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A Preliminary First Amendment Analysis of Legislation Treating News Aggregation as Copyright Infringement

Alfred C. Yen

Boston College Law School, alfred.yen@bc.edu

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A Preliminary First Amendment Analysis of Legislation Treating News Aggregation as Copyright Infringement

*Alfred C. Yen**

ABSTRACT

The newspaper industry has recently experienced economic difficulty. Profits have declined because fewer people read printed versions of newspapers, preferring instead to get their news through so-called “news aggregators” who compile newspaper headlines and provide links to stories posted on newspaper websites. This harms newspaper revenue because news aggregators collect advertising revenue that newspapers used to enjoy.

Some have responded to this problem by advocating the use of copyright to give newspapers the ability to control the use of their stories and headlines by news aggregators. This proposal is controversial, for news aggregators often do not commit copyright infringement. Accordingly, the use of copyright to help the newspaper industry would likely require amendment of the existing statute.

This Article analyzes the constitutionality of such potential legislation under the First Amendment. As the Article will show, legislation that treats news aggregation as copyright infringement changes the traditional contours of copyright in ways that expose copyright to serious First Amendment scrutiny. This analysis will show that Congress does not have a completely free hand in choosing how, if at all, to help the newspaper industry. In fact, Congress must be careful not to unduly restrict the practice of news aggregation.

* Professor of Law, Law School Fund Scholar, and Director, Emerging Enterprises and Business Law Program, Boston College Law School. J.D., Harvard Law School, 1983; M.S., Operations Research, Stanford University, 1980; B.S., Mathematics, Stanford University, 1980. The author would like to thank Vanderbilt University Law School and the *Vanderbilt Journal of Entertainment and Technology Law* for hosting the symposium for which this Article was written. Finally, Amanda Perkins and Giselle Rivers must be recognized for their most helpful research assistance. Copyright 2010 by Alfred C. Yen.

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This Article applies the First Amendment to potential copyright legislation giving newspapers¹ the ability to control news aggregation.² Such legislation (referred to as “aggregation control legislation”) potentially maintains or restores the profitability of news organizations that have lost revenue as technology renders old business models obsolete. Applying the First Amendment to such legislation shows that, while Congress may assist a struggling news industry, Congress must act with care to avoid suppressing the free speech rights of news aggregators more than is reasonably necessary to accomplish its legislative goal.

One need not go far to find stories about the declining profitability of newspapers.³ Many have closed,⁴ leaving questions about the future of news itself and the possible effects of that absence on society. If newspapers cannot make enough money reporting the news, then newsgathering itself could disappear, leaving the public without information crucial to everyday life and the democratic process.

1. This Article uses the term “newspapers” to denote traditional print newspapers and others who produce original news stories and distribute them as text in print or electronic form. These other entities include institutions like the Associated Press and, in some cases, radio and television broadcasters.

2. For a description of news aggregation, see *infra* notes 9-11 and accompanying text.

3. See, e.g., Frank Ahrens, *The Accelerating Decline of Newspapers*, WASH. POST, Oct. 27, 2009, at A15, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/10/26/AR2009102603272.html>; Tim Arango, *Fall in Newspaper Sales Accelerates to Pass 7%*, N.Y. TIMES, Apr. 27, 2009, at B3, available at <http://www.nytimes.com/2009/04/28/business/media/28paper.html>; James Surowiecki, *News You Can Lose*, NEW YORKER, Dec. 22, 2008, available at http://www.newyorker.com/talk/financial/2008/12/22/081222ta_talk_surowiecki.

4. See, e.g., Lynn DeBruin & Lisa Ryckman, *Rocky Mountain News to Close, Publish Final Edition Friday*, ROCKY MOUNTAIN NEWS, Feb. 26, 2009, <http://www.rockymountainnews.com/news/pages/special-reports/rocky-sale/> (announcing closure of the Rocky Mountain News); Dan Richman & Andrea James, *Seattle P-I to Publish Last Edition Tuesday*, SEATTLE POST-INTELLIGENCER, Mar. 16, 2009, http://www.seattlepi.com/business/403793_piclosure17.html (announcing last print edition of the Seattle Post-Intelligencer); see also Newspaper Death Watch, <http://www.newspaperdeathwatch.com/> (last visited Apr. 2, 2010) (listing metropolitan daily newspapers that have closed since March 2007).

Although various explanations for the decline of newspapers exist, many commentators—including those who run newspapers—blame news aggregators⁵ that make unauthorized use of news headlines and lead sentences and, as a result, disrupt traditional newspaper business models.⁶ Newspaper profits have not traditionally depended on the straight sale of news content. Instead, newspapers have charged readers a nominal fee for single copies of newspapers and made the bulk of their money from selling advertisements that readers would presumably see.⁷ The Internet changed the newspaper business by making it possible to distribute news more quickly and inexpensively than news sources could through print copies. Newspapers responded by putting their content online, hoping to attract wider readership and, by extension, more eyeballs for which to sell advertisements.⁸

Unfortunately for newspapers, placing content online has not maintained advertising revenue, for the Internet also made it easy for those who did not author news content to deliver and profit from the news. Now, news aggregators can analyze multiple newspaper websites, decide which stories will interest readers, and display information about those stories to readers—generally the headline and a sentence or two from the beginning of the article—along with links to the full story.⁹ Aggregators perform this task in different

5. Examples of news aggregators include Digg, <http://digg.com/> (last visited Apr. 2, 2010); Google News, <http://news.google.com/> (last visited Apr. 2, 2010); Newser, <http://www.newser.com/> (last visited Apr. 2010); Reddit, <http://www.reddit.com/> (last visited Apr. 2, 2010); Yahoo! News, <http://news.yahoo.com/> (last visited Apr. 2, 2010).

6. See Nancy Herther, *AP Challenges Google and Other News Aggregators at Newspaper Conference*, INFORMATION TODAY, Apr. 13, 2009, <http://newsbreaks.infotoday.com/NewsBreaks/AP-Challenges-Google-and-Other-News-Aggregators-at-Newspaper-Conference-53423.asp> (reporting that Associated Press Chairman Dean Singleton was “mad as hell” over damage caused by news aggregators); Arnon Mishkin, *The Fallacy of the Link Economy*, PAIDCONTENT.ORG, Aug. 13, 2009, <http://paidcontent.org/article/419-the-fallacy-of-the-link-economy/> (noting that news executives blame news aggregators for harming newspapers); David Sarno, *Murdoch accuses Google of news “theft”*, L.A. TIMES, Dec. 2, 2009, at B1, available at <http://articles.latimes.com/2009/dec/02/business/la-fi-news-google2-2009dec02> (reporting that Rupert Murdoch accused news aggregators of theft).

7. See John Leibowitz, Chairman, Fed. Trade Comm’n, “Creative Destruction” or Just “Destruction”: How Will Journalism Survive the Internet Age? 4 (Dec. 1, 2009), available at <http://www.ftc.gov/speeches/leibowitz/091201newsmedia.pdf> (stating that newspapers traditionally received 80 percent of their revenue from advertising); Posting of Nicholas Carr (*The Great Unbundling: Newspapers & the Net*) to Encyclopædia Britannica Blog, <http://www.britannica.com/blogs/2008/04/the-great-unbundling-newspapers-the-net/> (Apr. 7, 2008) (describing importance of advertising revenue to traditional print newspapers).

8. See Leibowitz, *supra* note 7, at 4-6 (describing challenges to journalism and news gathering posed by the Internet); Carr, *supra* note 7 (describing changes in news resulting from influence of the Internet, including challenges that arise as newspapers place content online).

9. For examples of aggregators, see *supra* note 5.

ways. Some use an entirely automated process, while others use human editorial choice or a combination of the two.¹⁰ For purposes of this Article, however, the salient feature of news aggregation is its ability to provide a news vehicle that readers prefer to a single newspaper website. Newspapers therefore face declining revenue because fewer readers actually read physical newspapers or browse through newspaper websites. Instead, readers prefer to surf the Internet, visiting news aggregators and clicking only on those stories that readers care to see in full.¹¹ Doing this eventually takes readers to newspaper websites, but newspaper profits are lost because the reader does not browse the newspaper's entire website. The reader instead views only particular articles of interest and returns to the aggregator's site, thereby eliminating opportunities to see further pages—and the ads they contain—on the newspaper's website. Rather, the reader sees more ads displayed by the aggregator, who profits from selling them.¹² Newspapers object to this because they believe that aggregators wrongly piggyback on the appeal of stories written by the newspapers' employees.¹³

The falling profitability of newspapers is a matter of some concern. If gathering and writing news becomes unprofitable for

10. See About Digg, <http://about.digg.com/> (last visited Apr. 2, 2010) (describing how Digg uses community submission and community expressed interest to choose and rank aggregated stories); About Google News, http://news.google.com/intl/en_us/about_google_news.html (last visited Apr. 2, 2010) (explaining Google News's automated process); Posting of Josh Catone (*5 News Aggregation Methods Compared*) to ReadWriteWeb, http://www.readwriteweb.com/archives/news_aggregation_methods.php (July 10, 2007, 12:54 EST) (describing different methods of news aggregation); Posting of Emma Heald (*Google News and Newspaper Publishers, Allies or Enemies?*) to The Editors Weblog, http://www.editorsweblog.org/analysis/2009/03/google_news_and_newspaper_publishers_all.php (Mar. 11, 2009, 15:39 EST) (describing differences between fully automated Google News aggregator and human-edited Drudge Report); Newser: What is Newser?, <http://www.newser.com/what-is-newser.aspx> (last visited Apr. 2, 2010) (stating that Newser combines human editorial judgment and technology); Reddit.com: Help, What is Reddit?, <http://www.reddit.com/help/faq#Whatisreddit> (last visited Apr. 2, 2010) (explaining that Reddit relies on users to submit and rate content).

