provided in the 17 U.S. Code § 106 for the online use of their press publications by information society service providers.

**(1) Definition**

A news publication is a collection of literary works of a journalistic nature, but may also include other works or other topics, and:

(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; **(except for scientific or academic periodicals)**

(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.

**(2) 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 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 protection granted under the first subparagraph shall not apply to acts of hyperlinking **and titles**.

## 1. The Proposal Explanation in General

This proposal aims to state clearly what constitutes infringement by a news aggregator and what does not. The current U.S. copyright law is not clear about the way infringement can be induced in this circumstance.<sup>137</sup> Thus, news aggregators can easily defend their use under the Fair Use Doctrine, so then it would be up to aggregators to provide the public access to news.<sup>138</sup> They can allege that there is a transformative use of the original news articles.<sup>139</sup> The use of copyrighted works may benefit the public, but it may not necessarily comport with the stated purpose of use. Even if an aggregator like Google News did not put any advertisements on the summary pages, they can earn other benefits when users click this summary page.

Therefore, in the general paragraph, this proposal grants press publications all the exclusive rights which a copyright owner can enjoy under 17 U.S.C. § 106. This means that, if we do not set any restrictions, the news aggregator can only use the press publisher's news works by licensing. In this way, the copyright is paid for and then used, and the copyright owner can realize his own interests through license. Although fair use is regarded as a transfer of the copyright owner's own interests, such transfer does not constitute a significant damage to the interests.<sup>140</sup> That is, the impact on the market value of freely using copyright works does not result in the conversion of infringement in any circumstances.<sup>141</sup> In this situation, a court may be neutral about whether there are potential damages to press

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<sup>137</sup> *See id.* at 7.

<sup>138</sup> *See, e.g., Perfect 10*, 508 F.3d at 1166.

<sup>139</sup> *See id.*

<sup>140</sup> *See Wendy J. Gordon, Fair Use as Market Failure: A Structural and Economic Analysis of the "Betamax" Case and Its Predecessors*. 82 COLUM. LAW REV. 1600, 1600–57 (1982).

<sup>141</sup> *See id.*

publications. Even if news aggregators benefit from the use, the courts might hold that news aggregators potentially increase the amount of reading for original articles. It seems like a win-win situation for both parties. In fact, news aggregators merely summarize the main points, and as a consequence, users stop reading without clicking the link to get further information.

## **2. Definition**

The second part of this proposal, as discussed in Part I, is a definition of what could be considered a press publication. News itself has the characteristics of facts, while a news report not only contains facts, but also carries the impressions of the author. Therefore, press publications select and refine abstract conceptions in the form of news, giving them material form through publication and production, and then spreading them to the public. The E.U. offers a good explanation. According to Article 2(4) of the new E.U. copyright directive, press publications (mainly literary works) which have a journalistic nature, can be protected under this law.<sup>142</sup> The EU classifies journalistic work into three categories: (1) each individual's works regularly updated under newspapers or magazines (except for scientific or academic periodicals); (2) works related to the news, aiming to provide public information; and (3) works published under a service provider.<sup>143</sup> The E.U. approach includes almost all the works related to a journalistic nature and excludes scientific or academic periodicals. Therefore, the U.S. could adapt the same definition of press publication as the E.U.

## **3. Exceptions**

This proposal sets some exceptions and tries to distinguish the conduct of news aggregators which can be

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<sup>142</sup> Copyright Directive, *supra* note 1, at art. 2(4).

<sup>143</sup> *Id.*

treated as fair use. In a nutshell, if news aggregators only use a title and hyperlinks, without advertisement along the sides, or small snippets, or any further personalized push functions, the free use of press publications' works can be considered fair use. The main controversial part of the E.U. approach is whether showing snippets to the public constitutes infringement.<sup>144</sup> In my opinion, showing merely snippets to the public may have its pros and cons. Nevertheless, the "heart" of copyrighted work is an essential point to figure out this problem. In some cases of search engines, like in *Perfect 10, Inc. v. Amazon.com, Inc.*,<sup>145</sup> although the defendants copied the image in its entirety, they reduced the image and gave the purpose of allowing users to identify the image and click to see the full-size version, and thus the use was reasonable.<sup>146</sup> To further interpret this holding, the court may allow reasonable use, which should be a non-substantive use with appropriate extraction and limited reproduction. If plagiarism replaces the reference and the new work crowds out the original work, it constitutes an unreasonable "substantive use."

