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ESSAY

TOLLBOOTHS AND NEWSSTANDS ON THE INFORMATION SUPERHIGHWAY

*Brad A. Greenberg**

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INTRODUCTION

The Internet has made it easier than ever before to stay informed on current events—and without ever needing to pick up, let alone pay for, a newspaper. But recent litigation and legislation in the United States and abroad have challenged the cost-free flow of such information. In March, a high-profile news-sharing case ended when a judge in the influential Southern District of New York¹ held that excerpting and distributing news clips to customers for a fee was not a fair use and infringed the publisher’s copyrights.² Two days later, the German Bundestag passed the ancillary copyright for press publishers, effective August 1, 2013, to prohibit news aggregators from excerpting articles without a license—the so-called “Google Tax.”³ Critics decried these developments as threatening free speech, undermining copyright policy goals, and contravening journalism values.

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1. The Southern District of New York is the leading trial court for copyright cases within the U.S. Court of Appeals for the Second Circuit, “the de facto Copyright Court of the United States.” See *Easter Seal Soc’y for Crippled Children & Adults of La., Inc. v. Playboy Enters.*, 815 F.2d 323, 325 (5th Cir. 1987).

2. *Associated Press v. Meltwater U.S. Holdings, Inc.*, 931 F. Supp. 2d 537, 541 (S.D.N.Y. 2013).

3. *Achtes Gesetz zur Änderung des Urheberrechtsgesetzes*, 23 BUNDESGESETZBLATT JAHRGANG 1161 (May 14, 2013), available at http://www.bundesgerichtshof.de/SharedDocs/Downloads/DE/Bibliothek/Gesetzesmaterialien/17_wp/Urheherr_Presseverlage_Leistungsschutzrecht/bgbl.pdf;jsessionid=94973530353C4CD4C9E840357C73E5B9.2_cid344?__blob=publicationFile. Though the law exempts “snippets,” it does not define the scope of a snippet. See Robert Levine, *In Europe, Google’s News Snippets May Get More Expensive*, BLOOMBERGBUSINESSWEEK (March 21, 2013), <http://www.businessweek.com/articles/2013-03-21/in-europe-googles-news-snippets-may-get-more-expensive>. It is possible that more than a few words could violate the law, even if only the URL is shared.

However, such concerns may be misplaced. The opposition to these recent legal developments is rooted in a belief that stronger intellectual property protections result in higher tolls, which, in turn, price many consumers out of accessing and using the information. But often overlooked is an existential consideration: information-gathering is expensive, and absent efficient tolls there will be far less information to access at all, regardless of cost. The U.S. Supreme Court recognized this principle in *Harper & Row Publishers, Inc. v. Nation Enterprises* as it applies more narrowly to whether copyright law inhibits free expression.⁴ Identifying the particular importance of incentives for newsgatherers, this Essay extends the *Harper & Row* rationale beyond its copyright mooring.

In light of the continued withering corps of professional newsgatherers, these legal developments actually could enhance the exchange of information and ideas to the extent they preserve incentives for news publishers. Accordingly, this Essay brackets off the questions of whether fair use protects news clipping or U.S. copyright law needs a Google Tax. It instead focuses on whether such legal regimes actually raise the policy concerns that critics assert.

Countering the perception that speech limitations affecting distribution necessarily reduce access to information, this Essay proffers that copyright expansions actually can increase access and thereby serve important copyright and First Amendment values. In doing so, this discussion contributes to the growing literature⁵ and two recent Supreme Court opinions⁶ discussing whether copyright law and First Amendment interests can coexist.

I. DEATH BY A THOUSAND PAPER CUTS

Due in large part to the Internet's disruptive nature and information-wants-to-be-free culture,⁷ the press is facing unprecedented challenges.⁸ Its problem is not one of product quality but of distribution and receipts. News-

4. See *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558–60 (1985).

5. See e.g., 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, *First Amendment Constraints on Copyright After Golan v. Holder*, 60 UCLA L. REV. 1082 (2013); 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); Jennifer Rothman, *Liberating Copyright: Thinking Beyond Free Speech*, 95 CORNELL L. REV. 463 (2010).

