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AGGRAVATED WITH AGGREGATORS: CAN INTERNATIONAL COPYRIGHT LAW HELP SAVE THE NEWSROOM?

INTRODUCTION

The creation of the World Wide Web was based on a concept of universality that would allow a link to connect to anywhere on the Internet.¹ Although the Internet has transformed from a technical luxury into an indispensable tool in today's society, this concept of universality remains. Internet users constantly click from link to link as they explore the rich tapestry of the World Wide Web to view current events, research, media, and more. Yet, few Internet users pause their daily online activity to think of the legal consequences of these actions.² Recent Internet censorship measures intended to prevent illegal downloading, such as the proposed Stop Online Piracy Act ("SOPA"), have been at the forefront of the public's attention due to fears of legislative limits on online free speech and innovation.³ However, the more common activity of Internet linking also creates the potential for legal liability

¹ See Tim Berners-Lee, *Realising the Full Potential of the Web*, 46 TECHNICAL COMM. 79, 79 (1999) ("The Web was designed to be a universal space of information, so when you make a bookmark or a hypertext link, you should be able to make that link to absolutely any piece of information that can be accessed using networks. The universality is essential to the Web: it loses its power if there are certain types of things to which you can't link.").

² See Mark Sableman, *Link Law Revisited: Internet Linking Law at Five Years*, 16 BERKELEY TECH. L.J. 1273, 1276 (2001) ("[M]any nontechnical web users also perceive hyperlinking as essential to the operation of the web, or, at least, as a mechanism so basic and essential that its use could not possibly be unlawful.").

³ Stop Online Piracy Act, H.R. 3261, 112th Cong. (2011); Jenna Wortham, *Protest on Web Takes on 2 Bills Aimed at Piracy*, N.Y. TIMES, Jan. 18, 2012, at A1. The Stop Online Privacy Act was introduced to Congress to expand U.S. law enforcement's ability to fight the distribution copyrighted intellectual property. E.g., H.R. 3261 § 102(f); Grant Gross, *The US Stop Online Piracy Act: A Primer*, PCWORLD (Nov. 16, 2011), http://www.peworld.com/businesscenter/article/244011/the_us_stop_online_piracy_act_a_primer.html. The provisions of SOPA include: Allowing the Department of Justice to issue court orders that prevent search engines from linking to copyright-infringing foreign websites, requiring Internet service providers to block access to infringing foreign websites, and allowing copyright holders to seek a court order preventing online advertising networks from advertising on any website infringing on their copyright. H.R. 3261 §§ 102–103; Gross, *supra*. Opponents of SOPA believe that the proposed legislation endangers free speech, Internet freedom and would increase financial burdens on Internet companies. Wortham, *supra* ("Internet companies fear that because the definitions of terms like 'search engine' are so broad in the legislation, Web sites big and small could be responsible for monitoring all material on their pages for potential violations—an expensive and complex challenge."); Gross, *supra*.

and dangerous court rulings with consequences that similarly threaten the Internet's ideals to be a universal tool.

As the Internet becomes a substantial provider of news sources,⁴ it is important to explore link liability within the news industry to protect the rights of citizens, publishers, and companies alike. With various newsrooms shutting down their offices and newspaper subscriptions dwindling, the newspaper industry views the Internet as harmful for business, as reliance on the Internet for news continues to increase.⁵ News aggregators, which collect information from various news sources and display it in a single place, have a mixed reputation among traditional media organizations. Many news outlets see aggregation as an essential tool to cover all the news that they are not able to cover, as well as an effective way of attracting visitors.⁶ While some media organizations want their stories widely disseminated, other news companies believe that aggregation steals their profits because aggregators have the ability to generate revenue from online advertising on their websites by compiling original news articles of other publishers.⁷ News Corporation owner Rupert Murdoch went so far as to compare news aggregators to thieves.⁸

Upset at the use of news aggregators, some traditional media sources have taken their frustrations to court. Sixteen suits directed at bloggers and other

⁴ Amy Mitchell & Tom Rosentiel, Pew Research Ctr.'s Project for Excellence in Journalism, *Major Trends*, STATE OF THE MEDIA 2012, <http://stateofthemedial.org/2012/overview-4/major-trends/> (last visited Sept. 10, 2012).

⁵ Rick Edmonds, Emily Guskin, Tom Rosentiel & Amy Mitchell, Pew Research Ctr.'s Project for Excellence in Journalism, *Newspapers: Building Digital Revenues Proves Painfully Slow*, STATE OF THE MEDIA 2012, <http://stateofthemedial.org/2012/newspapers-building-digital-revenues-proves-painfully-slow/> (last updated Apr. 11, 2012); see also STEVEN WALDMAN & THE WORKING GROUP ON INFORMATION NEEDS OF COMMUNITIES, FCC, THE INFORMATION NEEDS OF COMMUNITIES 10–11 (2011), available at http://fcc.gov/osp/inc-report/The_Information_Needs_of_Communities.pdf.

⁶ Michaëlle Bond, *Aggregating Without Aggravating*, AM. JOURNALISM REV., Fall 2011, at 8, 8, available at <http://www.ajr.org/article.asp?id=5132>. Empirical analysis suggests that after the Associated Press removed its content from Google News, there was a correlated decline in subsequent visits to traditional news sites after visiting Google News compared to other news aggregators that continued to host Associated Press content. Lesley Chiou & Catherine Tucker, *How Does Content Aggregation Affect Users' Search for Information?* 2 (NET Inst., Working Paper No. 11-18 2011), available at http://www.netinst.org/Chiou_Tucker_11_18.pdf (finding that "after Associated Press content was removed from Google News, fewer users subsequently visited other news sites after navigating to Google News relative to users who had used [another news aggregator with AP content]").

⁷ Kimberley Isbell & Citizen Media Law Project, *The Rise of the News Aggregator: Legal Implications and Best Practices* 1 (Berkman Ctr., Research Publication No. 2010-10, 2010), available at http://papers.ssrn.com/abstract_id=1670339.

⁸ *Id.*; Mercedes Bunz, *Rupert Murdoch: 'There's No Such Thing as a Free News Story'*, GUARDIAN (Dec. 1, 2009), <http://www.guardian.co.uk/media/2009/dec/01/rupert-murdoch-no-free-news>.

online publishers were filed in 2007, a number that has more than quadrupled from previous years.⁹ Although infringement suits continue to be filed against bloggers and aggregators, American courts have yet to decide a case considering the legality of news aggregators and aggregators' possible infringement on a publisher's copyright.¹⁰

This Comment will show that to answer the outstanding issue of news aggregators in the United States, the onus of limiting aggregators' access should be placed on the website owner through simple website tags and technological barriers. By looking at copyright decisions around the globe, primarily the common law courts of Australia and the United Kingdom, this Comment will show the mistakes and technological progression each country has made in its decisions concerning news aggregation and linking. As stated by Professor Jane Ginsburg of the Columbia University School of Law, this comparative approach "shows that . . . different results [are] reached despite a common jurisprudential heritage," which "complicate[s] the business planning of web-based enterprises whose users may be located across the globe."¹¹ As foreign and international forces increasingly influence the national copyright policy of the United States,¹² recent foreign case law will become a more important tool in shaping the U.S. judicial system's stance on emerging technological issues, such as news aggregators.

As the laws of our peer countries adapt to new technology, international precedent influences the United States. For example, the United States has been involved in the TRIPS Council of the World Trade Organization ("WTO"), where other countries can question the United States.¹³ In addition to the standard set of rules issued by the WTO, the 1996 World Intellectual Property Organization Copyright Treaty attempted to create an international norm regarding the circumvention of technological measures put in place by authors that restricts unauthorized use of the copyrighted material, which the United States implemented with the Digital Millennium Copyright Act

⁹ Brian Stelter, *A Line Borrowed, or Crossed?*, N.Y. TIMES, Mar. 2, 2009, at B1.

¹⁰ Isbell & Citizen Media Law Project, *supra* note 7, at 3.

¹¹ Jane C. Ginsburg, *News Aggregation: Discord Among Common Law Jurisdictions*, MEDIA INST. (Jan. 12, 2011), <http://www.mediainstitute.org/IPV/2011/011211.php>.

¹² See Graeme B. Dinwoodie, *Foreign and International Influences on National Copyright Policy: A Surprisingly Rich Picture*, in 6 NEW DIRECTIONS IN COPYRIGHT LAW 160, 160, 168, 169 (Fiona Macmillan ed., 2007).

¹³ See *id.* at 164; see also Marrakesh Agreement Establishing the World Trade Organization, Annex IC, art. 1, Apr. 15, 1994, 1867 U.N.T.S. 154 (establishing the TRIPS Council).

("DMCA").¹⁴ Furthermore, the United States has implemented the Berne Convention for the Protection of Literary and Artistic Works.¹⁵ The Berne Convention, which the United Kingdom and Australia have also ratified or acceded to, establishes minimum standards for international copyright law and requires each signatory country to apply its national copyright law to the copyrighted works of authors from other signatory countries.¹⁶

Arguments regarding the liability of news aggregators and the legality of posting a publication's headline and excerpt fall under two interrelated theories of copyright infringement: Copyright within the work itself, and deep-linking, which are links that bypass a website's homepage.¹⁷ Part I of this Comment will provide a background to news aggregation and its basic liability questions by reviewing early copyright infringement cases concerning headlines and deep-linking. Part II will examine a recent decision by the Australian Federal Court that did not find copyright infringement within a newspaper's headline, as well as the corresponding copyright legislation. Part III will then turn to a recent decision by the English High Court that found copyright to subsist in a headline and its excerpt, as well as the legislation that governs the United Kingdom and the European Union. Part IV will review the developing law concerning news aggregators in the United States. Part V will reconcile recent rulings in the common law courts of Australia and the United Kingdom concerning the emerging issue of news aggregators and copyright with current law and trends in the United States to show the probable direction of the law when American courts rule on the issue of copyright infringement within news aggregators. Because Europe has a low threshold concerning infringement,¹⁸ the United States is likely to move in the direction of Australia's precedents, in which copyright does not subsist in newspaper headlines and excerpts. U.S. courts are likely to place responsibility on the owner of a website with originating content to protect its property by using preventative safety measures.

¹⁴ *Id.* at 164–65; *see also* Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (codified in scattered sections of 17 U.S.C.); WIPO Copyright Treaty, art. 11, Dec. 20, 1996, S. TREATY DOC. No. 105-17, 2186 U.N.T.S. 121.

¹⁵ Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (codified in scattered sections of 17 U.S.C.).

¹⁶ Paris Act Relating to the Berne Convention for the Protection of Literary and Artistic Works, July 24, 1971, 1161 U.N.T.S. 3.

¹⁷ WORLD INTELLECTUAL PROP. ORG., INTELLECTUAL PROPERTY ON THE INTERNET: A SURVEY OF ISSUES 51 (2002), *available at* <http://www.wipo.int/export/sites/www/copyright/en/e-commerce/pdf/survey.pdf>.

¹⁸ *See* Rebecca Lubens, Note, *Survey of Development in European Database Protection*, 18 BERKELEY TECH. L.J. 447, 462 (2003).

I. BACKGROUND

A. *What is a News Aggregator?*

To understand the emerging law surrounding news aggregators, it is necessary to understand the technology behind aggregation services. A news aggregator scans a set of various types of sources, such as news websites or blogs, for new information, which it then displays on a single page.¹⁹ Some news aggregators use algorithms to sift through the abundance of news in a process called “scraping.”²⁰ Automated software applications will use algorithms to access websites, scan the articles for specific keywords or subject matter, and “scrape” the appropriate content from the website.²¹ In addition to this computerized software, aggregators are increasingly hiring human editors to spot stories that will be popular among an aggregator’s users.²² After gathering content, aggregators compile the stories for display.

The compilation and displays vary depending on the website. For example, Google News²³ was launched in 2002 as a companion to Google’s popular search engine.²⁴ Described as a “feed aggregator,” Google News crawls through thousands of online media sources and features the past month’s worth of various news articles by displaying the story’s headline, its first few lines, and a link to the rest of the story on the original website, as well as the source of the story.²⁵ Other aggregators, such as Gawker,²⁶ post similar information as shown by feed aggregators, but also add their own editorial commentary to the story’s headlines and excerpts.²⁷ Aggregators can also vary in specialty (e.g., technology focused), content (e.g., YouTube videos), and submissions (e.g.,

¹⁹ *News Aggregator Definition from PC Magazine Encyclopedia*, PC MAGAZINE, http://www.pcmag.com/encyclopedia_term/0,1237,t=news+aggregator&i=47946,00.asp (last visited Sept. 12, 2012). See generally Isbell & Citizen Media Law Project, *supra* note 7.

