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IN THE MATTER OF:                    )  
  )  
PUBLISHERS' PROTECTIONS            )  
STUDY ROUNDTABLE                    )

Pages:       1 through 211  
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Date:        December 9, 2021

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## HERITAGE REPORTING CORPORATION

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IN THE MATTER OF: )  
 )  
PUBLISHERS' PROTECTIONS )  
STUDY ROUNDTABLE )

Remote Roundtable  
Suite 206  
Heritage Reporting Corporation  
1220 L Street, N.W.  
Washington, D.C.

Thursday,  
December 9, 2021

The parties met remotely, pursuant to notice, at  
9:05 a.m.

PARTICIPANTS:

COPYRIGHT OFFICE ATTENDEES:

CHRIS WESTON  
ANDREW FOGLIA  
MELINDA KERN  
SHIRA PERLMUTTER  
MARIA STRONG

Session 1: The Effectiveness of Current  
Protections for Publishers

WAYNE BROUGH, R Street Institute  
DANIELLE COFFEY, News Media Alliance  
JANE GINSBURG  
KEITH KUPFERSCHMID, Copyright Alliance  
KATE SHEERIN, Google  
DANIEL TAKASH, Niskanen Center

PARTICIPANTS: (Cont'd.)

Session 2: Whether Additional Protections are Desirable

RICHLY ASTHENIC, Southlaw Ent.  
ANNEMARIE BRIDY, Google  
CATHY GELLIS, Copia Institute  
OLE JANI, Axel Springer  
ELIZABETH KENDALL, Meta Platforms  
JOSHUA LAMEL, Re:Create  
PETER ROUTHIER, Internet Archive  
JESSICA SILBEY, Boston University  
HAL SINGER, Econ One  
NZENGHA WASEME, Artworks Legal Incubator  
MATTHEW WILLIAMS, News Media Alliance

Session 3: How Any New Protections Might Affect Existing Rights, Limitations, and Obligations

JONATHAN BAND, Library Copyright Alliance  
JOHN BERGMAYER, Public Knowledge  
EDWARD HASBROUCK, National Writers Union  
CARLO LAVIZZARI, Lenz Caemmerer  
ERIC SCHWARTZ, News Media Alliance  
ALI STERNBURG, Computer & Communications Industry Association

P R O C E E D I N G S

(9:05 a.m.)

1  
2  
3 MR. FOGLIA: Hello, everyone, and thank you  
4 for joining us at the public roundtables for the U.S.  
5 Copyright Office's Publishers' Protection Study. You  
6 will now hear opening remarks from the Register of  
7 Copyrights and Director of the U.S. Copyright Office,  
8 Shira Perlmutter.

9 MS. PERLMUTTER: Good morning, everyone, and  
10 welcome to the Copyright Office's virtual roundtable  
11 in support of our study of protections for publishers.  
12 The topic today is the effectiveness of current  
13 copyright rights for publishers in the United States  
14 and whether any type of additional protection is  
15 called for.

16 And in requesting that the Copyright Office  
17 conduct this study, Congress noted the new ancillary  
18 copyright protections that the European Union has  
19 adopted for press publishers with respect to the use  
20 of their content by online intermediaries.

21 So some of the questions we'll explore  
22 include the scope of existing copyright protection for  
23 news publications, the economic effects of online  
24 aggregation of news content, whether additional  
25 protections such as those adopted in the EU would be

1 appropriate here and, if so, what form they should  
2 take, and how they would interact with existing  
3 constitutional or other rights held by other parties  
4 with copyright exceptions and limitations and with  
5 international treaty obligations.

6 So I am sure this will be a lively and  
7 informative discussion, and I look forward to hearing  
8 everyone's valuable input. Joining me from the  
9 Copyright Office are Maria Strong, Associate Register  
10 of Copyrights and Director of Policy and International  
11 Affairs, along with Senior Counsels for Policy and  
12 International Affairs, Andrew Foglia and Chris Weston,  
13 and our Barbara Ringer Fellow, Melinda Kern.

14 So I will now turn the proceedings over to  
15 Chris Weston to provide more information and to  
16 introduce the first session.

17 MR. WESTON: Thank you, Shira.

18 So a few instructions before we begin. Just  
19 to review the format, Copyright Office staff will be  
20 posing questions for the panelists to answer.  
21 Panelists should use Zoom's "Raise Hand" feature to  
22 indicate that they would like to respond to a  
23 question. We will try to let panelists speak in the  
24 order that they raise their hands. Panelists' remarks  
25 are being transcribed by a court reporter, and they

1 will be posted on the Copyright Office website, along  
2 with a video of the event.

3 We ask that panelists keep their remarks on  
4 any one question to two minutes to allow other people  
5 time to speak. We also ask that when you are not  
6 speaking you keep your microphone muted.

7 For audience members, please understand that  
8 the panel sessions do not include audience  
9 participation. At 3:15 p.m. Eastern Time, after the  
10 panels are completed, audience members who signed up  
11 to offer comments will be invited to do so, but during  
12 the panels, please use Zoom's Q&A function only if you  
13 have a technical problem with the call that you would  
14 like to bring to the Office's attention.

15 With that, I would like to thank both our  
16 panelists and our audience members for joining us  
17 today. I'm now going to start the first panel. So,  
18 if the people on the first panel could turn their  
19 cameras on and also my co -- my colleagues in the  
20 Copyright Office who will be asking questions along  
21 with me, Andrew Foglia and Melinda Kern.

22 We're going to start the first panel on  
23 existing copyright protections for publishers. So  
24 we're going to start by asking each panelist to  
25 introduce themselves just very briefly with your name

1 and your affiliation, and we can go alphabetically,  
2 starting with Wayne Brough.

3 MR. BROUGH: Thank you. My name is Wayne  
4 Brough, and I am the Tech and Innovation Director at  
5 the R Street Institute.

6 MR. WESTON: And then Danielle?

7 MS. COFFEY: Danielle Coffey, News Media  
8 Alliance, EVP and General Counsel, representing  
9 publishers across the country and in Europe.

10 MR. WESTON: Thank you. And Professor  
11 Ginsburg? I'm sorry, you're muted.

12 MS. GINSBURG: Sorry. Jane Ginsburg,  
13 Columbia Law School but appearing as a consultant for  
14 the News Media Alliance.

15 MR. WESTON: And Keith?

16 MR. KUPFERSCHMID: Keith Kupferschmid, CEO  
17 for the Copyright Alliance.

18 FEMALE VOICE: Recording in progress.

19 MS. SHEERIN: Kate Sheerin, public policy  
20 work at Google.

21 MR. WESTON: Thank you. And finally,  
22 Daniel?

23 MR. TAKASH: Hi, I'm Daniel Takash,  
24 regulatory policy fellow at the Niskanen Center.

25 MR. WESTON: Okay. Well, thank you,

1 everybody. I'm going to start with a question. A lot  
2 of the comments talked about fair use, and I'm going  
3 to ask a general question to everyone. To what extent  
4 does fair use permit news aggregation of press  
5 publisher content, such as headlines or short snippets  
6 of an article? Danielle, and then Jane.

7 MS. COFFEY: I'm going to cheat and somewhat  
8 answer your question but also use just a minute to say  
9 that the news industry right now is doing, just to set  
10 the stage since this is about an industry that I  
11 represent, they are providing news and information  
12 that is vital to communities, especially because of  
13 the pandemic. Our audiences are through the roof. So  
14 the determination of how much our content is protected  
15 throughout these panels today is critical to that  
16 information continuing to be provided to communities  
17 across our country. And I just wanted to thank you  
18 and say that this is an important issue.

19 To answer your question how is it protected,  
20 not adequately, but the laws are there. And I'll stop  
21 there. Thank you.

22 MR. WESTON: Okay. Jane Ginsburg was the  
23 next person who had their hand up.

24 MS. GINSBURG: There's a predicate question,  
25 which is the extent to which the content is protected



1 in the first place before you get to fair use, so I  
2 hope you will address that as well, but since this  
3 question is about fair use, of course, it's extremely  
4 fact intensive, but I think that, in many instances,  
5 the argument that news aggregation is transformative  
6 is rather weak because it's simply repackaging the  
7 news and delivering it to the public for the same  
8 purpose.

9 And the fourth factor, which courts have  
10 recently been paying heightened attention to, I think  
11 the economic effects of news aggregation are  
12 deleterious to the extent that they substitute for  
13 consultation of the source site, and they displace the  
14 advertising for the aggregator and away from the  
15 source sites.

16 MR. WESTON: Okay. Thank you. I believe  
17 that Kate Sheerin was next.

18 MS. SHEERIN: Hi, thank you for having me.  
19 I actually wanted to just take a step back, as Jane  
20 did in the beginning, and say news content, as defined  
21 by the Office, as links and snippets and headlines is  
22 excluded from copyright law under the core copyright  
23 doctrines in U.S. law.

24 MR. WESTON: Okay. Mr. Kupferschmid?

25 MR. KUPFERSCHMID: Yeah, usually people go

1 by first name, but it's okay. So, look, I just want  
2 to reiterate and support what Jane said. I mean, as  
3 we all know, fair use is determined on a case by case  
4 basis that's fact intensive, and so I think it's  
5 important to keep that in mind.

6 Jane mentioned the first and fourth factors;  
7 I'll mention the third. So, in the third factor, we  
8 look at how much is taken. I think, in this instance,  
9 when we're talking about fair use, I think, obviously,  
10 we look at the quantity of what's taken, but I think  
11 it's especially important that we look at the quality  
12 of what is taken because, at the essence, I think  
13 that's one of the most significant problems that's  
14 taking place here.

15 MR. WESTON: Thank you. Wayne?

16 MR. BROUGH: Thank you. Yeah, and I would  
17 state that my starting premise is that there is plenty  
18 of reasons that it is a fair use, and I think some  
19 other have mentioned that the concern is the role of  
20 ad revenues in this whole bigger picture.

21 And I'm an economist, so I'm looking at this  
22 from an economic framework, and I think the bigger  
23 question is, is there a decoupling that's going on,  
24 and is fair use the proper tool to address that kind  
25 of question?

1           MR. WESTON: Okay, thank you. I believe  
2 that's everyone who had their hand up, and I just, as  
3 a logistical matter, if people could take their hands  
4 down once they've answered the question just because  
5 otherwise I think that you've raised your hand a  
6 second time. Oh, I'm sorry, Jane did raise her hand a  
7 second time.

8           MS. GINSBURG: Yes. Since I raised the  
9 predicate question and Kate addressed it, I think I  
10 ought to address it as well, and I hope that I'm not  
11 out of order, which is the words and short phrases  
12 doctrine. Is it true that the content that is being  
13 aggregated, consisting of headlines, ledes, and  
14 photographs, is not protected? And I think that's  
15 actually incorrect. Photographs, quite clearly, are  
16 protected. The headlines and ledes certainly can be  
17 highly original in their presentation of unprotected  
18 facts.

19           And as to the question of whether they are  
20 too short, what's actually being copied, I think,  
21 probably isn't even under Copyright Office rules, but  
22 I wanted to say something about the words and short  
23 phrases doctrine because I've looked now at all the  
24 cases that apply the doctrine and also at the origins  
25 of the doctrine in the Sara Lee case, which is the

1 only case cited in the Compendium.

2 In fact, those cases are all about  
3 originality. They're not about brevity. Lots of  
4 courts simply say "short phrases," but the content at  
5 issue in all of those cases was considered to be  
6 trite, commonplace, formulaic, not original. Even  
7 those courts that say things like "short" phrases that  
8 are creative still aren't protected because they're  
9 "short", the content at issue in the actual case  
10 wasn't original content.

11 So what we don't have, notwithstanding the  
12 words and short phrases bar, is a true prohibition on  
13 the copying of original, albeit succinct, phrases, and  
14 I think it's very important to take a closer look at  
15 the words and short phrases doctrine.

16 Finally, I will point out that there is a  
17 difference between lack of protection and inability to  
18 register, because we're not talking about registering  
19 a headline. We're talking about the systematic  
20 copying of headlines, ledes, and photographs. And  
21 even if a headline standing alone may not be  
22 registerable, that doesn't mean that it's not a  
23 substantial part for purposes of the analysis of  
24 substantial similarity.

25 MR. WESTON: Thank you. Just another

1 logistical matter. Myself, Andrew Foglia, and Melinda  
2 Kern will be taking turns asking questions. So Andrew  
3 is next to ask a question.

4 MR. FOGLIA: Sure. Well, I'd actually like  
5 to follow up on that point and ask whether anyone  
6 else, Kate included, wanted to respond to Professor  
7 Ginsburg's discussion of the copyrightability  
8 question? If the answer is no, then I can ask a  
9 different question.

10 MR. WESTON: It looks like she's raised her  
11 hand.

12 MS. SHEERIN: I think it's clear that  
13 there's a fundamental disagreement here, and I think a  
14 lot of people have weighed in on the potential impact  
15 of applying the right this way on the way that the  
16 open internet works.

17 You know, the founders of the internet, Vint  
18 Cerf, Tim Berners Lee have weighed in on this  
19 question. They said breaching this fundamental  
20 principle by requiring payment for links would  
21 undermine content online. And I think, while I  
22 respectfully disagree with Jane, I think that there is  
23 a lot of debate here, and I'm sure you'll hear from a  
24 number of panelists today on that.

25 And while I have my hand raised, I just also

1 want to address some of the questions about  
2 transformativeness. I think what we're excluding is  
3 the immense public benefit that comes from news  
4 aggregation, the access to information, the diversity  
5 of news sources that users have access to, and how  
6 much news aggregation helps the public in finding  
7 information that they care about most. So I just  
8 wanted to register that as an additional point.

9 MR. FOGLIA: Thank you. I think Jane next  
10 and then Danielle.

11 MS. GINSBURG: Thanks. I just wanted to  
12 point out we're not talking about linking but about  
13 cutting and pasting. The excerpts that are copied  
14 have links back to the original sources. Those are  
15 more than welcome. The problem is that people don't  
16 click back on the links. But what we're talking about  
17 is not linking. We're talking about extracting,  
18 reproducing, and re disseminating the actual content.

19 MS. COFFEY: I would agree with that last  
20 comment, and I will also add too as a response to  
21 something that Kate said, which was that aggregation  
22 is a public service and a public good.

23 I would actually agree. I think that the  
24 internet has done amazing things for, you know, the  
25 aggregation and dissemination of valuable information,

1 including quality news content.

2           What we're talking about here is the ability  
3 to protect that content and the ability to have an  
4 exchange of value with those who disseminate the  
5 content on our behalf.

6           In this case, I think that one of the  
7 important things to raise is the impediment to  
8 enforcement that we haven't gotten into yet, and I  
9 don't know if we plan to in the questions, I know it  
10 was in the NOI, but it has to do with what are some of  
11 the impediments to that licensing.

12           And even if we had standing and there wasn't  
13 this disagreement on fair use, a prima facie case  
14 requires a showing that you did not authorize the use.  
15 And so, in the case that we're in now where we have  
16 two dominant platforms distributing on our behalf and  
17 it's a Hobson's choice whether or not to provide that  
18 information because everybody wants to be found, even  
19 for the little amount of revenue that we receive from  
20 those clicks, the consent part of the equation is  
21 flawed because we are forced to waive our ability to  
22 enforce our rights because of the dominance of the  
23 platforms.

24           So that's something that we may get into  
25 later, and I can expand on that and give examples, but

1 I wanted to raise that as being a fundamental part of  
2 what we're discussing as well. Thank you.

3 MR. FOGLIA: Kate, I think you were next,  
4 and then Keith.

5 MS. SHEERIN: Yeah, I just wanted to respond  
6 and say that people do click through to the news  
7 publishers' sites. We send about 24 billion clicks a  
8 month to news publishers, including the short extracts  
9 that are up to the news publishers who opt in. They  
10 have granular controls about how their content appears  
11 on our services, as Danielle just referenced. So it's  
12 up to them, the length of the snippet, how it appears,  
13 whether thumbnails are included, whether they appear  
14 on Google News, whether they appear on Google Search.

15 Those controls are extremely important.  
16 We've always respected those controls, and I think the  
17 important part is that Google Search and Google News  
18 have proven to the news industry that they're an  
19 important part of reaching their audience, and we're  
20 glad to partner up with them and further collaborate  
21 on ways that they can do that.

22 But I think it's wrong to say that it's a  
23 substitute or that individual users are not actually  
24 clicking through to the news publisher websites,  
25 because they are.



1 MR. FOGLIA: Thank you. Keith?

2 MR. KUPFERSCHMID: Yeah, once again, I think  
3 we find ourselves going down this path where we're  
4 talking in generalities, which, obviously, in the  
5 nature of the beast, we have to.

6 Obviously, let me just address linking for a  
7 second. Whether somebody links through or not is  
8 going to depend on a whole bunch of things: how much  
9 information is presented, how that information is  
10 presented, things like that.

11 I had seen one statistic that showed that  
12 people clicked on the link only .08 percent. That's a  
13 minuscule amount, .08 percent of the time. Now,  
14 granted, that's in one particular instance. There are  
15 other types of scenarios. So I want to be clear  
16 that's not across the board, of course.

17 But, to get to the original question, as  
18 we'll probably talk about that linking aspect a little  
19 bit more later, which was about the copyrightability,  
20 I was upset about, you know, in going through some of  
21 the comments and hearing some of the comments here  
22 about the fact that people say, well, news content is  
23 not creative, it's not expressive, right? Because  
24 that's obviously a significant part of  
25 copyrightability, and it's just the facts.

1           Well, my response to that is, if it's just  
2 the facts, then write your own darn story, right? I  
3 mean, it is absolutely the people who and the  
4 organizations who are taking these stories and pushing  
5 them out, aggregating them, clearly are taking them  
6 because their writing is expressive and good, there  
7 are editorial decisions that are being made. This is  
8 valuable storytelling, is what it is. And, otherwise,  
9 then don't take that. Just, you know, create your own  
10 story. So I'll stop there.

11           MR. FOGLIA: Thanks. Jane, I see your hand  
12 is up.

13           MS. GINSBURG: I just wanted to draw your  
14 attention to the comments that I filed, which include  
15 an appendix of a variety of news items reported  
16 differently, even just through the headlines and the  
17 ledes by a variety of different news sources. So one  
18 could say in the abstract that different news outlets  
19 tell the story different ways, but the appendix that I  
20 submitted, I think, gives concrete illustrations to  
21 how the same event can be presented quite differently  
22 in even a very short number of words.

23           MR. FOGLIA: Thank you. I'm going to turn  
24 it over to Melinda Kern for the next question.

25           MS. KERN: Thank you, Andrew. So, just to

1 follow up on fair use, this kind of tracks a question  
2 that we asked in our NOI. I just wanted to hear what  
3 your guys' thoughts were on basically the market  
4 impact that news aggregation is having on press  
5 publishers. So Ms. Coffey?

6 MS. COFFEY: I guess I could have saved some  
7 of the remarks that I made at the beginning for this  
8 portion because it really does reflect a lot of what  
9 we're experiencing right now.

10 Like I was saying earlier, the pandemic has  
11 shown us a lot of what's -- it's magnified the  
12 situation that's happening with the news industry.  
13 During the past couple of years, in the first year,  
14 there was a tremendous amount of information and we  
15 had a giant spike in our readership and our audience  
16 because what we were providing became the only source  
17 of the type of information people were seeking because  
18 everybody was very local in nature. It was a  
19 pandemic. Your geography became -- everybody  
20 quarantined.

21 And so what they were looking for was what  
22 was in your neighborhood, whether your schools were  
23 opening, whether the businesses were closing, so on  
24 and so forth, the health information in your  
25 neighborhood, so forth. And that became very granular

1 and only provided by local news reporters, who were  
2 deemed essential employers by CISA and still on the  
3 beat, stayed open, and our audiences spiked. It was  
4 through the roof.

5 We took down a lot of our paywalls because  
6 it was critical information, we wanted people to get  
7 it. And what happened was we closed newsrooms across  
8 the country. We laid off about 37,000 people,  
9 including those who were furloughed. It was another  
10 bloodbath, I hate to say, but among our industry, who  
11 was providing critical information during a period  
12 that was -- and this was global. At the same time,  
13 Australia experienced the same thing. Europe  
14 experienced the same thing.

15 It's when they accelerated their laws that  
16 ultimately required payment for news publication  
17 because it was so clear -- it became so clear that  
18 this problem is -- what the cause of it is, and it's  
19 that we, you know, with the 35 percent who do click  
20 through, we still don't get the advertising revenue  
21 because the dominant platforms have a monopoly in  
22 that. It's evidenced by the litigation.

23 So the news industry, the news publishers  
24 across our country, are suffering, yet they're  
25 providing this valuable content to communities who

1       rely on it that nobody else will produce. And when  
2       it's used and it's aggregated and it contributes to  
3       the revenue of those who distribute it, it's protected  
4       content. It's copyrightable content.

5               Articles are copyrightable, full stop.  
6       Extractions from those are what we're discussing, and  
7       a ton of resources, people, human capital, and  
8       importance goes into what we're producing, and it  
9       needs to be protected, and it needs to be compensated.

10              MS. KERN: Thank you. Wayne?

11              MR. BROUGH: Yeah, I would just say on your  
12       question of the market impacts and fair use, I think  
13       this is fundamentally an economic question. It's not  
14       a question of copyright and fair use. The sector that  
15       we're talking about of online or even print journalism  
16       has gone through tremendous changes, the biggest  
17       being, you know, this is one of the early examples of  
18       what a two sided market was, where you balance your  
19       readership with your ads to come up and maximize your  
20       profits.

21              But, when digital platforms came along, that  
22       link was separated, and between classifieds going to  
23       places like eBay or Craigslist or Indeed.com, to  
24       retailers wanting to buy more accurate, more  
25       profitable digital advertisements that are more

1 targeted, more beneficial, the traditional market that  
2 we're talking about for journalism has fundamentally  
3 changed. And that is an economic question, and I  
4 think it's better suited, if there are problems in  
5 that market, to use the tools of economic policy  
6 rather than the tools of copyright to try and look at  
7 those problems if there are identifiable market  
8 failures in that market.

9           So I'd be very careful to expand, you know,  
10 try to expand the role of fair use or minimize the  
11 role of fair use in order to change or control that  
12 market. It's an economic market that's in flux. All  
13 the participants in that market have been changing  
14 over the last few years. The bigger online players  
15 are now getting into the digital advertising  
16 marketplace. So there are changes that are going on,  
17 and I don't believe that fair use changes or changes  
18 in copyright law are the most appropriate way to  
19 address the concerns that we see in this market space.

20           MS. KERN: Thank you. Keith?

21           MR. KUPFERSCHMID: Thanks, Melinda. So the  
22 way the current digital market, digital environment is  
23 set up makes it exceedingly difficult for press  
24 publishers to continue their important societal  
25 endeavors at the level they demand and the public

1 demands, and I think we've touched upon this already  
2 that the primary reason for this is that online  
3 platforms and news aggregators cull and click news  
4 content without licensing the content from the  
5 publisher, okay?

6 Platforms and aggregators will display the  
7 text, the headlines, photographs, which we haven't  
8 really touched upon yet, and other content in a way  
9 that results in the aggregated content acting as a  
10 substitute for the press publishers' original content,  
11 and that's where the problem lies.

12 Platforms, without permission, scrape  
13 publishers' websites, reproduce and display content,  
14 disseminate it through their platforms and mobile  
15 applications, and, most importantly, take advertising  
16 dollars and subscription revenue from press publishers  
17 that could otherwise be funding the creation of more  
18 reliable news content to the public.

19 So the content created by press publishers  
20 at great cost, at great expense, at great risk is the  
21 lure that attracts users to these platforms and helps  
22 platforms grow exponentially in profit, audience, and  
23 influence. So, in short, press publishers and their  
24 employees put in all the long hours, they take all the  
25 risks, they have all the experience, they spend all

1 the money, sometimes millions of dollars, to create,  
2 facilitate, and deliver timely news content.

3 And then these platforms come along and they  
4 spend no time, have no experience, and spend no money,  
5 and swoop in to steal all the rewards. Last time I  
6 checked, that is the exact type of behavior that the  
7 law, especially intellectual property law, is intended  
8 to prevent. Unfortunately, U.S. IP laws are not  
9 adequately doing that, and they're not adequately  
10 protecting these press publishers from these type of  
11 activities.

12 So what we're talking about here in terms of  
13 market impact, and I imagine we'll go into this in a  
14 little bit more detail later, we're talking about loss  
15 of online subscription revenue, loss of overall  
16 advertising revenue, loss of opportunity for branding  
17 and marketing.

18 If we're talking about indirect and economic  
19 -- sorry, indirect economic and non-economic loss,  
20 we're talking about loss of readership, harm to brand,  
21 loss of advertising, loss of critical audience data,  
22 which should not be ignored, loss of engagement with  
23 the readers and, to some extent, loss of trust.

24 So I'll just say one final comment. Look, I  
25 think, and I hope everyone on this panel and the other



1 panels, we can all agree that what the news publishers  
2 do in getting out trusted, reliable information is  
3 essential to our society, okay? And the press  
4 publishers, they're dwindling, you know, over time,  
5 and I know NMA and others can go into more detail  
6 about this. We need to do something to stop the  
7 bleeding, okay? Whatever that is that, you know, we  
8 can figure out later, I guess, but something needs to  
9 be done here. And I'll stop there.

10 MS. KERN: Thank you. Daniel?

11 MR. TAKASH: Yes. I think it's very  
12 important, obviously, that news be produced and  
13 proliferated. I think this is especially true when  
14 you look at what is a crisis facing local journalism  
15 specifically.

16 However, I think there's an important  
17 distinction to be made that protecting it via  
18 intellectual property laws or policies resembling  
19 intellectual property is different from subsidy, which  
20 can take many different forms.

21 I think it's particularly important when you  
22 look at one of the trends that's really accelerated  
23 the decline in local news is a large wave of mergers,  
24 acquisitions, and then subsequent layoffs and  
25 consolidation.

1           So I think, you know, we were talking about  
2 market structures not just in terms of aggregators but  
3 in terms of advertisers, everything like that, I think  
4 it's important to consider the possibility of direct  
5 support for such local outlets in a way where the wide  
6 proliferation via aggregators would strictly be a  
7 positive sum and they don't have to rely on that as a  
8 part of their business model because they can rely on  
9 some form of direct support.

10           MS. KERN: Thank you. And Kate?

11           MS. SHEERIN: Thank you. And I just wanted  
12 to say I agree with Keith. I think we can all agree  
13 that we support high quality journalism across the  
14 board on this panel and want to see a healthy and  
15 sustainable news industry.

16           What I disagree with is the concept of  
17 substitution through news aggregation. There isn't  
18 evidence that suggests that at all. As I mentioned  
19 before, users are clicking through to news publishers'  
20 sites to get information.

21           Publishers have control of how their content  
22 appears in our services. If it was a substitute, one  
23 would think the news publishers would decide not to  
24 have their content appear. For the most part, they do  
25 not decide that. They decide to have their content

1 appear in our services and other similar services, and  
2 I think that there is a benefit there.

3 When we talk about what has happened to the  
4 news industry, I think that, you know, as Wayne said,  
5 there are a variety of factors. There are more places  
6 for advertisers on the web. Ad revenues are spread  
7 among more publishers than ever before.

8 The decline of classifieds has also played a  
9 factor in the news industry's revenue models. But  
10 Daniel mentioned something earlier about the ad  
11 revenues that they get through our services and  
12 others, and I just wanted to say, on average, we  
13 looked at this and we found that news publishers keep  
14 over 95 percent of the digital advertising revenue  
15 they generate when they use Google Ad Manager.

16 And so I think that we should start from a  
17 place of understanding that there may be disagreements  
18 here, but we should understand what is having an  
19 impact, what other things are happening in the  
20 ecosystem, and what is exactly related to copyright  
21 law.

22 I also wanted to mention that we keep  
23 referring to "news content," and I think, unless we're  
24 specific about what "news content" means, we're all  
25 approaching this conversation from a different angle.

1 So being precise with the language that we're using  
2 and that the Office uses in the study when they put it  
3 out, I think, is extremely important.

4 MS. KERN: Thank you. And lastly, Danielle?

5 MS. COFFEY: Yeah, I just want to

6 MR. WESTON: Actually, before you answer, I  
7 just wanted to ask a targeted question to you and  
8 maybe Keith and Jane, which is, you know, what other  
9 factors -- this has been mentioned a couple of times,  
10 and I'm curious, from your perspective, what other  
11 factors have impacted the viability of U.S. press  
12 publishers in the digital area? And, you know, is  
13 singling out aggregators, does that reflect the  
14 reality of the various types of impacts that, you  
15 know, maybe are affecting press publishers?

16 MS. COFFEY: Okay. Thank you, Chris. I'll  
17 address that, but, first, I just wanted to, while it's  
18 fresh, I wanted to address some of the things that  
19 Kate was saying. And I think it's important to  
20 understand how our content is used not just from an  
21 analysis of whether or not it's fair use perspective  
22 but in the business, how it's used.

23 So, when we have our content scraped,  
24 accessed through an HTTP request, we allow Google to  
25 come on our site, and then what shows up in Google

1 search is a myriad of ways that our content is cut and  
2 pasted.

3 The first way is AMP, Accelerated Mobile  
4 Pages. It's where we give out content, we put it in  
5 WordPress, it's hosted by Google, so that's where we  
6 get to -- that's where we incur a lot of the lack of  
7 data, advertising dollars, ability to get subscribers.

8 The evidence is found from our companies  
9 that, through AMP, we have less ability to get the  
10 three things that I just mentioned than organic  
11 search. Underneath AMP is "featured snippets," then  
12 you have "ask more questions," then you have  
13 advertisements, then you finally get to "organic  
14 search."

15 So you have all of these ways in which  
16 Google acquires and uses our data. And it's not 2009  
17 anymore where Larry Page said we just want to get the  
18 user to where they want to be. It is such a rich  
19 experience, it does become a substitute, and that's  
20 why 35 percent only click through.

21 Adding insult to injury, when you give your  
22 content for AMP -- because that is -- it's a Hobson's  
23 choice. You want to be found. So, going back to the  
24 original question which I'm responding to, which is we  
25 choose to have our content appear. It's not a choice.

1 I think that's my point. It's not a choice. So it's  
2 a false choice. So, when we give our content to AMP,  
3 the terms of service are so onerous, meaning Google  
4 gets to host it, I could read it to you, but let's  
5 just say it gives them the ability to use it in any  
6 other way that they would like to.

7 So those are terms of service. These are  
8 contracts of adhesion. These are ways in which we're  
9 pushed to give our content. This is not a choice. I  
10 just wanted to address that.

11 And then, also addressing the question that  
12 you just asked, Chris, other ways that we -- what are  
13 other factors that have affected our business. So,  
14 like I said, during the pandemic really magnified the  
15 situation. The internet has brought -- it's not the  
16 internet, it's the distribution platforms that we are  
17 concerned by and that have impacted our revenue stream  
18 because the internet itself has brought our news  
19 publishers tremendous audience in ways of connecting  
20 with our users and our readers in figuring out what it  
21 is in personalization and figuring out what it is they  
22 want to read more of.

23 We're responsible parties when it comes to  
24 using their information. We have these longstanding  
25 relationships with our readers where they can trust

1 our brand, they love us or they hate us, especially in  
2 the local communities, and we've found success through  
3 the internet.

4           However, the broken marketplace, which is  
5 what we're somewhat addressing here through copyright,  
6 but I think, in many ways, it's more addressed through  
7 competition law because those who reap the reward on  
8 our behalf -- the two main distributors, Google and  
9 Facebook -- it's a broken marketplace. So I could add  
10 on later, but for right now, I'll just stop there.

11           MR. WESTON: Okay, thanks. Keith?

12           MR. KUPFERSCHMID: Yeah, just to directly  
13 respond to your question, you know, clearly, you know,  
14 the news aggregators are not the only problem or  
15 causing news publishers problems, but they are the  
16 primary means. And as I said earlier -- or primary  
17 reason -- the market has obviously changed over time.

18           It's not like press publishers have been  
19 sitting on their hands and go woe is me. They have  
20 invested heavily in digital transition. They've  
21 developed novel and profitable ways to respond to the  
22 new ways that the public wants to consume news  
23 content. Many of them have explored digital  
24 subscription models and other reader-based sources of  
25 revenue. But, at the end of the day, ad revenue is

1 still the primary driver of revenue, and that ad  
2 revenue is now going mostly to the aggregators and not  
3 to the news publishers.

4 The data that would be collected on the  
5 readers so that the news publishers can figure out  
6 exactly, you know, what their readership is most  
7 interested in and many other factors that go into  
8 editorial decisions, that loss of data also, of  
9 audience data, consumer data, is also essential, and  
10 that is because of the aggregators. And so it's not  
11 the only reason, but it is the primary reason.

12 MR. WESTON: Thank you. Wayne?

13 MR. BROUGH: Yeah, I think the question you  
14 asked is a great question, and I do think you have to  
15 look at this market much more broadly than just the  
16 question of aggregators because the market today is  
17 fundamentally different than it was 20 years ago.

18 You sort of decouple the subscription and ad  
19 sides completely, and that means that, I think -- and,  
20 you know, as some of the commenters said, the news  
21 industry is struggling, and it's trying to find its  
22 footing in this new world. And I think the more we  
23 can promote finding a better model for -- an economic  
24 model, not a copyright model, in terms of how do you  
25 address some of these concerns -- but, basically,



1 we're in a world where the price of information has  
2 fallen almost to zero, so any consumer out there has  
3 access to more information than they've ever had at  
4 any time.

5 So not only are these newspapers competing  
6 with each other, they're competing with blog posts,  
7 they're competing with -- you know, eyeballs can go  
8 anywhere, and I admit it's a real challenge for this  
9 industry right now. But, in terms of addressing that  
10 challenge, I think, again, I think it is competition  
11 policy. I think it's a broader look at the underlying  
12 economic market structure, which is fundamentally  
13 different today than it was 20 years ago.

14 And I think changes in fair use or changes  
15 in copyright law are not going to address those  
16 fundamental differences at the more basic level in  
17 this industry. So, you know, I'm happy to hear the  
18 news media is adopting new approaches to advertising  
19 and new approaches to news, and I admit it's a  
20 challenge, but I think the challenge is an economic  
21 challenge, not a copyright challenge.

22 MR. WESTON: Thank you. Jane is next.

23 MS. GINSBURG: Since you asked me to  
24 respond, I'm not an expert in the business models of  
25 the media industries, but I did want to agree with the

1 basic point that this is at least as much a  
2 competition law question as a copyright question.

3 All the copyright protection in the world is  
4 not going to help if the copyright owners have no  
5 choice but to agree to contractual terms that are very  
6 unfavorable to them, which is why Australia took the  
7 approach of having basically an antitrust measure  
8 which requires the parties to bargain fairly with  
9 media arbitration, baseball arbitration if the  
10 negotiations don't work out, because I think, in  
11 Australia, they recognize that this is a question of  
12 market power and market dominance at least as much as  
13 a copyright question.

14 Finally, back to something Kate said, I  
15 completely agree that we should be precise about what  
16 we're talking about because "news" is rather  
17 amorphous, right? So I think we should be specific.  
18 Are we talking about entire articles? Are we talking  
19 about paragraphs, substantial chunks, more substantial  
20 than what I've been referring to, which is headlines  
21 and ledes and photographs.

22 I also agree that photographs have been a  
23 bit overlooked in this, and photographs unquestionably  
24 being copyrightable works of their own perhaps should  
25 be analyzed differently from headlines and ledes. But

1 I agree that we should be a little more precise in  
2 what we're referring to.

3 MR. WESTON: Thanks, Jane. Daniel was next.

4 MR. TAKASH: Thank you. I think, with  
5 respect to media outlets and news -- I will use the  
6 phrase broadly "news publishers," those who  
7 proliferate every subset of what we would call it -- I  
8 think there has been tremendous innovation in terms of  
9 their distribution models pre pandemic, but,  
10 certainly, the pandemic accelerated adaptation to the  
11 internet.

12 But one of the concerns I face, and this is  
13 related to the nationalization of news where,  
14 unfortunately, we run sort of into a problem of  
15 consumer choice, which is much harder to overcome than  
16 changes to policy, is that you see a superstar effect  
17 where large national outlets are better able to  
18 leverage these tools, in no small part due to their  
19 size and revenue.

20 There's an upfront cost that they're able to  
21 overcome at least far more easily than smaller outlets  
22 may not be able to capitalize. This was discussed in  
23 the Senate report that came out earlier this year or  
24 late last year. I can't recall which. Which, to that  
25 extent, I think there is a competition policy angle to

1 this certainly, especially with advertisements, things  
2 like that. But, at the end of the day, I do believe  
3 that if this is something we want to subsidize, though  
4 not necessarily protect or restrict access to, it's a  
5 fiscal policy question.

6           You know, of all the horrible things that  
7 have happened in the past couple of years, I think  
8 we've seen some very creative applications of fiscal  
9 policy via direct support to covering payroll or  
10 direct support to individuals.

11           And if we can suggest a policy change that  
12 leans less on protection and what we normally  
13 associate with copyright and more on direct financing,  
14 such that particularly smaller outlets can simply put  
15 their stuff out into the world, benefit aggregators,  
16 and simply not care whether, you know, how widely it's  
17 shared or how widely it's copied, I think that would  
18 be a far preferable avenue to explore than to lean  
19 onto a model that would disproportionately benefit  
20 larger, more established media, despite those --  
21 certainly not to disparage the work that they do.

22           MR. WESTON: Thank you. Kate?

23           MS. SHEERIN: Hi. So just one quick note on  
24 AMP, which Danielle mentioned. I think, just as news  
25 publishers have control over if and how their news

1 content appears in our services, they also have  
2 decisions about whether they want to use AMP or not.  
3 Many do, but you don't need to use AMP to appear in  
4 our services. So I just wanted to clarify that.

5 Secondly, there's been a lot of conversation  
6 about news aggregators and the money they're making  
7 from news content. News websites are a very small  
8 slice of all the information on the internet, and last  
9 year we took a look, and news related queries on  
10 Search accounted for just 2 percent of the total  
11 queries on Google Search globally.

12 We don't show ads or make money on the  
13 majority of searches, and we don't run ads on Google  
14 News or in the News results tab in Google Search. So  
15 I just wanted to clarify those two points as they were  
16 raised as part of this discussion.

17 MR. WESTON: I'm muted, sorry. I will turn  
18 it over to Andrew for the next question.

19 MS. COFFEY: Actually, can I just respond to  
20 a couple of points?

21 MR. WESTON: Yeah.

22 MS. COFFEY: It's just real quick. It's  
23 numbers, and we don't have expert witnesses here.  
24 We're not in court. So I'm just going to say that  
25 from an advertising -- I just need to be on record,

1 from an advertising perspective, the findings that we  
2 take 90 percent, we actually find that we take closer  
3 to 30 percent. The findings that there are 36  
4 percent, I believe you said, or rather, 2 percent of  
5 searches on Google, we find that there's 36 percent.  
6 So, if we're talking numbers, I just wanted to be on  
7 record with that even though we're not going to,  
8 obviously, deliberate that here. Thank you.

9 MR. WESTON: Thanks.

10 MR. FOGLIA: So I want to turn the topic  
11 slightly to an issue that came up in a few of the  
12 comments, and that is, how significant are current  
13 registration practices in publishers' abilities to  
14 protect their works? So, Danielle, if your hand is  
15 still up for that, feel free to start.

16 MS. COFFEY: It was up from the last one,  
17 but I think you asked about -- I'm sorry, you asked  
18 about registration practices?

19 MR. FOGLIA: Yes.

20 MS. COFFEY: Okay. And I'm going to assume  
21 that you're talking about registration of our articles  
22 and the headlines, that you're not talking about  
23 registration that was in the NOI, the question with  
24 regard to how do we acquire the license from an  
25 article that -- the compilation that the publisher

1 requires, is that correct?

2 MR. FOGLIA: That's right.

3 MS. COFFEY: Okay. With the Copyright  
4 Office? I'm glad you raised this because registration  
5 has -- we've worked a long time together with the  
6 Copyright Office, a couple decades now, to figure out  
7 how to register our content with the Copyright Office,  
8 not just for mandatory deposits, and we finally came  
9 to a very good resolution just a few years ago that I  
10 would commend you for that the registration of our  
11 content through a PDF as opposed to microfilm was  
12 overcome, and we can do that. Now we register our  
13 articles with PDFs. So thank you for that.

14 With regard to dynamic web registration, so  
15 the web content that we have, we used to be able to,  
16 many of our publishers, register their web content and  
17 the articles, the dynamic articles that change on the  
18 websites, through representative pages that you would  
19 file and show through the Copyright Office  
20 registration system.

21 Our members got -- our member news  
22 publishers got letters saying that you could no longer  
23 register through representative pages. And so then  
24 the question became, what's going to now replace what  
25 we used to be able to protect our content by?

1           Some of the claims that I hear, that we have  
2 a paper copy, so that should stand in place so that a  
3 dynamic web copy actually is not accurate because, in  
4 many cases, you have a lot of web content that not  
5 only changes but that's only web content that you  
6 don't have a paper article for.

7           So you will have more and more content going  
8 unprotected for the purposes of enforcement.  
9 Obviously, that's another issue that we've been  
10 discussing, so being able to enforce it at all. But  
11 we do need to be able to protect our articles,  
12 especially the dynamic web content that we produce  
13 through our digital website since our news publishers  
14 are becoming more -- and I probably should have said  
15 that at the beginning -- all of them are moving to  
16 digital.

17           However, it's also interesting because --  
18 another note I'll add is that we are making more of  
19 our money, our revenue, through print. Our print  
20 circulation for most of our news publishers continues  
21 to financially support the digital production of  
22 content. That's when you know you've got a broken  
23 marketplace. So registration is something that we'd  
24 like to see improved at the Copyright Office, and we  
25 look forward to working with you and have some



1 suggestions on how to go about doing that. Thank you.

2 MR. FOGLIA: Keith, go ahead.

3 MR. KUPFERSCHMID: Thanks. Yeah, I'm  
4 really, really glad you asked this question. I know I  
5 and others have spoken to the Copyright Office before  
6 about this issue. The registration system does not  
7 work for dynamic content and website content, and  
8 that's not, frankly, unique to news publishers, right?  
9 For news publishers who put -- more and more, these  
10 days, their content is not appearing in print or is  
11 appearing in print and also on the website, but  
12 there's a ton of information and news articles that  
13 are appearing just on the website, right?

14 And it's not like they just update the  
15 website once during the course of the day. It's not  
16 like they put out an article and that article is  
17 static. It will change, presumably, as new  
18 information comes along. How do you register that?  
19 How do you register all the news that's on the  
20 website?

21 We have been talking to the Copyright Office  
22 for a long, long time about this. There has been --  
23 no -- this is no easy solution, so I don't want to  
24 just put this burden on you guys. That system needs  
25 to change because, if news publishers and others who

1 want to register their website content can't do that,  
2 they can't get statutory damages, they can't --  
3 because they can't register their works -- and they  
4 can't get into a court to enforce their copyrights.

5 So, when people are using these articles  
6 illegally, they're really, frankly, screwed compared  
7 to a lot of other copyright owners and creators.  
8 That's got to change, and if there's one thing that  
9 the Copyright Office can do itself, frankly, without  
10 any outside assistance of Congress or anyone else,  
11 it's to fix the registration system so this system  
12 works.

13 And if the Copyright Office thinks that it  
14 needs congressional, like, needs some kind of  
15 legislative change to do this, then let's start  
16 talking about this. But this is a change whose time  
17 has come and, frankly, passed. I mean, websites are  
18 not a new thing. There needs to be a way to register  
19 dynamic and voluminous website content, and there just  
20 isn't, and that's a huge, huge problem.

21 MR. FOGLIA: Professor Ginsburg?

22 MS. GINSBURG: I just wanted to add another  
23 aspect of concern piling onto why this is a real  
24 problem that needs some kind of solution. To the  
25 extent that some courts are saying that the work is

1 what's in the registration and, therefore, if what  
2 your claim concerns is not in the registration, then  
3 you're out, that's very problematic to the extent that  
4 there may well be differences between the dynamic  
5 digital version and some print version.

6 I think it's quite problematic because, of  
7 course, the work is the creation. It isn't the  
8 registration as a matter of the 1976 copyright law.  
9 And so I think that those courts may well be wrong.  
10 But, to the extent that there is a case law that says  
11 the work is what's in the registration, I think that's  
12 another reason why there needs to be a way of having  
13 the registration cover the dynamic aspect of these  
14 websites, whether they are news media websites or any  
15 other kind of dynamic website.

16 MR. FOGLIA: Thank you. Melinda, you have  
17 the next question.

18 MS. KERN: So, going along similar lines,  
19 for short phrases that are not protectable under  
20 copyright, would it be wise for us to consider  
21 extending copyright protection to short phrases,  
22 however original?

23 And then also, the second question is, is  
24 there any situation where you can see that a headline  
25 could be copyrightable and register? Professor

1 Ginsburg?

2 MS. GINSBURG: Okay. As mentioned earlier,  
3 I think that's actually somewhat inaccurate to say  
4 that short phrases aren't protectable. As I mentioned  
5 earlier, the cases don't actually support that. They  
6 turn on originality and not on the number of words.  
7 There isn't a brevity threshold. And it has been  
8 recognized in cases, that even short phrases, when  
9 original, can be protected, whether one looks at them  
10 in isolation or more often and more accurately as part  
11 of a work.

12 So I think that the positive law,  
13 notwithstanding the regulation, the compendium, and  
14 the circular, should be understood as concerning  
15 originality and not some kind of unspecified word  
16 count. And, under that approach, there may well be  
17 many headlines that are original and therefore are  
18 protectable, even under the current state of the law,  
19 notwithstanding the words and short phrases doctrine,  
20 because there is, in fact, no actual per se bar to the  
21 protection of a short phrase if it is original.

22 Most short phrases aren't going to be  
23 original, which is why the case law, such as it is,  
24 rejects protection, not because it's short but because  
25 the content claimed is not original. I think it would

1 be much more helpful to focus on originality rather  
2 than word count.

3 MS. KERN: Thank you. Kate?

4 MS. SHEERIN: I just wanted to take a note  
5 about the reason that news publishers allow the use of  
6 headlines and short extracts in search and in Google  
7 News regardless of the copyrightability.

8 While we don't think they are copyrightable,  
9 as I mentioned before and throughout this panel, news  
10 publishers are opting in to allow this content to  
11 appear, and that's because, for users, right, who are  
12 looking for information on the web, the short extracts  
13 and headlines help them identify which news article is  
14 the one they want to look at, right? It helps them  
15 find the information they are looking for and click  
16 through to the news publishers where the news  
17 publishers can gain revenues through ads or  
18 subscriptions.

19 So this is a public use. The public uses  
20 headlines and short extracts to find information they  
21 need. Extending a copyright in this way would have  
22 detrimental impacts. We've talked a lot about the  
23 dynamics here, of course, between the news industry  
24 and Google, but I think, when we think about this,  
25 copyright doesn't necessarily mean a right to payment

1 at all. And so, if the question is about giving news  
2 publishers control over how their content appears,  
3 that already exists on our services today.

4 MS. KERN: Thank you. Danielle?

5 MS. COFFEY: I just, again, have to be on  
6 the record. We would not characterize our  
7 relinquishing of our news content as opting in. To  
8 us, it's a Hobson's choice. It's like asking someone  
9 if they want air. Without it, we would receive no  
10 revenue, no exposure when our members have tried to  
11 pull off of certain aspects of Google, and it is  
12 Google that we're talking about because they do have  
13 the dominant market share.

14 We would love to have a competitive  
15 environment. We would love to have Bing and Search,  
16 and then we could have our fair market share and there  
17 could be -- right now, the dominant party does take a  
18 hundred percent of the market share because we are not  
19 compensated.

20 As far as the opting in, going back to that,  
21 it's a Hobson's choice. So, in a competitive  
22 environment, we would have the ability to work with  
23 multiple parties. We believe that would be a  
24 healthier marketplace where it would be functional so  
25 that we could determine the fate of our content and

1       how it's used and how it's disseminated and also be  
2       able to have a return on that investment, going to  
3       very good points that were made and will be made later  
4       in the roundtable about our market share and being  
5       able to recoup that from those who are distributing  
6       our content.

7                But I just do have to be on the record that  
8       it's not -- I wouldn't characterize that it's opting  
9       in with a dominant monopoly. Thank you.

10               MS. KERN: Daniel?

11               MR. TAKASH: Thank you. Yes. So, if I  
12       understand your question correctly, as to the  
13       desirability of extending the ability for short  
14       phrases, headlines, to be available for copyright  
15       protection, I would consider it undesirable.

16               As Professor Ginsburg said, I think there  
17       would be, even if that were to happen, there would be  
18       significant questions about originality, which would  
19       not necessarily implicate an exclusive right.

20               However, I think, should that specific  
21       protection be extended, you would necessarily run into  
22       an interesting dynamic relative to what we're talking  
23       or compared to what we're talking about today, where  
24       you would have competing news publishers reporting on  
25       the same story and potentially -- and even if it turns

1 out to not be infringing at all -- potentially running  
2 into a scenario where they make editorial decisions  
3 purely based on concerns about litigation, or  
4 litigation should emerge between publishers that would  
5 simply prevent the proliferation.

6 So you'd run into a weird dynamic where,  
7 right now, we're talking about rent sharing between  
8 aggregators, platforms, and news publishers, but we  
9 certainly wouldn't want to create a scenario where the  
10 latter side are fighting among themselves, to answer  
11 that question.

12 MS. KERN: Thank you. And Kate?

13 MS. SHEERIN: I just wanted to respond to  
14 Danielle about the Hobson choice. I think, really, it  
15 is a disagreement about the value exchange that is  
16 happening here, and I think you all have heard  
17 throughout this panel and will continue to hear  
18 throughout the day that there are differences of  
19 opinions, different studies, different evidence here.  
20 There is not agreement between the parties, and that  
21 will kind of come through.

22 But I do think we believe we provide  
23 tremendous value to the news industry, 24 billion  
24 clicks per month for free. We provide services that  
25 are useful to the public, useful to the news industry.



1           And so I think Danielle and I will continue  
2 to disagree about these fundamental principles, but I  
3 just wanted to point out that I think it's not a  
4 Hobson's choice. It's a disagreement about the value  
5 exchange.

6           MS. KERN: Thank you. And then, Ms. Coffey,  
7 did you have a response or --

8           MS. COFFEY: Yeah, I would just say two  
9 things real quick just on the last point only because  
10 it was recently raised and I just heard "for free,"  
11 and that would be -- we would have to ignore the other  
12 side of the equation where revenue is produced for the  
13 party that is producing that traffic.

14           And the traffic, again, we don't believe  
15 that to be of significant value when the ad tech tax,  
16 as it's colloquially called, is so high that we don't  
17 believe we do get an adequate return on our  
18 investment, and that's because there's an anti  
19 competitive market on both the distribution side as  
20 well as the ad technology side, which is evidenced  
21 through litigation that I won't go into.

22           The other thing that I wanted to say is we  
23 have been talking a lot about the competition law.  
24 We've been talking about this being really about the  
25 dominant platforms and the consent and whether or not

1 we have that.

2 And if there is an acknowledgment that there  
3 is an opt in -- that we have an opt -- we're opting  
4 into this and we do have choices and that it is a  
5 competitive market, then I would think that we would  
6 all would be supportive of legislation that's pending  
7 in Congress, the Journalism Competition Act, that  
8 acknowledges that it's anti competitive and allows the  
9 remuneration for the value that is received by news  
10 content. So, if there is that value exchange today,  
11 which is what I'm hearing, then everybody on this  
12 panel should be supporting the JCPA. Thank you.

13 MS. KERN: Thank you. Chris?

14 MR. WESTON: Yes. Just returning to sort of  
15 pure copyright issues, assuming that Jane's view  
16 prevails that there is copyright protection for  
17 creative short phrases, including headlines, and that  
18 the use that aggregators are making is not fair, what  
19 is -- where does that get us? What is the -- you  
20 know, what follows from that? Does that lead to  
21 lawsuits? I'm just trying to figure out what the  
22 practical implication of that sort of conclusion is.  
23 Jane?

24 MS. GINSBURG: Whether it leads to lawsuits,  
25 I think, turns on the registration issue that we've

1 been talking about. But I would expect that the  
2 clarification of the positive copyright law could  
3 improve bargaining, but I don't know how much it could  
4 improve bargaining.

5 That brings us back to the question of  
6 market dominance because, as I said earlier, even if  
7 you have uncontroverted copyright protection, if you  
8 can't effectively bargain, that's not going to get you  
9 very far. Also, even if you could sue, there's the  
10 question of litigation costs and how long the lawsuit  
11 can go on. The situation is not at all comparable,  
12 but I'll just point out that the Google Books  
13 litigation went on for over 10 years. That's not  
14 ideal either.

15 MR. WESTON: Okay. Thank you. Wayne, you  
16 were next.

17 MR. BROUGH: Yeah. I would just add the  
18 alternative to lawsuits is simply less aggregation.  
19 If, in fact, platforms just decide they don't want to  
20 deal with it, it's actually a disservice to consumers.  
21 And I think solving that problem is difficult.

22 I mean, we've seen what's happened in  
23 Europe. There's not been an easy resolution to this  
24 question. Even the arbitration approach in Australia  
25 is problematic. So I think, if you go down that road,

1 there are going to be problems that ultimately provide  
2 a disservice to consumers and more consumer harm than  
3 benefit.

4 MR. WESTON: Thanks. Daniel?

5 MR. TAKASH: I wholeheartedly agree with  
6 Wayne's comments. The only way I would add is that,  
7 you know, should negotiation or litigation be the  
8 avenue that is pursued, be it under current laws or  
9 under some new regime, there is simply -- you know, we  
10 need to be prepared for the possibility that these  
11 operations would shut down.

12 And whether or not you agree that the share  
13 of revenue or the distribution of rents is equitable  
14 under a current system, you need to be -- you know,  
15 it's entirely possible that these operations will for  
16 one reason or another simply disappear.

17 And to that extent, I'll just once again  
18 point out that the way you prevent this is to do an  
19 end run around the regulatory policy and copyright and  
20 view it purely as a fiscal policy direct financial  
21 support solution where the producers of news content  
22 simply can become, you know, largely indifferent to  
23 the status of their copyrights and are simply happy to  
24 see it proliferated.

25 MR. WESTON: Thank you. Keith?

1           MR. KUPFERSCHMID: Yeah, just briefly. I  
2 mean, I think it's good that we're talking about  
3 potential solutions here. As I said earlier, clearly,  
4 something needs to be done. I won't go into any  
5 detail in terms of what the best or preferred solution  
6 is or anything like that, but just simply saying no,  
7 let's keep the status quo is not a solution, is not an  
8 answer. Something needs to be done, whether it's  
9 copyright, antitrust, I mean, unfair competition.  
10 There's a whole bunch of different possibilities here.