11. See Eric Alterman, *Out of Print*, NEW YORKER, Mar. 31, 2008, at 48, available at http://www.newyorker.com/reporting/2008/03/31/080331fa_fact_alterman (describing the effect of aggregation on news industry); AM. PRESS INST., NEWSPAPER ECONOMIC ACTION PLAN 3 (May 2009) ("Whole swaths of the American populace have abandoned newspapers or are growing up without the habit of reading them, yet the Websites of news organizations attract more readers than ever. The problem is that the online business model does not yet come close to compensating for the steep slide in the print business model that it is replacing."); *Newspapers Face a Challenging Calculus*, PEW RES. CENTER, <http://pewresearch.org/pubs/1133/decline-print-newspapers-increased-online-news> (describing growing reader preference for getting news online by following links to stories).

12. See Mishkin, *supra* note 6.

13. See *id.*

newspapers, it is at least possible that more newspapers will fold, leaving an information-impooverished public without plentiful, reliable news. Those who worry about this loss of print news, including the members of the newspaper industry, have suggested using copyright to stop news aggregators who act without the permission of the newspapers whose stories are used.¹⁴ This proposal is, of course, controversial. Those who favor it undoubtedly see it as crucial to the maintenance of newsgathering and the prevention of what they consider as theft.¹⁵ Others, however, harbor skepticism about aggregation control legislation, suggesting that aggregation is actually good for newspapers, and that attempts to prop up an outdated business model are unproductive and doomed to fail. For example, in a recent interview, Google CEO Eric Schmidt recognized that newspapers face significant challenges because readers use news aggregators.¹⁶ He asserted that Google creates revenue for newspapers by sending readers to newspaper websites where they will presumably see ads, but that it was not appropriate for Google to pay

14. See Richard Perez-Pena, *A.P. Seeks to Rein in Sites Using its Content*, N.Y. TIMES, Apr. 7, 2009, at B1, available at <http://www.nytimes.com/2009/04/07/business/media/07paper.html> (describing plans of The Associated Press to sue search engines and aggregators making use of Associated Press content); Posting of Neil Netanel (*The Demise of Newspapers: Economics, Copyright, Free Speech*) to Balkinization, <http://balkin.blogspot.com/2008/05/demise-of-newspapers-economics.html> (May 5, 2008 14:47 EST) (stating that a copyright amendment to make sure that aggregators make payments to newspapers may be necessary to preserve reporting); Posting of Richard Posner (*The Future of Newspapers*) to The Becker-Posner Blog, http://www.becker-posner-blog.com/2009/06/the_future_of_n.html (June 23, 2009, 19:37 CST) (“Expanding copyright law to bar online access to copyrighted materials without the copyright holder’s consent, or to bar linking to or paraphrasing copyrighted materials without the copyright holder’s consent, might be necessary to keep free riding on content financed by online newspapers from so impairing the incentive to create costly news-gathering operations that news services like Reuters and the Associated Press would become the only professional, nongovernmental sources of news and opinion.”).

15. See New Zealand Herald, *Google Slammed as “Parasites” of the Internet*, INDEPENDENT, Apr. 7, 2009, <http://www.independent.co.uk/news/media/online/google-slammed-as-parasites-of-the-internet-1664748.html> (reporting statement by the Wall Street Journal managing editor characterizing certain news aggregators as “parasites or tech tapeworms in the intestines of the internet”); Mark G. Contreras, Senior Vice President/Newspapers, E.W. Scripps Co., Statement Before the Federal Trade Commission, Workshop: “How Will News Media Survive the Internet Age?” 3 (Dec. 1, 2009), available at <http://www.ftc.gov/opp/workshops/news/docs/contreras.PDF> (stating, among other things, that newspapers need help licensing their content); Rupert Murdoch, Chairman & CEO, News Corp., From Town Crier to Bloggers: How Will Journalism Survive the Internet Age? 12-14 (Dec. 1, 2009), available at <http://www.ftc.gov/opp/workshops/news/docs/murdoch.PDF> (describing behavior of news aggregators as theft, saying that existing practices are “untenable” over the long run for the production of valuable news, and emphasizing that news organizations must be paid for producing content).

16. Adam Lashinsky, *Google News*, FORTUNE, Jan. 7, 2009, http://money.cnn.com/2009/01/07/technology/lashinsky_google.fortune/.

for content or otherwise help newspapers without a sound business model—something that Google has yet to identify.¹⁷

The application of the First Amendment to aggregation control legislation is important because the First Amendment constrains what Congress can do to help the newspaper industry. News aggregators speak when they tell people about interesting stories, making aggregation control legislation subject to First Amendment review.¹⁸ This does not necessarily mean that such legislation is unconstitutional. Copyright itself regulates speech, but courts have consistently upheld copyright against First Amendment challenges.¹⁹ At the same time, however, the Supreme Court has not given Congress the freedom to pass whatever copyright legislation it wants. In some cases, copyright legislation has been held unconstitutional even though Congress passed it for entirely legitimate reasons.²⁰ Accordingly, some forms of aggregation control legislation may be unconstitutional. It is therefore important to identify the extent to which this proves true, for arguing about the desirability of legislation makes little sense if courts will invalidate the legislation.

The analysis that follows shows that the aggregation control legislation most likely to increase newspaper profits (called “aggressive aggregation control”) probably violates the First Amendment. This may seem surprising given copyright’s general constitutionality.²¹ Existing copyright, however, gives newspapers only modest control over aggregation.²² Thus, aggregation control legislation will not really help newspapers unless it alters copyright to prohibit people from linking or using headlines and lead sentences without permission. These changes to copyright law would mean converting public domain material into private property and reducing the scope of fair use. Courts have already stated that such changes to copyright would create First Amendment problems.²³ Accordingly, the

17. *Id.*; see also Posting of Howard Knopf (*News Aggregators as “Tapeworms”*) to Excess Copyright, <http://excesscopyright.blogspot.com/2009/05/news-aggregators-as-tapeworms.html> (May 17, 2009, 16:23 EST) (arguing that use of copyright to control news aggregation is “regressive” and would only prop up an outdated business model); Posting of David Kravetz (*Murdoch Calls Google, Yahoo Copyright Thieves—Is He Right?*) to Threat Level, <http://www.wired.com/threatlevel/2009/04/murdoch-says-go/> (Apr. 3, 2009, 15:00 EST) (“We suspect Zell and Murdoch are just blowing smoke. If they were not, perhaps they could demand Google and Yahoo remove their news content. The search engines would kindly oblige.”).

18. See *infra* notes 63-89 and accompanying text

19. *Id.*

20. See *infra* notes 82-88 and accompanying text.

21. See *infra* notes 63-82 and accompanying text.

22. See *infra* Part I.

23. See *infra* notes 90-141 and accompanying text.

First Amendment tells us that the expansion of copyright cannot by itself fully address the problems facing the newspaper industry today. As a result, other solutions will also have to be considered.

The Article proceeds in three parts. In Part I, it considers the extent to which existing copyright law restricts the activity of news aggregators. In Part II, it describes the contents of strong aggregation control legislation and considers the extent to which such legislation would survive First Amendment scrutiny, concluding that aggressive aggregation control legislation would likely be found unconstitutional. In Part III, the Article analyzes how Congress might craft constitutional aggregation control legislation and whether such legislation is truly important to the viability of newspapers. It concludes that existing copyright gives newspapers sufficient rights to open the door to mutually beneficial relationships with aggregators that may preserve the economic viability of newspapers.