²⁰ Alex Wade, *The Tangled Web of Copyright Law*, GUARDIAN (Feb. 7, 2011), <http://www.guardian.co.uk/media-tech-law/tangled-web-of-copyright-law>; *News Aggregation: Lessons So Far from the NLA v Meltwater Dispute*, TAYLORWESSING (Feb. 2011), http://www.taylorwessing.com/download/article_meltwater.html.

²¹ *News Aggregation: Lessons So Far from the NLA v Meltwater Dispute*, *supra* note 20.

²² Bond, *supra* note 6.

²³ GOOGLE NEWS, <http://news.google.com> (last visited Sept 16, 2012).

²⁴ *Our History in Depth*, GOOGLE, <http://www.google.com/about/company/history/#2002> (last visited Aug. 24, 2012).

²⁵ Isbell & Citizen Media Law Project, *supra* note 7, at 2.

²⁶ GAWKER, <http://www.gawker.com> (last visited Sept. 16, 2012).

²⁷ Isbell & Citizen Media Law Project, *supra* note 7, at 5.

user-submitted or blogger-selected).²⁸ Feed aggregators, such as Google News, are the most vulnerable to copyright infringement and link liability.

B. News Aggregator Liability

Generally, major media companies have been appreciative of links and excerpts found in news aggregators because those links generate increased traffic.²⁹ However, with many newspapers under economic pressure, some publishers have become less accepting of aggregators that post links to free content.³⁰ A recent study by the Fair Syndication Consortium found that in one month, 75,000 websites had reused articles from newspapers more than 112,000 times without permission.³¹ Due to raised apprehension regarding news aggregators, some media executives have begun pursuing the aggregators in court.³² These media companies are concerned that aggregators are making profits from the companies' original content that the aggregator displays.

Media publishers typically make two arguments concerning news aggregator liability. First, publishers argue that aggregators infringe upon the copyright that is found in the headline and accompanying article when the aggregator scrapes the story and adds the unadulterated content to its website.³³ The second argument revolves around deep-linking. Deep-linking occurs when a hyperlink goes directly to the secondary page of a mainstream publisher's website, thereby enabling the user to bypass the website's home page, which often includes revenue-generating advertisements and information highlighting how to use the site's content.³⁴ By allowing readers to skip the home page, media companies argue aggregators create the potential for lost readers and customers, decreased ad revenue, and site misuse.

No Australian court had ever addressed the issue of copyright in a newspaper's headline until a recent decision by the Australian Federal Court.³⁵ Australia is a natural place to which the United States could turn for guidance

²⁸ *Id.* at 3.

²⁹ Stelter, *supra* note 9.

³⁰ *Id.*

³¹ WALDMAN, *supra* note 5, at 340; Peter Burrows, *New Survey Highlights Part of Newspaper-dom's Problem*, BUSINESSWEEK (Dec. 1, 2009), http://www.businessweek.com/the_thread/techbeat/archives/2009/12/new_survey_high.html.

³² *See* Stelter, *supra* note 9.

³³ *See infra* Parts II.B, III.D, IV.

³⁴ Gerrie Ebersöhn, *Hyperlinking and Deep-Linking*, 11 JUTA'S BUS. L. 73, 73 (2003); Sableman, *supra* note 2, at 1291.

³⁵ *See infra* Part II.B.

on this issue. Both nations feature a common law system, are liberal-conservative societies, and capitalist nations.³⁶ Many of Australia's copyright laws also are closely modeled on international norms, as well as specific laws of the United States.³⁷ Recently, Australia and the United States engaged in the process of negotiating a free trade agreement that focused largely on copyright, which led Australia to amend its legislation to mirror closely that of the United States.³⁸

II. THE CURRENT STATE OF THE LAW: AUSTRALIA

Originally, Australian copyright law was influenced by British copyright law, which “laid the foundation for Australian copyright law.”³⁹ After the “collapse of the [British] imperial system,”⁴⁰ Australia enacted the Australian Copyright Act 1968 (“1968 Act”).⁴¹ The 1968 Act remains in force today with various amendments, which are often influenced by international law, and especially law from the United States.⁴² This Part will explore the 1968 Act, as well as the Australian Federal Court's decision in *Fairfax Media*, which did not find that a copyright subsisted in a newspaper's headline based on the statute.

A. Australian Copyright Act 1968

The 1968 Act works to balance the competing interests between authors of original works who should be rewarded with commercial profits and the reading public who should benefit from the literary work.⁴³ Similar to other

³⁶ Dilan J. Thampapillai, *The Balancing Act of Copyright: The Copyright Laws of Australia and the United States in the Digital Era*, (Nov. 1, 2003) (unpublished paper), available at http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1021&context=lps_papers.

³⁷ See generally MARK J. DAVISON ET AL., *AUSTRALIAN INTELLECTUAL PROPERTY LAW 180–86* (2008) (chronicling the history of Australian intellectual property law).

³⁸ Australia–United States Free Trade Agreement: Fact Sheets Intellectual Property, DEP'T OF FOREIGN AFFAIRS & TRADE, http://www.dfat.gov.au/fta/ausfta/outcomes/08_intellectual_property.html (last visited Aug. 24, 2012).

³⁹ DAVISON ET AL., *supra* note 37, at 180, 182. Australia adopted a statute “which declared the British *Copyright Act 1911* was in force in Australia from 1 July 1912.” *Id.* at 181–82.

⁴⁰ DAVISON ET AL., *supra* note 37, at 182. Australian copyright law can be contrasted with U.S. copyright law in that the United States allows a broad fair use defense that is determined by individual courts, while Australia has more “specific circumstances” for when the fair use defense applies. DAVISON ET AL., *supra* note 37, at 273.

⁴¹ *Copyright Act 1968* (Cth) (Austl.).

⁴² DAVISON ET AL., *supra* note 37, at 16, 184.

⁴³ *Fairfax Media Publ'ns Propriety Ltd. v Reed Int'l Books Austl. Propriety Ltd.* (2010) 189 FCR 109, 113 (Austl.).

international copyright treaties, the 1968 Act extends a set of exclusive rights to owners of materials that fall within an exhaustive list.⁴⁴ To be protected, an author's material must fall into an exclusive category consisting of literary works, musical works, artistic works, or dramatic works.⁴⁵ If an author's material falls into one of the exclusive categories, the copyright owner is granted a set of exclusive rights, such as reproduction, publication, performance, and adaptation.⁴⁶ Australian news publishers who take issue with Australian news aggregators using their content argue that news articles are considered literary works⁴⁷ and complain that news aggregators are infringing on their copyright by reproducing the articles without permission.⁴⁸

Even if a work is granted copyright, use of the copyrighted work is not considered infringement if it falls under the fair dealing exception.⁴⁹ To be considered fair dealing, the use of the copyrighted work must be for a specific purpose: review, criticism, research, study, judicial proceedings, professional advice, or news reporting.⁵⁰ Furthermore, the use must also be 'fair,' depending upon all the circumstances, such as the nature of the work, the nature of the use, the effect of the use on any commercial market for the work, and "the amount and substantiality of the part copied taken in relation to the whole work."⁵¹ In *Fairfax Media Publications Propriety Ltd. v Reed International Books Australia Propriety Ltd.*, a case involving copyright in newspaper headlines and aggregators under the 1968 Act, the Federal Court of Australia ruled that systematic copying of newspaper headlines did not infringe because the headlines were too short to qualify as protectable works of authorship, despite the creative effort put into their creation.⁵²

⁴⁴ *Copyright Act 1968* s 31(1).

⁴⁵ *Id.* s 32.

⁴⁶ *Id.* s 31(1).

⁴⁷ *E.g., Fairfax Media*, 189 FCR at 112 (adjudicating a claim where an Australian newspaper publisher argues that headlines, and headline and by-lines in combination with an article constitute original literary works).

⁴⁸ *Id.*

⁴⁹ *Copyright Act 1968* ss 40–43.

⁵⁰ *Id.*

⁵¹ *Id.* s 40(2)(a)–(e).

⁵² *Fairfax Media*, 189 FCR at 122, 149.

B. Fairfax Media Publications Propriety Ltd. v Reed International Books Australia Propriety Ltd.

In *Fairfax Media*, the Federal Court of Australia addressed for the first time whether copyright subsisted in newspaper headlines.⁵³ Fairfax Media Publications (“Fairfax Media”) alleged that Reed International Books’ (“Reed Books”) news aggregation service infringed its copyrights by reproducing elements of articles from one of Fairfax Media’s publications.⁵⁴ Reed Books’ news aggregator provided its subscribers with abstracts of already published articles, together with often-unaltered headlines and bylines, in an arrangement different from the original source.⁵⁵ Fairfax Media alleged that, pursuant to the 1968 Act, the news aggregator violated copyright in four different ways: (1) each individual headline; (2) each article and headline combination; (3) the compilation of all the articles, including headlines; and (4) the entire edition of the newspaper.⁵⁶ Reed Books denied the infringement, arguing that none of the works at issue were capable of copyright protection, the aggregator did not reproduce a substantial part of any work other than the headline, and originality had not been proved.⁵⁷

When arguing the originality of the newspaper headlines, Fairfax Media claimed that the headlines reflect elements of novelty and creativity.⁵⁸ The publisher also distinguished headline writing as a significant and meticulous task that requires acute awareness of good news sense, style, and potential legal implications, as well as creativity, experience, and thought.⁵⁹ Fairfax Media also argued that the aggregator was a commercial venture that directly competed with its newspapers and was not in the position of a researcher who would cite the article.⁶⁰

Reed Books, however, favored a *de minimis* approach to copyright infringement, advocating that titles and short phrases “have been consistently refused separate protection under Australian and English copyright law” because “titles and the like are simply too insubstantial and too short to qualify

⁵³ *Id.* at 119.

⁵⁴ *Id.* at 112.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 112–14.

⁵⁸ *Id.* at 114.

⁵⁹ *Id.* at 115.

⁶⁰ *Id.* at 120.

for copyright protection as literary works.”⁶¹ Reed Books also relied on a public policy argument, claiming that it is necessary to identify a work by its name, such as a headline.⁶² Reed Books pointed to the sufficient acknowledgement requirement for the fair dealing defenses in the 1968 Act that requires “identification of the work by its title or other description.”⁶³ Reed Books contended that without the ability to identify books and articles by their titles, “there [would] be a significant detrimental impact to all bibliographic and reference systems”⁶⁴

Addressing the alleged infringement of the newspaper headlines, the Federal Court of Australia pointed to previous rulings regarding short titles, stating that:

For copyright to subsist in a work, one or more authors must have expended sufficient effort of a literary nature directed at the form of expression of the work . . . [which] must be the result of particular mental effort or exertion by the authors and cannot be essentially dictated by the nature of the information.⁶⁵

The Federal Court of Australia found that the headlines at issue were too trivial, lacking any distinction between creative expression and the facts and ideas the headlines conveyed.⁶⁶ The court also viewed the headline of each article as equivalent to the article’s title and too short to merit copyright protection.⁶⁷ Thus, the court in *Fairfax Media* recognized that headlines could be original, but did not consider headlines to meet the standard of a “work,” stating that “[a] headline that does no more than repeat a phrase from the article is not an original literary work.”⁶⁸ The court, however, left open “the possibility of establishing a basis for copyright protection of an individual headline”⁶⁹

⁶¹ *Id.* at 120.

⁶² *Id.* at 119–20.

⁶³ *Id.* at 120. The Federal Court of Australia uses the definition of “sufficient acknowledgement” found in section 10 of the Copyright Act of 1968. *Copyright Act 1968* s 10.

⁶⁴ *Fairfax Media Publ’ns Propriety Ltd. v Reed Int’l Books Austl. Propriety Ltd.* (2010) 189 FCR 109, 119 (Austl.); *accord id.* at 119–20.

⁶⁵ *Id.* (citation omitted).

⁶⁶ *Id.* at 122.

⁶⁷ *Id.* at 120.

⁶⁸ *Id.* at 122–23, 131. The court also stated that “[t]here may well be writings of original words or phrases that simply do not reach the level of constituting a ‘work,’ regardless of literary merit.” *Id.* at 122.

⁶⁹ *Id.* at 124.

