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U.S. Copyright Office
101 Independence Avenue, SE
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202-707-8350

VIA ONLINE SUBMISSION

Re: Comments of Engine Advocacy Regarding *Publishers' Protections Study: Notice and Request for Public Comment*

Dear Ms. Isbell & Mr. Foglia:

Engine is a non-profit technology policy, research, and advocacy organization that bridges the gap between policymakers and startups. Engine works with government and a community of thousands of high-technology, growth-oriented startups across the nation to support the development of technology entrepreneurship through economic research, policy analysis, and advocacy on local and national issues. We appreciate the opportunity to submit this response to the U.S. Copyright Office's request for public comment as it studies ancillary copyright protections for publishers.

A. Introduction

The Copyright Office's current study is rooted in concerns over reported disruptions facing local and city newspaper newsrooms.¹ However, the policy proposals noted in the Notice and Request for Public Comment (Notice) would be a poor fit to solving those problems and they would bring substantial unintended consequences. Extending copyright-like protections (also known as "ancillary copyright") or adjusting competition law to restrict sharing hyperlinks and quoting news headlines or snippets of articles would fundamentally alter the way we create, share, engage with, and learn from news and information online.

¹ Publishers' Protections Study: Notice and Request for Public Comment, 86 Fed. Reg. 56721, 56721-22 (Oct. 12, 2021) [hereinafter "Notice"].

Local media is vitally important—local and regional news sources can create a sense of community, drive conversations around the issues that matter to them, cover those issues with necessary nuance, hold leaders accountable, dig deeper on stories of local significance, connect audiences with actionable information and upcoming events, inform national media outlets, and more.² These are things that large, international news outlets cannot do. Policymakers are right to explore new structures, business models, etc. that can advance the creation and distribution of locally-relevant content that fulfills these essential roles.

Changes to copyright or competition law that restrict access to information would frustrate the goals that local media is meant to serve. But those changes would also make some of the exciting work U.S. startups are doing today impossible and snuff out future innovations. Existing law already provides tools to those seeking to impede startups and their users—where threats of (even frivolous) litigation can put startups out of business, put their financing at risk, or allow wealthy rightsholders to dictate the direction of innovation without justification.³ Where (even improper) accusations of infringement can be used to remove opposing views or deter individual speech online.⁴ If linking to or quoting an article online were grounds for more litigation and similar infringement threats, it would seriously exacerbate these concerns. Extending copyright-like protections or regulating competition over linking to or quoting the news would not just fail to solve the problems the Notice identifies, those proposals would be rife with unintended consequences for innovation and public discourse, and they would entrench the largest players in both media and digital markets.

As U.S. policymakers think about solving the problems facing local newspaper newsrooms, it is vital they take a holistic view of local media markets and digital and innovation ecosystems to avoid legal structures that restrict progress or curtail vital First Amendment rights.

B. Ancillary Copyright Protections Are Unwarranted and Would be Highly Detrimental

The underlying concerns at the foundation of the present study are not about copyright and would not be solved with changes to that law. Extending copyright-like protections to hyperlinks, news headlines, or brief quotes from news articles would cause substantial unintended consequences, for example: limiting innovation, restricting startups and their users without justification, curtailing vital civic and educational engagement, and erecting direct conflicts with the First Amendment.

² See, e.g., Melody Kramer, *Why Does Local Matter? Let's Ask Our Audience*, Poynter (June 23, 2015), <https://www.poynter.org/reporting-editing/2015/why-does-local-matter-lets-ask-our-audience/> (collecting audience perspectives about the importance and value of local newspapers and radio stations).

³ See, e.g., *Is the DMCA's Notice-and-Takedown System Working in the 21st Century?: Hearing Before the Subcomm. on Intellectual Property of the S. Comm. on the Judiciary*, 116th Congress n.31 (2020) (testimony of Abigail A. Rives), <https://www.judiciary.senate.gov/imo/media/doc/Rives%20Testimony.pdf> (discussing fate of video streaming startup Veoh); Matthew C. LeMerle et al., *The Impact of Internet Regulation on Early Stage Investment* (Nov. 2014), <https://static1.squarespace.com/static/571681753c44d835a440c8b5/t/572a35e0b6aa60fe011dec28/1462384101881/20EngineFifthEraCopyrightReport.pdf> (investors report reluctance in funding emerging startups that host user generated content if legal changes indicate money would go to cover legal fees or liability for user posts); Amanda Reid, *Copyright Policy as Catalyst and Barrier to Innovation and Free Expression*, 68 *Catholic Univ. L. Rev.* 33, 43-44 (2019) (arguing that “allowing incumbents to dictate copyright policy, Congress has entrenched a preference for extant technologies,” and explaining how innovation “can be thwarted by the threat of a copyright lawsuit”).

⁴ *Infra* Part B.