Furthermore, investigating the extent to which works are used requires both quantitative and qualitative analysis. In many copyright examples, "substantive" analysis is more important than quantitative analysis. Does the technology of aggregators abstract essential parts of the original news articles? Does the news aggregators' web page list all essential parts to the public? Also, courts should consider the relationship between the news posted on aggregators'

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<sup>144</sup> See generally *Associated Press v. Meltwater U.S. Holdings, Inc.*, 931 F. Supp. 2d 537, 542 (S.D.N.Y. 2013) (internal citation omitted); *Snippet*, MERRIAM WEBSTER, <https://www.merriam-webster.com/dictionary/snippet> [<https://perma.cc/ZVU4-TUM5>] ("a small part, piece, or thing; especially: a brief quotable passage").

<sup>145</sup> *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1167–68 (9th Cir. 2007).

<sup>146</sup> *Id.*

pages and the original articles. Can the former replace the latter? Will a substantial number of readers stop to click the links to see all details? The quantity of freely used parts of the news article could be small, but the aggregators use the essential parts of the original works. The consequence is limiting the exposure of the original news articles. It seems ambiguous for courts to determine each small snippet.

Therefore, this proposal excludes snippets, but grants hyperlinks and titles an exception for news aggregators to use in their businesses. Alternatively, news aggregators can use some key words from the original works in order to help the public find out what they want to read. In this way, news aggregators can serve as search engines and provide retrieval service. As can be seen, basic search engines and the news pages are completely different. For instance, Google News not only provides headlines, but also provides a personalized push customization service for each user. It should be noted that this function greatly facilitates the retrieval of news by users, yet, this series of services are beyond the use of search engines themselves. Most importantly, the news aggregator does not own the copyright of the original text and does not pay any fees to the original author. Copyright law should encourage innovation in science and technology and use these innovative technologies to facilitate the lives of the public. However, technological innovation must not override infringement. Even if the aggregator provides the public with a more convenient way to learn about current world events, it cannot circumvent the fact that they infringe upon the copyright of the publishing industry.

**B. Reasons to Adapt this Proposal**

As discussed in Part I, traditional press publications are endangered in the Internet environment.<sup>147</sup> When news aggregation services strongly impact the interests of news publishers, news publishers have turned to the law to resist the systematic capture and use of news products by news aggregators and to protect their investment and earnings from news products. This fact demonstrates that press publications have faced a situation that cannot be dealt with through compromise.<sup>148</sup>

**1. Better Protect Endangered Traditional Publications**

The first benefit of this proposal is that it can better protect traditional press publication by directly transferring the original copyrights to them. After the E.U. new copyright directive was implemented, news publications found their way to stimulate the amount of reading. A new law, strict but crucial for press publications, can totally change the way of sharing revenues. Last October, Facebook created a new news section, titled News Tab.<sup>149</sup> Facebook is in talks with multiple news agencies and will pay to publish the content of these news agencies on the platform.<sup>150</sup> This seems to be an opportunity to increase read rates for major news agencies. On one hand, today's social

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<sup>147</sup> See generally *Public Relations Consultants Ass'n Ltd. v. The Newspaper Licensing Agency Ltd.* [2013] UKSC 18. (appeal taken from Eng. & Wales).

<sup>148</sup> See Monika Isia Jasiewicz, *Copyright Protection in an Opt-Out World: Implied License Doctrine and News Aggregators*, YALE L.J. 837, 840–41 (2012).

<sup>149</sup> Casey Newton, *A new Facebook News tab is starting to roll out in the United States*, THE VERGE (Oct 25, 2019, 6:00 AM), <https://www.theverge.com/2019/10/25/20930664/facebook-news-tab-launch-united-states-test> [<https://perma.cc/8C9Z-72DW>].

<sup>150</sup> *Id.*



media does occupy a large part of people’s screen usage time. If news agencies can get publicity on social platforms and increase profits at the same time, it may be a good thing. On the other hand, Facebook can also change the shortcomings of the previous algorithms to recommend news, adding authority to news on its platform. This new type of cooperation model not only creates revenue for Facebook, but also guarantees that copyrighted works of news publishers can be used reasonably under the condition of remuneration. The introduction of the E.U.’s new copyright law has given publishers a new business model, so it can also stimulate the author to create more valuable articles. In addition, small copyright owners can profit from it. At least, from the perspective of legislation, the law directly gives them rights. They are different from the previous large-scale joint publishing groups and may have private contracts with news aggregators.<sup>151</sup>

## **2. Harmonization**

The next reason to adopt the proposal is harmonization. News aggregators’ infringing behaviors have precedent abroad, as news aggregators like Google News collect news in global areas.<sup>152</sup> Many countries started to pursue a balance of the distribution of benefits between news publishers and news aggregation search platforms to achieve the orderly development of the news and periodical industry. At first, Germany amended the Intellectual Property Law and created the rights of newspaper publishers to give traditional newspaper publishers certain rights to

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<sup>151</sup> See Paul Farhi, *A Costly Mistake?*, 31 AM. JOURNALISM REV. 36, 41 (2009), [hereinafter *A Costly Mistake?*] (noting that the AP President and Chief Executive Officer stated, “[i]t was a dumb idea to think that you could pay the rent on the Internet with advertising alone”).