While a headline alone is not copyrightable, the court found that it is possible for copyright to subsist in the whole edition of the newspaper and the combination of articles in the particular edition of the newspaper.⁷⁰ The court pointed to the skill and labor required to select and arrange the articles for the edition.⁷¹ Although the newspaper's articles alone qualified as a copyrightable "work," the court concluded that the combination of the newspaper's article and headline was not a discrete work because Fairfax Media failed to identify the joint authors.⁷² The 1968 Act requires for work of joint authorship that "the contribution of each author is not separate from the contribution of the other author."⁷³ Fairfax Media did not present evidence about the authorship of the headlines, and the evidence it did present showed that the writing of articles and headlines were "separate and distinct tasks with different authors."⁷⁴ Thus, the court held that the authorship requirement was not met for the article and headline combination because the journalist who wrote the body of the articles was not the same person who authored the headline, a duty typically given to the sub-editors.⁷⁵

Fairfax Media, however, was able to meet the joint authorship requirement for both the article compilation and edition work despite its failure to identify the individual involved in each work.⁷⁶ When looking at the issue of joint authorship for the article compilations, the court found the work came from authors and involved "considerable skill, judgment, knowledge, labour and expense involved in gathering, selecting and arranging the material . . ."⁷⁷ The newspaper publisher was able to meet the joint authorship standard by showing that the compilations of articles, as well as newspaper as a whole edition, were produced through the collaboration of various authors who did not have separate contributions from others.⁷⁸ Although the court found an established copyright in the article compilation and the edition works, the court did not find an infringement because the aggregator repackaged the articles and did not

⁷⁰ *Id.* at 135. The combination at issue in *Fairfax Media* included headlines, but not photos and advertisements. *Id.* at 126–27.

⁷¹ *Id.* at 134–35.

⁷² *Id.* at 124, 130–31, 134, 149.

⁷³ *Copyright Act 1968* s 10(1).

⁷⁴ *Fairfax Media*, 189 FCR at 134.

⁷⁵ *Id.* at 133–34.

⁷⁶ *Id.* at 135.

⁷⁷ *Id.* at 134–35.

⁷⁸ *Id.*

rely on Fairfax Media's particular selection, arrangement, and layout of materials.⁷⁹

The court also examined the news aggregator's fair dealing defense for reporting the news. The Australian fair dealing defense allows use of an original work if the purpose is reporting the news and "a sufficient acknowledgement of the work is made"⁸⁰ Even if the content was copyrightable, an infringement would be allowed if the headline was reproduced for the purpose of reporting the news. The court sided with the news aggregator after finding that the aggregator's abstracts were news summaries and, thus transformed the article and headline by adding something new with a further purpose or character.⁸¹ The publisher also made an argument that the aggregator's online database contains both the current day's articles and abstracts of articles published historically.⁸² The court, however, pointed to precedent that allowed news reporting to go beyond a report of current events.⁸³ Furthermore, the court did not limit the statute to newspapers, recognizing that reporting can be in other forms, such as a news aggregation.⁸⁴ Additionally, the court found that aggregators complement, rather than replace, newspapers by sending users to the publisher's website.⁸⁵ Although some users could substitute the use of the aggregator for reading the newspaper, the court recognized that the aggregator acts as a citation to the original article because it "enables users to scan in a comprehensive and efficient manner across a wide range of publications for news items of interest and then to go to the original publication to read those items in full."⁸⁶

Thus, the Australian Federal Court clarified a long-standing international issue concerning reproduction of headlines from online news services aggregators.⁸⁷ Headlines were too insubstantial and unoriginal to qualify for

⁷⁹ *Id.* at 138, 140. Even if the article/headline combination were a discrete work protected by copyright, the Court stated that "Fairfax would not succeed in claiming infringement by taking the headline because the headline has not been shown to be an original, and therefore, substantial part of the work." *Id.* at 137.

⁸⁰ *Copyright Act 1968* s 42(1)(a).

⁸¹ *Fairfax Media*, 189 FCR at 144.

⁸² *Id.* at 141.

⁸³ *Id.* at 141–42.

⁸⁴ *Id.* at 142.

⁸⁵ *Id.* at 143.

⁸⁶ *Id.* at 142–43.

⁸⁷ *See id.* at 119–20; Clayton Utz, *Is There Copyright in This Headline? Not According to the Federal Court*, LEXOLOGY (Sept. 10, 2010), <http://www.lexology.com/library/detail.aspx?g=ab8ef300-f518-49b8-93d0-0305ddd3d51c>.

copyright protection.⁸⁸ Furthermore, the use of headlines qualified under Australia's strict fair dealing exception because the content was used to report news and acted as a citation to the original article.⁸⁹ The decision, however, left some doors open.⁹⁰ First, some headlines or titles could "rise to the level of original literary work."⁹¹ While the decision did not detail the circumstances that would allow a short title to qualify for copyright protection, the court emphasized that short titles and headlines that merely repeated a phrase from the article would not qualify.⁹² Second, Reed creates abstracts to accompany its extracted information in the aggregator.⁹³ Feed aggregators, however, often scrape the headline and accompanying lead without adding any original content.⁹⁴ Third, this case did not explicitly cover the contentious topic of deep-linking aside from mentioning the benefits sites receive when linked to an aggregator.⁹⁵ These loopholes are explored by the United Kingdom in *Newspaper Licensing Agency v. Meltwater Holding*,⁹⁶ a recent case concerning copyright and news aggregators.

III. THE CURRENT STATE OF THE LAW: UNITED KINGDOM

The United Kingdom and other European countries are also relevant to the U.S. copyright law regarding news aggregators. The European Union has placed copyright constraints above the standard imposed by international law.⁹⁷ Europe had few cases concerning the specific issue of news aggregators and copyright until the United Kingdom's recent decision in *Newspaper Licensing Agency v. Meltwater Holdings*.⁹⁸

⁸⁸ *Fairfax Media*, 189 FCR at 122–23, 149.

⁸⁹ *Id.* at 143–44.

⁹⁰ Utz, *supra* note 87.

⁹¹ *Id.*

⁹² *Fairfax Media*, 189 FCR at 123, 131.

⁹³ *Id.* at 135.

⁹⁴ Isbell & Citizen Media Law Project, *supra* note 7, at 18. In a journalism-context a "lead" is defined as "a short summary serving as an introduction to a news story, article, or other copy." RANDOM HOUSE WEBSTER'S UNABRIDGED DICTIONARY 1093 (2d ed. 2001).

⁹⁵ *Fairfax Media*, 189 FCR at 143.

⁹⁶ *Newspaper Licensing Agency Ltd. v. Meltwater Holding BV*, [2011] EWCA (Civ) 890 (Eng.).

⁹⁷ See Dinwoodie, *supra* note 12, at 167.

⁹⁸ See *infra* Part III.A–C.

A. *Early Copyright Infringement in Europe*

In 1996, *Shetland Times Ltd. v. Wills* addressed arguments regarding deep-linking and the copyright of headlines.⁹⁹ The established newspaper Shetland Times claimed its rival, Shetland News, infringed on the Times' copyright by using its headlines as the text for hyperlinks to the Times' stories.¹⁰⁰ Lord Hamilton found that the hyperlinks to the stories permitted readers to obtain access to the Times while missing any advertising material that may appear on the front page.¹⁰¹ Lord Hamilton granted the Times an injunction prohibiting Shetland News from making further hyperlinks; Shetland News appealed.¹⁰² The case settled before an appeal hearing by negotiating a linking license that allowed Shetland News to link to the Times' pages on the condition that the links would clearly identify the Times as the originator of the linked stories.¹⁰³

Later, German and Danish courts extended infringement in cases of deep-linking when commercial interests were involved, by granting protection when the database creator made a substantial investment, citing to the 1996 European Community Directive on the Legal Protection of Databases ("Database Directive").¹⁰⁴ In 2001, the European Union adopted the Directive on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society ("Information Society Directive" or "ISD"), which significantly broadened copyright protection.¹⁰⁵

B. *Information Society Directive*

The Information Society Directive mandates strong copyright protection on all creative works in all member states.¹⁰⁶ The ISD requires member states to provide authors the exclusive right to authorize reproduction of their works "by any means and in any form, in whole or in part,"¹⁰⁷ and limits the exceptions to this exclusive reproduction right.¹⁰⁸ The only required exception is for "transient copying that occurs as part of a technical process, such as the

⁹⁹ *Shetland Times Ltd. v. Wills*, (1997) S.C. 316, 318 (Scot.).

¹⁰⁰ *Id.* at 318.

¹⁰¹ *Id.*

¹⁰² *Id.* at 120.

¹⁰³ Lubens, *supra* note 18, at 459 n.66.

¹⁰⁴ *Id.* at 460–62 (discussing cases); *see also* Council Directive 96/9, art. 7, 1996 O.J. (L 77) 20 (EC). The Database Directive extended copyright protection to databases. Lubens, *supra* note 18, 452–53.

¹⁰⁵ Council Directive 2001/29, 2001 O.J. (L 167) 10 (EC).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* art. 2, at 16.

¹⁰⁸ *Id.* art. 5, at 16.

loading of web pages into a computer's memory to browse the Internet."¹⁰⁹ Member states are also allowed to provide certain specific exceptions, such as "teaching or research so long as credit is given, quotations for review or criticism, incidental use in other works, or other 'minor' exceptions already existent in member states."¹¹⁰ Thus, the ISD "could forbid the copying of even the smallest amount of text, as it provides for exclusive reproduction rights of works 'in part' and provides no limit on how much copying is required to qualify as an impermissible 'reproduction in part.'"¹¹¹ Furthermore, there is no originality requirement.¹¹² Since its 2001 adoption, some European courts have read the ISD strictly and interpreted the legislation to hold any reproduction by a news aggregator of an author's intellectual property as part of the author's expression and liable for infringement, as found in *Infopaq International A/S v. Danske Dagblades Forening*.¹¹³

C. *Infopaq International A/S v. Danske Dagblades Forening*

The European Court of Justice ("ECJ") recently addressed a Denmark case that questioned copyright within news aggregators under the ISD: *Infopaq International A/S v. Danske Dagblades Forening*.¹¹⁴ Similar to the media monitoring organizations seen in *Fairfax Media*, Infopaq is "a media monitoring and analysis business" that aggregates abstracts of various articles from various sources, including Danish newspapers.¹¹⁵ The summaries, based upon a relevant search term, are "sent to customers by e-mail."¹¹⁶ A professional association of Danish daily newspaper publishers sued Infopaq claiming that the company needed consent for a reproduction or a reproduction in part from the newspaper publishers, which Infopaq disputed.¹¹⁷ Neither party disputed the legality of press-monitoring activity, summary writing, or selection of relevant articles based on specific search words.¹¹⁸ Instead, the

¹⁰⁹ Connor Moran, Note, *How Much Is Too Much? Copyright Protection of Short Portions of Text in the United States and European Union After Infopaq International A/S v. Danske Dagblades*, 6 WASH. J.L. TECH. & ARTS 247, 253 (2011).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ Case C-5/08, *Infopaq Int'l A/S v. Danske Dagblades Forening*, 2009 E.C.R. I-06569.

¹¹⁴ *Id.*

¹¹⁵ *Id.* para. 13.

¹¹⁶ *Id.*

¹¹⁷ *Id.* paras. 14–16, 22, 24–25.

¹¹⁸ *Id.* para. 23.

dispute over the ‘reproduction in part’ specifically concerned a text extract of eleven words that come before and after the specific search term.¹¹⁹

The ECJ broadly interpreted the ISD by holding that any reproduction in part should not “be treated any differently from the work as a whole,” as long as the work contained the author’s expression of intellectual creation.¹²⁰ Although isolated words are not covered by the ISD, “certain isolated sentences, or even certain parts of sentences . . . may be suitable for conveying to the reader the originality of a publication such as a newspaper article”¹²¹

In addition to following the ISD, which has created stringent rules on copyright protection, the United Kingdom had a very low standard of intellectual creation, requiring only that the work has not been copied.¹²² Fifteen years after finding infringement in text hyperlinks to a newspaper’s stories in *Shetland Times*, the United Kingdom revisited the questions that copyright, headlines, and linking often raise in *Newspaper Licensing Agency Ltd. v. Meltwater Holding BV*. Although *Meltwater* contains facts similar to *Fairfax Media*, the United Kingdom concluded that headlines and short extracts deserve copyright protection.¹²³ In the decision, the Court of Appeals, within a common law system similar to that of the United States, analyzed previous domestic case law, relevant legislation prevalent throughout Europe, and earlier cases of copyright infringement in other countries.