6. *Golan v. Holder*, 132 S. Ct. 873 (2012); *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

7. See Brad A. Greenberg, Comment, *The News Deal: How Price-Fixing and Collusion Can Save the Newspaper Industry—And Why Congress Should Promote It*, 59 UCLA L. REV. 414, 421 & n.31 (2011).

8. See ROBERT LEVINE, FREE RIDE: HOW DIGITAL PARASITES ARE DESTROYING THE CULTURE BUSINESS, AND HOW THE CULTURE BUSINESS CAN FIGHT BACK 110–35 (2012); Greenberg, *supra* note 7, at 420–24. Between 2005 and early 2012, they lost \$27 in print revenue for every dollar gained in digital revenue. See Alan D. Mutter, *Newspaper Digital Ad*

papers produce a public good. Though published information has long been non-rivalrous and non-excludable, the digital age has facilitated near-instantaneous verbatim re-publication by commercial users, thereby magnifying the difficulties newspapers face in profiting from their investments. Despite Americans consuming as much news today as they did at the dawn of the Internet era, far fewer pay for it.⁹ Consumers want the information that newspapers gather and disseminate, but without the bill.¹⁰ That helps explain why, adjusted for inflation, print newspaper revenue was lower last year than at any point since 1950.¹¹

A major disruptive force in news distribution has been the aggregator.¹² Generally, a news aggregator scours the Internet for news stories, collecting and combining the articles of greatest interest to its customers. There are free news aggregators like Google News, which copies an article's headline and first few sentences, and publishes them on interest-specific pages (*e.g.*, Top Stories, U.S., Technology), much like a traditional newspaper. Another aggregator model is the news-clipping agency, which offers a targeted paid service. Typically, the agency searches all media for references to a company's name, product, or officers; news clips are then sent to the client in bundled packets.¹³ Both online news aggregators and clipping services make it much easier for consumers to find news items of individualized interest. For example, rather than checking numerous newspaper websites every morning, a consumer interested in news about "driverless cars" can type those two words into Google News' search box and find every story published during a specified range of dates.¹⁴

The rise of aggregators has coincided with the collapse of the newspaper business.¹⁵ The consequences have been legion: newspaper closures, owner-

Share Hits All-Time Low, REFLECTIONS OF A NEWSOSAUR (Apr. 23, 2012, 5:00 AM), <http://newsosaur.blogspot.com/2012/04/newspaper-digital-ad-share-hits-all.html>.

9. *Trends in News Consumption: 1991–2012*, PEW RES. CTR. (Sept. 27, 2012), <http://www.people-press.org/2012/09/27/in-changing-news-landscape-even-television-is-vulnerable/>.

10. Even online-only newspapers face non-trivial newsgathering expenses, from web-domain and server-rental fees to transportation costs and reporter paychecks.

11. Mark J. Perry, *Free-Fall: Adjusted for Inflation, Print Newspaper Advertising Revenue in 2012 Was Lower than in 1950*, AEIDEAS (Apr. 8, 2013, 10:59 AM), <http://www.aeideas.org/2013/04/free-fall-adjusted-for-inflation-print-newspaper-advertising-in-2012-was-lower-than-in-1950/>.

12. See generally Kimberly Isbell, Berkman Ctr. for Internet & Soc'y, *The Rise of the News Aggregator: Legal Implications and Best Practices*, BERKMAN CTR. RES. PUBLICATION SERIES at 1 (2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1670339.

13. News clipping services operate similarly to Google Alerts, though to justify the expense are expected to be more exhaustive.

14. For August 29, 2013, Google News would have returned 10 results, including articles from *Forbes*, *AutoWeek*, and blogs hosted by the *New York Times* and *Tampa Bay Tribune*.

15. To be sure, aggregators are not even primarily to blame. Economics are responsible, particularly advertising losses due to the online/print disparity in ad value—digital dimes ver-

ship consolidations, coverage reductions, massive layoffs.¹⁶ While some foreign countries have responded with laws to prop up the press,¹⁷ U.S. courts have been asked to wrestle with legal limitations on news aggregators.¹⁸ Journalists, legal scholars, and politicians have discussed various measures directed at stabilizing the press.¹⁹ At the same time, private actors have increased pressure on aggregators to license uses, which has reaped some reward for newspapers. To avoid legal liability for Google News, Google recently agreed to settlements in France and Belgium;²⁰ in the United States, Google previously settled a similar dispute with the Associated Press (AP)²¹

sus print dollars—and the downfall of classifieds. See Greenberg, *supra* note 7, at 420–21. Yet, aggregators add to the economic morass: even when a user clicks through to a newspaper website, he is likely to skip the homepage, which contains the most valuable advertising space.