I. NEWS AGGREGATION AND COPYRIGHT

In order to understand how expanding copyright might help keep the newspaper industry alive, it is necessary to first examine how, if at all, existing copyright limits the behavior of news aggregators. Section 102(a) of the Copyright Act extends copyright protection to all “original works of authorship,”²⁴ and the Supreme Court has held that the standard of originality is low.²⁵ Once a work gains copyright, the Copyright Act grants copyright holders only six exclusive rights: the right to make copies, the right to make derivative works, the right to initially distribute copies of the work, the right to publicly perform the work, the right to publicly display the work, and (for sound recordings) the right to digitally transmit the work.²⁶ The Act also limits the rights of copyright holders by denying protection to certain aspects of otherwise copyrighted works.²⁷ Accordingly, people may freely copy those portions of works that lack sufficient originality—such as short phrases and facts.²⁸ The Copyright Act

24. 17 U.S.C. § 102(a) (2006).

25. See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991) (stating that the standard of originality is “low” and easily satisfied); *Am. Dental Ass'n v. Delta Dental Plans Ass'n*, 126 F.3d 977, 979 (7th Cir. 1997) (same); *CCC Information Servs., Inc. v. Maclean Hunter Mkt. Reports, Inc.*, 44 F.3d 61, 65 (2d Cir. 1994) (same).

26. 17 U.S.C. § 106(1)-(6) (2006).

27. See *id.* § 102(b) (denying protection to, among other things, ideas contained in works).

28. See *Feist*, 499 U.S. at 361-62, 364 (defendant's use of facts and unoriginal compilations of facts cannot be infringement); *Perma Greetings, Inc. v. Russ Berrie & Co., Inc.*, 598 F. Supp. 445, 448-49 (E.D. Mo. 1984) (defendant's use of short phrases not infringement).

gives people a similar right to copy the ideas expressed in a work.²⁹ In cases where context or other necessity renders a particular idea capable of only a limited range of expression, the so-called merger doctrine makes sure that the idea in question remains in the public domain by allowing others to copy even the expression of these ideas.³⁰ Finally, in other cases, the fair use doctrine excuses behavior that would otherwise be infringement.³¹

Together, the rights that the Copyright Act extends give newspapers the ability to control some, but not all, news aggregator practices. For example, a news aggregator that posts a complete copy of a newspaper article or a full size copy of a photograph on its website surely commits infringement because these uses violate the copyright holder's exclusive right to make and distribute copies of the work. At the same time, however, aggregators do not necessarily infringe by linking or the using headlines and lead sentences.

The copyright issues raised by linking are relatively straightforward. Unauthorized linking to a copyrighted work does not amount to infringement because linking does not involve copying, distribution, or the use of any other right that the Copyright Act expressly grants.³² It is therefore highly unlikely that courts would hold a news aggregator liable for infringement simply for linking to a news article.

The copyright issues get a bit more complicated when one considers the reproduction of headlines to give readers a sense of a news article they may want to read. Each of the limitations mentioned above potentially comes into play. Headlines may lack sufficient originality to support copyright. Even if they do, the merger

29. 17 U.S.C. § 102(b) (denying protection to ideas).

30. See *ATC Distrib. Group, Inc. v. Whatever It Takes Transmission & Parts, Inc.*, 402 F.3d 700, 707-08 (6th Cir. 2005) ("Under the merger doctrine, 'when there is essentially only one way to express an idea, the idea and its expression are inseparable [i.e., they merge,] and copyright is no bar to copying that expression.'" (quoting *Kohus v. Mariol*, 328 F.3d 848, 856 (6th Cir. 2003)) (alteration in original)); *Kregos v. Associated Press*, 937 F.2d 700, 705 (2d Cir. 1991) ("[E]xpression is not protected in those instances where there is only one or so few ways of expressing an idea that protection of the expression would effectively accord protection to the idea itself."); *Kern River Gas Transmission Co. v. Coastal Corp.*, 899 F.2d 1458, 1463 (5th Cir. 1990) (stating that there is no copyright when idea and expression merge).

31. 17 U.S.C. § 107 (2006) (establishing fair use for certain uses of works, including some uses for purposes of news reporting); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 582-83 (1994) (defining fair use for parodic uses that do not supplant the market for copyrighted original); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984) (defining fair use for certain noncommercial reproduction of copyrighted works).

32. *Ticketmaster Corp. v. Tickets.Com, Inc.*, No. CV 99-7654 HLH (BQRx), 2000 U.S. Dist. LEXIS 4553, at *6 (C.D. Cal. Mar. 27, 2000) ("[H]yperlinking does not itself involve a violation of the Copyright Act ... since no copying is involved."); see also Mark Sableman, *Link Law Revisited: Internet Linking Law at Five Years*, 16 BERKELEY TECH. L.J. 1273, 1297 (2001).

of idea and expression will sometimes prevent them from being copyrighted.³³ Finally, the fair use doctrine will probably excuse at least some aggregator use of headlines.³⁴

As noted earlier, copyright protects “original works of authorship,”³⁵ and it is easy for a work to qualify as original.³⁶ Entire news articles therefore easily gain copyright, but headlines frequently do not because their brevity renders them unoriginal. In fact, courts have a long history of denying copyright to short words and phrases.³⁷ For example, in *Perma Greetings, Inc. v. Russ Berrie & Co., Inc.*, the phrases “[a]long the way take time to smell the flowers” and “good friends are hard to find” were denied copyright for want of originality.³⁸ Cases like this imply that ordinary headlines such as “Red Sox Defeat Yankees” and “Obama Nominates Sotomayor” would lack sufficient originality to merit copyright protection. Perhaps courts would consider longer, more creative headlines like “Sox Sink Slowly in September” original. Even so, the merger of idea and expression and the fair use doctrine would shield the behavior of at least some news aggregators.

To see how the merger of idea and expression affect the copyrightability of even original headlines, consider the hypothetical headline “Sox Sink Slowly in September.” This cleverly expresses the idea that the Red Sox are slowly losing ground (yet again!) in the

33. Copyright clearly does not protect ideas. 17 U.S.C. § 102(b) (2006). Instead, copyright protects only the original expression of ideas. See *Baker v. Selden*, 101 U.S. 99, 101-104 (1880) (distinguishing between the ideas and concepts expressed in a book that copyright does not protect, and the explanation of those items that copyright does protect); *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930) (copyright does not protect a playwright’s ideas, only the expression of those ideas). The distinction between a work’s ideas and their expression is sometimes referred to as the idea/expression dichotomy. See *Kregos*, 937 F.2d at 707 (citing *Nichols* and referring to the idea/expression dichotomy). As noted earlier, in some cases, copyright still does not protect the expression of an idea if the idea is capable of only a limited number of expressions. When this happens, the idea and its expression have merged, and courts deny copyright protection to both the idea and its expression. See *supra* note 30 and accompanying text.

34. See *infra* notes 41-59 and accompanying text.

35. See *supra* note 24 and accompanying text.

36. See *supra* note 25 and accompanying text.

37. See *Southco, Inc. v. Kanebridge Corp.*, 390 F.3d 276, 286-87 (3d Cir. 2004) (following practice of denying copyright to short phrases); *CMM Cable Rep., Inc. v. Ocean Coast Props., Inc.*, 97 F.3d 1504, 1519 (1st Cir. 1996) (“It is axiomatic that copyright law denies protection to ‘fragmentary words and phrases.’” (quoting 1 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 2.01[B], at 2-13 to 2-18 (1995))); *Alberto-Culver Co. v. Andrea Dumon, Inc.*, 466 F.2d 705, 711 (7th Cir. 1972) (denying copyright to phrase “most personal sort of deodorant”); *Kitchens of Sara Lee, Inc. v. Nifty Foods Corp.*, 266 F.2d 541, 544 (2d Cir. 1959) (endorsing as a “fair summary of the law” a Copyright Office regulation denying copyright and registration to short phrases).

38. 598 F. Supp. 445, 448-49 (E.D. Mo. 1984).

American League East pennant race. In theory, people could express this idea in countless ways, with each separate expression qualifying for its own copyright. A person writing a headline, however, has very limited space in which to express herself, and there are only a limited number of ways to express the idea of the Sox losing the pennant race in five words or fewer. If copyright allowed the monopolization of each of these expressions, future headline writers could easily find themselves in a situation where they could not express the idea without risking infringement. This would mean effective ownership of the underlying idea, an unacceptable result given that the Copyright Act explicitly denies protection for ideas.³⁹ Courts would therefore probably deny copyright to many headlines under the principle of merger.⁴⁰

The availability of fair use to excuse potentially infringing uses of headlines will likely depend on how courts define the market for news articles. Under § 107 of the Copyright Act, fair use depends on four factors: (1) the nature of the defendant's use, (2) the amount of the borrowing, (3) the nature of the copyrighted work, and (4) the effect of the use on the market for the copyrighted original.⁴¹ The leading case of *Kelly v. Arriba Soft*⁴² indicates that such a four-factor test would shield the use of headlines to give potential readers a sense of the news articles to which aggregators link.