11           And I think it's good, and I thank the  
12 Copyright Office for holding this roundtable and kind  
13 of beginning these discussions because, clearly, we  
14 need a solution. We can't keep on going down this  
15 path. Otherwise, we'll see ourselves years from now,  
16 and we won't be complaining about aggregators taking  
17 news publishers' content because there will be no  
18 content. So I think it's good that we start talking  
19 about solutions, but I know that's predominantly for  
20 Panels 2 and 3, so I'll stop there.

21           MR. WESTON: Okay. Thanks. I will turn it  
22 over to Andrew for the next question.

23           MR. FOGLIA: Sure. This one may be more  
24 targeted to the economists, but I was wondering to  
25 what extent the problems we're discussing in the

1 current economics of news publishing are different for  
2 local news organizations or smaller news organizations  
3 than larger ones. Wayne, I think I saw you.

4 MR. BROUGH: Yeah. Thanks. I think it's a  
5 greater burden on the local producers because those  
6 are the ones, if, in fact, you move into some system  
7 of trying to arbitrate, you know, who's getting paid  
8 for what taxes, chances are the local news providers  
9 are going to be the ones that suffer. It's going to  
10 be much easier to run the articles from a large  
11 nationwide publisher. There's probably potentially  
12 more revenue involved in that on the ad side of  
13 things.

14 So, if, in fact, we move to this world where  
15 there's more protection and more abilities to sort of  
16 shift the sharing of rent, those on the platform and  
17 those publishers, I think, are going to end up  
18 shifting towards the larger publications and making it  
19 even more difficult for local producers to provide the  
20 revenues they need for local news.

21 MR. FOGLIA: Thanks. Daniel?

22 MR. TAKASH: Yes, I think one of the issues  
23 which face local publishers or at least you see a  
24 decline in the number of local papers and the rise of  
25 what are called "news deserts" is a large trend

1 towards financialization, where you have hedge funds  
2 and other largely financial firms acquiring  
3 newspapers, stripping for parts, leading to layoffs.  
4 And I think that's an issue which is entirely separate  
5 from the discussion, certainly deserves its own  
6 scrutiny, but for the purposes of this conversation is  
7 neither here nor there.

8 I think the other issue we see with local  
9 publication is -- and this is, you know, very  
10 difficult to change via the law -- consumer  
11 preferences. Pew Research put out that most folks  
12 simply do not know that their local publisher and that  
13 local outlets are seriously struggling. And I think,  
14 to a certain extent, being made aware of that problem  
15 could inspire a certain civic duty in local citizens  
16 to support their newspaper, which wouldn't necessarily  
17 solve the problem all on its own, but it would go a  
18 long way.

19 And then the final point I would make is  
20 that there is a problem -- again, this is part of  
21 national, cultural, consumer preference trends, which  
22 are hard to get around -- of the nationalization of  
23 the news. There are only so many hours in the day.  
24 You know, every minute I spend reading a national  
25 outlet is a minute I do not spend reading my local

1 paper. So these are issues that are separate from  
2 discussions of copyright and require a more creative  
3 approach than leaning into an intellectual property  
4 exclusivity-based model.

5 MR. FOGLIA: Thanks. Danielle?

6 MS. COFFEY: It's really just a description  
7 of our membership and the news publishers across the  
8 country, which is also different from, obviously,  
9 Australia and Europe. Actually, that's not true.  
10 Some member countries -- member states in Europe do  
11 look like the U.S., meaning the landscape of  
12 newspapers in the U.S. is very -- if there was a  
13 pyramid and you had the large publications, we would  
14 be very bottom heavy, meaning across our country we  
15 have 7 to 10,000, depending on how you define them,  
16 newspapers, small and local newspapers. covering very  
17 small corners of our country.

18 And that's different from, say, Australia,  
19 where you have larger publications. They do have  
20 regional small publications. It's just we have a  
21 tremendous amount. If you're looking at that pyramid,  
22 it's much more bottom heavy. And we have a few  
23 national publications, and then we have metropolitan,  
24 regional, and then just a ton of small and hyperlocal  
25 coverage. To your question, though, they invest in



1 reporters and newsrooms.

2           And, of course, notwithstanding the  
3 proportionality of what you would ever see the clicks  
4 coming -- the articles being posted from whether it's  
5 a national and also the national interest in the  
6 coverage from those publications versus a smaller  
7 local publication would obviously -- notwithstanding  
8 the proportionality, the investments in the newsrooms  
9 and the reporters is significant at the local level.

10           And so the last thing that I'll say is that  
11 in any solution that we come up with -- and I agree  
12 with Keith, there has to be a solution. We can't just  
13 keep saying what doesn't work. We have to figure out  
14 a way to make something work here.

15           Any solution that we come up with does, I  
16 would say -- that I feel strongly that it needs to  
17 reward the reporters and the newsrooms investments  
18 because, if we're rewarding clicks, that leads to an  
19 ecosystem that we're headed towards today where the  
20 quality of the content is going to hurt society. It's  
21 going to hurt the next generation because it's just  
22 not the quality journalism that we're used to where  
23 you rely on the brand. There's only so many -- you  
24 know when there's a tabloid in the newsstand when  
25 you're leaving the grocery store, and you can tell the

1 difference. You know when an alien is not coming out  
2 of somebody's head, that's a tabloid.

3 But now we just can't tell anymore because  
4 everything is merged and compiled together on search  
5 and social. And we need to maintain that standard for  
6 a civil society. Thank you.

7 MR. FOGLIA: Thanks. Daniel, before you  
8 answer, I'm going to actually add on one more question  
9 for you to also address potentially because what  
10 Danielle just mentioned about potential sort of brand  
11 and reputational dilution through aggregation,  
12 something that came up in a few comments, this concern  
13 that as the news content is aggregated, readers no  
14 longer distinguish or reward newspapers for developing  
15 a particular reputation for, you know, trustworthiness  
16 or something like that. What evidence do we have that  
17 that sort of dilution is happening, and what evidence  
18 do we have that it's happening because of aggregation?

19 MR. TAKASH: So, with respect to the  
20 question about dilution of quality, I think, to a  
21 certain agree, sensationalism and bias in reporting  
22 has always been with us. It's a problem that, I  
23 think, is difficult around.

24 That being said, I think one of the issues  
25 is that if even -- take whatever your preferred

1 distribution is in order as it relates to revenue per  
2 click or whatever or appearance in aggregation, I  
3 think it rewards virality, and I think it rewards  
4 sensationalizing, you know, eye grabbing, where, you  
5 know, it's an old joke, but it's a serious problem  
6 that people read the headlines, they don't read the  
7 actual content of the stories.

8           And I think a model that leans more on  
9 collecting revenue from the specific practice of  
10 aggregation, that would be problematic. Again, my  
11 specific solution would be something like, as  
12 suggested in one of the comments, something like a  
13 fourth estate fund that goes to either publications  
14 or, ideally, as Professor Silbey noted in her  
15 comments, towards individual journalists because  
16 there's no guarantee that simply because the funds go  
17 to the news publishers, that will trickle down to the  
18 people who are actually working.

19           So I think we need to lean more on an  
20 independent financial support model where people  
21 depend less on eye grabbing and more on substantive  
22 work that will, maybe not today, you know, maybe not  
23 all the time, but eventually inform serious public  
24 policy or, at a bare minimum, serve as a deterrent  
25 towards corruption in local officials. When local

1 papers go under, municipal bond ratings go up.

2 So it's not even necessarily a question of  
3 people catching the eyes, it's a question of someone  
4 actually watching, is a long winded answer to what  
5 hopefully at least addresses some of your question.

6 MR. FOGLIA: It does. Thank you. Keith,  
7 and then I'm going to turn it to Melinda for the next  
8 question.

9 MR. KUPFERSCHMID: Yeah, I just very quickly  
10 wanted to point out that we're hearing a lot of  
11 different solutions from the tech side of things that  
12 propose a variety of sources of paying for news  
13 production, like we just heard from Daniel, except one  
14 group that's left out, which is the actual technology  
15 companies that are using the content, right? They  
16 don't want to pay, but let someone else pay. I just  
17 -- that's bizarre to me. That's all I want to say.

18 MR. FOGLIA: Daniel, and then Melinda.

19 MR. TAKASH: Yeah. Sorry, I don't want to  
20 necessarily give the impression -- first, I would  
21 argue that it's the production and the existence of  
22 these institutions that matter. Again, it matters as  
23 a function of, like, local state policy where it would  
24 make sense, you know, just for the sake of their  
25 credit rating.

1           However, if we are concerned about, you  
2 know, distribution of the rents going forward, I think  
3 a tax on advertising more broadly would be an  
4 acceptable solution. I speak only for myself on that  
5 matter. So, if the concern is about payment, I think  
6 that's a perfectly acceptable solution. But, again,  
7 this is something which should be funded, general fund  
8 revenue, a further excise tax on alcohol -- whatever  
9 it should be, it's the existence and proliferation  
10 that matters the most.

11           MR. FOGLIA: Thanks. And Kate, actually, I  
12 do want to give you a chance to get in, so please go  
13 ahead.

14           MS. SHEERIN: Yeah. Thank you for just  
15 letting me answer this before you move on, but Keith  
16 said that technology companies are not contributing  
17 here. I strongly disagree. Along with the value I've  
18 mentioned throughout my remarks today, I wanted to  
19 point out the Google News Initiative.

20           Through the Google News Initiative, we've  
21 supported 7,000 news partners, 450,000 journalists,  
22 and provided over 300 million in global funding. We  
23 are a committed and long term partner of the news  
24 industry for over two decades. And so I think I just  
25 wanted to reiterate we are committed to this work. We

1 support high quality journalism. We want a  
2 sustainable and healthy news ecosystem going forward.

3 MR. FOGLIA: Thank you. Melinda?

4 MS. KERN: Thank you. Some of the comments  
5 touched on this, and I believe we heard a little from  
6 Kate, but I just wanted to know what the benefits that  
7 accrue to press publishers are from current  
8 aggregation practices. I know that some of the  
9 comments had mentioned increased audience, but I  
10 didn't know if anybody else had experience with any  
11 benefits that they were currently facing? Kate?

12 MS. SHEERIN: I just wanted to mention,  
13 alongside the value of traffic, we also provide a  
14 number of tools. One I wanted to mention is  
15 "Subscribe with Google" that helps drive subscriptions  
16 for news publishers. Since our launch, we've driven  
17 over 500,000 subscriptions for our partners around the  
18 world, 90,000 in the last six months alone. We're  
19 investing in tools across the board and collaborating  
20 closely with the news industry beyond just the traffic  
21 we send.

22 MS. KERN: Thank you. And Danielle?

23 MS. COFFEY: We do receive traffic.

24 However, when the traffic comes through, the problem  
25 is that because there's dominance -- and this is being

1 litigated; I won't get into this -- Google owns the  
2 buy side and the sales side of the advertising  
3 ecosystem so that, in addition to the arbitrage that  
4 has been found and the low take rates that we are  
5 finding, which contradict Kate's, it's an inadequate  
6 return on what value we're providing to the increased  
7 revenue of the platforms that we're not getting in  
8 return and is not only hurting our ability to produce  
9 quality journalism, but also the anti competitive  
10 conduct squeezes out other competitors, so that leads  
11 to the Hobson's choice that we've been talking about.

12 Another example that I would give of what we  
13 would like to receive -- so sorry, Melinda; it's the  
14 opposite of your question -- what we would like to  
15 receive is the examples that I gave before. And when  
16 we do work within the verticals and also the analytics  
17 and the tools and all the things that are offered by  
18 Google, we are at a detriment, and we found that  
19 through evidence of looking at our publications and  
20 what they've experienced when they use, like I said,  
21 the perfect example is Accelerated Mobile Pages, which  
22 is -- and I'm doing air quotes to say "voluntary"  
23 because it really isn't. Like I said, if you want to  
24 be found at the top of Search, it's really a Hobson's  
25 choice. Of course, you're going to want to be at the

1 top of Search before you have all of the other ways  
2 that they display our content.

3 So, in AMP, like I said before, we incur --  
4 we don't have as much data, we don't get as many  
5 subscribers, and we don't have as much advertising  
6 dollars as we do with organic search. So we are at a  
7 disadvantage. We are taking less revenue when we are  
8 using Google and Google's aggregation and tools and  
9 services, so we are not getting an adequate return on  
10 our investment. And notwithstanding GNI and some of  
11 these other grant programs, what we're looking for is  
12 a fair exchange of the value that we're providing at  
13 fair market value, which is, by definition, impossible  
14 when there's a monopoly and why laws are supposed to  
15 fix that. Thank you.

16 MS. KERN: Thank you. I think that is the  
17 only question I had at this moment. So, Chris?

18 MR. WESTON: Thanks, Melinda. So my  
19 question is the concept of "quality journalism" has  
20 come up a few times in the comments and then in our  
21 conversation today, and I wanted to ask, to what  
22 degree is the preservation or the promotion of quality  
23 journalism, as opposed to other kinds of journalism or  
24 quasi journalism, a concern of copyright law? You  
25 know, does the constitutional command of the progress



1 of science, does that have anything -- does that have  
2 any implications for the type of works that we want to  
3 encourage through copyright law? Danielle?

4 MS. COFFEY: Okay. That's asked a lot, and  
5 Jane will have a lot to say on this as well. That  
6 comes up a lot. What is news? What is protected  
7 here? What's quality? Because it's difficult to  
8 define news, it's kind of like a you know it when you  
9 see it sort of a thing.

10 Another way to look at it is the objective  
11 criteria that goes into the creation of news. So, if  
12 you look at you hire reporters, you have a  
13 fact-checking process, you have an error correction  
14 method, and the fact that we put our names on our  
15 products, the fact that you know who to complain to,  
16 that's what sets news publications and quality  
17 journalism apart.

18 Whether you agree with the content that is  
19 created and whether the viewpoints, you believe it to  
20 be factual or not, if there's a fact-checking process  
21 and citation to multiple sources, so on and so forth,  
22 the objective criteria, and Society for Professional  
23 Journalism has a code, a standard Code of Conduct that  
24 all of our news publications adhere to, in addition to  
25 having to their own newsroom standard Code of Conduct

1 for the creation of news and putting our name on it,  
2 we believe that that ensures that it's what we would  
3 deem to be quality versus what some are calling  
4 "citizen journalism," and that would be where a  
5 Facebook poster goes out and takes pictures on their  
6 phone.

7 That's not journalism because there's a  
8 method and there's a Code of Conduct that we adhere to  
9 to ensure that quality, to ensure that people can rely  
10 on it and the credibility -- love us or hate us, agree  
11 with what's being reported or not -- a reporter is  
12 still sitting in City Hall and reporting on the facts  
13 of what's taking place and editorializing on that  
14 content. Whether you agree with it or not, you know,  
15 is in addition to what we do.

16 And just on the citizen journalism, do we  
17 want citizen medicine practice on the streets? I  
18 mean, there has to be some sort of a standard of care  
19 to create these pieces that consumers rely on. Thank  
20 you.

21 MR. WESTON: Thanks. Thanks, Danielle.  
22 Jane, you're next.

23 MS. GINSBURG: Yeah, I'd like to reply at a  
24 slightly higher level of generality with respect to  
25 the relationship of copyright to quality creativity,

1 and I'd like to cite Lord Macaulay, who is often  
2 incompletely cited as having said that copyright is  
3 exceedingly bad because it is a tax on readers for the  
4 benefit of authors. He did say that, but he also said  
5 some other things that are at least as important. He  
6 said that we must have a supply of good books and the  
7 best way to achieve that objective is by liberally  
8 remunerating authors.

9           And the three models he posed were authors  
10 who were independently wealthy who could support  
11 themselves -- that's a small group -- patronage, which  
12 he loathed and for a variety of reasons, including  
13 that it makes the author beholden to the patron, and  
14 under those circumstances, two cheers for copyright --  
15 he didn't say it that way -- but that copyright is the  
16 best way to achieve a diversity of creators and to  
17 ensure that they can continue to be creators.

18           I'd like to advert back to something that  
19 Danielle said, which is there's nothing wrong with  
20 crowdsourcing, and that's a very nice adjunct, but you  
21 can't have a reliable and consistent supply of  
22 creativity if you rely on people's spare time and  
23 spare income.

24           And the copyright system is designed to  
25 create an ecosystem that will support creativity. Not

1 all of it will be high quality. Indeed, copyright  
2 eschews making quality judgments, but if you have a  
3 system that as a whole makes it possible to earn a  
4 living by creating works, you will get a lot of works,  
5 and many of them will, in fact, be quite good.

6 MR. WESTON: Thanks very much. Wayne?

7 MR. BROUGH: Yeah, I mean, I'd agree that  
8 having a professional class of journalists is of  
9 value, but in today's digital world, there's plenty of  
10 sources of quality reporting that come from law  
11 professors doing blogs -- it's across the board.

12 And I think, if we start saying copyright is  
13 different for, say, a law professor with a blog than a  
14 journalist doing something in a publication, I think  
15 we're going into territory where we've got some First  
16 Amendment issues, and I'd be very concerned about  
17 trying to distinguish between the two.

18 MR. WESTON: Okay, thanks. Andrew is next,  
19 and I don't want to say this is our very last  
20 question, but I guess depending upon the extent of the  
21 answers, it may be.

22 MR. FOGLIA: Thanks, Chris. So we've heard  
23 today a number of times that whatever causes of action  
24 news publishers may have, they may not be effective  
25 for competition related reasons. Nonetheless, I'd

1 like to ask about one more cause of action, and I'm  
2 curious to hear whether the panel thinks hot news  
3 misappropriation is still a viable cause of action and  
4 whether it has any application in this context.  
5 Thanks. Danielle?

6 MS. COFFEY: I believe that this is a  
7 subject for another panel, so I won't go into it much,  
8 but I will say that it has equally been eroded by the  
9 courts, the hot news doctrine. It is still viable in  
10 the states. However, because of a string of court  
11 cases, it is not a useful tool, nor is it, at the  
12 federal level, if it were to be utilized, you noted in  
13 your question the competition issues.

14 And a right to protect your property is  
15 where we are utilizing or where we've been active in  
16 competition law because it does protect the right to  
17 access your content. I don't want to get into it too  
18 much, but, currently, we have the ability to do that  
19 today. Under 1201 of the DMCA, we can actually  
20 protect access to our content, notwithstanding whether  
21 or not that content is protected by fair use.

22 However, that continues to relate back to  
23 the ability to withhold our content, and any one  
24 publisher who would withhold their content  
25 individually would be meaningless. They've tried.

1           To be able to collectively do that and have  
2           an enforcement mechanism to ensure compensation  
3           because of that withholding based on the access to the  
4           content is something that would result in a successful  
5           payment for the value that's being received and the  
6           increase of revenue, incremental revenue, due to that  
7           value of the content that's being received by the news  
8           content creator.

9           And, again, that's the JCPA, but, again,  
10          that's not in this panel, and Jane is an expert on the  
11          sui generis and which hot news is an example of, so  
12          I'll just stop there. Thank you.

13          MR. FOGLIA: Jane, I see your hand's up.

14          MS. GINSBURG: I thought I saw Keith as  
15          well. I just want to say that as a matter of current  
16          positive law, the hot news doctrine wouldn't really be  
17          applicable to news aggregation because, while some of  
18          its elements, notably, the threat to the business of  
19          the source of the content, is present, at least many  
20          so say, the essential hotness, heat or timeliness  
21          which underlies the hot news doctrine isn't really at  
22          issue here. We're not talking about the right to be  
23          the first to disseminate the news. That's what the  
24          actual INS case was about, and the more recent  
25          incarnations of hot news give a very, very short

1 window of exclusivity.

2 But I think the problem with news  
3 aggregation is not beating the source site to the  
4 punch. It's putting up the content of the source site  
5 in a persistent way even after its initial  
6 dissemination. So hot news at least as it currently  
7 exists and, indeed, was formulated back in 1918 by the  
8 Supreme Court doesn't quite map on to what's going on  
9 here.

10 MR. FOGLIA: Thanks. Melinda?

11 MR. WESTON: Actually, I'm going to jump the  
12 queue and say that we're almost done, but I want to  
13 give everybody 30 seconds or so to offer any closing  
14 remarks you'd like to offer. That's optional, you  
15 don't have to, but this is an opportunity for anybody  
16 to do that who wishes. Danielle?

17 MS. COFFEY: Only because it was in our  
18 comments, I would just reiterate -- well, first, I  
19 would reiterate the importance of what we're talking  
20 about. I started with that, I'd like to end with that  
21 because what we're talking about is something that has  
22 an impact on the democratic process and getting  
23 information to citizens of our country. So I think  
24 it's important, and I think everybody -- I think we  
25 all agree on that, which is a good thing. And, again,

1 thank you for holding this roundtable because it is  
2 such an important issue, and we appreciate you taking  
3 the time to -- and also would like to thank Senator  
4 Tillis in this respect for actually prompting the  
5 discussion. His leadership is notable.

6 I would just at this point reiterate what we  
7 asked in our comments of the Copyright Office, which  
8 is to recommend, at the end of the day, to recommend  
9 that reproduction and display of our content is  
10 infringing, to allow the registration process of  
11 dynamic web content and improve upon that, to consider  
12 national treatment with regard to the EU publishers'  
13 right, Article 15, that was promulgated. And then,  
14 lastly, to endorse the Journalism Competition  
15 Preservation Act, as I think that we've proven across  
16 the board this is really a competition issue to ensure  
17 the compensation that is deserved here. Thank you.

18 MR. WESTON: Okay, thanks. And Kate?

19 MS. SHEERIN: Thank you so much for putting  
20 together this panel and thank you for having me. I  
21 just wanted to emphasize something that many of us  
22 have said today and Andrew also just referenced in his  
23 last question. A lot of the discussion today has not  
24 been about copyright law or ancillary copyright, it  
25 has been about other issues of law, other types of



1 interventions. And so I think that we should keep  
2 that in mind as we move forward about what this study  
3 is looking at. Are we looking at copyright issues?  
4 What is the scope here? Where are we focused? And  
5 thank you for all the work and thank you for inviting  
6 us to participate.

7 MR. WESTON: Thank you. Keith?

8 MR. KUPFERSCHMID: Yeah, my last comment  
9 isn't so much as a summary or conclusory comment but  
10 more of just a reminder of something I said at the  
11 very beginning of this panel, which is please let's  
12 not forget about photojournalists and photojournalism.  
13 We've talked a lot about news publishers, obviously,  
14 and the content of the stories itself, but  
15 photojournalism can't be ignored here. And in any  
16 solutions that we talk about, and, hopefully, we will  
17 move forward talking about different solutions that  
18 might work here, hopefully, they'll be included in  
19 those discussions.

20 MR. WESTON: Thanks very much. So that  
21 brings Panel 1 to an end, so I will ask Panel 1  
22 panelists to mute yourself and turn off your cameras,  
23 and then we will move you to being audience members.  
24 And then we have a 10 minute break coming up, starting  
25 when I'm done talking, and then Panel 2 will start at

1 10:45. If, during that break, if Panel 2 panelists  
2 could log on for audio and video checks. Thank you  
3 very much.

4 (Whereupon, a brief recess was taken.)

5 MR. FOGLIA: Welcome back. For those of you  
6 who are just joining us, the first panel discussed  
7 existing protections for press publishers. We are  
8 about to begin the second panel, which will explore  
9 whether additional protections for press publishers  
10 are desirable.

11 My name is Andrew Foglia. I'm a Senior  
12 Counsel with the Office of Policy and International  
13 Affairs. With me are Chris Weston, also a Senior  
14 Counsel, and Melinda Kern, a Barbara Ringer Fellow.

15 I'm going to go through the instructions  
16 just as we did at the top of last panel. Copyright  
17 Office staff will be posing questions for the  
18 panelists to answer. Panelists should use Zoom's  
19 "Raise Hand" feature to indicate that they would like  
20 to respond to a question. We will try to let  
21 panelists speak in the order they raise their hands.  
22 The first time you speak, please state your name and  
23 affiliation, if any. Panelists' remarks are being  
24 transcribed by a court reporter, and they will be  
25 posted on the Copyright Office website, along with a

1 video of the event. We ask that panelists keep their  
2 remarks on any one question to two minutes to allow  
3 other panelists time to speak. We would also ask that  
4 while you are not speaking you keep your microphone  
5 muted.

6 For audience members, please understand that  
7 the panelist sessions do not include audience  
8 participation. At 3:15 p.m., after the panels are  
9 complete, audience members who signed up to offer  
10 comments will be invited to do so. A link to that  
11 sign up is available on the Copyright Office website  
12 and in the chat. But, during the panels, please use  
13 Zoom's Q&A function only if you have a technical  
14 problem with the call that you would like to bring to  
15 the Office's attention.

16 With that, I want to thank our panelists and  
17 our audience members for joining us today. So I'm  
18 going to start with two questions actually. In  
19 response to the Office's Notice of Inquiry on this  
20 topic, we received a number of comments. One thing  
21 the comments seemed to agree on was the troubling  
22 state of press publishing in terms of revenue lost,  
23 jobs cut, and papers closed. How much of publishers'  
24 current woes, if any, is attributable to third party  
25 use of news content?

1           And relatedly, a recurring theme in the  
2           comments and in the first panel was that additional  
3           copyright protections would not be sufficient to make  
4           press publishers' protections effective or to reverse  
5           their fortunes. Would additional protections be  
6           necessary? Thanks. And I will start with Annemarie.  
7           Annemarie, I'm sorry, you're muted.

8           MS. BRIDY: Sorry about that. So I think an  
9           important question to ask sort of anterior to the  
10          question of whether protections are desirable or  
11          necessary is whether they're constitutionally  
12          permissible, you know, and I think there are some very  
13          serious questions about that, right? The study  
14          defines "news content" as "links and snippets," you  
15          know, and copyright law has a number of  
16          constitutionally dictated limiting doctrines that, you  
17          know, prohibit the protection of facts and that  
18          prohibit the protection of ideas.

19          You know, and so I think that those things  
20          are not original under copyright law, and they  
21          wouldn't be protectable under the Supreme Court's  
22          decision in Feist. And so, you know, I do think there  
23          are some serious not just copyright doctrinal problems  
24          but problems that track back to constitutional ones  
25          when it comes to adopting an ancillary right for press

1 publishers here in the U.S.

2 MR. FOGLIA: Thanks, Annemarie. Mr. Jani?  
3 Sorry if I'm pronouncing your name wrong.

4 MR. JANI: That's okay. Let's keep with  
5 first names if you're good with this. So first name  
6 is pronounced Ole. Yeah, my name is Ole Jani. Just  
7 to briefly introduce myself, I'm a lawyer and partner  
8 at CMS, based in Berlin, Germany, and today I'm  
9 speaking on behalf of Axel Springer, which is an  
10 international technology and media company based in  
11 Berlin but active in more than 40 countries, including  
12 in the U.S., in the U.S. notably through the recent  
13 acquisition of Politico, which some of you might know.

14 Now, to the question whether it is desirable  
15 to have additional protection in place, I believe the  
16 answer really to this question must clearly be yes,  
17 and the answer is in the first panel today because, as  
18 we've seen, this discussion has made it quite clear  
19 that press publications are being used by digital  
20 services, such as aggregators, in a way they have not  
21 been used in the pre digital days, notably by the use  
22 of what we tend to call snippets, headlines, et  
23 cetera. So these new forms of use have given press  
24 publications and these small extracts new value.

25 Now the value is harvested by those who use

1 it, and the value is not allocated to those who  
2 produce it, which is the press publishers, and there  
3 is apparently a lack of protection, or at least there  
4 is uncertainty to what degree such small extracts are  
5 protected. And we have seen the same challenge and  
6 the same situation in Europe, obviously, because  
7 technology and the business models are global, so the  
8 challenges and the questions coming from these new  
9 strategies are global.

10 And Europe has found an answer to this, and  
11 the answer is to close the value gap and the  
12 protection gap by introducing new legislation and to  
13 give publishers, press publishers, additional  
14 protection of their asset for this specific type of  
15 use. And so, apparently, wherever there is a similar  
16 situation, and we see that the situation is comparable  
17 in the U.S. because of the circumstances described and  
18 discussed in the first panel, that there should be  
19 additional protection introduced in the U.S. too.

20 MR. FOGLIA: Professor Silbey?

21 MS. SILBEY: Yeah, hi, everyone. Thank you  
22 for convening this roundtable. I'm very glad to be  
23 here. I'll just be very brief. As a copyright  
24 scholar and an IP scholar, I think we should take a  
25 page from -- we should learn from history and look at

1     how expansion or strengthening of IP rights has helped  
2     or hurt certain industries over time and particularly  
3     the public interest, which is what copyright is for.

4             The remuneration right is an intermediary  
5     benefit that is supposed to promote the progress of  
6     science, but, also, copyright rights don't always help  
7     the owners. In fact, most copyright authors do not  
8     benefit from copyright at all. And the idea that we  
9     should have just more private rights at the expense of  
10    the public interest, history has suggested, is really  
11    not a very good idea. So I think, as we consider  
12    whether to expand or particularize copyright for one  
13    particular industry over others, we might worry that  
14    there are unintended consequences to the public  
15    interest that we are trying to serve.

16            And the United States has a very particular  
17    history of that. I think we need to distinguish it  
18    from other market systems in Europe, for example, that  
19    have other values and other systems in place to  
20    support different kinds of creators and industries.  
21    The United States is different, and I think our  
22    copyright history is different as well, and we need to  
23    take that into consideration.

24            MR. FOGLIA: I'm going to switch to first  
25    names, as was suggested, so I don't botch your titles

1 and names. Cathy?

2 MS. GELLIS: Okay. By way of introduction,  
3 I'm Cathy Gellis. I'm an attorney in private  
4 practice, and I'm here today representing the Copia  
5 Institute, which is a thinktank and a publisher of the  
6 Techdirt news site that comments on these sorts of  
7 technology and legal policy issues.

8 To get back to part A of that first  
9 question, I want to point out, speaking as a publisher  
10 here, that as a publication, we can only succeed  
11 economically and expressively when we can connect with  
12 audiences. So I think we're not alone among news  
13 outlets to say we can only succeed when we can connect  
14 with audiences, and that's what these third party  
15 services are doing, to help us connect with audiences.

16 It's doing everything we could have ever  
17 hoped for. So it's a weird thing to resent and want  
18 to say no to or make impossible, but a proposal like  
19 this threatens to do that. It's giving us what we  
20 need to be able to then succeed. And the issue  
21 appears to be that these third party services are  
22 independently benefitting from part of this  
23 relationship, but that doesn't mean we're losing.  
24 It's just we're both benefitting.

25 And I think, to get back to what Jessica



1 said, we have to think about what the cost would be  
2 if, all of a sudden, these third party services are  
3 deterred from helping us connect to these audiences  
4 that we really need if we're going to succeed in any  
5 capacity as news publishers.

6 MR. FOGLIA: Joshua?

7 MR. LAMEL: Thank you, Andrew. My name is  
8 Joshua Lamel. I am the Executive Director of  
9 Re:Create. Like Cathy, I also have the pleasure of  
10 saying I am a journalist as well. I'm trained as a  
11 journalist and was a journalist before I went to law  
12 school and became a copyright attorney. I also do  
13 write for Techdirt as well.

14 As we look at these issues, I think the most  
15 important -- you know, the first panel got a lot into  
16 copyrightability, a lot about what's happening here.  
17 I think it's important to note that the first panel,  
18 largely, a lot of the issues were focused on  
19 competition policy.

20 I mean, we even have an esteemed antitrust  
21 expert here today in Hal, and, you know, the question  
22 becomes, when you get at new rights, are we dealing  
23 with an intellectual property issue, a copyright  
24 issue, or are we dealing with what is largely an  
25 antitrust issue, an economic issue, and I think we

1 need to take that step, you know, back and ask, and I  
2 know you didn't ask for this study, but, like, is this  
3 the right forum for this? Should it be at the FTC? I  
4 think there's real conversations that need to be had  
5 in terms of expertise.

6           You know, the other thing I would say is, is  
7 when you get into -- you know, I heard a lot of talk  
8 about journalists and what journalists want on that  
9 first panel and a lot of talk about how newsrooms  
10 work, and I think, you know, journalism is evolving,  
11 right? Like, it's what is and what is not journalism  
12 is constantly evolving. What is and what is not news  
13 aggregation is constantly evolving as we look at this.

14           I mean, Ole, you purchased a wonderful  
15 publication where I'm friends with a lot of the  
16 journalists and work with a lot of the journalists at  
17 Politico. I'm a Politico subscriber. You do great  
18 work. Your biggest value to me is often your news  
19 aggregation, as a purchaser and to a lot of similarly  
20 situated people in the D.C. marketplace who have one  
21 place where they can get most of the news they need to  
22 get, where you have trusted journalists acting as  
23 curators and aggregators of what other journalists are  
24 writing is of immense value to me. It's a public  
25 good. I pay for that public good, but it is a public

1 good.

2           So I do want to bring up that, like, you  
3 know, we're getting into some very complicated as we  
4 delve into this issues of what is and what is not  
5 journalism, who should be defining that, what is and  
6 what is not news aggregation, who should be defining  
7 that, and as we look at these rights, those  
8 definitional issues, I think, are almost like the  
9 predecessor to even beginning to be able to discuss  
10 should we have rights, what should those rights be.  
11 You know, figuring out how and who to apply them is  
12 very perilous here, and it's an important point.

13           MR. FOGLIA: Thanks. Elizabeth?

14           MS. KENDALL: Hi. My name is Elizabeth  
15 Kendall, and I'm here on behalf of Meta Platforms,  
16 Inc., formerly Facebook. And to get to your question,  
17 I do not think that publishers need more protections.  
18 I think that the question included a reference to the  
19 problem that's being faced by publishers, and I don't  
20 think that's been fully diagnosed or really clarified.

21           So there are a lot of folks that you've  
22 heard from on the first panel and on this one, and I'm  
23 sure on the one to come, who give a variety of  
24 different perspectives on why the copyright and  
25 competition discussions are unwise. But I'd like to

1 just clarify a few things about the Facebook platform  
2 because I think I've seen some misconceptions. I can  
3 only speak for one platform, but I think I would also  
4 take this moment to point out how varied and diverse  
5 the universe is.

6 But, from my perspective, there are two  
7 things that I just kind of want to clarify for this  
8 debate, and number one is we are an opt in social  
9 media platform. The publishers who choose to use  
10 Facebook create their pages on Facebook. Then they  
11 post links to their content. They even include  
12 Facebook sharing buttons on their own website. The  
13 link appears as a default with a snippet that  
14 publishers create and control. This notion of control  
15 is one that I think that has been very central to  
16 copyright discussions as well as other policy  
17 discussions and I think is something that really needs  
18 to be understood.

19 The second -- and I can refer you all for  
20 more information to the submission that we made -- we  
21 are a free platform, and we provide free tools to  
22 publishers. We drive a tremendous amount of value to  
23 them. That's why they're so many of our important  
24 users. We, notably, as kind of has been discussed by  
25 various folks here, we drive traffic, we expand reach,

1 and we supply significant engagement with new as well  
2 as established readers.

3 We also have invested in specific programs  
4 for the publishing industry, and we also periodically  
5 invest in innovating new experiences for our users,  
6 including those users who are interested in news,  
7 which is a subset, and one of those has been the tab  
8 product, Facebook News, that is described further in  
9 my written submission.

10 So that's one perspective, but I think what  
11 I really want to communicate is that we have been in  
12 partnership with publishers. We treat them as  
13 important users just like we treat the broader  
14 community that we serve, and we think that we have  
15 been able to deliver value and control. And we're  
16 proud to be able to help those publishers who choose  
17 to use us, and we want to continue this conversation.  
18 I think it only gives us better insight into how to  
19 continue to do that. So thank you.

20 MR. FOGLIA: Nzengha?

21 MS. WASEME: So, yeah, to answer, I concur  
22 pretty much with a lot of what you said. You gave a  
23 lot of really great information, particularly for  
24 Facebook, right? So that's something that the public  
25 -- all those little details right there the public

1 needs to be aware of.

2 But, on behalf of Artworks, to answer the  
3 question is it necessary or is it desired to expand  
4 the rights, anybody that was on that first segment  
5 would say yes, it's absolutely desired. It's  
6 absolutely desired.

7 And as I stated, I'm here on behalf of  
8 Artworks. Artworks is a nonprofit legal service  
9 provider that focuses almost exclusively to creatives,  
10 content creators. And I would think that our  
11 constituents would say absolutely yes, you know, those  
12 rights need to be expanded, absolutely yes, or they  
13 might say heck yeah.

14 But do we want to overhaul copyright law, as  
15 I think it was Jessica Silbey said, do we want to do  
16 that for one industry? Is that really necessary? So  
17 now we go into, is it desired? Yeah. Is it  
18 necessary? I'm not so sure. If we want to do this  
19 big overhaul, do we need to study it? Yes. I think  
20 the Copyright Office is clear on that, saying there's  
21 not enough information and we want to go and do a  
22 study and decide, at least put out some information so  
23 the public is aware, which is, you know, crucial and  
24 to the soul of our country as a democratic process.  
25 So I would say yes.

1           And the other piece of it is, and it was  
2 discussed a lot on the first segment, whether or not  
3 copyright law, right, needs to be expanded in such a  
4 dramatic way, or can we find remedies, you know, in  
5 antitrust? Is this more an economic issue? Is this  
6 more about competition? And we know, particularly  
7 following or in the midst of the pandemic, the tech  
8 industry has gone through the roof, and that's  
9 affected how we receive or desire to receive news.

10           So that's what I would say to those two  
11 questions. Is it desirable? Absolutely. Is it  
12 necessary, meaning needed, we must do it? I'm not so  
13 quick to give a definitive answer to that. I agree  
14 that there needs to be more study. I agree with, you  
15 know, I think it was Joshua Lamel had said about maybe  
16 this isn't necessary about copyright; maybe this is  
17 about industry, and maybe that industry needs to be  
18 more part of the study and inform a little bit more of  
19 what we're talking about here today.

20           MR. FOGLIA: Thanks. Peter?

21           MR. ROUTHIER: Thanks. Good morning. Peter  
22 Routhier with Internet Archive, and thank you to the  
23 Copyright Office for holding this event, and thanks to  
24 the participants for being here.

25           On the question of whether it's necessary or

1 desirable, it seems to me there's a predicate  
2 question, which is the extent to which it is  
3 permissible in view of the current structure of  
4 copyright and the U.S. Constitution.

5 I was struck a little bit this morning on  
6 the first panel by the absence of consideration of a  
7 couple of things. One is the user's rights, the  
8 rights that belong to users, whether they be libraries  
9 like ours or just ordinary citizens.

10 And the other point was the constitutional  
11 questions and the constitutional implications of the  
12 things that are being discussed here, and I was happy  
13 to hear some of those beginning to be addressed in a  
14 little more detail on this panel.

15 You know, from our perspective, users have  
16 affirmative rights grounded in the Constitution.  
17 Those rights include the right to cite, quote, and  
18 their modern equivalent, to link. Under existing  
19 copyright law, those rights are vindicated through,  
20 among other things, the fair use doctrine and the  
21 idea-expression dichotomy.

22 Those rights cannot be impinged by any new  
23 copyright right, and because it appears to us that  
24 virtually all the models under study would impinge  
25 upon those rights, I don't believe they're available



1 in the United States.

2 MR. FOGLIA: Thanks. And I'm going to get  
3 to Matt in a second, but I want to give two  
4 clarifications.

5 First, we are going to have a third panel  
6 later that will address both users' rights and  
7 constitutional questions.

8 And second, when I asked if ancillary  
9 copyright protections were necessary, what I mean is  
10 many of the comments both to the NOI and the other  
11 panel previously mentioned that, for example, you  
12 could give all the copyright law in the world and it  
13 wouldn't do anything unless competition aspects were  
14 addressed. And so it seemed to me that the  
15 competition aspects were doing a lot of the work in  
16 the analysis of the comments. If that's the case,  
17 what work is ancillary copyright protection even  
18 doing?

19 With that said, I'm going to turn it over to  
20 Matt.

21 MR. WILLIAMS: Yeah, thank you very much.  
22 This is Matt Williams. I'm a partner at Mitchell  
23 Silberberg & Knupp, and I'm representing the News  
24 Media Alliance here today.

25 The first panel was very interesting, and to

1 some degree, I think there's a misconception of what's  
2 in our lengthy comments that we filed. We have not  
3 asked for changes to copyright law at this point.  
4 There are a few clarifications that we think are  
5 necessary or would be helpful that were already  
6 discussed along the lines of registration practice,  
7 words and short phrases. We'd love for the Office to  
8 do a full fair use analysis and give its opinion on  
9 whether or not what's going on is likely or unlikely  
10 to be fair use.

11 But we, in our comments and at this stage,  
12 have not asked for any changes to copyright law. The  
13 primary ask that we have is that the Office look at  
14 the data being submitted and decide that there's a  
15 problem, as Keith and others articulated earlier, and  
16 that the JCPA legislation is a great way to address  
17 that problem. That statute, if it was to be enacted,  
18 doesn't change copyright law at all. It is a statute  
19 designed to address the competition problem that  
20 exists in the marketplace. It allows for collective  
21 negotiation amongst news publishers to try to address  
22 the marketplace imbalance.

23 It is built off of a similar concept as to  
24 Section 1201(a) of the DMCA. It's an access-based  
25 statute. It doesn't get into what can someone do with

1 content that they have lawful access to. It doesn't  
2 get into fair use, which, as we all know, doesn't  
3 apply to the DMCA access right. It's a very narrowly  
4 tailored statute to address a very specific problem.

5 And so, in our comments and to date in this  
6 process, we have not asked for a change to copyright  
7 law. We have not asked for an EU's publisher's right.  
8 We've asked for the Office to consider the data,  
9 endorse the JCPA and the access-based right that it is  
10 built upon. And I'm happy to answer any follow up  
11 questions to that.

12 But just to quickly address what's been said  
13 by previous commenters on this panel, the 1201(a)  
14 access right has been consistently upheld as  
15 constitutional by courts. The fair use provisions do  
16 not apply to it.

17 Nevertheless, the First Amendment does not  
18 invalidate that statute, and so the JCPA builds upon  
19 that foundational law, is completely constitutional,  
20 specifically designed to address the primary problem  
21 at this stage, is a time limited statute, and so,  
22 happy to answer follow ups, but I think there's some  
23 maybe misunderstanding or misdirection as to what we  
24 proposed in our comments.

25 MR. FOGLIA. Thank you for that

1 clarification. At this point, I'm going to jump ahead  
2 to Hal, who has not spoken yet, and then I'm going to  
3 ask people who currently have their hands up to very  
4 briefly finish responding to the previous question  
5 before I turn it over to Chris Weston for the next  
6 question. So, Hal?

7 MR. SINGER: Hi, everyone. I'm Hal Singer.  
8 I'm an economist at Econ One and I'm a consultant to  
9 the News Media Alliance in this proceeding. And to an  
10 economist, what we're dealing with here is a massive  
11 power imbalance in which value added by content  
12 creators to newspapers is being appropriated by a  
13 dominant platform. In a competitive input market,  
14 these input providers would capture something closer  
15 to what an economist would call a marginal revenue  
16 product or the competitive level. So this is a  
17 competition problem. It is not a copyright problem.

18 I want to talk quickly about the private  
19 harms to newspapers and the social harms. In the  
20 private harms, there's two things that newspapers are  
21 complaining about. The first is that when Google  
22 scrapes newspaper content and offers detailed  
23 snippets, they can monetize this content without  
24 paying the content creators. They call this the  
25 reframing and curation, and the reframing and the

1 curation decreases the likelihood of a user clicking  
2 on the article and thereby deprives the news publisher  
3 of those clicks while at the same time enriching the  
4 dominant platforms. What we're complaining about is  
5 that they do not, users do not click on the links.  
6 This has nothing to do with the links. It's the  
7 headlines and summaries and snippets that are being  
8 taken and pictures. Now the reframing and curation  
9 also decreases the need for the user to subscribe to  
10 the newspaper in the first place. So those are the  
11 private harms.

12 Turning to the social harms, there are many  
13 social harms that flow from underpayments to the  
14 newspapers, including but not limited to two I'm going  
15 to focus on, employment effects in journalism and the  
16 important role that newspapers play in preserving the  
17 democratic process.

18 Now, as newspaper ad revenue was siphoned  
19 off to the dominant platforms over the last decade, we  
20 saw employment among newspapers fall from 71,000 in  
21 2008 to 31,000 in 2020. That's according to Pew  
22 Research. So, to answer your question, Andrew -- that  
23 was a long preamble -- intervention is desirable.  
24 It's absolutely necessary. And the solution here is  
25 what's embodied in the JCPA. It's not to change the

1 copyright laws. It's to permit newspapers to bargain  
2 collectively, and if that bargain doesn't result in a  
3 voluntary arrangement, there will be some sort of a  
4 structural bargain or a backstop to make sure that  
5 payment is achieved.

6 Now I can't speak to what that structured  
7 bargain is going to look like yet. The JCPA is in  
8 motion, but I will point out that in Canada there's a  
9 piece of legislation that would provide for baseball  
10 style arbitration if the collective bargaining in the  
11 first phase, the voluntary phase, fails to reach an  
12 agreement.

13 I just want to say one last thing and I'll  
14 surrender the mic, I promise, but Kate Sheerin of  
15 Google said something really important on that first  
16 panel that I just want to amplify. She says that  
17 Google wants to collaborate with news publishers, but  
18 they want to negotiate these deals individually, and,  
19 of course, that serves Google's interests. It serves  
20 Facebook's interests. But, to me, it was an admission  
21 of the value creation by the news publishers. But  
22 given that power imbalance, these individual  
23 negotiations will ensure that the payment will never  
24 be anywhere near the marginal revenue product at the  
25 competitive levels of the newspaper, and the reason

1 why is that, you know, Google doesn't need the Fort  
2 Worth Star Telegram, but the Star Telegram needs  
3 Google. So a long winded way of saying that  
4 intervention is absolutely necessary, and it's going  
5 to take the form of a solution to a competition  
6 problem, not a copyright problem.

7 MR. FOGLIA: Thanks. I'm going to go with  
8 Jessica, then we'll let in Joshua, then Annemarie, who  
9 was next, and then we're going to move to the next  
10 question, okay? So, Jessica?

11 MS. SILBEY: Hi, thanks. I'd just say very  
12 briefly that, you know, the question about what is  
13 desirable, I mean, of course, news journalism needs to  
14 be funded, and everyone's in agreement with that. The  
15 question is how the funding happens. And, I mean, if  
16 you think -- I mean, one of the things we're talking  
17 about is that the richest among us, whether it's the  
18 individuals or the corporations, need to pay their  
19 fair share to support the public interest in accurate  
20 and diversified news at the local and national level.  
21 The question of whether copyright solves that problem  
22 feels deeply myopic. It's like the law of the  
23 instrument. You know, we're holding a hammer with a  
24 whole lot of people here and we think copyright is the  
25 nail.

1           And so I'm very supportive of the idea of a  
2 competition -- that this is a problem of competition.  
3 It's also a question of funding what's in the public  
4 interest. And it's just -- I know it's a scary idea  
5 to think that, you know, we have to sort of engage in  
6 some form of distributive justice modeling here, but  
7 the funds for what we need in society, whether it's  
8 vaccine or education or infrastructure, rarely comes  
9 from intellectual property effectively, effectively.

10           And so more copyright or specified  
11 copyright, I mean, the history of our society has told  
12 us that intellectual property doesn't do those things.  
13 It's an industry model. It's a competition model. It  
14 has to do with staffing. And so paying the people who  
15 make the news, the employees, for example, and the  
16 staff, it rarely comes -- we have to have a fund. But  
17 the idea that it comes from the payment through  
18 copyright is just not borne out by the history of how  
19 copyright industries work, except for a few copyright  
20 industries, very, very few, and journalism has never  
21 been one of those actually.

22           So I guess I would just -- I think, if we  
23 think about how the copyright system works to  
24 diversify the expression, that originality standard is  
25 so low on purpose and for a constitutional reason,



1 anyone can be a copyright author. That doesn't mean  
2 that all copyright authors make money or get paid.  
3 It's just, that's an intolerable system actually. And  
4 then it just begs the question about what's  
5 copyrightable in the first place. And so I guess I'm  
6 just in full throated agreement that this is a law of  
7 the instrument problem, and copyright is not the nail.

8 MR. FOGLIA: Thank you. Ole?

9 MR. JANI: Thank you. I would just like to  
10 make two additional comments. The first one is to  
11 follow up on what Joshua said and just to avoid any  
12 doubts, this debate and this call for additional or  
13 better protection of press publications does not mean  
14 it's against news aggregation. News aggregation, of  
15 course, is not a bad thing per se. But what we have  
16 to be clear about is that news aggregators are not  
17 philanthropists. They are not running a business  
18 because they want to do good to society. They are  
19 running a business because they want to earn money,  
20 and these business models are essentially run on third  
21 party contact and this is the point.

22 And we have a situation where certain  
23 businesses are taking a free ride on other people's  
24 assets, and this is clear. The news aggregators are  
25 using press publications, private press publications

1 to fuel their own engines and to create the  
2 environment, which they are then able to monetize.  
3 This is not a bad thing if they use third party  
4 content. This is the essence of copyright law, that  
5 there are producers and there are distributors, but it  
6 has to be balanced and this balance is only guaranteed  
7 through an effective and enforceable legal system.  
8 And our impression is and our experience is that there  
9 is a lack of clarity in terms of what is protected and  
10 that there may be even a lack of protection. And we  
11 have made this experience in Europe and we have found  
12 answers to this question in Europe.

13 And this leads me to my second remark. It  
14 is not a competition question or a copyright question.  
15 It's both, right? They complement one another.  
16 Leveraging bargaining power, increasing bargaining  
17 power through, for example, the JCPA, which we believe  
18 is a great thing, it's a great initiative, and it  
19 would be very helpful if that became the law. But  
20 better bargaining power is of no value if there is  
21 nothing to bargain about, right? And if you have no  
22 enforceable rights, if you don't have any specificity  
23 on your assets and on your property, if people can  
24 just use it, there is no bargaining situation in the  
25 first place.

1           So these two initiatives have to go hand in  
2 hand: adequate legal protection which secures the  
3 assets and which enables the publisher to put a price  
4 tag on his assets and then having a legal framework  
5 which guarantees adequate and balanced bargaining.

6           And in Europe, we have done the copyright  
7 step before the competition law step. We have  
8 introduced the Article XV publishers' right with a DSM  
9 directive, and currently legislation is underway in  
10 the Digital Services Act and the Digital Markets Act,  
11 which will complement this IP approach with a  
12 competition law aspect in Europe. So my perception is  
13 that it would be the other way around in the U.S. But  
14 the point I want to make is it has to be both. It has  
15 to be two parts of that chain: competition, enhancing  
16 competition, and improving copyright law.

17           MR. FOGLIA: Thank you. Joshua?

18           MR. LAMEL: Thank you. So Ole and I agree.  
19 I want to thank him for actually just making the point  
20 he made because he just said what Re:Create's members  
21 have been arguing for a while, which is the JCPA  
22 inherently has to have some form of a copyright. And  
23 Re:Create's members have been negotiating on the JCPA  
24 in good faith for a while, and one of the issues we  
25 brought up is that the JCPA, you're saying it doesn't

1 invoke or force some sort of new copyright or  
2 copyright like provision. We think it's kind of not  
3 usable without that.

4 But, if you're saying that, then put a  
5 copyright savings clause into the JCPA. Make it clear  
6 for -- you know, the News Media Alliance, we've asked,  
7 our members have asked multiple times, make it clear  
8 that copyright, that there's no type of copyright,  
9 intellectual property, or other type of right that's  
10 created by the JCPA, and that ask has been denied.  
11 And, actually, this, the letter, if you want to  
12 understand the kind of history and why we're all here  
13 today, the letter to the Copyright Office requesting  
14 this study was the next thing that came after the ask  
15 for the copyright savings clause.

16 So, honestly, I find it cynical in some ways  
17 that folks will say, well, the JCPA doesn't, you know,  
18 invoke some sort of a copyright because, you know, the  
19 reality is, for it to work, it has to, or you need an  
20 economic idea, like Hal's mandatory arbitration  
21 provision, right?

22 But, in the United States, like, Hal's an  
23 economist, in the United States, mandatory arbitration  
24 would mean compelled speech, and the government cannot  
25 compel a website to carry other parties' content in

1 the United States. We're not France, where you can do  
2 that, right? That's what happened in France. We're  
3 not Germany, right? We're not Australia. It is  
4 fundamentally a violation of the First Amendment to  
5 compel a website to carry another website's speech.  
6 And so, while it might be a good or strong economic  
7 idea, right, it doesn't solve the constitutional  
8 problem. Matter of fact, I think it would be on its  
9 face unconstitutional because it's compelled speech.

10 MR. FOGLIA: Thanks. Annemarie?

11 MS. BRIDY: Thank you. So I am a copyright  
12 lawyer for Google -- I'm sorry, I didn't introduce  
13 myself before -- and in that capacity, I'd like to  
14 correct some misconceptions I'm hearing from some  
15 other panelists about Google's products and how they  
16 work. And so, first, to Matt's point about access  
17 rights, newspapers opt in to appear in Google Search  
18 and News, right, so we don't breach any pay walls or  
19 impinge on publisher access rights when we aggregate  
20 content for Search and News.

21 To Hal's point and also to Ole's points  
22 about sort of free riding and value exchanges, Google  
23 drives substantial value to news publishers, right, as  
24 evidenced by the fact that they opt in to inclusion in  
25 both News and Search and not only do they opt in,

1 right, they control the length of snippets. They  
2 control the size of thumbnail photos. And generally  
3 speaking, they opt in to have more of that content  
4 rather than less displayed on our services because  
5 they understand the value that we provide when users  
6 engage with that content on our services and can see  
7 enough about it to know that they want to go and click  
8 through to see the news publishers' sites. And every  
9 time they click through to those sites, news  
10 publishers have an opportunity to monetize that  
11 through advertising, right, and also to attract  
12 subscribers and get additional subscription revenue.  
13 So the representation that this is free riding or that  
14 there's not a meaningful and profound exchange of  
15 value that's happening here is just a complete  
16 misrepresentation.

17 And I just also want to emphasize, you know,  
18 how much we're hearing here about things that are  
19 totally extrinsic to copyright, right? So this is a  
20 study about copyright and ancillary copyright for  
21 press publishers, and probably half of the time I'm  
22 hearing is taken up by other things that are outside  
23 the scope of the study, and I think that that's just  
24 an important point to make. Thanks.

25 MR. FOGLIA: Thank you. I see that Matt and

1 Hal's hands are up. I'm going to ask you to briefly  
2 hold your thoughts and I'm going to turn Chris to ask  
3 the next question. If you, as part of answering the  
4 next question, you want to fold in whatever you were  
5 currently going to say, please do so. I also want to  
6 remind the panelists to please try to keep answers  
7 brief, under two minutes if possible, so that more  
8 people have a chance to speak. Thank you. Chris?