16. See Brad A. Greenberg, Comment, *A Public Press? Evaluating the Viability of Government Subsidies for the Newspaper Industry*, 19 UCLA ENT. L. REV. 189, 192–94 (2012); Rick Edmonds et al., *Newspapers: By the Numbers*, THE STATE OF THE NEWS MEDIA 2013 (May 7 2013), <http://stateofthemedial.org/2013/newspapers-stabilizing-but-still-threatened/newspapers-by-the-numbers/> (estimating newspaper editorial staff had fallen 30 percent since 2000 and was under 40,000 industry wide for the first time since 1978). For statistics on newspaper layoffs and closures between 2007 and 2012, see PAPER CUTS, <http://newspaperlayoffs.com/> (last visited Oct. 13, 2013).

17. Beyond Germany, Israel and Italy also reportedly are considering similar copyright expansions directed at Google News. See Eleonora Rosati, *Towards a Google Tax in Italy Too?*, 1709 BLOG (June 2, 2013, 12:53 PM), <http://the1709blog.blogspot.com/2013/06/towards-google-tax-also-in-italy.html>; Nati Tucker, *Bill Would Force Google to Share 7% of Israeli Revenues with Websites*, HAARETZ (Oct. 9, 2013, 1:21 PM), <http://www.haaretz.com/business/.premium-1.551465>.

18. See, e.g., Complaint: Trial by Jury Demanded, *Associated Press v. Meltwater U.S. Holdings, Inc.*, No. 1:12-cv-01087-DLC (S.D.N.Y. Feb. 14, 2012); Complaint: Jury Trial Demanded, *GateHouse Media Mass. I, Inc. v. N.Y. Times Co.*, No. 1:08-cv-12114-WGY (D. Mass. Dec. 22, 2008); Complaint: Trial by Jury Demanded, *Associated Press v. All Headline News Corp.*, No. 1:08-cv-00323-PKC (S.D.N.Y. Jan. 14, 2008); First Amended Complaint for Preliminary and Permanent Injunction & Copyright Infringement, *Agence France Presse v. Google, Inc.*, No. 1:05-cv-00546-GK (D.D.C. Apr. 29, 2005).

19. Some include newspapers partnering with a copyright enforcement firm, see Brad A. Greenberg, *Copyright Trolls and Presumptively Fair Uses*, 85 U. COLO. L. REV. 153 (2014), a U.S. senator introducing a bill that would make it easier for traditional newspapers to operate as tax-exempt 501(c)(3)s, see Newspaper Revitalization Act, S. 673, 111th Cong. § 1 (2009), and legal scholars evaluating government assistance, see David M. Schizer, *Subsidizing the Press*, J. LEGAL ANALYSIS 1 (2011), and the suitability of a federal “hot news” doctrine, see Shyamkrishna Balganesh, “Hot News”: *The Enduring Myth of Property in News*, 111 COLUM. L. REV. 419 (2011). I have proposed two measures: a narrow and limited antitrust exemption to enable newspapers to collaborate on a model for charging for online content, see Greenberg, *supra* note 7, at 428–29, and the establishment of a National Public Newsroom modeled after NPR, see Greenberg, *supra* note 16, at 241–44.

20. Mathew Ingram, *Why Google’s Settlement with French Publishers is Bad for the Web*, GIGAOM (Feb. 4, 2013 8:10 AM), <http://gigaom.com/2013/02/04/why-googles-settlement-with-french-publishers-is-bad-for-the-web/> (“[T]he settlement is being described as a ‘pay for links’ deal, and that perception is dangerous.”).

21. See 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>.

and last year several U.S. news organizations, including AP, The New York Times Co., and The McClatchy Company, created a system called NewsRight to track unpaid online uses and push licenses to aggregators.²²

There is good reason for the focused attention. It is about more than a romantic notion of holding a newspaper at the breakfast table, about more than perpetuating a power structure that serves publishers. Newspapers continue to serve an integral role in democratic society, and copyright plays a critical part in protecting press freedoms and independently funding newsgathering operations.²³ Thus, even if efforts to preserve financial incentives for newspaper publishers mistakenly enlist copyright, they are not misplaced.

