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6B Copyright Law, Competition & Trademark Law Session. Copyright Protections for Publishers

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SESSION 6: COPYRIGHT LAW & COMPETITION LAW
6B. Copyright Protections for Publishers

Moderator:
Ted Shapiro
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***Speakers*:**

Kimberley Isbell
U.S. Copyright Office, Washington, D.C.
Protections for Press Publishers: International Approaches and Domestic Considerations

Danielle Coffey
News Media Alliance, Arlington
Protection of Journalism in the U.S.

Ali Sternburg
Computer & Communications Industry Association, Washington, D.C.
Why a Snippet Tax Would Violate the First Amendment and International Obligations

***Panelists*:**

Jan Bernd Nordemann
Nordemann, Berlin
Carlo Scollo Lavizzari
Lenz Caemmerer, Basel

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TED SHAPIRO: Welcome, copyright lovers. This panel is focused on copyright protection for publishers. As many of you know, this topic has become quite hot lately with interesting developments around the world from the European Union to Australia, US, Germany, Spain, France, and in fact, all of the member states of the EU as they are implementing the 2019 DSM copyright directive, many of them quite late, and indeed, one of the big examples we have is the EU's creation of a related or neighboring right for press publishers only, often confused with something called a snippet tax, or an ancillary right.

A related right is an exclusive right. A related right may not be as well known in many common law jurisdictions like the US. Basically, a related right is like a poor cousin to copyright. He or she lives on the wrong side of the tracks in copyright town. Related rights are not quite as good as authors' rights, although there are certainly arguments about that. Related rights have been recognized at the international level, for example, in the WPPT, and in the Beijing treaty for audiovisual performances, as well as in many countries' national laws, especially in Europe, but not only.

It's just that they don't fit as well in common law copyright jurisdictions but certainly, the US has found ways to implement the WPPT and has the system for dealing with this. I'm hoping that the speakers and the panelists are going to explain more about the nature of this right, the relationship with exceptions and limitations or fair use, and of course, the new related right is subject to all of them and existing jurisprudence that's relevant. Perhaps some of the speakers will also talk about the relationship with authors' rights, and one thing that I think we're going to explore a little is really what happens when we ask the legislator to intervene to regulate in a space like this.

For me, a big example of that is Article 15 related right. It's a very skinny little related right, and for that matter, Article 17 on platform liability. When you invite the legislator into your business, you don't always get what you expect. Okay. With that, I think we're going to start off with our speakers. Our first session will be a presentation from Kimberley Isbell from the U.S. Copyright Office. Kimberley, the floor is yours. I believe you have seven minutes.

KIMBERLEY ISBELL: Okay, thanks. The question of the state of journalism and the issue of protections for press publishers are a bit of a groundhog day that keeps on giving for those of us who are interested in media policy issues. Over the last two decades, we've seen a precipitous drop in newspaper advertising revenue, we've seen industry-wide layoffs, the shuttering of newsrooms, not just around the country, but around the world, and much of this decline has recently been laid at the feet of the internet, particularly the rise of aggregators and large online platforms that distribute news content.

The problem of how to fund the creation of quality journalism, and who's led to benefit from journalism is really much older than that. During World War I, Hearst took advantage of the telegraph, the telephone, and bribery to freeride off of the *Associated Press*'s war reporting, actually prompting the Supreme Court to create a new common law tort of hot news misappropriation. Newspaper revenues then began a mostly upward trajectory in the 1950s but by the 1970s, industry

concern was now focused on the threat from television and radio competition for advertising dollars.

You would frequently hear newsrooms complaining about the local disc jockey or the news anchor ripping off their latest investigation of city hall for their programming. Once again, though, revenues took off on a very sharp increase trajectory, sparked mainly by a wave of newspaper consolidations, the shuttering of many newspapers that were serving the same city consolidating from two daily papers to one, usually getting rid of the afternoon paper, which that fact itself sparked a couple of concerned congressional hearings about the state of the news industry and what consolidations met.

By 1990, following a two-year decline in revenues, newspaper industry sources were now pointing to competition from direct mail, telephone marketing, and catalogs for advertising eyeballs, and after much angst, revenues then once again took off, peaking for good in the late 1990s before you see the precipitous decline that occurred in the early 2000s, which has successfully been blamed on the internet, free *Huffington Post*, Google News and most recently, Facebook, but I think there's really no question at this point that newspaper revenues have fallen off a cliff in the 21st century.

This has taken with them many local newsrooms and created local news deserts where large communities are just not served by quality local reporting, and I think there's no question that there needs to be a reckoning with the advertising model as a way to fund quality journalism. What, if we can't rely on advertising, do we look for? Obviously, look to monetizing the content, and so concerns about the internet's impact on journalism have recently animated, as Ted mentioned, Article 15 of the DSM copyright directive in the European Union, it's also animated the News Bargaining Code that Australia has recently adopted.