Aggregation, as the Notice defines it, is correctly outside the bounds of copyright infringement liability. The Notice offers an expansive definition of aggregators and their activities, including collection of links “and sometimes snippets of third-party articles” made available to readers and “allowing users to share news stories.”⁵ As the Notice correctly acknowledges, facts and ideas, titles, short phrases, headlines, etc. are not eligible for copyright protection. And the law permits quoting written works, like news articles, for purposes of, e.g., education, comment, and criticism.⁶

Were these norms to change, it would mark a truly fundamental shift in how people interact with information, data, content, and facts online. Indeed, scores of startups were built around copyright law working the way it currently does, and changes that expand copyright-like protections to links or snippets would raise new barriers to their work—and for some innovators, such changes would be enormous, even insurmountable. Merely by way of example, creating ancillary copyright protection would impact startups like these:

- [Fiskkit](#) is building public discourse and criticism tools. They provide a platform for users to “discuss important news topics and to find out what information is accurate” in articles on the Internet. They also offer a classroom product with an “article discussion tool that lets students practice critical thinking and close reading.”⁷
- [Civil Media](#) is an edtech startup focused on equipping teachers with a new, more productive way to talk about current events in the classroom. They “research, vet, and summarize political topics so [educators] can spend more time doing what matters most — teaching.” They have collected and created a library of resources on newsworthy, contemporary issues, presenting a balance of perspectives and helping teachers train students to be civil and critical thinkers.⁸
- [TeacherCoach](#) is an edtech company that develops and provides a platform for personal growth and professional development tools—including webinars, trainings, and community portals that span topics from educator wellness to nutrition and bullying.⁹ They have solutions to serve individual educators, institutions, and entire school districts. They are both a curator and they create as much original content as they can.

In addition to the direct impact on these and other companies and websites, as Fiskkit’s founder, John Pettus, recently put it: granting additional copyright coverage to things like hyperlinks and news headlines would create potential “unintended consequences here that are massive and mostly

⁵ Notice, *supra* note 1, at 56722.

⁶ Notice, *supra* note 1, at 56723.

⁷ Fiskkit, <https://fiskkit.com/about>; Fiskkit Classroom, <https://classroom.fiskkit.com/login>; see also, e.g., *Promoting Civility and Critical Thinking Online*, Engine (Dec. 11, 2020) <https://www.engine.is/news/startupseverywhere-sanfrancisco-calif-fiskkit> (#StartupsEverywhere profile of John Pettus, Founder and CEO, Fiskkit).

⁸ Civil Media, <https://www.civilmedia.io/>.

⁹ Teacher Coach, <https://www.teachercoach.com/>; see also, e.g., Ian Rutledge, *Edtech to Bridge the Personal, Professional Wellness Gap of Educators*, Engine (Aug. 27, 2021) <https://www.engine.is/news/startupseverywhere-mount-laurel-nj-teachercoach> (#StartupsEverywhere profile of Jared Scherz, Founder & CEO, TeacherCoach).

pernicious.” As the Office considers the viability of adding new copyright-like protections to U.S. law,¹⁰ it must account for these substantial risks and tensions.

Ensuring Space for Innovation. Ensuring communities across the country can access the vital benefits of local media presents vital opportunities for innovation.¹¹ The Notice at least implicitly discusses the challenges of adapting the business of running traditional local, city, or regional newspapers to a modern audience.¹² The Office’s study should also account for the increasingly diverse ways audiences access locally-relevant, topical, and newsworthy content; it should factor the various ways that content is created and distributed. Moreover, as policymakers evaluate proposals, it is critical to avoid new law or regulation that would thwart these innovative new businesses and local media sources.

Traditional newspapers are not the only way to access information. Of course, radio and TV stations also create and distribute local media, and all three types of outlets (can) have a parallel online presence. But there is a great deal of innovation around who creates and shares locally-relevant, topical, and/or timely information. For example, there are startups like those mentioned above that present balanced, unbiased, and/or fact-checked information,¹³ those that generate and distribute hyper-local coverage,¹⁴ or that connect communities around events.¹⁵ There are new business models for local news blogs or sites dedicated to deep dives and expert coverage on specific topics.¹⁶ And while we can listen to local radio on the Internet (from anywhere in the world),¹⁷ especially during the pandemic, podcasting has become an increasingly important way for audiences to listen to news and for news organizations to reach their audience.¹⁸

¹⁰ Letter from Senator Thom Tillis et al. to Shira Perlmutter, Register of Copyrights 1 (May 3, 2021), <https://www.copyright.gov/policy/publishersprotections/letter-to-the-copyright-office.pdf>.

¹¹ *Supra* Part A (summarizing, at a high-level, why local media is vitally important); Kramer, *supra* note 2 (similar).

¹² *See* Notice, *supra* note 1, at 56722-23 (discussing disruption and transformation in the Internet era, and correlating that to a time period during which local newspaper newsrooms saw declining revenue and headcount); *see also, e.g.*, Julia Munslow, *Gen Z Demands Personality from Journalists*, NiemanLab, <https://www.niemanlab.org/2021/12/gen-z-demands-personality-from-journalists/> (last visited Jan. 5, 2022); Mike Masnick, *The Problem With Newspapers: Lack Of Innovation, Lack Of Engagement... And Lack Of Reporting*, Techdirt (May 11, 2009), <https://www.techdirt.com/articles/20090510/2128554820.shtml>.

¹³ *E.g.*, Civil Media, *supra* note 8, Fiskkit, *supra* note 7.

¹⁴ *E.g.*, The Engine Team, *Delivering Local Content While Encouraging Community Participation*, Engine (May 15, 2020) <https://www.engine.is/news/startupseverywhere-greenville-sc> (#StartupsEverywhere profile of Ryan Heafy, Co-Founder and COO, 6AM City)

¹⁵ *E.g.*, Hong Zhuang, *Reimagining the Online Event Management Experience*, Engine (Oct. 29, 2021) <https://www.engine.is/news/startupseverywhere-omaha-ne-eventvesta> (#StartupsEverywhere profile of Andrew Prystai, CEO & Co-Founder, Event Vesta).