II. THE MARKETPLACE OF IDEAS NEEDS NEW INFORMATION

An important theory shaping First Amendment doctrine is the marketplace of ideas. Though famously articulated by Justice Holmes,²⁴ the marketplace concept goes back to colonial America and presumes that competition among ideas, fostered by free exchange, will result in the best ideas becoming the accepted ones. The Internet has made it much easier to share ideas, giving every speaker a platform traditionally available only those with access to the press,²⁵ to perform in-depth research on discrete issues, and to engage in geography-defying communities. This, in theory, should provide for a more robust marketplace.

But the financial decline of the newspaper industry has led to a massive reduction in professional newsgatherers, which, in turn, has reduced current informational contributions to the marketplace of ideas. The traditional press remains the primary supplier of newsgatherers and new information; the emergence of new media has not changed that.²⁶ New media has skewed attention toward national and global news and away from more narrowly appealing state and municipal issues, and has reduced costly and time-con-

22. Rick Edmonds, *AP, 28 News Orgs Launch NewsRight to Collect Licensing Fees from Aggregators*, POYNTER (Jan. 5, 2012, 9:59 AM), <http://www.poynter.org/latest-news/business-news/the-biz-blog/157817/ap-28-news-orgs-launch-newsright-to-collect-licensing-fees-from-aggregators/>.

23. See Edward Lee, *Freedom of the Press 2.0*, 42 GA. L. REV. 309, 316 (2008); Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283 (1996).

24. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

25. See Jack M. Balkin, *Media Access: A Question of Design*, 76 GEO. WASH. L. REV. 933, 936 (2008); Greenberg, *supra* note 7, at 445.

26. See *How News Happens*, PEW RES. CTR. (Jan. 11, 2010), <http://www.journalism.org/2010/01/11/how-news-happens/> (finding that 95 percent of stories with “new information” comes from traditional media, primarily newspapers); see also *In re 2006 Quadrennial Regulatory Review*, 23 FCC Rcd. 2010, 2042 (2008); Maurice E. Stucke & Allen P. Grunes, *Toward a Better Competition Policy for the Media: The Challenge of Developing Antitrust Policies that Support the Media Sector’s Unique Role in Our Democracy*, 42 CONN. L. REV. 101, 114–16 (2009); Greenberg, *supra* note 7, at 445–46.

suming investigative reporting.²⁷ Additionally, reporting accuracy and credibility are more limited with new media,²⁸ particularly with crowdsourced news. Crowdsourcing can help disseminate initial information about a breaking and rapidly changing situation, such as natural disaster or terror attack, more quickly than newspaper websites and cable news channels. But crowdsourced information often is incomplete²⁹ and incorrect.³⁰ And Americans, though increasingly getting their news online, remain skeptical about its veracity, with the majority of participants in a recent study saying that at least half of the information they get online is not reliable.³¹

Newspapers also remain central to other First Amendment theories of the press's place in democracy. Whether publishing in print or online, newspapers staffed by full-time reporters facilitate democratic self-governance by disseminating empowering information³² and serve as a check on govern-

27. See Greenberg, *supra* note 16, at 199 n.45.

28. To be sure, some new media organizations outperform traditional media in supplying new and democracy-enhancing information. ProPublica, a nonprofit of about twenty editorial employees that is supported by a major philanthropic endowment, and the political news site Politico are superb examples. The new venture of eBay founder Pierre Omidyar also has been welcomed with much fanfare. See Ryan Chittum, *The Extraordinary Promise of the New Greenwald-Omidyar Venture*, COLUM. JOURNALISM REV. (Oct. 17, 2013, 6:50 AM), available at http://www.cjr.org/the_audit/the_extraordinary_promise_of_t.php. But these business models are *sui generis*, and they are staffed by professional newsgatherers (indeed, some prominent newspaper ex-pats).

29. Though also true of articles by professional newsgatherers, the holes are less likely to be filled by the crowd once the moment has passed and a new trending topic has come to the fore.