D. Newspaper Licensing Agency Ltd. v. Meltwater Holding BV

Meltwater Holding (“Meltwater”), a media monitoring and analytics service similar to Infopaq and Reed International, monitors media websites to identify articles that match its clients’ interests.¹²⁴ E-mail alerts give the clients a link to each article, its headline, the opening words, and an extract of the article.¹²⁵ The Newspaper Licensing Agency (“NLA”), a licensing agency that represents U.K. newspapers, first allowed companies like Meltwater to use its clients’ websites if NLA granted a Web Database License (“WDL”) to the

¹¹⁹ *Id.* paras. 20, 30.

¹²⁰ *Id.* paras. 38–39.

¹²¹ *Id.* para. 47.

¹²² Moran, *supra* note 109, at 254.

¹²³ *Newspaper Licensing Agency Ltd. v. Meltwater Holding BV*, [2011] EWCA (Civ) 890 (Eng.). For a discussion of *Fairfax Media*, see *supra* Part II.B.

¹²⁴ *Newspaper Licensing Agency Ltd.*, [2011] EWCA (Civ) 890, [2].

¹²⁵ *Id.* [2].

media monitoring company.¹²⁶ The NLA, however, promulgated another scheme to require the companies' clients to also obtain a Web End User License ("WEUL").¹²⁷ After this new license provision was established, the defendants argued that the licenses were unreasonable, with Meltwater arguing that the WDL was unnecessary to continue its business, and the Public Relations Consultants Association ("PRCA")¹²⁸ arguing that the WEUL was not necessary to use Meltwater's services.¹²⁹ The NLA, however, maintained that a license was still required because, without mutual consent, Meltwater's alerts would be considered infringement of NLA's copyright in the article's content and headline.¹³⁰ The High Court concluded that the headlines at issue were capable of being literary works, the extracts were capable of being a substantial part of the article constituting a literary work, and the copies made by the end-user's computer when users without WEULs clicked on the links Meltwater provided was an infringement of the publisher's copyright.¹³¹

The PRCA argued that a headline, in all but the most exceptional cases, is not capable of being a literary work separate from its respective article.¹³² The publisher, however, submitted evidence to the High Court arguing that the headlines at issue were "striking and substantial" and required a "valuable and discrete skill," using an argument like that of the newspaper publisher in *Fairfax Media*.¹³³ Ultimately, the High Court pointed to the "considerable skill in devising" headlines as "they are specifically designed to entice by informing the reader of the content of the article in an entertaining manner."¹³⁴ The decision of the High Court was appealed to the English Court of Appeal, where a panel of three judges unanimously dismissed the appeal.¹³⁵

¹²⁶ *Id.* [3].

¹²⁷ *Id.*

¹²⁸ There were three defendants in the case, Meltwater Holdings BV, a Dutch company, Meltwater News UK Ltd., its UK subsidiary, and Public Relations Consultants Association, whose members subscribed to Meltwater News. The Public Relations Consultants Association appealed the decision of the High Court. *Id.* at [1].

¹²⁹ *Id.* [3]–[4].

¹³⁰ *See id.* [4].

¹³¹ *Id.* [5].

¹³² *Id.* [18].

¹³³ *Id.* [16] (quoting *Newspaper Licensing Agency Ltd. v. Meltwater Holding BV*, [2010] EWHC (Ch) 3099, [58] (Eng.)). For the discussion of publisher's arguments in *Fairfax Media*, see *supra* Part II.B.

¹³⁴ *Newspaper Licensing Agency Ltd.*, [2011] EWCA (Civ) 890, [16] (quoting *Newspaper Licensing Agency Ltd.*, [2010] EWHC (Ch) 3099, [70]).

¹³⁵ *Id.* [5], [48], [50]–[51]. The Court of Appeal agreed with the decision of the High Court regarding headlines, stating "[the] judgment that newspaper headlines are capable of being original literary works is plainly correct." *Id.* [22].

The English Court of Appeal referred to the relevant provisions of the Copyright, Designs and Patents Act 1988, which establishes the statutory basis of copyright law in the United Kingdom.¹³⁶ The Act requires a headline to be a “work,” and both “original” and “literary.”¹³⁷ The English Court of Appeal found that a headline was literary because it consists of words.¹³⁸ The Court of Appeal also determined that “original” does not mean novelty or merit but instead that the work “originated with the author.”¹³⁹ Thus, the Court of Appeal found that headlines were copyrightable because they were works that were original and literary.¹⁴⁰

The holding contained some possibility for cases where neither the headline nor the excerpts would constitute a copyrightable work, in which case a license would not be required.¹⁴¹ The Court of Appeal, however, did not explicitly explain what kind of titles or headlines would not require copyright, which left open many questions for businesses that reproduce titles of books, films, music, and other similar works.¹⁴²

In addition to NLA’s headlines being capable of copyright, the court also ruled that the article extracts were copyrightable.¹⁴³ The PRCA argued that the extracts of the articles were so short and purely factual that the reader could get only an idea of what the article was about without any sense of the author’s intellectual creation.¹⁴⁴ According to the court, however, the test is one of

¹³⁶ *Id.* [12]–[14] (quoting Copyright, Designs and Patents Act 1988, c. 48, §§ 1–3, 16–18, 28A, 30, 178 (Eng.)).

¹³⁷ *Id.* [19] (referring to section 1(1)(a) of the Copyright, Designs and Patents Act 1988).

¹³⁸ *Id.* [19], [22].

¹³⁹ *Id.* [19]; *accord id.* [20]. Regarding *Infopaq*, the High Court decision stated that “[t]he effect of *Infopaq* is that even a very small part of the original may be protected by copyright if it demonstrates the stamp of individuality reflective of the creation of the author or authors of the article.” *Newspaper Licensing Agency Ltd.*, [2010] EWHC (Ch) 3099, [83]. The Court of Appeal stated that “[i]t do[es] not understand the decision of the European Court of Justice in *Infopaq* to have qualified the long standing test [regarding a work].” *Newspaper Licensing Agency Ltd.*, [2011] EWCA (Civ) 890, [20].

¹⁴⁰ *Id.* [22].

¹⁴¹ *See id.* [22], [29]. The Court of Appeal also mentioned *Fairfax Media*, which did not find copyright in newspaper headlines, but the Court of Appeal did not follow *Fairfax Media* as precedent, pointing to language in the case that stated a headline is still not completely excluded from copyright protection. *Id.* [21].

¹⁴² *Copyright in Newspaper Headlines and Short Extracts*, TAYLORWESSING (July 28, 2011), <http://www.taylorwessing.com/news-insights/details/copyright-in-newspaper-headlines-and-short-extracts-2011-07-28.html>; Jeremy Phillips, *Bently Slams “Very Disappointing” Ruling in Meltwater*, IPKAT (July 27, 2011, 11:12 PM), <http://ipkitten.blogspot.com/2011/07/bently-slams-very-disappointing-ruling.html> (reporting comments made by Professor Lionel Bently, who was advising Meltwater).

¹⁴³ *Newspaper Licensing Agency Ltd.*, [2011] EWCA (Civ) 890, [30].

¹⁴⁴ *Id.* [27].

quality, not quantity.¹⁴⁵ Although the common ground among European courts is that newspaper articles are literary works, articles may not necessarily be protected if the extracted words are in isolation.¹⁴⁶ The Information Society Directive, however, requires a broad interpretation of the scope of the protection by considering the use of certain isolated sentences to convey the originality of a publication, such as a newspaper article, to be an intellectual creation of the original work's author.¹⁴⁷

Ultimately, the Court of Appeal determined that it is “inevitable that some of [the excerpts] will constitute a substantial part of the original so as, when copied by the client, prima facie, to amount to an infringement of copyright in the original literary work.”¹⁴⁸ Thus, the extract, while small, was considered a substantial infringement on the copyright.¹⁴⁹

Addressing the liability of Meltwater's clients who did not possess a WEUL, the PRCA pointed to an exception in the ISD that allows temporary copies.¹⁵⁰ When the ECJ in *Infopaq* examined the temporary copies exception in the ISD, the court outlined the five conditions set out in the Information Society Directive.¹⁵¹ The ISD requires copying: (1) to be temporary; (2) to be transient or incidental; (3) to have no independent integral economic significance; and (4) to be integral and essential to the technological process, which (5) has the sole purpose to transmit an intermediary or lawful use of a work or protected subject matter between third parties in a network.¹⁵² Although the *Infopaq* court allowed browsing under the temporary copies exception, the *Meltwater* court refused this defense and significantly broadened the ISD to exclude consumptive use, such as accessing a web page, by requiring the person who has been browsing to show that it was lawful to make the copy.¹⁵³ Thus, the temporary copies exception was confined to third parties making copies in transmission systems.¹⁵⁴ Critics argue with this interpretation of the *Infopaq* case, believing that the original decision indicated that the temporary copies exception is “aimed at facilitating ‘lawful use’ of a

¹⁴⁵ *Id.* [24].

¹⁴⁶ *Id.* [25].

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* [28].

¹⁴⁹ *Id.* [29].

¹⁵⁰ *Id.* [14], [30].

¹⁵¹ Case C-5/08, *Infopaq Int'l A/S v. Danske Dagblades Forening*, 2009 E.C.R. I-06569, para. 54.

¹⁵² Council Directive 2001/29, *supra* note 105, art. 5, at 16.

¹⁵³ *Newspaper Licensing Agency Ltd.*, [2011] EWCA (Civ) 890, [32]–[35].

¹⁵⁴ Phillips, *supra* note 142; *see Newspaper Licensing Agency Ltd.*, [2011] EWCA (Civ) 890, [32]–[35].

work.”¹⁵⁵ Furthermore, detractors of *Meltwater* believe the court essentially created liability for many Web users.¹⁵⁶ Thus, browsers who want to display a web page on a personal computer may be required to obtain a license to legally view the content.¹⁵⁷

Although *Meltwater* acknowledged authors of the articles at issue by providing links to the original articles, the court rejected this fair dealing defense.¹⁵⁸ The Court of Appeal agreed with the High Court’s rejection of the fair dealing defense¹⁵⁹ because of the high probability that end-users would infringe the publisher’s copyright, as well as the commercial nature of the aggregator; the High Court compared the link to “a citation of the title of a book coupled with an indication of where the book may be found.”¹⁶⁰

The court’s solution in *Meltwater*, which is aimed at alleviating modern media outlets’ problem of generating money due to the added competition of aggregators, carries several important copyright implications in England for aggregators and content.¹⁶¹ Furthermore, the use of short snippets, even if only eleven words, potentially infringes copyright if the excerpt constitutes a substantial part of the original article.¹⁶² Finally, a URL link is not sufficient acknowledgement of copyrighted material to come within the fair dealing exception,¹⁶³ which could possibly impact publicly available lists, bookmarks, and summaries. Although these are possible effects stemming from *Meltwater*, the case is too recent to have generated any major repercussions. In addition, because NLA took issue with copyright infringement only when there was a specific commercial option in place, it is unclear whether this case applies to aggregators that do not have a preexisting commercial license with a publisher.¹⁶⁴

¹⁵⁵ Phillips, *supra* note 142.

¹⁵⁶ *See id.*

¹⁵⁷ *Id.* The question of whether users need a license to view a website will be ruled on by the Supreme Court in the U.K. in 2013. *Id.*

¹⁵⁸ *Newspaper Licensing Agency Ltd.*, [2011] EWCA (Civ) 890 at [40]–[41].

¹⁵⁹ *Id.* [41].

¹⁶⁰ *Newspaper Licensing Agency Ltd. v. Meltwater Holding BV*, [2010] EWHC (Ch) 3099, [146] (Eng.).

¹⁶¹ Wade, *supra* note 20.

¹⁶² *Copyright in Newspaper Headlines and Short Extracts*, *supra* note 142.

¹⁶³ *Newspaper Licensing Agency Ltd. v. Meltwater Holding BV*, [2010] EWHC (Ch) 3099, [146] (Eng.); *Newspaper Licensing Agency Ltd.*, [2011] EWCA (Civ) 890, [40].

¹⁶⁴ *See Newspaper Licensing Agency Ltd.*, [2011] EWCA (Civ) 890, [4].