¹⁶ *E.g.*, Techdirt, <https://www.techdirt.com/>; Comments of Copia Institute, In re Study on Ancillary Copyright Protections for Publishers, Docket No. 2021-5 (Nov. 26, 2021), <https://www.regulations.gov/comment/COLC-2021-0006-0031>; Substack, <https://substack.com/>; *PoPville is Creating Neighborhood News and Community*, Patreon, <https://www.patreon.com/PoPville> (last visited Jan. 5, 2022); Stratechery, <https://stratechery.com/>.

¹⁷ *E.g.*, Kramer, *supra* note 2 (quoting audience who listen to and support local public radio stations online, after moving to a different state).

¹⁸ *E.g.*, Sarah Scire, *Radio Listening has Plummeted. NPR is Reaching a Bigger Audience than Ever. What Gives?*, NiemanLab (Aug. 19, 2020), <https://www.niemanlab.org/2020/08/radio-listening-has-plummeted-npr-is-reaching-a-bigger-audience-than-ever-what-gives/>.

These innovators, their users, and their audiences are also improving opportunities for engagement with news and information. Local media’s role in, e.g., creating community, driving conversations, holding leaders accountable, and providing actionable information is not a one-way street. Indeed, these are unprecedented times for us, the public, to engage with the news, to comment and offer our thoughts, and exercise our First Amendment rights when it comes to current events. And innovators have created tools that help us hold even the press accountable.¹⁹ Here again, startups like those mentioned above are creating the space for that two-way engagement—for example, allowing educators to learn from each other or enabling critical commentary and education around current events.²⁰

Creating ancillary copyright would be a major change in the way the Internet operates, pulling the rug out from underneath companies and creators whose innovation is founded on the idea of an open Internet where you can link to and quote other sources. Requiring companies, websites, or individuals to pay to license hyperlinks or news headlines would erect new barriers to entry. Max Tendero, Civil Media’s founder and CEO, recently told us how his company “wants to help teachers teach students to think critically. Our classroom content would not be feasible if we had to pay for every link we put in.” Likewise, as John Pettus of Fiskkit explained, “[i]f they charged for links, it would put us and every other news startup out of business.”

To keep local media vibrant and ensure public discourse weathers continuing technological and societal changes with integrity, we need copyright law to allow innovators to keep coming up with new ways to create, distribute, and engage with the crucial locally-relevant content that city newspapers used to have a “close to” monopoly on.²¹

Benefits of Linking. Linking content is a good thing. And today’s political and informational environment only re-emphasizes the need for diverse mechanisms to expose Internet users to content and information they might not ordinarily see.²²

Sharing links is good for innovators, Internet users, and media outlets, too. Indeed, the Notice discusses how “aggregators” drive significant traffic to news websites.²³ As TeacherCoach’s Jared Scherz explained: “I was recently interviewed by a morning news show in Philadelphia, which is a marketing tool for us.” New limitations on how people could share that content would hurt TeacherCoach’s ability to get the word out about their work.

Preventing Abuse, Lopsidedness, and Bias. Attaching infringement liability to linking or quoting news articles would give the subset of organizations who receive additional copyright-like

¹⁹ E.g., Joseph A. Tomain, *Big Data and the Fourth Estate: Protecting the Development of News Media Monitoring Databases*, 12 J. Bus. & Tech. L. 53, 56-57 (2016).

²⁰ TeacherCoach, *supra* note 9; Fiskkit, *supra* note 7.

²¹ See Notice, *supra* note 1, at 56723.

²² See, e.g., Civil Media, *supra* note 8 (startup focused on presenting multiple perspectives on contemporary issues); cf. Chris Anderson, *The Long Tail*, Wired (Jan. 10, 2004), <https://www.wired.com/2004/10/tail/> (discussing possibility for niche markets in digital, versus physical, space).

²³ Notice, *supra* note 1, at 56722-23; cf. Mike Schuster et al., *Sampling Increases Music Sales: An Empirical Copyright Study*, 56 Am. Bus. L.J. 177 (2019) (study finding increased sales of songs sampled in other work).

protections more control over how everyone else in the country creates, consumes, or criticizes that content. That would open opportunities for abuse, but, even less intentional or malicious, it would lead to lopsidedness and bias in how news and information are presented.

First, abuse of intellectual property systems is unfortunately familiar. Ancillary copyright would become another tool people could exploit to remove or restrict speech. For example, experience with Section 512 of the Digital Millennium Copyright Act (DMCA)—and improper takedown notices under the auspices of trademark or copyright—shows how people use allegations of infringement to stifle speech they do not like.²⁴ For example:

- A media personality used DMCA takedowns to remove content accusing him of spreading COVID-19 misinformation. A YouTuber compiled a series of clips of the media personality speaking about COVID-19 and a journalist tweeted the video, criticizing the messages downplaying the virus. The media personality responded by filing a DMCA takedown to have the video removed.²⁵
- A video game journalist used a DMCA takedown to remove a social media post that disagreed with him about a video game. The journalist wrote a review of a game, and another video game critic tweeted a screenshot of a portion of the article in a post criticizing the journalist's view. The journalist then filed a DMCA notice, to have the screenshots removed.²⁶

Moreover, content removals and threats of litigation have been shown to have more reaching, chilling effects on speech.²⁷ If a press publisher could sue a startup or individual Internet user over linked or quoted content, that could severely exacerbate those chilling effects. Use of litigation to control speech already creates feedback loops and a culture of caution that constrict fair use of copyrighted material.²⁸ And people report less willingness to speak and write about certain topics online after receiving a DMCA notice, and that includes a reduced willingness to share their own personal creations or contribute to online communities.²⁹ Expanding copyright-like protections to links, headlines, and quotes would open another avenue and make it even easier to weaponize copyright against opposing views (because linking is so common and foundational to those commenting on the news).