In *Kelly*, the defendant Arriba Soft operated a search engine that displayed so-called thumbnail images to users as search results.⁴³ Arriba Soft obtained those images by copying original, full-size images from Internet sites and producing smaller, lower quality images for display to users. Users who wanted to see full-size images then had to click through to the original websites displaying the full-size images. The plaintiff Kelly sued when Arriba Soft copied thirty-five images from Kelly's website and used thumbnail versions as search results.⁴⁴ The District Court granted summary judgment for Arriba Soft, ruling

39. See 17 U.S.C. § 102(b).

40. See *supra* note 30 and accompanying text. Interestingly, the influence of automated search engines and news aggregation has led to the use of straightforward headlines of the sort less likely to support copyright. See Steve Lohr, *This Boring Headline is Written for Google*, N.Y. TIMES, Apr. 9, 2006, available at <http://www.nytimes.com/2006/04/09/weekinreview/09lohr.html> (describing how search engines find stories with plain headlines more easily).

41. 17 U.S.C. § 107 (2006).

42. 336 F.3d 811 (9th Cir. 2003).

43. *Id.* at 815.

44. *Id.* at 815-16.

that fair use protected its use of the thumbnail images.⁴⁵ The Ninth Circuit affirmed.⁴⁶

With respect to factor one of the fair use analysis, the court recognized that Arriba Soft used the copyrighted works for commercial purposes, and that this weighed against fair use.⁴⁷ This did not mean, however, that factor one counted against Arriba Soft. The court noted that Arriba Soft's use, while commercial, actually enhanced access to Kelly's images without supplanting the need for the originals. The smaller, lower quality thumbnails only informed users about the desirability of viewing the full size original. Users would not consider the thumbnails as substitutes for the originals because the low quality reproductions lacked too many details. This swung factor one in Arriba Soft's favor.⁴⁸

The court then found that factor two favored Kelly because Kelly's works were creative.⁴⁹ This followed well-established precedent holding that the use of factual works is more likely to be fair because facts are in the public domain and should be widely disseminated.⁵⁰ The court also noted that Kelly had already published his works, a fact that counted somewhat in the defendant's favor.⁵¹ This was not enough, however, to swing factor two for Arriba Soft.⁵²

Factor three came out neutral despite Arriba Soft's copying of the entire images in question.⁵³ Normally, such wholesale copying would resolve factor three in Kelly's favor.⁵⁴ Here, however, the particular purpose of the copying justified copying the entire image

45. *Id.* at 816.

46. *Id.* at 822. The court reversed the district court on the issue of whether fair use shielded Arriba Soft's use of full-sized images and remanded for further consideration on this issue alone. *Id.*

47. *Id.* at 818.

48. *Id.* at 818-20.

49. *Id.* at 820.

50. *See, e.g.,* *Stewart v. Abend*, 495 U.S. 207, 237 (1990) ("In general, fair use is more likely to be found in factual works than in fictional works."); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 563 (1985) ("The law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy.");

51. *Kelly*, 336 F.3d at 820.

52. *Id.*; *see also Harper & Row*, 471 U.S. at 564 (fair use more easily applies to uses of published works than unpublished ones).

53. *Kelly*, 336 F.3d at 821.

54. *See, e.g.,* *Wall Data Inc. v. L.A. County Sherriff's Dep't*, 447 F.3d 769, 780 (9th Cir. 2006) (verbatim copy of entire work weighs against fair use); *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 925 (2d Cir. 1994) (copying of entire articles counted against finding of fair use).

because the images would be unrecognizable unless copied in their entirety.⁵⁵

The court finished its fair use analysis with the conclusion that factor four favored Arriba Soft.⁵⁶ The opinion identified two primary markets for Kelly's photos. These included attracting users to Kelly's website where he sold advertisements, and selling or licensing Kelly's photos for others' use.⁵⁷ Arriba Soft's use of Kelly's images did not materially affect either market. The court wrote:

By showing the thumbnails on its results page when users entered terms related to Kelly's images, the search engine would guide users to Kelly's web site [sic] rather than away from it. Even if users were more interested in the image itself rather than the information on the web page, they would still have to go to Kelly's site to see the full-sized image. The thumbnails would not be a substitute for the full-sized images because the thumbnails lose their clarity when enlarged. If a user wanted to view or download a quality image, he or she would have to visit Kelly's web site. This would hold true whether the thumbnails are solely in Arriba's database or are more widespread and found in other search engine databases.

Arriba's use of Kelly's images also would not harm Kelly's ability to sell or license his full-sized images. Arriba does not sell or license its thumbnails to other parties. Anyone who downloaded the thumbnails would not be successful selling full-sized images enlarged from the thumbnails because of the low resolution of the thumbnails. There would be no way to view, create, or sell a clear, full-sized image without going to Kelly's web sites.⁵⁸

In some ways, the case for shielding aggregator use of headlines as fair use is stronger than the case for shielding search engine use of thumbnails. Aggregators use headlines in the same way that search engines use thumbnails—namely, to give people a sense of whether they would like to look at something in more detail. Headlines are generally factual in nature, making them particularly good candidates for fair use treatment.⁵⁹ Additionally, headlines comprise only small parts of news articles, while thumbnails reproduce entire images. Finally, readers are unlikely to consider headlines as a substitute for an entire article, making the effect on the market for the copyrighted original small.

There is, however, a wrinkle. Although readers are the obvious market for copyrighted news articles, one could argue that potential advertisers comprise the true market. After all, newspapers sell their content as vehicles for attracting viewers of advertisements. To the

55. *Id.*

56. *Id.* at 821-22.

57. *Id.* at 821.

58. *Id.* at 821-22. More recently, the Ninth Circuit reached a similar conclusion with respect to Google's use of thumbnails as part of its image search function. *See Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701, 719-25 (9th Cir. 2007).

59. *See supra* note 50 and accompanying text.

extent that publication of headlines allows news aggregators to lure away advertisers who would otherwise pay to advertise on newspaper sites, the effect on the market for the copyrighted work may be strong enough to warrant denial of fair use. That said, one should be careful about considering such “substitution” to be determinative of fair use. Ordinary search engines attract advertisements by displaying search results that convey the substance of copyrightable web pages that might otherwise gain such revenue themselves. Courts have not shown an inclination to treat search engines as mass infringers.⁶⁰ Thus, at the very least, it seems likely, but not certain, that courts would use fair use to shield at least some instances of news aggregation.

The same doctrines that governed aggregator use of headlines also govern aggregators’ use of lead sentences. Here, however, courts likely will find lead sentences copyrightable. Lead sentences are probably original because they are longer than headlines. Courts would therefore be much less likely to deny copyright to lead sentences than to headlines because it would be hard to call lead sentences short phrases. Moreover, although lead sentences often express ideas in a brief, focused way, the range of possible constructions for lead sentences is probably larger than for headlines, making it unlikely that a court would deny copyright because the idea and expression had merged. Fair use, however, remains a distinct possibility. As was the case for headlines, an aggregator’s use of a lead sentence is comparable to the use of a thumbnail. The nature of the original copyrighted work remains factual, and the amount borrowed is small. Finally, it is still quite unlikely that readers consider a lead sentence a full substitute for the original. Aggregators will therefore find protection, if at all, under the fair use doctrine.

II. A FIRST AMENDMENT ANALYSIS OF AGGREGATION CONTROL LEGISLATION

Copyright does not give newspapers reliable protection against every instance of aggregation. Although in some instances newspapers could successfully sue aggregators for infringement, in others, newspapers would fail. Accordingly, aggregation control legislation would help newspapers only by aggressively closing gaps in existing copyright law. This would include: (1) defining newspaper

60. See *Perfect 10 v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007) (preliminary injunction against Google vacated even though the search engine made use of plaintiff’s copyrighted images).

headlines and lead sentences as copyrightable subject matter even if they lack originality or represent the merger of idea and expression, (2) curtailing the scope of fair use,⁶¹ and (3) treating links as a form of infringement.⁶² Together, these changes would effectively make news aggregation illegal without the consent of newspapers whose articles get aggregated.

A First Amendment analysis of such legislation starts with the relationship between copyright and free speech. At first inspection, copyright seems to conflict with the First Amendment's command that Congress shall make "no law" abridging freedom of speech.⁶³ Courts generally treat the reproduction and distribution of texts as speech,⁶⁴ so the Copyright Act clearly infringes speech by preventing the unauthorized copying and distribution of copyrighted works.⁶⁵

What, then, keeps copyright from violating the First Amendment? The Supreme Court has drawn attention to two features of copyright to answer this question. First, copyright acts as an incentive for the production of speech by permitting commercial

61. See Perez-Pena, *supra* note 14 (describing efforts to force aggregators to pay for using headlines and small amounts of text and stating that news organizations have been reluctant to bring copyright suits for fear of losing on grounds of fair use).