<sup>152</sup> See Mark Scott, *Google News to Shut Down in Spain*, N.Y. TIMES (Dec. 11, 2014, 4:43 AM), [http://bits.blogs.nytimes.com/2014/12/11/google-to-drop-its-news-site-in-spain/?\\_r=1](http://bits.blogs.nytimes.com/2014/12/11/google-to-drop-its-news-site-in-spain/?_r=1) [https://perma.cc/3WJ8-846L].

protect their interests.<sup>153</sup> German legislators passed *Leistungsschutzrecht für Presseverleger* (translated as “ancillary copyright for press publishers”) a bill in 2013.<sup>154</sup> Then, in 2014, the Spanish “Intellectual Property Law” created a “fair compensation right” system in the “Restrictions on Rights” section to regulate news aggregation search behavior.<sup>155</sup> As a result, in order to protect endangered news publications, the E.U. promulgated their new directive on copyright last year.<sup>156</sup> The aforementioned reason to set a harmonized law in the E.U. is that the establishment of the European Union confuses the copyright of news publications. The European Union does not have a unified system for defining when the author of news content is a journalist, and when the news publisher is a journalist.<sup>157</sup> All these facts show that the unbalanced relationship in the U.S. should be taken into account. Only a harmonized standard of this problem can save the endangered press publications.

#### IV. CRITICISMS OF THIS PROPOSAL

Since this proposal aims to add a section into the current U.S. copyright law and combine most of the E.U. new directive elements into this proposal, critics might

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<sup>153</sup> See, e.g., Harro Ten Wolde & Eric Auchard, *Germany's Top Publisher Bows to Google in News Licensing Row*, REUTERS (Nov. 5, 2014, 10:35 AM), <http://www.reuters.com/article/us-google-axel-sprngr-idUSKBN0IP1YT20141105> [<https://perma.cc/3FXT-S38Q>].

<sup>154</sup> Christopher Gagne, Note, *Canon AEDE: Publishers' Protections from Digital Reproductions of Works by Search Engines Under European Copyright Law*, 29 TEMP INT'L & COMPAR. L.J. 203, 216 (2015).

<sup>155</sup> *Id.* at 221–22.

<sup>156</sup> See generally Copyright Directive, *supra* note 1.

<sup>157</sup> Lindsay Marks, *Can Copyright Save the U.S. News Industry?: Applying The 2016 European Union Proposal to The US*, 46 AM. INTELL. PROP. L. ASS'N. Q. J. 61, 90 (2018).

object that it is inconsistent with the legislative purposes of the current U.S. legislation. Potential main criticisms shall be addressed in the following part of the paper.

**A. *Exacerbate Internet Information Inequities***

The first objection to consider is whether this proposal can actually be implemented in the U.S. When news aggregators want to keep their current business models, they have to distribute their economic loss to their users. This proposal may exacerbate Internet information inequities. Today, in the United States, where the payment model is popular, large and small media companies have built payment walls. People who are unwilling or unable to pay tens of dollars a month for subscription fees are basically not able to see first-hand information.<sup>158</sup> they often pay more fees to see information from different positions. Information equality has been declining, and this happened even before the new copyright law.<sup>159</sup> Sergey Brin, one of the founders of Google, declared at the beginning of the company's establishment that Google's goal is to use "a perfect search engine [to] process and understand all the information in the world."<sup>160</sup> In the past two decades, the existence of Google has promoted the free dissemination of information on the Internet and the fairness of information. As Part I of this article addressed, after the E.U. passed the new copyright directive, Google announced that they may consider leaving the entire European market.

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<sup>158</sup> See generally Jason Brett, *Congress Explores Benefits of Digital Equity And Internet Adoption In U.S.*, FORBES (Jan 29, 2020, 2:37 AM), <https://www.forbes.com/sites/jasonbrett/2020/01/29/congress-explores-benefits-of-digital-equity-and-internet-adoption-in-us/#7ca754af2dfc> [<https://perma.cc/PE6B-RJ4Z>].

<sup>159</sup> See generally *id.*

<sup>160</sup> Capital & Perkins, *supra* note 130.