²⁴ Rives, *supra* note 3, at 11-14 (presenting examples); Comments of Engine Advocacy in Response to *Secondary Trademark Infringement Liability in the E-Commerce Setting*, Docket No. PTO-T-2020-0035, at 5-7 (Dec. 28, 2020), <https://static1.squarespace.com/static/571681753c44d835a440c8b5/t/5ff37a915abd827cadbf968f/1609792145348/20.12.28+Comments+to+Docket+PTO+T+2020+0035.pdf> (similar).

²⁵ *TV Doctor Believes Copyright Will Save Him From Criticism, Is Very Wrong*, Elec. Frontier Found. (Apr. 4, 2020), <https://www.eff.org/takedowns/tv-doctor-believes-copyright-will-save-him-criticism-very-wrong>.

²⁶ *A Critic Uses the DMCA to Avoid Criticism*, Elec. Frontier Found. (May 2, 2018), <https://www.eff.org/takedowns/critic-uses-dmca-avoid-criticism>.

²⁷ E.g., Wendy Seltzer, *Free Speech Unmoored in Copyright's Safe Harbor: Chilling Effects of the DMCA on the First Amendment*, 24 Harv. J.L. & Tech. 171 (2010); Jonathon W. Penney, *Privacy and Legal Automation: The DMCA as a Case Study*, 22 Stan. Tech. L. Rev. 412, 447 (2019) (survey results showing recipients of DMCA takedown notices are also deterred from online communication and engagement generally).

²⁸ See generally Rosalind Jane Schonwald, *Associated Press v. Meltwater US Holdings, Inc.: Fair Use, A Changing News Industry, and the Influence of Judicial Discretion and Custom*, 29 Berkeley Tech. L.J. 799, 831-33 (2014).

²⁹ E.g., Penney, *supra* note 27, at 445-47.

Second, and less egregious but still concerning, is the fact that ancillary copyright would bring imbalance into how the news is presented, analyzed, and consumed. For one, requiring “aggregators” to pay for links would erect new barriers to entry and impose costs some startups would not be able to afford. This would entrench incumbents and increase the power of large media organizations selling licenses to links.

But this ancillary copyright structure would also put infringement liability in the middle of efforts to present balanced, unbiased, comprehensive information. Max Tendoro, Civil Media’s founder and CEO, recently told us: “When you are writing, making assertions, describing something—you need to be able to explain what your sources are. If copyright law allows someone behind the scenes to pull the strings, it frustrates the formation of narratives on the left and the right. If Fox or CNN writes something, and then could restrict access to it, that would decrease the credibility of our work significantly.” Many media organizations will rarely (if ever) write analyses of their own news or data from opposing political perspectives.³⁰ That’s a role for someone else to fill—for example, another media outlet, an Internet user, or an innovator. Ancillary copyright should not stand in the way of generating that balance.

Litigation Costs Become a Weapon. Relatedly, the costs of litigation are already very high. The risk of infringement litigation or liability already puts startups at a disadvantage, and investors shy away from business models where there’s a risk money will go to legal fees as opposed to innovation.³¹ Expanding the scope of what is infringing, by creating copyright-like protection over such commonplace activities of linking and quoting, would make it that much harder for startups to launch and succeed. Just one or two infringement suits, especially with a larger entity, could put a startup or small company out of business.³²

Free Speech Implications. In “considering the difference between domestic and foreign copyright law,”³³ the Office cannot discount the First Amendment. Our constitutionally protected, speech-related rights are not just fundamental to our society and our democracy, but they are distinct from other countries’ laws.³⁴ Legal structures in one country may not be appropriate (or even possible) in the U.S. because of how our Constitution treats and prioritizes freedom of speech. While the Notice does not mention or ask about the First Amendment implications of ancillary copyright, the Office must address these important aspects in its study.

Internet users are allowed to comment on the news, and startups are among the many companies and websites that can—and do—enable that public engagement with current events. This reflects a critical value in the U.S., that the person who writes the news does not get to control it, they do not get to dictate who comments on it, and they cannot use copyright law to restrict whether, how, and

³⁰ Cf. *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1263–64 (2d Cir. 1986) (finding fair use where defendant was using original work and underlying information, but presenting an opposing viewpoint).

³¹ See, e.g., LeMerle, *supra* note 3.

³² See, e.g., *The State of the Startup Ecosystem*, Engine 17 (2021), <https://engineis.squarespace.com/s/The-State-of-the-Startup-Ecosystem.pdf> (comparing average startup funding to costs of litigation).

³³ Letter to Copyright Office, *supra* note 10, at 1.

³⁴ We hope the Copyright Office will also consult with constitutional law scholars to better understand these important issues.

who can criticize what they have to say. To quote John Pettus of Fiskkit again, “copyright law should not be a tool that allows monied, institutional interests to put content out there to the public but then control what people are allowed to say about it. . . . If people put content out there to be publicly available, the public should be able to annotate or fact check it, criticize it.”