9 MR. WESTON: Thanks, Andrew. You know, I  
10 think that given the drift of the conversation, as  
11 Annemarie mentioned, towards competition law, I should  
12 just remind everybody that what Congress asked us to  
13 do was to study ancillary copyright protection for  
14 publishers. So, to the degree that there are other  
15 things, then we definitely want to know about that.  
16 But, in terms of the point about if all you have is a  
17 hammer, everything looks like a nail, you know, we  
18 were given a hammer, so to speak. But we will  
19 definitely take in all of the comments about, you  
20 know, whether or not that hammer is the right hammer.  
21 I don't want to -- I'm stretching the metaphor beyond  
22 sense.

23 But I want to ask actually something that  
24 Ole brought up. Is there evidence to suggest that  
25 ancillary copyright protections standing alone, so

1 without also having competition protections, have  
2 benefitted publishers in the countries that have  
3 adopted those protections, and does the effect vary  
4 with the size of the publisher? So I'm thinking  
5 obviously about Article XV but also the experience in  
6 Spain and Germany before that. So, Matt, you can  
7 answer that question, or you can fold it into whatever  
8 you were going to say previously.

9 MR. WILLIAMS: Oh, I'm sorry, I thought you  
10 started by saying that you wanted Ole to address the  
11 question about the EU rights.

12 MR. WESTON: No. I was just invoking his  
13 answer as a way to bring it in.

14 MR. WILLIAMS: Okay. Yeah. So I'll try to  
15 answer that and also address a couple of the things  
16 that have been said. As you said, Congress has asked  
17 you to look into ancillary protections for press  
18 publishers. And as I said before in our comments, we  
19 did not ask the Office to endorse verbatim some kind  
20 of EU publishers' right in the United States.

21 What someone means by ancillary protection  
22 could be a matter of semantics. But I think what we  
23 are asking for is that the Office digest everything  
24 that's been filed and that will be filed and said in  
25 this proceeding, conclude there is a problem, conclude



1 that the JCPA would do a very good job of addressing  
2 that problem, perhaps without entirely solving it, and  
3 then we've asked for some very specific clarifications  
4 of copyright law, not changes to copyright law, and  
5 those were discussed in the previous panel but include  
6 registration practices, words and short phrases,  
7 clarifying that essentially the circular and other  
8 documents out there, as Jane Ginsburg testified, do  
9 not really line up with the case law, and we would  
10 love for you to walk through the fair use analysis and  
11 ideally opine that what's going on is not a fair use.

12 But, to what Joshua said about there needing  
13 to be a copyright backbone, I think, for the JCPA,  
14 that could also be a matter of semantics, but it's an  
15 important one. It is built, as I said, on an access-  
16 based 1201(a) oriented concept, and 1201(a) already  
17 allows preclusion of access to content. There is no  
18 fair use defense to that statute, and the courts have  
19 upheld that as constitutional.

20 So what the JCPA would allow is an exception  
21 to the antitrust laws so that press publishers could  
22 talk together about the best way to use those rights  
23 to get to a place where we're operating in a world of  
24 fairness where monies could flow to press publishers  
25 and authors in a way that would sustain valuable

1 journalism, from high level publications that everyone  
2 might know the name of to the very local oriented  
3 publications. And so it's a targeted statute that  
4 does not alter underlying copyright law but is built  
5 on existing statutory provisions that people do not  
6 refer to as copyright per se, the 1201 provisions, and  
7 so I think it's entirely within the scope of the  
8 study.

9 I think I was just called both cynical and  
10 Anne said that I was making misrepresentations.  
11 Neither of those things are true, and that was not my  
12 intent. And so there's a lot of detail related to the  
13 EU publishers' right, but we are not asking at this  
14 time for an endorsement of that or incorporation of  
15 that into U.S. law. So I still feel at this moment in  
16 time like that is a distraction.

17 And I just want to emphasize there is  
18 something to bargain for here. There was someone who  
19 said there's nothing to bargain for. The access is  
20 something to bargain for by itself, and the reason  
21 that right now those rights can't be effectively used  
22 is the competition issues that are laid out in our  
23 comments. I think Danielle said in the previous panel  
24 it's like asking someone if they want air, and that's  
25 the situation that the publishers find themselves in

1 right now.

2 MR. WESTON: Okay, thanks. I will move to  
3 Hal next, but I also want to remind everybody to try  
4 and keep your remarks brief just so we can get as much  
5 information as we can. So, Hal, you are up next.

6 MR. SINGER: Thanks, Chris, I'll go really  
7 fast. I think Ole said that we need something else  
8 besides the competition, and I don't think that's  
9 right. We're not asking for anything to be done with  
10 copyright laws. NMA thinks that it has everything it  
11 needs. News articles are already covered by  
12 copyright.

13 To Josh's point that mandatory arbitration  
14 is compelled speech, I'd say that's respectfully  
15 wrong. There's nothing in the JCPA that would require  
16 Google or Facebook to post content on its pages or for  
17 Google to put our new stories anywhere special in  
18 their search. The arbitration is designed to get a  
19 fair market value for the access to the newspaper  
20 content.

21 On the question of opt in, I think that's  
22 false. Newspapers don't have anywhere to go. Google  
23 has monopolized search and Facebook has monopolized  
24 social media and collectively they've monopolized  
25 digital ad markets.

1           And finally, to Annemarie's point, she talks  
2           about substantial value coming back in the other  
3           direction from the platforms. But, as Danielle  
4           mentioned earlier today, that flow, that traffic flow  
5           is being taxed at a monopoly rate by Google. In fact,  
6           Google's conduct is already the subject of an  
7           antitrust litigation for the exclusionary practices it  
8           performs in the ad tech space.

9           So the discussion today is how to get  
10          newspapers compensated for the value they create for  
11          the platforms, right? We're trying to get  
12          compensation for the value and flow in that direction.  
13          That payment is occurring at below competitive levels.  
14          The payment that Annemarie is focused on is already --  
15          Google's already being compensation for. In fact,  
16          it's being compensated for at monopoly rates.

17          MR. WESTON: All right, thank you. I  
18          believe Joshua had his hand up next.

19          MR. LAMEL: Sure. Thank you. So the  
20          response, what I want to make to just, like, all this  
21          you asked me is, you know, what has been the  
22          experiences, you know, of other countries, right?  
23          When Spain created an ancillary copyright, the end  
24          result of that was, you know, if Google News basically  
25          stopped, you know, aggregating the news, right, and if

1 the end result here, if the desirable end result from  
2 a public interest perspective is not having news  
3 aggregation occurring anymore, like, I'll accept that.  
4 I mean, my members -- you know, I don't know -- I  
5 personally, not speaking on behalf of members, me  
6 personally, don't think that, like, an end result of  
7 no more news aggregation is a bad result. An end  
8 result of news not showing up in search results is a  
9 terrible result from a purely public interest  
10 perspective.

11 But, if you're not going to have a must  
12 carry obligation, right, if there's an ability for the  
13 news aggregators to walk away, what we saw in Spain  
14 and in France and in Australia is they were going to  
15 walk away and then the government had to compel them  
16 to negotiate and create a must carry right or they  
17 undid the law, right, because they realized walking  
18 away was not in the public interest.

19 So, in Spain, they walked away, publishers  
20 complained, ancillary copyright, you know, they moved  
21 past that. In France, they said, yeah, we don't want  
22 to carry it. They had an antitrust suit brought  
23 against them for saying we don't want to carry that  
24 content, right? Like, I mean, that's compelled  
25 speech, right, because of the First Amendment. You

1 can't do that in the United States because that would  
2 compel the carry of news content, would compel the  
3 platforms to have something on their platform.

4 In the case of Australia, again, right, it  
5 was a forced negotiation. You could not -- Facebook  
6 said, oh, we're not -- you know, we're going to walk  
7 away. And I'll leave for Elizabeth and Annemarie to  
8 talk about the experiences of their platforms in these  
9 situations, but -- is news aggregation becomes not  
10 profitable, it probably ends. We've seen them walk  
11 away, and that's not good for the public interest.

12 MR. WESTON: Thank you. Ole?

13 MR. JANI: Yeah, thank you, Chris. To your  
14 question then, following up again on Joshua regarding  
15 the examples in Spain and Germany, I reckon it is very  
16 much a myth that the approach that's taken in Spain  
17 and Germany didn't work. It was about power play in  
18 the end. It was again a monopolized market where for  
19 those who were previously able to use third party  
20 content for free suddenly were asked to pay a price,  
21 and so they tried to say, well, in that case, we pull  
22 out of the market. And in Germany, there was some  
23 litigation on that then German ancillary right, and  
24 that was well underway with promising results in  
25 courts, and for very formal reasons, the right was

1 then not enforceable. But this was a very formal  
2 reason. I'm not going into details here. And Spain  
3 was simply a market too small.

4 And one of the rationales behind the  
5 European approach was simply to say, okay, we have to  
6 create leverage also on this stage. We have to -- the  
7 common market is large. It's 500 million users and  
8 members of the European Union, and we have to just put  
9 this onto a next level so that we are not talking  
10 about individual jurisdictions, here Spain, there  
11 Germany, Latvia, whatever, you name them, but one  
12 unified Europe with one uniform legal system. So it  
13 is a myth that it didn't work. It was just, it would  
14 be far too early to judge on whether it worked or not.  
15 It was then replaced by the European approach.

16 And this is now the second part of your  
17 question, only about 10 member states of the European  
18 Union have transposed this Article XV into their  
19 national laws. But we already see that this Article  
20 XV being enforced and being partially transposed into  
21 national laws is giving the industry and the press  
22 publishers the tailwind they need because they have  
23 gotten large players to the table and they are  
24 negotiating and it will take its time, but we're  
25 seeing the scene is changing because of the law.

1           And your second question, Chris, whether  
2           this law benefits large publishers rather than small  
3           publishers, this is definitely not the case. It  
4           benefits them all, and it's then a matter of how to  
5           enforce it. And in Europe, as you well know, we have  
6           a legal framework which across the board, through --  
7           it's not specific for particular media. Rightholders  
8           can bargain collectively and they can pool their  
9           rights in collective management organizations.

10           And this is not only an answer to the  
11           competition question, to create bargaining leverage,  
12           but it's also to create a one stop shop. And this, of  
13           course, this one stop shop, which will benefit the  
14           small publishers because they can then team up with  
15           the larger one, they can pool their portfolios, and  
16           they can approach potential users through this  
17           collective rights management organization and join  
18           forces. So there is no evidence that this is a law  
19           only for large companies. In fact, it benefits the  
20           entire industry.

21           MR. WESTON: Okay, thank you. Thank you.  
22           Cathy was next.

23           MS. GELLIS: Thank you. You know, at a very  
24           superficial way, speaking on behalf of Techdirt, we  
25           should benefit. We are a small publisher. As Ole



1 said, this is for everybody. It isn't for us. We  
2 won't benefit. Smaller publishers live in the long  
3 tail, and revenue doesn't follow all the way through,  
4 down to the long tail, certainly not on an equal  
5 basis, but it goes to the bigger players who are able  
6 to sort of have all this gravitational pull that takes  
7 most of the money and sends it to them and there's a  
8 lot less left behind. We know it was bad for  
9 independent publishers in Spain. Techdirt has  
10 reported on this.

11 And speaking for myself, having litigated in  
12 the webcasting royalty rate scheme, I've also seen how  
13 it hurts particularly independent publishers because  
14 it also then hurts independent facilitators. The  
15 services that this is ostensibly supposed to target  
16 for, if you're making money directing traffic to us,  
17 you should share it.

18 So what we keep hearing, the reason we fall  
19 back to competition is on the one hand -- you know, on  
20 the one hand, we're hearing how dare you facilitating  
21 service make money from sending us traffic; on the  
22 other hand, we're also hearing, you know, we need more  
23 competition for the services that are out there, like  
24 there should be more Googles.

25 Well, how are we going to get more Googles

1 when we're making it so economically inhospitable to  
2 get more Googles? Because we're not just talking  
3 about, oh, this is all cream and you should be sharing  
4 it on top. When you start to impose the types of  
5 revenue sharing schemes that this is all animated by,  
6 you create enormous costs: transactional costs,  
7 compliance costs. If we want another Google, we  
8 should not be making it economically irrational for a  
9 service to go into this business of facilitating and  
10 driving audience traffic when, ultimately, yes, for  
11 every publisher, what you need most of all is to have  
12 your audience traffic.

13 And instead of saying thank you for giving  
14 us these viewers, we're punishing them for actually  
15 having succeeded and daring to actually have made some  
16 money on the side by now poisoning it so nobody can  
17 make money, and that's not going to be good for  
18 anybody, certainly not the services, and if the  
19 services go away, it will not be good for the  
20 publishers. And we certainly know it's not going to be  
21 good for us and we think others similarly situated  
22 with us, including our larger incumbent neighbors.  
23 Thank you.

24 MR. WESTON: Thank you. Nzengha?

25 MS. WASEME: Yes. So, in the interest of

1 time, which we are focusing on right now, I don't want  
2 to repeat or be duplicative of what Joshua said. I'll  
3 just say ditto to that, as well as what Hal said,  
4 ditto to that. I do want to also I guess ditto what  
5 Cathy just said, talking about it not being a one size  
6 fits all. It's not. Artworks also represents the  
7 smaller publishers, and so it wouldn't be fair to make  
8 a statement like that. And I don't believe it's true.

9 Now, for those of you that got a piece of  
10 the earlier segment, that segment was chock full of  
11 industry professionals and everybody had something  
12 different to say. Everyone had contradictory stats.  
13 So what that does -- what that tells us all when we  
14 talk about public interest is, one, yeah, we need to  
15 say this a little bit more, but, two, at a minimum,  
16 what Matt was saying, I think it boils down to a PSA,  
17 you know, where we're talking about letting the public  
18 know, letting everyone know what the standards are,  
19 not necessarily expanding the rights, but what are the  
20 standards first and also interoffice tweaking of what  
21 the protocols are, like we talked about registration.  
22 You know, those things can be tweaked without an  
23 expansion of the copyright -- of rights to publishers  
24 specifically. It could be -- you know, when we talk  
25 about one size fits all, tweaking the registration

1 process would be a one size fits all.

2 But, yeah, I'm definitely, you know, going  
3 to reiterate what the Copyright Office has said, we  
4 need to study it. The industry itself, just as  
5 evidenced by this panel, as well as the one earlier,  
6 the industry is not on the same page, so it needs to  
7 be studied.

8 MR. WESTON: Thank you. Annemarie?

9 MS. BRIDY: So I'm hearing a lot of  
10 conclusions of law being thrown around here about  
11 issues that are currently being disputed in litigation  
12 related to competition, and so I just want to take a  
13 second to recenter the conversation on copyright law  
14 and to say a few things about how copyright law works  
15 and has always worked, right.

16 So copyright's exclusive rights have always  
17 been understood both in the U.S. and globally as  
18 rights to exclude uncompensated uses of protected  
19 works, right? They're not rights to demand and  
20 collect payment for compelled uses. So, consistent  
21 with the principle of freedom of contract, copyright  
22 licenses aren't compulsory for those who choose not to  
23 make compensable uses of covered works, right? In  
24 other words, remuneration for rightholders does not  
25 necessarily flow from the creation or existence of a

1 right to exclude, right, and I think folks recognize  
2 that by saying we're not really asking for anything in  
3 copyright.

4 But I just want to emphasize, right, that  
5 payment is conditioned on a willing licensee's use of  
6 that rightholder's covered work, right? And so, you  
7 know, this isn't a roundtable, I don't think, about  
8 the JCPA. Again, it's not about competition. You  
9 know, those issues are being litigated, and I think  
10 it's not prudent for me to comment on them. It's also  
11 not really helpful or appropriate for folks on the  
12 panel to offer conclusions of law that haven't yet  
13 been reached in court and may not be reached in court.

14 MR. WESTON: Okay, thank you. Elizabeth?

15 MS. KENDALL: Thanks. I wanted to echo some  
16 of the things -- the points that have been raised, in  
17 particular that there really is a diverse landscape of  
18 publishers, of platforms, of users, and people who  
19 will be affected by any change to the status quo. And  
20 I think that that's something that I hope the  
21 Copyright Office will address in its study because I  
22 think it's clear from this panel in particular that  
23 there's maybe not a consensus about what problem is  
24 being examined and how. And so welcome any additional  
25 guidance prior to the submission of rebuttal comments

1 from the Office about the particular aspects of the  
2 ancillary copyright and what types of again definition  
3 of the problem you're seeking so that we can help.

4 And then just to speak again on behalf of  
5 Meta, one of the things that I think is a pragmatic  
6 challenge with the idea of an Article XV type approach  
7 in the United States that hopefully will be addressed  
8 by the next panel as well is how you define news  
9 publisher and how you define news. And I can speak as  
10 a platform, not only are those very challenging  
11 questions, but we have to have some way to recognize  
12 that at scale with a huge and welcome diversity of  
13 voices. And I think that to really understand how  
14 some of these concepts would be applied in practice,  
15 taking into account the size and variability of the  
16 actors requires attention to all of those contributors  
17 and potential people who are impacted.

18 I personally am not sure how the government  
19 could create a definition of news. I think it  
20 implicates a variety of First Amendment issues, as  
21 well as just very challenging social ones. Thank you.

22 MR. WESTON: Thanks. I'm going to go with  
23 Hal next and then Matt and Jessica. I believe Joshua  
24 and Ole have already weighed in on this question. So,  
25 after Matt and Jessica, I'm going to hand it over to

1 Melinda to ask the next question. Matt, go ahead.

2 MR. SINGER: Sorry, I thought you said Hal.

3 MR. WESTON: I'm sorry, Hal. I did. The  
4 cubes are moving around on my screen and where one  
5 person was.

6 MR. SINGER: Okay. All right. Well, I want  
7 to respond to something that Cathy said about the  
8 smalls won't benefit from the JCPA. And it is a bit  
9 surprising to me, I've got say, that a news publisher  
10 like Techdirt is parroting back a Google line that the  
11 JCPA is all about benefitting the large newspapers.  
12 And I deal with this argument in part 4A of my paper,  
13 which is posted to the Copyright Office.

14 Let me just explain that small newspapers or  
15 small entities in any union are always going to  
16 benefit by more than the large entities in the union,  
17 right? The largest don't necessarily need the union,  
18 but the smalls do. And so, if the JCPA produces a pot  
19 of money, then approximates the fair market value  
20 contribution of all newspapers, including the smalls  
21 and the large, right, then the smalls will get a  
22 portion of that pot based on their pro rata share of  
23 however the coalition wants to break it up. One  
24 obvious allocation would be to break it up based on  
25 the pro rata share of traffic they generate or the pro

1 rata share of employment that they have in the  
2 newspaper industry. So the smalls would be  
3 unequivocally better off relative to the status quo.

4 And Cathy asked, you know, will the JCPA, by  
5 giving the smalls the ability to join this union and  
6 bargain collectively, discourage entry and search, I  
7 think that is really far fetched. In fact, Microsoft  
8 has already announced publicly that they're happy to  
9 enter the search market and compete with these  
10 regulations.

11 And then, finally, the last point, is that  
12 Cathy says we should be worried about entry and  
13 search. We should be worried -- we should be more  
14 worried about entry and investment in journalism. We  
15 have journalists, the employment in journalism has  
16 fallen in half. We want to encourage investment  
17 there, and that's precisely what the JCPA is intended  
18 to fix.

19 MR. WESTON: Thank you. Matt, now it's your  
20 turn.

21 MR. WILLIAMS: Yeah. Thank you. I'll try  
22 and be brief since I ran over last time. I just  
23 completely disagree that the JCPA is somehow outside  
24 the scope of this study. I tried to refer before to  
25 what does ancillary mean. The fact that we're right



1 now at least not asking for an EU publishers' right  
2 does not mean that we're not asking for something that  
3 isn't purely copyright law but that would do great  
4 benefit for a copyright dependent industry and is  
5 something I think the Office is fully qualified to  
6 endorse if it so chooses. And that statute only  
7 applies on the platform side to platforms with a  
8 billion monthly active users. So this notion that  
9 somehow it's going to negatively impact the growth of  
10 smaller platforms that might compete with those  
11 dominant platforms, I think, is misguided.

12 I also find it a bit ironic that a lot of  
13 the commentary in this study, both in the written  
14 submissions and today, is about, well, we want free  
15 information for everybody and that's our business  
16 model. But then, when it comes to do we have to make  
17 small payments to press publishers, the threat is  
18 we'll just go dark on you and you won't be available  
19 anymore and then you'll realize you need us. That  
20 gets to the heart of the competition problem and also  
21 is a bad thing for copyright and a bad thing for  
22 access to public information. There's huge profits  
23 being made. Kicking back some of that to the people  
24 that create the content shouldn't be an issue.

25 And now, on the definition of news, just

1 very quickly, we did not try to say there's only one  
2 way to approach that. We referenced a few different  
3 statutes, including the JCPA legislation that defines  
4 who that statute would cover. And so we think there's  
5 plenty of ways for the Office to look through those  
6 definitions and make a good decision for itself about  
7 what it thinks that definition should be.

8 MR. WESTON: Thank you. Jessica and then  
9 Melinda with the next question.

10 MS. SILBEY: Yeah, I'll be very brief. I  
11 just want to address the question about the EU  
12 experience, and I just want to caution us, as we look  
13 around the world and see how these things are playing  
14 out in different places, we cannot ignore the  
15 background conditions, the cultural attitudes, the  
16 social networks, the welfare systems, the industry  
17 structures, and the individual constitutional mandates  
18 that shape how the directive is playing out in  
19 different places. Like, I appreciate wanting to look  
20 around and see the diversity experiences in a  
21 laboratory kind of way, but the EU in particular and  
22 Australia also, they're very, very different social  
23 and political systems, and to say that their  
24 experience is going to be like ours or not like ours  
25 requires us to really understand those other ways.

1 And I'll just say, like, the cost of living, for  
2 example, and how things get funded, tax statutes, I  
3 mean, they're just so different, and they all  
4 implicate, I think, how this would play out on the  
5 ground.

6 MR. WESTON: Thank you. I'm going to hand  
7 it to Melinda Kern for the next question.

8 MS. KERN: Thank you. Jessica got to my  
9 question a little bit, but given a lot of other  
10 countries have implemented an ancillary copyright or a  
11 press publishers' right, what can Congress learn from  
12 this and those experiences if it decides to grant a  
13 press publishers' right or something similar? And I  
14 see that Matt Williams and Cathy Gellis still have  
15 their hands up, so I don't know if that's particularly  
16 to answer the question or if you just still had your  
17 hands up.

18 MR. WILLIAMS: I just still had my hand up.  
19 I would just say quickly we tried to lay out in our  
20 written comments the problems facing various different  
21 categories of publishers and how helping them protect  
22 their existing rights through something like the JCPA  
23 would benefit them.

24 MS. KERN: Ole?

25 MR. JANI: Thank you. Let me just for the

1 record make one clarification because, from Hal's  
2 comment, I gather that there was a misunderstanding or  
3 there may be a misunderstanding. When I referred to  
4 the JCPA, all I was going to say is that we believe, I  
5 believe personally, that the JCPA is a great approach  
6 and a great initiative, and whether there is anything  
7 to bargain about under present U.S. law is beyond my  
8 own competence. I'm not talking about this and  
9 talking about the access right. I understand there  
10 is, of course, something that can be bargained and  
11 there is protection, but talking about the access  
12 right. That's all I was trying to say, was that  
13 additional copyright legislation or copyright  
14 protection would amplify this, and I didn't mean to  
15 say that there was nothing to bargain about. So just  
16 to make this crystal clear, I guess this is important  
17 because there were comments here on the panel which  
18 suggested that there was a misunderstanding.

19 Now what can Congress -- what could Congress  
20 learn? In Europe, we have certain principles which  
21 govern the publishers' right, and the most -- the two  
22 most important principles are there is no registration  
23 requirement, which heard this in the first panel  
24 today, in particular, because we're talking about  
25 dynamic content. We're talking about very fast

1 distribution and creation of the content. It would be  
2 a prohibitive burden and threshold if there was a  
3 registration requirement. So this is number one,  
4 there should be no registration requirement whatsoever  
5 regarding the protection in the first place and the  
6 ability to litigate.

7           Second, we need to get -- this is at least  
8 what we did in Europe -- we got rid of the originality  
9 threshold because snippets and headlines, at least in  
10 Europe, it is unclear whether and to what extent they  
11 are protected as a work of authorship. If you take  
12 something small from a copyrighted work, because of  
13 its brevity, it may be below the originality  
14 threshold. But, since aggregators, search engines  
15 typically use very small parts and headlines, the  
16 question as to whether it is copyrighted because it's  
17 a work of authorship, because it's original, and this  
18 answer can only be given on a case by case basis, this  
19 again would be prohibitive because we need a legal  
20 framework which is sort of -- which covers everything.

21           So these are the two principles, I guess,  
22 which should be most importantly looked at, no  
23 registration requirement and no originality threshold,  
24 and this is, of course, part of the concept of  
25 ancillary rights in Europe, which protect investment

1 rather than creativity, so we could very easily  
2 transpose the concept for the protection of press  
3 publishers from music companies, broadcasters, et  
4 cetera.

5 MS. KERN: Thank you very much. Peter?

6 MR. ROUTHIER: Thank you. Yes. I'm not  
7 sure we can learn that from the European perspective  
8 at least in any sense that's really relevant to this  
9 undertaking here. I think we can learn that that was  
10 something that the press publishers at Axel Springer  
11 wanted and obtained in the EU. But I'm not sure what  
12 that tells us about the matter under consideration  
13 here, which I think has to be sitting in the Copyright  
14 Office, responding to an inquiry from some Senators  
15 about copyright, what we can do with copyright law in  
16 the United States against the background of existing  
17 rights and, as I started with, existing rights that  
18 users have in the United States under copyright law.

19 I don't think it's enough to say, oh, it's  
20 okay, there is no fair use or First Amendment  
21 exception to 1201. I don't think that's accurate. I  
22 don't think that record's been set, and I think that's  
23 the kind of thing that I would expect this study to  
24 look into.

25 I've heard a lot of people talking about the

1 JCPA and asking the Copyright Office to bless the  
2 JCPA. I would suggest that the appropriate thing for  
3 the Copyright Office to be considering are copyright  
4 considerations, the Copyright Office is housed within  
5 the Library of Congress, are library and user  
6 considerations. Now those considerations have to  
7 include not what the economic circumstances of the  
8 publishers lead them to desire and demand and prefer  
9 vis a vis European law but what's available under  
10 United States law, in particular, United States  
11 constitutional law.

12 MS. KERN: Thank you. Next is Joshua.

13 MR. LAMEL: Sure. I just want to make a  
14 couple quick points. On the registration front,  
15 right, I mean, I don't have to tell the Copyright  
16 Office why registration exists and all the different  
17 reasons for registration and why registration should  
18 be encouraged in terms of informing the public about  
19 what is -- you know, what people are going to claim  
20 copyright in, but there is no registration in the  
21 United States that's not a copyright. And I just want  
22 to, you know, state that pretty clearly.

23 And in this case, when you're dealing with  
24 dynamic content, as well as content that is behind  
25 what I would describe as dead links and disappears

1 unless the United Archive archives it or some other  
2 library, but we're dealing with a huge challenge in  
3 people using the content knowing whether it exists or  
4 not, right, and so any type of registration  
5 requirements that you start to bring into dynamic  
6 content, content that disappears from its publishing  
7 source on the web, it's not like it was printed in a  
8 newspaper, right, creates all sorts of complications  
9 in the value of that registration, what that looks  
10 like. So it would need to be considering, you know,  
11 well beyond your question, Melinda, and I apologize,  
12 but I just, with the registration being talked about,  
13 felt the need to state that.

14           The other thing I would say, and Jessica  
15 made this point much more brilliantly than I ever  
16 could, but, you know, in the United States, copyright  
17 is to incentivize creativity. That's its purpose.  
18 That's why we have it. It's a very different model  
19 than Europe. And I may have misheard Ole, but what I  
20 heard him talking about was the importance of  
21 protecting the investment. Well, that's not why we  
22 have copyright law in the United States. That's a  
23 very European approach. So, if there's something to  
24 be learned from Europe in this, is Europe views  
25 copyright law as protecting investment, and that's



1       okay. Europe can think that. But that very clearly  
2       goes against Article I, Section 8, Clause 8. It very  
3       clearly goes against over two centuries of court  
4       interpretation of why we have copyright law in the  
5       United States. And so, to me, that's a really  
6       important thing to take away from the European model.  
7       The European model is based on protecting investment,  
8       not incentivizing your creation.

9               MS. KERN: Thank you, Joshua. Annemarie?

10              MS. BRIDY: Yes. So my comment is basically  
11       a plus one to what Josh just said, right? Like, we  
12       know that the Supreme Court in Feist said that, you  
13       know, copyright does not protect sweat-of-the-brow  
14       investments in the industrious collection of  
15       information, right? Even if we wanted to dispense  
16       with the originality requirement, which I guess was a  
17       viable policy choice for them to make in Europe, I  
18       don't know, but we can't do that here, right?  
19       Originality is a constitutional requirement. The  
20       Supreme Court has expressly repudiated  
21       sweat-of-the-brow doctrine. So that's just not really  
22       a policy choice that Congress is free to make here.

23              MS. KERN: And Matt?

24              MR. WILLIAMS: Thank you. Yeah, quickly, on  
25       that last point, what we proposed in our comments in

1 no way asked the Office to try to do away with the  
2 originality requirement. What we did ask is for the  
3 Office to revisit some statements made in various  
4 documents, like circulars and the compendium that we  
5 don't think accurately reflects the state of the law.  
6 And Professor Ginsburg talked some about that in the  
7 first panel, so I won't belabor it.

8 But the issue from our point of view is not  
9 getting rid of an originality requirement for the  
10 copyright law but clarifying that things like  
11 headlines, especially when incorporated into longer  
12 works, can be original, can be protectable, and the  
13 Constitution says nothing about how many words have to  
14 be stated for something to be protectable, and I think  
15 we'll add to that in the reply round.

16 I'll also quickly just say the progress  
17 clause is not the only clause through which Congress  
18 has power and it has acted through other clauses to  
19 address copyright adjacent issues in the past.

20 On what was said about fair use and Section  
21 1201 and constitutionality, if anyone can cite me an  
22 opinion that says 1201 is unconstitutional despite the  
23 fact that fair use clearly is not a defense to that  
24 statute, I'd love to hear it. There's the long list  
25 of cases that say otherwise. There's one *Green v. DOJ*

1 that's now on appeal to the D.C. Circuit that the  
2 trial court judge handled it quite well and rejected  
3 the notion that 1201 is unconstitutional. I think the  
4 courts across the board have rejected the notion that  
5 fair use is a defense to 1201.

6 And so this notion of what's in or outside  
7 the bounds of the study and whether the Office has the  
8 authority to talk about access right related issues, I  
9 think, is a red herring because the Office has been  
10 assigned for years and years something I worked on all  
11 the time, the 1201 rulemaking, which critics of 1201  
12 love to call it para copyright. They've always said  
13 it's not really copyright. Well, the Office is tasked  
14 with the authority of handling that provision, and  
15 that provision provides an exclusive right of access  
16 upon which the JCPA is based.

17 So that's essentially what I wanted to get  
18 through, is the notion that the Office can't speak to  
19 the JCPA because maybe people here didn't anticipate  
20 that that would be called an ancillary right, I think,  
21 is bogus and a distraction.

22 MS. KERN: Thank you. So I'm going to have  
23 Hal speak next, and if the other panelists that have  
24 their hands raised wouldn't mind holding their  
25 thoughts until closing remarks, which we will have

1 after Hal speaks.

2 MR. SINGER: Thank you. Just two really  
3 quick responses to your question about what's the  
4 lesson from Europe. And I think the first lesson is  
5 that intervention in these markets can positively  
6 effectuate social change, and the newspapers got paid  
7 and they're about to be paid in Canada. This is a  
8 good thing. We get more journalists and we get more  
9 democracy. We should all be in favor of those things.

10 And the second point is related, is that we  
11 can't allow market forces to dictate the split of the  
12 pie here as monopolists like Google and Facebook will  
13 pay the content creators well below the competitive  
14 level so long as these deals can be negotiated  
15 individually. So that's why the ask here is that  
16 these deals no longer be negotiated individually but  
17 instead collectively via a coalition of newspapers so  
18 that they can extract something closer to fair market  
19 value of what they are creating for the platforms.

20 MR. FOGLIA: Thanks, Hal. We're going to  
21 turn now to closing questions, and before we do that,  
22 I just want to caution that just because we didn't get  
23 to every question we could have asked or that you  
24 wanted to discuss, it's not because we're not  
25 interested in those questions. We just have little

1 time and a lot of panelists and a lot to talk about.  
2 We still have comments open for second round comments  
3 for our Notice of Inquiry. We would appreciate any  
4 further thoughts you have on those.

5 With that, I'm going to ask for closing  
6 remarks. If everybody could keep their remarks to one  
7 minute if possible because we're going to run over  
8 time. And I'll start with Joshua. I think he had his  
9 hand up first.

10 MR. LAMEL: Sure, thanks, Andrew. Just a  
11 couple quick things. Number one, I just want to  
12 quickly respond to Matt's point about 188 and  
13 constitutionally. I looked at the -- I mean, I'm not  
14 an expert on this, but I know there is a long  
15 established record from your previous database  
16 protection inquiry on that issue, and I think the  
17 record on that would disagree with that point and  
18 would say that because we're dealing with  
19 copyrightable -- underlying copyrightable content, the  
20 newspaper article itself, right, not a link or  
21 snippet, that, you know, that's the 188, when 188  
22 applies.

23 Number two, I just want to point out that  
24 we're three hours and eight minutes into this and  
25 Substack hasn't come up yet. And I think that's

1 important just to point out, you know, just how  
2 dynamic things are right now, right? Like, despite  
3 this, like, feeling of staticness, right, Substack for  
4 journalists, a lot of journalists are leaving the  
5 newspaper model and moving to the Substack-based model  
6 of practicing our trades. I just want to point that  
7 out. I'm not saying it's a good thing, a bad thing,  
8 that's not it, but it's just how evolving things are.  
9 And when you try to place, you know, or try to fit  
10 things into existing regimes into those markets, you  
11 know, there can be challenges to that. And Substack  
12 is a threat to the news media ones and their members.  
13 I think it absolutely is. That doesn't mean it's not  
14 journalism and not news.

15           And then the third thing is just to harp  
16 back on, like, we're dealing with non-copyrightable  
17 content here and creating some sort of new right,  
18 right, like, has so many problems from a fundamentals  
19 of copyright perspective, and I just want to, you  
20 know, remind that point which was made in the first  
21 panel.

22           MR. FOGLIA: Thanks, Joshua. Annemarie, I  
23 think I saw your hand up previously.

24           MS. BRIDY: Yeah. No, I mean, I would just  
25 in closing say that, you know, keeping a healthy and

1 sustainable and diverse news industry is obviously a  
2 valuable goal. It's critical to our democracy. It's  
3 not something that Google or any entity can or should  
4 have to tackle alone. You know, it's a shared  
5 responsibility across publishers, tech companies,  
6 government, civil society, you know, and that we at  
7 Google are committed, as we've always been, to playing  
8 our role in a deep and meaningful way in supporting  
9 that goal and that, you know, as many other panelists  
10 have already said, that copyright is really pretty  
11 clearly the wrong tool for this job.

12 MR. FOGLIA: Thank you. Ole?

13 MR. JANI: Yeah, thank you. Now just as a  
14 final remark, obviously, the copyright systems in  
15 Europe and in the U.S. are different in detail. And  
16 so the European approach, as we have it now with  
17 Article XV, certainly could not be a blueprint and  
18 should not be considered a blueprint for anything that  
19 might happen in the U.S. But what it could be is sort  
20 of a source of inspiration, and it gives some answers  
21 to the questions we believe are universal because the  
22 situation and the challenges for press publishers in  
23 the tech environment we have been discussing today are  
24 global. So, with this said, I'd be happy to follow up  
25 and continue this discussion and to contribute if the

1 Office feel that it might be helpful. We can share  
2 our experience and our views from Europe with you for  
3 further steps in the U.S. Again, thank you very much.

4 MR. FOGLIA: Thank you. Jessica?

5 MS. SILBEY: Yeah. I just wanted to take  
6 the opportunity to sort of cheerlead the Copyright  
7 Office and just say you are the experts in the  
8 Copyright Office's administration and the way  
9 copyright has been working and you have a history and  
10 you have records. And I just feel like you can tell  
11 Congress that this is not -- that copyright is really  
12 the wrong tool here. I mean, we're here to inform  
13 you, but I'm getting the sense -- I mean, I just want  
14 to -- I want to suggest that you can tell Congress  
15 that thank you for asking us this question, but in all  
16 of our deep, profound experience and given the case  
17 law and the history and the administrability of all  
18 these different rules, this is not best suited for  
19 copyright, and I just wanted to support that  
20 possibility for you.

21 MR. FOGLIA: Thank you. Cathy?

22 MS. GELLIS: Thanks. One quick point to  
23 touch on, I just want to note for the record how silly  
24 the accusation that I'm here parroting Google is.  
25 There's no reason for us to parrot Google. We're on



1 the record having actually been unhappy with Google  
2 for making its ad service unusable. What drives us to  
3 be here is essentially recognizing that we're not  
4 going to solve the competition problem by focusing on  
5 increasing monopoly power.

6           When we play out the mechanics of what would  
7 happen with a policy scheme like this, we know that it  
8 would hurt us, and we know this because we've seen it  
9 before. We've seen the dynamic of what happened.  
10 We've seen what happens in Europe where audience  
11 facilitating services go out of the audience  
12 facilitating service business, and we know that hurts  
13 small publications. We know -- and I know personally  
14 what I brought up with my experience in the webcasting  
15 space, where I was representing a service, and I know  
16 firsthand how expensive it is, particularly for  
17 smaller upstart services, to try to comply with  
18 ancillary copyright regimes like this. It can be  
19 debilitating. It drives out the services, and if you  
20 drive out the services, you lose that facilitation  
21 benefit that they're going to deliver, which all  
22 outlets need but especially small outlets need.

23           We shouldn't be looking at -- we shouldn't  
24 be pretending that these schemes are something new and  
25 something that's benign. We know they've hurt them

1 before. We can't just turn a blind eye to how they  
2 hurt them and pretend that this time might magically  
3 be different. It's not going to be different. We  
4 know better, and we need to be really, really careful,  
5 especially in speaking on behalf of one of the small  
6 publishers, whose interests absolutely are as equally  
7 tantamount as any of the larger entities who are here  
8 today.

9 MR. FOGLIA: Thank you. Nzengha?

10 MS. WASEME: Well, I mean, I want to thank  
11 the Copyright Office for hosting this roundtable. The  
12 conversation, the conversation itself, even though  
13 there have been a lot of contradictory remarks or  
14 contradictory stats thrown out there, the conversation  
15 itself is valuable. And I'll extend that to the panel  
16 itself and the meaningful commentary that we've been  
17 kind of chewing on.

18 And I really love what Joshua said about  
19 cultural differences. I mean, honestly, arguably, the  
20 only reason we're here is because of what Europe is  
21 doing, right, not necessarily because the industry in  
22 the U.S. has gotten on the same page, right? So I  
23 appreciate what Annemarie said to further clarify that  
24 with regard to cultural difference but also what our  
25 U.S. Constitution will allow, you know. So I think

1 that's very important.

2           And for my closing remarks, I do think the  
3 Copyright Office, as I said before, could improve its  
4 process and that this is not necessarily about  
5 expanding copyright law or copyrights or copyright  
6 rights or the fair use doctrine. I think it's more  
7 about modernizing the way the Copyright Office  
8 processes things in regard to registration and this  
9 ever changing digital world, you know, and I believe  
10 it could also continue to study, particularly  
11 following the roundtable today, to study as well as  
12 take in industry commentary.

13           For me, I believe that will preserve the  
14 integrity of the Copyright Office and its role,  
15 including this study subsequent to this roundtable, as  
16 well as seeing how it can be included. I think it was  
17 Jessica that said it a second ago about having the  
18 authority to make that recommendation to Congress  
19 based on whatever the study shows and making that  
20 recommendation to be integrated in some way with the  
21 JCPA or, you know, presenting to Congress, okay, these  
22 are our findings and maybe, possibly, we believe that  
23 the copyright law is not necessarily the remedy here.

24           So I thank everyone. I've had a really good  
25 time, and I look forward to see what the studies say

1 and what those recommendations are.

2 MR. FOGLIA: Thank you. Elizabeth?

3 MS. KENDALL: I'll be quick. I know we're  
4 at time. I think, first, I'd just like to echo if  
5 we're going to cheerlead the Copyright Office, I've  
6 been working with you guys for most of my career, and  
7 I never want to miss an opportunity to do that. I  
8 appreciate that you've hosted us and included a lot of  
9 very different points of view and, you know, I really  
10 just would like to offer to the Office and to the  
11 other panelists on this panel and the others myself as  
12 a resource. I think there are still some big open  
13 factual and legal questions about sort of where this  
14 effort goes, and, you know, there may be other things  
15 that we can do to advance that dialogue, so would just  
16 like to continue this conversation. Thank you.

17 MR. FOGLIA: Thanks. Matt?

18 MR. WILLIAMS: Yes. I also want to thank  
19 the Office staff for putting the work in here and also  
20 members of Congress and their staff for paying  
21 attention to this issue, which, for my client, News  
22 Media Alliance, is really of critical importance,  
23 beyond critical importance at this point. And I also  
24 want to thank the other panelists in all the  
25 roundtables. I think having all the diverse

1 viewpoints in front of you should help the Office,  
2 using its experience, come up with the right  
3 recommendations to Congress. So I really appreciate  
4 the opportunity to be here.

5 MR. FOGLIA: Thanks. Peter?

6 MR. ROUTHIER: Yeah, thank you. I just echo  
7 the thanks to all the panelists and to the Office.  
8 And I'll just make one very quick point, which is I  
9 think that, you know, as I've said throughout, it's  
10 really important that we keep the public interest in  
11 mind and that one of those things that I was glad to  
12 hear a little bit about was registration deposit.  
13 Registration deposit serves really important public  
14 interest functions. As you know, I mean, the Office  
15 spends a lot of time on that. That's not something we  
16 should be abandoning here. Thank you very much.

17 MR. FOGLIA: And, Hal?

18 MR. SINGER: Yeah, just quickly. You know,  
19 again, to this point that the JCPA, by allowing  
20 collective bargaining, would somehow discourage entry  
21 by news aggregators, just, I can't see the nexus here  
22 as an economist. Let me just say too that the  
23 regulations -- this might not be understood -- that  
24 the regulations that we're talking about, which is  
25 collective bargaining, would only apply to dominant

1 platforms. So it wouldn't even touch a small news  
2 aggregator. So I don't, I just don't understand as an  
3 economic matter how it would discourage news  
4 aggregators.

5 The last point I just want to say in terms  
6 of it being like an onerous requirement, I would  
7 submit that we shouldn't be too worried about Google  
8 or Facebook exiting the search or social media  
9 industry. I think they're doing just fine. I think  
10 that Google can afford to hire a lawyer, an evaluation  
11 expert, maybe an economist to go before this  
12 arbitrator and argue what the value, fair market  
13 value, is that the newspapers are bringing to their  
14 platforms, and they will be just fine. You know,  
15 don't lose any sleep over what we're contemplating  
16 here with respect to Google and Facebook. I'll just  
17 leave it at that.

18 MR. FOGLIA: Okay. Well, thank you to all  
19 the panelists for your participation today, and many  
20 of you submitted comments as well. We thank you for  
21 those. We are now going to break for lunch, and we'll  
22 return at 1:30 p.m. Eastern for Panel 3, which will  
23 concern the effect any additional rights on -- or any  
24 additional protections on existing rights for users or  
25 authors, as well as copyright limitations or trade

1 obligations, and the constitutional issues as well.

2 Thanks, everyone.

3 (Whereupon, at 12:20 p.m., the roundtable in  
4 the above entitled matter recessed, to reconvene at  
5 1:30 p.m. this same day, Thursday, December 9, 2021.)

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A F T E R N O O N S E S S I O N

(1:30 p.m.)

MS. KERN: Hello, everyone and welcome back to the Copyright Office's roundtable on ancillary copyright protections for publishers. This is now the third session, where we will be discussing the interaction between any new protections and existing rights, exceptions and limitations, and international treaty obligations. Since some of you are just joining us for the first time, I'll go over a couple of logistics, but if all the panelists on this session could just make sure their cameras are on for me, that would be great.

So a few logistics. The Copyright Office staff, myself, Chris Weston, and Andrew Foglia, will be posing questions for the panelists. If the panelists would like to respond, just please use the "Raise Hand" function on Zoom, but please keep your mics muted if you're not speaking. Also, if you could please limit your answers to about one to two minutes.

And then just as a quick plug and reminder, we are going to be having an audience participation session that starts at 3:15. If you would like to participate in that, there will be a link which will be put in the chat below. Requests to participate in



1 that session should be submitted by 2 p.m. Eastern  
2 Standard Time.

3 So I guess, just really quickly, if the  
4 panelists could please just go around and introduce  
5 themselves and any affiliation they have. We'll go in  
6 alphabetical order and let me see who that starts  
7 with. I believe that starts with Jonathan Band.

8 MR. BAND: Hi. Happy to be here. I'm  
9 Jonathan Band. I represent the Library Copyright  
10 Alliance, which consists of the American Library  
11 Association, the Association of Research Libraries,  
12 and the Association of College and Research Libraries.

13 MS. KERN: Thank you. Mr. Bergmayer?

14 MR. BERGMAYER: Hi there. I'm John  
15 Bergmayer. I'm the Legal Director of Public  
16 Knowledge, a consumer group here based in Washington,  
17 D.C. We work on intellectual property, as well as  
18 antitrust and competition law.

19 MS. KERN: And Mr. Hasbrouck? Please  
20 correct me if I'm pronouncing that wrong as well.

21 MR. HASBROUCK: Got it right. I'm Edward  
22 Hasbrouck, representing the National Writers Union,  
23 whose membership includes writers and journalists in  
24 all genres and media. I'm also the NWU representative  
25 on the Authors' Rights Expert Group of the

1 International Federation of Journalists.

2 MS. KERN: Thank you. And Mr. Lavizzari?

3 MR. LAVIZZARI: Hello. My name is Carlo  
4 Lavizzari. I'm a lawyer from Basel, Switzerland, and  
5 I'm licensed to practice in Switzerland, England and  
6 Wales, and in South Africa. I've been representing  
7 publishers in many fora, and here I am, however, just  
8 as an independent lawyer joining this panel. Thank  
9 you very much for allowing so.

10 MS. KERN: And Mr. Schwartz?

11 MR. SCHWARTZ: Thank you, Melinda. I'm Eric  
12 Schwartz. I'm a partner in the law firm of Mitchell  
13 Silberberg & Knupp here in Washington, D.C. And today  
14 I'm here representing the News Media Alliance.

15 MS. KERN: And Ms. Sternburg?

16 MS. STERNBURG: Hi. I'm Ali Sternburg,  
17 Senior Policy Counsel at the Computer & Communications  
18 Industry Association, CCIA, also in Washington, D.C.  
19 Thanks for having me.

20 MS. KERN: All right. I think that covers  
21 all the panelists we have on Panel 3 for today. So  
22 the first question that I would like to pose to the  
23 panelists are -- so several of the comments had  
24 mentioned Berne Article 10(1), so I wanted to ask,  
25 what impact do the panelists think Berne 10(1) has on

1 a potential press publishers' right? And, Mr. Band,  
2 it looks like you had your hand up first, so go ahead.

3 MR. BAND: Well, this is a very technical  
4 issue and we dig into it deeply in our comments. But  
5 just at a very high level, Article 10(1) of the Berne  
6 Convention creates a quotation right. It has been  
7 interpreted to be mandatory, so that means all  
8 countries must have -- must allow for quotations, and  
9 several international copyright law scholars have  
10 interpreted the quotation right in Berne as being  
11 inconsistent with an ancillary -- with the ancillary  
12 copyright regime established in the EU.

13 Now, to be sure, Professor Ginsburg, whom we  
14 heard from in the first panel, she and Professor  
15 Ricketson have come up with a theory as to why it is  
16 not inconsistent, even though she says, well, on the  
17 surface, yeah, it's plainly inconsistent, but she  
18 comes up with a rather complicated explanation as to  
19 why it might not be inconsistent. But her analysis  
20 really hinges on the fact that when the quotation  
21 right was first adopted, that there was, you know, the  
22 history, the legislative history of the Berne  
23 Convention seemed to allow for the possibility of  
24 national regulation of hot news misappropriation,  
25 especially, you know, dealing with the kinds of

1 misappropriation that was going on in the early 20th  
2 Century involving wire services, so exactly what is  
3 within the scope of hot news misappropriation. So she  
4 -- so their argument that an ancillary right that  
5 would conceivably be permitted would be perhaps  
6 limited, you know, it seems that that's what she's  
7 saying, this really would be hot news  
8 misappropriation.

9 But that's not what is in the EU. The EU is  
10 much broader than hot news misappropriation. So, you  
11 know, to the extent that anything would be allowed on  
12 an ancillary regime, it seems that it would have to be  
13 limited to hot news misappropriation, and even there,  
14 you know, that might not be correct, and so we get  
15 into that in more detail. But, in any event, that is  
16 much, much narrower than an ancillary right regime  
17 like what we have -- what was set up in the EU and in  
18 Australia.

19 MS. KERN: Thank you. Mr. Lavizzari?

20 MR. LAVIZZARI: Yeah. I think I would  
21 disagree with Jonathan on this -- I mean, obviously,  
22 Sam Ricketson and Jane Ginsburg are the leading  
23 commentators on the Berne Convention, and they have  
24 written extensively on this and made this available to  
25 the U.S. Copyright Office. Also, even in the EU, the

1 quotation exception is available even for the  
2 ancillary rights, so there is no conflict per se.

3 I would also like to say that the issue  
4 really here is one of fragile fresh content being made  
5 available by journalists and publishers for the  
6 benefit of society as a whole, and the issue is should  
7 intermediaries and aggregators be able to benefit from  
8 this for free. The question is, therefore, not  
9 necessarily one of injunctive relief of making it  
10 impossible to quote, but rather whether these  
11 intermediaries shouldn't play fair and compensate the  
12 benefit that they get?

13 MS. KERN: Thank you. And, Mr. Schwartz?

14 MR. SCHWARTZ: Well, thank you. First thing  
15 to just clarify, my clients aren't seeking, as the  
16 last panel noted several times, an ancillary right, so  
17 it's sort of a moot point for purposes of the comments  
18 and the ask of the American News Media Alliance. So I  
19 think this is only a question then for whether or not  
20 the European Union is in compliance with Berne.

21 First thing I'd say is that the first  
22 question asked is whether or not 10(1) is even a  
23 mandatory requirement of Berne. And while some  
24 commentators say it is, Mihaly Ficsor, who wrote the  
25 guidebook for the WIPO and the former head of the WIPO

1 Copyright Division, says it's not. So first point is  
2 that there's questions of whether it's even a  
3 mandatory requirement.

4 But I would say that overall, the question  
5 of 10(1) and EU's compliance with it as an ancillary  
6 right is, frankly, from the aggregators' point of  
7 view, looking at the question from what I'd call the  
8 wrong end of the telescope. Article 10(1) says that  
9 the quotation right applies but must be applied in  
10 accordance with fair practice. So the real question  
11 in the United States is whether, when fair practice,  
12 for instance, being fair use, whether or not the  
13 takings, the copy/pasting, which we've heard about in  
14 the first two panels, that the aggregators are  
15 undertaking is even compatible with the Berne  
16 exception for quotations, and, obviously, the News  
17 Media Alliance and news publishers would say it is not  
18 being undertaken in accordance with fair practices.

19 MS. KERN: Thank you. Mr. Hasbrouck?

20 MR. HASBROUCK: Well, I'm very glad you  
21 raised this question because implicitly it raises one  
22 of our key concerns, which is Berne 10(3). Any usage  
23 under Berne 10(1) is subject to the requirement of  
24 Berne 10(3), which requires identification not only of  
25 the original source but of the author.

1           Now one of the problems with the news  
2 aggregators is that they systematically and flagrantly  
3 violate Berne 10(3). Even the most cursory glance at  
4 news.google.com or the Facebook news page will show  
5 you that publishers are identified and not the authors  
6 except occasionally and incidentally. And they can  
7 get away with this because the U.S. has never enacted  
8 any law that even purports in any way, shape, or form  
9 to implement Berne 10(3).

10           So, if there is going to be reliance on  
11 Berne 10(1), that could take place only after Congress  
12 enacts, as we have long called for, legislation to  
13 implement Berne 10(3), which it should do anyway, but  
14 I think this proceeding highlights the importance of  
15 that. And this is especially problematic because it  
16 adds insult to injury for authors, who are told that  
17 they should accept this aggregation and republication  
18 for exposure when even the minimal black letter treaty  
19 right to be named in that news aggregation is being  
20 systematically and flagrantly violated.

21           MS. KERN: Thank you. Ms. Sternburg?

22           MS. STERNBURG: Thank you. I would just  
23 echo some of the points that Jonathan Band made when  
24 he was mentioning these questions. CCIA's written  
25 comments also provide analysis and history of Berne

1 Article 10(1), some other provisions in the Berne  
2 Convention dating back to the 1880s, as well as in  
3 1967, when they chose to delete the word "short"  
4 before "quotations." I think it's unambiguous that  
5 there's an international obligation around providing  
6 this right to quote. And as I don't think Johnathan  
7 mentioned, but our comments do as well, provisions of  
8 Berne, including Article 10(1), are incorporated in  
9 TRIPS, which is part of the WTO agreement. So these  
10 -- there are ways of enforcing these international  
11 obligations, but would definitely just echo the point  
12 that Article 10(1) is really relevant to this context  
13 of the importance of the right to quote for the U.S.  
14 and other signatories of Berne.

15 MS. KERN: Thank you. Mr. Bergmayer?

16 MR. BERGMAYER: Yeah. I would just like to  
17 make sure that there's no implication that fair use in  
18 the United States, like, somehow has to be justified  
19 under the Berne quotation language. I understand fair  
20 use to be consistent with Berne's three step test, and  
21 it's just a limitation and exception that, you know,  
22 the United States is free to offer under Berne, and,  
23 furthermore, because fair use is a constitutional  
24 requirement, the Constitution trumps Berne. And so I  
25 believe that, you know, that is a -- yeah, that's the



1 basic point I wanted to make. Very short.

2 MS. KERN: And, lastly, Mr. Schwartz?

3 MR. SCHWARTZ: Yeah. Just, I didn't want to  
4 overstep my time in the first intervention. One, I  
5 think Jonathan mischaracterized Jane's conclusions,  
6 Jane Ginsburg's conclusions in her article about  
7 whether the Article 15 is or isn't compliant with  
8 Berne. She did not conclude that it is not compliant.

9 And, secondly, the qualification in 10(1),  
10 you know, is a qualification of compliance with fair  
11 practice. That's the point. It's not -- it's not a  
12 question of fair use.