In Canada, they've proposed the Online News Act. Even here in the United States, we've proposed the Journalism Competition and Preservation Act. Generally, I think you can group international approaches to the problem into two camps. The first is, as Ted mentioned, the adoption of ancillary rights, providing additional protections for content of news publishers, and then the other is a competition approach, which would include the Australia and the Canada approaches to allow collective bargaining against online news aggregators and people like Google News and Facebook, but the history of this goes back a ways.

Even before the DSM, new protections for press publishers were adopted by Germany in 2013 and followed by Spain in 2014. The German law looks probably most familiar to those who have seen the DSM, providing press publishers with a one-year exclusive right to make the press product or parts thereof available to the public for commercial purposes on the internet. Spain took a slightly modified approach, they modified their quotation right for nonsignificant fragments of content to grant press publishers an inalienable right to equitable remuneration whenever search engines use content that was disclosed in periodical publications or on periodically updated websites that have an informative purpose of creation of public opinion or entertainment.

The European Union, the Commission then looked at these two models, decided that there was still a concern there, and adopted a related right, and I think-- Am I out of time? I'm sorry.

TED SHAPIRO: Yes, you are. You want to just sum up real quickly?

KIMBERLEY ISBELL: The European Commission adopted the related right approach of Germany which was Article 15 of the DSM. I will end there.

TED SHAPIRO: Okay, thanks, Kimberley. Of course, we had the German and Spanish experiences but what happened was that Google threatened to de-index Spain and then threatened to de-index Germany but I guess the European Union might be too big to de-index. Kimberley, you didn't get through all of your presentation because you forgot about the rules-

KIMBERLEY ISBELL: I'm sorry.

TED SHAPIRO: -but that's okay. In your view, what's the best approach to deal with this issue?

KIMBERLEY ISBELL: I think that is still an open question. As you mentioned, an ancillary right is a difficult transposition to a common law country. The United States similar to Italy actually has already protection for collective works. We don't have the European Union-wide problem where it is difficult for press publishers to assert copyright in the underlying content. I think what you see in Italy is that instead of adopting this ancillary right, they've instead looked more like the Spanish model and adopted a right of remuneration.

Whether or not a pure ancillary works in the United States or other common law countries I think is a question. Obviously, competition questions rely upon an underlying right to be negotiated. If there is no right, you cannot have a competition solution. Otherwise, what are you negotiating about? I think other people who are far smarter than me have been thinking about this for decades, and I don't know that there is yet the perfect answer.

TED SHAPIRO: One question that I have is the relationship to copyright. I mean, the journalists have copyright, no? In the EU, in many countries, it was felt that the copyright that press publishers acquired was insufficient and that's why there needed to be this related right. I hate the word ancillary right. It's almost as bad as snippet tax. How would that work in the US if you were to create a new protection for press publishers, what would be the subject matter of the right?

KIMBERLEY ISBELL: Well, as I mentioned, part of the animating concern of the European Union, and the Director General actually mentioned this in their report, was a concern about the press publishers having the burden of having to prove ownership of copyright in the journalistic output because the ownership was vested in the original authors and there wasn't a broader collective right. Obviously, in the United States, we do have that collective right. It's not a great overlay. The subject of the ancillary right is that collective work, which already exists in the United States.

There are questions as to whether or not providing an additional right in the United States would require going beyond that and would likely require tackling carving out something from the fair use provision saying that with or without fair use there's going to be a right of remuneration for this type of content.

Certainly, there are different arguments as to what level of use requires remuneration in those cases. Is it just the headline? Is it the headline plus the leads? Is it the headline plus significant portions of the article plus the photo? I'm not sure there's even agreement on which level of protection you would need to make it significant.

TED SHAPIRO: Okay. Jan, Germany ever the source of great ideas for copyright changes at the European Union level. What is the German experience with the related right? You had a provision before and I was wondering about something that Kimberley said also, is it sufficient for Article 15 to have just a remuneration right? Can you give us a little bit of your experience in this area?

JAN BERND NORDEMANN: Yes. Thanks, Ted. Indeed the Germans had a predecessor. Before the EU-related drive for press publishers, it was a German national right. The experience was in particular regarding search engines that once you have a strong or a dominant market player on the other market side in the licensing market, it is very difficult to bring the exclusive right to life because Google asked the publishers for a free license, and in case they didn't do this, they threatened with delisting, or later on when they obviously saw that this may provoke antitrust concerns, they threatened at least listing light.