62. See Posner, *supra* note 14 (suggesting expansion of copyright "to bar linking to or paraphrasing copyrighted materials without the copyright holder's consent" in order to protect news industry).

63. U.S. CONST. amend. I.

64. See *Neb. Press Ass'n v. Stuart*, 427 U.S. 539 (1976) (applying First Amendment to prevent injunction stopping press from publishing accounts of confessions to law enforcement); *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971) (First Amendment protects publication of classified study "History of U.S. Decision-Making Process on Viet Nam Policy").

65. See 17 U.S.C. § 106 (2006) (granting authors exclusive right to reproduction and distribution of copyrighted works); 17 U.S.C. § 502 (providing injunctive relief against infringers). For articles analyzing the conflict between copyright and the First Amendment, see DAVID L. LANGE & H. JEFFERSON POWELL, *NO LAW: INTELLECTUAL PROPERTY IN THE IMAGE OF AN ABSOLUTE FIRST AMENDMENT* (2009); C. Edwin Baker, *First Amendment Limits on Copyright*, 55 VAND. L. REV. 891 (2002); Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354 (1999); Robert C. Denicola, *Copyright and Free Speech: Constitutional Limitations on the Protection of Expression*, 67 CAL. L. REV. 283 (1979); Paul Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983 (1970); Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147 (1998); Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1 (2001); Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180 (1970); L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 VAND. L. REV. 1 (1987); Pamela Samuelson, *Reviving Zacchini: Analyzing First Amendment Defenses in Right of Publicity and Copyright Cases*, 57 TUL. L. REV. 836 (1983); Lionel S. Sobel, *Copyright and the First Amendment: A Gathering Storm?*, 19 COPYRIGHT L. SYMP. (ASCAP) 43 (1971); Alfred C. Yen, *A First Amendment Perspective on the Idea/Expression Dichotomy and Copyright in a Work's "Total Concept and Feel"*, 38 EMORY L.J. 393 (1989); Diane Leenheer Zimmerman, *Information as Speech, Information as Goods: Some Thoughts on Marketplaces and the Bill of Rights*, 33 WM. & MARY L. REV. 665 (1992).

exploitation of that speech.⁶⁶ Second, doctrines like originality, the idea/expression dichotomy, and fair use guarantee many free uses of copyrighted works.⁶⁷ This lessens copyright's impact on free speech, allowing copyright's pro-speech incentives to outweigh its restrictions on speech. Two Supreme Court cases, *Harper & Row v. The Nation Enterprises, Inc.*⁶⁸ and *Eldred v. Ashcroft*,⁶⁹ establish this understanding of copyright and the First Amendment.

In *Harper*, the Court considered a dispute arising from defendant *The Nation's* publication of an article about former President Gerald Ford's memoir *A Time to Heal: The Autobiography of Gerald R. Ford*.⁷⁰ Harper & Row, the memoir's publisher, promoted the book by arranging for *Time* magazine to publish excerpts before the public could buy the book. In the days leading up to public sale of *A Time to Heal*, *The Nation's* editor, Victor Navasky, obtained a copy of Ford's book from an unauthorized source. This enabled *The Nation* to publish an article that summarized portions of the book and quoted some of Ford's language. *Time* subsequently canceled its contract for early publication of excerpts. Harper & Row then sued *The Nation* for copyright infringement.⁷¹

Harper is famous for applying the fair use doctrine. For purposes of this Article, however, particular attention must be paid to *The Nation's* assertion that the First Amendment required a ruling in its favor. *The Nation* claimed that the public's interest in reading a former president's exact words outweighed any copyright-based right to control the book's first publication.⁷² The Supreme Court rejected this argument and stated that doctrines like the idea/expression dichotomy and the fair use doctrine ameliorated potential conflicts between copyright and the First Amendment. According to the Court, these doctrines allowed the public to make free use of certain portions of works while reserving to authors sufficient rights to encourage speech.⁷³ The Court wrote, "In our haste to disseminate news, it should not be forgotten that the Framers intended copyright itself to

66. See *infra* note 73 and accompanying text.

67. See *infra* notes 73-82 and accompanying text.

68. 471 U.S. 539 (1985).

69. 537 U.S. 186 (2003).

70. 471 U.S. at 542-43.

71. *Id.*

72. *Id.* at 555-56.

73. *Id.* at 556 (endorsing statement by Second Circuit that the idea/expression dichotomy "[strikes] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression" (quoting *Harper & Row, Publishers, Inc. v. Nation Enters.*, 723 F.2d 195, 203 (2d Cir. 1983)) (alteration in original)).

be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas."⁷⁴ This economic incentive justified copyright's effects on free speech, especially when the idea/expression dichotomy and fair use keep copyright's effects on speech reasonably small.⁷⁵

The Supreme Court further elaborated on the relationship between copyright and the First Amendment in *Eldred v. Ashcroft*,⁷⁶ a case that laid the framework for how courts should assess copyright legislation under the First Amendment. In *Eldred*, the plaintiff challenged the constitutionality of the Copyright Term Extension Act (CTEA), a piece of legislation that added twenty years to the duration of all existing and prospective copyrights.⁷⁷ The plaintiff contended that the CTEA was a content-neutral regulation of speech that could not survive the elevated scrutiny that the First Amendment requires.⁷⁸ The Court disagreed, however, and applied the less exacting rational basis test to the CTEA.⁷⁹ This led to the conclusion that the CTEA did not violate the First Amendment.⁸⁰

Justice Ginsburg's majority opinion drew heavily upon *Harper*. She repeated *Harper's* observations that copyright promotes speech and that the idea/expression dichotomy and fair use keep copyright from unduly restricting speech:

In addition to spurring the creation and publication of new expression, copyright law contains built-in First Amendment accommodations. First, it distinguishes between ideas and expression and makes only the latter eligible for copyright protection. . . . As we said in *Harper & Row*, this "idea/expression dichotomy strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression." Due to this distinction, every idea, theory, and fact in a copyrighted work becomes instantly available for public exploitation at the moment of publication.

74. *Id.* at 558.

75. *Id.* at 560. The Court stated that,

In view of the First Amendment protections already embodied in the Copyright Act's distinction between copyrightable expression and uncopyrightable facts and ideas, and the latitude for scholarship and comment traditionally afforded by fair use, we see no warrant for expanding the doctrine of fair use to create what amounts to a public figure exception to copyright.

Id.

76. 537 U.S. 186 (2003).

77. *Id.* at 192-93.

78. *Id.* at 193-94.

79. *Id.* at 213 (discussing rational basis for the CTEA).

80. *Id.* at 222.

Second, the “fair use” defense allows the public to use not only facts and ideas contained in a copyrighted work, but also expression itself in certain circumstances.⁸¹

This did not mean, however, that Congress had complete freedom to rewrite copyright as it pleased. To the contrary, copyright legislation could escape more searching First Amendment scrutiny only if “Congress has not altered the traditional contours of copyright protection.”⁸²

Unfortunately, Justice Ginsburg did not define what it means to alter the traditional contours of copyright. However, it seems that an understanding of the traditional contours ought to include long-standing doctrines that limit the scope of copyright because those are the very limits that allow copyright’s incentives to outweigh its restriction on speech.

For example, consider the effect of eliminating or significantly weakening the idea/expression dichotomy. Copyright leaves ideas in the public domain so that people may use ideas as they see fit.⁸³ Protecting ideas would shrink the public domain, decreasing the free use of ideas and, by extension, diminishing free speech. This would upset the balance between copyright’s incentives and restrictions on speech. It is, of course, theoretically possible that any given increase in the scope of copyright might encourage more speech than it suppresses, but this does not mean that courts should merely accept such a possibility under a rational basis test. As the Supreme Court suggested in *Eldred*, courts should apply elevated scrutiny to such a change in copyright’s traditional contours in order to make sure that copyright’s incentives still justify its restrictions on speech.⁸⁴

Brief reflection reveals further traditional contours that Congress should not be able to alter without exposing copyright to elevated scrutiny. Weakening or eliminating fair use would restrict speech in ways that the *Eldred* Court considered important to the copyright/First Amendment balance.⁸⁵ Additionally, extending copyright protection to unoriginal material would have an effect

81. *Id.* at 219 (citations omitted).

82. *Id.* at 221.

83. *Id.* at 219. The Court stated:

As we said in *Harper & Row*, this “idea/expression dichotomy strikes a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author’s expression.” Due to this distinction, every idea, theory, and fact in a copyrighted work becomes instantly available for public exploitation at the moment of publication.

Id. (citation omitted).