13 And third point, we're talking about, as  
14 happens with Berne, this is obligations that Berne  
15 members have to apply to foreign Berne works and Berne  
16 country members, not in the case of the United States  
17 American authors. These are -- Berne minima are only  
18 obligations that are applied for other than American  
19 works or U.S. works, however you define them.

20 So, again, this is all sort of a moot point  
21 for my clients because, really, the question, Melinda,  
22 that you asked is, is the EU in compliance with Berne,  
23 and since my clients aren't asking for an ancillary  
24 right, that's really the only question, I think, that  
25 you're posing.

1 MS. KERN: Well, thank you for all your  
2 answers, everyone. I will now turn it over to Chris  
3 Weston.

4 MR. WESTON: Hi. Thanks, Melinda. Chris  
5 Weston, Senior Counsel for Policy and International  
6 Affairs at the Copyright Office. Just before I ask a  
7 question, I just want to respond to something that  
8 Eric mentioned. With respect to your client's  
9 interests, they may or may not dovetail with what  
10 Congress asked us to look into, which was specifically  
11 whether or not something like the Article 15 would be  
12 feasible in the United States. So I definitely  
13 appreciate your client's interest, but we also do have  
14 to investigate that question.

15 So --

16 So I muted myself, sorry. So my question is  
17 actually not about international standards but about  
18 the Constitution and about the First Amendment. I  
19 know a lot of people wrote in their comments about  
20 First Amendment problems with a sui generis or with a  
21 change to the copyright law regarding ancillary  
22 copyrights. With respect to the news media  
23 association's disavowal of wanting to pursue such a  
24 thing, would the changes that they are asking for,  
25 would they -- do they encounter any First Amendment

1 questions? I'm thinking of revising what a lot of  
2 people understand as the short phrase restriction on  
3 copyright if you can copyright words and short  
4 phrases. So, if something like that, does that raise  
5 First Amendment questions at all? I'm going to be  
6 informal and use first names. So, Eric, please go  
7 ahead.

8 MR. SCHWARTZ: Okay. Well, sort of let me  
9 recharacterize what News Media Alliance comments did  
10 say and didn't say.

11 First of all, I think most helpful for the  
12 News Media Alliance would be for the Copyright Office  
13 to describe the nature and scope of the problem,  
14 there's a significant problem.

15 Second, the ask is that the Copyright  
16 Office, as the expert agency, would review existing  
17 law and in detail how it's effectively working or not  
18 working. To the point about the copyrightability of  
19 short phrases, to Jane Ginsburg's point on the first  
20 panel this morning, it's a question of originality.  
21 The blanket statement that is contained in the  
22 Copyright Office's Circular 33 and Compendium, the  
23 question to be looked at, and as the cases have done,  
24 is a question that it's a matter of originality, not  
25 brevity, that drives the question. So there's no

1 constitutional concern if, in fact, a work, no matter  
2 how brief, is deemed to be original. So there's not  
3 an issue there.

4           And third, with regard to your point, Chris,  
5 about the European Union right as an ancillary right,  
6 I think it would be helpful for the Copyright Office  
7 to take a good look at Article 15 and a side by side  
8 with existing U.S. law. Yes, the EU adopted an  
9 ancillary right. But, if you pull back from that and  
10 take a look at what rights already exist for  
11 publishers in the United States -- reproduction,  
12 distribution, public display -- you'll see that they  
13 -- that a lot of what the European Union did lines up  
14 very neatly with what was already existing U.S. law.  
15 The main difference and the main motivator for the  
16 European Union is ownership questions. The European  
17 Union doesn't have work for hire, whereas the U.S. law  
18 does.

19           And the last point would be that, you know,  
20 if you were to characterize what we've heard in the  
21 first two panels this morning and in their filings,  
22 it's not a problem necessarily of copyright  
23 protection. It's a question of effective enforcement  
24 of existing rights. And what the Copyright Office  
25 could do most effectively and consistent with, I

1 think, what Senator Tillis's letter was asking for, is  
2 simply to define the scope of existing rights and  
3 limitations and exceptions, including fair use, and  
4 take a really careful and thoughtful analysis of that  
5 and incorporate that into the study, and I think that  
6 would be extremely helpful to Congress to understand  
7 these rights exist, but they can't be effectively  
8 enforced, and the reason is because of market  
9 imbalance, as the second panel talked about, which is  
10 why the JCPA is necessary to address that market  
11 imbalance.

12 MR. WESTON: Okay. Thank you. Carlo?

13 MR. LAVIZZARI: Yeah. So, I mean, copyright  
14 is an engine of free speech, and so there is not  
15 really a conflict between copyright or an ancillary  
16 right with the desire to have more free expression.  
17 The question is who in the distribution chain should  
18 compensate and enable effectively this fuel that feeds  
19 the free expression.

20 From a comparative point of view, I would  
21 like to draw the Copyright Office and the audience to  
22 a trilogy of cases of the Court of Justice in the EU,  
23 all decided on 29 July 2019. The three cases deal  
24 with the interaction between the European  
25 Constitutional Bill of Rights, the National Bill of

1 Rights of Member States, and the copyright rules of  
2 the EU. In one case called Pelham, about music  
3 sampling, a snippet of two seconds that was used in  
4 samples was found protectable under the equivalent of  
5 sound recording protection in the EU. And on the  
6 issue of conflict with constitutional rights, the  
7 court said, as long as the sample is recognizable,  
8 copyright prevails. But, of course, if the sample was  
9 changed beyond recognition, then that would be  
10 different.

11 The second case on that day is Spiegel  
12 Online and also very much found that the exceptions  
13 and limitations are sufficient to balance the concerns  
14 of free expression. As part of that case, similar to  
15 the parody rationale in U.S. law, the court found that  
16 where a defendant cannot reasonably be asked to  
17 request permission, a free use is justified due to the  
18 fundamental rights position. I think that is very  
19 sensible, but I would argue that news aggregators are  
20 routinely in the position to request permission in the  
21 form of licensing. And also perhaps even though there  
22 are many competition law issues associated with  
23 dominant platforms, in Europe, there is a broader  
24 theory of collective management of rights, which also  
25 facilitates an efficient way of securing adequate

1 permissions that allow free expression and allow  
2 reinvestment in creative and useful content.

3 Thank you.

4 MR. WESTON: Thank you. John, John  
5 Bergmayer?

6 MR. BERGMAYER: Yeah. To answer your  
7 question, you know, the shorter the phrase, the less  
8 likely it is to be original. So I don't really see  
9 these as like these, like, wildly divergent ways of  
10 looking at things. And, furthermore, not only that,  
11 the shorter the phrase, also the more likely it is  
12 that it's going to be subject to some other limiting  
13 doctrine in copyright. For example, like merger  
14 doctrine, if a man bites a dog and you say man bites  
15 dog, even if you just posit that it is original and  
16 copyrightable, other people are allowed to say man  
17 bites dog if a man bites a dog.

18 In terms of enforcement of existing rights,  
19 you know, I just would say the Copyright Office  
20 obviously does not define what copyright is. It maybe  
21 describes the outcomes of various court decisions.

22 And in terms of the constitutional  
23 limitations, the arguments that Public Knowledge makes  
24 is that because copyright must be subject to both fair  
25 use and the idea-expression dichotomy, which I think

1 is getting a little bit less play here and I think is  
2 very relevant in the case of news when, you know, to  
3 the extent that there's something valuable, it is  
4 information. However, information under the United  
5 States Constitution, facts can never be protected by  
6 any form of intellectual property, and you can't get  
7 around the constitutional limitations on copyright by  
8 calling it something different. And I'm fully aware  
9 the previous panel discussed some of this and there  
10 was discussion about 1201. You know, I'll just leave  
11 it there.

12 MR. WESTON: Thanks. Jonathan Band?

13 MR. BAND: Sure. So there's a lot to  
14 respond to, but I won't respond to everything because  
15 I agree with a lot of what John Bergmayer just said.  
16 But responding to some of the points that Eric made,  
17 so, first of all, at the highest level, you know, even  
18 though Eric says his client isn't asking for an  
19 ancillary right, I did read the comments very  
20 carefully and, in fact, they are asking for it, okay,  
21 because they do say that, you know, they're concerned  
22 about the fact that there isn't reciprocity so that  
23 U.S. publishers might not receive royalties from the  
24 ancillary right, and they say one way to take care of  
25 that problem is for the U.S. to adopt an ancillary



1 right. So it is in the comments. I appreciate that  
2 that is not the main ask, and also I appreciate Matt  
3 Williams' very lawyerly description of saying we are  
4 not asking for an ancillary right at this time, so  
5 perfectly, you know, reserving the right to ask for it  
6 tomorrow. But I just wanted to make that clear that  
7 there's, you know, no question that an ancillary right  
8 is in play and not simply because Senator Tillis asked  
9 about it. Also, Axel Springer, right, the whole  
10 comment was about an ancillary right, as News Corp's  
11 was. So, you know, I appreciate your point, Eric,  
12 that that's not the main ask or the current ask, but  
13 it is lurking there in the background.

14           The second point I wanted to make had to do  
15 with, you know, this issue of, oh, we just want the  
16 Copyright Office to give a legal opinion on fair use,  
17 right? Well, that's not the appropriate role of the  
18 Copyright Office, you know, and especially as we know  
19 here, you know, we can have all the -- you know, we  
20 can line up law professors on each side, you know, and  
21 to give their opinion on whether what Google is doing  
22 in any given situation is a fair use or isn't a fair  
23 use, but, you know -- and even in this proceeding,  
24 right, so you have Jane Ginsburg saying not a fair  
25 use, but then you have Neil Netanel saying, yes, it is

1 a fair use, right? And so that's just in terms of  
2 what was submitted here. And I'm sure we can do a  
3 poll of copyright professors and then you'd get all  
4 over the map.

5 But, in any event, the deeper point, of  
6 course, is that every headline is going to be  
7 different, right? You know, it depends on the  
8 headline and, you know, whether or not there may -- it  
9 may or may not be fair use with respect to that  
10 specific headline, even though I would tend to be of  
11 the view that the vast majority of headlines would be  
12 fair use, if not all of them. But, you know,  
13 conceivably, there would be, you know, one headline  
14 that, you know, for some reason, it might not be a  
15 fair use.

16 But the bigger point that really came out of  
17 the -- for both the previous panels is at some point  
18 that's all irrelevant, right, and Professor -- you  
19 know, Jane said this, it's like, well, what difference  
20 does it make if we give publishers more rights because  
21 there's this enforcement issue and, you know, that --  
22 to the extent that it's called a competition issue or  
23 a business issue or an economics issue, I think  
24 there's different ways of characterizing it, but it's  
25 clear that the publishers have no shortage of causes

1 of action and also, as we heard in the previous  
2 panels, right, that, you know, you have these -- you  
3 know, that you have these robot.text, you know,  
4 there's these bot exclusion headers, right, that  
5 Google respects and that in the Facebook case, the  
6 publishers are placing the content on Facebook, right,  
7 so there's clearly a license, right?

8 So there's no question that there's plenty  
9 of rights there. There's a question as to why the  
10 publishers aren't enforcing those rights, and, that's  
11 you know, ultimately, you know, again, it's a  
12 competition/business/economics issue which really is  
13 beyond the scope of this study. You know, I think the  
14 Copyright Office could really have a one paragraph  
15 study. It doesn't need to go into depth and say,  
16 well, you know, this isn't the question. It's not  
17 about whether there's adequate rights. There's no  
18 shortage of rights. It's a question of why they're  
19 not being enforced and what are the consequences of  
20 that. But, again, that's ultimately not an IP issue.

21 MR. WESTON: Thank you. Ali?

22 MS. STERNBURG: Thank you. Some of the  
23 points I wanted to make have been addressed, so I  
24 would just echo that the question about the Copyright  
25 Office guidance and circulars on short phrases, as

1 John Bergmayer said, there's constitutional issues in  
2 the intersection of the First Amendment, copyright,  
3 including fair use, but also the idea-expression  
4 dichotomy and the fact that no ownership of facts and  
5 other limitations on the scope of what is protectable  
6 under copyright. So I would agree that there would be  
7 serious First Amendment problems if there were -- and  
8 just that that guidance should remain as it is. It's  
9 really crucial for users and services, I would argue.

10 And I also reiterate a point Jonathan Band  
11 just made, that I think the JCPA conversation is  
12 outside of the scope of the Copyright Office and  
13 copyright law. Thank you.

14 MR. WESTON: Thanks. Edward?

15 MR. HASBROUCK: Thank you. You know, I  
16 think the question that you asked, you know, would an  
17 ancillary right be compatible with the First  
18 Amendment, I think this is a red herring. An  
19 ancillary right would no more be a threat to a free  
20 speech and a free press than is copyright itself a  
21 threat to free speech and free press. It's just what  
22 is copyrightable. You know, my right to free speech  
23 ends when I want to reprint the entirety of some  
24 copyrighted work that you've written. That's not a  
25 First Amendment violation. And in the same way, a

1 carveout from antitrust law for negotiations, which is  
2 part of what's contemplated in the JCPA, is not a  
3 threat to the First Amendment any more than antitrust  
4 law in general is a threat to the First Amendment.

5 And from the perspective of an author and as  
6 a reader, I think that it is the monopolization and  
7 control of channels of digital distribution by a  
8 handful of companies that's actually one of the  
9 greatest threats today to the rights of free speech  
10 and free press. It's meaningless if you can speak  
11 freely but only in a closet where nobody can hear you.  
12 And if the distribution is monopolized, that strangles  
13 the ability to have robust public discourse. And so I  
14 actually think that this kind of antitrust reform  
15 would be very critical to advancing the goals of the  
16 First Amendment.

17 MR. WESTON: Thanks. Eric?

18 MR. SCHWARTZ: Yeah. So lots of issues have  
19 been raised and let me just pull back and address, you  
20 know, from 30,000 feet the largest one, Jonathan's  
21 notion of a one paragraph study. As one who worked  
22 for some time in the Copyright Office, I think the  
23 Copyright Office and the Copyright employees, you  
24 know, absolutely have a duty to take a look at a  
25 broken marketplace and ask two questions: one, is

1 there adequate protection, and, two, is there adequate  
2 enforcement of the existing rights.

3 To Jonathan's, well, maybe you are asking  
4 for ancillary, maybe you're not, no, we're not. I'll  
5 address the national treatment question because you  
6 mischaracterized that in a minute. But the bigger  
7 question is, as the second panel spent a lot of time  
8 talking about, Hal Singer in his filing, is market  
9 imbalance. And to the point that, well, you  
10 authorized the use of your materials, this is you  
11 know, Google's monopolization of search and Facebook's  
12 monopolization of social media requires that.

13 And then the question one must ask is, is  
14 the progress clause being properly treated in this  
15 marketplace, which allows for two incentives: one is  
16 the right to create, to incentivize the creation of  
17 new works; the other is to disseminate them, as the  
18 Supreme Court has said in cases, you know, as recent  
19 as Golan. And the fact that these aggregators so  
20 dominate the dissemination market means -- and given  
21 the statistics that NMA included in its filing means  
22 that the marketplace is broken for those that are  
23 creating the material and in essence are forced to use  
24 these disseminators that have such a huge market  
25 influence. It is not working, and it is absolutely

1 appropriate for the Copyright Office to take a look at  
2 it and to take a look at the scope of existing rights  
3 and, as Jane did, for instance, in her paper, to use  
4 some examples and answer the question, is this cutting  
5 and pasting. You know, a lot of the aggregators are  
6 referring to it as just headlines. Don't forget the  
7 photographs. The taking of an entire photograph with  
8 a headline, with ledes, and sometimes the reproduction  
9 of entire works in a systematic way, is that fair use?  
10 It is absolutely appropriate for the Copyright Office  
11 to opine on that not in a particular instance but just  
12 in a general instance.

13 Last point on national treatment, Jonathan,  
14 we were not suggesting -- all I was saying legally --  
15 the filing was saying legally is, since the European  
16 Union adopted Article 15 as a matter of reciprocity,  
17 there are two ways for other countries to enjoy the  
18 rights in the European Union. One would be to have  
19 equivalent rights and it may be, by the way, that  
20 existing U.S. law provides equivalent rights. The  
21 other is in trade agreements that simply provide for  
22 broad national treatment so that U.S. publishers could  
23 enjoy those rights there. That was the ask in the  
24 News Media Alliance, the second point, that if there's  
25 broad national treatment obligations in any future

1 trade agreement, as the U.S. did, for instance, in the  
2 U.S.-Canada-Mexico Agreement so that performances in  
3 Canada that don't exist in the United States require  
4 payment for American sound recording producers and  
5 performers in Canada, even though those rights don't  
6 exist in the United States. That's what national  
7 treatment does in a trade agreement. That was that  
8 point.

9 MR. WESTON: Thank you. Ali?

10 MS. STERNBURG: Thanks. So I thought the  
11 question earlier was more about First Amendment  
12 considerations around changing Copyright Office  
13 guidance around short phrases. But, definitely, if  
14 there's interest in talking about First Amendment  
15 considerations generally regarding ancillary  
16 copyright, there's a lot of precedent about free  
17 speech rights for digital services users, as well as  
18 the rights of news aggregators themselves and how  
19 they're engaging in editorial discretion when they're  
20 showing what's relevant to users. All that is speech  
21 protected by the First Amendment. Thank you.

22 MR. WESTON: Thanks. John Bergmayer?

23 MR. BERGMAYER: Yeah. I would not say that  
24 a mere antitrust exemption without more at any step  
25 itself violates the First Amendment. We have



1 antitrust exemptions now. I would say they're bad  
2 policy and outside of the Copyright Office to, you  
3 know, people who have jurisdiction over antitrust law.  
4 We're happy to make that argument all the time. I do  
5 appreciate the concession on previous panels that a  
6 mere antitrust exemption without more would be  
7 ineffective because there needs to be an underlying  
8 right in order for people to collectively bargain  
9 over. I would -- and our position is that any version  
10 of that new right, whether it is created by statute or  
11 whether it is sort of assumed to exist by the courts,  
12 otherwise why would you pass that antitrust exemption.  
13 Any path whatsoever to get you to that new substantive  
14 right needs to respect idea expression and fair use.  
15 Otherwise it would be unconstitutional. So I'm trying  
16 to make our position as clear as possible here.

17 MR. WESTON: Thanks a lot. Carlo?

18 MR. LAVIZZARI: Yeah. I just wanted for the  
19 benefit of the U.S. audience on the issue of short  
20 phrases, say that in the UK Meltwater case from 2010,  
21 that topic was dealt with and it was found and  
22 advanced by the Queen's Counsel then that often the  
23 headlines in newspapers are actually crafted and  
24 selected later after multiple headlines have been  
25 crafted by people different from the journalists who

1 write the article.

2 And in terms of free expression, it should  
3 be -- there should be no bias against people crafting  
4 catchy headlines, and if that's the head start, the  
5 work gets to an audience, then an aggregator shouldn't  
6 be allowed to appropriate it.

7 Also, on the continent, just from book  
8 titles, in France, *Les liaisons dangereuses* is  
9 copyrightable, *Clochemerle* is copyrightable, *Felix the*  
10 *Cat* is copyrightable, *Vol de nuit* ("Nightflight") is  
11 copyrightable, *The Heroic Charlie Hebdo* is  
12 copyrightable, *Cinquante nuances de Grey* ("50 Shades  
13 of Gray") is copyrightable. In Germany, *Der Mensch*  
14 *lebt nicht vom Lohn allein* ("Man does not live from  
15 salary alone") is copyrightable. Thank you.

16 MR. WESTON: Thanks. I'm going to give it  
17 to Eric and then Ali and then give it to Andrew Foglia  
18 to ask the next question.

19 MR. SCHWARTZ: Well, thanks. I just wanted  
20 to address a point that John raised again -- the two  
21 Johns, John and Jonathan, my friends, suggesting that  
22 somehow there is a seeking of a new right. There's  
23 not seeking of a new right with the JCPA. The right  
24 already exists. It's a right of access that 1201  
25 provides. And, by the way, without fair use, and its

1 constitutional has been upheld, but that was a  
2 question, you know, an issue that was discussed a lot  
3 in the second panel, so not repeating it. But there's  
4 not a new right. It's just the fact that the  
5 publishers can't exercise their existing right when it  
6 comes to access for the reasons already mentioned  
7 about the huge market imbalance, that they have to  
8 rely on this dissemination of their own works and that  
9 what the JCPA would do is to recalibrate that market  
10 imbalance by collective bargaining.

11 MR. WESTON: Thanks. And Ali?

12 MS. STERNBURG: Thank you. Just wanted to  
13 make a quick overarching point that looking at what  
14 other countries have done is not always really that  
15 instructive to the U.S. because we uniquely have the  
16 First Amendment. We have fair use. A lot of our  
17 copyright law is based in the Constitution under  
18 Article I, Section 8, Clause 8 and promoting progress.  
19 So there's a lot of really different motivations in  
20 other jurisdictions for why copyright exists and what  
21 it's intended to promote and protect that are pretty  
22 different from U.S. law. So I just wanted to raise  
23 that. Thank you.

24 MR. WESTON: Thanks. Andrew?

25 MR. FOGLIA: Thanks. My question seems

1 likely to call upon a lot of repetition, but, because  
2 so many of you were talking again about competition  
3 law and because many of your comments discussed  
4 competition law and in particular, in addition to the  
5 JCPA and Australia's bargaining code, I would like  
6 again to ask, even those of you who addressed it  
7 before, first, do you think it's appropriate for the  
8 Copyright Office to opine on those competition law  
9 issues, and, second, what -- do you see any  
10 constitutional issues arising from something like  
11 Australia's bargaining model or the JCPA? Thanks.  
12 And, Edward, I see your hand is already up, so go  
13 ahead.

14 MR. HASBROUCK: In terms of, you know, why  
15 this is appropriate, let's look back at what the  
16 constitutional goals are, which are to protect authors  
17 and inventors, not publishers, not distributors, not  
18 intermediaries, but authors and inventors. And so I  
19 think that's the overarching purpose within which you  
20 have to look at this. Any benefit of copyright law to  
21 publishers and other intermediaries is incidental to  
22 the goal of benefitting creators and users, writers  
23 and readers or whatever.

24 So I think there's an important question  
25 here which necessarily gets involved not only with

1 competition law but also, sadly, to further broaden  
2 what people are complaining is already too broad and  
3 problematic, it also involves labor law because, when  
4 you look at the rights that are implicated here, which  
5 are really authors' rights. And so I think, if I may,  
6 I want to raise the question here, which is why I  
7 think it's appropriate for the Copyright Office,  
8 because your mission is the mission of copyright,  
9 which is to serve the public interest and the interest  
10 of authors and creators. Notwithstanding the legal  
11 fiction of work for hire, publishers are not the  
12 creators, okay?

13 So the question -- and this was in the  
14 Notice of Inquiry, if I may, if it's not out place to  
15 bring it up -- the question you specifically asked  
16 was, should authors receive a share of this  
17 remuneration, and I think that's really exactly the  
18 right question to be asking. And, unfortunately, the  
19 problem of disparate bargaining power between a few  
20 platforms and many publishers is replicated in the  
21 asymmetry of bargaining power between those publishers  
22 and the much more numerous volume of creators.

23 And so I think, if you are going to address  
24 this through an exception to antitrust law, it is  
25 equally important not only to recognize that many

1       journalists today are self publishers and to figure  
2       out how they would be incorporated into the publisher  
3       category, but also to recognize that many of them are  
4       independent journalists and freelancers, not employees  
5       who do not benefit from the exception to copyright for  
6       labor union organizing. And so any exception to --  
7       excuse me, exception to antitrust. So any exception  
8       to antitrust for bargaining with the platforms needs  
9       to be accompanied by an exception to antitrust to  
10      permit authors and journalists to bargain with the  
11      publishers, and that is one of the strongest lessons  
12      of the experience in implementation of the EU  
13      directive.

14                 You know, the Australian law relies  
15      basically on trickle down for any money from the  
16      platforms that goes to publishers to actually get to  
17      journalists. The European law includes a mandate for  
18      sharing of those revenues and negotiations. Well, in  
19      the U.S., that would run afoul of antitrust law. So,  
20      if you're going to fulfill this mission, I think  
21      there's strong reasons to see that the goals of  
22      copyright need to be furthered by an antitrust  
23      exemption to permit creators in their roles as self  
24      publishers, as freelancers, as independent journalists  
25      to negotiate collectively with publishers and

1 distributors at all levels. Thank you.

2 MR. FOGLIA: Thanks. Carlo?

3 MR. LAVIZZARI: Yeah. I think I'd go a very  
4 long way towards what Edward just said, that  
5 effectively copyright is a monopoly right. Monopoly  
6 does sound a lot like competition law to me. It is,  
7 of course, a beneficial one that gives the head start  
8 to the creators and then, as a consequence, also to  
9 publishers. And in Europe, I guess, like Edward just  
10 said, we have a big tradition of collective management  
11 of rights and of ensuring that fair remuneration is  
12 ultimately paid. So the issue that arises now in the  
13 imbalance between dominant platforms and news  
14 organizations is not all too distant from the general  
15 pattern that the Copyright Office has to deal with at  
16 least in questions of collective licensing.

17 So, to me, those issues are definitely  
18 related. And I do also have a bit of an impression of  
19 the kettle calling the pot black when you have these  
20 platforms effectively running a business model and a  
21 strong bargaining position of an artificial fair use  
22 position and then going to say the rightsholders who  
23 would like to enforce their rights, now we can't talk  
24 about it because of competition law. Thank you.

25 MR. FOGLIA: John?

1           MR. BERGMAYER: Yes. I'm sure that there's  
2 other people who are in the queue who are bursting to  
3 say this, so, sorry, I get to say it first. The  
4 purpose of copyright and all intellectual property is  
5 to promote the progress of science and the useful  
6 arts, and benefitting authors is the means to that  
7 end. I think it's a good means to the end. Like,  
8 that is the means to an end that I would support.  
9 It's still not the purpose, right? The purpose is  
10 right there in black and white in the Constitution,  
11 and it's important to never lose sight of that.

12           I'll also say our comments, Public  
13 Knowledge's comments, we do have a solution -- we  
14 agree generally that there is a problem. We just have  
15 a very different idea of the way to solve it. So, you  
16 know, other people can speak for themselves.

17           For other reason, I think that the  
18 Australian model, to answer your question, would be  
19 unconstitutional in the United States for other  
20 reasons beyond the stuff I said before about fair use  
21 and idea expression. It likely would be  
22 unconstitutional because it is a mandatory carriage,  
23 because the way that it is structured, it's not really  
24 possible for the platforms in Australia to pick and  
25 choose what they pay for, so they might as well carry



1 it. And I would say that applying Turner and other  
2 cases that involve cable television, mostly litigated  
3 '90s, early 2000s, that posed similar questions of  
4 mandatory carriage by cable systems of broadcast  
5 stations and other means, there's a whole number of  
6 cases that did not have -- that had, like, a sort of  
7 intermediate scrutiny standard, right, so it was  
8 easier for the government to justify forms of  
9 mandatory carriage in the case of Turner.

10 So I'll just concede and say, okay, I'll  
11 even apply the weaker test to the case of platforms.  
12 I believe that it would be unconstitutional under that  
13 test even if those cable regulations that were allowed  
14 under the test are still allowed. I still think they  
15 are, but I think applying that test in other areas  
16 such as platforms have a very different background in  
17 terms of the market and how people interact with them.  
18 I don't think it would be allowed. So, yeah, you  
19 know, if you're looking for constitutional reasons not  
20 to do Australia, I think that that is a pretty strong  
21 one because I do believe that those cable TV cases are  
22 fairly on point. Thank you.

23 MR. FOGLIA: Jonathan?

24 MR. BAND: So this is, in fact, an  
25 enormously complicated business/competition/economic

1 issue, way beyond my ability to comprehend it. I  
2 mean, you have -- you know, the Internet is a very big  
3 place, and you have, you know, thousands and thousands  
4 of people who are distributing news, meaning news  
5 sites, maybe tens of thousands, hundreds of thousands,  
6 right? It's a vast ocean of people who are providing  
7 content, and they're always -- they're competing  
8 amongst each other to find someone, you know, to find  
9 an audience, okay? And so it doesn't matter whether  
10 there were 10 Google News or 100 Google News, and, you  
11 know, there probably are.

12 I mean, there's lots of news aggregators out  
13 there that do probably exactly what Google News does,  
14 but, you know, I don't know what they -- who they are,  
15 but the point is that this is a really complicated  
16 problem that, you know, might be beyond, you know, the  
17 scope of competition law, right, because I think you  
18 could have a lot of competitors, and I think, frankly,  
19 if you had a hundred companies -- if Google's market  
20 share in the, you know, how ever you want to define  
21 what Google News is, if it were -- if there a hundred  
22 competing companies, I would submit that that would  
23 even be a much worse situation for publishers because  
24 then they would be trying to -- each fight over, you  
25 know, a hundred -- they would still want to be on all

1 100 sites, and they would be competing with each other  
2 and trying to get themselves elevated, so it would be  
3 a worse situation, not a better situation.

4 But the point is this is really complicated,  
5 and it has nothing to do with intellectual property,  
6 and so, you know, maybe if you had a chief economist,  
7 maybe he or she would be able to help sort through  
8 these issues and what they are, but, you know,  
9 frankly, you don't, I don't think, and even so, I  
10 think, you know, this is a problem that, you know, all  
11 these -- you know, the FTC is reg -- I mean, everyone  
12 is sort of reg -- this is a very complicated new kind  
13 of market that no one really understands, and so, you  
14 know, the Copyright Office certainly seems to be the  
15 wrong place to be dealing with that.

16 And just two other quick points. Number  
17 one, in terms of, like, what is the problem or what  
18 are we really trying to solve here, I don't think that  
19 a solution that leads to News Corp or The New York  
20 Times or The Washington Post getting a lot more money  
21 and local publishers getting a little more money, I  
22 don't think that's a good solution. I mean, that's  
23 not the -- the problem with any sort of IP type  
24 solution is it's blunt. It's a blunt object, and if  
25 we really -- and, again, this is my view. The problem

1 is not that News Corp is having financial problems  
2 because it isn't or that The New York Times isn't. I  
3 mean, these companies have -- these publishers have  
4 all expanded their reach. They're doing great.  
5 They're making lots of money.

6 The problem is the local news publisher,  
7 which is in, you know, the news desert, and so we need  
8 to focus on, come up with a solution that is really  
9 targeted at that problem and not just say, okay, well,  
10 we'll come up with a solution that leads to News Corp  
11 and The New York Times and The Washington Post getting  
12 \$90 more or \$95 more and then, you know, so that the  
13 local publishers get another \$5. That's not a  
14 solution that we should, you know, and, frankly, I  
15 think even the JCPA would probably lead to that  
16 solution, right, that all the money will still go to  
17 the big publishers, and then, you know, some crumbs  
18 will go to the local publishers, and that's not what  
19 we want.

20 And then the last point here is that part of  
21 -- and this really goes to the first point. Part of  
22 what's so confusing here is when everyone talks about,  
23 oh, the, you know, the bad monopoly or monopsony of,  
24 you know, Facebook and Google with respect to the  
25 dissemination of news, I think people are sort of

1 confusing two different things, right? I mean, on the  
2 one hand, those companies do -- are in this sort of --  
3 have this distribution function. Separately, those  
4 companies have the advertising function, and we need  
5 to separate those two functions.

6 If the concern is advertising and, you know,  
7 control over advertising, then the focus needs to be  
8 on advertising. It just happens here in this case to  
9 coincide that there's no -- but to say, if we're  
10 worried about insufficient advertising revenue, to say  
11 that somehow that has anything to do with the  
12 aggregation, I mean, those are again sort of mixing  
13 and matching, and so it's really important to sort of  
14 separate those two, and it's hard to separate those  
15 two because there is this overlap of functions, but  
16 there are different -- you know, these are different  
17 channels, different parts of the companies, and they  
18 really need to be kept separate.

19 MR. FOGLIA: Thanks. Ali?

20 MS. STERNBURG: Yeah, just to address a few  
21 of the questions that were raised. As I think most of  
22 us are copyright lawyers, not antitrust lawyers, but  
23 my understanding is that for antitrust purposes, a  
24 part of what you have to establish is what the  
25 relevant market actually is, and so I think there is

1 some ambiguity about what newspapers own if the  
2 copyright press publisher's rights were to change  
3 because you can't really talk about the relevant  
4 market for rights in an information good until you  
5 establish the contours of the right and the nature of  
6 the good and what competition and in what are you  
7 actually talking about competition in. And so I think  
8 defining the market, as my understanding, is an  
9 important part of conversations about competition and  
10 antitrust, and there's a lot of ambiguity here and  
11 lack of clear definitions.

12 As to the First Amendment flaws with the  
13 Australian proposal, I know John Bergmayer talked  
14 about some of this, but there are definitely some  
15 concerns in U.S. First Amendment law, including things  
16 around requiring aggregators to carry content, as well  
17 as singling out certain aggregators for differential  
18 treatment. Both of these would trigger heightened if  
19 not -- heightened scrutiny, if not strict scrutiny,  
20 even more so when a regulation is aimed at particular  
21 figures within an industry such as Australia's  
22 measure, which was aimed at two U.S. companies. So I  
23 would raise those as some clear First Amendment  
24 challenges with the Australian approach, which is also  
25 copyright and -- antitrust and not copyright and so

1 not really in the scope of this.

2 MR. FOGLIA: Thanks. Eric?

3 MR. SCHWARTZ: Thanks, Andrew. So, to  
4 answer the question you asked about 15 minutes ago or  
5 so it seems, should the Copyright Office be looking at  
6 competition law, I think I already answered earlier  
7 the answer is yes, and here's why. You have a  
8 copyright-based industry that is protected by  
9 copyright laws basically since the outset of U.S.  
10 federal copyright protection, and you've got a system  
11 that is broken by the statistics both in the number of  
12 papers, local papers that are diminishing, to  
13 Jonathan's point, the number of jobs that are being  
14 lost, and you have two companies that are dominating  
15 dissemination and therefore revenue, both on the --  
16 you know, doing damage both on the ad side of what  
17 they retain and on the damage to subscription side.

18 You know, the question one might ask is,  
19 where is the consumer in all of this? And, really, I  
20 think the answer is they're not -- they won't be  
21 harmed by the JCPA, which, by the way, to Jonathan's  
22 question, the monies, as Hal Singer mentioned in the  
23 second panel, would be disseminated both to the bigs  
24 and the littles, so I think there is that  
25 dissemination, but the point here is you've got

1 creators that are both in the entire ecosystem, to  
2 Edward's point, the authors and the publishers, you've  
3 got two dominant disseminators, and the question for  
4 consumers is would it harm consumers if those  
5 intermediaries have to pay for the cut and paste and  
6 infringement that they are undertaking on this, you  
7 know, an enormous scale of billions of takings per  
8 day, and the answer is no.

9           It's just -- it would just be the  
10 intermediaries that would have to pay, and I don't see  
11 any difference, and so, for all those reasons, Andrew,  
12 I do think it's appropriate for the Copyright Office  
13 to take a look at a copyright-based industry that is  
14 not operating as it should be or could be and for the  
15 public benefit. Having quality journalism matters to  
16 the country both for social and economic reasons, and  
17 I think that's important for the Office to take a look  
18 at both, as I said, under existing rights and without  
19 necessarily talking about the necessity for additional  
20 rights, just the fact that the existing rights and the  
21 existing system is not working.

22           MR. FOGLIA: Thanks. Edward, and then I'm  
23 going to turn to Melinda for the next question. Go  
24 ahead, Edward.

25           MR. HASBROUCK: Thank you. If I could



1 respond to a couple of points that were made by  
2 Jonathan a few minutes ago and in some of the  
3 comments, first, there was allusion made to robot.text  
4 as something that is widely observed. I can't let  
5 that pass without noting that the Internet Archive,  
6 which is one of the largest aggregators and infringing  
7 reproducers of news content, not just of headlines but  
8 of full text, has made a deliberate decision to  
9 completely ignore robot.text, so you can't take that  
10 as a standard that's generally being abided by.

11 In terms of the question of, you know, do we  
12 care whether more money is going to The New York Times  
13 or The Washington Post? No, I don't. I care whether  
14 more money is going to the journalists, whether  
15 they're on the staff of The New York Times, whether  
16 they're a stringer, whether they're the self publisher  
17 of the blog of record in my hometown who is now the  
18 single most influential journalist in that town, a not  
19 uncommon phenomenon. Where do their revenues come  
20 from?

21 And we've raised this issue before in terms  
22 of fair use analysis. Before you can begin to assess  
23 the fair use factors, you need to know what the normal  
24 modes of exploitation of these works are, but there's  
25 been almost no inquiry comparable to that into

1 publishers' business models, of authors' business  
2 models, which is a prerequisite to applying fair use  
3 tests and I think is also really significant in  
4 figuring out how to divide up the pie of revenues from  
5 these new uses, these ancillary uses and the ancillary  
6 rights.

7           So there's a very important role, which  
8 we've asked for before, and I'd reiterate that call  
9 now for the Copyright Office to dig deeper into  
10 authors' business models to help provide a framework  
11 on which more informed fair use analysis could be  
12 based because a lot of times what we find is people  
13 are claiming that their use is non-infringing because  
14 it's not interfering with those uses they're aware of,  
15 but they don't realize the new and innovative ways  
16 that authors are actually exploiting their rights that  
17 are getting trampled on by these new intermediaries  
18 who claim to be benefitting us while screwing us.

19           Thank you.

20           MR. FOGLIA: Melinda?

21           MS. KERN: Thank you, Andrew. So I believe  
22 Mr. Bergmayer touched on this a little bit, but we've  
23 heard a lot about why, I guess, an ancillary copyright  
24 is not constitutional or would not be constitutional,  
25 but I wanted to dive a little deeper on the point of,

1 is there a version of ancillary copyright that you  
2 think would be constitutional? I think what was  
3 mentioned earlier was preserving fair use and other  
4 limitations, but I wanted to, like I said, dive a  
5 little deeper on that point and get a couple other  
6 perspectives if anyone has any. Mr. Bergmayer?

7 MR. BERGMAYER: I'll just say no. Thank  
8 you.

9 MS. KERN: Thank you. Mr. Band?

10 MR. BAND: Sure. So -- and this is again  
11 something that we talk about in much greater detail in  
12 our comments, but to the extent that what is going on  
13 is an effort to protect something that is not -- that  
14 is unoriginal, then that just can't be done  
15 constitutionally. The Supreme Court precedent is very  
16 clear that the IP clause is both access -- both  
17 authorizes -- you know, both creates rights but also  
18 limits rights. It's a floor and a ceiling, and the  
19 ceiling is, you know, that you can't protect -- you  
20 can't give protection to something that's not original  
21 when you're dealing with copyrightable -- with  
22 writings with copyrightable subject matter, and what  
23 that means is that you can't rely on the Commerce  
24 Clause or another power to do something that the IP  
25 clause prohibits.

1           And, you know, this all came out in great  
2 detail in the context of the database legislation  
3 debate, which I had the misfortune of spending eight  
4 years of my life involved with, but this issue was  
5 explored in great detail, and there were -- you know,  
6 the DOJ weighed in and they agreed that you can't rely  
7 on the Commerce power to do something that would not  
8 be permitted under the IP power. You know,  
9 Congresswoman Lofgren wrote a, you know, wrote an  
10 opinion on this and so forth. So, you know, there's a  
11 lot of case law that the -- and a lot of analysis that  
12 the Copyright Office should dig into to inform its  
13 analysis, but it's pretty clear that you can't rely on  
14 the Commerce Clause to do anything to protect anything  
15 that is not original, so, you know -- and I'll stop  
16 there, and we can go into more detail if you want.

17           MS. KERN: Thank you. Mr. Lavizzari?

18           MR. LAVIZZARI: Yes, thank you.

19           Essentially, for copyright, what is protectable and  
20 what is subject to fair use, they're both really  
21 involving policy judgments and are different sides of  
22 the same coin, and when you look at it that way, I  
23 think the premise perhaps that is being given here  
24 that, you know, a news article under Feist is not  
25 protectable and that's almost like a tablet from

1 ancient Rome, it is what it is, but if you look at the  
2 modern articles, the articles of the future, they are  
3 really "knowledge stacks". They have really evolved.

4           And I think the situation today is quite  
5 comparable to when, in 1972, the USA decided to  
6 protect sound recordings previously protectable under  
7 common law under U.S. state law, and perhaps the same  
8 or similar discussions were taking place then and  
9 people said how could you protect sound recordings.  
10 That's an ancillary right to a performance and a  
11 musical composition. Well, now you have it, and you  
12 have had it for a long time, and the world hasn't  
13 broken in. The Internet's not broken. The  
14 Constitution is still there.

15           So I think it's the same now. An article of  
16 the 1970s and an article, digital article of today, is  
17 completely different, so I think one has to look at  
18 the rationale for such a right, what is it supposed to  
19 do, and that is exactly why it's so important you're  
20 studying these questions. Does it recognize the value  
21 and unique quality of trusted news information? Does  
22 it help to give the head start that copyright is about  
23 to the fresh, intelligent, creative impulse that comes  
24 from use that is so needed nowadays? Does it assist  
25 in actually claiming damages and objecting to mass

1 infringement, where you have, I think, one could  
2 summarize some of the things that were said previously  
3 that there are a few actors who are simply too big to  
4 infringe, and would this ancillary right change the  
5 balance there, and I think it would. Would it help to  
6 protect and give protection to an object that can be  
7 safeguarded against unfair competition from third  
8 party aggregators? Yes, it could.

9           Finally, would it be compatible to create  
10 such a publisher related ancillary right with the  
11 rights of the author? Could there be a fair reward  
12 for authors side by side? And I think, again, you  
13 have the answer in the sound recordings' creation of  
14 copyright, and so I would urge you to study this but  
15 not simply look at the news article from the 1970s and  
16 say Feist said no. Today's articles are completely  
17 different and are worth protecting. Thank you.

18           MS. KERN: Thank you very much. Ms.  
19 Sternburg?

20           MS. STERNBURG: Thanks, Melinda. To go back  
21 to your question of is there a version of ancillary  
22 copyright that would be constitutional, I agree with  
23 John and Jonathan that no, I don't think it could be  
24 under the First Amendment and all the Supreme Court  
25 precedent about traditional contours and about 107,

1 102(b), ideas, facts, so many limitations on the scope  
2 of copyright that are constitutional that I think  
3 would prevent there from being a version of ancillary  
4 copyright that could possibly be constitutional.

5 Thank you.

6 MS. KERN: Thank you. Mr. Band, did you  
7 have a response, or did you just -- okay. Thank you.  
8 So thank you so much for your responses, and I will  
9 turn it back over to Chris Weston.

10 MR. WESTON: Thanks, Melinda. So I wanted  
11 to -- something that John Bergmayer mentioned that we  
12 maybe have not paid much attention to was the idea-  
13 expression dichotomy, and I was thinking about some of  
14 the examples that Professor Ginsburg provided of  
15 multiple headlines for the same event but that were  
16 dramatically different in expression, and I was just  
17 wondering what your reaction to that example was in  
18 terms of considering whether or not headlines should  
19 properly be copyrightable regardless of length. Carlo  
20 had his hand up first.

21 MR. LAVIZZARI: Yeah, just as I mentioned  
22 earlier in that Chancery Division case of Meltwater,  
23 which is a media monitoring organization operating  
24 globally and having been sued successfully globally by  
25 many newspaper publishers, it was revealed that there

1 very often are, in fact, competing headlines crafted  
2 by different authors from the authors of the articles,  
3 so you can look at that case decided in 2010 where  
4 Meltwater was found liable and that absolutely these  
5 headlines are worth protecting, as sometimes are  
6 creative titles of books.

7 I would also like to point you to the  
8 interesting debate that took place at the Charles  
9 Clark lecture in 2017 between Justice Leval and Jon  
10 Baumgarten where they discussed, in fact, the Google  
11 Books case and the first instance case in the district  
12 court as well as the case that Justice Leval was  
13 ruling on, and he did, in fact, note that as part of  
14 the record of that case, the snippets that Google  
15 shows exclude short works. They exclude cookbooks,  
16 poems, and other type of look up information from the  
17 snippets, so that was not part of that ruling  
18 whatsoever even though that case is a mass  
19 digitization case, not a mass dissemination case.

20 But it's worth reading into the U.S.  
21 Copyright Office that that ruling is no support for  
22 not protecting short works. Quite the contrary. The  
23 Judge in that discussion implicitly found that the  
24 harm caused to short works and short copyrightable  
25 phrases is actually greater than for longer works.



1 Thank you.

2 MR. WESTON: Thanks. John?

3 MR. BERGMAYER: Yeah, I just want to make  
4 sure that we're distinguishing, I think, two very  
5 distinct legal concepts when we're talking about  
6 headlines because there's copyrightability and then  
7 there's fair use, and, you know, the copyrightability  
8 headline question is just similar to what we said  
9 before about short phrases. It's like shorter phrases  
10 are simply less likely to be original. You know, I  
11 agree it is possible in language to convey the same  
12 underlying factual information sometimes with  
13 different words. That's one question.

14 Then the second question is just fair use.  
15 It is very possible to maintain that all things being  
16 equal, because they're headlines, because you're  
17 linking to something, there's all sorts of reasons to,  
18 you know, posit that just regardless of where you come  
19 down on copyrightability that the quotation of  
20 headlines specifically, not short phrases in the  
21 abstract but specifically headlines in this context is  
22 much more likely to be found a fair use even if you  
23 concede on copyrightability.

24 MR. WESTON: Thanks. Jonathan? You're  
25 muted.

1           MR. BAND: Sorry. I decided I knew I needed  
2 to do something, so I lowered my hand, but I didn't  
3 remember that I also needed to unmute. Too many  
4 things at the same time. But the one point I wanted  
5 to make to add to what John was saying is that to the  
6 extent, you know, the great harm that rightsholders  
7 are alleging that is caused by the aggregators is that  
8 people are satisfied by seeing the headline and don't  
9 click through, right? They want to be found, but they  
10 don't want the person, you know, the reader, to stop  
11 at the headline and not go further.

12           And I would just submit that if a person is  
13 satisfied by the headline, that obviously indicates  
14 that the person only wanted the facts, wasn't  
15 interested in the expression, certainly not in the  
16 expression in the underlying article, and also not the  
17 expression that may exist, if any, in the headline.  
18 They simply wanted to know, what was the score of the  
19 Wizards game last night? You know, they simply want  
20 to know, you know, who, you know, who allegedly won an  
21 election. They're not interested in anything else  
22 because, if they're satisfied by the headline and  
23 don't click through, that's all they want, and that  
24 seems to me to indicate -- it suggests that certainly  
25 that it would be a fair use, right, in that case?

1           If the person is satisfied by simply seeing  
2 the Wizards, you know, all they wanted to know is not  
3 even -- they didn't care about the score. They simply  
4 wanted to know did the Wizards win last night and  
5 that's all they need, right? And they're not going to  
6 click through. Then, clearly, their purposes simply  
7 is factual, but even beyond that, I mean, that really  
8 does indicate the fact that the audience can be  
9 satisfied by purely factual information suggests that  
10 in the analysis that at least in that particular use  
11 that it is a merger.

12           MR. WESTON: Thanks. Eric?

13           MR. SCHWARTZ: Yeah, so there's two parts to  
14 the question, Chris, I think. You know, one is the  
15 predicate question of whether or not there's copyright  
16 protectability and then to some of the others who have  
17 answered this is the question of fair use. I think,  
18 to Jonathan's point that he was just making on click  
19 throughs to answer the second point first, the fact  
20 that 65 percent of those who go to Google News don't  
21 click back to the original source is an indication on  
22 a fair use analysis that there's a substitutional use  
23 by Google News.

24           To the first question, first of all, it's  
25 the broad strokes in some of the filings that somehow

1 news is not copyright protectable, you know, digging  
2 deeper into the question of whether a particular  
3 headline may be. Again, as happened in the cases that  
4 have looked at with short phrases, it's a question of  
5 originality in a short phrase and some may rise to the  
6 level of originality and some may not, but the bigger  
7 problem, of course, is it's not just headlines that  
8 are taken, it's entire photographs, so it's again  
9 misrepresenting what the problem is from the point of  
10 view of the creators, the authors and publishers.  
11 It's the taking of the headline plus the lede plus an  
12 entire photograph, which certainly has copyrightable  
13 expression, and incorporating that in a cut-and-paste  
14 way into the aggregator's site.

15 MR. WESTON: Thank you. Ali?

16 MS. STERNBURG: I would just note that the  
17 Copyright Office got it right in the NOI where it said  
18 that most fundamentally, facts and ideas are not  
19 copyrightable, nor are titles and short phrases,  
20 including headlines. I think it's important to --  
21 yeah, I agree that they should not -- that they're not  
22 protectable by copyright and that you don't even need  
23 to get to fair use, but there's fair use analysis  
24 there as well.

25 I was going to make another point, but I

1 just lost my train of thought. So, yeah, I guess I  
2 would just say that the Office -- another point -- I  
3 might make it later, but, yeah, I agree the Office is  
4 -- oh, so just generally in fair use, I think it's  
5 important that the analysis is flexible. We don't  
6 want to have to say that a certain amount of words or  
7 characters or something is some kind of pseudo-law  
8 thing where people -- so, yeah, I think it's important  
9 that that remains flexible, but you don't even need to  
10 get to fair use because it's not protectable by  
11 copyright, as the Office correctly noted in the NOI.

12 MR. WESTON: Thank you. I'm going to move  
13 to Andrew now to ask what is probably the last  
14 question.

15 MR. FOGLIA: Thanks. Because we are  
16 approaching the end of the panel, I want to ask  
17 whether there are other rights, whether of users or  
18 authors or platforms or treaty obligations, that we've  
19 not yet discussed that you would like to raise before  
20 we finish the panel? And I'll start with Edward.

21 MR. HASBROUCK: Thank you. I realize it's  
22 probably, you know, out of scope, but given the  
23 invitation, we would reiterate our belief that there  
24 is a continued need for moral rights legislation. I  
25 earlier alluded to the need for legislation to

1 implement Berne 10(3).

2 In addition, building on some of the  
3 comments in the earlier panels, the biggest barrier --  
4 barriers to enforcing our rights are often the  
5 registration requirements. And I find it particularly  
6 -- whether you want to call it ironic or call it  
7 hypocritical, that those who are saying, well, this  
8 isn't a copyright problem, this is an enforcement  
9 problem are the same ones who want to raise the  
10 barriers of registration, which currently are (a) a  
11 prohibited formality and a Berne violation and (b) a  
12 barrier to enforcement of our rights, even higher.  
13 So, if you want to say this is an enforcement problem,  
14 there remains a need to reform the registration  
15 system.

16 It's our position that registration should  
17 be eliminated, but even without doing that, while we  
18 appreciate very much the modest reform that was made  
19 in implementing group registration for multiple  
20 articles published online, that still doesn't come  
21 close to addressing the bigger problem of the  
22 effective impossibility of registering dynamic web  
23 content, which remains essentially a flat bar to  
24 meaningful copyright protection. So, if you're going  
25 to go down the path of, well, either some of this is

1 outside the scope of the Copyright Office or this is  
2 an enforcement problem, the place where you can really  
3 do something within the Office is to reform the  
4 procedures for registration of web content. Thank you  
5 very much.

6 MR. WESTON: Thank you. Jonathan?

7 MR. BAND: I remembered to perform the right  
8 function. So just in response to Ed's point, it's not  
9 a -- registration is not a Berne violation because it  
10 only applies to U.S. citizens.

11 With respect to the question you asked,  
12 Andrew, rightsholders have plenty of causes of action  
13 in addition to copyright that they could use right now  
14 in addition to Section 1201. If they use  
15 technological protections, you know, there's the  
16 Computer Fraud and Abuse Act, there's trespass to  
17 chattel, so Computer Fraud and Abuse is both at the  
18 federal level, but then every state just about, I  
19 believe, has its own version of a Computer Fraud and  
20 Abuse Act which prohibits unauthorized access to  
21 information and, again, trespass to chattel. So there  
22 are plenty of causes of action that could be used  
23 right now, but they're not being used, and so, you  
24 know, we've talked about why, you know, the  
25 rightsholders say they're not being used because, you

1 know, a gun is being held to their head and there's a  
2 Hobson's choice.

3 I would suggest that perhaps if, you know,  
4 the right entity did the deep economic analysis, the  
5 conclusion is that the value flow is entirely in the  
6 direction of the rightsholders and that they benefit  
7 so much more, you know, from being included in Google  
8 News than not being included in Google News that --  
9 you know, so that's why. I mean, they just simply  
10 would make an obvious economic choice that this is --  
11 that they get a huge benefit from it and that having a  
12 must carry -- having a, you know, additional payment  
13 would simply -- certainly, for the big guys, would  
14 just be, you know, additional gravy.

15 MR. FOGLIA: Thank you. And everyone else,  
16 if you can please answer the question and fold in any  
17 closing statement you want to offer because we're  
18 going to be transitioning to closing statements.  
19 Thanks. Carlo?

20 MR. LAVIZZARI: Yes. So I have three points  
21 that might be interesting for the Copyright Office to  
22 consider. The first one is one that builds around  
23 what Jonathan just said. When I have to console  
24 clients that their works have been copied, I say,  
25 "what's worse than being copied?" -- "Not being



1 copied." It seems to me that that is pretty much what  
2 Jonathan said.

3 And it looks to me -- that brings me to my  
4 second point, that perhaps the principles around  
5 standard essential patents could be interesting where  
6 you have large companies doing a holdout, effectively  
7 refusing to accept the license. It seems that large  
8 news aggregators are effectively doing that. It's a  
9 holdout. They could, but they just choose not to.

10 The third and last item is linked to the  
11 Berne Convention, but, also, I like in particular the  
12 wording of the European Copyright Directive, Article  
13 5-3(c). I'm going to read it. It won't take long.

14 It's an exception, but you will see that it  
15 holds some interesting comebacks for rightsholders.  
16 So it is allowed "to make reproductions by the press,  
17 communication to the public or making available of  
18 published articles on current economic, political, or  
19 religious topics or of broadcast or other subject  
20 matter of the same character, in cases where such use  
21 is not expressly reserved, and as long as the source,  
22 the author is indicated or the use of the works in  
23 connection with the reporting of current events, to  
24 the extent justified for the informatory purpose as  
25 long as the source, including the author's name, is

1 indicated, unless this turns out to be impossible."

2           It seems to me to the extent that these  
3 platforms are acting as aggregators, why aren't they  
4 simply considered -- I know they fight this status,  
5 other organs of the press, in which case they should  
6 be held to the same standard? So, to the extent that  
7 they curate content, I don't really see why these  
8 rules shouldn't apply. They can also be found in  
9 Article 10(2) and (3) of the Berne Convention, so I  
10 just quoted here the European Copyright Directive, but  
11 there is an international standard to the same effect.