30. Crowdsourcing in the aftermath of the Boston Marathon bombing, in which a missing college student was incorrectly identified as one of the bombers by Twitter and Reddit users, serves as a stark example. See Gerry Shih, *Boston Marathon Bombings: How Twitter and Reddit Got It Wrong*, INDEP. (Apr. 20, 2013), <http://www.independent.co.uk/news/world/americas/boston-marathon-bombings-how-twitter-and-reddit-got-it-wrong-8581167.html>; see also Craig Silverman, *Visualized: Incorrect Information Travels Farther, Faster on Twitter Than Corrections*, POYNTER (March 7, 2012), <http://www.poynter.org/latest-news/regret-the-error/165654/visualized-incorrect-information-travels-farther-faster-on-twitter-than-corrections/>.

31. USC ANNEBERG SCH. CTR. FOR DIGITAL FUTURE, THE 2010 DIGITAL FUTURE PROJECT 70-81 (2010), available at http://www.digitalcenter.org/wp-content/uploads/2012/12/2010_digital_future_report-year9.pdf.

32. See *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 585 (1983) (quoting *Grosjean v. Am. Press Co.*, 297 U.S. 233, 250 (1936)) (“[A]n untrammelled press [is] a vital source of public information . . . and an informed public is the essence of working democracy.”); see also ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 75 (1965) (arguing that the First Amendment is designed to foster democratic self-governance by ensuring that “no idea, no opinion, no doubt, no belief, no counterbelief, no relevant information, may be kept from [citizens].”); Neil Weinstock Netanel, *New Media in Old Bottles? Barron’s Contextual First Amendment and Copyright in the Digital Age*, 76 GEO. WASH. L. REV. 952, 965–66 (2008) (Traditional media “still supply an invaluable and unequalled layer of accreditation, fact checking, agenda setting, and wide-ranging and systematic investigative reporting, while reaching a mass audience and representing public opinion before powerful decisionmakers.”).

ment actions.³³ They also help set the public agenda and expose community members to opposing views. In this regard, newsgathering contributions tend to serve dual constitutional roles: they advance both copyright values of promoting cultural progress and First Amendment values of informing ideas and facilitating self-governance. Though the Supreme Court has said that news reporting is more prone to fair use because it is informational in nature,³⁴ jurisprudence also indicates it is of critical importance that newsgathering and publishing remain financially viable.³⁵

To be clear, this Essay is not premised on a theory of *press* exceptionalism.³⁶ Instead, it embraces a theory of *newsgatherer* exceptionalism. And although “any author may quite accurately assert that he is contributing to the flow of information to the public,”³⁷ newspapers remain the primary supplier of newsgatherers (who also happen to carry the imprimatur of greater accuracy and credibility). Thus, I focus on the sustainability of the newspaper industry as vital to preserving contributions of new information generally, and investigative and local news specifically.

The nature of most new media is quite different from traditional newspapers, even those that no longer publish a print edition. Although news aggregators like Google News might supplant the market for newspapers, aggregators do not offer a substitute product for gathering and organizing new information into readable stories.³⁸ Without original news sources, Google News would be almost indistinguishable from Google’s minimalist

33. See Vincent Blasi, *The Checking Value in First Amendment Theory*, 2 AM. B. FOUND. RES. J. 521 (1977).

34. Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 563–64 (1985) (discussing the scope of the fair use defense to copyright infringement, codified in 17 U.S.C. § 107 (2012)).

35. See, e.g., Associated Press v. United States, 326 U.S. 1, 27–28 (1945) (Frankfurter, J., concurring); Int’l News Serv. v. Associated Press, 248 U.S. 215, 238–41 (1918). The modern concern is not that newspapers are not compensated for the full social value of their contributions, but that they do not receive compensation sufficient to survive. This distinguishes the need for additional newsgathering incentives from other products protected by intellectual property. See Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031 (2005) (arguing that free riding rhetoric is misplaced in intellectual property discussions and that in no other area of the economy do producers fully internalize all social value); see also Wendy J. Gordon, *On Owning Information: Intellectual Property and the Restitutory Impulse*, 78 VA. L. REV. 149 (1992).