The only logical, responsible way to engage with news and information is by citing sources—and online, that means linking. If someone wants to comment on the news, criticize an op-ed, compare coverage from one source with another—she needs to provide enough context so it is clear what she is talking about. That means quoting, perhaps a headline or a snippet of an article. Creating copyright infringement liability every time anyone wants to engage with news or information online would be disastrous.

Within existing copyright law, these values are perhaps most on display in the context of fair use. News reporting—like criticism, commentary, teaching, and scholarship—is called out in the statute as an activity fair use is designed to protect.³⁵ Reporters, authors, teachers, researchers, and the public can take things that *actually are copyright-protected* and use them. While courts sometimes struggle to apply fair use in a consistent, predictable fashion, it remains an essential safety valve to ensure copyright does not trample First Amendment rights.³⁶ Yet the uncertainty about which uses are permitted and which are infringing (which brings the threat of high litigation costs and steep statutory damages) already creates a chilling effect in online speech and news reporting.³⁷ Further expanding the scope of copyright to create infringement around activities that are currently—correctly—outside the scope of copyright protection would exacerbate those chilling problems.³⁸

Likewise, “the right to receive ideas is a necessary predicate to the recipient’s meaningful exercise of his own rights of speech, press, and political freedom”—that access to information and ideas “makes it possible for citizens generally to exercise their rights . . .”³⁹ For example, as Jared Scherz, TeacherCoach’s founder and CEO, recently told us: right now, “we do not do a good enough job teaching young people how to be discerning about data. They may read something online and consider it gospel. If we limit the sources that are available to them, because we are being ultra-cautious about [ancillary copyright] infringement, then those problems will be even more protracted.”

Using copyright law to improperly stop the flow of information online would curtail our fundamental First Amendment rights, with consequences for the way we engage with and learn from

³⁵ 17 U.S.C. § 107.

³⁶ Cf. Seltzer, *supra* note 27 (discussing tension in the fact specific questions of permissible use of content (including fair use) and bright-line copyright takedowns online, resultant chilling effects on speech, and conflict between copyright law and the First Amendment that courts sometimes attempt to address through the lens of copyrightability or fair use).

³⁷ *Id.*; see also, e.g., Ryan McNamara, Comment, *Technically, It Wasn’t Me: How a Questionable Finding of Copyright Infringement May Chill Journalism in the Social Media Age*, 93 Tul. L. Rev. 1255 (2019) (quoting *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 579-82 (1977) (Powell, J., dissenting)).

³⁸ Cf. Jessica Litman, *Fair Use: “Incredible Shrinking” or Extraordinarily Expanding?*, 31 Colum. J.L. & Arts 587 (2008) (discussing the historical, extraordinary expansion of rights granted by copyright law and commensurate shifts in fair use).

³⁹ *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 867–68 (1982).

content and how we express and form our own thoughts. Yet creating copyright-like protections for links and news snippets would do just that.

C. Changes to Competition Law Would Implicate the Exact Same Concerns, and Experience Shows How Ideas Presented in the Notice Favor Large Actors

Approaching the issue through the “competition” lens discussed in the Notice poses the same problems as creating new copyright-like protections discussed above. The underlying fundamentals—linking between websites on an open Internet—are unchanged, whether approached through the misguided creation of ancillary copyright,⁴⁰ or through the problematic endorsement of legal cartels,⁴¹ or mandated negotiation and arbitration that would each erect structures to transact on hyperlinks and effectively create a “tax” or “fee” on sharing hyperlinks and quoting headlines or snippets.⁴² Each of these regimes will have the effect of restricting that sharing, and the ultimate consequences would be identical.

Engine shares the deep concern about the well-being of and embraces the value of local media for our communities, democracy, nation, and world. But however well-intentioned the motives underpinning the Office’s present study, implementing the competition-related proposals the Notice explores would run counter to the goals of improving or supporting local media. Because the Notice fails to take a full view of the issue,⁴³ the policies it explores would solidify the position of large players at the expense of small firms, foreclose innovation, and limit how participants in democratic societies can interact with the news.

Legal Structures for Negotiation Over Links Similarly Restrict Sharing and Disadvantage Smaller Entities. Structures like those discussed in the Notice inherently favor large organizations (both “aggregators” and “publishers”), disadvantaging smaller ones.⁴⁴ Indeed, “news aggregators”

⁴⁰ Notice, *supra* note 1, at 56723-25; *see also, e.g.*, Spain (2014), European Union (2019).

⁴¹ Notice, *supra* note 1, at 56725-26; *see also, e.g.*, the Journalism Competition and Preservation Act of 2021.

⁴² Notice, *supra* note 1, at 56725-26; *see also, e.g.*, Australia (2021).