12           My last point is linked to the old Times v.  
13 Tasini case. In that case where it was about who owns  
14 digital rights, a U.S. court eventually refused to  
15 grant an injunction to Tasini author against Times  
16 saying that it would be a disproportionate remedy but  
17 that there would be compensation, and I do wonder if  
18 these principles applying to injunctive relief in the  
19 U.S. may also in some way contribute to the balance of  
20 finding a higher level of copyright protection in the  
21 U.S.

22           MR. FOGLIA: Thanks. Eric?

23           MR. SCHWARTZ: So, as just closing remarks,  
24 just want to say to Chris, Andrew, Melinda and  
25 everyone at the Copyright Office thank you very much,

1 first of all, for undertaking this study. To repeat  
2 something that's, you know, sort of a theme of mine in  
3 this panel then, that from the News Media Alliance's  
4 point of view, we do think it would be very helpful to  
5 restate and clarify the scope of existing rights and  
6 protection and the nature of fair use in this  
7 particular instance.

8 Second, that we are facing primarily, as  
9 I've said, an enforcement problem. To sort of build  
10 on something Edward just raised to this last question,  
11 we did make suggestions about improving internal  
12 Copyright Office practices with regard to the  
13 registration of dynamic websites, and we would look  
14 forward to working with the Copyright Office on ways  
15 to do this. I can speak from personal experience  
16 having made the first registration for a website, I  
17 don't know, 15 or 20 years ago, whenever it was, and  
18 those practices haven't changed all that much, but,  
19 obviously, the nature of websites has.

20 Perhaps a pre registration type system of a  
21 paper only initially followed by a subsequent deposit  
22 copy, something that -- something has to be better  
23 than the current system, and it is important if  
24 enforcement is the theme of this panel for my point of  
25 view, it's certainly important to have an effective

1 and easy registration system both for standing to sue  
2 and for effective remedies in Section 412, statutory  
3 damages and attorneys' fees. Thank you.

4 MR. FOGLIA: Ali?

5 MS. STERNBURG: Yes. Thanks again for the  
6 opportunity to participate in this. Just to kind of  
7 reiterate some of the points that I made throughout, I  
8 think there are a lot of copyright and copyright  
9 adjacent and some non-copyright reasons why additional  
10 press publisher rights are essentially an ancillary  
11 copyright would be really problematic under U.S. law  
12 and in international obligations.

13 Just to raise one more element of U.S.  
14 copyright law that hasn't really been mentioned a lot  
15 but was mentioned in the Office's NOI is the merger  
16 doctrine. We talked a bit about idea-expression, but  
17 just to quote from the Office's NOI itself, the merger  
18 doctrine bars protection - "where there are only a  
19 few, limited ways of expressing an idea, the merger  
20 doctrine bars protection for the expression in order  
21 to avoid giving a backdoor monopoly to the idea  
22 itself," so I just mention that as yet another reason  
23 under U.S. copyright law that the scope of  
24 protectability and other limitations and exceptions  
25 like fair use, just one more reason why there are

1 concerns on behalf of industry and the public  
2 interest. Thanks again.

3 MR. FOGLIA: Thanks. Jonathan?

4 MR. BAND: Thanks. So two quick points.  
5 One is that as the Copyright Office looks at this  
6 issue, it really needs to dig into the history and  
7 really understand how the Internet generally, not news  
8 aggregation specifically, but the Internet generally,  
9 has completely eviscerated the historic business model  
10 of newspapers in general and local newspapers in  
11 particular and how it's the Internet that has, you  
12 know, the Internet writ large has basically eliminated  
13 the local newspaper's monopoly over advertising, and  
14 that is the root cause of the crisis that is facing  
15 local newspapers now.

16 And so, you know, the Office really needs to  
17 focus on that. To the extent that it's, you know,  
18 there's this, you know, narrative that now we're  
19 hearing about how the news aggregators somehow are  
20 siphoning off traffic and somehow benefitting even  
21 though that's kind of hard to see exactly how they  
22 benefit, but, you know, to the extent that they do  
23 benefit by people simply stopping at Google News,  
24 which has no ads, but, you know, and the argument that  
25 somehow there's a substitution effect, again, the

1 Office really needs to look deep, and I think the  
2 ultimate answer is going to be there will be no  
3 conclusive evidence that there is a meaningful  
4 substitution effect of the people.

5           There's no way -- you know, a person who  
6 simply again wants to know what the score of the  
7 Wizards game was last night, to say somehow that if  
8 they had gone to the Washington Post's page that they  
9 then would have what? Read the article? Spent more  
10 time? Clicked on ads? I mean, it's entirely  
11 speculative, especially if, again, most -- the people  
12 who are stopping at the headline who simply get the  
13 fact that they want, they're not going to be clicking  
14 on anything, and

15           MR. FOGLIA: Jonathan, we're three minutes  
16 over, so if you could conclude.

17           MR. BAND: Right. So I think it's just, you  
18 know, there really needs to be digging into the  
19 substitution effect issue and not simply accepting it  
20 at face value.

21           MR. FOGLIA: Thanks. And sorry to cut you  
22 off. John?

23           MR. BERGMAYER: News is a public good.  
24 Public Knowledge agrees that there's a challenge  
25 particularly with local news, and we think that a

1 vigorous public policy response from the government is  
2 warranted. However, putting the constitutional  
3 arguments, I've said enough aside, I think that a  
4 property right-based approach is simply the wrong  
5 approach. It is a square peg in a round hole. I  
6 don't think it would work, and it would have many  
7 unintended consequences.

8 We are not just saying "no" to everything.  
9 Our comments do have -- you know, we do think they're  
10 outside the jurisdiction of this Office. Other  
11 solutions, and I think it's probably relevant to some  
12 of the people here, our policy solution does involve  
13 vigorous antitrust enforcement against some of the  
14 panelists who are here today, so, you know, I think  
15 you can sort of recognize that there is a problem but  
16 just profoundly disagree on the means to address the  
17 problem, and I would hope that everyone who has  
18 participated today, you know, can understand, you  
19 know, this is a good faith argument. You know, I  
20 respect a lot of the arguments on the other side, and  
21 I would hope that, you know, others give the same  
22 courtesy to us. Thank you.

23 MR. FOGLIA: Thanks. And I see Edward and  
24 Ali have their hands up. We are five minutes over, so  
25 I will ask each of you to keep it to 30 seconds if

1 possible, and I'll start with Ali since she had her  
2 hand up first.

3 MS. STERNBURG: Thank you. I just wanted to  
4 raise one more item and reiterate one thing that I and  
5 several other panelists have said throughout today.  
6 One thing I didn't really talk about as much, but  
7 there's a lot of U.S. copyright precedent around fair  
8 use, thumbnail photos, snippets in search engines, so  
9 there's a lot of fair use precedent in addition to a  
10 lot of copyright protections, scope reasons, but just  
11 to reiterate the final point is that this is the  
12 Copyright Office, and a lot of what's been discussed,  
13 even as John Bergmayer just mentioned, a lot of what's  
14 been discussed has been outside of the scope of  
15 copyright and more in antitrust and competition and  
16 other areas of law that I don't think are within the  
17 scope of what Congress asked and what this study is  
18 intended to do, so I would encourage staying on topic  
19 to copyright. Thank you.

20 MR. FOGLIA: Thanks. Edward?

21 MR. HASBROUCK: More than anything else, the  
22 future of journalists depends on whether -- journalism  
23 -- depends on whether journalists can continue to make  
24 a living as journalists and continue to practice that  
25 profession, so I hope that you will center your



1 concerns going forward on the rights, the livelihoods,  
2 the business models of those journalists and how to  
3 make sure that they remain viable. Thank you.

4 MR. FOGLIA: Thanks. Melinda?

5 MS. KERN: All right. Well, thank you,  
6 everyone. That concludes our third and final panel  
7 for the Ancillary Copyright Protections for Publishers  
8 roundtable. If all the panelists on this panel could  
9 just please make sure their microphones are muted and  
10 turn their cameras off, we will resume our audience  
11 participation session at 3:15 p.m. Eastern Standard  
12 Time, so that's in about eight minutes, so thank you  
13 so much, and we will see you guys back here at 3:15.

14 (Whereupon, a brief recess was taken.)

15 MR. WESTON: Okay. Welcome back, everybody.  
16 It's 3:15, and as announced, we have a open mike  
17 session for people who signed up in order to give  
18 brief oral comments on the topic at hand, copyright  
19 protections for press publishers, so I believe we have  
20 two people who have signed up. The first is Jay Leon  
21 Peace, Jr., and so I would ask that Mr. Peace be  
22 unmuted and he can go ahead and make his comment.

23 MR. PEACE: I apologize. I had a urgent  
24 call on the other line there. Yes, I can be heard?

25 MR. WESTON: Yes, we can hear you.

1           MR. PEACE: Okay. Thank you. Just very  
2 short, I guess, I'll make it much shorter, is that my  
3 request is that the fees for registration, if there's  
4 any way to have them lowered for those of us who are  
5 independent, freelance, or say non-traditional  
6 providers to facilitate our getting access from, I  
7 guess, in the -- access to protection for our content,  
8 if there's any way to lower those fees. The larger  
9 institutions and people that are more established and  
10 they have more money aren't as impacted as those of us  
11 that do not.

12           MR. WESTON: Okay. Thank you very much.

13           MR. PEACE: Thank you. Thank you.

14           MR. WESTON: Our next speaker or next  
15 commenter is Michelle Shocked, and you can go ahead  
16 whenever you're ready.

17           (No response.)

18           MR. WESTON: You can go ahead. You're muted  
19 right now.

20           MS. SHOCKED: Thank you for following  
21 through on Senator Tillis's request to conduct this  
22 study and for the different points of view that were  
23 represented, but if there's anything I can do to  
24 amplify the point of view represented by Edward  
25 Hasbrouck and the public commenter that just spoke,

1 we're independent creators, and I don't know how often  
2 our voices are represented or heard in these  
3 conversations, but this is an opportunity to let you  
4 know that we're really struggling out here, and we're  
5 relying on the Copyright Office to find a remedy given  
6 all of the factors that are destroying our  
7 livelihoods. Thank you.

8 MR. WESTON: Thank you very much. So we  
9 have no more people who signed up to comment, so I  
10 want to close this roundtable by saying thank you to  
11 Andrew and Melinda, who joined me in asking questions.  
12 Thank you to Steve and Alicia, who helped set all this  
13 up and helped manage the Zoom calls. And finally and  
14 most of all, thank you to all the panelists, who took  
15 time out of their schedule to join us, and thank you  
16 to everybody who has and who will submit written  
17 comments. With -- I don't believe there's anything  
18 else, so I will call this roundtable to a close and  
19 wish everyone a good afternoon.

20 (Whereupon, at 3:20 p.m., the roundtable in  
21 the above entitled matter adjourned.)

22 //

23 //

24 //

25 //

REPORTER'S CERTIFICATE

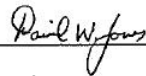
CASE TITLE: Publishers' Protections Study Roundtable

HEARING DATE: December 9, 2021

LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the Library of Congress.

Date: December 9, 2021



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<p><b>\$</b></p> <p><b>\$5</b> [1] 179:13  <b>\$90</b> [1] 179:12  <b>\$95</b> [1] 179:12</p> <hr/> <p><b>/</b></p> <p>// [24] 142:6,7,8,9,10,11,12,13,14,15,16,17,18,19,20,21,22,23,24,25  <b>210</b>:22,23,24,25</p> <hr/> <p><b>0</b></p> <p><b>08</b> [2] 16:12,13</p> <hr/> <p><b>1</b></p> <p><b>1</b> [2] 72:21,21  <b>1:30</b> [3] 141:22 142:5  <b>143</b>:2  <b>10</b> [4] 50:13 72:24 <b>110</b>:  17 177:10  <b>10(1)</b> [12] 145:24,25  <b>146</b>:5 <b>148</b>:22 <b>149</b>:5,8,  23 <b>150</b>:11 <b>151</b>:1,8,12  <b>152</b>:9  <b>10(2)</b> [1] 201:9  <b>10(3)</b> [6] 149:22,24 <b>150</b>:  3,9,13 <b>197</b>:1  <b>10,000</b> [1] 55:15  <b>10:45</b> [1] 73:1  <b>100</b> [2] 177:10 178:1  <b>102(b)</b> [1] 190:1  <b>107</b> [1] 189:25  <b>12:20</b> [1] 142:3  <b>1201</b> [12] 68:19 <b>105</b>:6  <b>125</b>:21 <b>129</b>:21,22 <b>130</b>:  3,5,11,11 <b>159</b>:10 <b>169</b>:  24 <b>198</b>:14  <b>1201(a)</b> [4] 89:24 <b>90</b>:  13 <b>104</b>:16,16  <b>15</b> [7] 71:13 <b>152</b>:7 <b>153</b>:  11 <b>155</b>:7 <b>166</b>:16 <b>182</b>:  4 <b>202</b>:17  <b>188</b> [3] 132:12,21,21  <b>1880s</b> [1] 151:2  <b>1918</b> [1] 70:7  <b>1967</b> [1] 151:3  <b>1970s</b> [2] 188:16 <b>189</b>:  15  <b>1972</b> [1] 188:5  <b>1976</b> [1] 42:8</p> <hr/> <p><b>2</b></p> <p><b>2</b> [6] 36:10 37:4 <b>52</b>:20  <b>72</b>:25 <b>73</b>:1 <b>144</b>:1  <b>20</b> [3] 31:17 <b>32</b>:13 <b>202</b>:  17  <b>2000s</b> [1] 176:3  <b>2008</b> [1] 92:21  <b>2009</b> [1] 28:16  <b>2010</b> [2] 168:20 <b>191</b>:3  <b>2017</b> [1] 191:9  <b>2019</b> [1] 156:23  <b>2020</b> [1] 92:21</p>	<p><b>2021</b> [1] 142:5  <b>20th</b> [1] 147:1  <b>24</b> [2] 15:7 <b>47</b>:23  <b>29</b> [1] 156:23</p> <hr/> <p><b>3</b></p> <p><b>3</b> [4] 52:20 <b>141</b>:22 <b>145</b>:  21 <b>201</b>:9  <b>3:15</b> [6] 5:9 <b>74</b>:8 <b>143</b>:  23 <b>208</b>:11,13,16  <b>3:20</b> [1] 210:20  <b>30</b> [3] 37:3 <b>70</b>:13 <b>206</b>:  25  <b>30,000</b> [1] 164:20  <b>300</b> [1] 60:22  <b>31,000</b> [1] 92:21  <b>33</b> [1] 154:22  <b>35</b> [2] 19:19 <b>28</b>:20  <b>36</b> [2] 37:3,5  <b>37,000</b> [1] 19:8</p> <hr/> <p><b>4</b></p> <p><b>40</b> [1] 76:11  <b>412</b> [1] 203:2  <b>450,000</b> [1] 60:21  <b>4A</b> [1] 118:12</p> <hr/> <p><b>5</b></p> <p><b>5-3(c)</b> [1] 200:13  <b>50</b> [1] 169:12  <b>500</b> [1] 110:7  <b>500,000</b> [1] 61:17</p> <hr/> <p><b>6</b></p> <p><b>65</b> [1] 194:20</p> <hr/> <p><b>7</b></p> <p><b>7</b> [1] 55:15  <b>7,000</b> [1] 60:21  <b>71,000</b> [1] 92:20</p> <hr/> <p><b>8</b></p> <p><b>8</b> [4] 128:2,2 <b>170</b>:18,18</p> <hr/> <p><b>9</b></p> <p><b>9</b> [1] 142:5  <b>9:05</b> [1] 3:2  <b>90</b> [1] 37:2  <b>90,000</b> [1] 61:18  <b>90s</b> [1] 176:3  <b>95</b> [1] 26:14</p> <hr/> <p><b>A</b></p> <p><b>a.m</b> [1] 3:2  <b>abandoning</b> [1] 140:  16  <b>abided</b> [1] 184:10  <b>abilities</b> [2] 37:13 <b>53</b>:  15  <b>ability</b> [16] 14:2,3,21  <b>28</b>:7,9 <b>29</b>:5 <b>45</b>:22 <b>46</b>:  13 <b>62</b>:8 <b>68</b>:18,23 <b>108</b>:  12 <b>119</b>:5 <b>124</b>:6 <b>164</b>:  13 <b>177</b>:1  <b>able</b> [19] 34:17,20,22</p>	<p><b>38</b>:15,25 <b>39</b>:10,11 <b>46</b>:  2,5 <b>69</b>:1 <b>79</b>:20 <b>82</b>:9  <b>84</b>:15,16 <b>97</b>:2 <b>109</b>:19  <b>112</b>:5 <b>148</b>:7 <b>178</b>:7  <b>above</b> [2] 142:4 <b>210</b>:  21  <b>absence</b> [1] 87:6  <b>absolutely</b> [14] 17:3  <b>85</b>:5,6,11,12 <b>86</b>:11  <b>92</b>:24 <b>94</b>:4 <b>133</b>:13  <b>137</b>:6 <b>164</b>:24 <b>165</b>:25  <b>166</b>:10 <b>191</b>:4  <b>abstract</b> [2] 17:18  <b>192</b>:21  <b>Abuse</b> [3] 198:16,17,  20  <b>accelerated</b> [5] 19:15  <b>24</b>:22 <b>28</b>:3 <b>34</b>:10 <b>62</b>:  21  <b>accept</b> [3] 108:3 <b>150</b>:  17 <b>200</b>:7  <b>acceptable</b> [2] 60:4,6  <b>accepting</b> [1] 205:19  <b>access</b> [27] 13:4,5 <b>32</b>:  3 <b>35</b>:4 <b>68</b>:17,20 <b>69</b>:3  <b>90</b>:1,3,14 <b>100</b>:16,19  <b>104</b>:15,17 <b>105</b>:19 <b>106</b>:  19 <b>120</b>:22 <b>123</b>:9,11  <b>130</b>:8,15 <b>169</b>:24 <b>170</b>:  6 <b>186</b>:16 <b>198</b>:20 <b>209</b>:  6,7  <b>access-based</b> [2] 89:  24 <b>90</b>:9  <b>accessed</b> [1] 27:24  <b>accompanied</b> [1]  <b>173</b>:9  <b>accordance</b> [2] 149:  10,18  <b>according</b> [1] 92:21  <b>account</b> [1] 117:15  <b>accounted</b> [1] 36:10  <b>accrue</b> [1] 61:7  <b>accurate</b> [4] 20:24 <b>39</b>:  3 <b>94</b>:19 <b>125</b>:21  <b>accurately</b> [2] 43:10  <b>129</b>:5  <b>accusation</b> [1] 135:  24  <b>achieve</b> [2] 66:7,16  <b>achieved</b> [1] 93:5  <b>acknowledges</b> [1] 49:  8  <b>acknowledgment</b> [1]  <b>49</b>:2  <b>acquire</b> [1] 37:24  <b>acquires</b> [1] 28:16  <b>acquiring</b> [1] 54:2  <b>acquisition</b> [1] 76:13  <b>acquisitions</b> [1] 24:  24  <b>across</b> [14] 6:9 <b>7</b>:17  <b>16</b>:16 <b>19</b>:7,24 <b>25</b>:13</p>	<p><b>55</b>:7,14 <b>61</b>:19 <b>67</b>:11  <b>71</b>:15 <b>111</b>:6 <b>130</b>:4  <b>134</b>:5  <b>Act</b> [6] 49:7 <b>71</b>:15 <b>98</b>:  10,10 <b>198</b>:16,20  <b>acted</b> [1] 129:18  <b>acting</b> [3] 22:9 <b>81</b>:22  <b>201</b>:3  <b>action</b> [6] 67:23 <b>68</b>:1,  3 <b>162</b>:1 <b>198</b>:12,22  <b>active</b> [3] 68:15 <b>76</b>:11  <b>120</b>:8  <b>activities</b> [1] 23:11  <b>actors</b> [2] 117:16 <b>189</b>:  3  <b>actual</b> [6] 11:9 <b>13</b>:18  <b>43</b>:20 <b>58</b>:7 <b>59</b>:14 <b>69</b>:  24  <b>actually</b> [40] 8:19 <b>10</b>:  15,20 <b>12</b>:4 <b>13</b>:23 <b>15</b>:  23 <b>27</b>:6 <b>36</b>:19 <b>37</b>:2  <b>39</b>:3 <b>43</b>:3,5 <b>50</b>:20 <b>55</b>:  9 <b>57</b>:8 <b>58</b>:18 <b>59</b>:4 <b>60</b>:  11 <b>68</b>:19 <b>70</b>:11 <b>71</b>:4  <b>74</b>:18 <b>95</b>:21 <b>96</b>:3 <b>98</b>:  19 <b>99</b>:11 <b>102</b>:23 <b>113</b>:  14,15 <b>136</b>:1 <b>153</b>:17  <b>164</b>:8,14 <b>168</b>:23 <b>173</b>:  16 <b>180</b>:25 <b>181</b>:7 <b>185</b>:  16 <b>188</b>:25 <b>191</b>:25  <b>ad</b> [15] 9:20 <b>26</b>:6,10,15  <b>30</b>:25 <b>31</b>:1,18 <b>48</b>:15,  20 <b>53</b>:12 <b>92</b>:18 <b>106</b>:  25 <b>107</b>:8 <b>136</b>:2 <b>182</b>:  16  <b>adaptation</b> [1] 34:10  <b>add</b> [9] 13:20 <b>30</b>:9 <b>39</b>:  18 <b>41</b>:22 <b>50</b>:17 <b>51</b>:6  <b>57</b>:8 <b>129</b>:15 <b>193</b>:5  <b>added</b> [1] 91:11  <b>Adding</b> [1] 28:21  <b>addition</b> [8] 62:3 <b>64</b>:  24 <b>65</b>:15 <b>171</b>:4 <b>197</b>:2  <b>198</b>:13,14 <b>207</b>:9  <b>additional</b> [20] 3:14,  24 <b>13</b>:8 <b>73</b>:9 <b>75</b>:2,5  <b>76</b>:15 <b>77</b>:13,19 <b>96</b>:10,  12 <b>101</b>:12 <b>116</b>:24 <b>123</b>:  13 <b>141</b>:23,24 <b>183</b>:19  <b>199</b>:12,14 <b>203</b>:9  <b>address</b> [31] 8:2 <b>9</b>:24  <b>10</b>:10 <b>13</b>:1 <b>16</b>:6 <b>21</b>:  19 <b>27</b>:17,18 <b>29</b>:10 <b>31</b>:  25 <b>32</b>:15 <b>57</b>:9 <b>88</b>:6  <b>89</b>:16,19,21 <b>90</b>:4,12,  20 <b>103</b>:10,15 <b>116</b>:21  <b>121</b>:11 <b>129</b>:19 <b>156</b>:10  <b>164</b>:19 <b>165</b>:5 <b>169</b>:20  <b>172</b>:23 <b>180</b>:20 <b>206</b>:16  <b>addressed</b> [7] 10:9  <b>30</b>:6 <b>87</b>:13 <b>88</b>:14 <b>117</b>:  7 <b>162</b>:23 <b>171</b>:6</p>	<p><b>addresses</b> [1] 59:5  <b>addressing</b> [5] 29:11  <b>30</b>:5 <b>32</b>:9 <b>104</b>:1 <b>197</b>:  21  <b>adds</b> [1] 150:16  <b>adequate</b> [8] 48:17  <b>63</b>:9 <b>98</b>:2,5 <b>157</b>:25  <b>162</b>:17 <b>165</b>:1,1  <b>adequately</b> [3] 7:20  <b>23</b>:9,9  <b>adhere</b> [2] 64:24 <b>65</b>:8  <b>adhesion</b> [1] 29:8  <b>adjacent</b> [2] 129:19  <b>203</b>:9  <b>adjourned</b> [1] 210:21  <b>adjunct</b> [1] 66:20  <b>administrability</b> [1]  <b>135</b>:17  <b>administration</b> [1]  <b>135</b>:8  <b>admission</b> [1] 93:20  <b>admit</b> [2] 32:8,19  <b>adopt</b> [1] 159:25  <b>adopted</b> [6] 3:19,25  <b>103</b>:3 <b>146</b>:21 <b>155</b>:8  <b>166</b>:16  <b>adopting</b> [2] 32:18 <b>75</b>:  25  <b>ads</b> [6] 20:19 <b>36</b>:12,13  <b>44</b>:17 <b>204</b>:24 <b>205</b>:10  <b>advance</b> [1] 139:15  <b>advanced</b> [1] 168:22  <b>advancing</b> [1] 164:15  <b>advert</b> [1] 66:18  <b>advertisements</b> [2]  <b>28</b>:13 <b>35</b>:1  <b>advertisers</b> [2] 25:3  <b>26</b>:6  <b>advertising</b> [21] 8:14  <b>19</b>:20 <b>21</b>:15 <b>22</b>:15 <b>23</b>:  16,21 <b>26</b>:14 <b>28</b>:7 <b>32</b>:  18 <b>36</b>:25 <b>37</b>:1 <b>60</b>:3  <b>62</b>:2 <b>63</b>:5 <b>101</b>:11 <b>180</b>:  4,6,7,8,10 <b>204</b>:13  <b>advertisings</b> [1] 20:  25  <b>Affairs</b> [4] 4:11,12 <b>73</b>:  13 <b>153</b>:6  <b>affected</b> [3] 29:13 <b>86</b>:  9 <b>116</b>:19  <b>affecting</b> [1] 27:15  <b>affiliation</b> [3] 6:1 <b>73</b>:  23 <b>144</b>:5  <b>affirmative</b> [1] 87:16  <b>afford</b> [1] 141:10  <b>afoul</b> [1] 173:19  <b>Africa</b> [1] 145:6  <b>afternoon</b> [1] 210:19  <b>agency</b> [1] 154:16  <b>aggregate</b> [1] 100:19  <b>aggregated</b> [4] 10:13  <b>20</b>:2 <b>22</b>:9 <b>57</b>:13</p>	<p><b>aggregating</b> [2] 17:5  <b>107</b>:25  <b>aggregation</b> [31] 3:24  <b>7</b>:4 <b>8</b>:5,11 <b>13</b>:4,6,21,  25 <b>18</b>:4 <b>25</b>:17 <b>50</b>:18  <b>57</b>:11,18 <b>58</b>:2,10 <b>61</b>:  8 <b>63</b>:8 <b>69</b>:17 <b>70</b>:3 <b>81</b>:  13,19 <b>82</b>:6 <b>96</b>:14,14  <b>108</b>:3,7 <b>109</b>:9 <b>150</b>:17,  19 <b>180</b>:12 <b>204</b>:8  <b>aggregator</b> [3] 8:14  <b>141</b>:2 <b>169</b>:5  <b>aggregator's</b> [1] 195:  14  <b>aggregators</b> [38] 22:  3,6 <b>25</b>:2,6 <b>27</b>:13 <b>30</b>:  14 <b>31</b>:2,10,16 <b>35</b>:15  <b>36</b>:6 <b>47</b>:8 <b>49</b>:18 <b>52</b>:  16 <b>76</b>:20 <b>81</b>:23 <b>96</b>:16,  24 <b>108</b>:13 <b>124</b>:14 <b>140</b>:  21 <b>141</b>:4 <b>148</b>:7 <b>149</b>:  14 <b>150</b>:2 <b>157</b>:19 <b>165</b>:  19 <b>166</b>:5 <b>167</b>:18 <b>177</b>:  12 <b>181</b>:16,17 <b>184</b>:6  <b>189</b>:8 <b>193</b>:7 <b>200</b>:8  <b>201</b>:3 <b>204</b>:19  <b>aggregators'</b> [1] 149:  6  <b>ago</b> [7] 31:17 <b>32</b>:13 <b>38</b>:  9 <b>138</b>:17 <b>182</b>:4 <b>184</b>:2  <b>202</b>:17  <b>agree</b> [30] 13:19,23 <b>24</b>:  1 <b>25</b>:12,12 <b>32</b>:25 <b>33</b>:  5,15,22 <b>34</b>:1 <b>51</b>:5,12  <b>56</b>:11 <b>57</b>:21 <b>64</b>:18 <b>65</b>:  10,14 <b>67</b>:7 <b>70</b>:25 <b>74</b>:  21 <b>86</b>:13,14 <b>98</b>:18  <b>159</b>:15 <b>163</b>:6 <b>175</b>:14  <b>189</b>:22 <b>192</b>:11 <b>195</b>:21  <b>196</b>:3  <b>agreed</b> [1] 187:6  <b>agreement</b> [8] 47:20  <b>93</b>:12 <b>94</b>:14 <b>96</b>:6 <b>151</b>:  9 <b>167</b>:1,2,7  <b>agreements</b> [1] 166:  21  <b>agrees</b> [1] 205:24  <b>ahead</b> [11] 40:2 <b>60</b>:13  <b>91</b>:1 <b>118</b>:1 <b>146</b>:2 <b>154</b>:  7 <b>171</b>:13 <b>183</b>:24 <b>208</b>:  22 <b>209</b>:15,18  <b>aimed</b> [2] 181:20,22  <b>air</b> [3] 45:9 <b>62</b>:22 <b>105</b>:  24  <b>albeit</b> [1] 11:13  <b>alcohol</b> [1] 60:8  <b>Ali</b> [10] 145:16 <b>162</b>:21  <b>167</b>:9 <b>169</b>:17 <b>170</b>:11  <b>180</b>:19 <b>195</b>:15 <b>203</b>:4  <b>206</b>:24 <b>207</b>:1  <b>Alicia</b> [1] 210:12  <b>alien</b> [1] 57:1</p>
--	--	---	---	---	--

<p><b>allegedly</b> [1] 193:20  <b>alleging</b> [1] 193:7  <b>allein</b> [1] 169:14  <b>Alliance</b> [14] 6:8,14, 17 88:24 91:9 99:6 139:22 144:10 145:14 148:18 149:17 154:9, 12 166:24  <b>Alliance's</b> [1] 202:3  <b>allocated</b> [1] 77:1  <b>allocation</b> [1] 118:24  <b>allow</b> [13] 5:4 27:24 44:5,10 71:10 74:2 104:20 131:11 137:25 146:8,23 158:1,1  <b>allowed</b> [7] 147:11 158:16 169:6 176:13, 14,18 200:16  <b>allowing</b> [2] 140:19 145:9  <b>allows</b> [4] 49:8 89:20 104:17 165:15  <b>alluded</b> [1] 196:25  <b>allusion</b> [1] 184:3  <b>almost</b> [6] 32:2 70:12 82:8 85:9 184:25 187: 25  <b>alone</b> [6] 11:21 61:18 79:12 102:25 134:4 169:15  <b>alongside</b> [1] 61:13  <b>alphabetical</b> [1] 144: 6  <b>alphabetically</b> [1] 6:1  <b>already</b> [19] 22:1 45:3 89:5 104:16 106:11 107:6,14,15 110:19 117:24 119:8 134:10 155:10,14 169:24 170: 6 171:12 172:2 182:6  <b>alter</b> [1] 105:4  <b>alternative</b> [1] 50:18  <b>amazing</b> [1] 13:24  <b>ambiguity</b> [2] 181:1, 10  <b>Amendment</b> [26] 67: 16 90:17 100:4 108: 25 117:20 125:20 153: 18,20,25 154:5 163:2, 7,18,25 164:3,4,16 167:11,14,21,25 170: 16 181:12,15,23 189: 24  <b>American</b> [5] 144:10 148:18 152:17,18 167: 4  <b>among</b> [7] 19:10 26:7 47:10 79:12 87:20 92: 20 94:17  <b>amongst</b> [2] 89:21 177:8  <b>amorphous</b> [1] 33:17</p>	<p><b>amount</b> [6] 14:19 16: 13 18:14 55:21 83:22 196:6  <b>AMP</b> [9] 28:3,9,11,22 29:2 35:24 36:2,3 63: 3  <b>amplify</b> [3] 93:16 123: 14 209:24  <b>analysis</b> [17] 11:23 27: 21 88:16 89:8 104:10 146:19 150:25 156:4 184:22 185:11 187:11, 13 194:10,22 195:23 196:5 199:4  <b>analytics</b> [1] 62:16  <b>analyzed</b> [1] 33:25  <b>ancient</b> [1] 188:1  <b>ancillary</b> [54] 3:17 71: 24 75:25 88:8,17 101: 20 102:13,25 103:17, 21 107:23 108:20 109: 23 117:2 119:25 122: 10 124:25 130:20 136: 18 143:4 146:11,11 147:4,12,16 148:2,16 149:5 152:23 153:21 155:5,9 156:15 159: 19,24,25 160:4,7,10 163:17,19 165:4 167: 15 185:5,5,23 186:1 188:10 189:4,10,21 190:3 203:10 208:7  <b>Andrew</b> [24] 4:12 5:21 12:1,2 17:25 36:18 52:22 67:18 71:22 73: 11 80:7 92:22 102:9 132:10 143:15 169:17 170:24 182:3 183:11 185:21 196:13 198:12 201:24 210:11  <b>angle</b> [2] 26:25 34:25  <b>animated</b> [1] 113:5  <b>Anne</b> [1] 105:10  <b>Annemarie</b> [12] 75:6, 7 76:2 94:8 100:10 102:11 107:14 109:7 115:8 128:9 133:22 137:23  <b>Annemarie's</b> [1] 107: 1  <b>announced</b> [2] 119:8 208:16  <b>another</b> [18] 11:25 19: 9 39:9,18 41:22 42: 12 51:16 62:12 64:10 68:7 97:15 100:5 113: 7 179:13 186:24 195: 25 196:2 203:22  <b>answer</b> [38] 4:20 7:8, 19 12:8 27:6 47:10 52:8 57:8 59:4 60:15 73:18 76:16,17 77:10,</p>	<p>11 84:21 85:2 86:13 90:10,22 92:22 103:7, 13,15 111:10 122:16 124:18 158:6 166:4 175:18 182:4,7,20 183:8 189:13 194:19 199:16 205:2  <b>answered</b> [3] 10:4 182:6 194:17  <b>answering</b> [1] 102:3  <b>answers</b> [6] 67:21 97: 12 102:6 134:20 143: 20 153:2  <b>anterior</b> [1] 75:9  <b>anti</b> [3] 48:18 49:8 62: 9  <b>anticipate</b> [1] 130:19  <b>antitrust</b> [29] 33:7 52: 9 80:20,25 86:5 104: 21 107:7 108:22 144: 18 164:1,3,14 167:24 168:1,3,6,12 172:24 173:7,8,9,19,22 180: 22,23 181:10,25 206: 13 207:15  <b>anybody</b> [4] 61:10 70: 15 85:4 113:18  <b>anyway</b> [1] 150:13  <b>apart</b> [1] 64:17  <b>apologize</b> [2] 127:11 208:23  <b>apparently</b> [2] 77:3, 15  <b>appeal</b> [1] 130:1  <b>appear</b> [8] 15:13,14 25:24 26:1 28:25 36: 3 44:11 100:17  <b>appearance</b> [1] 58:2  <b>appearing</b> [4] 6:13 40: 10,11,13  <b>appears</b> [8] 15:10,12 25:22 36:1 45:2 79: 21 83:13 87:23  <b>appendix</b> [2] 17:15,19  <b>applicable</b> [1] 69:17  <b>application</b> [1] 68:4  <b>applications</b> [2] 22: 15 35:8  <b>applied</b> [3] 117:14 149:9 152:18  <b>applies</b> [4] 120:7 132: 22 149:9 198:10  <b>apply</b> [8] 10:24 82:11 90:3,16 140:25 152: 15 176:11 201:8  <b>applying</b> [5] 12:15 176:1,15 185:2 201: 18  <b>appreciate</b> [12] 71:2 121:19 132:3 137:23 139:8 140:3 153:13 160:1,2,11 168:5 197:</p>	<p>18  <b>approach</b> [17] 33:7 43:16 50:24 55:3 98: 11 109:16 110:5,15 111:16 117:6 121:2 123:5 127:23 134:16 181:24 206:4,5  <b>approaches</b> [2] 32:18, 19  <b>approaching</b> [2] 26: 25 196:16  <b>appropriate</b> [12] 4:1 21:18 116:11 126:2 160:17 166:1,10 169: 6 171:7,15 172:7 183: 12  <b>appropriated</b> [1] 91: 12  <b>approximates</b> [1] 118:19  <b>arbitrage</b> [1] 62:3  <b>arbitrate</b> [1] 53:7  <b>arbitration</b> [8] 33:9,9 50:24 93:10 99:20,23 106:13,18  <b>arbitrator</b> [1] 141:12  <b>Archive</b> [3] 86:22 127: 1 184:5  <b>archives</b> [1] 127:1  <b>area</b> [1] 27:12  <b>areas</b> [2] 176:15 207: 16  <b>aren't</b> [9] 11:8 43:4,22 115:22 148:15 152:23 162:10 201:3 209:10  <b>arguably</b> [1] 137:19  <b>argue</b> [4] 59:21 141: 12 157:19 163:9  <b>arguing</b> [1] 98:21  <b>argument</b> [6] 8:5 118: 12 147:4 168:4 204: 24 206:19  <b>arguments</b> [3] 158:23 206:3,20  <b>arises</b> [1] 174:12  <b>arising</b> [1] 171:10  <b>around</b> [18] 51:19 54: 22 57:23 61:17 98:13 115:10 118:4 121:13, 20 144:4 151:5 159:7 167:12,13 181:16 199: 22 200:4 207:7  <b>arrangement</b> [1] 93:3  <b>article</b> [38] 7:6 37:25 39:6 40:16,16 44:13 71:13 92:2 98:8 103: 5 110:18,19 117:6 128:2 132:20 134:17 145:24 146:5 149:8 151:1,8,12 152:6,7 153:11 155:7 166:16 169:1 170:18 187:24</p>	<p>188:15,16,16 189:15 193:16 200:12 201:9 205:9  <b>Articles</b> [18] 20:5 33: 18 37:21 38:13,17,17 39:11 40:12 41:5 53: 10 56:4 106:11 188:2, 2 189:16 191:2 197: 20 200:18  <b>articulated</b> [1] 89:15  <b>artificial</b> [1] 174:21  <b>arts</b> [1] 175:6  <b>Artworks</b> [4] 85:2,8,8 114:6  <b>aside</b> [1] 206:3  <b>aspect</b> [4] 16:18 41: 23 42:13 98:12  <b>aspects</b> [4] 45:11 88: 13,15 117:1  <b>assess</b> [1] 184:22  <b>asset</b> [1] 77:14  <b>assets</b> [4] 96:24 97: 23 98:3,4  <b>assigned</b> [1] 130:10  <b>assist</b> [1] 188:24  <b>assistance</b> [1] 41:10  <b>Associate</b> [2] 4:9 35: 13  <b>associated</b> [1] 157: 22  <b>Association</b> [4] 144: 11,11,12 145:18  <b>association's</b> [1] 153: 23  <b>assume</b> [1] 37:20  <b>assumed</b> [1] 168:11  <b>assuming</b> [1] 49:15  <b>asymmetry</b> [1] 172: 21  <b>attention</b> [7] 5:14 8: 10 17:14 74:15 117: 16 139:21 190:12  <b>attitudes</b> [1] 121:15  <b>attorney</b> [2] 79:3 80: 12  <b>attorneys'</b> [1] 203:3  <b>attract</b> [1] 101:11  <b>attracts</b> [1] 22:21  <b>attributable</b> [1] 74:24  <b>audience</b> [27] 5:7,8, 10,16 15:19 18:15 22: 22 23:21 29:19 31:9 61:9 72:23 74:6,7,9, 17 113:10,12 136:10, 11 143:22 156:21 168: 19 169:5 177:9 194:8 208:10  <b>audiences</b> [6] 7:13 19:3 79:12,14,15 80: 3  <b>audio</b> [1] 73:2  <b>Australia</b> [13] 19:13</p>	<p>33:6,11 50:24 55:9, 18 100:3 108:14 109: 4 121:22 147:18 175: 24 176:20  <b>Australia's</b> [3] 171:5, 11 181:21  <b>Australian</b> [4] 173:14  <b>author</b> [7] 66:13 96:1 149:25 164:5 189:11 200:22 201:15  <b>author's</b> [1] 200:25  <b>authority</b> [3] 130:8,14 138:18  <b>authorize</b> [1] 14:14  <b>authorized</b> [1] 165:10  <b>authorizes</b> [1] 186:17  <b>authors</b> [23] 66:4,8,9 78:7 96:2 104:25 141: 25 150:5,16 152:17 171:16,18 172:10,16 173:10 175:6 183:2 185:16 189:12 191:2, 2 195:10 196:18  <b>Authors'</b> [4] 144:25 172:5 185:1,10  <b>authorship</b> [2] 124: 11,17  <b>available</b> [9] 46:14 74: 11 87:25 120:18 126: 9 147:24 148:1,5 200: 17  <b>avenue</b> [2] 35:18 51:8  <b>average</b> [1] 26:12  <b>avoid</b> [2] 96:11 203:21  <b>aware</b> [5] 54:14 85:1, 23 159:8 185:14  <b>away</b> [11] 8:14 108:13, 15,18,19 109:7,11 113:19 128:6 129:1 150:7  <b>Axel</b> [3] 76:9 125:10 160:9</p>
<b>B</b>					
<p><b>back</b> [30] 8:19 13:14, 16 28:23 33:14 45:20 50:5 66:18 68:22 70: 7 73:5 75:24 79:8,25 81:1 107:2 112:19 118:10 120:23 133:16 143:3 151:2 155:9 164:19 171:15 189:20 190:9 194:21 208:13, 15  <b>backbone</b> [1] 104:13  <b>backdoor</b> [1] 203:21  <b>background</b> [4] 121: 15 125:16 160:13 176: 16  <b>backstop</b> [1] 93:4  <b>bad</b> [10] 66:3 96:15 97: 3 108:7 112:8 120:21,</p>					

<p>21 133:7 168:1 179:23  <b>balance</b> [5] 20:18 97:6 157:13 189:5 201:19  <b>balanced</b> [2] 97:6 98:5  <b>Band</b> [17] 144:7,8,9 146:1,3 150:23 159:12,13 163:10 176:24 186:9,10 190:6 193:1 198:7 204:4 205:17  <b>bar</b> [3] 11:12 43:20 197:23  <b>Barbara</b> [2] 4:13 73:14  <b>bare</b> [1] 58:24  <b>bargain</b> [16] 33:8 50:8 93:1,2,4,7 97:21 105:18,19,20 111:8 119:6 123:7,15 168:8 173:10  <b>bargained</b> [1] 123:10  <b>bargaining</b> [18] 50:3,4 93:10 97:16,16,20,24 98:5 111:11 140:20,25 170:10 171:5,11 172:19,21 173:8 174:21  <b>barrier</b> [2] 197:3,12  <b>barriers</b> [2] 197:4,10  <b>bars</b> [2] 203:18,20  <b>baseball</b> [2] 33:9 93:9  <b>based</b> [13] 47:3 69:3 76:8,10 104:16 118:22,24 128:7 130:16 138:19 144:16 170:17 185:12  <b>Basel</b> [1] 145:4  <b>basic</b> [3] 32:16 33:1 152:1  <b>basically</b> [8] 18:3 31:25 33:7 107:24 128:10 173:15 182:9 204:12  <b>basis</b> [3] 9:4 112:5 124:18  <b>Baumgarten</b> [1] 191:10  <b>beast</b> [1] 16:5  <b>beat</b> [1] 19:3  <b>beating</b> [1] 70:3  <b>became</b> [7] 18:16,19,25 19:17 38:24 80:12 97:19  <b>become</b> [2] 28:19 51:22  <b>becomes</b> [2] 80:22 109:9  <b>becoming</b> [1] 39:14  <b>begin</b> [3] 4:18 73:8 184:22</p>	<p><b>beginning</b> [7] 8:20 18:7 39:15 52:13 72:11 82:9 87:13  <b>begs</b> [1] 96:4  <b>behalf</b> [12] 14:5,16 30:8 76:9 82:15 85:2,7 108:5 111:24 117:4 137:5 204:1  <b>behavior</b> [1] 23:6  <b>behind</b> [3] 110:4 112:8 126:24  <b>beholden</b> [1] 66:13  <b>belabor</b> [1] 129:7  <b>belief</b> [1] 196:23  <b>believe</b> [33] 8:16 10:1 21:17 35:2 37:4 45:23 47:22 48:14,17 61:5 64:19 65:2 68:6 76:15 87:25 97:17 107:18 114:8 117:23 123:4,5 134:21 138:9,13,22 144:7 151:25 176:12,21 185:21 198:19 208:19 210:17  <b>below</b> [1] 87:8  <b>below</b> [4] 107:13 124:13 131:13 143:25  <b>beneficial</b> [2] 21:1 174:7  <b>benefit</b> [27] 13:3 26:2 35:15,19 51:3 66:4 78:5,8 111:13,25 112:2 118:8,16 120:4 122:23 136:21 148:6,7,12 168:19 171:20 173:5 183:15 199:6,11 204:22,23  <b>benefits</b> [5] 61:6,11 111:2,4,19  <b>benefitted</b> [1] 103:2  <b>benefitting</b> [7] 79:22,24 118:11 171:22 175:6 185:18 204:20  <b>benign</b> [1] 136:25  <b>Bergmayer</b> [20] 144:13,14,15 151:15,16 158:5,6 159:15 163:1 167:22,23 175:1 181:13 185:22 186:6,7 190:11 192:3 205:23 207:13  <b>Berlin</b> [2] 76:8,11  <b>Berne</b> [35] 145:24,25 146:5,10,22 147:23 148:20,23 149:15,22,23,24 150:3,9,11,13,25 151:1,8,14,19,22,24 152:8,14,14,15,15,17,22 197:1,11 198:9 200:11 201:9  <b>Berne's</b> [1] 151:20  <b>Berners</b> [1] 12:18</p>	<p><b>besides</b> [1] 106:8  <b>best</b> [5] 52:5 66:7,16 104:22 135:18  <b>better</b> [10] 21:4 31:23 34:17 84:18 96:13 97:20 119:3 137:4 178:3 202:22  <b>between</b> [15] 11:17 20:22 42:4 44:23 47:4,7,20 67:17 143:7 156:15,24 172:19,21 174:13 191:9  <b>beyond</b> [11] 61:20 102:21 123:7 127:11 139:23 157:9 162:13 175:20 177:1,16 194:7  <b>bias</b> [2] 57:21 169:3  <b>big</b> [7] 85:19 139:12 174:10 177:2 179:17 189:3 199:13  <b>bigger</b> [8] 9:20,22 21:14 112:5 161:16 165:6 195:6 197:21  <b>biggest</b> [3] 20:16 81:18 197:3  <b>biggs</b> [1] 182:23  <b>Bill</b> [2] 156:25,25  <b>billion</b> [3] 15:7 47:23 120:8  <b>billions</b> [1] 183:7  <b>Bing</b> [1] 45:15  <b>bit</b> [14] 16:19 23:14 33:23 86:18 87:5 114:15 118:8 120:12 122:9 140:12 159:1 174:18 185:22 203:16  <b>bites</b> [4] 158:14,14,17,17  <b>bizarre</b> [1] 59:17  <b>black</b> [3] 150:18 174:19 175:10  <b>blanket</b> [1] 154:21  <b>bleeding</b> [1] 24:7  <b>bless</b> [1] 126:1  <b>blind</b> [1] 137:1  <b>blog</b> [3] 32:6 67:13 184:17  <b>blogs</b> [1] 67:11  <b>bloodbath</b> [1] 19:10  <b>blueprint</b> [2] 134:17,18  <b>blunt</b> [2] 178:24,24  <b>board</b> [7] 16:16 25:14 61:19 67:11 71:16 111:6 130:4  <b>bogus</b> [1] 130:21  <b>boils</b> [1] 114:16  <b>bond</b> [1] 59:1  <b>book</b> [1] 169:7  <b>Books</b> [4] 50:12 66:6 191:6,11</p>	<p><b>borne</b> [1] 95:18  <b>bot</b> [1] 162:4  <b>botch</b> [1] 78:25  <b>both</b> [27] 5:15 48:19 79:24 88:6,10 97:15 98:14 100:25 105:9 115:17 120:13 158:24 161:17 181:18 182:11,15,16,23 183:1,16,18 186:16,16,17 187:20 198:17 203:1  <b>bottom</b> [2] 55:14,22  <b>bounds</b> [1] 130:7  <b>brand</b> [4] 23:20 30:1 56:23 57:10  <b>branding</b> [1] 23:16  <b>breach</b> [1] 100:18  <b>breaching</b> [1] 12:19  <b>break</b> [5] 72:24 73:1 118:23,24 141:21  <b>brevity</b> [4] 11:3 43:7 124:13 154:25  <b>BRIDY</b> [5] 75:8 100:11 115:9 128:10 133:24  <b>brief</b> [9] 73:4 77:23 102:7 106:4 119:22 121:10 155:2 208:14,18  <b>briefly</b> [6] 5:25 52:1 76:7 91:4 94:12 102:1  <b>brilliantly</b> [1] 127:15  <b>bring</b> [5] 5:14 74:14 82:2 103:13 127:5 172:15  <b>bringing</b> [1] 141:13  <b>brings</b> [3] 50:5 72:21 200:3  <b>broad</b> [4] 166:22,25 172:2 194:25  <b>broadcast</b> [2] 176:4 200:19  <b>broadcasters</b> [1] 125:3  <b>broaden</b> [1] 172:1  <b>broader</b> [4] 32:11 84:13 147:10 157:23  <b>broadly</b> [3] 31:15 34:6 60:3  <b>broken</b> [8] 30:4,9 39:22 164:25 165:22 182:11 188:13,13  <b>Brough</b> [9] 6:2,3,4 9:16 20:11 31:13 50:17 53:4 67:7  <b>brought</b> [6] 29:15,18 98:25 102:24 108:22 136:14  <b>build</b> [1] 202:9  <b>building</b> [1] 197:2  <b>builds</b> [2] 90:18 199:22</p>	<p><b>built</b> [4] 89:23 90:10 104:15 105:4  <b>bunch</b> [2] 16:8 52:10  <b>burden</b> [3] 40:24 53:5 124:2  <b>bursting</b> [1] 175:2  <b>business</b> [19] 25:8 27:22 29:13 32:24 69:18 77:7 96:17,19,20 113:9 120:15 136:12 161:23 174:20 185:1,1,10 204:9 208:2  <b>business/competition/economic</b> [1] 176:25  <b>businesses</b> [2] 18:23 96:23  <b>buttons</b> [1] 83:12  <b>buy</b> [2] 20:24 62:2</p>	<p><b>C</b>  <b>cable</b> [4] 176:2,4,13,21  <b>call</b> [15] 5:13 34:7 74:14 76:22 91:15,24 96:12 130:12 149:7 171:1 185:8 197:6,6 208:24 210:18  <b>called</b> [8] 3:15 48:16 53:25 105:9 130:20 150:12 157:2 161:22  <b>calling</b> [3] 65:3 159:8 174:19  <b>calls</b> [1] 210:13  <b>came</b> [8] 20:21 34:23 37:11 38:8 57:12 99:14 161:16 187:1  <b>cameras</b> [4] 5:19 72:22 143:12 208:10  <b>Canada</b> [4] 93:8 131:7 167:3,5  <b>cannot</b> [4] 87:22 99:24 121:14 157:16  <b>capacity</b> [2] 80:5 100:13  <b>capital</b> [1] 20:7  <b>capitalize</b> [1] 34:22  <b>capture</b> [1] 91:14  <b>care</b> [7] 13:7 35:16 65:18 159:24 184:12,13 194:3  <b>career</b> [1] 139:6  <b>careful</b> [3] 21:9 137:4 156:4  <b>carefully</b> [1] 159:20  <b>Carlo</b> [6] 145:3 156:12 168:17 174:2 190:19 199:19  <b>carriage</b> [3] 175:22 176:4,9  <b>carry</b> [10] 99:25 100:5 108:12,16,22,23 109:2 175:25 181:16 199:12</p>	<p><b>carveout</b> [1] 164:1  <b>case</b> [44] 9:3,3 10:25 11:1,9 14:6,13,15 42:10 43:23 69:24 88:16 104:9 109:4,21 111:3 124:18,18 126:23 135:16 152:16 157:2,11,14 159:2 162:5 168:20 176:9,11 180:8 187:11 190:22 191:3,11,11,12,14,18,19,19 193:25 201:5,13,13  <b>cases</b> [17] 10:24 11:2,5 39:4 43:5,8 68:11 129:25 154:23 156:22,23 165:18 176:2,6,21 195:3 200:20  <b>Cat</b> [1] 169:10  <b>catching</b> [1] 59:3  <b>catchy</b> [1] 169:4  <b>categories</b> [1] 122:21  <b>category</b> [1] 173:3  <b>Cathy</b> [10] 79:1,3 80:9 111:22 114:5 118:7 119:4,12 122:14 135:21  <b>cause</b> [4] 19:18 68:1,3 204:14  <b>caused</b> [2] 191:24 193:7  <b>causes</b> [4] 67:23 161:25 198:12,22  <b>causing</b> [1] 30:15  <b>caution</b> [2] 121:12 131:22  <b>CCIA</b> [1] 145:18  <b>CCIA's</b> [1] 150:24  <b>ceiling</b> [2] 186:18,19  <b>Center</b> [2] 6:24 207:25  <b>central</b> [1] 83:15  <b>centuries</b> [1] 128:3  <b>Century</b> [1] 147:2  <b>CEO</b> [1] 6:16  <b>Cerf</b> [1] 12:18  <b>certain</b> [9] 45:11 54:14,15 57:21 78:2 96:22 123:20 181:17 196:6  <b>certainly</b> [16] 10:16 34:10 35:1,21 47:9 54:5 112:4 113:18,20 134:17 178:14 193:15,24 195:12 199:13 202:25  <b>cetera</b> [2] 76:23 125:4  <b>chain</b> [2] 98:15 156:17  <b>challenge</b> [10] 32:8,10,20,20,21,21 77:5 117:6 127:2 205:24  <b>challenges</b> [4] 77:8</p>
---	---	---	---	--	---	---