36. See, e.g., Sonja R. West, *Awakening the Press Clause*, 58 UCLA L. REV. 1025 (2011). Whether the First Amendment confers positive rights for the press is unclear, but I find persuasive Eugene Volokh’s claim that the Framers were concerned with protecting the press as a technology for disseminating information, and not as an industry. See generally Eugene Volokh, *Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today*, 160 U. PA. L. REV. 459 (2012).

37. Branzburg v. Hayes, 408 U.S. 665, 705 (1972).

38. This helps reconcile the seeming tension between publishers’ position that they do not want Google to aggregate their content but do want Google to optimize search results. (Indeed, a newspaper currently could prevent Google News from publishing even a snippet by placing a “robots.txt” file on its news site; that would prevent crawling by all search engines,

homepage, lacking any news content. And like Google News, most new media operations contribute a product that is at best supplemental to that of newspapers.³⁹ The Internet has dramatically expanded the sharing of ideas, yet few new media organizations contribute much new information to enhance the debate over ideas—or to inform readers that a debate is needed at all.

This phenomenon undermines a primary basis for the marketplace of ideas. Developing ideas relies on the availability of competing information. When information is recycled from one source, it creates a redundancy in the market; copies of the same information cannot vie for acceptance. Worse, the segregating nature of the Internet reduces exposure to oppositional ideas by enabling consumers to avoid disagreeable stories, facts, ideas, and opinions; the traditional newspaper bundle encumbered this avoidance by giving readers news about the local water board along with sports scores and the stock report, and by inviting opposing columnists.⁴⁰ The result is a democratic participant who spends more time consuming news but has less knowledge of contrary ideas and less information about lower-profile, typically local, news items that in today's media landscape may not be reported at all.

III. ACCESS-PRESERVING TOLLS?

At its core, this Essay stands for a simple but often overlooked proposition in the discussion of information policy: absent existence, there can be no access. Accordingly, despite the value that aggregators add by disseminating information more broadly than most newspapers, usage fees *could* be advisable on policy grounds, whether premised on copyright, tort, or some legal regime.

Nearly a century ago, the U.S. Supreme Court recognized in *International News Service v. Associated Press* that newsgathering is expensive and

not just those involved in news aggregation.) But publishers like search because they believe it supplements readership while aggregation, they argue, supplants it.

39. See Greenberg, *supra* note 7, at 434–38.

40. Cass R. Sunstein, *So Much for Serendipity in Personalized News*, BLOOMBERG (Aug. 12, 2013, 10:10 AM), <http://www.bloomberg.com/news/2013-08-12/so-much-for-serendipity-in-personalized-news.html> (discussing newspapers' "architecture of serendipity"); see also Scott L. Althaus & David Tewksbury, *Agenda Setting and the "New" News: Patterns of Issue Importance Among Readers of the Paper and Online Versions of the New York Times*, 29 COMM. RES. 180 (2002) (finding that study participants who read the print version of the *New York Times* had a different perception of important political issues and could recognize and recall more stories from a broader variety of topics than participants who read the online version of the *New York Times*); Paige Madsen, *Aggregating Agendas: Online News Aggregators as Agenda Setters* (Sept. 18, 2013) (unpublished manuscript) (on file with Author) (finding that Google News prioritizes topics of less interest to editors at the *New York Times* and *Los Angeles Times*, including sports, entertainment, business, and technology, and also finding that Google News' higher photo-to-article ratio makes it more difficult for readers to quickly judge a story's importance).

that newspapers require adequate incentives to provide an important public good.⁴¹ Similarly, both Germany's Google Tax and *Associated Press v. Meltwater U.S. Holdings, Inc.*⁴², holding that news clippings infringed copyrights, were concerned with protecting newspaper incentives because of the business's positive externalities. It is important, then, that such protections are in fact likely to increase newspaper revenues and can do so without imposing an unnecessary burden on others that would offset the value of preserving informational access.