⁴³ A broad look at the issues facing local media reveals cycles of change. Over the course of several years, concerns about declining local media have been attributed to many things, but policymakers seeking to solve problems facing local media need to also search beyond scapegoats to craft sound policy solutions. Local news organizations have faced macroeconomic and debt issues. The Notice underscores competition enabled by the Internet meant the end of local monopolies for some local news outlets and the decline of traditional advertising revenue. At the same time as those ad revenues were declining, digital ad revenues have increased. The Internet also enabled cheap classified ads, and Craigslist was once held up as the reason that newspapers were experiencing decline. The present study insinuates that news aggregators are to blame. None of these factors is likely to hold sole explanatory power, and that should be reflected in any potential policy responses. *See, e.g.*, Carmel Lobello, *Craigslist Took Nearly \$1 Billion a Year Away from Dying Newspapers*, *The Week* (Jan. 11, 2015), <https://theweek.com/articles/461056/craigslist-took-nearly-1-billion-year-away-from-dying-newspapers>; Monojoy Bhattacharjee, *Digital Ad Spend Rebounds, as “Dormant, More Traditional Customers” Shift Online*, *WNIP* (Jul. 24, 2020), <https://whatsnewinpublishing.com/digital-ad-spend-rebounds-as-dormant-more-traditional-customers-shift-online/>.

⁴⁴ *See generally Engine Responses to Targeted Consultation on Article 17*, Engine (Sept. 10, 2020) https://static1.squarespace.com/static/571681753c44d835a440c8b5/t/5f5a64c6cb585e4abe0cf490/1599759563332/20.09.10_Engine+Responses+to+Targeted+Consultation+on+Article+17.pdf (as with Article 17 of the copyright directive, “it inherently favors larger organizations and certain traditional rightsholder organizations, and

can level the playing field between large and small publishers:⁴⁵ they drive traffic to news websites, aid in news discovery, and benefit smaller news organizations.⁴⁶

Rather than deliver benefits to small news organizations, imposing barriers to linking causes those organizations to lose revenue, page views, or cease operating entirely—entrenching benefits large publishers already enjoy.⁴⁷ Relatedly, ancillary rights of the type contemplated in the Notice create a competitive advantage for existing and well-established “aggregators,” making it harder for startups to launch and compete.⁴⁸ The act of linking is free, integral to the functioning of the Internet, and enables startup success.

Startups trying to innovate in both content and delivery recognize these dynamics and see the value from linking without inhibition. For example, as a creator of content, TeacherCoach’s Jared Scherz emphasized their desire to prioritize the openness that is best for society. “We want people to be able to share—to be able to link to our content.” Policymakers should not pursue ineffective “solutions” that create more problems for innovators.

The U.S.-based proposal cited in the Notice, the Journalism Competition and Preservation Act of 2021 (JCPA), would be similarly counterproductive and limit the sharing of links. While the JCPA wouldn’t explicitly create a new exclusive right to links in the same manner as ancillary copyright would,⁴⁹ its creation of a regime to enable negotiation implies that links are excludable in ways they currently are not. That could, as some observers have noted, lead news organizations to limit linking by “withhold[ing] content until or unless they obtain the compensation they seek.”⁵⁰ If they wanted to pursue it, smaller organizations, like tech enabled media startups, are likely to have less power to do this successfully. And media startups that rely on linking to content as part of their business model would face barriers to success if large organizations are able to withhold or prohibit that linking.

disadvantages smaller service providers and Internet-enabled creators . . .” and startups “will be at an inherent disadvantage in trying to negotiate with large rightsholders [that] have more bargaining power, and can use that power . . .”)

⁴⁵ Julia Reda, *Extra Copyright for News Sites (“Link Tax”)* <https://juliareda.eu/eu-copyright-reform/extra-copyright-for-news-sites/>.

⁴⁶ Mike Masnick, *Study Of Spain's 'Google Tax' On News Shows How Much Damage It Has Done*, Techdirt (Jul. 29, 2015), <https://www.techdirt.com/articles/20150725/14510131761/study-spains-google-tax-news-shows-how-much-damage-it-has-done.shtml>; see also Pedro Posada de la Concha et al., *Translation from the Original Spanish: “Impacto sobre la Competencia y el Libre Mercado de la Tasa Google o Canon AEDE,”* NERA Economic Consulting, [http://clabe.org/pdf/Informe_NERA_para_AEPP_\(INGLES\).pdf](http://clabe.org/pdf/Informe_NERA_para_AEPP_(INGLES).pdf).

⁴⁷ Posada de la Concha, *supra* note 46.

⁴⁸ Meghan Sali, *Five Reasons Why the Link Tax is Still a Bad Idea*, Open Media (Nov. 30, 2015) <https://openmedia.org/article/item/five-reasons-why-link-tax-still-bad-idea-0>.

⁴⁹ *Supra* Part B.

⁵⁰ Lisa McPherson, *Can the Journalism Competition & Preservation Act Really Preserve Local Journalism? Public Knowledge Says “Probably Not,”* Public Knowledge (June 17, 2021) <https://publicknowledge.org/can-the-journalism-competition-preservation-act-really-preserve-local-journalism-public-knowledge-says-probably-not/>.