<p>133:11 134:22 181:24  <b>challenging</b> [2] 117:10,21  <b>chance</b> [2] 60:12 102:8  <b>Chancery</b> [1] 190:22  <b>chances</b> [1] 53:8  <b>change</b> [17] 21:11 35:11 38:17 40:17,25 41:8,15,16 54:10 89:18 90:6 92:25 116:19 131:6 153:21 181:2 189:4  <b>changed</b> [4] 21:3 30:17 157:9 202:18  <b>changes</b> [12] 20:16 21:16,17,17 32:14,14 34:16 39:5 89:3,12 104:4 153:24  <b>changing</b> [4] 21:13 110:25 138:9 167:12  <b>channels</b> [2] 164:7 180:17  <b>character</b> [1] 200:20  <b>characterize</b> [3] 45:6 46:8 155:20  <b>characterizing</b> [1] 161:24  <b>characters</b> [1] 196:7  <b>Charles</b> [1] 191:8  <b>Charlie</b> [1] 169:11  <b>chat</b> [2] 74:12 143:25  <b>chattel</b> [2] 198:17,21  <b>cheat</b> [1] 7:7  <b>checked</b> [1] 23:6  <b>checks</b> [1] 73:2  <b>cheerlead</b> [2] 135:6 139:5  <b>cheers</b> [1] 66:14  <b>chewing</b> [1] 137:17  <b>chief</b> [1] 178:6  <b>chock</b> [1] 114:10  <b>choice</b> [18] 14:17 28:23,25 29:1,2,9 33:5 34:15 45:8,21 47:14 48:4 62:11,25 128:17,22 199:2,10  <b>choices</b> [1] 49:4  <b>choose</b> [6] 28:25 83:9 84:16 115:22 175:25 200:9  <b>chooses</b> [1] 120:6  <b>chose</b> [1] 151:3  <b>Chris</b> [21] 4:12,15 27:16 29:12 49:13 63:17 67:22 73:13 91:5 102:2,8 106:6 109:13 111:1 143:15 153:2,4 155:4 190:9 194:14 201:24  <b>chunks</b> [1] 33:19  <b>Cinquante</b> [1] 169:12</p>	<p><b>Circuit</b> [1] 130:1  <b>circular</b> [3] 43:14 104:7 154:22  <b>circulars</b> [2] 129:4 162:25  <b>circulation</b> [1] 39:20  <b>circumstances</b> [3] 66:14 77:17 126:7  <b>CISA</b> [1] 19:2  <b>citation</b> [1] 64:21  <b>cite</b> [3] 66:1 87:17 129:21  <b>cited</b> [2] 11:1 66:2  <b>citizen</b> [3] 65:4,16,17  <b>citizens</b> [4] 54:15 70:23 87:9 198:10  <b>City</b> [1] 65:12  <b>civic</b> [1] 54:15  <b>civil</b> [2] 57:6 134:6  <b>claim</b> [3] 42:2 126:19 185:18  <b>claimed</b> [1] 43:25  <b>claiming</b> [2] 185:13 188:25  <b>claims</b> [1] 39:1  <b>clarification</b> [3] 50:2 91:1 123:1  <b>clarifications</b> [3] 88:4 89:4 104:3  <b>clarified</b> [1] 82:20  <b>clarify</b> [7] 36:4,15 83:1,7 137:23 148:15 202:5  <b>clarifying</b> [2] 104:7 129:10  <b>clarity</b> [1] 97:9  <b>Clark</b> [1] 191:9  <b>class</b> [1] 67:8  <b>classifieds</b> [2] 20:22 26:8  <b>clause</b> [11] 99:5,15 128:2 129:17,17 165:14 170:18 186:16,24,25 187:14  <b>clauses</b> [1] 129:18  <b>clear</b> [19] 12:12 16:15 19:17,17 76:18 85:20 96:16,24 99:5,7 116:22 123:16 160:6 161:25 168:16 181:11,23 186:16 187:13  <b>clearly</b> [13] 10:15 17:5 30:13 52:3,13 76:16 126:22 128:1,3 129:23 134:11 162:7 194:6  <b>click</b> [15] 13:16 15:6 19:19 22:3 28:20 44:15 58:2 92:5 101:7,9 193:9,23 194:6,18,21  <b>clicked</b> [2] 16:12 205:10</p>	<p><b>clicking</b> [4] 15:24 25:19 92:1 205:13  <b>clicks</b> [6] 14:20 15:7 47:24 56:3,18 92:3  <b>client</b> [2] 139:21 159:18  <b>client's</b> [2] 153:8,13  <b>clients</b> [4] 148:15 152:21,23 199:24  <b>Clochemerle</b> [1] 169:9  <b>close</b> [4] 77:11 197:21 210:10,18  <b>closed</b> [2] 19:7 74:23  <b>closely</b> [1] 61:20  <b>closer</b> [4] 11:14 37:2 91:14 131:18  <b>closet</b> [1] 164:11  <b>closing</b> [10] 18:23 70:13 130:25 131:21 132:5 133:25 138:2 199:17,18 201:23  <b>CMS</b> [1] 76:8  <b>co</b> [1] 5:19  <b>coalition</b> [2] 118:23 131:17  <b>code</b> [5] 64:23,23,25 65:8 171:5  <b>COFFEY</b> [21] 6:7,7 7:7 13:19 18:5,6 27:5,16 36:19,22 37:16,20 38:3 45:5 48:6,8 55:6 61:23 64:4 68:6 70:17  <b>coin</b> [1] 187:22  <b>coincide</b> [1] 180:9  <b>collaborate</b> [2] 15:20 93:17  <b>collaborating</b> [1] 61:19  <b>colleagues</b> [1] 5:19  <b>collect</b> [1] 115:20  <b>collected</b> [1] 31:4  <b>collecting</b> [1] 58:9  <b>collection</b> [1] 128:14  <b>collective</b> [10] 89:20 93:10 111:9,17 140:20,25 157:24 170:10 174:10,16  <b>collectively</b> [8] 69:1 93:2 106:24 111:8 119:6 131:17 168:8 173:25  <b>College</b> [1] 144:12  <b>colloquially</b> [1] 48:16  <b>Columbia</b> [1] 6:13  <b>come</b> [18] 20:19 23:3 27:25 41:17 47:21 56:11,15 63:20 67:10 82:23 132:25 140:2 146:15 179:8,10 184:19 192:18 197:20</p>	<p><b>comebacks</b> [1] 200:15  <b>comes</b> [13] 13:3 29:23 40:18 61:24 64:6 75:25 95:8,16,17 120:16 146:18 170:6 188:23  <b>coming</b> [5] 56:4 57:1 72:24 77:8 107:2  <b>command</b> [1] 63:25  <b>commend</b> [1] 38:10  <b>comment</b> [10] 13:20 23:24 72:8,9 116:10 123:2 128:10 160:10 208:22 210:9  <b>commentary</b> [3] 120:13 137:16 138:12  <b>commentators</b> [2] 147:23 148:24  <b>commenter</b> [2] 209:15,25  <b>commenters</b> [2] 31:20 90:13  <b>comments</b> [55] 5:11 7:2 16:21,21 17:14 37:12 51:6 57:12 58:12,15 61:4,9 63:20 70:18 71:7 74:10,20,21 75:2 79:6 88:10,16 89:2,11 90:5,24 96:10 102:19 103:18 105:23 116:25 122:20 123:17 128:25 132:2,2 141:20 145:23 146:4 148:17 150:25 151:7 153:19 154:9 159:19 160:1 171:3 175:12,13 184:3 186:12 197:3 206:9 208:18 210:17  <b>Commerce</b> [3] 186:23 187:7,14  <b>committed</b> [3] 60:23,25 134:7  <b>common</b> [2] 110:7 188:7  <b>commonplace</b> [1] 11:6  <b>communicate</b> [1] 84:11  <b>communication</b> [1] 200:17  <b>Communications</b> [1] 145:17  <b>communities</b> [4] 7:12,16 19:25 30:2  <b>community</b> [1] 84:14  <b>companies</b> [16] 28:8 59:15 60:16 111:19 125:3 134:5 164:8 177:19,22 179:3 180:2,4,17 181:22 182:14 200:6</p>	<p><b>company</b> [1] 76:10  <b>comparable</b> [4] 50:11 77:16 184:25 188:5  <b>comparative</b> [1] 156:20  <b>compared</b> [2] 41:6 46:23  <b>compatible</b> [3] 149:15 163:17 189:9  <b>compel</b> [5] 99:25 100:5 108:15 109:2,2  <b>compelled</b> [5] 99:24 100:9 106:14 108:24 115:20  <b>Compendium</b> [4] 11:1 43:13 129:4 154:22  <b>compensable</b> [1] 115:23  <b>compensate</b> [2] 148:11 156:18  <b>compensated</b> [4] 20:9 45:19 107:10,16  <b>compensation</b> [5] 69:2 71:17 107:12,15 201:17  <b>compete</b> [2] 119:9 120:10  <b>competence</b> [1] 123:8  <b>competing</b> [8] 32:5,6,7 46:24 177:7,22 178:1 191:1  <b>competition</b> [55] 30:7 32:10 33:2 34:25 48:23 49:7 52:9 67:25 68:13,16 71:14,16 80:19 82:25 86:6 88:13,15 89:19 91:17 94:5 95:2,2,13 97:14 98:7,12,15,16 102:11 103:1 105:22 106:8 111:11 112:19,23 115:12 116:8 120:20 136:4 144:18 157:22 161:22 171:2,4,8 172:1 174:6,24 177:17 181:6,7,9 182:6 189:7 207:15  <b>competition/busines s/economics</b> [1] 162:12  <b>competitive</b> [11] 45:14,21 48:19 49:5,8 62:9 91:13,16 93:25 107:13 131:13  <b>competitors</b> [2] 62:10 177:18  <b>compilation</b> [1] 37:25  <b>compiled</b> [1] 57:4  <b>complain</b> [1] 64:15  <b>complained</b> [1] 108:20  <b>complaining</b> [4] 52:</p>	<p>16 91:21 92:4 172:2  <b>complement</b> [2] 97:15 98:11  <b>complete</b> [2] 74:9 101:15  <b>completed</b> [1] 5:10  <b>completely</b> [8] 31:19 33:15 90:19 119:23 184:9 188:17 189:16 204:9  <b>compliance</b> [5] 113:7 148:20 149:5 152:10,22  <b>compliant</b> [2] 152:7,8  <b>complicated</b> [6] 82:3 146:18 176:25 177:15 178:4,12  <b>complications</b> [1] 127:8  <b>comply</b> [1] 136:17  <b>composition</b> [1] 188:11  <b>comprehend</b> [1] 177:1  <b>compulsory</b> [1] 115:22  <b>Computer</b> [4] 145:17 198:16,17,19  <b>concede</b> [2] 176:10 192:23  <b>conceivably</b> [2] 147:5 161:13  <b>concept</b> [6] 25:16 63:19 89:23 104:16 124:24 125:2  <b>concepts</b> [2] 117:14 192:5  <b>concern</b> [8] 9:19 41:23 57:12 60:5 63:24 141:23 155:1 180:6  <b>concerned</b> [4] 29:17 60:1 67:16 159:21  <b>concerning</b> [1] 43:14  <b>concerns</b> [10] 21:19 31:25 34:12 42:2 47:3 149:22 157:13 181:15 204:1 208:1  <b>concession</b> [1] 168:5  <b>conclude</b> [4] 103:25,25 152:8 205:16  <b>concludes</b> [1] 208:6  <b>conclusion</b> [2] 49:22 199:5  <b>conclusions</b> [4] 115:10 116:12 152:5,6  <b>conclusive</b> [1] 205:3  <b>conclusory</b> [1] 72:9  <b>concrete</b> [1] 17:20  <b>concur</b> [1] 84:21  <b>conditioned</b> [1] 116:5  <b>conditions</b> [1] 121:15</p>
---	--	---	--	--	--



<p><b>conduct</b> [7] 3:17 62:10 64:23,25 65:8 107:6 209:21</p> <p><b>conflict</b> [3] 148:2 156:15 157:6</p> <p><b>confusing</b> [2] 179:22 180:1</p> <p><b>Congress</b> [21] 3:17 41:10 49:7 102:12 103:16 122:11 123:19,19 126:5 128:22 129:17 135:11,14 138:18,21 139:20 140:3 150:11 153:10 156:6 207:17</p> <p><b>congressional</b> [1] 41:14</p> <p><b>Congresswoman</b> [1] 187:9</p> <p><b>connect</b> [4] 79:11,13,15 80:3</p> <p><b>connecting</b> [1] 29:19</p> <p><b>connection</b> [1] 200:23</p> <p><b>consensus</b> [1] 116:23</p> <p><b>consent</b> [2] 14:20 48:25</p> <p><b>consequence</b> [1] 174:8</p> <p><b>consequences</b> [3] 78:14 162:19 206:7</p> <p><b>consider</b> [7] 25:4 42:20 46:15 71:11 78:11 90:8 199:22</p> <p><b>consideration</b> [3] 78:23 87:6 125:12</p> <p><b>considerations</b> [5] 126:4,6,6 167:12,15</p> <p><b>considered</b> [3] 11:5 134:18 201:4</p> <p><b>considering</b> [3] 126:3 127:10 190:18</p> <p><b>consistent</b> [4] 66:21 115:20 151:20 155:25</p> <p><b>consistently</b> [1] 90:14</p> <p><b>consisting</b> [1] 10:13</p> <p><b>consists</b> [1] 144:10</p> <p><b>console</b> [1] 199:23</p> <p><b>consolidation</b> [1] 24:25</p> <p><b>constantly</b> [2] 81:12,13</p> <p><b>constituents</b> [1] 85:11</p> <p><b>Constitution</b> [10] 87:4,16 129:13 137:25 151:24 153:18 159:5 170:17 175:10 188:14</p> <p><b>constitutional</b> [32] 4:3 63:25 75:24 87:10,</p>	<p>11 88:7 90:15,19 95:25 100:7 104:19 121:17 126:11 128:19 142:1 151:23 155:1 156:25 157:6 158:22 159:7 163:1 171:10,16 176:19 185:24,24 186:2 189:22 190:2,4 206:2</p> <p><b>constitutionality</b> [2] 129:21 170:1</p> <p><b>constitutionally</b> [4] 75:11,16 132:13 186:15</p> <p><b>consultant</b> [2] 6:13 91:8</p> <p><b>consultation</b> [1] 8:13</p> <p><b>consume</b> [1] 30:22</p> <p><b>consumer</b> [8] 31:9 32:2 34:15 51:2 54:10,21 144:16 182:19</p> <p><b>consumers</b> [5] 50:20 51:2 65:19 183:4,4</p> <p><b>contact</b> [1] 96:21</p> <p><b>contained</b> [1] 154:21</p> <p><b>contemplated</b> [1] 164:2</p> <p><b>contemplating</b> [1] 141:15</p> <p><b>content</b> [131] 3:20,24 7:5,14,25 8:20 10:12 11:4,9,10 12:21 13:18 14:1,3,5 15:10 16:22 19:25 20:4,4 22:4,4,8,9,10,13,18,19 23:2 25:21,24,25 26:23,24 27:20,23 28:1,4,22,25 29:2,9 30:23 36:1,7 38:7,11,15,16,25 39:4,5,7,12,22 40:7,7,10 41:1,19 43:25 44:10 45:2,7,25 46:6 49:10 51:21 52:17,18 56:20 57:13 58:7 59:15 63:2 64:18 65:14 68:17,20,21,23,24 69:4,7,8,19 70:4 71:9,11 72:14 74:25 75:14 83:11 85:10 90:1 91:11,22,23,24 97:4 99:25 100:20 101:3,6 104:17 106:16,20 108:24 109:2,20 120:24 123:25 124:1 126:24,24 127:3,6,6 131:13 132:19 133:17 148:4 158:2 162:6 177:7 181:16 184:7 197:23 198:4 201:7 209:7</p> <p><b>context</b> [4] 68:4 151:12 187:2 192:21</p> <p><b>continent</b> [1] 169:7</p>	<p><b>continue</b> [11] 21:24 47:17 48:1 66:17 84:17,19 134:25 138:10 139:16 207:23,24</p> <p><b>continued</b> [1] 196:24</p> <p><b>continues</b> [2] 39:20 68:22</p> <p><b>continuing</b> [1] 7:16</p> <p><b>contours</b> [2] 181:5 189:25</p> <p><b>contract</b> [1] 115:21</p> <p><b>contracts</b> [1] 29:8</p> <p><b>contractual</b> [1] 33:5</p> <p><b>contradict</b> [1] 62:5</p> <p><b>contradictory</b> [3] 114:12 137:13,14</p> <p><b>contrary</b> [1] 191:22</p> <p><b>contribute</b> [2] 134:25 201:19</p> <p><b>contributes</b> [1] 20:2</p> <p><b>contributing</b> [1] 60:16</p> <p><b>contribution</b> [1] 118:20</p> <p><b>contributors</b> [1] 117:16</p> <p><b>control</b> [11] 21:11 25:21 35:25 45:2 83:14,14 84:15 101:1,2 164:7 180:7</p> <p><b>controls</b> [3] 15:10,15,16</p> <p><b>convening</b> [1] 77:22</p> <p><b>Convention</b> [6] 146:6,23 147:23 151:2 200:11 201:9</p> <p><b>conversation</b> [12] 26:25 36:5 54:6 63:21 84:17 102:10 115:13 137:12,12,14 139:16 163:11</p> <p><b>conversations</b> [3] 81:4 181:9 210:3</p> <p><b>convey</b> [1] 192:11</p> <p><b>cookbooks</b> [1] 191:15</p> <p><b>Copia</b> [1] 79:4</p> <p><b>copied</b> [6] 10:20 13:13 35:17 199:24,25 200:1</p> <p><b>copy</b> [3] 39:2,3 202:22</p> <p><b>copy/pasting</b> [1] 149:13</p> <p><b>copying</b> [2] 11:13,20</p> <p><b>Copyright</b> [302] 3:5,7,10,13,16,18,22 4:4,9,19 5:1,20,23 6:17 8:22,22 10:21 20:14 21:6,18 26:20 30:5 31:24 32:15,21 33:2,3,4,13 35:13 38:3,6,7,19 39:24 40:5,21 41:7,9,</p>	<p>13 42:8,20,21 44:21,25 46:14 49:15,16 50:2,7 51:19 52:9,12 55:2 63:24 64:3 65:25 66:2,14,15,24 67:1,12 71:7,24,24 72:3 73:16,25 74:11 75:3,15,20,23 77:23 78:3,6,7,8,12,22 80:12,23 82:24 83:16 85:14,20 86:3,16,23 87:4,19,23 88:9,12,17 89:3,12,18 90:6 91:17 93:1 94:6,21,24 95:10,11,18,19,19,23 96:1,2,7 97:4,14 98:6,16,22 99:1,2,5,8,8,13,15,18 100:11 101:19,20,20 102:13,25 104:4,4,13 105:4,6 106:10,12 107:23 108:20 114:23 115:3,13,14,21 116:3,21 117:2 118:13 120:3,4,21 122:10 123:13,13 125:13,15,18 126:1,3,3,4,15,20,21 127:16,22,25 128:4,13 129:10,19 130:12,13 133:19 134:10,14 135:6,8,9,11,19 136:18 137:11 138:3,5,5,7,14,23 139:5 141:25 143:4,5,14 144:9 146:9,12 147:25 149:1 153:6,21 154:3,3,12,15,22 155:6,22,24 156:13,15,21 157:1,8 158:13,19,20,24 159:7 160:16,18 161:3 162:14,24 163:2,6,12,13,20 164:22,23,23 166:1,10 167:12,16 168:2 170:17,20 171:8,20 172:7,8 173:5,22 174:5,15 175:4 178:14 180:22 181:2,25,25 182:5,9,10 183:12 185:9,23 186:1 187:12,19 188:22 189:14,22 190:2,4 191:21 194:15 195:1,17,22 196:11 197:8,24 198:1,13 199:21 200:12 201:10,20,25 202:12,14 203:8,8,11,14,23 204:5 207:7,10,12,15,19 208:7,18 210:5</p> <p><b>copyright's</b> [1] 115:16</p> <p><b>copyright-based</b> [2] 182:8 183:13</p> <p><b>copyrightability</b> [10]</p>	<p>12:7 16:19,25 44:7 80:16 154:18 192:6,7,19,23</p> <p><b>copyrightable</b> [23] 20:4,5 33:24 42:25 44:8 96:5 132:19,19 158:16 163:22 169:9,9,10,11,12,13,15 186:21,22 190:19 191:24 195:12,19</p> <p><b>copyrighted</b> [3] 124:12,16 163:24</p> <p><b>Copyrights</b> [6] 3:7 4:10 41:4 51:23 138:5 153:22</p> <p><b>core</b> [1] 8:22</p> <p><b>corners</b> [1] 55:17</p> <p><b>Corp</b> [3] 178:19 179:1,10</p> <p><b>Corp's</b> [1] 160:10</p> <p><b>corporations</b> [1] 94:18</p> <p><b>correct</b> [4] 38:1 100:14 144:20 147:14</p> <p><b>correction</b> [1] 64:13</p> <p><b>correctly</b> [2] 46:12 196:11</p> <p><b>corruption</b> [1] 58:25</p> <p><b>cost</b> [4] 22:20 34:20 80:1 122:1</p> <p><b>costs</b> [4] 50:10 113:6,6,7</p> <p><b>Counsel</b> [6] 6:8 73:12,14 145:17 153:5 168:22</p> <p><b>Counsels</b> [1] 4:11</p> <p><b>count</b> [2] 43:16 44:2</p> <p><b>countries</b> [8] 55:10 76:11 103:2 107:22 122:10 146:8 166:17 170:14</p> <p><b>country</b> [11] 6:9 7:17 19:8,24 55:8,14,17 70:23 85:24 152:16 183:16</p> <p><b>couple</b> [12] 18:13 27:9 35:7 36:20 38:6 87:7 103:15 126:14 132:11 143:10 184:1 186:5</p> <p><b>course</b> [17] 8:3 16:16 40:15 42:7 44:23 56:2 62:25 93:19 94:13 96:15 111:13 123:10 124:24 157:8 161:6 174:7 195:7</p> <p><b>court</b> [21] 4:25 36:24 41:4 68:10 70:8 73:24 116:13,13 128:3,12,20 130:2 156:22 157:7,15 158:21 165:18 186:15 189:24 191:12 201:14</p>	<p><b>Court's</b> [1] 75:21</p> <p><b>courtesy</b> [1] 206:22</p> <p><b>courts</b> [11] 8:9 11:4,7 41:25 42:9 68:9 90:15 104:18 109:25 130:4 168:11</p> <p><b>cover</b> [2] 42:13 121:4</p> <p><b>coverage</b> [2] 55:25 56:6</p> <p><b>covered</b> [3] 106:11 115:23 116:6</p> <p><b>covering</b> [2] 35:9 55:16</p> <p><b>covers</b> [2] 124:20 145:20</p> <p><b>crafted</b> [3] 168:23,25 191:1</p> <p><b>crafting</b> [1] 169:3</p> <p><b>Craigslist</b> [1] 20:23</p> <p><b>cream</b> [1] 113:3</p> <p><b>create</b> [18] 17:9 23:1 47:9 65:19 66:25 83:10,14 97:1 107:10 108:16 110:6 111:11,12 113:6 117:19 120:24 165:16 189:9</p> <p><b>created</b> [5] 22:19 64:19 99:10 107:23 168:10</p> <p><b>creates</b> [3] 127:8 146:6 186:17</p> <p><b>creating</b> [4] 67:4 131:19 133:17 165:23</p> <p><b>creation</b> [10] 22:17 42:7 64:11 65:1 93:21 115:25 124:1 128:8 165:16 189:13</p> <p><b>creative</b> [8] 11:8 16:23 35:8 49:17 55:2 158:2 188:23 191:6</p> <p><b>creatives</b> [1] 85:9</p> <p><b>creativity</b> [5] 65:25 66:22,25 125:1 127:17</p> <p><b>creator</b> [1] 69:8</p> <p><b>creators</b> [17] 41:7 66:16,17 78:20 85:10 91:12,24 131:13 171:22 172:10,12,22 173:23 174:8 183:1 195:10 210:1</p> <p><b>credibility</b> [1] 65:10</p> <p><b>credit</b> [1] 59:25</p> <p><b>crisis</b> [2] 24:14 204:14</p> <p><b>criteria</b> [2] 64:11,22</p> <p><b>critical</b> [8] 7:15 19:6,11 23:21 134:2 139:22,23 164:15</p> <p><b>critics</b> [1] 130:11</p> <p><b>crowdsourcing</b> [1] 66:20</p> <p><b>crucial</b> [2] 85:23 163:9</p>
--	---	---	--	---	--

<p><b>crumbs</b> [1] 179:17  <b>crystal</b> [1] 123:16  <b>cubes</b> [1] 118:4  <b>cull</b> [1] 22:3  <b>cultural</b> [4] 54:21 121:15 137:19,24  <b>curate</b> [1] 201:7  <b>curation</b> [3] 91:25 92:1,8  <b>curators</b> [1] 81:23  <b>curious</b> [2] 27:10 68:2  <b>current</b> [15] 3:12 21:22 37:12 43:18 51:8,14 53:1 61:7 69:15 74:24 87:3 160:12 200:18,23 202:23  <b>currently</b> [8] 61:11 68:18 70:6 91:3 98:9 102:5 115:11 197:10  <b>cursor</b> [1] 150:3  <b>cut</b> [4] 28:1 74:23 183:5 205:21  <b>cut-and-paste</b> [1] 195:13  <b>cutting</b> [2] 13:13 166:4  <b>cynical</b> [2] 99:16 105:9</p> <hr/> <p style="text-align: center;"><b>D</b></p> <p><b>D.C</b> [5] 81:20 130:1 144:17 145:13,18  <b>damage</b> [2] 182:16,17  <b>damages</b> [3] 41:2 188:25 203:3  <b>dangereuses</b> [1] 169:8  <b>Daniel</b> [11] 6:22,23 24:10 26:10 34:3 46:10 51:4 53:21 57:7 59:13,18  <b>Danielle</b> [2] 6:6,7 7:6 13:10 15:11 27:4 35:24 37:14 45:4 47:14 48:1 55:5 57:10 61:22 64:3 65:21 66:19 68:5 70:16 105:23 107:3  <b>dare</b> [1] 112:20  <b>daring</b> [1] 113:15  <b>dark</b> [1] 120:18  <b>darn</b> [1] 17:2  <b>data</b> [10] 23:21 28:7,16 31:4,8,9,9 63:4 89:14 90:8  <b>database</b> [2] 132:15 187:2  <b>date</b> [1] 90:5  <b>dating</b> [1] 151:2  <b>day</b> [9] 30:25 35:2 40:15 47:18 54:23 71:8 142:5 157:11 183:8</p>	<p><b>days</b> [2] 40:10 76:21  <b>de</b> [2] 169:10,12  <b>dead</b> [1] 126:25  <b>deal</b> [4] 50:20 118:12 156:23 174:15  <b>dealing</b> [10] 80:22,24 91:10 126:23 127:2 132:18 133:16 146:25 178:15 186:21  <b>deals</b> [3] 93:18 131:14,16  <b>dealt</b> [1] 168:21  <b>debate</b> [5] 12:23 83:8 96:12 187:3 191:8  <b>debilitating</b> [1] 136:19  <b>decade</b> [1] 92:19  <b>decades</b> [2] 38:6 60:24  <b>December</b> [1] 142:5  <b>decide</b> [6] 25:23,25,25 50:19 85:22 89:14  <b>decided</b> [4] 156:23 188:5 191:3 193:1  <b>decides</b> [1] 122:12  <b>decision</b> [3] 75:22 121:6 184:8  <b>decisions</b> [5] 17:7 31:8 36:2 47:2 158:21  <b>decline</b> [3] 24:23 26:8 53:24  <b>decouple</b> [1] 31:18  <b>decoupling</b> [1] 9:23  <b>decreases</b> [2] 92:1,9  <b>deem</b> [1] 65:3  <b>deemed</b> [2] 19:2 155:2  <b>deep</b> [4] 134:8 135:16 199:4 205:1  <b>deeper</b> [5] 161:5 185:9,25 186:5 195:2  <b>deeply</b> [2] 94:22 146:4  <b>default</b> [1] 83:13  <b>defendant</b> [1] 157:16  <b>defense</b> [3] 104:18 129:23 130:5  <b>define</b> [8] 55:15 64:8 117:8,9 152:19 156:2 158:20 177:20  <b>defined</b> [1] 8:20  <b>defines</b> [2] 75:14 121:3  <b>defining</b> [3] 82:5,6 181:8  <b>definitely</b> [9] 102:15,19 111:3 115:2 151:11 153:12 167:13 174:17 181:14  <b>definition</b> [5] 63:13 117:2,19 120:25 121:7</p>	<p><b>definitional</b> [1] 82:8  <b>definitions</b> [2] 121:6 181:11  <b>definitive</b> [1] 86:13  <b>degree</b> [4] 63:22 77:4 89:1 102:14  <b>delete</b> [1] 151:3  <b>deleterious</b> [1] 8:12  <b>deliberate</b> [2] 37:8 184:8  <b>deliver</b> [3] 23:2 84:15 136:21  <b>delivering</b> [1] 8:7  <b>delve</b> [1] 82:4  <b>demand</b> [3] 21:25 115:19 126:8  <b>demands</b> [1] 22:1  <b>democracy</b> [2] 131:9 134:2  <b>democratic</b> [3] 70:22 85:24 92:17  <b>denied</b> [1] 99:10  <b>depend</b> [2] 16:8 58:21  <b>dependent</b> [1] 120:4  <b>depending</b> [2] 55:15 67:20  <b>depends</b> [3] 161:7 207:22,23  <b>deposit</b> [3] 140:12,13 202:21  <b>deposits</b> [1] 38:8  <b>deprives</b> [1] 92:2  <b>depth</b> [1] 162:15  <b>Der</b> [1] 169:13  <b>describe</b> [2] 126:25 154:13  <b>described</b> [2] 77:17 84:8  <b>describes</b> [1] 158:21  <b>description</b> [2] 55:6 160:3  <b>desert</b> [1] 179:7  <b>deserts</b> [1] 53:25  <b>deserved</b> [1] 71:17  <b>deserves</b> [1] 54:5  <b>designed</b> [4] 66:24 89:19 90:20 106:18  <b>desirability</b> [1] 46:13  <b>desirable</b> [8] 73:10 75:10 76:14 86:11 87:1 92:23 94:13 108:1  <b>desire</b> [3] 86:9 126:8 156:16  <b>desired</b> [4] 85:3,5,6,17  <b>despite</b> [3] 35:20 129:22 133:2  <b>destroying</b> [1] 210:6  <b>detail</b> [12] 23:14 24:5 52:5 87:14 105:12 134:15 147:15 154:17 186:11 187:2,5,16</p>	<p><b>detailed</b> [1] 91:22  <b>details</b> [2] 84:25 110:2  <b>determination</b> [1] 7:14  <b>determine</b> [1] 45:25  <b>determined</b> [1] 9:3  <b>deterred</b> [1] 80:3  <b>detrerent</b> [1] 58:24  <b>detriment</b> [1] 62:18  <b>detrimental</b> [1] 44:22  <b>developed</b> [1] 30:21  <b>developing</b> [1] 57:14  <b>diagnosed</b> [1] 82:20  <b>dialogue</b> [1] 139:15  <b>dichotomy</b> [4] 87:21 158:25 163:4 190:13  <b>dictate</b> [1] 131:11  <b>dictated</b> [1] 75:16  <b>difference</b> [6] 11:17 57:1 137:24 155:15 161:19 183:11  <b>differences</b> [4] 32:16 42:4 47:18 137:19  <b>different</b> [56] 12:9 17:17,18,19 24:19,20 26:25 31:17 32:13 47:19,19 52:10 53:1 55:8,18 59:11 67:13 72:17 78:20,21,22 82:24 114:12 121:2,14,19,22 122:3,20 126:16 127:18 134:15 135:18 137:3,3 139:9 157:10 159:8 161:7,24 168:25 170:19,22 175:15 176:16 180:1,16,16,17 187:21 188:17 189:17 190:16 191:2 192:13 209:22  <b>differential</b> [1] 181:17  <b>differently</b> [3] 17:16,21 33:25  <b>difficult</b> [6] 21:23 50:21 53:19 54:10 57:23 64:7  <b>dig</b> [4] 146:4 185:9 187:12 204:6  <b>digest</b> [1] 103:23  <b>digging</b> [2] 195:1 205:18  <b>digital</b> [24] 20:21,25 21:15,22,22 26:14 27:12 30:20,23 39:13,16,21 42:5 67:9 76:19,21 98:10,10 106:25 138:9 164:7 167:17 188:16 201:14  <b>digitization</b> [1] 191:19  <b>dilution</b> [3] 57:11,17,20</p>	<p><b>diminishing</b> [1] 182:12  <b>direct</b> [6] 25:4,9 35:9,10,13 51:20  <b>directing</b> [1] 112:16  <b>direction</b> [3] 107:3,12 199:6  <b>directive</b> [5] 98:9 121:18 173:13 200:12 201:10  <b>directly</b> [1] 30:12  <b>Director</b> [5] 3:7 4:10 6:4 80:8 144:15  <b>disadvantage</b> [1] 63:7  <b>disagree</b> [8] 12:22 25:16 48:2 60:17 119:23 132:17 147:21 206:16  <b>disagreement</b> [4] 12:13 14:13 47:15 48:4  <b>disagreements</b> [1] 26:17  <b>disappear</b> [1] 51:16  <b>disappears</b> [2] 126:25 127:6  <b>disavowal</b> [1] 153:23  <b>discourage</b> [3] 119:6 140:20 141:3  <b>discourse</b> [1] 164:13  <b>discretion</b> [1] 167:19  <b>discuss</b> [2] 82:9 131:24  <b>discussed</b> [15] 34:22 73:6 77:18 83:24 86:2 87:12 89:6 104:5 159:9 170:2 171:3 191:10 196:19 207:12,14  <b>discussing</b> [6] 15:2 20:6 39:10 52:25 134:23 143:6  <b>discussion</b> [11] 4:7 12:7 36:16 54:5 71:5,23 76:18 107:9 134:25 159:10 191:23  <b>discussions</b> [7] 52:13 55:2 72:19 82:25 83:16,17 188:8  <b>disparage</b> [1] 35:21  <b>disparate</b> [1] 172:19  <b>dispense</b> [1] 128:15  <b>displace</b> [1] 8:13  <b>display</b> [5] 22:6,13 63:2 71:9 155:12  <b>displayed</b> [1] 101:4  <b>disproportionate</b> [1] 201:16  <b>disproportionately</b> [1] 35:19  <b>disputed</b> [1] 115:11  <b>disseminate</b> [4] 14:4 22:14 69:23 165:17</p>	<p><b>disseminated</b> [2] 46:1 182:23  <b>disseminating</b> [1] 13:18  <b>dissemination</b> [8] 13:25 70:6 165:20 170:8 179:25 182:15,25 191:19  <b>disseminators</b> [2] 165:24 183:3  <b>disservice</b> [2] 50:20 51:2  <b>distant</b> [1] 174:14  <b>distinct</b> [1] 192:5  <b>distinction</b> [1] 24:17  <b>distinguish</b> [3] 57:14 67:17 78:17  <b>distinguishing</b> [1] 192:4  <b>distraction</b> [2] 105:16 130:21  <b>distribute</b> [1] 20:3  <b>distributing</b> [3] 14:16 46:5 177:4  <b>distribution</b> [12] 29:16 34:9 48:19 51:13 58:1 60:2 124:1 155:12 156:17 164:7,12 180:3  <b>distributive</b> [1] 95:6  <b>distributors</b> [4] 30:8 97:5 171:17 174:1  <b>ditto</b> [3] 114:3,4,4  <b>dive</b> [2] 185:25 186:4  <b>divergent</b> [1] 158:9  <b>diverse</b> [4] 83:4 116:17 134:1 139:25  <b>diversified</b> [1] 94:20  <b>diversify</b> [1] 95:24  <b>diversity</b> [12] 13:4 66:16 117:12 121:20  <b>divide</b> [1] 185:4  <b>Division</b> [2] 149:1 190:22  <b>DMCA</b> [3] 68:19 89:24 90:3  <b>doctrinal</b> [1] 75:23  <b>doctrine</b> [17] 10:12,23,24,25 11:15 43:19 68:9 69:16,21 87:20 128:21 138:6 158:13,14 203:16,18,20  <b>doctrines</b> [2] 8:23 75:16  <b>documents</b> [2] 104:8 129:4  <b>dog</b> [4] 158:14,15,17,17  <b>doing</b> [18] 7:9 23:9 40:1 62:22 67:11,14 79:15,16 88:15,18 137:</p>
--	--	--	---	---	---

<p>21 141:9 160:21 179:4                  4 182:16 197:17 200:6,8  <b>DOJ</b> [2] 129:25 187:6  <b>dollars</b> [4] 22:16 23:1 28:7 63:6  <b>dominance</b> [4] 14:22                  33:12 50:6 61:25  <b>dominant</b> [14] 14:16 19:21 45:13,17 46:9 48:25 91:13 92:4,19 120:11 140:25 157:23 174:13 183:3  <b>dominate</b> [1] 165:20  <b>dominating</b> [1] 182:14  <b>done</b> [11] 13:24 24:9 52:4,8 70:12 72:25 98:6 106:9 154:23 170:14 186:14  <b>doubts</b> [1] 96:12  <b>dovetail</b> [1] 153:9  <b>down</b> [12] 10:4 16:3 19:5 50:25 51:11 52:14 58:17 112:4 114:16 173:15 192:19 197:25  <b>dramatic</b> [1] 86:4  <b>dramatically</b> [1] 190:16  <b>draw</b> [2] 17:13 156:21  <b>drift</b> [1] 102:10  <b>drive</b> [4] 61:15 83:22, 25 136:20  <b>driven</b> [1] 61:16  <b>driver</b> [1] 31:1  <b>drives</b> [4] 100:23 136:2,19 154:25  <b>driving</b> [1] 113:10  <b>DSM</b> [1] 98:8  <b>due</b> [3] 34:18 69:6 157:17  <b>duplicative</b> [1] 114:2  <b>during</b> [7] 5:11 18:13 19:11 29:14 40:15 73:1 74:12  <b>duty</b> [2] 54:15 164:24  <b>dwindling</b> [1] 24:4  <b>dynamic</b> [19] 38:14,17 39:3,12 40:7 41:19 42:4,13,15 46:22 47:6 71:11 123:25 126:24 127:5 133:2 136:9 197:22 202:13  <b>dynamics</b> [1] 44:23</p> <hr/> <p style="text-align: center;"><b>E</b></p> <hr/> <p><b>each</b> [7] 5:24 32:6 160:20 177:8,24 178:1 206:25  <b>earlier</b> [18] 18:10 26:10 30:16 34:23 43:2, 5 50:6 52:3 89:15</p>	<p>107:4 114:10 115:5 167:11 182:6 186:3 190:22 196:25 197:3  <b>early</b> [4] 20:17 110:14 147:1 176:3  <b>earn</b> [2] 67:3 96:19  <b>easier</b> [2] 53:10 176:8  <b>easily</b> [2] 34:21 125:1  <b>Eastern</b> [4] 5:9 141:22 144:1 208:11  <b>easy</b> [3] 40:23 50:23 203:1  <b>eBay</b> [1] 20:23  <b>echo</b> [6] 116:15 139:4 140:6 150:23 151:11 162:24  <b>Econ</b> [1] 91:8  <b>economic</b> [22] 3:23 8:11 9:22 20:13 21:3,5, 12 23:18,19 31:23 32:12,20 80:25 86:5 99:20 100:6 126:7 141:3 183:16 199:4,10 200:18  <b>economically</b> [3] 79:11 113:1,8  <b>economics</b> [2] 53:1 161:23  <b>economist</b> [8] 9:21 91:8,10,15 99:23 140:22 141:11 178:6  <b>economists</b> [1] 52:24  <b>ecosystem</b> [6] 26:20 56:19 61:2 62:3 66:25 183:1  <b>Ed's</b> [1] 198:8  <b>editorial</b> [4] 17:7 31:8 47:2 167:19  <b>editorializing</b> [1] 65:13  <b>education</b> [1] 95:8  <b>Edward</b> [12] 144:21 163:14 171:12 174:4, 9 183:22,24 196:20 202:10 206:23 207:20 209:24  <b>Edward's</b> [1] 183:2  <b>effect</b> [7] 34:16 103:3 141:23 201:11 204:25 205:4,19  <b>effective</b> [7] 67:24 75:4 97:7 155:23 197:22 202:25 203:2  <b>effectively</b> [12] 50:8 95:9,9 105:21 154:17 155:25 156:7,18 174:5,20 200:6,8  <b>effectiveness</b> [1] 3:12  <b>effects</b> [3] 3:23 8:11 92:15  <b>effectuate</b> [1] 131:6</p>	<p><b>efficient</b> [1] 157:25  <b>effort</b> [2] 139:14 186:13  <b>eight</b> [3] 132:24 187:3 208:12  <b>either</b> [3] 50:14 58:13 197:25  <b>election</b> [1] 193:21  <b>element</b> [1] 203:13  <b>elements</b> [1] 69:18  <b>elevated</b> [1] 178:2  <b>eliminated</b> [2] 197:17 204:12  <b>Elizabeth</b> [5] 82:13,14 109:7 116:14 139:2  <b>embodied</b> [1] 92:25  <b>emerge</b> [1] 47:4  <b>emphasize</b> [4] 71:21 101:17 105:17 116:4  <b>employees</b> [4] 22:24 95:15 164:23 173:4  <b>employers</b> [1] 19:2  <b>employment</b> [4] 92:15,20 119:1,15  <b>enable</b> [1] 156:18  <b>enables</b> [1] 98:3  <b>enacted</b> [2] 89:17 150:7  <b>enacts</b> [1] 150:12  <b>encounter</b> [1] 153:25  <b>encourage</b> [3] 64:3 119:16 207:18  <b>encouraged</b> [1] 126:18  <b>end</b> [18] 30:25 35:2 51:19 53:17 70:20 71:8 72:21 107:23 108:1,1, 6,7 109:18 149:8 175:7,7,8 196:16  <b>endeavors</b> [1] 21:25  <b>endorse</b> [4] 71:14 90:9 103:19 120:6  <b>endorsement</b> [1] 105:14  <b>ends</b> [2] 109:10 163:23  <b>enforce</b> [5] 14:22 39:10 41:4 111:5 174:23  <b>enforceable</b> [3] 97:7, 22 110:1  <b>enforced</b> [3] 110:20 156:8 162:19  <b>enforcement</b> [14] 14:8 39:8 69:2 155:23 158:18 161:21 165:2 197:8,12,13 198:2 202:9,24 206:13  <b>enforcing</b> [3] 151:10 162:10 197:4  <b>engage</b> [2] 95:5 101:6  <b>engagement</b> [2] 23:22 84:1</p>	<p><b>engaging</b> [1] 167:19  <b>engine</b> [1] 156:14  <b>engines</b> [3] 97:1 124:14 207:8  <b>England</b> [1] 145:5  <b>enhancing</b> [1] 98:15  <b>enjoy</b> [2] 166:17,23  <b>enormous</b> [2] 113:6 183:7  <b>enormously</b> [1] 176:25  <b>enough</b> [4] 85:21 101:7 125:19 206:3  <b>enriching</b> [1] 92:3  <b>ensure</b> [6] 65:9,9 66:17 69:2 71:16 93:23  <b>ensures</b> [1] 65:2  <b>ensuring</b> [1] 174:11  <b>enter</b> [1] 119:9  <b>entire</b> [7] 33:18 111:20 166:7,9 183:1 195:8,12  <b>entirely</b> [6] 51:15 54:4 104:2 105:7 199:5 205:10  <b>entirety</b> [1] 163:23  <b>entities</b> [3] 118:15,16 137:7  <b>entitled</b> [2] 142:4 210:21  <b>entity</b> [2] 134:3 199:4  <b>entry</b> [4] 119:6,12,14 140:20  <b>environment</b> [5] 21:22 45:15,22 97:2 134:23  <b>equal</b> [2] 112:4 192:16  <b>equally</b> [3] 68:8 137:6 172:25  <b>equation</b> [2] 14:20 48:12  <b>equitable</b> [1] 51:13  <b>equivalent</b> [4] 87:18 157:4 166:19,20  <b>Eric</b> [11] 145:11 153:8 154:6 159:16,18 160:11 164:17 169:17 182:2 194:12 201:22  <b>eroded</b> [1] 68:8  <b>error</b> [1] 64:13  <b>eschews</b> [1] 67:2  <b>especially</b> [14] 7:12 9:11 23:7 24:13 30:1 35:1 39:12 129:11 136:22 137:5 146:25 150:15 160:18 205:11  <b>essence</b> [3] 9:12 97:4 165:23  <b>essential</b> [5] 19:2 24:3 31:9 69:20 200:5  <b>essentially</b> [7] 96:20 104:7 130:17 136:3</p>	<p>187:19 197:23 203:10  <b>establish</b> [2] 180:24 181:5  <b>established</b> [5] 35:20 84:2 132:15 146:12 209:9  <b>estate</b> [1] 58:13  <b>esteemed</b> [1] 80:20  <b>et</b> [2] 76:22 125:3  <b>EU</b> [20] 3:25 71:12 103:11,20 105:13 120:1 121:11,21 125:11 146:12 147:9,9,17,25 152:22 155:8 156:22 157:2,5 173:12  <b>EU's</b> [2] 90:7 149:5  <b>Europe</b> [30] 6:9 19:13 50:23 55:9,10 77:6, 10 78:18 97:11,12 98:6,12 110:12 111:5 123:20 124:8,10,25 127:19,24,24 128:1, 17 131:4 134:15 135:2 136:10 137:20 157:23 174:9  <b>European</b> [22] 3:18 110:5,8,15,17 125:7 126:9 127:23 128:6,7 134:16 148:20 155:5, 13,16,16 156:24 166:15,18 173:17 200:12 201:10  <b>evaluation</b> [1] 141:10  <b>even</b> [6] 10:21 11:6, 21 14:12,18 17:16,22 20:15 37:7 43:8,18 46:17,25 50:6,9,24 53:19 57:25 59:2 70:5 80:20 82:9 83:11 88:17 97:10 128:15 137:12 141:1 146:16 147:13,25 148:1,22 149:2,15 150:3,8,18 157:21 158:15 159:17 160:23 161:10 167:5 171:6 176:11,13 177:23 178:9 179:15 181:20 191:18 192:22 194:3,7 195:22 196:9 197:12,17 204:20 207:13  <b>event</b> [7] 5:2 17:21 74:1 86:23 147:15 161:5 190:15  <b>events</b> [1] 200:23  <b>eventually</b> [2] 58:23 201:14  <b>everybody</b> [15] 7:1 14:18 18:18,19 49:11 70:13,24 102:12 106:3 112:1 114:11 120:15 132:6 208:15 210:16  <b>everyone</b> [2] 3:3,9 7:</p>	<p>3 10:2 23:25 77:21 91:7 105:1 114:12,18 138:24 142:2 143:3 153:2 178:11 179:22 199:15 201:25 206:17 208:6 210:19  <b>everyone's</b> [2] 4:8 94:14  <b>everything</b> [9] 25:3 57:4 79:16 102:17 103:23 106:10 124:20 159:14 206:8  <b>evidence</b> [9] 25:18 28:8 47:19 57:16,17 62:19 102:24 111:18 205:3  <b>evidenced</b> [4] 19:22 48:20 100:24 115:5  <b>eviscerated</b> [1] 204:9  <b>evolved</b> [1] 188:3  <b>evolving</b> [4] 81:10,12, 13 133:8  <b>EVP</b> [1] 6:8  <b>exact</b> [1] 23:6  <b>exactly</b> [7] 26:20 31:6 147:2 172:17 177:13 188:19 204:21  <b>examined</b> [1] 116:24  <b>example</b> [10] 62:12,21 69:11 78:18 88:11 95:15 97:17 122:2 158:13 190:17  <b>examples</b> [6] 14:25 20:17 62:15 109:15 166:4 190:14  <b>exceedingly</b> [2] 21:23 66:3  <b>except</b> [3] 59:13 95:19 150:6  <b>exception</b> [12] 104:20 125:21 148:1 149:16 151:21 172:24 173:5, 6,7,7,9 200:14  <b>exceptions</b> [5] 4:4 143:8 156:3 157:12 203:24  <b>excerpts</b> [1] 13:13  <b>exchange</b> [6] 14:4 47:15 48:5 49:10 63:12 101:14  <b>exchanges</b> [1] 100:22  <b>excise</b> [1] 60:8  <b>exclude</b> [4] 115:18 116:1 191:15,15  <b>excluded</b> [1] 8:22  <b>excluding</b> [1] 13:2  <b>exclusion</b> [1] 162:4  <b>exclusionary</b> [1] 107:7  <b>exclusive</b> [3] 46:19 115:16 130:15</p>
--	---	--	---	---	---

<p><b>exclusively</b> [1] 85:9  <b>exclusivity</b> [1] 70:1  <b>exclusivity-based</b> [1] 55:4  <b>excuse</b> [1] 173:7  <b>Executive</b> [1] 80:8  <b>exemption</b> [4] 167:24  168:6,12 173:23  <b>exemptions</b> [1] 168:1  <b>exercise</b> [1] 170:5  <b>exist</b> [6] 155:10 156:7  167:3,6 168:11 193:17  <b>existence</b> [3] 59:21  60:9 115:25  <b>existing</b> [26] 3:22 4:2  5:23 73:7 87:18 105:5  122:22 125:16,17  133:10 141:24 143:7  154:16 155:8,14,24  156:2 158:18 165:2  166:2,20 170:5 183:18,20,21 202:5  <b>exists</b> [7] 45:3 70:7  89:20 126:16 127:3  169:24 170:20  <b>exiting</b> [1] 141:8  <b>expand</b> [6] 14:25 21:9,  10 78:12 83:25 85:3  <b>expanded</b> [3] 85:12  86:3 179:4  <b>expanding</b> [2] 114:19  138:5  <b>expansion</b> [2] 78:1  114:23  <b>expect</b> [2] 50:1 125:23  <b>expense</b> [2] 22:20 78:9  <b>expensive</b> [1] 136:16  <b>experience</b> [15] 22:25  23:4 28:19 61:10 97:8,11  103:5 121:12,24  135:2,16 136:14 140:2  173:12 202:15  <b>experienced</b> [3] 19:13,14 62:20  <b>experiences</b> [5] 84:5  107:22 109:8 121:20  122:12  <b>experiencing</b> [1] 18:9  <b>expert</b> [8] 32:24 36:23  69:10 80:21 132:14  141:11 144:25 154:16  <b>expertise</b> [1] 81:5  <b>experts</b> [1] 135:7  <b>explain</b> [1] 118:14  <b>explanation</b> [1] 146:18  <b>exploitation</b> [1] 184:24</p>	<p><b>exploiting</b> [1] 185:16  <b>explore</b> [3] 3:21 35:18  73:8  <b>explored</b> [2] 30:23  187:5  <b>exponentially</b> [1] 22:22  <b>exposure</b> [2] 45:10  150:18  <b>expressing</b> [1] 203:19  <b>expression</b> [15] 95:24  156:16,19 157:14  158:1 168:14 169:2  175:21 190:13,16 193:15,16,17 195:13 203:20  <b>expressive</b> [2] 16:23  17:6  <b>expressively</b> [1] 79:11  <b>expressly</b> [2] 128:20  200:21  <b>extend</b> [1] 137:15  <b>extended</b> [1] 46:21  <b>extending</b> [3] 42:21  44:21 46:13  <b>extensively</b> [1] 147:24  <b>extent</b> [24] 7:3,25 8:12  23:23 34:25 41:25 42:3,10  51:17 52:25 54:14  67:20 87:2 124:10  147:11 159:3 161:22  186:12 193:6 200:24  201:2,6 204:17,22  <b>extract</b> [1] 131:18  <b>extracting</b> [1] 13:17  <b>Extractions</b> [1] 20:6  <b>extracts</b> [6] 15:8 44:6,  12,20 76:24 77:4  <b>extremely</b> [4] 8:3 15:15  27:3 156:6  <b>extrinsic</b> [1] 101:19  <b>eye</b> [3] 58:4,21 137:1  <b>eyeballs</b> [1] 32:7  <b>eyes</b> [1] 59:3</p> <hr/> <p style="text-align: center;"><b>F</b></p> <p><b>face</b> [4] 34:12 53:23  100:9 205:20  <b>Facebook</b> [19] 30:9  65:5 82:16 83:1,10,  10,12 84:8,24 106:16,  23 109:5 131:12 141:8,16  150:4 162:5,6  179:24  <b>Facebook's</b> [2] 93:20  165:11  <b>faced</b> [1] 82:19  <b>facie</b> [1] 14:13  <b>facilitate</b> [2] 23:2 209:6</p>	<p><b>facilitates</b> [1] 157:25  <b>facilitating</b> [4] 112:20  113:9 136:11,12  <b>facilitation</b> [1] 136:20  <b>facilitators</b> [1] 112:14  <b>facing</b> [5] 24:14 61:11  122:20 202:8 204:14  <b>fact</b> [35] 8:4 9:4 11:2  16:22 43:20 50:19 53:6,14  64:14,15 67:5  78:7 100:8,24 107:5,  15 111:19 119:7,25  129:23 146:20 155:1  159:20,22 163:4 165:19  170:4 176:24 183:20  191:1,10,13 194:8,  19 205:13  <b>fact-checking</b> [2] 64:13,20  <b>factor</b> [3] 8:9 9:7 26:9  <b>factors</b> [8] 9:6 26:5  27:9,11 29:13 31:7  184:23 210:6  <b>facts</b> [10] 10:18 16:25  17:2 65:12 75:17 159:5  163:4 190:1 193:14  195:18  <b>factual</b> [5] 64:20 139:13  192:12 194:7,9  <b>fails</b> [1] 93:11  <b>failures</b> [1] 21:8  <b>fair</b> [90] 7:2,4 8:1,3 9:3,  9,18,24 14:13 18:1  20:12,14 21:10,11,17  27:21 32:14 45:16 49:18  63:12,13 68:21 87:20  89:8,10 90:2,15  94:19 104:10,11,18  106:19 114:7 118:19  125:20 129:20,23 130:5  131:18 138:6 141:12  148:11 149:10,11,  12,18 151:17,19,23  152:10,12 156:3 158:24  160:16,22,22,24  161:1,9,12,15 163:3  166:9 168:14 169:25  170:16 174:11,21 175:20  184:22,23 185:2,11  186:3 187:20 189:11  192:7,14,22 193:25  194:17,22 195:23,  23 196:4,10 202:6  203:25 207:7,9  <b>fairly</b> [2] 33:8 176:22  <b>fairness</b> [1] 104:24  <b>faith</b> [2] 98:24 206:19  <b>fall</b> [2] 92:20 112:18  <b>fallen</b> [2] 32:2 119:16  <b>false</b> [2] 29:2 106:22  <b>far</b> [6] 34:21 35:18 45:20  50:9 110:14 119:7</p>	<p><b>fast</b> [2] 106:7 123:25  <b>fate</b> [1] 45:25  <b>favor</b> [1] 131:9  <b>feasible</b> [1] 153:12  <b>feature</b> [2] 4:21 73:19  <b>featured</b> [1] 28:11  <b>federal</b> [3] 68:12 182:10  198:18  <b>Federation</b> [1] 145:1  <b>feeds</b> [1] 156:18  <b>feel</b> [5] 37:15 56:16  105:15 135:1,10  <b>feeling</b> [1] 133:3  <b>feels</b> [1] 94:22  <b>fees</b> [3] 203:3 209:3,8  <b>feet</b> [1] 164:20  <b>Feist</b> [4] 75:22 128:12  187:24 189:16  <b>Felix</b> [1] 169:9  <b>Fellow</b> [3] 4:13 6:24  73:14  <b>felt</b> [1] 127:13  <b>FEMALE</b> [1] 6:18  <b>fetched</b> [1] 119:7  <b>few</b> [19] 4:18 21:14 37:11  38:9 55:22 57:12  63:20 83:1 89:4 95:19,20  115:14 121:2  143:14 172:19 180:20  184:2 189:3 203:19  <b>Ficsor</b> [1] 148:24  <b>fiction</b> [1] 172:11  <b>fight</b> [2] 177:24 201:4  <b>fighting</b> [1] 47:10  <b>figure</b> [6] 24:8 31:5 38:6  49:21 56:13 173:1  <b>figures</b> [1] 181:21  <b>figuring</b> [4] 29:20,21  82:11 185:4  <b>file</b> [1] 38:19  <b>filed</b> [4] 17:14 89:2  103:24,24  <b>filing</b> [3] 165:8,21 166:15  <b>filings</b> [2] 155:21 194:25  <b>final</b> [5] 23:24 54:19  134:14 207:11 208:6  <b>finally</b> [9] 6:21 11:16  28:13 33:14 38:8 107:1  119:11 189:9 210:13  <b>financial</b> [4] 51:20 54:2  58:20 179:1  <b>financialization</b> [1] 54:1  <b>financially</b> [1] 39:21  <b>financing</b> [1] 35:13  <b>find</b> [15] 16:3 31:21 37:2,5  44:15,20 86:4 99:16  105:25 120:12 177:8,8  185:12 197:5 210:</p>	<p>5  <b>finding</b> [4] 13:6 31:23  62:5 201:20  <b>findings</b> [3] 37:1,3  138:22  <b>fine</b> [2] 141:9,14  <b>finish</b> [2] 91:4 196:20  <b>firm</b> [1] 145:12  <b>firms</b> [1] 54:2  <b>first</b> [103] 4:16 5:17,18,  22 8:1 9:1,6 18:13 27:17  28:3 59:20 67:15  69:23 70:18 73:6,22  75:2 76:5,5,17 77:18  78:24 79:8 80:15,17  81:9 82:22 85:4 86:2  87:6 88:5,25 90:17  91:21 92:10 93:11,15  96:5,10 97:25 100:4,  16 108:25 114:20 117:20  123:23 124:5 125:20  129:7 131:4 132:9  133:20 139:4 143:10  145:22 146:2,14,21  148:14,21,21 149:1,  14 152:4 153:18,20,  25 154:5,6,11,19 155:21  159:17 163:2,7,17,  25 164:3,4,16 167:11,  14,21,25 170:16 171:7  175:3 179:21 181:12,  15,23 184:3 189:24  190:20 191:11 194:19,  24 199:22 202:1,16  207:2 208:20  <b>firsthand</b> [1] 136:16  <b>fiscal</b> [3] 35:5,8 51:20  <b>fit</b> [1] 133:9  <b>fits</b> [3] 114:6,25 115:1  <b>five</b> [1] 206:24  <b>fix</b> [3] 41:11 63:15 119:18  <b>flagrantly</b> [2] 150:2,20  <b>flat</b> [1] 197:23  <b>flawed</b> [1] 14:21  <b>flaws</b> [1] 181:12  <b>flexible</b> [2] 196:5,9  <b>floor</b> [1] 186:18  <b>flow</b> [7] 92:13 104:24  107:4,4,12 115:25  199:5  <b>flux</b> [1] 21:12  <b>focus</b> [5] 44:1 92:15  179:8 180:7 204:17  <b>focused</b> [3] 72:4 80:18  107:14  <b>focuses</b> [1] 85:9  <b>focusing</b> [2] 114:1  136:4  <b>FOGLIA</b> [74] 3:3 4:12  5:21 12:1,4 13:9 15:3</p>	<p>16:1 17:11,23 37:10,  19 38:2 40:2 41:21  42:16 52:23 53:21 55:5  57:7 59:6,18 60:11  61:3 67:22 69:13 70:10  73:5,11 76:2 77:20  78:24 80:6 82:13  84:20 86:20 88:2 90:25  94:7 96:8 98:17  100:10 101:25 131:20  133:22 134:12 135:4,  21 137:9 139:2,17  140:5,17 141:18 143:15  169:17 170:25 174:2,25  176:23 180:19  182:2 183:22 185:20  196:15 199:15 201:22  203:4 204:3 205:15,  21 206:23 207:20 208:4  <b>fold</b> [3] 102:4 103:7  199:16  <b>folks</b> [6] 54:11 82:21  83:25 99:17 116:1,11  <b>follow</b> [7] 12:5 18:1  90:10,22 96:11 112:3  134:24  <b>followed</b> [1] 202:21  <b>following</b> [4] 86:7  109:14 138:11 209:20  <b>follows</b> [1] 49:20  <b>footing</b> [1] 31:22  <b>fora</b> [1] 145:7  <b>force</b> [1] 99:1  <b>forced</b> [3] 14:21 109:5  165:23  <b>forces</b> [2] 111:18 131:11  <b>foreign</b> [1] 152:15  <b>forget</b> [2] 72:12 166:6  <b>form</b> [8] 4:1 25:9 94:5  95:6 98:22 150:8 157:21  159:6  <b>formal</b> [2] 109:25 110:1  <b>formality</b> [1] 197:11  <b>format</b> [1] 4:19  <b>former</b> [1] 148:25  <b>formerly</b> [1] 82:16  <b>forms</b> [3] 24:20 76:23  176:8  <b>formulaic</b> [1] 11:6  <b>formulated</b> [1] 70:7  <b>Fort</b> [1] 94:1  <b>forth</b> [4] 18:24,25 64:21  187:10  <b>fortunes</b> [1] 75:5  <b>forum</b> [1] 81:3  <b>forward</b> [9] 4:7 39:25  60:2 61:2 72:2,17  138:25 202:14 208:1  <b>found</b> [19] 14:18 26:</p>
--	--	--	--	--	---