A lot of problems when licensing Google and they accepted the free license. It didn't really work, and the press publishers were forced to fight this in court. It took of course very long. Then, in the end, during the trial, the German national related right got canceled due to formal issues. That's why at least a lesson to be learned from Germany is you have to think this parallelly with antitrust law, in particular, regarding Google.

TED SHAPIRO: Thanks, Jan. I think we're going to move to the next speaker. Danielle, you can see that there's been challenges in Europe with this. Please, the floor is yours for I believe also seven minutes.

DANIELLE COFFEY: Great. Thank you very much. Thank you for having me.

TED SHAPIRO: You look very cozy there on the couch. [chuckles]

DANIELLE COFFEY: [laughs] Yes, I am. It's great for my back. [chuckles] Thank you very much for having me. I appreciate joining this esteemed panel, especially it was very easy coming after Kim because I get to skip past all of the history of the newspaper industry. I'm with the News Media Alliance. We represent 2000 newspapers across the country and internationally.

Like I said, I get to skip past a lot of our history, which we recognize what's happened in our industry, and I love talking about that subject just because there's so many things and so many speed bumps like any industry that could have been done differently.

One of the issues that we grapple with is actually human behavior and the fact that our readers read a print product and transitioning them to the digital. In many cases, an older audience, giving them iPads, and so on and so forth, have been very interesting to watch in our industry. Where I'll start because I get to skip past everything that Kim went over is what we did was, we asked our members what they're experiencing in the industry, how their content is being consumed by their readers.

What we've learned is that the internet has been amazing for our audiences, especially during the pandemic. when local content has been consumed in mass because everything's become local. Schools closing, businesses, so on and so forth, health, have impacted local communities. It's been great for our readership. It's been great for the consumption of our news content, and our audiences, the trajectory has gone upward. However, the revenue of our news content monetization has gone downward.

We've had to identify what's the problem here. What we did was we did an interview with all of our newspapers to see how their content is consumed over the platforms because our main distributors are two major platforms, two monopolies, Google and Facebook. Like I said, the internet has been great for us, but 70% of our content that goes through these two companies has not allowed us to monetize our content. We wanted to figure out why. We did tons of interviews, countless interviews. What we've realized is that our content is consumed in a way that keeps readers inside the walls of these two platforms and users don't leave. 65% of users just don't leave.

They're consumed in ways that we have lower subscriptions, we have lower data, we don't get compensated directly from the platforms, which is the subject that I'll get to in a second, but we can't monetize what is consumed through the platform because of the rules that we have to adhere to. If you read the terms and conditions of giving our content to let's say, AMP or other products and services and verticals, we actually just can't monetize that data or that content.

One of the ways in which we would enforce our rights, which we do have, Kim is absolutely correct, that in the US we have the ability to protect our compilations, which is why it wouldn't be the ancillary right just because we have very different legal systems, I think we do across all countries, which is why there have been so many different approaches, and so how we would protect our content would traditionally be copyright. There's copyright protections that we can assert today because we can protect the compilation, but no one company-- I won't go into what we submitted to the copyright office.

I'm sure Kim has had plenty of that and others because we gave very lengthy comments to be able to describe ways in which we do believe we have those protections today.

Unfortunately, even with those protections, it's meaningless because with two large companies, no one publisher is going to be able to assert their right because it's a Hobson's choice. It's like asking if you want air. We don't have the ability to assert our copyright protection because this is actually a competition issue. What Congress has done with the Journalism Competition Preservation Act, which they've now strengthened to have an enforcement mechanism, is to base this right on our current ability to withhold our content.

We have that ability today, it's under 1201 of the DMCA, so that's our right. We actually have the underlying right to demand compensation, but like I said, no one publisher would do it. We get to collectively come together to assert that right. What we've also added because we've realized we don't have willing participants because of what we've seen in Europe and Australia, we've added in an enforcement mechanism and a dispute resolution mechanism, a backstop, if

you will, to be able to ensure a speedy and fair outcome to those negotiations. The JCPA is currently moving through Congress right now. It's being considered by the Senate in the house.

It'll be marked up and then sent to the floor, and then hopefully, we'll see compensation to news publishers like we've seen around the world because we do provide an economic value to the platforms that we're not seeing in return like other content industries. While we're focused on copyright, we think that it's essential to the ecosystem. It's supposed to incentivize the investment and reinvestment in newsrooms and reporters so that we can provide that valuable content to communities like I talked about. Right now, we're in a situation where it's an urgent problem, and this is an urgent solution.

We're working with all of our partners internationally as well because there's not a one size fits all, but we do need to solve this problem in the public interest and in what's good for the best societal outcome here.

TED SHAPIRO: Danielle, what are the chances this legislation's going to pass?