Meltwater made a final bid to counter the NLA's licensing scheme at the Copyright Tribunal,¹⁶⁵ which helps parties decide "the terms and conditions of licences offered by . . . collective licensing bodies"¹⁶⁶ The news aggregator fought against requiring its clients to pay for receiving a search result after clicking on the provided link, arguing that these license fees significantly increase operational costs to many UK businesses in the strained economy.¹⁶⁷ Furthermore, the aggregator disagreed with the *Meltwater* opinion because its "millions of professionals will unwittingly infringe copyright legislation on a daily basis by simply browsing the web."¹⁶⁸ The Copyright Tribunal provided an online licensing regime to ensure stability for both publishers and end-users.¹⁶⁹ The Tribunal, however, cut the NLA's proposed license fees because they found them to be too high.¹⁷⁰ While Meltwater paints this ruling as a broad decision that affects all consumers,¹⁷¹ the ruling only affects commercial operators. Although licenses are not required of free aggregators, such as Google News,¹⁷² litigation is still a possibility.¹⁷³

The ruling in *Meltwater* fell in line with other rulings in similar cases from the European Union. For example, Copiepresse, an association of Belgian newspaper publishers, petitioned Google in the Belgian Court over its Google News aggregator, asking the court to require Google to remove allegedly infringing content.¹⁷⁴ Similar to the previous cases examined, Copiepresse took issue with Google News's display of the titles, leads, and cached text copies of its members' newspaper articles.¹⁷⁵ Copiepresse argued that Google News

¹⁶⁵ Meltwater Holding BV and Newspaper Licensing Agency Ltd., Copyright Tribunal CT114/09 (Feb. 14, 2012), available at <http://www.ipo.gov.uk/ct11409-140212.pdf> (interim decision); Press Release, Meltwater Grp., UK Ruling Classifies Millions as Copyright Offenders (July 27, 2011), available at <http://www.meltwater.com/about/press-room/news-releases/uk-ruling-classifies-millions-as-copyright-offenders>.

¹⁶⁶ *About the Copyright Tribunal*, COPYRIGHT TRIBUNAL, <http://www.ipo.gov.uk/ctribunal/ctribunal-about.htm> (last visited Feb. 26, 2011).

¹⁶⁷ *Meltwater Holding*, Copyright Tribunal CT114/09 paras. 10–11.

¹⁶⁸ Press Release, Meltwater Group, *supra* note 164.

¹⁶⁹ See *Meltwater Holding*, Copyright Tribunal CT114/09.

¹⁷⁰ *Id.* para. 260; Jorn Lyseggen, *The Implication of Today's Verdict in the UK Copyright Tribunal*, 14 MELTWATER GROUP (Feb. 14, 2012), <http://blog.meltwater.com/the-implication-of-today's-verdict-in-the-uk-copyright-tribunal>.

¹⁷¹ Press Release, Meltwater Grp., *supra* note 165.

¹⁷² Robert Andrews, *Winners and Losers in the News Aggregator Copyright Case*, PAIDCONTENT (July 27, 2011, 4:50 PM), <http://paidcontent.org/419-winners-and-losers-in-the-news-aggregator-copyright-case/>.

¹⁷³ Mary Anne Reid & Fiona James, *Aggregating the News: Who Should Pay?*, AUSTL. COPYRIGHT COUNSEL (Nov. 29, 2010), <http://www.copyright.org.au/news-and-policy/details/id/1872>.

¹⁷⁴ *Copiepresse v. Google, Inc.*, Tribunal de Première Instance [Civ.] [Tribunal of First Instance], Brussels, Feb. 15, 2007, No. 06/10.928/C (Belg.); Reid & James, *supra* note 173.

¹⁷⁵ Reid & James, *supra* note 173.

went beyond carrying out its general search functions, especially because the news headlines and excerpts could be found on the Google News homepage without a search being conducted.¹⁷⁶

Google argued that in addition to qualifying under copyright exceptions for news reporting and citations, the fragments in question were not sufficiently original to qualify for protection based on originality.¹⁷⁷ The court held that some headlines were not original enough to warrant copyright protection.¹⁷⁸ Furthermore, the news reporting and citation exceptions did not apply because Google's service as an automatic news aggregator did not provide any commentary on the excerpted content.¹⁷⁹ Like the Court of Appeals in *Meltwater*, the court in *Copiepresse v. Google* rejected Google's argument that the user, rather than Google, created the copy of the work.¹⁸⁰ Instead, the court ruled that Google made a digital reproduction the moment the content was stored in Google's memory, thus making a copy of the original documents available to the public and violating Belgium copyright law.¹⁸¹ Thus, in addition to the United Kingdom, other countries in Europe more readily find that copyright subsists in headlines and article excerpts. With Australia and the United Kingdom diverging in their interpretation of news aggregator liability, this Comment will now explore the current law of the United States in regards to this issue.

IV. THE CURRENT STATE OF THE LAW: UNITED STATES

In the United States, a work is protected if it is an "original work[] of authorship" and is "fixed in any tangible medium of expression" that can be read directly or with the aid of a "machine or device."¹⁸² With certain exceptions, the copyright owner has various exclusive rights: the rights of reproduction, distribution, adaptation, performance, and public display.¹⁸³ Under U.S. law, copyright infringement occurs when a person with access to a copyrighted work uses a substantially similar work in a way that violates at

¹⁷⁶ See Graham Smith, *Copiepresse v. Google – the Belgian Judgment Dissected*, BIRD & BIRD (Mar. 13, 2007), <http://www.twobirds.com/English/News/Articles/Pages/2007/Copiepresse-v-Google.aspx>.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² 17 U.S.C. § 102(a) (2006).

¹⁸³ See *id.* § 106.

least one of the copyright owner's exclusive rights.¹⁸⁴ However, work may fall under several exceptions created by U.S. law.

A. *Exceptions*

Because copyright protection extends only to elements of a work that demonstrate minimal creativity, there are some exceptions to protection.¹⁸⁵ For example, a creative expression may be too insubstantial to rise above a de minimis amount required before protection attaches.¹⁸⁶ Similarly, a work may lack sufficient originality necessary to qualify for copyright protection.¹⁸⁷ In addition to these exceptions, a possible defense to infringement is fair use, which allows an author to use copyrighted material under certain circumstances.¹⁸⁸ Cyberspace, however, has complicated copyright infringements, exceptions, and defenses.

1. *De Minimis/Lack of Originality Exception*

If all news aggregators rewrote the news stories they gather, there would be no copyright issue. Many aggregators, however, republish several sentences from the original article without alteration or permission.¹⁸⁹ Whether these excerpts, and the accompanying headlines, are deserving of copyright protection is a hotly debated question.¹⁹⁰ Although the Supreme Court set a low bar for creativity, holding that a work must “possess some creative spark, ‘no matter how crude, humble or obvious’ it might be” to be original and protectable under copyright law,¹⁹¹ some words or phrases may lack the originality to rise above this de minimis requirement.¹⁹² For example, ideas and facts, in and of themselves, cannot be copyrighted—only the expression of

¹⁸⁴ *Id.* §§ 106, 501(a).

¹⁸⁵ *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

¹⁸⁶ *Newton v. Diamond*, 388 F.3d 1189, 1192, 1196 (9th Cir. 2004).

¹⁸⁷ *Feist*, 499 U.S. at 345. A fundamental principle of copyright is an author cannot copyright the ideas or facts he narrates. *Id.* at 344–45. For fact-based works, because “[f]acts are never original[,] . . . the compilation author can claim originality, if at all, only in the way the facts are presented.” *Id.* at 358.

¹⁸⁸ 17 U.S.C. § 107 (2006).

¹⁸⁹ *Isbell & Citizen Media Law Project*, *supra* note 7, at 2.

¹⁹⁰ *See* Symposium, *Journalism's Digital Transition: Unique Legal Challenges and Opportunities*, (Apr. 9, 2010), *available at* <http://cyber.law.harvard.edu/events/2010/04/journalismtransition> (videos of symposium at Berkman Center for Internet & Society at Harvard University).

¹⁹¹ *Feist*, 499 U.S. at 345 (quoting 1 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 1.08[C][1] (1990)).

¹⁹² *Newton v. Diamond*, 388 F.3d 1189, 1192 (9th Cir. 2004).

ideas and facts are protected.¹⁹³ Furthermore, courts can deny copyright protection even to a creative expression under the merger doctrine, which denies protection when the ideas or facts are inseparable from the expressions.¹⁹⁴ Without the merger doctrine, granting the author protection of the expression would also give the author protection of the underlying idea.¹⁹⁵

Titles and phrases also may be too short to rise above the *de minimis* standard for originality of creative expression. News aggregators claim that headlines, and sometimes leads, do not qualify for copyright protection because they are too short and highly factual.¹⁹⁶ Short headlines “generally seek to encapsulate the factual content of the story,”¹⁹⁷ which would make the expression and facts inseparable and subject to the merger doctrine.¹⁹⁸ Media organizations, however, emphasize the creative importance of a headline to capture the reader’s attention.¹⁹⁹

The United States Court of Appeals for the Second Circuit reviewed a similar argument concerning news abstracts in *Nihon Keizai Shimbun, Inc. v. Comline Business Data, Inc.*²⁰⁰ The court held that it is not infringement for an abstract to directly copy one paragraph from a six-paragraph-foreign-language article.²⁰¹ Comline Business Data, similar to a commercial aggregator, creates abstracts of news articles from a variety of sources.²⁰² Although facts lack the originality to be copyrightable creative expressions, compilations of facts may have protection because they “display originality in their selection, arrangement, or presentation”²⁰³ Furthermore, through the description of

¹⁹³ *Feist*, 499 U.S. at 350 (citing *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 547–48 (1985)).

¹⁹⁴ *Ets-Hokin v. Sky Spirits, Inc.*, 225 F.3d 1068, 1082 (9th Cir. 2000) (“Under the merger doctrine, courts will not protect a copyrightable work from infringement if the idea underlying the copyrighted work can be expressed in only one way, lest there be a monopoly on the underlying idea.”).

¹⁹⁵ *Id.*

¹⁹⁶ For examples of arguments by news aggregators, see *supra* Parts II.B, III.D; see e.g., *Google Inc.’s Answer and Counterclaims* at 22, *Agence France Presse v. Google Inc.*, No. 1:05CV00546 (GK) (D.D.C. May 19, 2005) (stating that headlines and leads are “fact-based works”).

¹⁹⁷ *Google Inc.’s Answer and Counterclaims*, *supra* note 196, at 22.

¹⁹⁸ See *Ets-Hokin*, 225 F.3d. at 1082; see also *Journalism’s Digital Transition: Unique Legal Challenges and Opportunities—CLE Handouts*, ONLINE MEDIA LEGAL NETWORK 10 (Apr. 9, 2010), http://www.omln.org/CLE_Handouts.pdf [hereinafter *CLE Handouts*].

¹⁹⁹ *CLE Handouts*, *supra* note 198, at 11.

²⁰⁰ *Nihon Keizai Shimbun, Inc. v. Comline Bus. Data, Inc.*, 166 F.3d 65 (2d Cir. 1999).

²⁰¹ *Id.* at 71 (concluding that a one-paragraph abstract of a six-paragraph article “is not substantially similar . . . in a quantitative sense”).

²⁰² *Id.* at 69.

²⁰³ *Id.* at 70; see also *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 358 (1991).

facts, there is some room for originality within news articles due to an author's choice of words, analysis of events, and structure of materials.²⁰⁴ Although the abstract at issue in the case used a literal translation of one paragraph from a six-paragraph article,²⁰⁵ the court found that the abstract was not substantially similar in a quantitative sense. It did, however, find that other summaries by Comline which copied more than half of articles constituted infringement.²⁰⁶ Thus, a shorter, highly-factual text, such as a news headline, may fall under copyright exceptions, but as the text becomes longer, such as an excerpt or lead, the exception argument becomes more difficult to make.

Courts, however, have varied approaches to copyright protection for short text fragments in determining whether a creative expression is too short or unoriginal to receive protection.²⁰⁷ For example, if “single brief sentences . . . demonstrate particular originality or form the core of the protected work[,]” the [non-author's] expression is considered an infringement.²⁰⁸ Aggregators also argue that their business practice falls under the fair use umbrella, an affirmative defense under the Copyright Act.²⁰⁹

2. Fair Use Defense

Even if headlines and leads are copyrightable subject matter, the fair use defense permits the use of copyrighted material in certain circumstances without liability for infringement.²¹⁰ The ultimate test of fair use stems from the Constitution: Where the primary goal of copyright is “[t]o promote the Progress of Science and the useful Arts.”²¹¹ In application, however, courts have implemented a four-factor test.²¹² Whether fair use allows the user of copyrighted material to avoid infringement depends on: the purpose and character of the use; the nature of the copyrighted work; the amount and substantiality of the work used; and the effect of the use on the market for the

²⁰⁴ *Nihon Kezai Shimbum*, 166 F.3d at 70.