The negotiating structure created by the JCPA will exaggerate existing power differences, too. It might begin from a sound place, trying to balance power structures by collective action—much like labor unions can balance the power of large employers—but “publishers” and “aggregators” are not uniform classes. There are relevant, substantive differences in the size, resources, business models, and bargaining power of individual local papers compared to national or international media organizations and between large Internet companies that already have licenses to media content, mid-sized companies with large volumes of user-generated content, and early stage startups looking for users and generating new content. A proposal like the JCPA would tend to benefit large actors, continuing the power imbalance and leaving smaller outlets and tech-enabled media startups behind.⁵¹

Changes to Competition Law Do Not Help Local Media in Practice. The use of competition law to resolve concerns with local media has seen its problems in implementation. The key example cited in the Notice, Australia’s Media Bargaining Code, requires “aggregators” and “press publishers” to negotiate over charges to link content. This has benefited large media players like News Corp.,⁵² which owns dozens upon dozens of media assets throughout Australia and worldwide. News Corp. is one among the large publishers in Australia who have secured agreements with both Google and Facebook.⁵³

Meanwhile, smaller entities face barriers under the Code. At a high level, this is not surprising: if a website has to negotiate licenses to all links, that creates an incentive to negotiate with the sources that can provide the most links. There are high administrative costs for Internet companies to reach these deals, and negotiating with all (or even many) small organizations is not practical (or possible) at scale.⁵⁴ But there are other barriers under the Australian model. For example, there are definitional problems about who counts as a news entity, meaning some small or niche publishers are excluded because they are determined to not count as news entities and there are higher costs and uncertainties to navigate just to determine who has to pay to link to what.⁵⁵

⁵¹ Organizations across the political spectrum agree that JCPA would have pernicious side-effects. *See, e.g.*, McPherson, *supra* note 50; Alden Abbot, *Congress Should Not Legalize a News Media Cartel*, Truth on the Market (Mar. 16 2021) <https://truthonthemarket.com/2021/03/16/congress-should-not-legalize-a-news-media-cartel/>.

⁵² Chris Marchese, *For Rupert Murdoch and Friends, “Protecting the Free Press” Means Getting the Government to Kill Competition*, NetChoice (Feb. 12, 2021) <https://netchoice.org/for-rupert-murdoch-and-friends-protecting-the-free-press-means-getting-the-government-to-kill-competition/> (discussing how News Corp. lobbied for a change that they immediately and disproportionately benefited from); *see also* McPherson, *supra* note 50 (regarding the influence of the News Media Alliance upon the JCPA).

⁵³ Zoe Samios, *The Big Tech Companies are Hard to Deal With’: Senator Bragg*, The Sydney Morning Herald (June 7, 2021) <https://www.smh.com.au/business/companies/the-big-tech-companies-are-hard-t-deal-with-senator-bragg-20210602-p57xfw.html>.

⁵⁴ *See* Mike Masnick, *As Predicted, Smaller Media Outlets Are Getting Screwed By Australia’s Link Tax*, Techdirt. (June 21, 2021) <https://www.techdirt.com/articles/20210617/10131247008/as-predicted-smaller-media-outlets-are-getting-screwed-australias-link-tax.shtml> (“the administrative costs for the internet companies to have to figure out how to compensate smaller publishers is so unworthy of the hassle, that those smaller publications will just start to be excluded en masse from Google and Facebook, once again serving the interests of the largest publishers, and not actually helping the cause of journalism at all”).

⁵⁵ *See, e.g.*, Zoe Samios, *Not Newsy Enough: Facebook Spurns Small Publishers*, The Sydney Morning Herald (Aug. 2, 2021) <https://www.smh.com.au/business/companies/not-newsy-enough-facebook-spurns-small-publishers-20210727->

In practice, experience with the “Australia model” maps what happened in other countries that tried “link taxes” (whether through a competition, copyright, or other lens). Small players are left to the wayside while, if anything, large entities that were not struggling are further enriched. After a link tax was enacted in Spain, traffic to Spanish publishers fell by six percent overall, but traffic to smaller Spanish publishers dropped by 14 percent.⁵⁶ Similarly, one study concluded, as a result of snippet fees, “online publishers, especially small ones, stop attracting significant advertising revenue.”⁵⁷ These side effects erect barriers to entry and expansion for startups innovating in media and the delivery of online content, and they make it more difficult for startups and their users to pull information from a large and diverse set of sources. There is no reason to believe pursuing a similar path in the U.S. could create different results.

Being Pro-Innovation is Pro-Competitive. Innovation should be at the core of addressing challenges faced in local media.⁵⁸ Instead of standing up new competition (or copyright-like) law to force the industry into the past, innovators hold the promise to continue building vibrant media ecosystems—and law and policy should not stand in the way. Startups are creating new and valuable ways to engage with and receive the news, for example, enabling critical commentary and logic education,⁵⁹ creating spaces for educators to learn from each other and field-related journalism,⁶⁰ building community focused content,⁶¹ distributing and promoting local events,⁶² or helping educators and students engage in civil conversations about weighty current events in the news.⁶³

Likewise, implicit in the Copyright Office’s study are issues of competition more broadly, not just within media markets. To support the tech startups that will lead innovation in media, audience engagement, civics education, and more, policymakers should focus on lowering barriers they face. For example, preserving Section 230 ensures startups are able to host user-generated content, including, e.g., blogs or comments, while avoiding potentially venture-ending litigation.⁶⁴ Passing a federal privacy framework that preempts a growing state-by-state patchwork of laws will increase

[p58tdav.html](https://www.smh.com.au/business/companies/facebook-snubs-sbs-the-conversation-on-content-deals-20210922-p58tdav.html); *Facebook Snubs SBS, The Conversation on Media Deals*, The Sydney Morning Herald (Sept. 22, 2021) <https://www.smh.com.au/business/companies/facebook-snubs-sbs-the-conversation-on-content-deals-20210922-p58tdpd.html>.

⁵⁶ Ashley Johnson, *Nasty Side Effects if Australia Forces News Aggregators to Pay for Content*, ITIF (Aug. 10, 2020), <https://itif.org/publications/2020/08/10/nasty-side-effects-if-australia-forces-news-aggregators-pay-content>.