DANIELLE COFFEY: With Obama's endorsement yesterday, I think they're higher. [laughs] I thought that was amazing what he said to Stanford. We were really pleased to see that. We continue to have the support of our leadership. It's remained bipartisan. I don't think many things that aren't bipartisan are going to pass this year. What you always vie for is the calendar. Oh, I'm seeing your timer. The less that the calendar has you can find windows is when you struggle to pass any legislation, especially in an election year because everything leading up to November is going to be a time crunch. It's going to be difficult to get the attention of legislators.

Because there's such an in bipartisan interest in helping local journalism, and one of the biggest shifts that's actually made this even more palatable, not just because it's bipartisan, because it helps journalism, and because they do want to bring bipartisan measures to the floor because that's just politically, always, especially in an election year, politically more palatable. There was a lot of rhetoric from our opposition and a lot of folks were worried that this was going to be a windfall for the large national publications like the *New York Times*, *The Wall Street Journal*, so on and so forth, *Fox News* because it helps broadcasters as well.

One of the biggest changes in the legislation that now refocuses to actually benefit only small and local publications, there was a cap that was imposed so that large national publications are not eligible, and because of that and all of the rhetoric about it was big media cartel, that has also made it more palatable because local news being paid by monopolies who are making money off their content is not a difficult purpose to get behind. It is being embraced widely. To answer your question, it does have a good chance of passage, and I'm cautiously optimistic.

TED SHAPIRO: Thanks, Danielle. Carlo, how are you doing, how are things in Basel?

CARLO SCOLLO LAVIZZARI: Very good. Spring is on its way. I even had to shut out the sun, otherwise. there's too much light here. All very good.

TED SHAPIRO: I seem to have the opposite problem here.

CARLO SCOLLO LAVIZZARI: Of course, I miss being in New York at this time at Fordham with all of you and many friends in the whole community.

TED SHAPIRO: Next year, hopefully. You've heard quite a bit about the US angle, and of course, Kimberley touched upon some of the EU stuff, and Jan has mentioned Germany. In your view, how can you make something like this work, does it have to actually be a combination because the right doesn't seem to be enough on its own?

CARLO SCOLLO LAVIZZARI: I think it's almost like a perfect storm situation. You have platform regulation, or in fact, antitrust law, really struggling with entities that are too big to infringe or too big to be regulated. You see that across the board in all areas of regulation that's coming their way. I think this stalling any holdouts and negotiation that we see in Australia, or in South Africa even there is legislation now on the subject, that that's the antitrust or competition angle. I would say in addition the publishers are in a way the latecomers too, as you say, the wrong side of the railway line, the related right, in the sense that sound recording got a copyright in the US, a related right in Europe.

We don't have, in Europe, the work-for-hire doctrine that makes very clear who owns rights when you have a bundle of rights, and the modern publication is different from your newspapers of the '50s, '60s. It's really a very sophisticated digital product that's layered, that is extendable, citable, needs to be preserved for future generations. I think the case is there to recognize the value these publishers bring, for them to be equal with all the other producers, the motion picture, the sound recording, broadcasters, et cetera, for a related right. The problems to be solved is not necessarily the antitrust angle.

It's the mass copyright infringement, where in Germany also there's another solution with a presumption of ownership, at least for injunctions, that's been given to exclusive licensees of copyrighted works, but the related right would really dispose of this. It's the old published edition of the colonial copyright act that effectively would get a new lease of life here. The other issue that needs to be solved is the one of collective licensing. Kim mentioned this in relation to Italy.

You have these cases in Europe where publishers were effectively deprived of the share of collective licensing revenues, and that had to be amended from the DSM. That was also partly the result of a missing related right. To sum up, I think you have, on the one hand, the holdout, the competitive angle, and on the other hand, simply solving the problem of mass infringement of recognition of the bundle of rights value that publishers create, and of the collective licensing angle.

TED SHAPIRO: Thanks Carlo, you refer to the [unintelligible] case and the provision that overturned it and reinstated a share for private copy and reprography. Is that correct?

CARLO SCOLLO LAVIZZARI: Yes.

TED SHAPIRO: Okay. I see again that we need to move to our next session. Our next speaker is Ali Sternburg from the CCIA who's going to explain why the snippet tax would violate the first amendment and international obligations. Ali, the floor is yours.

ALI STERNBURG: Thank you so much and thanks to everyone for your really interesting thoughtful comments today and for having me. As just said, I'm going to talk about how these snippet taxes like the EU and Australian approaches and Canada's recent proposal are inconsistent with international copyright obligations that prohibit nations from restricting quotation of published works and inconsistent with the constitutional underpinnings of the US copyright system and its inherent limits on protectable subject matter. Most jurisdictions view displaying a short quotation or snippet to be permissible because it may be too short to qualify for copyright protection.