However, faced with the impact of new communication channels such as the Internet, radio, and television, the revenues of E.U. and U.S. press publications have declined year by year.<sup>161</sup> In fact, the relationship between news publishers and network service providers is very delicate. On one hand, the former accuses the network platforms of hurting the traditional news publishing market. On the other hand, news publishers also hope that the network platforms can create diversion and transmission channels for traditional news publishing.<sup>162</sup> Existing laws cannot curb the problem of news aggregation and infringement.<sup>163</sup> If this happens, in the long run, it will not be conducive to encouraging the continuous production of high-quality original news works. In fact, both the European Union and the suggestions in this article hope to modify legislation to increase the ability to obtain digital rights and bargaining power via transferring the power to the original copyright owners and letting them decide how to distribute or reproduce their works. It should be noted that, even though both ways will utterly change the current business model of news aggregators, the original creators are not supposed to be hurt.

***B. Not the Right Balance—Violating Utilitarianism for Copyright***

The second objection is that copyright is a right that is extremely easy to establish. The scope of protection of copyright is very wide, and the standard is low.<sup>164</sup> As long as a work can be proved to be original, the system makes it difficult to guarantee that there is no duplicate copyright

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<sup>161</sup> *See infra* Part I.

<sup>162</sup> *See id.*

<sup>163</sup> *See id.*

<sup>164</sup> *See* 17 U.S.C. § 102 (1992).

protected work.<sup>165</sup> However, the legitimate goal of the U.S. copyright law is encouraging innovation. Besides, the dominant copyright law theory in the United States is utilitarian and provides creators with limited motivation for copyright protection in order to produce materials that are valuable to the society.<sup>166</sup> Copyright laws are currently being adjusted to encourage the development of digital technologies and the innovative use of copyrighted content.<sup>167</sup> In defending the use of copyrighted materials, courts tend to find the rational use of search engines to support the public interest of obtaining information.<sup>168</sup> Meanwhile, case law also shows that courts have made a distinction between protecting the growth of digital technology for the public interest and admitting that it does not allow the systematic acquisition of digital copyright and the unauthorized use of copyright content.<sup>169</sup> Furthermore, in October 2015, the Second Circuit Federal Court of Appeals ruled that Google’s digital scanning of books and the provision of electronic retrieval to users is a fair use and complies with Section 107 of the Copyright Act, which means that commercial text and data mining are legal uses.<sup>170</sup> This verdict essentially created a new era for the commercial application of the Google Digital Library project using the fair use system. It should be noted, however, that if the U.S. totally copies the approach of E.U. right now, things would be different in application. The E.U.’s new directive is too strict for news aggregators. This proposal aims to set a right balance between two parties.

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<sup>165</sup> *See id.*

<sup>166</sup> *See* Jeanne C. Fromer, *An Information Theory of Copyright Law*, 64 EMORY L. J. 71, 73 (2014).

<sup>167</sup> *See generally* Runhua Wang, *New Private Law? Intellectual Property “Common-Law Precedents” in China*, 89 UMKC L. REV. 109 (2020).

<sup>168</sup> *See* Fordham, *supra* note 75, at 989.

<sup>169</sup> *See id.*

<sup>170</sup> *Authors Guild v. Google, Inc.*, 804 F.3d 202, 217 (2nd Cir. 2015).

According to current U.S. copyright law, works created by the original writer and fixed in any tangible media can be protected under copyright law.<sup>171</sup> That is a plain definition of the current U.S. copyright law, which means the original copyright owners have exclusive rights to choose how to distribute their works.<sup>172</sup> Internet service providers, like news aggregators, are the ones who freely use the original work and benefit from it. In order to balance interests, news aggregators should only have their basic function, which is to help the public select and retrieve. In this proposal, excluding the title and hyperlinks is meant to encourage news aggregators to continue to provide access to the content. Nonetheless, if they want to make huge profits like they used to by offering snippets, putting advertisements, and other personalized push services, they must get licenses from the press publication.

## V. CONCLUSION

Under the current U.S. copyright law, it is ambiguous whether the news aggregators' conduct could be considered infringement. Besides, as the Fair Use Doctrine and U.S. utilitarian background currently exist, courts may grant more protection to news aggregators. However, this phenomenon is the key to change and must be taken into account. As Internet technology grows in this era, innovation cannot be encouraged blindly, and the fundamental problem of protecting the original creators should not be ignored. This time, since the E.U. became the leader in this reform, the problems between news publishers and news aggregators should be known and reasonable rights should be granted so that they can survive and create more value for the society.

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<sup>171</sup> 17 U.S.C. § 102 (1992).

<sup>172</sup> *Id.*