84. *See supra* note 82 and accompanying text.

85. *See* 537 U.S. at 219-200 (discussing the importance of fair use to copyright/First Amendment balance).

similar to the elimination or weakening of the idea/expression dichotomy. People presently have the freedom to use unoriginal material in the same manner as ideas because both are in the public domain.⁸⁶ Extending copyright protection to unoriginal material would therefore burden speech just as eliminating or weakening the idea/expression dichotomy would.⁸⁷ Finally, consider what would happen if Congress began adding entirely new substantive rights to copyright. Each of those new rights would prohibit free uses of works that people presently enjoy, uses that would otherwise be considered free speech.⁸⁸

Aggressive aggregation control legislation would therefore alter the traditional contours of copyright in ways that require elevated First Amendment scrutiny. Making newspaper headlines and lead sentences copyrightable subject matter would push copyright beyond the boundaries that the idea/expression dichotomy and originality set. Prohibiting linking would be the equivalent of adding a new substantive right to copyright, and it would shrink the scope of fair use. Given the *Eldred* Court's clear statement about the relationship between copyright and the First Amendment, a court could not apply the rational basis test to our hypothesized legislation without overlooking its responsibility to make sure that copyright's encouragement of speech outweighs its suppression of speech.⁸⁹

So what would the application of elevated scrutiny to copyright involve? Two cases, *Turner Broadcasting System, Inc. v. Federal Communications Commission*⁹⁰ and *Golan v. Holder*,⁹¹ offer important

86. See *supra* notes 24-29 and accompanying text.

87. See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346 (1991) ("Originality is a constitutional requirement.").

88. See *Golan v. Gonzales*, 501 F.3d 1179, 1187-92 (10th Cir. 2007) (applying elevated scrutiny to copyright legislation removing works from the public domain).

89. Not every court has applied elevated scrutiny to copyright legislation in the wake of *Eldred*. Most notably, in *Kahle v. Gonzales*, 487 F.3d 697 (9th Cir. 2007), the Ninth Circuit applied a deferential standard of review to aspects of the CTEA that allowed copyright holders to maintain their copyrights without complying with various statutory formalities. *Id.* at 698-700. The court refused to apply elevated scrutiny on the ground that the Supreme Court had already found the CTEA constitutional in *Eldred*. *Id.* at 700. *Kahle* has relatively little to say about when a court should apply elevated First Amendment scrutiny to copyright legislation because the Ninth Circuit saw the case as an attempt to re-litigate *Eldred*. It would therefore be incorrect to read *Kahle* as standing for the proposition that all First Amendment review of copyright legislation should be deferential. For contrasting analyses of this question, see David S. Olson, *First Amendment Interests and Copyright Accommodations*, 50 B.C. L. REV. 1393 (2009) (arguing that there are many situations in which courts should apply elevated First Amendment scrutiny); Marybeth Peters, *Constitutional Challenges to Copyright Law*, 30 COLUM. J.L. & ARTS 509 (2007) (arguing that courts are properly unwilling to use the First Amendment to invalidate copyright legislation).

90. 520 U.S. 180 (1997).

clues. *Turner* involved a First Amendment challenge to the “must-carry” provisions of the Cable Television Consumer Protection and Competition Act of 1992 that required cable television operators to dedicate some of their channels to the signals of conventional broadcast channels.⁹² The plaintiffs sued, complaining that forcing cable network operators to carry the signals of conventional broadcasters violated the First Amendment rights of cable network operators.⁹³ The Court rejected this challenge.⁹⁴

The Court began its analysis by characterizing the must-carry provisions as a content-neutral, as opposed to content-based, regulation of speech, thereby controlling the level of scrutiny that the Court would apply to the statute.⁹⁵ Content-based regulation suppresses speech because of the ideas that the speech in question expresses,⁹⁶ whereas content-neutral regulation suppresses speech without reference to the ideas contained in the speech.⁹⁷ Thus, a law prohibiting speech advocating the legalization of gay marriage would be content-based because it suppresses only speech expressing a particular point of view. Content-neutral regulation includes laws prohibiting burning of draft cards and reasonable regulations governing the use of parks, even if those regulations prevent speech activities.⁹⁸ Courts apply strict scrutiny to content-based regulations because they amount to censorship favoring some ideas over others.⁹⁹ It makes sense to find these regulations unconstitutional absent compelling justification from the government. Content-neutral

91. 611 F. Supp. 2d 1165 (D. Colo. 2009).

92. 520 U.S. at 185.

93. *Id.* at 185-86.

94. *Id.* at 185.

95. *Id.* at 189.

96. *See United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 811-12 (2000) (statute found content-based because it suppressed certain speech on the basis of its content); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382-83 (1992) (government may not proscribe speech because it disapproves of the ideas expressed); *Boos v. Barry*, 485 U.S. 312, 329-30 (1988) (law prohibiting display of any sign within 500 feet of a foreign embassy if sign is critical or offensive to that foreign government is content-based regulation).

97. *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986) (content-neutral speech regulations are justified without reference to the content of the speech).

98. *See Thomas v. Chi. Park Dist.*, 534 U.S. 316, 325 (2002) (upholding permit requirement for use of park); *Clark v. Cmty for Creative Non-Violence*, 468 U.S. 288, 289 (1984) (upholding restrictions on sleeping in park even though demonstrators wanted to draw attention to plight of the homeless by sleeping in a public park); *United States v. O'Brien*, 391 U.S. 367 (1968) (law prohibiting burning of draft card upheld against challenge from individual burning draft card in protest).

99. *See Playboy Entm't Group*, 529 U.S. at 813 (content-based restriction must satisfy strict scrutiny); *Boos*, 485 U.S. at 321-22 (content-based regulation subject to “most exacting” scrutiny).

regulations, however, pose less obvious threats to speech. Park use regulations do not favor some ideas over others; they merely promote the orderly use of public resources. The lower threat to free speech associated with content-neutral regulation justifies less searching constitutional review. This level of review is not cursory, but falls in between the deferential methods of the rational basis test and the practical guarantee of unconstitutionality associated with strict scrutiny.¹⁰⁰ Accordingly, courts will find a content-neutral regulation constitutional "if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests."¹⁰¹

In *Turner*, the important governmental interest at stake was the economic health of the conventional broadcast industry.¹⁰² The Court wrote:

Congress expressed clear concern that the "marked shift in market share from broadcast television to cable television services," resulting from increasing market penetration by cable services, as well as the expanding horizontal concentration and vertical integration of cable operators, combined to give cable systems the incentive and ability to delete, reposition, or decline carriage to local broadcasters in an attempt to favor affiliated cable programmers. Congress predicted that "absent the reimposition of [must-carry], additional local broadcast signals will be deleted, repositioned, or not carried," with the end result that "the economic viability of free local broadcast television and its ability to originate quality local programming will be seriously jeopardized."¹⁰³

Keeping conventional broadcasters healthy served three interrelated interests: preserving the benefits of free, over-the-air broadcasting; encouraging the broad distribution of information from multiple sources; and promoting fair competition in television programming.¹⁰⁴ After lengthy analysis, the Court accepted the government's claim that the must-carry rules served these purposes.¹⁰⁵

Next, the Court found that the must-carry provisions served this interest without undue burdens on speech.¹⁰⁶ The Court identified two ways in which must-carry might infringe the free

100. See *Bartnicki v. Vopper*, 532 U.S. 514, 548 (2001) (referring to the "often fatal standard of strict scrutiny"); *Lyng v. Int'l Union*, 485 U.S. 360, 370 (1988) (rational basis test of legislation is "quite deferential").

101. *Turner Broad. Sys., Inc. v. F.C.C.*, 520 U.S. 180, 189 (1997).

102. *Id.* at 189-90.

103. *Id.* at 191.

104. *Id.* at 189.

105. *Id.* at 190-213.

106. *Id.* at 215-16 ("Because the burden imposed by must-carry is congruent to the benefits it affords, we conclude must-carry is narrowly tailored to preserve a multiplicity of broadcast stations.").

speech of cable operators.¹⁰⁷ First, it might interfere with their editorial discretion in deciding what programming to carry.¹⁰⁸ Second, the reduction in available channels might impair the ability of cable operators to compete for future carriage.¹⁰⁹ Neither of these burdens proved significant.¹¹⁰ Cable operators satisfied the must-carry provisions by using unused channel capacity 87 percent of the time.¹¹¹ Very few operators had to drop programming in order satisfy must-carry, and only 1.18 percent of cable channel capacity was directed to must-carry nationwide.¹¹² Indeed, cable operators voluntarily carried most conventional over-the-air channels.¹¹³ Although the plaintiffs suggested potentially less restrictive methods for achieving the purposes of must-carry, the Court chose not to second-guess Congress' judgment about how to regulate the cable television industry because of the relatively modest speech burdens imposed by the must-carry provisions.¹¹⁴

*Golan v. Holder*¹¹⁵ involved, among other things, a First Amendment challenge to the constitutionality of § 514 of the Uruguay Round Agreements Act,¹¹⁶ now codified at 17 U.S.C. § 104A.¹¹⁷ This provision implemented certain portions of the Berne Convention¹¹⁸ by granting copyright to certain works written by foreign authors after those works had fallen into the public domain.¹¹⁹ The plaintiffs sued the U.S. government to complain that § 514 deprived them of their right to use these works freely and without charge.¹²⁰

The District Court originally granted summary judgment to the Government.¹²¹ In so ruling, the District Court relied on cases—

107. *Id.* at 214.