<p>13 28:8,23 30:2 62:4, 18,24 77:10 97:11 157:4,12,15 168:21 191:4,23 192:22 193: 9 201:8 foundational [1] 90: 19 founders [1] 12:17 fourth [3] 8:9 9:6 58: 13 fragile [1] 148:4 framework [5] 9:22 98:4 111:6 124:20 185:10 France [5] 100:1,2 108:14,21 169:8 frankly [8] 40:8 41:6,9, 17 149:6 177:18 178: 9 179:14 Fraud [3] 198:16,17, 19 free [28] 37:15 47:24 48:10 83:21,21 96:23 100:22 101:13 109:20 120:14 128:22 148:8 151:22 156:14,16,19 157:14,17 158:1 163: 19,20,21,21,22 164:9, 10 167:16 169:2 freedom [1] 115:21 freelance [1] 209:5 freelancers [2] 173:4, 24 freely [1] 164:11 fresh [3] 27:18 148:4 188:23 friends [2] 81:15 169: 21 front [2] 126:14 140:1 FTC [2] 81:3 178:11 fuel [2] 97:1 156:18 fulfill [1] 173:20 full [5] 20:5 89:8 96:6 114:10 184:8 fully [3] 82:20 120:5 159:8 function [7] 5:12 59: 23 74:13 143:18 180: 3,4 198:8 functional [1] 45:24 functions [3] 140:14 180:5,15 fund [3] 58:13 60:7 95: 16 fundamental [6] 12: 13,19 15:1 32:16 48: 2 157:18 fundamentally [6] 20: 13 21:2 31:17 32:12 100:4 195:18 fundamentals [1] 133:18</p>	<p>funded [3] 60:7 94:14 122:2 funding [4] 22:17 60: 22 94:15 95:3 funds [3] 54:1 58:16 95:7 furloughed [1] 19:9 further [8] 15:20 60:8 84:8 132:4 135:3 137: 23 172:1 193:11 furthered [1] 173:22 furthermore [2] 151: 23 158:10 future [3] 166:25 188: 2 207:22</p> <p style="text-align: center;"><b>G</b></p> <p>gain [1] 44:17 game [2] 193:19 205:7 gap [2] 77:11,12 gather [1] 123:2 gave [2] 62:15 84:22 GELLIS [5] 79:2,3 111: 23 122:14 135:22 General [7] 6:8 7:3 60: 7 164:4 166:12 174: 14 204:10 generalities [1] 16:4 generality [1] 65:24 generally [7] 101:2 167:15 175:14 184:10 196:4 204:7,8 generate [2] 26:15 118:25 generation [1] 56:21 generis [2] 69:11 153: 20 genres [1] 144:24 geography [1] 18:19 German [1] 109:23 Germany [8] 76:8 100: 3 103:6 109:15,17,22 110:11 169:13 gets [4] 29:4 120:20 169:5 171:25 getting [15] 21:15 24: 2 53:7 62:7 63:9 70: 22 82:3 129:9 135:13 159:1 178:20,21 179: 11 185:17 209:6 giant [1] 18:15 Ginsburg [23] 6:11,12, 12 7:22,24 10:8 13: 11 17:13 32:23 41:21, 22 43:1,2 46:16 49: 24 65:23 69:14 104:8 129:6 146:13 147:22 160:24 190:14 Ginsburg's [3] 12:7 152:6 154:19 give [26] 14:25 28:4,21 29:2,9 59:20 60:12 62:12 69:25 70:13 77:</p>	<p>13 82:23 86:13 88:3, 12 89:8 160:16,21 161:20 169:16,17 186: 20 188:22 189:6 206: 21 208:17 given [12] 76:23 93:22 102:10,18 122:9 124: 18 135:16 160:22 165: 20 187:23 196:22 210: 5 gives [5] 17:20 29:5 84:18 134:20 174:7 giving [6] 45:1 79:19 110:21 113:13 119:5 203:21 glad [6] 15:20 38:4 40: 4 77:22 140:11 149: 20 glance [1] 150:3 global [5] 19:12 60:22 77:7,9 134:24 globally [4] 36:11 115: 17 190:24,24 GNI [1] 63:10 goal [3] 134:2,9 171: 22 goals [3] 164:15 171: 16 173:21 Golan [1] 165:19 Google [65] 6:20 15: 14,14,17,17 26:15 27: 24,25 28:5,16 29:3 30:8 36:11,13,14 37: 5 44:6,24 45:11,12 50:12 60:19,20 61:15 62:1,18 63:8 91:21 93:15,17 94:1,3 100: 12,17,22 106:16,17, 22 107:5,24 113:7 118:10 131:12 134:3, 7 135:24,25 136:1 141:7,10,16 160:21 162:5 177:10,10,13, 21 179:24 191:10,14 194:20,23 199:7,8 204:23 Google's [7] 63:8 93: 19 100:15 107:6,15 165:11 177:19 Googles [3] 112:24, 25 113:2 got [16] 38:21,22 39: 22 41:8 67:15 80:15 114:9 118:9 122:8 124:8 131:6 144:21 182:10,25 183:3 195: 17 gotten [3] 14:8 110:23 137:22 govern [1] 123:21 government [6] 99: 24 108:15 117:18 134:</p>	<p>6 176:8 206:1 grabbing [2] 58:4,21 grant [3] 63:11 122:12 201:15 granted [1] 16:14 granular [2] 15:10 18: 25 gravitational [1] 112: 6 gravy [1] 199:14 Gray [1] 169:13 great [17] 22:20,20,20 31:14 81:17 84:23 89: 16 97:18,18 120:3 123:5,6 143:13 179:4 187:1,5 193:6 greater [3] 53:5 186: 11 191:25 greatest [1] 164:9 Green [1] 129:25 Grey [1] 169:12 grocery [1] 56:25 ground [1] 122:5 grounded [1] 87:16 group [5] 59:14 66:11 144:16,25 197:19 grow [1] 22:22 growth [1] 120:9 guarantee [1] 58:16 guaranteed [1] 97:6 guarantees [1] 98:5 guess [15] 18:6 24:8 67:20 95:22 96:5 114: 4 123:16 124:21 128: 16 144:3 174:9 185: 23 196:1 209:2,7 guidance [4] 116:25 162:25 163:8 167:13 guidebook [1] 148:25 gun [1] 199:1 guys [4] 40:24 139:6 199:13 208:13 guys' [1] 18:3</p> <p style="text-align: center;"><b>H</b></p> <p>Hal [16] 80:21 91:2,6,7 106:3,5 114:3 117:23 118:2,3 130:23 131:1, 20 140:17 165:8 182: 22 Hal's [5] 99:20,22 100: 21 102:1 123:1 half [2] 101:21 119:16 Hall [1] 65:12 hammer [5] 94:23 102:17,18,20,20 Hand [29] 4:21 7:23 10:2,5,6 12:11,25 17: 11 37:14 73:19 98:1, 2 107:18 112:19,20, 22 117:25 122:6,18 132:9 133:23 143:18 146:2 171:12 180:2</p>	<p>190:20 193:2 207:2 208:18 hand's [1] 69:13 handful [1] 164:8 handled [1] 130:2 handling [1] 130:14 hands [10] 4:24 10:3 30:19 73:21 91:3 102: 1 122:15,17 130:24 206:24 happen [3] 46:17 134: 19 136:7 happened [7] 19:7 26: 3 35:7 50:22 100:2 136:9 195:3 happening [7] 18:12 26:19 47:16 57:17,18 80:16 101:15 happens [4] 94:15 136:10 152:14 180:8 happy [9] 32:17 51:23 87:12 90:10,22 119:8 134:24 144:8 168:4 hard [3] 54:22 180:14 204:21 harder [1] 34:15 harm [5] 23:20 51:2 183:4 191:24 193:6 harmed [1] 182:21 harms [6] 91:19,19,20 92:11,12,13 harp [1] 133:15 harvested [1] 76:25 Hasbrouck [1] 144: 19,21,22 149:19,20 163:15 171:14 183:25 196:21 207:21 209:25 hate [3] 19:10 30:1 65: 10 head [6] 57:2 148:25 169:4 174:7 188:22 199:1 headed [1] 56:19 headers [1] 162:4 headline [17] 11:19, 21 42:24 161:6,8,10, 13 166:8 192:8 193:8, 11,13,17,22 195:3,11 205:12 headlines [38] 7:5 8: 21 10:13,16 11:20 17: 16 22:7 33:20,25 37: 22 43:17 44:6,13,20 46:14 49:17 58:6 76: 22 92:7 124:9,15 129: 11 161:11 166:6 168: 23,24 169:4 184:7 190:15,18 191:1,5 192:6,16,20,21 195:7, 20 health [1] 18:24 healthier [1] 45:24</p>	<p>healthy [3] 25:14 61:2 133:25 hear [12] 3:6 12:23 18: 2 32:17 39:1 47:17 68:2 87:13 129:24 140:12 164:11 208:25 heard [17] 47:16 48:10 59:13 61:5 67:22 81: 7 82:22 123:23 125: 25 127:20 146:14 149: 13 155:20 162:1 185: 23 208:24 210:2 hearing [12] 4:7 16:21 49:11 59:10 100:14 101:18,22 112:18,20, 22 115:9 204:19 heart [1] 120:20 heat [1] 69:20 heavily [1] 30:20 heavy [2] 55:14,22 Hebdo [1] 169:11 heck [1] 85:13 hedge [1] 54:1 heightened [3] 8:10 181:18,19 held [3] 4:3 199:1 201: 6 Hello [3] 3:3 143:3 145:3 help [11] 33:4 44:13 78:6 79:15 84:16 117: 3 140:1 178:7 185:10 188:22 189:5 helped [3] 78:1 210: 12,13 helpful [9] 44:1 89:5 97:19 116:11 135:1 154:11 155:6 156:6 202:4 helping [2] 80:3 122: 21 helps [4] 13:6 22:21 44:14 61:15 Heroic [1] 169:11 herring [2] 130:9 163: 18 Hi [11] 6:23 8:18 35:23 77:21 82:14 91:7 94: 11 144:8,14 145:16 153:4 high [6] 25:13 48:16 61:1 67:1 105:1 146: 5 higher [3] 65:24 197: 12 201:20 highest [1] 159:17 highlights [1] 150:14 highly [1] 10:17 hinges [1] 146:20 hire [4] 64:12 141:10 155:17 172:11 historic [1] 204:9</p>
--	--	---	---	--	---

<p><b>history</b> [13] 77:25 78:10,17,22 95:11,18 99:12 135:9,17 146:22,22 150:25 204:6</p> <p><b>Hobson</b> [1] 47:14</p> <p><b>Hobson's</b> [8] 14:17 28:22 45:8,21 48:4 62:11,24 199:2</p> <p><b>hold</b> [1] 102:2</p> <p><b>holding</b> [5] 52:12 71:1 86:23 94:23 130:24</p> <p><b>holdout</b> [2] 200:6,9</p> <p><b>holds</b> [1] 200:15</p> <p><b>hole</b> [1] 206:5</p> <p><b>hometown</b> [1] 184:17</p> <p><b>honestly</b> [2] 99:16 137:19</p> <p><b>hope</b> [7] 8:2 10:10 23:25 116:20 206:17,21 207:25</p> <p><b>hoped</b> [1] 79:17</p> <p><b>hopefully</b> [4] 59:5 72:16,18 117:7</p> <p><b>horrible</b> [1] 35:6</p> <p><b>host</b> [1] 29:4</p> <p><b>hosted</b> [2] 28:5 139:8</p> <p><b>hosting</b> [1] 137:11</p> <p><b>hot</b> [12] 68:2,9 69:11,16,21,25 70:6 146:24 147:3,7,10,13</p> <p><b>hotness</b> [1] 69:20</p> <p><b>hours</b> [3] 22:24 54:23 132:24</p> <p><b>housed</b> [1] 126:4</p> <p><b>However</b> [14] 24:16 30:4 39:17 42:22 46:20 60:1 61:24 68:10,22 118:23 145:7 152:19 159:4 206:2</p> <p><b>HTTP</b> [1] 27:24</p> <p><b>huge</b> [8] 41:20,20 117:12 120:22 127:2 165:24 170:7 199:11</p> <p><b>human</b> [1] 20:7</p> <p><b>hundred</b> [4] 45:18 177:19,21,25</p> <p><b>hundreds</b> [1] 177:5</p> <p><b>hurt</b> [6] 56:20,21 78:2 136:8,25 137:2</p> <p><b>hurting</b> [1] 62:8</p> <p><b>hurts</b> [3] 112:13,14 136:12</p> <p><b>hyperlocal</b> [1] 55:24</p> <p><b>hypocritical</b> [1] 197:7</p> <hr/> <p><b>I</b></p> <p><b>idea</b> [14] 78:8,11 95:1,4,17 99:20 100:7 117:6 168:14 175:15,21 190:12 203:19,21</p> <p><b>idea-expression</b> [4] 87:21 158:25 163:3 203:16</p>	<p><b>ideal</b> [1] 50:14</p> <p><b>ideally</b> [2] 58:14 104:11</p> <p><b>ideas</b> [3] 75:18 190:1 195:18</p> <p><b>identifiable</b> [1] 21:7</p> <p><b>identification</b> [1] 149:24</p> <p><b>identified</b> [1] 150:5</p> <p><b>identify</b> [1] 44:13</p> <p><b>ignore</b> [3] 48:11 121:14 184:9</p> <p><b>ignored</b> [2] 23:22 72:15</p> <p><b>illegally</b> [1] 41:6</p> <p><b>illustrations</b> [1] 17:20</p> <p><b>imagine</b> [1] 23:13</p> <p><b>imbalance</b> [9] 89:22 91:11 93:22 156:9,11 165:9 170:7,10 174:13</p> <p><b>immense</b> [2] 13:3 81:24</p> <p><b>impact</b> [7] 12:14 18:4 23:13 26:19 70:22 120:9 145:25</p> <p><b>impacted</b> [4] 27:11 29:17 117:17 209:10</p> <p><b>impacts</b> [3] 20:12 27:14 44:22</p> <p><b>impediment</b> [1] 14:7</p> <p><b>impediments</b> [1] 14:11</p> <p><b>impinge</b> [2] 87:24 100:19</p> <p><b>impinged</b> [1] 87:22</p> <p><b>implement</b> [3] 150:9,13 197:1</p> <p><b>implementation</b> [1] 173:12</p> <p><b>implemented</b> [1] 122:10</p> <p><b>implementing</b> [1] 197:19</p> <p><b>implicate</b> [2] 46:19 122:4</p> <p><b>implicated</b> [1] 172:4</p> <p><b>implicates</b> [1] 117:20</p> <p><b>implication</b> [2] 49:22 151:17</p> <p><b>implications</b> [2] 64:2 87:11</p> <p><b>implicitly</b> [2] 149:21 191:23</p> <p><b>importance</b> [7] 20:8 70:19 127:20 139:22,23 150:14 151:13</p> <p><b>important</b> [48] 7:18 9:5,11 11:14 14:7 15:15,17,19 21:24 24:12,16,21 25:4 27:3,19</p>	<p>66:5 70:24 71:2 75:9 80:15,17 82:12 83:23 84:13 92:16 93:15 101:24 104:15 123:16,22 128:6 133:1 138:1 140:10,13 171:24 172:25 175:11 180:13 181:9 183:17 185:7 188:19 195:20 196:5,8 202:23,25</p> <p><b>importantly</b> [2] 22:15 124:22</p> <p><b>impose</b> [1] 113:4</p> <p><b>impossibility</b> [1] 197:22</p> <p><b>impossible</b> [4] 63:13 79:18 148:10 201:1</p> <p><b>impression</b> [3] 59:20 97:8 174:18</p> <p><b>improve</b> [4] 50:3,4 71:11 138:3</p> <p><b>improved</b> [1] 39:24</p> <p><b>improving</b> [2] 98:16 202:11</p> <p><b>impulse</b> [1] 188:23</p> <p><b>inability</b> [1] 11:17</p> <p><b>inaccurate</b> [1] 43:3</p> <p><b>inadequate</b> [1] 62:5</p> <p><b>Inc</b> [1] 82:16</p> <p><b>incarnations</b> [1] 69:25</p> <p><b>incentives</b> [1] 165:15</p> <p><b>incentivize</b> [2] 127:17 165:16</p> <p><b>incentivizing</b> [1] 128:8</p> <p><b>incidental</b> [1] 171:21</p> <p><b>incidentally</b> [1] 150:6</p> <p><b>include</b> [8] 3:22 5:8 17:14 74:7 83:11 87:17 104:5 126:7</p> <p><b>included</b> [9] 12:6 15:13 72:18 82:18 138:16 139:8 165:21 199:7,8</p> <p><b>includes</b> [2] 144:23 173:17</p> <p><b>including</b> [18] 14:1 15:8 19:9 49:17 66:12 76:11 84:6 92:14 113:22 118:20 121:3 138:15 151:8 156:3 163:3 181:15 195:20 200:25</p> <p><b>inclusion</b> [1] 100:24</p> <p><b>income</b> [1] 66:23</p> <p><b>incompletely</b> [1] 66:2</p> <p><b>inconsistent</b> [4] 146:11,16,17,19</p> <p><b>incorporate</b> [1] 156:5</p> <p><b>incorporated</b> [3] 129:11 151:8 173:2</p> <p><b>incorporating</b> [1]</p>	<p>195:13</p> <p><b>incorporation</b> [1] 105:14</p> <p><b>incorrect</b> [1] 10:15</p> <p><b>increase</b> [1] 69:6</p> <p><b>increased</b> [2] 61:9 62:6</p> <p><b>increasing</b> [2] 97:16 136:5</p> <p><b>incremental</b> [1] 69:6</p> <p><b>incumbent</b> [1] 113:22</p> <p><b>incur</b> [2] 28:6 63:3</p> <p><b>Indeed</b> [2] 67:1 70:7</p> <p><b>Indeed.com</b> [1] 20:23</p> <p><b>independent</b> [9] 58:20 112:9,13,14 145:8 173:4,24 209:5 210:1</p> <p><b>independently</b> [2] 66:10 79:22</p> <p><b>indicate</b> [4] 4:22 73:19 193:24 194:8</p> <p><b>indicated</b> [2] 200:22 201:1</p> <p><b>indicates</b> [1] 193:13</p> <p><b>indication</b> [1] 194:21</p> <p><b>indifferent</b> [1] 51:22</p> <p><b>indirect</b> [2] 23:18,19</p> <p><b>individual</b> [5] 15:23 58:15 93:22 110:10 121:17</p> <p><b>individually</b> [4] 68:25 93:18 131:15,16</p> <p><b>individuals</b> [2] 35:10 94:18</p> <p><b>industries</b> [5] 32:25 78:2,20 95:19,20</p> <p><b>industrious</b> [1] 128:14</p> <p><b>industry</b> [40] 7:9,10 15:18 18:12 19:10,23 25:15 26:4 31:21 32:9,17 44:23 47:23,25 60:24 61:20 78:13 84:4 85:16 86:8,17,17 95:13 110:21 111:20 114:11 115:4,6 119:2 120:4 121:16 134:1 137:21 138:12 141:9 145:18 181:21 182:8 183:13 204:1</p> <p><b>industry's</b> [1] 26:9</p> <p><b>ineffective</b> [1] 168:7</p> <p><b>influence</b> [2] 22:23 165:25</p> <p><b>influential</b> [1] 184:18</p> <p><b>inform</b> [4] 58:23 86:18 135:12 187:12</p> <p><b>informal</b> [1] 154:6</p> <p><b>information</b> [42] 4:15 7:11,16 13:4,7,25 14:18 16:9,9 18:14,17,24 19:6,11 24:2 25:20</p>	<p>29:24 32:1,3 36:8 40:12,18 44:12,15,20 70:23 83:20 84:23 85:21,22 106:5 120:15,22 128:15 159:4,4 181:4 188:21 191:16 192:12 194:9 198:21</p> <p><b>informative</b> [1] 4:7</p> <p><b>informatory</b> [1] 200:24</p> <p><b>informed</b> [1] 185:11</p> <p><b>informing</b> [1] 126:18</p> <p><b>infrastructure</b> [1] 95:8</p> <p><b>infringe</b> [1] 189:4</p> <p><b>infringement</b> [2] 183:6 189:1</p> <p><b>infringing</b> [3] 47:1 71:10 184:6</p> <p><b>inherently</b> [1] 98:22</p> <p><b>inhospitable</b> [1] 113:1</p> <p><b>initial</b> [1] 70:5</p> <p><b>initially</b> [1] 202:21</p> <p><b>Initiative</b> [4] 60:19,20 97:18 123:6</p> <p><b>initiatives</b> [1] 98:1</p> <p><b>injunction</b> [1] 201:15</p> <p><b>injunctive</b> [2] 148:9 201:18</p> <p><b>injury</b> [2] 28:21 150:16</p> <p><b>innovating</b> [1] 84:5</p> <p><b>Innovation</b> [2] 6:4 34:8</p> <p><b>innovative</b> [1] 185:15</p> <p><b>input</b> [3] 4:8 91:13,14</p> <p><b>Inquiry</b> [6] 74:19 125:14 132:3,16 172:14 184:25</p> <p><b>INS</b> [1] 69:24</p> <p><b>insight</b> [1] 84:18</p> <p><b>inspiration</b> [1] 134:20</p> <p><b>inspire</b> [1] 54:15</p> <p><b>instance</b> [9] 9:8 16:14 149:12 166:3,11,12 167:1 191:11 202:7</p> <p><b>instances</b> [1] 8:4</p> <p><b>instead</b> [2] 113:13 131:17</p> <p><b>Institute</b> [2] 6:5 79:5</p> <p><b>institutions</b> [2] 59:22 209:9</p> <p><b>instructions</b> [2] 4:18 73:15</p> <p><b>instructive</b> [1] 170:15</p> <p><b>instrument</b> [2] 94:23 96:7</p> <p><b>insufficient</b> [1] 180:10</p> <p><b>insult</b> [2] 28:21 150:16</p>	<p><b>integrated</b> [1] 138:20</p> <p><b>integrity</b> [1] 138:14</p> <p><b>intellectual</b> [12] 23:7 24:18,19 55:3 80:23 95:9,12 99:9 144:17 159:6 175:4 178:5</p> <p><b>intelligent</b> [1] 188:23</p> <p><b>intended</b> [4] 23:7 119:17 170:21 207:18</p> <p><b>intensive</b> [2] 8:4 9:4</p> <p><b>intent</b> [1] 105:12</p> <p><b>interact</b> [2] 4:2 176:17</p> <p><b>interaction</b> [2] 143:7 156:24</p> <p><b>interest</b> [19] 56:5 78:3,6 189:1</p> <p><b>109:11 113:25 114:14 140:10,14 153:13 167:14 172:9,9 204:2</b></p> <p><b>interested</b> [5] 31:7 84:6 131:25 193:15,21</p> <p><b>interesting</b> [7] 39:17 46:22 88:25 191:8 199:21 200:5,15</p> <p><b>interests</b> [4] 93:19,20 137:6 153:9</p> <p><b>interfering</b> [1] 185:14</p> <p><b>intermediaries</b> [8] 3:20 148:7,11 171:18,21 183:5,10 185:17</p> <p><b>intermediary</b> [1] 78:4</p> <p><b>intermediate</b> [1] 176:7</p> <p><b>internal</b> [1] 202:11</p> <p><b>international</b> [14] 4:5,10,12 73:12 76:10 143:8 145:1 146:9 151:5,10 153:5,17 201:11 203:12</p> <p><b>internet</b> [16] 12:16,17 13:24 29:15,16,18 30:3 34:11 36:8 86:22 177:2 184:5 204:7,8,11,12</p> <p><b>Internet's</b> [1] 188:13</p> <p><b>interoffice</b> [1] 114:20</p> <p><b>interpretation</b> [1] 128:4</p> <p><b>interpreted</b> [2] 146:7,10</p> <p><b>intersection</b> [1] 163:2</p> <p><b>intervention</b> [4] 92:23 94:4 131:5 152:4</p> <p><b>interventions</b> [1] 72:1</p> <p><b>intolerable</b> [1] 96:3</p> <p><b>introduce</b> [5] 4:16 5:25 76:7 100:12 144:4</p> <p><b>introduced</b> [2] 77:19</p>
---	---	--	---	--	--

<p>98:8  <b>introducing</b> [1] 77:12  <b>introduction</b> [1] 79:2  <b>invalidate</b> [1] 90:18  <b>inventors</b> [2] 171:17, 18  <b>invest</b> [2] 55:25 84:5  <b>invested</b> [2] 30:20 84:3  <b>investigate</b> [1] 153:14  <b>investing</b> [1] 61:19  <b>investment</b> [9] 46:2 48:18 63:10 119:14, 16 124:25 127:21,25 128:7  <b>investments</b> [3] 56:8, 17 128:14  <b>invitation</b> [1] 196:23  <b>invited</b> [2] 5:11 74:10  <b>inviting</b> [1] 72:5  <b>invoke</b> [2] 99:1,18  <b>invoking</b> [1] 103:12  <b>involve</b> [2] 176:2 206:12  <b>involved</b> [3] 53:12 171:25 187:4  <b>involves</b> [1] 172:3  <b>involving</b> [2] 147:2 187:21  <b>IP</b> [9] 23:8 77:24 78:1 98:11 162:20 178:23 186:16,24 187:8  <b>ironic</b> [2] 120:12 197:6  <b>irrational</b> [1] 113:8  <b>irrelevant</b> [1] 161:18  <b>isn't</b> [20] 10:21 25:17 41:20 42:7 43:7 62:23 69:21 72:9 86:16 112:1 116:7 120:3 152:7 159:18,22 160:22 162:16 179:2,2 197:8  <b>isolation</b> [1] 43:10  <b>issue</b> [42] 7:18 11:5,9 37:11 39:9 40:6 49:25 54:4,8 69:22 71:2, 16 79:20 80:23,24,25, 25 86:5 120:24 129:8 132:16 139:21 146:4 148:3,6 155:3 157:6 160:15 161:21,22,23, 23 162:12,20 168:19 170:2 174:12 177:1 184:21 187:4 204:6 205:19  <b>issues</b> [28] 49:15 53:22 55:1 57:24 67:16 68:13 71:25 72:3 79:7 80:14,18 82:4,8 98:24 105:22 115:11 116:</p>	<p>9 117:20 129:19 130:8 142:1 157:22 163:1 164:18 171:9,10 174:17 178:8  <b>item</b> [2] 200:10 207:4  <b>items</b> [1] 17:15  <b>itself</b> [14] 29:18 41:9 72:14 105:20 115:4 121:6 132:20 137:12, 15,16 163:20 167:25 203:17,22</p> <p style="text-align:center"><b>J</b></p> <p><b>Jane</b> [25] 6:12 7:6,22 8:19 9:2,6 10:6 12:22 13:9 17:11 27:8 32:22 34:3 49:23 64:5 65:22 69:10,13 104:8 147:22 152:6 154:19 160:24 161:19 166:3  <b>Jane's</b> [2] 49:15 152:5  <b>Jani</b> [7] 76:2,4,6 96:9 109:13 122:25 134:13  <b>Jay</b> [1] 208:20  <b>JCPA</b> [44] 49:12 69:9 89:16 90:9,18 92:25 93:7 97:17 98:21,23, 25 99:5,10,17 104:1, 13,20 106:15 116:8 118:8,11,18 119:4,17, 23 121:3 122:22 123:4,5 126:1,2 130:16,19 138:21 140:19 156:10 163:11 164:2 169:23 170:9 171:5,11 179:15 182:21  <b>Jessica</b> [11] 79:25 85:15 94:8,10 117:23,25 121:8 122:8 127:14 135:4 138:17  <b>job</b> [2] 104:1 134:11  <b>jobs</b> [2] 74:23 182:13  <b>John</b> [16] 144:14 158:4,4 159:15 163:1 167:22 169:20,21 174:25 181:13 189:23 190:11 192:2 193:5 205:22 207:13  <b>Johnathan</b> [1] 151:6  <b>Johns</b> [1] 169:21  <b>join</b> [3] 111:17 119:5 210:15  <b>joined</b> [1] 210:11  <b>joining</b> [7] 3:4 4:8 5:16 73:6 74:17 143:10 145:8  <b>joke</b> [1] 58:5  <b>Jon</b> [1] 191:9  <b>Jonathan</b> [18] 144:7,9 147:21 150:23 152:5 159:12 163:10 166:13 169:21 176:23 184:2 189:23 192:24 198:6</p>	<p>199:23 200:2 204:3 205:15  <b>Jonathan's</b> [5] 164:20 165:3 182:13,21 194:18  <b>Josh</b> [1] 128:11  <b>Josh's</b> [1] 106:13  <b>Joshua</b> [16] 80:6,8 86:15 94:8 96:11 98:17 104:12 107:18 109:14 114:2 117:23 126:12 128:9 132:8 133:22 137:18  <b>journalism</b> [30] 20:15 21:2 24:14 25:13 49:7 56:22 61:1 62:9 63:19,23,23,24 64:17,23 65:4,7,16 71:14 81:10,11 82:5 92:15 94:13 95:20 105:1 119:14,15 133:14 183:15 207:22  <b>journalist</b> [5] 67:14 80:10,11,11 184:18  <b>journalists</b> [27] 58:15 60:21 67:8 81:8,8,16, 16,22,23 119:15 131:8 133:4,4 144:23 145:1 148:5 168:25 173:1, 4,10,17,24 184:14 207:22,23,24 208:2  <b>Jr</b> [1] 208:21  <b>judge</b> [3] 110:14 130:2 191:23  <b>judgments</b> [2] 67:2 187:21  <b>July</b> [1] 156:23  <b>jump</b> [2] 70:11 91:1  <b>jurisdiction</b> [2] 168:3 206:10  <b>jurisdictions</b> [2] 110:10 170:20  <b>justice</b> [4] 95:6 156:22 191:9,12  <b>justified</b> [3] 151:18 157:17 200:24  <b>justify</b> [1] 176:8</p> <p style="text-align:center"><b>K</b></p> <p><b>Kate</b> [17] 6:19 8:17 10:9 12:6 13:21 15:3 25:10 27:19 33:14 35:22 44:3 47:12 60:11 61:6,11 71:18 93:14  <b>Kate's</b> [1] 62:5  <b>keep</b> [19] 5:3,6 9:5 26:13,22 52:7,14 56:13 72:1 74:1,4 76:4 102:6 106:4 112:18 132:6 140:10 143:18 206:25  <b>keeping</b> [1] 133:25  <b>Keith</b> [16] 6:15,16 15:4 16:1 21:20 25:12</p>	<p>27:8 30:11 40:2 51:25 56:12 59:6 60:15 69:14 72:7 89:15  <b>KENDALL</b> [4] 82:14, 15 116:15 139:3  <b>kept</b> [1] 180:18  <b>Kern</b> [49] 4:13 5:21 12:2 17:24,25 20:10 21:20 24:10 25:10 27:4 42:18 44:3 45:4 46:10 47:12 48:6 49:13 61:4,22 63:16 73:14 122:7,8,24 125:5 126:12 128:9,23 130:22 143:3 144:13,19 145:2,10,15,20 147:19 148:13 149:19 150:21 151:15 152:2 153:1 185:21 186:9 187:17 189:18 190:6 208:5  <b>kettle</b> [1] 174:19  <b>key</b> [1] 149:22  <b>Kicking</b> [1] 120:23  <b>kind</b> [22] 9:24 18:1 41:14,24 42:15 43:15 47:21 52:12 64:8 83:7, 24 99:2,12 103:19 121:21 125:23 137:17 164:14 178:12 196:7 203:6 204:21  <b>kinds</b> [3] 63:23 78:20 146:25  <b>knowing</b> [1] 127:3  <b>Knowledge</b> [4] 144:16 158:23 188:3 205:24  <b>Knowledge's</b> [1] 175:13  <b>Knupp</b> [2] 88:23 145:13  <b>KUPFERSCHMID</b> [11] 6:16,16 8:24,25 16:2 21:21 30:12 40:3 52:1 59:9 72:8</p> <p style="text-align:center"><b>L</b></p> <p><b>labor</b> [2] 172:3 173:6  <b>laboratory</b> [1] 121:21  <b>lack</b> [6] 11:17 28:6 77:3 97:9,10 181:11  <b>laid</b> [2] 19:8 105:22  <b>LAMEL</b> [7] 80:7,8 86:15 98:18 107:19 126:13 132:10  <b>landscape</b> [2] 55:11 116:17  <b>language</b> [3] 27:1 151:19 192:11  <b>large</b> [15] 24:23 34:17 53:10,25 55:13 110:7, 23 111:2,19 118:11, 16,21 200:6,7 204:12  <b>largely</b> [4] 51:22 54:2</p>	<p>80:18,24  <b>larger</b> [8] 35:20 53:3, 18 55:19 111:15 113:22 137:7 209:8  <b>largest</b> [3] 118:17 164:20 184:6  <b>Larry</b> [1] 28:17  <b>last</b> [30] 13:19 21:14 23:5 34:24 36:8 37:16 48:9 56:10 61:18 67:19 71:23 72:8 73:16 92:19 93:13 119:11,22 128:25 141:5 148:16 155:19 166:13 179:20 193:19 194:4 196:13 200:10 201:12 202:10 205:7  <b>lastly</b> [3] 27:4 71:14 152:2  <b>late</b> [1] 34:24  <b>later</b> [9] 14:25 16:19 23:14 24:8 30:10 46:3 88:6 168:24 196:3  <b>latter</b> [1] 47:10  <b>Latvia</b> [1] 110:11  <b>launch</b> [1] 61:16  <b>Lavizzari</b> [12] 145:2,3, 4 147:19,20 156:13 168:18 174:3 187:17, 18 190:21 199:20  <b>Law</b> [115] 6:13 8:22,23 21:18 23:7,7 26:21 30:7 32:15 33:2 42:8, 10 43:12,18,23 48:23 50:2 54:10 63:24 64:3 67:10,13 68:16 69:16 71:24,25 75:15,20 80:11 85:14 86:3 87:19 88:12 89:3,12,18 90:7,19 94:22 96:6 97:4,19 98:7,12,16 102:11 104:4,4,9 105:4,15 108:17 110:25 111:2,18 115:10,13, 14 116:12 120:3 123:7 125:15,18 126:9,10, 11 127:22,25 128:4 129:5,10 135:17 138:5,23 144:18 145:12 146:9 150:8 153:21 154:17 155:8,14,17 157:15,22 160:20 163:13 164:1,4 166:20 168:3 170:17,22 171:3,4,8,20 172:1,3,24 173:14,17,19 174:6, 24 177:17 181:15 182:6 187:11 188:7 203:11,14,23 207:16  <b>lawful</b> [1] 90:1  <b>laws</b> [12] 7:20 19:15 23:8 24:18 51:8 63:</p>	<p>14 93:1 104:21 106:10 110:19,21 182:9  <b>lawsuit</b> [1] 50:10  <b>lawsuits</b> [3] 49:21,24 50:18  <b>lawyer</b> [5] 76:7 100:12 141:10 145:4,8  <b>lawyerly</b> [1] 160:3  <b>lawyers</b> [2] 180:22,22  <b>lay</b> [1] 122:19  <b>layoffs</b> [2] 24:24 54:3  <b>lead</b> [3] 49:20 126:8 179:15  <b>leadership</b> [1] 71:5  <b>leading</b> [2] 54:3 147:22  <b>leads</b> [6] 49:24 56:18 62:10 97:13 178:19 179:10  <b>lean</b> [2] 35:18 58:19  <b>leaning</b> [1] 55:3  <b>leans</b> [2] 35:12 58:8  <b>learn</b> [5] 77:25 122:11 123:20 125:7,9  <b>learned</b> [1] 127:24  <b>least</b> [16] 33:1,12 34:21 53:23 59:5 66:5 69:19 70:6 77:3 85:22 120:1 124:7,9 125:8 174:16 194:10  <b>leave</b> [3] 109:7 141:17 159:10  <b>leaving</b> [2] 56:25 133:4  <b>lebt</b> [1] 169:14  <b>lecture</b> [1] 191:9  <b>lede</b> [1] 195:11  <b>ledes</b> [7] 10:13,16 11:20 17:17 33:21,25 166:8  <b>Lee</b> [2] 10:25 12:18  <b>left</b> [2] 59:14 112:8  <b>legal</b> [13] 79:7 85:8 97:7 98:2,4 110:12 111:6 124:19 139:13 144:15 160:16 172:10 192:5  <b>legally</b> [2] 166:14,15  <b>legislation</b> [11] 49:6 77:12 89:16 93:9 98:9 121:3 123:13 150:12 187:2 196:24,25  <b>legislative</b> [2] 41:15 146:22  <b>length</b> [3] 15:12 101:1 190:19  <b>lengthy</b> [1] 89:2  <b>Leon</b> [1] 208:20  <b>Les</b> [1] 169:8  <b>less</b> [10] 28:9 35:12 50:18 58:21 63:7 101:4 112:8 158:7 159:1</p>
--	---	--	--	---	--

<p>192:10  <b>lesson</b> [2] 131:4,4  <b>lessons</b> [1] 173:11  <b>letter</b> [4] 99:11,13 150:18 156:1  <b>letters</b> [1] 38:22  <b>letting</b> [3] 60:15 114:17,18  <b>Leval</b> [2] 191:9,12  <b>level</b> [15] 21:25 32:16 56:9 65:24 68:12 91:16 94:20 105:1 110:9 131:14 146:5 159:17 195:6 198:18 201:20  <b>levels</b> [3] 93:25 107:13 174:1  <b>leverage</b> [3] 34:18 110:6 111:11  <b>Leveraging</b> [1] 97:16  <b>liable</b> [1] 191:4  <b>liaisons</b> [1] 169:8  <b>liberally</b> [1] 66:7  <b>libraries</b> [3] 87:8 144:11,12  <b>Library</b> [5] 126:5,5 127:2 144:9,10  <b>license</b> [3] 37:24 162:7 200:7  <b>licensed</b> [1] 145:5  <b>licensee's</b> [1] 116:5  <b>licenses</b> [1] 115:22  <b>licensing</b> [4] 14:11 22:4 157:21 174:16  <b>lies</b> [1] 22:11  <b>life</b> [1] 187:4  <b>likelihood</b> [1] 92:1  <b>likely</b> [7] 89:9 158:8,11 171:1 175:21 192:10,22  <b>limit</b> [1] 143:20  <b>limitation</b> [1] 151:21  <b>limitations</b> [11] 4:4 141:25 143:8 156:3 157:13 158:23 159:7 163:5 186:4 190:1 203:24  <b>limited</b> [5] 90:21 92:14 147:6,13 203:19  <b>limiting</b> [2] 75:16 158:12  <b>limits</b> [1] 186:18  <b>line</b> [4] 104:9 118:10 160:20 208:24  <b>lines</b> [3] 42:18 89:6 155:13  <b>link</b> [7] 16:12 20:22 74:10 83:13 87:18 132:20 143:24  <b>linked</b> [2] 200:10 201:12  <b>linking</b> [5] 13:12,17 16:6,18 192:17</p>	<p><b>links</b> [10] 8:21 12:20 13:14,16 16:7 75:14 83:11 92:5,6 126:25  <b>list</b> [1] 129:24  <b>litigate</b> [1] 124:6  <b>litigated</b> [4] 62:1 112:11 116:9 176:2  <b>litigation</b> [10] 19:22 47:3,4 48:21 50:10,13 51:7 107:7 109:23 115:11  <b>little</b> [18] 14:19 16:18 23:14 34:1 61:5 84:25 86:18 87:5,14 114:15 122:9 131:25 140:12 159:1 178:21 185:22,25 186:5  <b>littles</b> [1] 182:24  <b>live</b> [2] 112:2 169:14  <b>livelihoods</b> [2] 208:1 210:7  <b>lively</b> [1] 4:6  <b>living</b> [3] 67:4 122:1 207:24  <b>loathed</b> [1] 66:12  <b>local</b> [35] 18:18 19:1 24:14,23 25:5 30:2 53:2,5,8,19,20,23,24 54:8,12,13,15,25 55:16 56:7,9 58:25,25 59:23 94:20 105:2 178:21 179:6,13,18 182:12 204:10,13,15 205:25  <b>Lofgren</b> [1] 187:9  <b>log</b> [1] 73:2  <b>logistical</b> [2] 10:3 12:1  <b>logistics</b> [2] 143:11,14  <b>Lohn</b> [1] 169:14  <b>long</b> [22] 22:24 38:5 40:22,22 50:10 54:18 59:4 60:23 92:23 94:3 112:2,4 129:24 131:14 132:14 150:12 157:7 174:4 188:12 200:13,21,25  <b>longer</b> [5] 38:22 57:14 129:11 131:16 191:25  <b>longstanding</b> [1] 29:24  <b>look</b> [49] 4:7 9:1,8,10,11 11:14 21:6 23:24 24:14,22 31:15 32:11 36:9 39:25 44:14 55:11 64:10,12 77:25 80:14 81:13 82:7 89:13 93:7 103:17 121:5,12,19 125:24 138:25 153:10 155:7,10 164:24 166:1,2 171:15,20</p>	<p>172:4 183:13,17 187:22 188:1,17 189:15 191:3,16 202:13 205:1  <b>looked</b> [6] 10:23 26:13 124:22 132:13 154:23 195:4  <b>looking</b> [15] 9:21 18:21 44:12,15 55:21 62:19 63:11 72:3,3 136:23 149:7 158:10 170:13 176:19 182:5  <b>looks</b> [7] 12:10 43:9 102:17 127:9 146:2 200:3 204:5  <b>Lord</b> [1] 66:1  <b>lose</b> [3] 136:20 141:15 175:11  <b>losing</b> [1] 79:23  <b>loss</b> [10] 23:14,15,16,19,20,21,21,22,23 31:8  <b>lost</b> [3] 74:22 182:14 196:1  <b>lot</b> [74] 7:1 12:14,23 18:8,11 19:5 28:6 36:5 39:4 41:7 44:22 48:23 59:10 64:4,5,6 67:4 71:23 72:13 80:15,16,18 81:7,9,15,16,19 82:21 84:22,23 86:2 88:15 94:24 105:12 112:8 115:9 120:12 122:9 125:25 132:1,1 133:4 137:13 139:8 140:15 153:19 154:1 155:13 159:13,15 165:7 166:5 167:16 168:17 170:2,16,19 171:1 174:6 177:18 178:20 181:10 185:12,23 187:11,11 203:8,14 206:20 207:7,9,10,12,13  <b>Lots</b> [4] 11:3 164:18 177:12 179:5  <b>love</b> [9] 30:1 45:14,15 65:10 89:7 104:10 129:24 130:12 137:18  <b>low</b> [2] 62:4 95:25  <b>lower</b> [1] 209:8  <b>lowered</b> [2] 193:2 209:4  <b>lunch</b> [1] 141:21  <b>lure</b> [1] 22:21  <b>lurking</b> [1] 160:13</p>	<p>24 148:4 150:23 159:16 163:11 184:1,3,8 197:18 202:16 203:7  <b>magically</b> [1] 137:2  <b>magnified</b> [2] 18:11 29:14  <b>main</b> [5] 30:8 155:15,15 160:2,12  <b>maintain</b> [2] 57:5 192:15  <b>majority</b> [2] 36:13 161:11  <b>man</b> [5] 158:14,14,16,17 169:14  <b>manage</b> [1] 210:13  <b>management</b> [4] 111:9,17 157:24 174:10  <b>Manager</b> [1] 26:15  <b>mandate</b> [1] 173:17  <b>mandates</b> [1] 121:17  <b>mandatory</b> [10] 38:8 99:20,23 106:13 146:7 148:23 149:3 175:2 2176:4,9  <b>many</b> [33] 8:4 24:20 30:6,23 31:7 36:3 38:16 39:4 43:17 54:23 56:23 63:4 67:5 69:19 71:21 83:23 88:10 92:12 129:13 133:18 134:9 141:19 145:7 157:22 171:2,3 172:20,25 173:3 190:1,25 193:3 206:6  <b>map</b> [2] 70:8 161:4  <b>marginal</b> [2] 91:15 93:24  <b>Maria</b> [1] 4:9  <b>market</b> [53] 18:3 20:12,18 21:1,5,7,8,12,12,13,19,22 23:13 25:2 30:17 31:15,16 32:12 33:12,12 45:13,16,18 46:4 48:19 49:5 50:6 63:13 78:18 91:13 106:19 109:18,22 110:3,7 118:19 119:9 131:11,18 141:12 156:8,10 165:8,20,24 170:7,9 176:17 177:19 178:13 180:25 181:4,8  <b>marketing</b> [1] 23:17  <b>marketplace</b> [11] 21:16 30:4,9 39:23 45:24 81:20 89:20,22 164:25 165:15,22  <b>Markets</b> [4] 98:10 106:25 131:5 133:10  <b>mass</b> [3] 188:25 191:18,19  <b>massive</b> [1] 91:10</p>	<p><b>matching</b> [1] 180:13  <b>material</b> [1] 165:23  <b>materials</b> [1] 165:10  <b>Matt</b> [14] 88:3,20,22 101:25 103:6 114:16 117:23,25 118:1 119:19 122:14 128:23 139:17 160:2  <b>Matt's</b> [2] 100:16 132:12  <b>matter</b> [20] 10:3 12:1 42:8 59:22 60:5 69:15 100:8 103:22 104:14 111:4 125:12 141:3 142:4 154:24 155:1 166:16 177:9 186:22 200:20 210:21  <b>matters</b> [3] 59:22 60:10 183:15  <b>maximize</b> [1] 20:19  <b>mean</b> [48] 9:2 11:22 17:3 41:17 44:25 50:22 52:2,9 65:18 67:7 79:23 80:20 81:14 88:9 94:13,15,16 95:11 96:1,13 99:24 108:4,24 119:25 120:2 122:3 123:14 126:15 132:13 133:13,24 135:12,13 137:10,19 140:14 147:21 156:13 177:2,12 178:11,22 179:3 180:1,12 194:7 199:9 205:10  <b>meaning</b> [5] 29:3 55:11,14 86:12 177:4  <b>meaningful</b> [5] 101:14 134:8 137:16 197:24 205:3  <b>meaningless</b> [2] 68:25 164:10  <b>means</b> [13] 26:24 30:16 31:19 103:21 146:7 165:20,21 175:6,7,8 176:5 186:23 206:16  <b>measure</b> [2] 33:7 181:22  <b>mechanics</b> [1] 136:6  <b>mechanism</b> [1] 69:2  <b>Media</b> [29] 6:7,14 32:18,25 33:9 34:5 35:20 42:14 76:10 83:9 88:24 91:9 99:6 106:24 111:7 133:12 139:22 141:8 144:24 145:14 148:18 149:17 153:22 154:9,12 165:12 166:24 190:23 202:3  <b>medicine</b> [1] 65:17  <b>Melinda</b> [27] 4:13 5:21 12:1 17:24 21:21 42:16 59:7,18 61:3</p>	<p>62:13 63:18 70:10 73:14 118:1 121:9 122:7 127:11 145:11 152:21 153:4 183:23 185:20 189:20 190:10 201:24 208:4 210:11  <b>Meltwater</b> [3] 168:20 190:22 191:4  <b>member</b> [5] 38:21 55:10,10 110:17 157:1  <b>members</b> [19] 5:7,10,16 38:21 45:10 72:23 74:6,9,17 98:20,23 99:7 108:4,5 110:8 133:12 139:20 152:15,16  <b>membership</b> [2] 55:7 144:23  <b>Mensch</b> [1] 169:13  <b>mention</b> [5] 9:7 26:22 61:12,14 203:22  <b>mentioned</b> [27] 9:6,19 25:18 26:10 27:9 28:10 35:24 43:2,4 44:9 57:10 60:18 61:9 88:11 102:11 107:4 145:24 151:7 153:8 170:6 182:22 186:3 190:11,21 203:14,15 207:13  <b>mentioning</b> [1] 150:24  <b>mere</b> [2] 167:24 168:6  <b>merged</b> [1] 57:4  <b>merger</b> [5] 158:13 194:11 203:15,17,19  <b>mergers</b> [1] 24:23  <b>Meta</b> [2] 82:15 117:5  <b>metaphor</b> [1] 102:21  <b>method</b> [2] 64:14 65:8  <b>metropolitan</b> [1] 55:23  <b>mic</b> [1] 93:14  <b>Michelle</b> [1] 209:15  <b>microfilm</b> [1] 38:11  <b>microphone</b> [2] 5:6 74:4  <b>microphones</b> [1] 208:9  <b>Microsoft</b> [1] 119:7  <b>mics</b> [1] 143:19  <b>midst</b> [1] 86:7  <b>might</b> [20] 72:18 76:13 78:13 85:13 100:6 105:2 120:10 134:19 135:1 137:2 140:23 146:19 147:14 159:23 161:14 175:25 177:16 182:18 196:3 199:21  <b>Mihaly</b> [1] 148:24  <b>mike</b> [1] 208:16</p>
--	--	---	--	---	---