It may fall under an exception to copyright law, like fair use in the US, or fair dealing elsewhere, including exceptions mandated by Article 10(1) of the Berne Convention, which prohibits nations from restricting the right to quote. Creating a right to payment for content used in news aggregation services is likely in violation of this international obligation under Berne and would violate the first amendment. Starting first with international obligations, granting additional rights to press publishers would contravene US compliance with the Berne Convention. Article 10(1) provides that it shall be permissible to make quotations, including quotations from newspaper articles and periodicals in the form of press summaries.

Since its inception, Berne has guaranteed this mandatory quotation right. Whereas prior to 1967, the right existed only to make short quotations, the 1967 Revision consciously deleted the word short. As specifically recommended by nations' international copyright experts and the diplomatic conference minutes from 1967 revealed that there was an unsuccessful proposal to reinsert the word “short” before quotations. It was overwhelmingly rejected. Because established international copyright rules prohibit nations from restricting the right to quote, national legislation that contradicts these obligations breaches commitments made under the WTO.

Because provisions of Berne are incorporated in TRIPS, it's part of the WTO agreement. WTO members have a mandatory affirmative obligation to permit anyone to quote from a work that is already lawfully publicly available and therefore an ancillary right or other form of snippet tax would abrogate this right in violation of TRIPS obligations. The fact that the EU and some member states and Australia have adopted these kinds of regimes does not demonstrate that they're permitted under international law.

In addition, under Berne article 2(8) copyright does not extend to news of the day. The mechanism by which the United States implements article 2(8) is copyrights originality requirement and 17 U.S.C. § 102(b) and as discussed Article 10(1) has a mandatory quotation right including quotations from newspaper articles and periodicals in the form of press summaries and the mechanism by which the US implements this quotation right is 17 U.S.C. § 107.

Importantly, originality is a constitutional requirement for copyright protection in the United States and the US Supreme Court has explained that sections 102(b) and 107 are built in accommodations to the first amendment that if they were restricted would likely raise serious constitutional concerns. Which I'll talk a little bit more about now. Ancillary copyright protections would violate

the constitutional purposes of copyright and by abrogating the traditional first amendment safety valves embodied in doctrines, such as the originality requirement, merger doctrine and fair use would be subject to heightened First Amendment scrutiny.

In addition to copyright-specific laws, these measures in the EU and Australia, for example, have multiple features that have repeatedly led US courts to strike down regulation under the First Amendment. They impinge on editorial discretion, potentially discriminate based on content or identity of favorite speakers and compel speech. Any attempt to create a new right to favor publishers or restrict the activities of news aggregators would raise serious First Amendment concerns and appear unlikely to satisfy constitutional scrutiny.

The Supreme Court has long recognized that although copyright operates as a restriction on speech, the safety valves embodied in US copyright law, fair use and idea expression dichotomy, and copyright's role in fostering additional speech are what render it compatible with the First Amendment. The Supreme Court has warned that further First Amendment scrutiny is unnecessary only where Congress has not altered the traditional contours of copyright protection, and EU and Australia measures would do just that.

Regardless of whether they take the form of an amendment to the Copyright Act or a new ancillary right, they would do so in ways that reduce or eliminate precisely these built-in free speech safeguards that the Supreme Court suggested were critical to copyright law's compatibility with the First Amendment. Finally, many major aggregators and news search services allow publishers significant control over whether their articles appear in search results and aggregations using tools such as established robots.txt protocols, which automatically instruct search engines whether or not they can access a website. Publishers that don't want their sites to be scraped or crawled by aggregators can rely with confidence on the robots.txt exclusion protocol, an internet industry standard as respected by major search engines and news aggregators. By adding two short lines of code in the header of a website, website administrators can prevent automated programs from copying headlines, snippets, or any other content from that site. Most publishers do not invoke robots.txt, however, because they benefit from and rely heavily on the traffic that news aggregators direct to them. The fact that news publishers for more than a decade have consented to being crawled by search engines and have actively posted their content on social media sites proves that these services provide them with enormous value.

Even EU regulators acknowledge this when they unsuccessfully tried to suppress a copyright-related study they had requested on press publishers' rights around the adoption of Article 15 of the DSM directive because it found that the available empirical evidence shows that newspapers actually benefit from news aggregation platforms in terms of increased trafficked newspaper websites, and more advertising revenue. Thank you. I stayed in time. Thanks so much.

TED SHAPIRO: Perfect. Well done. Thanks. Thanks very much, Ali the issue of the Berne Convention. I didn't see the word right in Article 10, but I'm going to ask Professor Jan Nordemann who is an expert in the Berne Convention to talk a little bit about the analysis that you've made. My understanding is that of

course our Article 10 would still be subject to the three-step test. People can design exceptions. They have to meet the test and then they would be in compliance, but maybe I'm missing something, Jan, you comment on the Berne angle?