108. *Id.*

109. *Id.*

110. *Id.* (“Appellants say the burden of must-carry is great, but the evidence adduced on remand indicates the actual effects are modest.”).

111. *Id.*

112. *Id.*

113. *Id.* at 215.

114. *Id.* at 215-16 (“Because the burden imposed by must-carry is congruent to the benefits it affords, we conclude must-carry is narrowly tailored.”).

115. 611 F. Supp. 2d 1165 (D. Colo. 2009).

116. *Id.* at 1167.

117. 17 U.S.C. § 104A (2006).

118. Berne Convention for the Protection of Literary and Artistic Works, *adopted* Sept. 9, 1886, S. Treaty Doc. No. 99-27, 1161 U.N.T.S. 3.

119. *Holder*, 611 F. Supp. 2d at 1168.

120. *Id.*

121. *Id.*; *Golan v. Gonzales*, No. Civ.01-B-1854(BNB), 2005 WL 914754, at *17 (D. Colo. Apr. 20, 2005).

including *Eldred*¹²²—that considered copyright generally consistent with the First Amendment.¹²³ The court then applied a rational basis test to § 514 and unsurprisingly found it constitutional.¹²⁴

The Tenth Circuit reversed and remanded.¹²⁵ Unlike the District Court, the Tenth Circuit found that Congress did not traditionally remove material, particularly entire works, from the public domain.¹²⁶ This meant that § 514 changed the traditional contours by granting copyright to certain foreign works already in the public domain.¹²⁷ Accordingly, the Tenth Circuit sent the case back to the District Court with instructions to review § 514 under elevated scrutiny.¹²⁸

On remand, the District Court applied elevated scrutiny to § 514 and found the provision unconstitutional.¹²⁹ The court first found that § 514 was content-neutral because the law selected speech for suppression simply because the speech made unauthorized use of certain copyrighted works, and not because of the ideas expressed.¹³⁰ The court then considered three proffered reasons for the law: (1) compliance with treaty obligations under the Berne Convention, (2) protection for the interests of U.S. authors abroad, and (3) correction of historical inequities.¹³¹ None proved sufficient for the statute to pass constitutional muster.

The court agreed that the United States had to live up to its treaty obligations, but this did not obviate the need to balance the government's interest against the First Amendment rights of the plaintiffs.¹³² In this case, the restoration of copyright to works previously in the public domain burdened rights "near the core of the First Amendment."¹³³ Section 514 contained some minor exceptions that marginally decreased its burden on speech, but the court did not consider these to be at all significant.¹³⁴ The court then noted that the government actually had considerable discretion about how it chose to

122. *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

123. *Gonzales*, 2005 WL 914754 at *17.

124. *Id.* at *15-*18.

125. *Golan v. Gonzales*, 501 F.3d 1179, 1182 (10th Cir. 2007).

126. *Id.* at 1188-92.

127. *Id.* at 1192.

128. *Id.* at 1196-97.

129. *Golan v. Holder*, 611 F. Supp. 2d 1165, 1170-77 (D. Colo. 2009).

130. *Id.* at 1170.

131. *Id.* at 1172.

132. *Id.* at 1172-73.

133. *Id.* at 1173.

134. *Id.* (finding that the amount of speech subject to suppression is substantial).

implement its treaty obligations.¹³⁵ For example, the government could have given those most affected by § 514 extended rights to make free use of works being removed from the public domain.¹³⁶ The decision not to do so meant that § 514 was substantially broader than necessary to serve the government's interest.¹³⁷ The remaining justifications fared even less well. The court found that the government did not present sufficient evidence to support the conclusion that § 514 would actually protect the interests of U.S. authors abroad.¹³⁸ Moreover, the court decided that § 514 actually created inequities rather than correcting them.¹³⁹

Turner and *Golan* stand on opposite sides of the line between permissible and impermissible content-neutral legislation. Must-carry survived intermediate First Amendment scrutiny because of its modest, well-targeted impact on speech, while the extension of copyright to public domain works failed because it deprived people of significant free speech rights more broadly than reasonably necessary to accomplish a legitimate government purpose. The differences between *Turner* and *Golan* imply that Congress is not free to pass whatever aggregation control legislation it desires. *Turner* allowed the government to help conventional television broadcasters at the expense of cable operators. This means that the government could, at least in theory, act to help newspapers at the expense of news aggregators. There are, however, significant differences between the Cable Television Consumer Protection and Competition Act of 1992 and aggressive aggregation control legislation, differences that push such legislation over to the *Golan* side of the line.

First, must-carry provisions burdened speech by asking cable operators to disseminate the speech of others alongside their own.¹⁴⁰ Aggregation control operates differently because it prohibits aggregators from distributing their own speech, particularly information about news articles and where they may be read. Moreover, aggregation control legislation would extend copyright to ideas and unoriginal material, material already in the public domain. This resembles the propertization of public domain material that the *Golan* court found unconstitutional.

135. *Id.* at 1174.

136. *Id.*

137. *Id.* at 1175.

138. *Id.* at 1175-76.

139. *Id.* at 1177.

140. *See supra* notes 92-94 and accompanying text.

Second, the must-carry provisions barely disturbed the speech of cable operators. Cable operators rarely had to drop programming in order to carry conventional broadcasters' signals, and cable operators generally carried those signals voluntarily.¹⁴¹ By contrast, the suggested restriction on news aggregation greatly interferes with the free speech of aggregators. It would force aggregators to drop their preferred programming, i.e., information about news articles, something aggregators would not do voluntarily.

Third, must-carry had the primary effect of increasing the amount of information available to the public, while restricting news aggregators does not have such an effect. The mandatory carriage of conventional television on cable meant that people had more ways to view more channels. Using copyright to restrict news aggregators has precisely the opposite effect because restrictions on aggregators mean that the public will have fewer ways to discover, learn about, and read news articles.

Finally, must-carry rules survived First Amendment review in large part because the government limited their applicability to the very speakers (cable operators) whose behavior might threaten conventional broadcasters.¹⁴² This helped the *Turner* Court to conclude that must-carry did not burden substantially more speech than necessary.¹⁴³ By contrast, the general propertization of headlines and lead sentences will affect many speakers other than the aggregators who might threaten the newspaper industry. Bloggers, search engines, and even libraries would become liable for using web pages to inform readers about the general content of even a single news article and linking to it. It is highly unlikely that restricting this sort of speech would help the newspaper industry, and indeed it would likely harm the overall quantity and quality of speech generally.

The *Turner* and *Golan* holdings show that Congress does not have a free hand to fashion whatever aggregation control legislation it desires. Using copyright to increase the rights of newspapers changes the traditional contours of copyright, thereby exposing aggregation

141. See *supra* notes 112-113 and accompanying text.

142. *Turner Broad. Sys. v. F.C.C.*, 520 U.S. 180, 185 (1997) (stating that cable television systems, not others, must carry local broadcast signals); *id.* at 209-13 (Congress had sufficient evidence to conclude that the expansion of cable television threatened traditional broadcasters).

143. See *id.* at 215-16 (burden of must-carry is appropriate to its benefits). The *Turner* Court did not state that the class of those burdened by must-carry provisions was narrowly tailored. Nevertheless, the outcome of the case probably would have been different if Congress had placed responsibility for carrying conventional broadcast signals on those other than cable operators. Doing so would have burdened the speech of many whose behavior did not injure conventional broadcasters with no countervailing public benefit. This would likely have tipped the case against the constitutionality of must-carry rules.

control legislation to elevated First Amendment scrutiny. Such scrutiny need not be fatal; however, the extension of copyright to public domain material and the weakening of fair use create serious burdens on speech that affect many speakers whose behavior is not well-connected to the goal of protecting newspapers from the effects of news aggregation. Accordingly, courts should find unconstitutional the aggressive aggregation control legislation of the sort described here.