The available evidence portrays a murky picture about the economic value of restricting aggregators. Google quickly responded to Germany's passage of the ancillary copyright for publishers by saying it would make Google News opt-in for German publishers.⁴³ Though far too early to know the consequences in Germany, one possibility playing out elsewhere suggests that a prohibition on third parties aggregating news articles without the publishers consent will not necessarily increase newspaper revenues. In late 2012, 90 percent of Brazil's daily circulation newspapers opted out of Google News after the Brazilian National Association of Newspapers advised members that the service reduces the likelihood that an Internet user will click through to read the entire article on a newspaper's website.⁴⁴ Opting out immediately resulted in a roughly 5 percent reduction in online traffic, but the long-term effects remain to be seen.⁴⁵ Removing freely accessible news aggregation from the Internet could motivate more news consumers to visit the websites of the newspaper(s) that they trust to report on issues of interest. Moreover, removing aggregated news could empower more newspapers to charge for online content because it is much easier to sell your product when someone else is not already giving it away for free.⁴⁶ Alternatively, a news aggregator that suddenly has a shortage of cost-free content could be motivated to license from newspapers and other media,

41. *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 238–41, 245 (1918). This opinion is the source of the "hot news" doctrine, which is only available, if at all, under state law and even then is largely preempted by the 1976 Copyright Act. See *Barclays Capital Inc. v. Theflyonthewall.com, Inc.*, 650 F.3d 876, 902–03 (2d Cir. 2011).

42. *Associated Press v. Meltwater U.S. Holdings, Inc.*, 931 F. Supp. 2d 537 (S.D.N.Y. 2013).

43. Loek Essers, *Google News Opt-In is Not Good Enough, German Publishers Say*, PCWORLD (June 25, 2013, 3:05 AM), <http://www.pcworld.com/article/2042923/google-news-optin-is-not-good-enough-german-publishers-say.html>.

44. Robert Andrews, *Google News Faces Mass Newspaper Boycott in Brazil*, PAIDCONTENT (Oct. 19, 2012, 8:00 AM), <http://paidcontent.org/2012/10/19/google-news-faces-mass-newspaper-boycott-in-brazil/>.

45. Gregory Ferenstein, *Brazil's Google News Boycott Reportedly Only Drops Traffic 5%*. *Oof.*, TECHCRUNCH (Oct. 26, 2012), <http://techcrunch.com/2012/10/26/brazils-google-news-boycott-reportedly-only-drops-traffic-5-oof/> (reporting that the modest decrease "not only justifies their own protest but could inspire a mass revolt online").

46. To be sure, newspapers likely never will be able to rely only on far less-valuable online advertising revenue.

which apparently is the end that newspaper trade organizations and publishers seek.⁴⁷ Either way, it is possible that newspaper revenue from aggregators would increase over the long term.

The result of restricting news clipping is similarly unproven, but is more intuitively beneficial to newspapers. The court in *Meltwater* addressed whether a news clipping service violated a news publisher's copyrights by using "automated computer programs or algorithms to copy or 'scrape' an article from an online news source, index the article, and deliver verbatim excerpts of the article to its customers in response to search queries."⁴⁸ The court held that such verbatim copying was an infringement not protected by fair use,⁴⁹ and found that refusing to pay AP's licensing fees—annually, hundreds of millions of dollars from 8,000 licensee customers—would harm AP's revenue in two ways.⁵⁰ First, Meltwater's refusal to pay resulted in a direct loss of income related to those uses. Second, and more significantly, Meltwater's business model gave it a competitive advantage over AP licensees, who in turn would be spurred to reduce purchases, back out of licenses, or close shop altogether. The court went on to hold that prohibiting free riding would preserve AP's newsgathering incentives—and that was a significant policy consideration.⁵¹

The *Meltwater* decision adopts the publisher-friendly perspective that stronger copyright protection would stabilize at least a portion of newspapers' revenue stream, but much remains unknown and the economics involving both types of news aggregators would benefit greatly from in-depth empirical study. The biggest challenge to restricting news aggregation to preserve informational access long-term is that neither measure is likely to do more than slow the decline of newspaper losses. Yet, a single panacea for preserving the corps of professional newgatherers is unlikely; a cocktail may

47. See Miguel Helft, *Google Insists It's a Friend of Newspapers*, N.Y. TIMES (Apr. 7, 2009), <http://www.nytimes.com/2009/04/08/technology/internet/08google.html> (reporting that the Associated Press would require Google News and other websites using content from the AP and its member organizations to pay for a license); *Old Media Wants a Piece of the New Media Action*, ADWEEK (Feb. 6, 2006, 12:00 AM), <http://www.adweek.com/news/advertising/old-media-wants-piece-new-media-action-83886> (discussing plans by a Paris-based organization representing 18,000 newspapers to get members "a cut of the money Google makes from search-ad results"); *Urgent Action Plan to Help Regional Press*, SOCIETY OF EDITORS (March 24, 2009), http://www.societyofeditors.co.uk/page-view.php?page_id=139&parent_page_id=0&news_id=1236 (detailing a letter in which two organizations representing British editors and newspapers pushed government officials to "look urgently for effective ways in which Google and others could be prevented from profiting from third party content without recompense to or consent from those who generated the material.").