²⁰⁵ *Id.* at 71. Courts use an “ordinary observer test” to determine substantial similarity. *Id.* at 70. The test asks “whether an average lay observer would overlook any dissimilarities between the works and would conclude that one was copied from the other.” *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ Moran, *supra* note 109, at 250.

²⁰⁹ *E.g.*, *Nihon Kezai Shimbum*, 166 F.3d at 72; Google Inc.'s Answer and Counterclaims, *supra* note 196, at 28.

²¹⁰ 17 U.S.C. § 107 (2006).

²¹¹ *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991) (quoting U.S. CONST. art. I, § 8, cl. 8).

²¹² *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577–78 (1994).

copyrighted work.²¹³ Although the Court has provided guidance on how to weigh these four factors, judges have flexibility when determining whether the non-author's use is a fair use.²¹⁴

First, when evaluating purpose and character of the allegedly infringing use, courts will consider three factors: (1) whether the use of copyrighted material is commercial in nature; (2) whether a work is transformative of the original; and (3) whether the use is for a legitimate purpose.²¹⁵ The commercial nature of aggregators does not weigh in favor of fair use of copyrighted material, although this is not the definitive criterion for determining the purpose and character of use.²¹⁶ Some aggregators serve as media monitoring companies that distribute stories to paying clients, such as Meltwater, while other news aggregators, such as Yahoo! News, get paid not by clients but rather through revenue from advertisements around the republished news stories.²¹⁷ Although both types of aggregators generate profit, courts have previously held that the commercial aspect can be of "minimal significance" if the fair use is for a legitimate purpose.²¹⁸ Although the commercial factor does not support a finding of fair use for most aggregators, courts also consider whether there was a transformative use of the prior work, as well as the purpose of the use, in the analysis of the purpose and character of the infringing content.²¹⁹

An aggregator transforms an original work if it repurposes the content, rewrites the stories, or indexes and categorizes stories.²²⁰ The Ninth Circuit has allowed Internet search engines to reproduce copyrighted works under fair use.²²¹ For example, in *Kelly v. Arriba Soft Corp.*, a photographer claimed thumbnail versions of his pictures in a search engine constituted copyright

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.* at 578–79 (citations omitted).

²¹⁶ *Id.* at 579; *Nihon Keizai Shimbun, Inc. v. Comline Bus. Data, Inc.*, 166 F.3d 65, 72 (2d Cir. 1999) (“[U]se for commercial purposes tends to point this factor against fair use.”).

²¹⁷ *About Meltwater News Media Monitoring Software*, MELTWATER GRP., <http://www.meltwater.com/products/meltwater-news/about/> (last visited Sept. 16, 2012); Kenny Olmstead, Jane Sasseen, Amy Mitchell & Tom Rosenstiel, *Digital: News Gains Audience But Loses Ground in Chase for Revenue*, STATE OF THE NEWS MEDIA 2012, <http://stateofthedia.org/2012/digital-news-gains-audience-but-loses-more-ground-in-chase-for-revenue/> (last visited Sept. 16, 2012).

²¹⁸ *Sega Enters. v. Accolade, Inc.*, 997 F.2d 1510, 1522–23 (9th Cir. 1992).

²¹⁹ *Id.* at 1522.

²²⁰ *E.g., Nihon Keizai Shimbun*, 166 F.3d at 72 (stating that although the abstracts were for news reporting, the abstracts were not transformative because they were mostly direct translations); *Isbell & Citizen Media Law Project*, *supra* note 7, at 10, 19.

²²¹ *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 822 (9th Cir. 2002).

infringement; the court pointed to the library-like function of the pictures in the search engine, different from the artistic expression function for the photographer, thus finding that the Internet search engine's use was transformative.²²² The Ninth Circuit subsequently held that image search engines “provide an entirely new use of the original work” and significantly benefit the public “by incorporating an original work into a new work, namely, an electronic reference tool.”²²³

News aggregators, similar to search engines, repurpose their content by indexing and categorizing the articles on the website.²²⁴ Aggregators also serve a significant public interest by collecting stories from a large variety of sources, organizing the content onto one web page for easy user access, categorizing the feeds, and permitting feed searches.²²⁵ However, it can also be argued that news aggregators do not provide an “entirely new use” for the original content because traditional news media outlets already actively collect and organize headlines and story excerpts to be read by the public on their own websites.²²⁶ Although there is a question of how much aggregators transform a headline and article excerpts, aggregators' use of original content qualifies as minimally transformative due to the convenience to the public, as well as informational searching and indexing functions.²²⁷ Thus, despite commercial profits of aggregators, the purpose and character of the aggregator's use of original news content is likely to support a finding of fair use.

The second factor of the fair use test concerns the nature of the copyrighted work. When evaluating a work's nature, a court looks at whether the work is expressive or more factual and whether the work is published.²²⁸ Factual works, such as news reports, are given a thin veil of protection because factual works need to be disseminated to the public and contribute to immediate productive use by others.²²⁹ Because news aggregators use factual works, courts are likely to weigh the nature of the copyrighted work in favor of fair use by news aggregators.

²²² *Id.* at 819 (“Because [the Internet search engine's] use is not superseding [the photographer's] use but, rather, has created a different purpose for the images, [the Internet search engine's] use is transformative.”).

²²³ *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1165 (9th Cir. 2007), *appealed after remand*, 653 F.3d 976 (9th Cir. 2011).

²²⁴ Isbell & Citizen Media Law Project, *supra* note 7, at 10.

²²⁵ *Id.* at 11.

²²⁶ *See id.* at 10–11.

²²⁷ *Id.*

²²⁸ *See Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 563–64 (1985).

²²⁹ *See id.* at 563.

When analyzing the third factor of the proportionality of original content that was copied, courts initiate a quantitative and qualitative examination of the amount and substantiality of the aggregator's use of reproduced copyrighted work.²³⁰ From a quantitative perspective, court decisions have found fair use even when an entire copyrighted work has been used.²³¹ Most news aggregators, however, limit their use to only a small portion of the original work, such as the headline and sometimes a brief excerpt or opening paragraph.²³² Although the quantitative analysis is likely to weigh in favor of fair use, news aggregators have a more difficult argument concerning the qualitative aspect.²³³ The Supreme Court has previously ruled against reproduction of short excerpts if the excerpt reproduced the "heart" of the work.²³⁴ Publishers argue that headlines and leads are similar to the "heart" of the article because both contain the most important parts of the story.²³⁵ Copyright scholar Tim Wu, however, argues that the first few excerpted lines of a story should not constitute a substitute for the entire story.²³⁶ In the case of aggregators, a "headline and lede cannot be understood as a substitute for the entire story" because both provide only the main idea of the article.²³⁷ Because facts are not entitled to protection and the reproduced portions are not substantial, this factor is likely to weigh in favor of fair use.²³⁸

The final factor in the fair use test is the effect of the use on the potential market for the original copyrighted work.²³⁹ This factor has been debated between content originators and news aggregators. Content originators, such as the Associated Press ("AP"), claim that news aggregators that do not pay a direct licensing fee threaten the well-defined market that exists for the

²³⁰ Isbell & Citizen Media Law Project, *supra* note 7, at 12.

²³¹ *Triangle Publ'ns, Inc. v. Knight-Rider Newspapers, Inc.* 626 F.2d 1171, 1177 n.15 (5th Cir. 1980) (citing *Williams & Wilkins Co. v. United States*, 487 F.2d 1345, 1353 (Ct. Cl. 1973) *aff'd by an equally divided court* 420 U.S. 376 (1975) (per curiam)).

²³² Isbell & Citizen Media Law Project, *supra* note 7, at 12.

²³³ *See id.*

²³⁴ *Harper & Row Publishers*, 471 U.S. at 565; *accord id.* at 564–65.

²³⁵ *Id.*

²³⁶ Anjali Dalal, *Protecting Hyperlinks and Preserving First Amendment Values on the Internet*, 13 U. PA. J. CONST. L. 1017, 1063 (2011); Saul Hansell, *The Associated Press To Set Guidelines for Using Its Articles*, N.Y. TIMES, June 16, 2008, at C7.

²³⁷ Dalal, *supra* note 236, at 1063. "Lede" is an alternate form of "lead." 8 THE OXFORD ENGLISH DICTIONARY 744 (2d ed. 1989); *accord Lede – Definition and More*, MERRIAM-WEBSTER ONLINE, <http://www.merriam-webster.com/dictionary/lede> (last visited Oct. 18, 2012).

²³⁸ *See Nihon Keizai Shimbun, Inc. v. Comline Bus. Data, Inc.*, 166 F.3d 65, 72 (2d Cir. 1999).

²³⁹ Isbell & Citizen Media Law Project, *supra* note 7, at 12–13.

reproduction and syndication of news articles.²⁴⁰ Because aggregators organize news stories from a wide variety of sources onto one page, consumers who use news aggregators no longer have a need to go back to an article's original source.²⁴¹

News aggregators, however, argue that their services benefit newspapers by exposing new consumers to their content and driving traffic to their websites by linking to them.²⁴² Aggregators also argue that consumers who only skim the headlines and article excerpts on a news aggregators's website are not likely to visit individual news websites and read full articles on their own.²⁴³ Thus, if news aggregators did not exist, the customers would not likely be a source of traffic for the newspapers' websites.²⁴⁴ While some courts agreed with traditional news media and found this factor to cut against fair use because news abstracts "compete with and supersede" the original article,²⁴⁵ analysis of this final factor remains fact-specific in each case. Because application of the fair use test varies by judge, the courts' rulings are unpredictable, especially with an emerging area of law such as news aggregators.²⁴⁶ Recent lawsuits may show the direction courts are heading concerning the fair use defense.

B. Recent Law Suits Concerning News Aggregators and Copyright

A Las Vegas company, Righthaven, has been involved in a series of lawsuits attempting to redefine the murky fair use doctrine.²⁴⁷ Similar to the arguments made by publishers in other countries, claims by wire services and publishers in the United States allege that aggregators infringe their copyright and steal their product.²⁴⁸ Righthaven acts as a shell company by transferring the copyright of the content from its client to Righthaven when the client's content has been possibly infringed.²⁴⁹ Righthaven then files lawsuits against

²⁴⁰ *Id.*

²⁴¹ *Id.* at 13.

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Nihon Keizai Shimbun, Inc. v. Comline Bus. Data, Inc.*, 166 F.3d 65, 73 (2d Cir. 1999).

²⁴⁶ Daniel A. Diskin, *The Huffington Post and Copyright Law's Fair Use Doctrine*, COPYRIGHT & TRADEMARK BLOG (July 15, 2011), <http://copymarkblog.com/2011/07/15/the-huffington-post-and-copyright-laws-fair-use-doctrine/>.

²⁴⁷ John Patrick Pullen, *Las Vegas's Copyright Crapshoot Could Maim Social Media*, CNNMONEY (Jan. 6, 2011), <http://tech.fortune.cnn.com/2011/01/06/las-vegass-copyright-crapshoot-could-maim-social-media/>.

²⁴⁸ *Id.*

²⁴⁹ *Id.*

the alleged infringers.²⁵⁰ Righthaven has argued that fair use “has been very stretched by advocates of reproductions.”²⁵¹ However, U.S. District Judge James Mahan took issue with Righthaven’s strategy in a recent case concerning the repost of an article from the Las Vegas Review–Journal, a Righthaven client, by an immigrant-and-refugee-rights organization.²⁵² Judge Mahan questioned whether any harm was done because there was “no market for the copyrighted work” as Righthaven was not publishing it.²⁵³

In a different case, the U.S. District Court of Nevada also granted summary judgment to one of the alleged infringers in *Righthaven, LLC v. Hoehn* on the grounds of fair use.²⁵⁴ The only factor weighing against fair use was that the entire work was posted.²⁵⁵ The court found that Hoehn’s use of the article was noncommercial and nonprofit, a presumptively fair use.²⁵⁶ The article was also posted as part of an online discussion in a sports handicapping forum.²⁵⁷ When considering the creativity of the article, the court found that the work contained a significant informational element, which allowed for a broader scope of fair use.²⁵⁸ However, because fair use varies on a case-by-case basis and the alleged content was found in an online discussion forum, it is difficult to contend that the *Hoehn* fair use analysis would apply to news aggregators as well.