III. COPYRIGHT AND AGGREGATION CONTROL IN LIGHT OF THE FIRST AMENDMENT

The unconstitutionality of aggressive aggregation control provides a backdrop against which to consider the future of news aggregation and the revenues of newspapers. Consider first the First Amendment limits on what aggregation control legislation will likely accomplish. Aggressive aggregation control may be unconstitutional, but Congress could theoretically pass less restrictive forms of aggregation control that would survive a constitutional challenge. For example, Congress might limit the parties to whom aggregation control would apply. Perhaps only news aggregators (however they are defined) would be prevented from using headlines and linking. Or perhaps Congress could restrict the duration of the prohibition against linking to a twenty-four-hour period after the news article in question is first published. Congress might also limit the remedy for news aggregation. Copyright ordinarily allows a successful plaintiff to recover compensatory damages or presumed statutory damages in addition to an injunction against the infringing activity.¹⁴⁴ Eliminating injunctive relief and putting a cap on the amount of damages would obviously shrink the effect of aggregation control on speech. This could even take the form of legislatively mandated compulsory licensing that supports a system of micropayments from aggregators to newspapers.¹⁴⁵

Taken individually or together, these possibilities would reduce the conflict between aggregation control legislation and the First Amendment. It is entirely possible, but not certain, that these limits would enable aggregation control to pass constitutional muster. Unfortunately, such legislation might not be worth passing because

144. 17 U.S.C. §§ 502, 504 (2006) (providing for recovery of damages and injunctive relief in copyright cases).

145. See Netanel, *supra* note 14 (considering possibility that making aggregators pay for content is the only way to preserve reporting).

the suggested limits would probably still allow a significant amount of news aggregation to continue. Even if news aggregators could be defined with sufficient clarity to avoid First Amendment vagueness and overbreadth problems, those identified as aggregators would resume aggregating after the twenty-four-hour restriction expires. Indeed, if aggregation were sufficiently profitable, aggregators might happily pay the required damages to continue aggregating before the expiration of restrictions.¹⁴⁶ To be sure, limited aggregation control legislation would probably be of economic value to newspapers. That value might not be enough, however, to keep newspapers sufficiently profitable. And, of course, if Congress tries to strengthen aggregation control to ensure newspaper profits, the chances of unconstitutionality would rise.

The problems identified here imply that newspapers, and indeed society, cannot rely on legislative changes to copyright as the comprehensive solution for maintaining the health of the newspaper industry. All is not lost, however. Even though existing copyright law does not prohibit all instances of news aggregation,¹⁴⁷ it does provide leverage against many aggregators because almost every aggregator will eventually infringe. This leverage, along with incentives based on rights that newspapers clearly own, creates conditions ripe for commercial arrangements that benefit both newspapers and aggregators.

For example, some aggregators use automated processes to select and display articles for aggregation.¹⁴⁸ It is highly unlikely that any automated process can accurately avoid reproducing the admittedly unusual headline that is copyrightable or ensuring that all uses of lead sentences stay within fair use. Even aggregators that use humans for aggregation cannot guarantee that infringement will not happen. In many cases, the humans themselves are not likely to be well-trained in copyright law, and in still others the proper application will not be apparent. Thus, simply by the law of large numbers, every aggregator will eventually commit infringement, thereby offering newspapers the opportunity to sue.

Of course, the damages available from this kind of suit would be far smaller than the damages that newspapers believe aggregation causes, and it is not clear whether a court would enjoin a defendant

146. Indeed, it might be socially valuable for aggregators to do this on the theory that their willingness to pay reflects the social utility of aggregation.

147. See *supra* Part I.

148. See *supra* note 10 and accompanying text.

from aggregating simply because the defendant occasionally errs.¹⁴⁹ Nevertheless, it is likely that enough instances of infringement could be lumped together to create the threat of meaningful damages, and it remains possible that a court would issue an injunction against aggregation. In short, the suit suggested here would at least get a news aggregator's attention and trigger serious settlement discussions. Neither party will want to risk the consequences of an adverse judgment because it could effectively destroy aggregation as a business or seriously damage newspapers' hopes for gaining revenue from aggregators. This is where a newspaper can offer something to induce aggregators to pay fees for aggregating.

It is important to remember that aggregators operate in a highly competitive market where others can easily replicate the basic content that they offer. Aggregators that want to attract and keep readers must therefore offer something valuable that its competitors cannot. Obviously, effective choice and classification of aggregated articles accomplish this, as would prompt summaries of articles and audio-visual content that bring a website to life. A newspaper can offer aggregators that settle on favorable terms the added benefit of these very advantages. For example, a newspaper could offer immediate access to news stories before they appear on the Internet, allowing the aggregator to produce content earlier than its rivals. This could be particularly valuable in areas like financial news, where the ability to respond to information quickly is valued. Similarly, a newspaper could offer licensing for images, videos, podcasts, or even entire articles that complement the news. A newspaper might even offer to make its content available to aggregators in a form that made aggregation easier and more effective. Again, an aggregator getting access to this would have a competitive advantage over rivals, and newspapers could cement that advantage by suing aggregators that use the copyrighted audio-visual content without permission.

It is easy to see how aggregators might find it attractive to pay some amount (perhaps a reasonable percentage of advertising revenue) in exchange for these benefits and the freedom to aggregate without fear of suit. Indeed, a truly enlightened aggregator should realize that some support for the news industry is a good idea because, without news gathering, there is nothing to aggregate. It is likely that such arrangements have already begun. In 2006, Agence France-Press (AFP) sued Google, contending that Google's news aggregation infringed AFP's copyrights. Google settled that case on terms that

149. See *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006) (finding that injunctive relief should not be automatic in patent cases).

“will enable the use of AFP’s newswire content in innovative, new ways that will dramatically improve newswire content on the Internet.”¹⁵⁰ Google also entered into a similar arrangement with the Associated Press, as did Yahoo.¹⁵¹ More recently, the Associated Press has conducted intense negotiations with Google and Yahoo for new, and presumably more comprehensive, agreements of this nature.¹⁵²

Without question, the expense of filing a suit and conducting negotiations might prevent agreements between all newspapers and all aggregators, but newspapers could probably negotiate successfully with the major aggregators if they really cared to do so. This leaves open the possibility, if not the likelihood, that the absence of aggregation control legislation will not stop society from enjoying the benefits of news aggregation while preserving the economic viability of newspapers or other news gathering organizations.

IV. CONCLUSION

This Article has offered a preliminary analysis of aggressive aggregation control and the First Amendment. For better or worse, a significant portion of the commentary about aggregation control calls for such legislation without considering the issues raised here. This is unfortunate because aggregation control imposes serious burdens on free speech that courts cannot ignore by repeating the conventional refrain that copyright is consistent with the First Amendment. Indeed, it is quite likely that the First Amendment significantly reduces the usefulness of aggregation control legislation to ensure the health of newspapers. Fortunately, as this Article has shown, newspapers and newsgathering will not necessarily disappear.

150. Caroline McCarthy, *Agence France-Presse, Google Settle Copyright Dispute*, CNET NEWS, Apr. 6, 2007, http://news.cnet.com/Agence-France-Presse,-Google-settle-copyright-dispute/2100-1030_3-6174008.html.

151. Juan Carlos Perez, *Google Inks Deal to Run Associated Press Content*, INFO WORLD, Aug. 3, 2006, <http://www.infoworld.com/t/data-management/google-inks-deal-run-associated-press-content-768> (licensing deal with Associated Press gives Google “permission to use the wire service’s material in a broader manner than it currently does”); Posting of Rocky Agrawal (*How the AP Blew It*) to reDesign, <http://blog.agrawals.org/2009/04/15/how-the-ap-blew-it/> (April 15, 2009 21:17 EST) (referring to Yahoo! as an early licensee of AP).

152. See Russell Adams, *AP, Yahoo Near Deal on Content Use*, WALL STREET J., Jan. 14, 2010, at B2. Perhaps not surprisingly, the Associated Press’ negotiation with Google has turned contentious, with Google having voluntarily decided to stop carrying Associated Press content. See Dirk Smillie, *AP’s Curley Has Fightin’ Words for Google*, FORBES, Apr. 30, 2009, <http://www.forbes.com/2009/04/30/associated-press-google-business-media-apee.html> (describing content of earlier Google arrangement with Associated Press and issues in ongoing negotiations); Posting of Mike Masnick (*Google Stops Hosting AP News*) to Techdirt, <http://www.techdirt.com/articles/20100111/0744197702.shtml> (Jan. 11, 2010 16:51 EST).

Existing copyright can, without violating the First Amendment, still provide sufficient leverage for newspapers to negotiate arrangements to share the revenue generated by news aggregators. Of course, this does not mean that newspapers will be as profitable as they once were or that newsgathering will remain as large a business as it is today. There is, however, considerable reason to believe that mutually beneficial agreements between newspapers and aggregators will help keep newsgathering a vital part of our society.