JAN BERND NORDEMANN: I've looked into this because I think it's an interesting argument definitely worth discussing because as we all know, news content is very important for free speech. Also for the right of information, of course. we have to treat this and take this seriously, this argument. At least from my European perspective, of course I can say nothing about US constitutional law, but from my European perspective and from the Berne perspective, I think the quotation right is really out of danger here because both EU copyright law and also the new related right for press publishers, they are subject to all the exceptions limitations that we know from genuine copyright, in particular, the quotation right from Article 10 Berne Conventions. If you want to quote from a press publication that is still possible, but for example, what search engines do, they do not quote.

They just at least quotation, I think we all agree on what this is, at least in quotation, is use. For example, within the work you use an original work of somebody else in order to express an opinion, positive or negative, but search engines just display snippets for example, that's not quoting. I think we are out of the quotation right here.

TED SHAPIRO: Thanks Jan. Moving to the constitutional issue and I'm going to put this to Danielle. Perhaps you could comment, I'm not going to put Kim on the spot and make her answer it, I'll let somebody who had probably has a different view, please comment.

DANIELLE COFFEY: I'm trying to get the name of the case because we just had a big Supreme Court win yesterday, we were really happy about it because I don't know if folks were following, but the *Reed* decision that talks about categories of speech. I would just correct something that Ali said just about the compelled speech, nothing actually in, at least in the legislation in the US compels requires display.

It's actually just about access to the content that's already being displayed. It doesn't require future condition to display. Even so you would look at any definition that that talks about eligibility, and two would be negotiating under such a regime and you would look at a definition and you would determine whether or not a category-based distinction is taking place and because of some bad precedent or some confusion that was created by the *Reed* decision.

We were very happy. I can't remember the exact name of the decision that came out yesterday from the Supreme Court, *City of Austin, Texas v. Reagan National Advertising of Austin, LLC*, the Austin, if somebody knows it, please jump in. The case was just decided yesterday. It said that, and it actually, it brought us back to where we were before *Reed*, which is really how it had been for since I can remember.

That has regulated all sorts of content-based distinctions. It also makes sense. If *Reed* had stood, there would be concern about what it would undo that's already been done and so forth. The decision that came out yesterday was much

more logical and aligned with how things work today, which is function or purpose-based distinctions do not trigger strict scrutiny.

That's the world that we've been living in until a little bit of confusion about *Reed* and Sotomayor, one of the lines that she said in the decision that I thought was so telling is that "you shouldn't have to read the billboard or the message to be able to determine whether or not the law applies."

That was an overbroad interpretation of what the Court's guidance is when determining whether or not category-based distinctions, such as the ones that we make in laws that have to apply. Even the copyright law that applies to every industry might be stricken if we start making such distinction. We were very pleased with the decision that came out yesterday that puts us on solid ground there.

TED SHAPIRO: Thanks, Danielle. There's a question in the Q&A, I think it's for Ali. The questions is, when you say news of the day is addressed by originality, does that boil down to the facts being unprotectable? If so, do you agree the way news publishers express those facts are protectable and thus don't implicate the constitutional concerns you mentioned, that's from Joshua Simmons.

ALI STERNBURG: Thanks. I'm happy to try to address some of this. One other limitation, there are a number of different limitations on the scope of copyright protection, in addition to, before you even get to limitations and exceptions, like fair use. Another one is that there's no copyright protection for facts of course. We talked and I mentioned a little bit about the merger doctrine, a lot of news reporting, whether it's the example like the Red Sox beat the Yankees 3-0, or like something that is like there's so few words that you can express that in and I'm a Red Sox fan here, but I think--

TED SHAPIRO: I'm from Boston.

ALI STERNBURG: Awesome. Me too. I think it really does limit the way that things can be expressed if there were to be protection on a headline or a snippet that's that few words. I don't think we talked about how facts aren't protected by US copyright law, and that is another thing. Let me just, you can come back to me if anyone else wants to weigh in.

ALI STERNBURG: Of course. A headline, I guess to the news-of-the-day and what I was just saying, headline doesn't generally doesn't rise to this level of originality that's required in US law for copyright protection. Itn addition to the 'you can't own facts,' that factual headline would not be sufficiently original to be protected by copyright.

TED SHAPIRO: Sorry. Carlo, were you trying to jump in?

CARLO SCOLLO LAVIZZARI: Just wanted to jump in about the principle, what's fair for an individual may not be fair for the aggregator. The aggregator is really making a mass use and deriving enormous financial benefit on the back of the products of these newspapers or any other publishers. Arguing that the end-user is entitled to some fair use or quotation to me doesn't really go to the bottom of where the aggregator sits and that relationship that needs to be fixed with the publishers.