Other cases regarding the legality of news aggregators have been filed but were settled before going to trial. Agence France Presse (“AFP”), a Paris-based wire service, sued Google News claiming that the headline, lead, and accompanying photo displayed by Google News’ aggregator were protected content even in an abbreviated form.²⁵⁹ AFP does not freely distribute news, but instead requires parties to pay licensing fees to publish its exclusive content on their own websites.²⁶⁰ Therefore, AFP argued that the headline,

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ 792 F. Supp. 2d 1138, 1151 (D. Nev. 2011).

²⁵⁵ *Id.*

²⁵⁶ *Id.* at 1149.

²⁵⁷ *See id.* at 1141, 1149.

²⁵⁸ *Id.* at 1150.

²⁵⁹ First Amended Complaint at 1–2, *Agence France Presse v. Google Inc.*, No. 1:05CV00546 (GK) (D.D.C. Apr. 29, 2005).

²⁶⁰ *CLE Handouts*, *supra* note 198, at 9. AFP argued that “those who invest time and money into the production of news should be granted protective rights in the material” to prevent aggregators from freeriding on their efforts. *Id.*

lead, and photo displayed by the news aggregators were licensed content and fell outside the fair use exception. The AFP case, however, settled before trial after Google entered into a licensing deal with the AFP to post content.²⁶¹ During these proceedings, Google also moved to stop another potential suit from the Associated Press, another wire service, by entering into a similar licensing agreement.²⁶² Despite these licensing agreements, Google maintains that activities by its aggregator, Google News, were fully consistent with fair use and that the agreements allow for new uses of AP and AFP news content.²⁶³

Before the case settled in January 2009, GateHouse Media (“GateHouse”), a publisher of newspapers and corresponding websites, made a similar claim against the New York Times Co., which aggregates local news on Boston.com, for copying GateHouse’s headlines and leads.²⁶⁴ GateHouse specializes in local content and advertising in both print and online media, filling the void left by larger daily newspapers such as the Boston Globe.²⁶⁵ The New York Times, however, decided to compete with GateHouse’s local websites with its Boston.com website.²⁶⁶ The website included original headlines and leads of multiple articles from GateHouse’s various local newspapers and websites.²⁶⁷ Because GateHouse was the “sole provider of local news from small suburban neighborhoods,” this was a significant distinction from aggregators like Google News that use thousands of sources for national news.²⁶⁸ GateHouse argued that it needed protection because modern readers tend to look only at headlines and excerpts, rather than actually visiting the site to read the whole story.²⁶⁹ In addition to its claim of direct copyright infringement against Boston.com for copying GateHouse’s original material, GateHouse also took issue with Boston.com’s practice of deep-linking to a specific news article and, thus, bypassing GateHouse’s homepage.²⁷⁰ GateHouse primarily earns revenue through the advertisement placement on the homepage of its websites, which

²⁶¹ Reid & James, *supra* note 173.

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ Complaint at 1–2, GateHouse Media Massachusetts I, Inc. v. New York Times Co., No. 1:08-CV-12114-WGY (D. Mass. Jan. 22, 2008).

²⁶⁵ *Id.* at 5.

²⁶⁶ *Id.* at 7–8.

²⁶⁷ *Id.* at 9–11.

²⁶⁸ *CLE Handouts*, *supra* note 198, at 13.

²⁶⁹ Bruce W. Sanford et al., *Saving Journalism with Copyright Reform and the Doctrine of Hot News*, 26 COMM. LAWYER 8, 8–9 (2009).

²⁷⁰ Complaint, *supra* note 264, at 12.

exposes users to the advertisements while they peruse the headlines and leads.²⁷¹ Thus, the deep-links created the false impression that GateHouse authorized Boston.com's distribution of the copyrighted content, as well as created confusion concerning the original source of the news stories.²⁷² The case, however, settled after the New York Times agreed to remove GateHouse's content from its websites.²⁷³

The AP also filed a copyright infringement suit, among other claims, against the aggregator, All Headline News ("AHN"), which is a different type of aggregator than Google News.²⁷⁴ Unlike Google News, which is a feed aggregator open to the nonpaying public, AHN is a media monitoring organization, much like Meltwater, which copies and rewrites stories found on the Internet and sells the content to clients that redistribute news content.²⁷⁵ Because AHN copies the creative expression found in the AP's articles to prepare its own stories for AHN clients, the AP argued that AHN willfully infringed the AP's copyrights.²⁷⁶ AHN filed a motion to dismiss the copyright infringement claim arguing that the DMCA was not written to protect rewritten news articles, but instead aimed to prevent circumvention of any digital protection of copyright information.²⁷⁷ The court denied the motion to dismiss finding that the DMCA had no textual support for AHN's limited protection argument.²⁷⁸ The parties eventually reached a settlement in which AHN agreed not to use AP content and paid an unspecified sum "to settle the AP's claim for past unauthorized use of AP expression and news content."²⁷⁹

C. *Recent Law Suits Concerning News Aggregators and Deep-Linking*

Another possible copyright infringement issue that aggregators face in the United States concerns deep-linking. Although U.S. publishers have not made claim against news aggregators specifically concerning deep-linking,

²⁷¹ *Id.* at 7.

²⁷² *Id.* at 12.

²⁷³ Letter Agreement Between The New York Times Company and GateHouse Media Massachusetts I, Inc. (Jan. 25, 2009), available at <http://www.nytc.com/pdf/Agreement.pdf>.

²⁷⁴ See *Associated Press v. All Headline News Corp.*, 608 F. Supp. 2d 454, 457 (S.D.N.Y. 2009).

²⁷⁵ *Id.* at 457–58.

²⁷⁶ Complaint at 17–18, *Associated Press*, 608 F. Supp. 2d 454 (No. 08-CV-00323).

²⁷⁷ Memorandum in Support of Defendants' Motion to Dismiss Under Federal Rule of Civil Procedure 12 at 16–17, *Associated Press*, 608 F. Supp. 2d 454 (No. 1:08-CV-00323).

²⁷⁸ *Associated Press*, 608 F. Supp. 2d at 462.

²⁷⁹ Press Release, Associated Press and AHN Media, AP and AHN Media Settle AP's Lawsuit Against AHN Media and Individual Defendants (July 13, 2009), available at http://www.mediabistro.com/fishbowl/ny/ap-settles-hot-news-lawsuit-with-ahn-media_b12121.

publishers around the world have made the claim.²⁸⁰ Deep-linking has been discussed only in a handful of cases in the United States, including *Ticketmaster Corp. v. Tickets.Com, Inc.*²⁸¹ If Tickets.com did not sell tickets to a certain event, the website provided deep-links to the relevant ticketing web pages within the Ticketmaster website, which bypassed Ticketmaster's homepage.²⁸² Ticketmaster brought a charge of copyright infringement against Tickets.com claiming Tickets.com's deep-linking practice copied and extracted basic information from Ticketmaster's interior web pages.²⁸³ The district court rejected the claim of copyright infringement because Tickets.com presented Ticketmaster's factual data in its own format.²⁸⁴ Furthermore, the court ruled the deep-linking was not a violation of the Copyright Act because customers were automatically transferred to a subsidiary webpage of another site.²⁸⁵ In addition, the court found no copyright to subsist in the URL because it is simply an address, "open to the public, like the street address of a building, which, if known, can enable the user to reach the building."²⁸⁶

V. PROPOSED SOLUTIONS: WHAT THE LAW SHOULD BE

The financial future of many news organizations is bleak, due to changing patterns of news consumption fueled by the Internet and aggregators. In response, Congress has held hearings on how to save the news industry.²⁸⁷ Legislative proposals include antitrust exemptions, tax breaks, nonprofit status for struggling news organizations, and hot news reform.²⁸⁸ While all are viable solutions, this Comment focuses on copyright reform as an answer to the

²⁸⁰ See, e.g., *Shetland Times Ltd. v. Wills*, (1997) S.C. 316, 318 (Scot.); Lubens, *supra* note 18.

²⁸¹ *Ticketmaster Corp. v. Tickets.com, Inc.*, No. CV997654HLHVBKX, 2003 WL 21406289, at *1 (C.D. Cal. Mar. 7, 2003).

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ *Id.* at *5.

²⁸⁵ *Id.* at *6.

²⁸⁶ *Id.* at *5.

²⁸⁷ E.g., *A New Age for Newspapers: Diversity of Voices, Competition and the Internet: Hearing Before the Subcomm. on Courts and Competition Policy of the H. Comm. on the Judiciary*, 111th Cong. 3 (2009) (statement of Rep. Jason Chaffetz proposing antitrust exemption for news organizations); *id.* at 40 (statement of John Nichols, Journalist) (proposing tax breaks for news organizations); *id.* at 45 (statement of Bernard J. Lunzer, President, The Newspaper Guild) (proposing nonprofit status for news organizations).

²⁸⁸ *Id.*; *Database and Collections of Information Misappropriations: Joint Hearing before the Subcomm. on the Courts, the Internet, and Intellectual Prop. of the H. Comm. on the Judiciary and the Subcomm. on Commerce, Trade, and Consumer Protection of the H. Comm. on Energy and Commerce*, 108th Cong. 10–11 (2003) (statement of David Carson, General Counsel, Copyright Office of the United States) (proposing hot news reform).

problems caused by news aggregators who collect the original content of others.

A. *International Legislation and Case Law*

English and Australian courts currently differ on whether headlines and excerpts can be the subjects of copyright protection and, even assuming copyrightability, whether their reproduction falls under a fair dealing defense. Comparing U.S. law to the precedent set by these two countries, the United States is likely to side with the Australian point of view that headlines and excerpts are not copyrightable.

Looking first at Europe's body of law, the Information Society Directive followed by Europe is not similar to the Copyright Act in the United States. The ISD includes no substantial similarity test and lacks a specified originality requirement.²⁸⁹ Although intellectual creation and originality have yet to be defined in the ISD, both are necessary to prove reproduction.²⁹⁰ To prove reproduction in the United States, however, an author must prove *both* originality and substantial similarity.²⁹¹ The United States also allows a fair use exception with an open-ended test, which bears some kinship to the "fair dealing" defense found in U.K. copyright law.²⁹² The fair dealing defense in the ISD, however, is more narrowly drafted than the "fair use" defense. Whereas the United States employs a fair use balancing test, whose results change based on the specific facts of the case and context, Europe works from a series of narrowly crafted exceptions that do not necessarily adapt to technological advances.²⁹³ Thus, Europe's protection of copyright, even for short fragments, is much stronger than the protection offered by the United States.²⁹⁴

When examining early case law in the United Kingdom, American academics criticized *Shetland Times*, saying that the holding would not be accepted under United States copyright law because of the United Kingdom's strict copyright rules.²⁹⁵ *Meltwater's* ruling concerning news aggregators, furthermore, shows the pronounced challenges in European countries as search

²⁸⁹ Moran, *supra* note 109, at 253.

²⁹⁰ *Id.* at 253–54.

²⁹¹ 17 U.S.C. § 106 (2002).

²⁹² Moran, *supra* note 109, at 257.

²⁹³ *Id.*; *see also* Smith, *supra* note 176.

²⁹⁴ Moran, *supra* note 109, at 257.

²⁹⁵ *See* Sableman, *supra* note 2, at 1288.

engines develop and extend their activities into areas beyond general-purpose searches, especially due to the lack of a flexible doctrine of fair use.²⁹⁶ For example, taking temporary copies of Internet content is considered fair use under U.S. law, contrary to *Meltwater's* ruling.²⁹⁷

The AP recently initiated a suit against Meltwater in the United States likely hoping U.S. law will follow U.K. precedent.²⁹⁸ The suit alleges that Meltwater has been illegally selling content from the AP.²⁹⁹ The AP, however, makes a distinction between Meltwater and other aggregators, such as Google News, due to Meltwater's commercial nature, which requires clients to pay a fee for its clipping services.³⁰⁰ The decision is likely to hinge on whether Meltwater's use of the AP's headlines and excerpts falls under the fair use defense.³⁰¹ Although the AP hopes that the U.S. court rules consistently with the United Kingdom's finding against fair use,³⁰² New York federal courts are likely to fall in line with Australia's precedent.