48. *Associated Press v. Meltwater U.S. Holdings, Inc.*, 931 F. Supp. 2d 537, 543 (S.D.N.Y. 2013).

49. *Id.* at 550–61.

50. *Id.* at 542.

51. *Id.* at 553. The court's reasoning was based solely on AP's copyright claim and not its hot news claim. Though the court's language evokes *International News Service v. Associated Press*, 248 U.S. 215 (1918), the court did not mention the case.

be required. Accordingly, a prophylactic measure should not be disregarded simply because it would provide only partial relief.

Assuming stronger copyright protection provides a financial benefit to newspapers, the next question is whether these laws balance the financial needs of newsgatherers with policy concerns about restrictions on information sharing. To the extent that these copyright expansions⁵² place a “re-write” constraint on third parties distributing a newspaper’s copyrighted material, they appear narrow in scope, tailored only to limiting certain reproductions, and leaving open other methods by which to communicate the information.⁵³ For example, Meltwater can identify and share news clips but cannot include the copyrighted expression within the clips; it must write its own short summaries. A U.S. version of Germany’s Google Tax would prohibit the operation of news-aggregating websites that directly copy more than an article’s headline;⁵⁴ as with the Digital Millennium Copyright Act’s anti-circumvention provision, a Google Tax would create a presumption that fair use is unavailable as a defense.⁵⁵ Unless such a law expressly forbade linking to a news article—and that much broader prohibition would raise distinct policy concerns—news aggregators could still operate as directories for top headlines. This model is familiar to readers of the heavily trafficked Drudge Report, which provides only an excerpt of the headline and a hyperlink and, thus, is more likely to drive traffic to the original source.⁵⁶ The immediate burden on aggregators is limited and leaves substantial channels for cheaply collecting and sharing the same information.

Additionally, news aggregation restrictions inhibit access only to the aggregators. Articles remain accessible from original sources, though newspaper websites increasingly charge for access to all content, or to content after *n* free stories per month. That could price some consumers out of reading the original story in its place of original publication. Importantly, however, limitations on news aggregators may perpetuate long-term access if they help a newspaper stay in business. In turn, that would preserve access to new information that would not be discovered and distributed but for the newspaper’s efforts. Though access may come at a higher cost, consumers likely would receive the added benefit of keeping those news providers around longer.

52. They are expansions to the extent they either did not previously exist in their respective legal regimes or were not judicially recognized.

53. Again, whether that is a correct application of fair use is beyond this Essay.

54. Headlines generally are believed to be precluded from U.S. copyright because they fall within the exclusion for “words and short phrases such as names, titles, and slogans.” 37 C.F.R. § 202.1(a) (2013); *see also* Robert Denicola, *News on the Internet*, 23 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 68, 77 (2012) (“[N]o court has ruled on the copyrightability of news headlines under U.S. law.”). However, a British court recently held that newspaper headlines can meet British copyright standards. *See Newspaper Licensing Agency v. Meltwater Holding BV*, [2011] EWCA (Civ) 890, [16].

55. *See* 17 U.S.C. § 1201 (2012); Netanel, *supra*, note 5, at 1113–15.

56. *See* DRUDGE REPORT, <http://www.drudgereport.com/> (last visited Oct. 14, 2013).

CONCLUSION

The Internet has upended newspaper economics. Because newspapers remain the primary contributor of new information to the marketplace of ideas, the decline in the press portends significant problems for effective self-governance. Recent legislation, legal opinions, and private ordering could help stabilize newspaper revenues. To that end, restrictions on the free sharing of news actually could preserve access, even as they erect new toll-booths on the information superhighway.