I actually wonder Ali, if a piece of content is long enough to be protected, it's clear that the publisher is the owner. What's your answer there? Just robot text,

or assuming those things are clarified either by law or jurisprudence, would you argue that there should be an agreement between the reuse by an aggregator and the originator of the content?

TED SHAPIRO: Would you like to answer that Ali?

ALI STERNBURG: I'm not sure I'm following.

DANIELLE COFFEY: Maybe I can add to it because the question--

CARLO SCOLLO LAVIZZARI: Bring it in.

DANIELLE COFFEY: Do you mind? It's because the question asked whether or not there's originality in not just our works, but what's taken from our works. Even if you look at ways in which Google uses our products again. What if you're looking from a copyright lens and you're doing an analysis of whether or not there's a fair use to determine what Carlo's asking. Let's say it's determined that there is and this question, I'm very curious what Ali thinks, whether that then necessitates an agreement.

I would even double down on that as far as the headlines that are used. We in our journalism school, so Mizzou we work with a lot, we have this foundation American Press Institute, and we do a lot of work with the universities and training of newsrooms to be able to improve our content, it's all about the content. That's the mission of newspapers. In writing, being able to grab the attention of the readers, especially in the internet age.

You have to be able to write in a way that really captures the attention and the essence. There's entire classes and seminars. I know Fordham does them, and so forth, that has teaches journalists how to write in a way that would do just that, capture attention, articulate the essence. Whether or not that's original, I would argue very much so that it is very original. The articulating what it is you're covering and reporting on.

Then to Carlos's question, then once that's established and certainly in Europe, it is that there's a right to that. Then what would the platforms do with that right? Ignore it. Is the alternative the only alternative an agreement or robots.txt?

TED SHAPIRO: The question is, assuming that the hurdles that you were referring to, or overcome would you be supportive of the opposing position because I certainly get the point. I think that something, it has to be worthy of protection and of course, exceptions or fair use need to apply. I guess what Carlo and Danielle were saying were if we get over those hurdles.

ALI STERNBURG: I don't think that these hurdles can be overcome in the US. As it's been said, they're very different regimes, like civil law versus common law and different reasons for copyright protection in the US based under the progress clause about promoting progress of science and eventually it goes into the public domain. They're very different. In addition to our first amendment and commitment to free speech, there are very different reasons for US copyright law and a very unique First Amendment that sets it aside from different copyright law regimes in Europe that have the EU and member states.

I don't think that those hurdles can be overcome. so I guess I'm not sure I can get to the next part about--

TED SHAPIRO: You're unwilling to accept the hypo but that's okay. We do have free speech in the European Union at least in the Western part of it. Kimberley, maybe we'll flip over to you and see if you would like to comment on this constitutional issue. Are these hurdles, can they be overcome or are you working on projects that will violate the US constitution?

KIMBERLEY ISBELL: I guess speaking for the U.S. Copyright Office, we would certainly never propose anything that we thought would violate the constitution. While I don't pretend that I am an expert in First Amendment law, it's been a couple of years since I've actually done a First Amendment case, I think it's pretty clear from Supreme Court jurisprudence that copyright law can live alongside the First Amendment.

There are accommodations for freedom of expression within the copyright laws. I would say that, yes, theoretically there is a way to do it, obviously, that would require considering of the specifics and exactly what it looks like. Some proposals may not actually comply, but I think it's certainly possible to craft one that would.

TED SHAPIRO: Do we have any questions out there in the audience? People are very shy today.

CARLO SCOLLO LAVIZZARI: If there are no questions, I just wanted to say when in 1972, sound recording started to be protected through a related right in the US, the music didn't stop. It wasn't like no more free speech in the form of music. To add a related right, *per se*, I think it's a bit of a catastrophizing assumption that that would bring freedom of expression in the US to a standstill.

TED SHAPIRO: The related right in Article 15 of course is not underpinned by a creativity requirement, but rather I believe in an investment criteria which is a similar justification for other related rights because there are also related rights for music producers, audio-visual producers and broadcasters. It's premised on the investment that they bring. I thought it was strange when they proposed article 15, that it was only for press publishers and not all publishers, but that was an issue that didn't go very far.

I thought it would be like saying we'll give protection to film producers, but not TV producers. I don't see any new questions. I'm going to flip back over to Jan to explain if he could, why there isn't a free speech issue with Article 15 under the charter of fundamental rights of the EU. Which would be the corollary, I suppose. Jan, would you like to comment on that part? I don't want to put you on the spot for US constitution. I thought I put you on the spot for European constitution.