⁵⁷ Joshua Benton, *Google is Threatening to Kill Google News in Europe if the EU Goes Ahead with Its “Snippet Tax,”* Nieman Lab (Jan. 22, 2019), <https://www.niemanlab.org/2019/01/google-is-threatening-to-kill-google-news-in-europe-if-the-eu-goes-ahead-with-its-snippet-tax/>.

⁵⁸ *Supra* Part B.

⁵⁹ Fiskkit, *supra* note 7.

⁶⁰ TeacherCoach, *supra* note 9.

⁶¹ 6AM City, *supra* note 14.

⁶² Event Vesta, *supra* note 15.

⁶³ Civil Media, *supra* note 8.

⁶⁴ *Startups, Content Moderation, & Section 230*, Engine (Dec. 9 2021) <https://static1.squarespace.com/static/571681753e44d835a440c8b5/t/61b26e51cdb21375a31d312f/1639083602320/Startups%2C+Content+Moderation%2C+and+Section+230+2021.pdf>.

certainty and market access and lower compliance costs for startups.⁶⁵ Promoting diversity in innovation,⁶⁶ through increased capital access, education, and networks, will help underrepresented founders fill historical gaps in all markets, including community-specific news.

D. Defining News and Aggregation Is Fraught, and Policies Discussed in the Notice Would Put the Federal Government in the Uncomfortable and Highly-Problematic Position of Picking Winners and Losers when it Comes to Creating and Criticizing News

Definitions are critically important here. New laws defining “news aggregator” and “press publisher” would dictate who has to pay for which links and snippets, and they would shape (if not control) who gets to create, contribute to, read, and comment on news, information, and data. Unpacking the complexity behind the definitions further reveals how problematic the ideas of ancillary copyright or competition-based prohibitions on linking would be.

For example, what is a “press publisher?” Would that include bloggers and podcasters? As noted above, many local or topic-specific blogs have become widely read sources of quality news and information.⁶⁷ The law should also support (and not impede) their important work. Similarly, would the definition of “press publisher” distinguish between standard news articles and opinion pieces? Both types of articles warrant comment, criticism, and fact checking. But some writing is done with a particular agenda in mind and may demand different scrutiny to uncover inaccuracies, misrepresentations, or misunderstandings.

On the flip side, there are types of information that are only valuable when they can be freely shared. For example, in most cases, authors want more eyes on material like press releases, event listings, and real estate or job postings. And they can turn to local media outlets to reach those eyes. If users and websites have to pay to link to that content, it would fundamentally frustrate the purpose.

The possibility of murky definitions creates confusion that would further restrict speech and innovation while opening doors to gamesmanship. Courts have noted the importance of not letting monikers dictate permitted use of content.⁶⁸ But those semantic disputes arise (and have to be litigated), and extending ancillary copyright or competition restrictions would necessitate semantic line drawing and disputes as the people who can afford to litigate the issue repeatedly try to shape those definitions.

Regardless of what definitions were codified, the landscape for creating and sharing information is always changing, and any definitions would quickly become stale. This would restrict certain

⁶⁵ Sean Davis, *Startups Need it, Lawmakers Want It, But Congress Has Yet to Move a Privacy Bill*, Engine (Sept. 17, 2021) <https://engineadvocacyfoundation.medium.com/startups-need-it-lawmakers-want-it-but-congress-has-yet-to-move-a-privacy-bill-77a688eb2a12>.

⁶⁶ *Making the Startup Ecosystem More Equitable*, Engine 6 (Nov. 2021), <https://static1.squarespace.com/static/571681753c44d835a440c8b5/t/6193d03ac7eb9c40442a6740/1637077051416/Making+the+Startup+Ecosystem+More+Equitable+11.15.pdf>.

⁶⁷ E.g., *supra* note 16.

⁶⁸ *Swatch v. Bloomberg*, 756 F.3d 73, 82 (2d Cir. 2014) (whether the plaintiff in a copyright case refers to a use as “data delivery” and the defendant calls it “news reporting” does not matter to whether there’s a fair use).

applications of emerging technology. Not only would extant startups and innovators struggle to maneuver a new copyright or competition regime,⁶⁹ but limits on linking and sharing snippets would influence the development of, e.g., augmented and virtual reality technology. Understandably risk-averse companies would be unwilling to launch new innovations or business models that could become accused of crippling infringement allegations over hyperlinking.⁷⁰

Overall, defining what is and is not subject to enhanced copyright or competition protection is fraught. And answering these questions would put the federal government in the uncomfortable—and problematic—position of picking winners and losers when it comes to speech. For example, if the government were to limit “press publishers” to traditional newspaper newsrooms, that would reflect a choice against scores of other great authors who write blogs, newsletters, etc. To create law in this area, the government will have to say what content and speech are “good enough” to warrant paying for links.

* * *

Thank you again for the opportunity to provide these comments. Engine remains committed to engaging with the Office on these and other important topics that implicate the role copyright law and policy plays for innovation, startups, and the users that rely on them.

⁶⁹ *Supra* Parts B, C.

⁷⁰ *E.g.*, Reid, *supra* note 3, at 54-55 (“even when a new technology does not infringe, the risk of litigation is a powerful disincentive for innovators”); LeMerle, *supra* note 3 (discussing risk of infringement liability for user conduct as a disincentive to startup investors).