Unlike the United Kingdom, Australia's copyright laws are more similar to those of the United States, such as the DMCA, which gives owners of digital content some additional rights.³⁰³ Although the DMCA allows the news industry to prevent and remedy losses from unauthorized distribution of its content, the DMCA's uses are limited in the context of news aggregators.³⁰⁴ For example, in the AP's settled case against AHN, the court concluded that AHN violated the DMCA's copyright management information provision when AHN removed the original references to the AP as the owner and author of the articles that it copies, which most news aggregators do not do.³⁰⁵

²⁹⁶ Smith, *supra* note 176.

²⁹⁷ Compare *Ticketmaster Corp. v. Tickets.com*, No. CV997654HLHVBKX, 2003 WL 21406289 (C.D. Cal. Mar. 7, 2003) (holding that making temporary copies of electronic information is fair use), with *Newspaper Licensing Agency Ltd. v. Meltwater Holding BV*, [2011] EWCA (Civ) 890 (Eng.) (declining to apply the fair use defense to temporary Internet copies).

²⁹⁸ *AP Sues Meltwater News Claiming Copyright Offense*, WALL ST. J. (Feb. 14, 2012), <http://online.wsj.com/article/APed357b5af39f4eefb07436e43ea2b56a.html>.

²⁹⁹ *Id.*

³⁰⁰ *Id.*

³⁰¹ *Id.*

³⁰² See *id.*

³⁰³ Priya Barnes, *The Prospects for Protecting News Content Under the Digital Millennium Copyright Act*, 3 HARV. J. SPORTS & ENT. L. 201, 203 (2012).

³⁰⁴ *Id.* at 29.

³⁰⁵ *Associated Press v. All Headline News Corp.*, 608 F. Supp. 2d 454, 461 (S.D.N.Y. 2009); Jeffrey D. Neuburger, *A Brief History of AP's Battles with News Aggregators*, PBS (May 26, 2009), <http://www.pbs.org/mediashift/2009/05/a-brief-history-of-aps-battles-with-news-aggregators146.html>.

Unlike the United States' broad interpretation of the fair use defense, Australia has more specific guidelines, requiring content under the 1968 Act to fall within one of the fair dealing specific purposes.³⁰⁶ The United States' open-ended fair use defense has been interpreted by U.S. courts to allow some reasonable personal use of works that would not necessarily be permitted under Australia's fair dealing laws. Furthermore, compared to the United Kingdom's decision in *Meltwater*, which found that making temporary copies of copyrighted content constitutes infringement,³⁰⁷ Australian copyright law recognizes exceptions for temporary copies made in the ordinary course of use,³⁰⁸ similar to copying permitted under U.S. case law. Instead of relying on U.S. courts to hold aggregators accountable for violating copyright law, news organizations must take preventative measures to protect their intellectual property, as well as their bottom line.

B. Preventative Actions by the Media Companies

Because U.S. courts will likely find that aggregators do not infringe upon the copyright of news publishers, the courts will continue to hold media companies responsible for preventing unwanted access by aggregators.³⁰⁹ Granting content providers with strict copyright protection over aggregators to help maintain existing media companies' business models would threaten the meaning and purpose of U.S. copyright law.³¹⁰ With new media changing the landscape of news organizations, newspapers must not rely on strict interpretations of copyright; instead, they must adopt a business model that generates profits based upon how readers consume news in the Internet age.³¹¹

For example, after the U.K. decision in *Meltwater*, several news organizations took preventative action against aggregators. Rupert Murdoch's News International prevented the aggregator NewsNow from linking to various online content, including The Sun and News of the World, by changing its search engine settings with a simple protocol.³¹² Mirror Group, publisher of

³⁰⁶ See *supra* Part II.A.

³⁰⁷ Newspaper Licensing Agency Ltd. v. Meltwater Holding BV, [2011] EWCA (Civ) 890, [32]–[35] (Eng.).

³⁰⁸ Copyright Act 1968 ss 43–43A.

³⁰⁹ Dalal, *supra* note 236, at 1065.

³¹⁰ *Id.*

³¹¹ Isbell & Citizen Media Law Project, *supra* note 7, at 21.

³¹² Helena Humphrey, *True to His Word: Murdoch Blocks News Aggregators*, EDITORS WEBLOG (Jan. 11, 2010, 1:02 PM), http://www.editorsweblog.org/multimedia/2010/01/true_to_his_word_murdoch_blocks_news_agg.php. If a news publisher added a simple robots.txt file to the website's web root, the aggregator's

various leading British publications including Daily Mirror and the Daily Record, followed the lead of News International.³¹³

Unlike the actions by News International, which completely prevented aggregators from accessing articles, several U.S. news organizations are responding to aggregators by tracking the use of their original articles online and then seeking licensing terms that create a profit.³¹⁴ The Associated Press was joined by twenty-eight news organizations, including the New York Times and the Washington Post in the creation of NewsRight, a digital content licensing organization.³¹⁵ The company provides publishers with a tag to insert in the HTML code of their stories' headlines and text.³¹⁶ As the article is posted on blogs and aggregated, the encoded stories report to NewsRight's registry.³¹⁷

In addition to the tracking HTML codes utilized by NewsRight, a news publisher has the option to use other simple HTML tags or other technological barriers, such as password protection or forced redirection, when preventing news aggregators from accessing its websites.³¹⁸ Without the ability to scrape content, aggregators must use a manual process, which decreases the likelihood aggregators will include the website's original content on their sites.³¹⁹ These technological fixes, however, come with consequences for news publishers. If aggregators do not have access to a website's original content, the publisher is potentially sacrificing the website's visibility and possible ad revenue.³²⁰ Publishers must carefully weigh these frustrations. For example, if a website wishes to link to Japan's largest business newspaper, the Nikkei,³²¹ an administrator must complete a detailed written application stating its

search engine bot would be forbidden from indexing the content on the website, thus preventing the aggregator from gaining access to the publisher's content. *Block or Remove Pages Using a Robots.txt File*, GOOGLE WEBMASTER TOOLS HELP, <http://support.google.com/webmasters/bin/answer.py?hl=en&answer=156449> (last updated May 7, 2012).

³¹³ *Daily Mirror Website Follows News International to Block NewsNow*, WIRE (Jan. 26, 2010, 10:29 AM), <http://blogs.pressgazette.co.uk/wire/6068>.

³¹⁴ Federica Cherubini, *NewsRight: US Companies Come Together to Monitorize Their Online Content*, EDITORS WEBLOG (Jan. 6, 2012, 6:58 PM), http://www.editorsweblog.org/web_20/2012/01/newsright_us_companies_together_to_monit.php.

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ *Id.*

³¹⁸ Dalal, *supra* note 236, at 1058.

³¹⁹ *Id.* at 1065.

³²⁰ *Id.*

³²¹ *Id.* at 1072; Hiroko Tabuchi, *Japanese Newspaper, in a Twist, Discourages Linking to its Website*, N.Y. TIMES, Apr. 9, 2010, at B6.

reasons for linking to the site.³²² By restricting the public's ability to link to its site, Nikkei seeks to "protect its content, ensure that its paywall would not be breached, and . . . prevent the linking of its content from 'inappropriate' sites,"³²³ which some criticize as outdated thinking towards the Internet.³²⁴

Commentators argue that, ultimately, content owners give an implied license when they take restrictive measures.³²⁵ Furthermore, "the technical distinction between a deep- and surface- link is artificial . . . [so] the analysis for deep-linking to a site's interior page should be consistent with arguments of an implied license for linking to a homepage."³²⁶ Thus, many online commercial interests have turned to preventative measures so users are not able to deep-link the website.³²⁷ With these options available, typically requiring the addition of a simple tag, courts are unlikely to find liability based upon an aggregator's deep-linking.

In Europe, one of these preventative measures, a robots.txt file,³²⁸ was put into question in Copiepresse's infringement case against Google.³²⁹ Google argued that "newspapers had explicitly or implicitly consented to [Google News'] use of their materials by not using standard technical means . . . to stop their publications being indexed by search engines."³³⁰ The Court of Appeal of Brussels rejected this argument on the ground that copyright is a right to prior authorization, not a right to opt out of a particular use.³³¹ While the argument of an implied license failed in Europe, the United States has found implied licenses to exist in the context of search engines storing copyrighted work.

In *Field v. Google Inc.*, an author sued Google because Google's search engine "makes and analyzes copies of each web page it finds and then stores the HTML code from those pages in a temporary location called a cache"; caches are then often included in a user's search results.³³² Because widely recognized and well-publicized protocols are available to content owners who

³²² Dalal, *supra* note 236, at 1072–73; Tabuchi, *supra* note 318.

³²³ Dalal, *supra* note 236, at 1073.

³²⁴ Tabuchi, *supra* note 321.

³²⁵ Lubens, *supra* note 18, at 450–51.

³²⁶ *Id.* at 451.

³²⁷ *Id.* at 450–51.

³²⁸ *Google Loses Copiepresse Appeal*, AUSTRALIAN COPYRIGHT COUNCIL (Sept. 5, 2011), <http://www.copyright.org.au/news-and-policy/details/id/1952/>.

³²⁹ *Id.*

³³⁰ *Id.*

³³¹ *Id.*

³³² *Field v. Google Inc.*, 412 F. Supp. 2d 1106, 1110 (D. Nev. 2006).

want to prevent websites from storing copies of their content, the court ruled that Field's inaction supported an implied license.³³³ News publishers can also use these meta-tags, such as robots.txt, to prevent aggregators from scraping content.³³⁴ The implied license between the author and Google, however, also relied on the author's knowledge of these meta-tags.³³⁵ With many news publishers making their aggravations known with aggregators, it would be difficult for a publisher to make the argument that the copyright owner was not aware of the aggregator's use.³³⁶ Courts, however, should "apply a light touch when interpreting the law in this area" and creating regulations because of the wide availability of self-help mechanisms.³³⁷

In addition to an implied license, copyright owners may be estopped from asserting a copyright claim if four conditions are met: (1) the publisher knew of the aggregator's allegedly infringing conduct; (2) the publisher intended for the aggregator to rely upon his conduct or acted so that the aggregator had a right to believe it was so intended; (3) the aggregator was ignorant of the true facts; and (4) the aggregator detrimentally relied on the publisher's conduct.³³⁸ In *Field*, the court found that all four elements of estoppel were met, especially because the author did not engage in the necessary preventative measures, which the court interpreted as the author's silence regarding his desire to not have his work copied into the cache.³³⁹ Courts, however, have noted the distinction between aggregators and search engines and have not ruled without the required technical expertise to resolve the question.³⁴⁰

CONCLUSION

The United States has set a high bar for copyrightable materials when compared to copyright law governing Australia and the United Kingdom. As noted in Australia's ruling on the issue of copyright and headlines, headlines

³³³ *Id.* at 1116.

³³⁴ *Id.*

³³⁵ *Id.*

³³⁶ *See id.* at 1109, 1116.

³³⁷ Dalal, *supra* note 236, at 1058.

³³⁸ *Field*, 412 F. Supp. 2d at 1116.

³³⁹ *Id.* at 1117. In *Fairfax Media*, the news aggregator also raised an argument regarding estoppel believing that there was an assumption that the publisher would not assert copyright infringement in any reproduction of its original content because the publisher knew about the aggregator's media monitoring service for a long time. The court, however, rejected this argument, finding no evidence of this assumption of an implied license. *Fairfax Media Publ'ns Propriety Ltd. v Reed Int'l Books Austl. Propriety Ltd.* (2010) 189 FCR 109, 49–50 (Austl.).

³⁴⁰ *Righthaven v. Choudhry*, 2011 WL 2976800 (D. Nev. July 21, 2011).

are inseparable from the facts they describe and often are too short to qualify for copyright protection.³⁴¹ Even if copyright subsists in a headline and its accompanying excerpts on a news aggregator's websites, the doctrine of fair use can be used to defend the aggregator's use of original content. The fair use defense as interpreted by U.S. courts affords the law flexibility when dealing with emerging technology, such as news aggregators. Although news aggregators are seen as a hindrance to original content providers, readily available and well-known safety barriers exist, which prevent news aggregators from accessing online content. Thus, courts are likely to place the onus on news publishers to take advantage of these technological measures to defend against news aggregators. Because the Internet was created on a foundation of an open atmosphere for all users, courts cannot be expected to monitor every Internet user who does not use a site the way it was intended, especially when websites have chosen to forgo protective measures.

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³⁴¹ See *Fairfax Media Publ'ns Propriety Ltd. v Reed Int'l Books Austl. Propriety Ltd.* (2010) 189 FCR 109, 149 (Austl.).

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