JAN BERND NORDEMANN: Oh yes. Like every copyright lawyer, of course, at least in the last years I'm an expert in fundamental rights because copyright as we all know and love it is at the core of the society and that the really where the fundamental rights are. As I said earlier, already, I think it is very important to really be sensitive to the issue of news. On the other hand, we also need quality journalism that is solidly financed.

That's why the EU as was said already multiple times introduced this related right. There has been a balancing of the different fundamental rights involved in particular free speech. As I said, all the quotation rights. In particular,

guaranteeing free speech is out of protection, is a recognized limitation or exception rather to also this related right. At least from all that we've seen so far as Carlos also emphasized, we do not see any restrictions to free speech in Europe.

It rather comes down to being paid, certain users now being paid, which were not paid before. For now, we don't see also that the exclusive right is being used to prohibit at least that's of course, the history is very young still, but we are not seeing the right to be used. As I said, to exclude people from using news content

TED SHAPIRO: The German implementation of Article 15. Of course, the Germans have completed implementation of the directive about a third of the countries are done. How is that working out so far? What's going on with it?

JAN BERND NORDEMANN: There's no big money yet with the publishers they are still negotiating the publishers and particular collecting societies for the press publishers are negotiating on a collective level. Google has tried to do some individual deals with publishers but at least to my knowledge so far, this has not really come to the result that the collective licensing through collecting societies will be limited. The German Antitrust Office also has an eye on it because of the dominant market position of Google.

In France, for example, the same thing happened. The French published us a little further than the Germans. They already do have the first deals, as it seems with Google but also under heavy pressure by antitrust authorities and antitrust courts because Google, in the beginning, tried the same game as they tried with the former national German right. They tried to get free licenses or very, very cheap licenses by bringing their market power into the game.

DANIELLE COFFEY: Could I jump in there to add something to a question that's in the comments with regard to France? It also answers an earlier question that was asked.

TED SHAPIRO: Please do, because I was just about to say, "Oh, look, we have a couple of questions." Go ahead.

DANIELLE COFFEY: Yes. I think that it also answers a question from before. Where it wasn't a hypothetical, there were actually rights in place, and there was this unwillingness like Jan just mentioned which is this unwillingness to come to the table to negotiate. When France, the competition authority stepped in and actually was very effective agency dealer France came to do the press sorry, came to a deal.

Our version of the AP came to an agreement, APIG was working on it and so forth. That's actually been quite from all accounts successful which is why the purpose of the focus really is the competition aspect. That unwillingness needs to be met with the government stepping in to say, "Because you have an unwilling participant to abide by the law, very clear law in Europe, that the government needs to step in because the platform needs to be identified as a dominant monopoly that must come to the table."

An economic abuse of power is what they call it in Europe. In US obviously antitrust. I thought that that was good question, and to segue with what

Jan was saying with regard to what happened in France, when the competition authority steps in it really is effective, which is why we follow that model.

ALI STERNBURG: Just to respond from my perspective on implementation in France and elsewhere from our perspective, we think it's implemented in a problematic manner. I know we're running out of time. From industry perspective, the French implementation of Article 15 leads to a financial obligation completely out of platforms' control. It can't pull out of the market, must pay whatever price the regulator imposes.

That's why regarding the Canadian bill that was just introduced, that's more of the Australian model than the EU model, but Professor Michael Geist there called that a "shakedown subsidy" model. In addition, would just flag there's some concerns with how it's been implemented in Croatia and in Austria, and some other countries. That ends up creating barriers and challenges for US companies to try to comply with national rules when the EU directive was all about a digital single market.

There's a question in the chat about the Australian perspective where large press publishers would be the major beneficiaries rather than small publishers. I would also be interested in that because from my perspective I didn't see how it would benefit local publishers. I haven't read the latest version of the JCPA, but again, that's an antitrust proposal and we're talking a little bit more about copyright at the Fordham IP conference

TED SHAPIRO: We only have a few more seconds left. I don't know, Danielle, Sorry.

CARLO SCOLLO LAVIZZARI: Just wanted to pick on the very short extract. I think the good news about that exclusion it's one of the questions by Eleonora Rosati. It means short extracts are licensable so I'm very grateful for that because short extracts for all kinds of publishers are bread and butter licensing material. Maybe very short is according to the old ECJU decision five words before a key search word and five words after a key search word.

ALI STERNBURG: From our perspective, there's a lot of concerns with how it's actually implemented in practice and it would still raise Berne quotation right problems.

TED SHAPIRO: To the extent they exist. Okay. Well, thanks very much, everyone. I'm sorry, we didn't quite get to all of Fiona's questions. We run out of time, peace, love and copyright to you all. Thanks very much for your participation and see you next year, hopefully in the flesh. Bye-bye.

DANIELLE COFFEY: Thank you.