<p><b>million</b> <sup>[2]</sup> 60:22 110:7  <b>millions</b> <sup>[1]</sup> 23:1  <b>mind</b> <sup>[4]</sup> 9:5 72:2 130:24 140:11  <b>mine</b> <sup>[1]</sup> 202:2  <b>minima</b> <sup>[1]</sup> 152:17  <b>minimal</b> <sup>[1]</sup> 150:18  <b>minimize</b> <sup>[1]</sup> 21:10  <b>minimum</b> <sup>[2]</sup> 58:24 114:15  <b>minuscule</b> <sup>[1]</sup> 16:13  <b>minute</b> <sup>[6]</sup> 7:8 54:24, 25 72:24 132:7 165:6  <b>minutes</b> <sup>[10]</sup> 5:4 74:2 102:7 132:24 143:20 182:4 184:2 205:15 206:24 208:12  <b>misappropriation</b> <sup>[7]</sup> 68:3 146:24 147:1,3, 8,10,13  <b>mischaracterized</b> <sup>[2]</sup> 152:5 165:6  <b>misconception</b> <sup>[1]</sup> 89:1  <b>misconceptions</b> <sup>[2]</sup> 83:2 100:14  <b>misdirection</b> <sup>[1]</sup> 90:23  <b>misfortune</b> <sup>[1]</sup> 187:3  <b>misguided</b> <sup>[1]</sup> 120:11  <b>misheard</b> <sup>[1]</sup> 127:19  <b>misrepresentation</b> <sup>[1]</sup> 101:16  <b>misrepresentations</b> <sup>[1]</sup> 105:10  <b>misrepresenting</b> <sup>[1]</sup> 195:9  <b>miss</b> <sup>[1]</sup> 139:7  <b>mission</b> <sup>[3]</sup> 172:8,8 173:20  <b>misunderstanding</b> <sup>[4]</sup> 90:23 123:2,3,18  <b>Mitchell</b> <sup>[2]</sup> 88:22 145:12  <b>mixing</b> <sup>[1]</sup> 180:12  <b>mobile</b> <sup>[3]</sup> 22:14 28:3 62:21  <b>model</b> <sup>[20]</sup> 25:8 31:23, 24,24 35:19 55:4 58:8,20 95:13,13 120:16 127:18 128:6,7 133:5, 5 171:11 174:20 175:18 204:9  <b>modeling</b> <sup>[1]</sup> 95:6  <b>models</b> <sup>[12]</sup> 26:9 30:24 32:24 34:9 66:9 77:7 87:24 96:20 185:1,2,10 208:2  <b>modern</b> <sup>[2]</sup> 87:18 188:2  <b>modernizing</b> <sup>[1]</sup> 138:</p>	<p>7  <b>modes</b> <sup>[1]</sup> 184:24  <b>modest</b> <sup>[1]</sup> 197:18  <b>moment</b> <sup>[3]</sup> 63:17 83:4 105:15  <b>monetize</b> <sup>[3]</sup> 91:23 97:2 101:10  <b>money</b> <sup>[21]</sup> 23:1,4 36:6,12 39:19 96:2,19 112:7,16,21 113:16, 17 118:19 173:15 178:20,21 179:5,16 184:12,14 209:10  <b>monies</b> <sup>[2]</sup> 104:24 182:22  <b>monitoring</b> <sup>[1]</sup> 190:23  <b>monopolists</b> <sup>[1]</sup> 131:12  <b>monopolization</b> <sup>[3]</sup> 164:6 165:11,12  <b>monopolized</b> <sup>[5]</sup> 106:23,23,24 109:18 164:12  <b>monopoly</b> <sup>[11]</sup> 19:21 46:9 63:14 107:5,16 136:5 174:5,5 179:23 203:21 204:13  <b>monopsony</b> <sup>[1]</sup> 179:23  <b>month</b> <sup>[2]</sup> 15:8 47:24  <b>monthly</b> <sup>[1]</sup> 120:8  <b>months</b> <sup>[1]</sup> 61:18  <b>moot</b> <sup>[2]</sup> 148:17 152:20  <b>moral</b> <sup>[1]</sup> 196:24  <b>morning</b> <sup>[5]</sup> 3:9 86:21 87:5 154:20 155:21  <b>most</b> <sup>[27]</sup> 9:13 13:7 21:18 22:15 25:24 31:6 39:20 43:22 54:11 60:10 78:7 80:14 81:21 112:7 113:11 123:21, 22 124:22 139:6 150:3 154:11 155:25 180:21 184:18 195:18 205:11 210:14  <b>mostly</b> <sup>[2]</sup> 31:2 176:2  <b>motion</b> <sup>[1]</sup> 93:8  <b>motivations</b> <sup>[1]</sup> 170:19  <b>motivator</b> <sup>[1]</sup> 155:15  <b>move</b> <sup>[9]</sup> 53:6,14 60:15 72:2,17,23 94:9 106:2 196:12  <b>moved</b> <sup>[1]</sup> 108:20  <b>moving</b> <sup>[3]</sup> 39:15 118:4 133:5  <b>MS</b> <sup>[118]</sup> 3:9 6:7,12,19 7:7,24 8:18 10:8 12:12 13:11,19 15:5 17:13,25 18:5,6 20:10</p>	<p>21:20 24:10 25:10,11 27:4,5,16 32:23 35:23 36:19,22 37:16,20 38:3 41:22 42:18 43:2 44:3,4 45:4,5 46:10 47:12,13 48:6,6,8 49:13,24 55:6 60:14 61:4,12,22,23 63:16 64:4 65:23 68:6 69:14 70:17 71:19 75:8 77:21 79:2 82:14 84:21 94:11 100:11 111:23 113:25 115:9 116:15 121:10 122:8,24 125:5 126:12 128:9,10,23 130:22 133:24 135:5, 12 137:10 139:3 143:3 144:13,19 145:2,10, 15,15,16,20 147:19 148:13 149:19 150:21, 21,22 151:15 152:2 153:1 162:22 167:10 170:12 180:20 185:21 186:9 187:17 189:18, 18,20 190:6 195:16 203:5 207:3 208:5 209:20  <b>much</b> <sup>[54]</sup> 7:14 9:8 13:6 16:8 31:15 33:1,12 34:15 44:1 50:3 53:10 55:22 63:4,5 67:6 68:7,18 71:19 72:9, 20 73:3 74:23 84:22 88:21 101:18 106:4 109:16 125:5 127:15 135:3 140:16 145:9 147:10,16,16 157:12 172:22 177:23 186:11 189:18 190:8,12 192:22 197:18 198:5 199:7 200:1 201:25 202:18 207:6 208:13 209:2,12 210:8  <b>multiple</b> <sup>[6]</sup> 45:23 64:21 99:7 168:24 190:15 197:19  <b>municipal</b> <sup>[1]</sup> 59:1  <b>music</b> <sup>[2]</sup> 125:3 157:2  <b>musical</b> <sup>[1]</sup> 188:11  <b>must</b> <sup>[11]</sup> 66:6 76:16 86:12 108:11,16 146:8,8 149:9 158:24 165:13 199:12  <b>mute</b> <sup>[1]</sup> 72:22  <b>muted</b> <sup>[10]</sup> 5:6 6:11 36:17 74:5 75:7 143:19 153:16 192:25 208:9 209:18  <b>myopic</b> <sup>[1]</sup> 94:22  <b>myriad</b> <sup>[1]</sup> 28:1  <b>Myself</b> <sup>[8]</sup> 12:1 60:4 76:7 100:13 112:11</p>	<p>139:11 143:15 153:16  <b>myth</b> <sup>[2]</sup> 109:16 110:13  <hr/> <p style="text-align: center;"><b>N</b></p> <hr/> <b>nail</b> <sup>[3]</sup> 94:25 96:7 102:17  <b>name</b> <sup>[15]</sup> 5:25 6:3 9:1 65:1 73:11,22 76:3,5, 6 80:7 82:14 105:2 110:11 145:3 200:25  <b>named</b> <sup>[1]</sup> 150:19  <b>names</b> <sup>[5]</sup> 64:14 76:5 78:25 79:1 154:6  <b>narrative</b> <sup>[1]</sup> 204:18  <b>narrower</b> <sup>[1]</sup> 147:16  <b>narrowly</b> <sup>[1]</sup> 90:3  <b>national</b> <sup>[18]</sup> 34:17 54:21,24 55:23 56:5,5 71:12 94:20 110:19, 21 144:22 146:24 156:25 165:5 166:13,22, 25 167:6  <b>nationalization</b> <sup>[2]</sup> 34:13 54:22  <b>nationwide</b> <sup>[1]</sup> 53:11  <b>nature</b> <sup>[6]</sup> 16:5 18:18 154:13 181:5 202:6, 19  <b>near</b> <sup>[1]</sup> 93:24  <b>neatly</b> <sup>[1]</sup> 155:14  <b>necessarily</b> <sup>[17]</sup> 35:4 44:25 46:19,21 54:16 59:2,20 114:19 115:25 118:17 137:21 138:4,23 148:9 155:22 171:25 183:19  <b>necessary</b> <sup>[13]</sup> 75:6, 11 85:3,16,18 86:12, 16,25 88:9 89:5 92:24 94:4 156:10  <b>necessity</b> <sup>[1]</sup> 183:19  <b>need</b> <sup>[53]</sup> 24:6 36:3,25 39:11 44:21 51:10,14 52:14 53:20 57:5 58:19 78:17,22 79:20 80:4 81:1,4,21 82:17 85:12,19 92:9 94:1,18 95:7 99:19 106:7 110:22 112:22 113:11 114:14 115:4 118:17 120:19 124:7,19 127:10, 13 136:22,22 137:4 162:15 173:22 179:7 180:4,18 184:23 194:5 195:22 196:9,24,25 197:14  <b>needed</b> <sup>[4]</sup> 86:12 188:24 193:1,3  <b>needing</b> <sup>[1]</sup> 104:12  <b>needs</b> <sup>[29]</sup> 20:9,9 24:8 40:24 41:14,14,18,24 42:12 52:4,8 56:16</p>	<p>83:17 85:1 86:3,14, 17 94:2,13 106:11 115:6 168:7,14 173:8 180:7 204:6,16 205:1, 18  <b>negatively</b> <sup>[1]</sup> 120:9  <b>negotiate</b> <sup>[3]</sup> 93:18 108:16 173:25  <b>negotiated</b> <sup>[2]</sup> 131:14, 16  <b>negotiating</b> <sup>[2]</sup> 98:23 110:24  <b>negotiation</b> <sup>[3]</sup> 51:7 89:21 109:5  <b>negotiations</b> <sup>[4]</sup> 33:10 93:23 164:1 173:18  <b>neighborhood</b> <sup>[2]</sup> 18:22,25  <b>neighbors</b> <sup>[1]</sup> 113:22  <b>Neil</b> <sup>[1]</sup> 160:25  <b>neither</b> <sup>[2]</sup> 54:7 105:11  <b>Netanel</b> <sup>[1]</sup> 160:25  <b>networks</b> <sup>[1]</sup> 121:16  <b>never</b> <sup>[6]</sup> 93:23 95:20 139:7 150:7 159:5 175:11  <b>Nevertheless</b> <sup>[1]</sup> 90:17  <b>new</b> <sup>[36]</sup> 3:17 30:22 31:22 32:18,19 40:17 41:18 51:9 76:23,24 77:8,12 80:22 84:1,5 87:22 99:1 106:17 133:17 136:24 143:7 165:17 168:10,13 169:22,23 170:4 178:12, 19 179:2,11 184:12, 15 185:5,15,17  <b>news</b> <sup>[234]</sup> 3:23,24 6:7, 14 7:4,9,11 8:5,7,11, 20 13:3,5,6 14:1 15:6, 8,9,14,17,18,24 16:22 17:15,17,18 18:4,12 19:1,16,23,23 22:3,3, 18 23:2 24:1,12,23 25:15,17,19,23 26:4,9, 13,23,24 29:18 30:14, 15,22 31:3,5,20 32:18, 19 33:16 34:5,6,13 35:24,25 36:6,7,7,9, 14,14 38:21 39:13,20 40:8,9,12,19,25 42:14 44:5,7,9,13,16,16,23 45:1,7 46:24 47:8,23, 25 49:9 51:21 52:17 53:1,2,2,8,20,25 54:23 55:7 57:13 58:17 59:12 60:19,20,21,23 61:2,16,20 64:6,8,11, 16,24 65:1 67:24 68:</p>	<p>2,9 69:7,11,16,17,21, 23,25 70:2,6 72:13 74:25 75:14 79:6,12 80:5 81:12,18,21 82:6 84:6,8 86:9 88:23 89:21 91:9 92:2 93:17,21 94:13,20 95:15 96:14,14,16,24 99:6 100:18,20,23,25 101:8,9 106:11 107:24,25 108:2,7,8,13 109:2,9 117:8,9,19 118:9 120:25 133:12,14 134:1 139:21 140:21 141:1, 3 145:14 146:24 147:3,7,10,13 148:18 149:16,17 150:1,4,19 153:22 154:9,12 157:19 159:2 160:10 166:24 167:18 174:13 177:4, 4,10,10,12,13,21 178:19 179:1,6,7,10,25 184:7 187:24 188:21 189:15 194:20,23 195:1 199:8,8 200:8 202:3 204:7,19,23 205:23, 25  <b>news.google.com</b> <sup>[1]</sup> 150:4  <b>newspaper</b> <sup>[11]</sup> 54:16 91:22 92:10,18 93:25 106:19 119:2 127:8 132:20 133:5 190:25  <b>newspaper's</b> <sup>[1]</sup> 204:13  <b>newspapers</b> <sup>[27]</sup> 32:5 54:3 55:12,16,16 57:14 91:12,19,20 92:14,16,20 93:1 100:17 106:22 107:10 118:11, 14,20 131:6,17 141:13 168:23 181:1 204:10,10,15  <b>newsroom</b> <sup>[1]</sup> 64:25  <b>newsrooms</b> <sup>[5]</sup> 19:7 56:1,8,17 81:9  <b>newsstand</b> <sup>[1]</sup> 56:24  <b>next</b> <sup>[38]</sup> 7:23 8:17 12:3 13:9 15:3 17:24 32:22 34:3 36:18 42:17 50:16 52:22 56:21 59:7 65:22 67:18 91:5 94:9,9 99:14 102:3,4 106:3,5 107:18 110:9 111:22 117:8,23 118:1 121:9 122:7 126:12 130:23 169:18 183:23 209:14,14  <b>nexus</b> <sup>[1]</sup> 140:21  <b>nice</b> <sup>[1]</sup> 66:20  <b>nicht</b> <sup>[1]</sup> 169:14  <b>night</b> <sup>[3]</sup> 193:19 194:4</p>
---	--	---	---	---	---

<p>205:7  <b>Nightflight</b> <sup>[1]</sup> 169:10  <b>Niskanen</b> <sup>[1]</sup> 6:24  <b>NMA</b> <sup>[3]</sup> 24:5 106:10          165:21  <b>nobody</b> <sup>[3]</sup> 20:1 113:          16 164:11  <b>NOI</b> <sup>[8]</sup> 14:10 18:2 37:          23 88:10 195:17 196:          11 203:15,17  <b>non-copyright</b> <sup>[1]</sup>          203:9  <b>non-copyrightable</b>  <sup>[1]</sup> 133:16  <b>non-economic</b> <sup>[1]</sup> 23:          19  <b>non-infringing</b> <sup>[1]</sup>          185:13  <b>non-traditional</b> <sup>[1]</sup>          209:5  <b>Nonetheless</b> <sup>[1]</sup> 67:          25  <b>nonprofit</b> <sup>[1]</sup> 85:8  <b>nor</b> <sup>[3]</sup> 54:7 68:11 195:          19  <b>normal</b> <sup>[1]</sup> 184:23  <b>normally</b> <sup>[1]</sup> 35:12  <b>notable</b> <sup>[1]</sup> 71:5  <b>notably</b> <sup>[4]</sup> 69:18 76:          12,21 83:24  <b>note</b> <sup>[7]</sup> 35:23 39:18          44:4 80:17 135:23          191:13 195:16  <b>noted</b> <sup>[5]</sup> 3:17 58:14          68:12 148:16 196:11  <b>nothing</b> <sup>[8]</sup> 66:19 92:          6 97:21 105:19 106:          15 123:15 129:13 178:          5  <b>Notice</b> <sup>[3]</sup> 74:19 132:3          172:14  <b>noting</b> <sup>[1]</sup> 184:5  <b>notion</b> <sup>[7]</sup> 83:14 120:8          130:3,4,6,18 164:21  <b>notwithstanding</b> <sup>[8]</sup>          11:11 43:13,19 56:2,          7 63:10 68:20 172:10  <b>novel</b> <sup>[1]</sup> 30:21  <b>nowadays</b> <sup>[1]</sup> 188:24  <b>nuances</b> <sup>[1]</sup> 169:12  <b>nuit</b> <sup>[1]</sup> 169:10  <b>number</b> <sup>[16]</sup> 12:24 17:          22 43:6 53:24 61:14          67:23 74:20 75:15 83:          8 124:3 132:11,23          176:5 178:16 182:11,          13  <b>numbers</b> <sup>[2]</sup> 36:23 37:          6  <b>numerous</b> <sup>[1]</sup> 172:22  <b>NWU</b> <sup>[1]</sup> 144:24  <b>Nzengha</b> <sup>[3]</sup> 84:20</p>	<p>113:24 137:9  <hr/> <b>O</b>  <b>object</b> <sup>[2]</sup> 178:24 189:          6  <b>objecting</b> <sup>[1]</sup> 188:25  <b>objective</b> <sup>[3]</sup> 64:10,22          66:7  <b>obligation</b> <sup>[2]</sup> 108:12          151:5  <b>obligations</b> <sup>[9]</sup> 4:5          142:1 143:9 151:11          152:14,18 166:25 196:          18 203:12  <b>observed</b> <sup>[1]</sup> 184:4  <b>obtained</b> <sup>[1]</sup> 125:11  <b>obvious</b> <sup>[2]</sup> 118:24          199:10  <b>obviously</b> <sup>[20]</sup> 9:9 16:          4,6,24 24:12 30:17          37:8 39:9 55:8 56:7          72:13 77:6 103:5 134:          1,14 147:21 149:16          158:20 193:13 202:19  <b>occasionally</b> <sup>[1]</sup> 150:          6  <b>occurring</b> <sup>[2]</sup> 107:13          108:3  <b>ocean</b> <sup>[1]</sup> 177:6  <b>offer</b> <sup>[8]</sup> 5:11 70:13,14          74:9 116:12 139:10          151:22 199:17  <b>offered</b> <sup>[1]</sup> 62:17  <b>offers</b> <sup>[1]</sup> 91:22  <b>Office</b> <sup>[107]</sup> 3:7, 16 4:9,          19 5:1,20 8:21 10:21          27:2 38:4,6,7,19 39:          24 40:5,21 41:9,13          52:12 71:7 73:12,17,          25 74:11 85:20 86:23          89:7,13 90:8 99:13          103:19,23 115:3 116:          21 117:1 118:13 120:          5 121:5 125:14 126:1,          3,4,16 129:1,3 130:7,          9,13,18 135:1,7 137:          11 138:3,7,14 139:5,          10,19 140:1,7,14 143:          14 147:25 153:6 154:          12,16 155:6,24 156:          21 158:19 160:16,18          162:14,25 163:12 164:          22,23 166:1,10 167:          12 168:2 171:8 172:7          174:15 178:14 182:5          183:12,17 185:9 187:          12 191:21 195:17 196:          2,3,11 198:1,3 199:21          201:25 202:12,14 204:          5,16 205:1 206:10          207:12 210:5  <b>Office's</b> <sup>[10]</sup> 3:5,10 5:          14 74:15,19 135:8</p>	<p>143:4 154:22 203:15,          17  <b>officials</b> <sup>[1]</sup> 58:25  <b>often</b> <sup>[7]</sup> 43:10 66:1          81:18 168:22 191:1          197:4 210:1  <b>Okay</b> <sup>[43]</sup> 6:25 7:22 8:          16,24 9:1 10:1 22:5          24:3,7 27:16 30:11          37:20 38:3 43:2 50:          15 52:21 64:4 67:18          71:18 76:4 79:2 94:          10 103:14 106:2 110:          5 111:21 116:14 118:          6 125:20 128:1 138:          21 141:18 154:8 156:          12 159:20 172:12 176:          10 177:9 179:9 190:7          208:15 209:1,12  <b>old</b> <sup>[2]</sup> 58:5 201:12  <b>Ole</b> <sup>[14]</sup> 76:6,6 81:14          96:8 98:18 102:24          103:10 106:7 109:12          111:25 117:24 122:24          127:19 134:12  <b>Ole's</b> <sup>[1]</sup> 100:21  <b>once</b> <sup>[4]</sup> 10:4 16:2 40:          15 51:17  <b>one</b> <sup>[113]</sup> 5:4 9:13 14:6          16:11,14 17:17 20:17          23:24 24:22 25:22 34:          12 35:23 37:16 41:8          43:9 44:14 51:16 52:          23 53:22 57:8,24 58:          12 59:13 61:14 68:1,          23 74:2,20 78:12 81:          20 82:22,23 83:3,8,15          84:7,10 85:16 87:7          91:8 93:13 94:16 95:          21 96:10 97:15 98:24          104:15 110:4,11,12          111:12,13,15 112:19,          20 114:5,14,25 115:1,          5 117:5 118:4,23 121:          1 123:1 124:3 128:11          129:25 132:6,11 135:          22 137:5 140:8,11          143:20 148:4,9 149:          21 150:1 152:4 157:2          159:24 161:13 162:14          164:8,20,21,21,25          165:13,15 166:18 173:          11 174:7 176:21 178:          13,17 180:2 182:18          184:6 188:17 189:1          192:13 193:4 194:14          199:22,22 203:13,25          204:5 207:4,4,6  <b>onerous</b> <sup>[2]</sup> 29:3 141:          6  <b>ones</b> <sup>[7]</sup> 53:3,6,9 75:          24 117:21 133:12 197:</p>	<p>9  <b>online</b> <sup>[9]</sup> 3:20,23 12:          21 20:15 21:14 22:2          23:15 157:12 197:20  <b>only</b> <sup>[49]</sup> 5:12 11:1 16:          12 18:16 19:1 28:20          30:14 31:11 32:5 39:          5,5 48:9 51:6 54:23          56:23 60:4 62:8 63:          17 70:17 74:13 79:10,          13 83:3 84:18 97:6          100:25 110:17 111:10,          19 117:10 120:6 121:          1 124:18 129:17 137:          20 140:25 148:19 149:          24 150:11 152:17,24          158:10 164:11 171:25          172:25 193:14 198:10          202:21 203:18  <b>open</b> <sup>[5]</sup> 12:16 19:3          132:2 139:12 208:16  <b>opening</b> <sup>[2]</sup> 3:6 18:23  <b>operating</b> <sup>[3]</sup> 104:23          183:14 190:23  <b>operations</b> <sup>[2]</sup> 51:11,          15  <b>opine</b> <sup>[3]</sup> 104:11 166:          11 171:8  <b>opinion</b> <sup>[5]</sup> 89:8 129:          22 160:16,21 187:10  <b>opinions</b> <sup>[1]</sup> 47:19  <b>opportunity</b> <sup>[8]</sup> 23:16          70:15 101:10 135:6          139:7 140:4 203:6          210:3  <b>opposed</b> <sup>[2]</sup> 38:11 63:          23  <b>opposite</b> <sup>[1]</sup> 62:14  <b>opt</b> <sup>[9]</sup> 15:9 49:3,3 83:          8 100:17,24,25 101:3          106:21  <b>opting</b> <sup>[5]</sup> 44:10 45:7,          20 46:8 49:3  <b>optional</b> <sup>[1]</sup> 70:14  <b>oral</b> <sup>[1]</sup> 208:18  <b>order</b> <sup>[9]</sup> 4:24 10:11          21:11 58:1 73:21 144:          6 168:8 203:20 208:          17  <b>ordinary</b> <sup>[1]</sup> 87:9  <b>organic</b> <sup>[3]</sup> 28:10,13          63:6  <b>organization</b> <sup>[2]</sup> 111:          17 190:23  <b>organizations</b> <sup>[5]</sup> 17:          4 53:2,2 111:9 174:          14  <b>organizing</b> <sup>[1]</sup> 173:6  <b>organs</b> <sup>[1]</sup> 201:5  <b>oriented</b> <sup>[2]</sup> 104:16          105:2  <b>original</b> <sup>[25]</sup> 10:17 11:</p>	<p>6,10,13 13:14 16:17          22:10 28:24 42:22 43:          9,17,21,23,25 75:20          124:17 129:12 149:25          155:2 158:8,15 186:          20 187:15 192:10 194:          21  <b>originality</b> <sup>[17]</sup> 11:3          43:6,15 44:1 46:18          95:24 124:8,13,23          128:16,19 129:2,9          154:20,24 195:5,6  <b>origins</b> <sup>[1]</sup> 10:24  <b>ostensibly</b> <sup>[1]</sup> 112:15  <b>other</b> <sup>[97]</sup> 4:3,3 5:4 9:          19 16:15 22:8 23:25          26:1,19 27:8,10 29:6,          12,13 30:24 31:7 32:          6 41:7 42:15 48:11,          22 54:2,8 62:10 63:1,          11,23 66:5 71:25,25          74:3 78:18,19,19 81:          6,23 83:16 86:1 87:          10,20 88:10 96:23 98:          13 99:9,25 100:15          101:22 102:14 104:7          107:2,22 112:22 115:          24 121:25 122:9 127:          1,14 129:18 130:23          134:9 139:11,14,24          151:1,14 152:18 158:          12,16 163:5 165:17          166:17,21 170:14,20          171:21 175:2,16,17,          19 176:1,5,15 177:8          178:1,16 186:3,5 191:          16 196:17 200:19 201:          5 203:24 206:10,20          207:5,16 208:24  <b>others</b> <sup>[10]</sup> 24:5 26:12          40:5,25 78:13 89:15          113:21 139:11 194:16          206:21  <b>otherwise</b> <sup>[7]</sup> 10:5 17:          8 22:17 52:15 129:25          168:12,15  <b>ought</b> <sup>[1]</sup> 10:10  <b>ourselves</b> <sup>[2]</sup> 16:3 52:          15  <b>out</b> <sup>[65]</sup> 10:11 11:16          13:12 17:5 24:2,8 27:          3,13 28:4 29:20,21          31:5 32:2 33:10 34:          23 35:15 38:6 40:16          42:3 47:1 48:3 49:21          50:12 51:18 54:11 56:          13 57:1 59:10,14 60:          19 62:10 65:5 79:9          82:11 83:4 85:22 93:          8 95:18 104:8 105:22          109:22 112:23 121:14,          18 122:4,19 132:23</p>	<p>133:1,7 136:6,11,19,          20 137:14 161:16 172:          14 173:2 177:12 181:          17 185:4 187:1 196:          22 201:1 210:4,15  <b>outcomes</b> <sup>[1]</sup> 158:21  <b>outlet</b> <sup>[1]</sup> 54:25  <b>outlets</b> <sup>[10]</sup> 17:18 25:          5 34:5,17,21 35:14          54:13 79:13 136:22,          22  <b>outset</b> <sup>[1]</sup> 182:9  <b>outside</b> <sup>[9]</sup> 41:10 101:          22 119:23 130:6 163:          12 168:2 198:1 206:          10 207:14  <b>over</b> <sup>[35]</sup> 4:14 17:24          21:14 24:4 26:14 30:          17 35:25 36:18 45:2          50:13 52:22 60:22,24          61:17 78:2,13 88:19          91:5 92:19 117:25          119:22 128:3 132:7          141:15 143:10 153:2          161:4 168:3,9 177:24          180:7 190:9 204:13          205:16 206:24  <b>overall</b> <sup>[2]</sup> 23:15 149:          4  <b>overarching</b> <sup>[2]</sup> 170:          13 171:19  <b>overcome</b> <sup>[3]</sup> 34:15,          21 38:12  <b>overhaul</b> <sup>[2]</sup> 85:14,19  <b>overlap</b> <sup>[1]</sup> 180:15  <b>overlooked</b> <sup>[1]</sup> 33:23  <b>overstep</b> <sup>[1]</sup> 152:4  <b>own</b> <sup>[12]</sup> 17:2,9 33:24          54:5,17 64:25 83:12          97:1 123:8 170:8 181:          1 198:19  <b>owners</b> <sup>[3]</sup> 33:4 41:7          78:7  <b>ownership</b> <sup>[2]</sup> 155:16          163:4  <b>owns</b> <sup>[2]</sup> 62:1 201:13  <hr/> <b>P</b>  <b>p.m</b> <sup>[9]</sup> 5:9 74:8 141:          22 142:3,5 143:2 144:          1 208:11 210:20  <b>Page</b> <sup>[6]</sup> 28:17 77:25          115:6 137:22 150:4          205:8  <b>Pages</b> <sup>[6]</sup> 28:4 38:18,          23 62:21 83:10 106:          16  <b>paid</b> <sup>[6]</sup> 53:7 96:2 131:          6,7 174:12 190:12  <b>pandemic</b> <sup>[7]</sup> 7:13 18:          10,19 29:14 34:9,10          86:7  <b>panel</b> <sup>[64]</sup> 5:8,17,18,</p>
---	--	--	---	--	--

<p>22 23:25 25:14 44:9 47:17 49:12 68:2,7 69:10 71:20 72:11,21, 21,25 73:1,6,8,16 75: 2 76:17 77:18 80:15, 17 81:9 82:22 87:6, 14 88:5,11,25 90:13 93:16 104:5 105:23 115:5 116:12,22 117: 8 123:17,23 129:7 133:21 137:15 139:11 141:22 145:8,21 146: 14 148:16 154:20 156: 9 159:9 165:7 170:3 182:23 196:16,20 202: 3,24 208:6,8 panelist [2] 5:24 74:7 panelists [34] 4:20,21, 23 5:3,16 12:24 72: 22 73:1,18,18,21 74:1, 3,16 100:15 102:6 130:23 132:1 134:9 139:11,24 140:7 141: 19 143:11,16,17 144: 4 145:21,23,25 206: 14 207:5 208:8 210: 14 Panelists' [2] 4:24 73: 23 panels [13] 5:10,12 7: 15 24:1 52:20 74:8, 12 149:14 155:21 161: 17 162:2 168:5 197:3 paper [6] 39:2,6 55:1 118:12 166:3 202:21 papers [5] 53:24 59:1 74:23 182:12,12 para [1] 130:12 paragraph [2] 162:14 164:21 paragraphs [1] 33:19 parody [1] 157:15 parrot [1] 135:25 parroting [2] 118:10 135:24 part [28] 11:23 14:20 15:1,17,19 16:24 25: 8,24 34:18 36:16 43: 10 54:20 79:8,22 86: 18 102:3 110:16 118: 12 124:24 151:9 157: 14 164:2 179:20,21 180:24 181:9 191:13, 17 partially [1] 110:20 participants [2] 21: 13 86:24 participate [4] 72:6 143:24,25 203:6 participated [1] 206: 18 participation [5] 5:9</p>	<p>74:8 141:19 143:22 208:11 particular [19] 16:14 57:15 78:13,16 111:7 116:17,22 117:1 121: 21 123:24 126:10 166: 11 171:4 181:20 194: 10 195:2 200:11 202: 7 204:11 particularize [1] 78: 12 particularly [11] 24: 21 35:14 78:2 84:23 86:6 112:13 122:15 136:16 138:10 197:5 205:25 parties [5] 4:3 29:23 33:8 45:23 47:20 parties' [1] 99:25 partner [5] 15:20 60: 23 76:7 88:22 145:12 partners [2] 60:21 61: 17 partnership [1] 84:12 parts [5] 54:3 98:15 124:15 180:17 194:13 party [10] 45:17 48:13 74:24 79:14,21 80:2 96:21 97:3 109:19 189:8 pass [2] 168:12 184:5 passed [1] 41:17 past [4] 18:13 35:7 108:21 129:19 paste [1] 183:5 pasted [1] 28:2 pasting [2] 13:13 166: 5 patents [1] 200:5 path [4] 16:3 52:15 168:13 197:25 patron [1] 66:13 patronage [1] 66:11 pattern [1] 174:15 pay [10] 59:16,16 81: 25 94:18 100:18 109: 20 131:13 175:25 183: 5,10 paying [5] 8:10 59:12 91:24 95:14 139:20 payment [14] 12:20 19:16 44:25 60:5 69: 5 93:5,23 95:17 107: 13,14 115:20 116:5 167:4 199:12 payments [1] 120:17 payroll [1] 35:9 paywalls [1] 19:5 PDF [1] 38:11 PDFs [1] 38:13 Peace [5] 208:21,21, 23 209:1,13</p>	<p>peg [1] 206:5 Pelham [1] 157:2 pending [1] 49:6 people [60] 5:4,18 8: 25 10:3 12:14 13:15 15:6 16:12,22 17:3 18:17 19:6,8 20:7 41: 5 58:6,18,20 59:3 65: 9 81:20 91:3 94:24 95:14 97:23 102:8 105:5 116:18 117:17 120:23 125:25 126:19 127:3 130:19 153:19 154:2 158:16 168:3,8, 25 169:3 172:2 175:2, 16 176:17 177:4,6 179:25 185:12 188:9 193:8 196:8 204:23 205:4,11 206:12 208: 17,20 209:9 210:9 people's [2] 66:22 96: 23 per [7] 43:20 47:24 58: 1 96:15 105:6 148:2 183:7 percent [13] 16:12,13 19:19 26:14 28:20 36: 10 37:2,3,4,4,5 45:18 194:20 perception [1] 98:12 perfect [1] 62:21 perfectly [2] 60:6 160: 5 perform [1] 198:7 performance [1] 188: 10 performances [1] 167:2 performers [1] 167:5 performs [1] 107:8 perhaps [9] 33:24 104:2 147:5 157:21 187:23 188:7 199:3 200:4 202:20 perilous [1] 82:12 period [1] 19:11 periodically [1] 84:4 Perlmutter [2] 3:8,9 permissible [2] 75:12 87:3 permission [3] 22:12 157:17,20 permissions [1] 158: 1 permit [4] 7:4 93:1 173:10,23 permitted [2] 147:5 187:8 persistent [1] 70:5 person [7] 7:23 118:5 193:10,12,14 194:1 205:5</p>	<p>personal [1] 202:15 personalization [1] 29:21 personally [5] 108:5, 6 117:18 123:5 136: 13 perspective [11] 27: 10,21 37:1 83:6 84: 10 87:15 108:2,10 125:7 133:19 164:5 perspectives [2] 82: 24 186:6 Peter [4] 86:20,21 125: 5 140:5 Pew [2] 54:11 92:21 phase [2] 93:11,11 phenomenon [1] 184: 19 philanthropists [1] 96:17 phone [1] 65:6 photograph [2] 166:7 195:12 photographs [9] 10: 14,15 11:20 22:7 33: 21,22,23 166:7 195:8 photojournalism [2] 72:12,15 photojournalists [1] 72:12 photos [2] 101:2 207: 8 phrase [6] 34:6 43:21 154:2 158:7,11 195:5 phrases [28] 10:11,23 11:4,7,12,13,15 42:19, 21 43:4,8,19,22 46:14 49:17 89:7 104:6 154: 4,19 162:25 167:13 168:20 191:25 192:9, 9,20 195:4,19 pick [1] 175:24 picture [1] 9:20 pictures [2] 65:5 92:8 pie [2] 131:12 185:4 piece [3] 86:1 93:9 114:9 pieces [1] 65:19 piling [1] 41:23 place [21] 8:1 9:14 26: 17 39:2 65:13 76:15 78:19 81:21 92:10 96: 5 97:25 104:23 124:5 133:9 150:11 172:14 177:3 178:15 188:8 191:8 198:2 places [4] 20:23 26:5 121:14,19 placing [1] 162:6 plainly [1] 146:17 plan [1] 14:9 platform [9] 53:16 83:</p>	<p>1,3,9,21 91:13 109:3 117:10 120:7 platforms [41] 14:16, 23 19:21 20:21 22:3, 6,12,14,21,22 23:3 29: 16 47:8 48:25 50:19 62:7 82:15 92:4,19 107:3,11 109:3,8 116: 18 120:7,10,11 131: 19 141:1,14 157:23 172:20 173:8,16 174: 13,20 175:24 176:11, 16 196:18 201:3 play [7] 92:16 109:17 122:4 136:6 148:11 159:1 160:8 played [1] 26:8 players [3] 21:14 110: 23 112:5 playing [3] 121:13,18 134:7 please [17] 5:7,12 60: 12 72:11 73:22 74:6, 12 102:5,6 143:17,18, 20 144:4,19 154:6 199:16 208:9 pleasure [1] 80:9 plenty [6] 9:17 67:9 121:5 162:8 198:12, 22 plug [1] 143:21 plus [3] 128:11 195:11, 11 poems [1] 191:16 point [95] 11:16 12:5 13:8,12 29:1 33:1 48: 3,9 50:12 51:18 54: 19 59:10 60:19 71:6 79:9 82:12 83:4 87: 10 89:3 91:1 93:8 96: 21 98:14,19 100:16, 21 101:24 102:16 106: 13 107:1 119:11 127: 15 128:25 129:8 131: 10 132:12,17,23 133: 1,6,20 135:22 139:23 140:8,19 141:5 148: 17 149:1,6 151:11 152:1,11,13,20 154: 18,19 155:4,19 156: 20 160:11,14 161:5, 16,17 163:10 165:9 166:13,24 167:8 169: 20 170:13 176:22 177: 15 178:4 179:20,21 182:13,25 183:2 185: 25 186:5 191:7 193:4 194:18,19 195:9,25 196:2 198:8 200:4 201:12 202:4,24 207: 11 209:24 points [16] 36:15,20</p>	<p>46:3 100:21 116:16 126:14 139:9 150:23 159:16 162:23 178:16 184:1 199:20 203:7 204:4 209:22 poisoning [1] 113:16 policies [1] 24:18 Policy [28] 4:10,11 6: 19,24 21:5 32:11 34: 16,25 35:5,9,11 51:19, 20 58:24 59:23 73:12 79:7 80:19 83:16 128: 17,22 136:7 145:17 153:5 168:2 187:21 206:1,12 political [2] 121:23 200:18 Politico [3] 76:13 81: 17,17 poll [1] 161:3 pool [2] 111:8,15 portfolios [1] 111:15 portion [2] 18:8 118: 22 pose [1] 145:22 posed [2] 66:9 176:3 posing [4] 4:20 73:17 143:16 152:25 posit [2] 158:15 192: 18 position [7] 157:18,20 168:9,16 174:21,22 197:16 positive [4] 25:7 43: 12 50:2 69:16 positively [1] 131:5 possibilities [1] 52: 10 possibility [4] 25:4 51:10 135:20 146:23 possible [9] 51:15 67: 3 102:7 132:7 168:16 175:24 192:11,15 207: 1 possibly [2] 138:22 190:4 post [5] 83:11 106:16 178:20 179:11 184:13 Post's [1] 205:8 posted [4] 5:1 56:4 73: 25 118:13 poster [1] 65:5 posts [1] 32:6 pot [3] 118:18,22 174: 19 potential [6] 12:14 52: 3 57:10 111:16 117: 17 146:1 potentially [4] 46:25 47:1 53:11 57:9 power [14] 33:12 91: 11 93:22 97:16,17,20</p>
--	---	--	---	--	--

<p>109:17 129:18 136:5 172:19,21 186:24 187: 7,8 practical [1] 49:22 practice [10] 58:9 65: 17 79:4 89:6 117:14 145:5 149:10,11 152: 11 207:24 practices [8] 37:13,18 61:8 104:6 107:7 149: 18 202:12,18 practicing [1] 133:6 pragmatic [1] 117:5 pre [3] 34:9 76:21 202: 20 preamble [1] 92:23 precedent [5] 167:16 186:15 189:25 207:7, 9 precise [3] 27:1 33:15 34:1 precisely [1] 119:17 preclusion [1] 104:17 predecessor [1] 82:9 predicate [4] 7:24 10: 9 87:1 194:15 predominantly [1] 52: 19 prefer [1] 126:8 preferable [1] 35:18 preference [1] 54:21 preferences [1] 54: 11 preferred [2] 52:5 57: 25 premise [2] 9:17 187: 23 prepared [1] 51:10 prerequisite [1] 185: 2 present [2] 69:19 123: 7 presentation [1] 10: 17 presented [3] 16:9,10 17:21 presenting [1] 138:21 preservation [2] 63: 22 71:15 preserve [1] 138:13 preserving [2] 92:16 186:3 press [46] 3:19 7:4 18: 4 21:23 22:10,16,19, 23 23:10 24:3 27:11, 15 30:18 61:7 73:7,9 74:22 75:4,25 76:19, 23 77:2,13 96:13,25, 25 101:21 103:17 104: 21,24 110:21 120:17 122:11,13 125:2,10 134:22 146:1 163:20,</p>	<p>21 164:10 181:2 200: 16 201:5 203:10 208: 19 presumably [1] 40:17 pretend [1] 137:2 pretending [1] 136: 24 pretty [7] 84:22 126: 22 134:10 170:21 176: 20 187:13 200:1 prevails [2] 49:16 157: 8 prevent [4] 23:8 47:5 51:18 190:3 previous [9] 90:13 91: 4 104:5 105:23 132: 15 159:9 161:17 162: 1 168:5 previously [6] 88:11 103:8 109:19 133:23 188:6 189:2 price [3] 32:1 98:3 109:20 prima [1] 14:13 primarily [1] 202:8 primary [7] 22:2 30: 16,16 31:1,11 89:13 90:20 principle [2] 12:20 115:21 principles [6] 48:2 123:20,22 124:21 200: 4 201:18 print [6] 20:15 39:19, 19 40:10,11 42:5 printed [1] 127:7 prior [1] 116:25 private [6] 78:9 79:3 91:18,20 92:11 96:25 pro [3] 118:22,25,25 probably [12] 10:21 16:18 39:14 53:11 101:21 109:10 177:11, 13 179:15 196:13,22 206:11 problem [60] 5:13 13: 15 19:18 22:11 30:14 34:14 41:20,24 50:21 54:14,17,20 57:22 58: 5 61:24 70:2 74:14 82:19 89:15,17,19 90: 4,20 91:17,17 94:6,6, 21 95:2 96:7 100:8 103:25 104:2 116:23 117:3 120:20 136:4 154:13,14 155:22 159: 25 172:19 175:14 177: 16 178:10,17,23,25 179:6,9 195:7,9 197: 8,9,13,21 198:2 202:9 206:15,17 problematic [7] 42:3,</p>	<p>6 50:25 58:10 150:15 172:3 203:11 problems [14] 9:13 21:4,7 30:15 51:1 52: 25 75:23,24 122:20 133:18 150:1 153:20 163:7 179:1 procedures [1] 198:4 proceeding [4] 91:9 103:25 150:14 160:23 proceedings [1] 4:14 process [9] 64:13,20 70:22 71:10 85:24 90: 6 92:17 115:1 138:4 processes [1] 138:8 produce [4] 20:1 39: 12 62:8 77:2 produced [2] 24:12 48:12 producers [5] 51:21 53:5,19 97:5 167:4 produces [1] 118:18 producing [2] 20:8 48:13 product [3] 84:8 91: 16 93:24 production [3] 39:21 59:13,21 products [2] 64:15 100:15 profession [1] 207:25 Professional [2] 64: 22 67:8 professionals [1] 114:11 Professor [13] 6:10 12:6 41:21 42:25 46: 16 58:14 67:13 77:20 129:6 146:13,14 161: 18 190:14 professors [3] 67:11 160:20 161:3 profit [1] 22:22 profitable [3] 20:25 30:21 109:10 profits [2] 20:20 120: 22 profound [2] 101:14 135:16 profoundly [1] 206: 16 programs [2] 63:11 84:3 progress [7] 6:18 63: 25 78:5 129:16 165: 14 170:18 175:5 prohibit [2] 75:17,18 prohibited [1] 197:11 prohibition [1] 11:12 prohibitive [2] 124:2, 19 prohibits [2] 186:25</p>	<p>198:20 proliferate [1] 34:7 proliferated [2] 24:13 51:24 proliferation [3] 25:6 47:5 60:9 promise [1] 93:14 promising [1] 109:24 promote [4] 31:23 78: 5 170:21 175:5 promoting [1] 170:18 promotion [1] 63:22 prompting [1] 71:4 promulgated [1] 71: 13 pronounced [1] 76:6 pronouncing [2] 76:3 144:20 proper [1] 9:24 properly [2] 165:14 190:19 property [15] 23:7 24: 18,19 55:3 68:14 80: 23 95:9,12 97:23 99: 9 144:17 159:6 175:4 178:5 206:4 proportionality [2] 56:3,8 proposal [2] 79:18 181:13 propose [1] 59:12 proposed [2] 90:24 128:25 protect [19] 14:3 35:4 37:14 38:25 39:11 68: 14,16,20 122:21 124: 25 128:13 170:21 171: 16 186:13,19 187:14 188:6,9 189:6 protectability [2] 194: 16 203:24 protectable [14] 42: 19 43:4,18 75:21 129: 12,14 157:4 163:5 187:19,25 188:6 195: 1,22 196:10 protected [18] 7:14, 19,25 10:14,16 11:8 20:3,9 43:9 64:6 68: 21 77:5 97:9 115:18 124:11 159:5 167:21 182:8 protecting [8] 23:10 24:17 127:21,25 128: 7 189:17 191:5,22 Protection [44] 3:5,14, 22 11:17 33:3 35:12 42:21 43:21,24 46:15, 21 49:16 50:7 53:15 75:17,18 76:15 77:3, 12,14,19 88:17 96:13 97:10 98:2 102:13</p>	<p>103:21 123:11,14 124: 200:18 5 125:2 132:16 155: 23 157:5 165:1 182: 10 186:20 189:6 197: 24 201:20 202:6 203: 18,20 209:7 protections [23] 3:11, 18,25 5:23 73:7,9 75: 3,4,5,10 82:17 88:9 102:25 103:1,3,17 141:24 143:5,7 198: 15 207:10 208:7,19 protocols [1] 114:21 proud [1] 84:16 proven [2] 15:18 71: 15 provide [13] 4:15 14: 17 47:22,24 51:1 53: 19 61:13 83:21 93:9 101:5 150:25 166:21 185:10 provided [4] 7:16 19: 1 60:22 190:14 provider [1] 85:9 providers [3] 53:8 91: 14 209:6 provides [3] 130:15 166:20 169:25 providing [8] 7:11 18: 16 19:11,25 62:6 63: 12 151:5 177:6 provision [4] 99:2,21 130:14,15 provisions [5] 90:15 105:5,6 151:1,7 prudent [1] 116:10 PSA [1] 114:16 pseudo-law [1] 196:7 public [48] 3:4 6:19 8: 7 13:3,6,22,22 21:25 22:18 30:22 44:19,19 47:25 58:23 78:3,10, 14 81:24,25,25 84:24, 25 85:23 94:19 95:3 108:2,9,18 109:11 114:14,17 120:22 126: 18 140:10,13 144:15 155:12 158:23 164:13 172:9 175:12 183:15 200:17 204:1 205:23, 24 206:1 209:25 publication [6] 19:16 54:9 56:7 67:14 79: 10 81:15 publications [19] 3: 23 53:18 55:13,19,20, 23 56:6 58:13 62:19 64:16,24 76:19,24 96: 13,25,25 105:1,3 136: 13 publicly [1] 119:8 published [2] 197:20</p>	<p>200:18 publisher [22] 7:5 15: 24 22:5 37:25 53:11 54:12 68:24 79:5,9 92:2 98:3 100:19 103: 4 111:25 113:11 117: 9 118:9 173:2 179:6 184:16 189:10 203:10 publisher's [2] 90:7 181:2 publishers [133] 3:11, 13,19 5:23 6:9 15:8,9 18:5 19:23 21:24 22: 16,19,23 23:10 24:1,4 25:21,23 26:7,13 27: 12,15 29:19 30:15,18 31:3,5 34:6 35:25 38: 16,22 39:13,20 40:8,9, 25 44:5,10,16,17 45:2 46:24 47:4,8 53:17, 23 55:7 58:17 61:7, 16 67:24 72:13 73:7, 9 76:1 77:2,13,13 80: 5 82:17,19 83:9,14,22 84:12,16 89:21 93:17, 21 100:23 101:10,21 102:14 103:2,18 104: 21,24 105:25 108:19 110:22 111:2,3,14 112:2,9,13 113:20 114:7,23 116:18 120: 17 122:21 125:3,10 126:8 134:5,22 137:6 143:5 145:7 148:5 149:17 150:5 155:11 159:23 161:20,25 162: 6,10 166:22 170:5 171:17,21 172:11,20, 21 173:1,11,16,24,25 174:9 177:23 178:21 179:3,13,17,18 183:2 190:25 195:10 208:7, 19 Publishers' [20] 3:5 15:7 22:10,13 25:19 37:13 52:17 71:12 74: 23 75:4 98:8 101:8 103:20 105:13 120:1 122:11,13 123:21 146: 1 185:1 publishing [4] 53:1 74:22 84:4 127:6 pull [5] 45:11 109:21 112:6 155:9 164:19 punch [1] 70:4 punishing [1] 113:14 purchased [1] 81:14 purchaser [1] 81:19 pure [1] 49:15 purely [5] 47:3 51:20 108:9 120:3 194:9 purports [1] 150:8</p>
--	---	--	---	--	---

<p><b>purpose</b> [8] 8:8 95:25 127:17 171:19 175:4, 9,9 200:24 <b>purposes</b> [6] 11:23 39:8 54:6 148:17 180: 23 194:6 <b>pursue</b> [1] 153:23 <b>pursued</b> [1] 51:8 <b>pushed</b> [1] 29:9 <b>pushing</b> [1] 17:4 <b>put</b> [15] 22:24 27:2 28: 4 35:14 40:9,16,24 54:11 64:14 85:22 98: 3 99:4 106:17 110:8 143:25 <b>putting</b> [5] 65:1 70:4 71:19 139:19 206:2 <b>pyramid</b> [2] 55:13,21</p> <p style="text-align: center;"><b>Q</b></p> <p><b>Q&amp;A</b> [2] 5:12 74:13 <b>qualification</b> [2] 152: 9,10 <b>qualified</b> [1] 120:5 <b>quality</b> [20] 9:11 14:1 25:13 56:20,22 57:20 61:1 62:9 63:19,22 64:7,16 65:3,9,25 67: 1,2,10 183:15 188:21 <b>quantity</b> [1] 9:10 <b>quarantined</b> [1] 18: 20 <b>quasi</b> [1] 63:24 <b>Queen's</b> [1] 168:22 <b>queries</b> [2] 36:9,11 <b>question</b> [170] 4:23 5: 4 7:1,3,8,19,24 8:3 9: 23,25 10:4,9,19 12:3, 8,9,19 16:17 17:24 18:1 20:12,13,14 21: 3 27:7 28:24 29:11 30:13 31:13,14,16 33: 2,2,11,13 35:5 36:18 37:23 38:24 40:4 42: 17,23 45:1 46:12 47: 11 50:5,10,24 52:22 55:25 57:8,20 59:2,3, 5,8 62:14 63:17,19 67:20 68:13 71:23 73: 20 74:2 75:9,10 76: 14,16 79:9 80:21 82: 16,18 85:3 86:25 87: 2 91:4,6 92:22 94:10, 12,15,21 95:3 96:4 97:12,14,14 102:3,4 103:7,11 106:21 109: 14 110:17 111:1,11 117:24 118:1 121:9, 11 122:7,9,16 124:16 127:11 131:3,23 135: 15 145:22 148:8,19, 22 149:4,7,10,21 152: 12,21,24 153:7,14,16</p>	<p>154:20,23,24,25 155: 23 156:17 158:7 160: 7 162:8,9,16,18,24 163:16 165:5,7,13 166:4 167:11 169:18 170:2,25 171:24 172: 6,13,15,18 175:18 182:4,18,22 183:3,23 184:11 189:21 192:8, 13,14 194:14,15,17, 24 195:2,4 196:14 198:11 199:16 202:10 <b>questions</b> [33] 3:21 4: 20 5:20 12:2 13:1 14: 9 28:12 46:18 73:17 74:18 75:13 77:8 86: 11 87:11 88:7 90:11 117:11 131:21,25 134: 21 139:13 143:16 149: 2 150:24 154:1,5 155: 16 164:25 174:16 176: 3 180:21 188:20 210: 11 <b>queue</b> [2] 70:12 175:2 <b>quick</b> [14] 35:23 36:22 48:9 86:13 126:14 131:3 132:11 135:22 139:3 140:8 143:21 170:13 178:16 204:4 <b>quickly</b> [10] 59:9 90: 12 91:18 121:1 122: 19 128:24 129:16 132: 12 140:18 144:3 <b>quite</b> [9] 10:15 17:21 42:6 67:5 70:8 76:18 130:2 188:4 191:22 <b>quo</b> [3] 52:7 116:19 119:3 <b>quotation</b> [7] 146:6, 10,20 148:1 149:9 151:19 192:19 <b>quotations</b> [3] 146:8 149:16 151:4 <b>quote</b> [5] 87:17 148: 10 151:6,13 203:17 <b>quoted</b> [1] 201:10 <b>quotes</b> [1] 62:22</p> <p style="text-align: center;"><b>R</b></p> <p><b>Raise</b> [16] 4:21,24 10: 6 14:7 15:1 73:19,21 143:18 154:4 170:22 172:6 181:23 196:19 197:9 203:13 207:4 <b>raised</b> [15] 10:5,8 12: 10,25 36:16 38:4 48: 10 116:16 130:24 149: 21 164:19 169:20 180: 21 184:21 202:10 <b>raises</b> [1] 149:21 <b>ran</b> [1] 119:22 <b>rarely</b> [2] 95:8,16 <b>rata</b> [3] 118:22,25 119:</p>	<p>1 <b>rate</b> [2] 107:5 112:12 <b>rates</b> [2] 62:4 107:16 <b>rather</b> [10] 8:6 21:6 33: 16 37:4 44:1 101:4 111:2 125:1 146:18 148:10 <b>rating</b> [1] 59:25 <b>ratings</b> [1] 59:1 <b>rationale</b> [2] 157:15 188:18 <b>rationales</b> [1] 110:4 <b>re</b> [1] 13:18 <b>Re:Create</b> [1] 80:9 <b>Re:Create's</b> [2] 98:20, 23 <b>reach</b> [3] 83:25 93:11 179:4 <b>reached</b> [2] 116:13,13 <b>reaching</b> [1] 15:19 <b>reaction</b> [1] 190:17 <b>read</b> [7] 29:4,22 58:6,6 159:19 200:13 205:9 <b>reader</b> [2] 164:6 193: 10 <b>reader-based</b> [1] 30: 24 <b>readers</b> [8] 23:23 29: 20,25 31:5 57:13 66: 3 84:2 171:23 <b>readership</b> [4] 18:15 20:19 23:20 31:6 <b>reading</b> [3] 54:24,25 191:20 <b>ready</b> [1] 209:16 <b>real</b> [6] 32:8 36:22 41: 23 48:9 81:4 149:10 <b>reality</b> [2] 27:14 99:19 <b>realize</b> [3] 120:19 185: 15 196:21 <b>realized</b> [1] 108:17 <b>really</b> [95] 18:8 22:8 24:22 29:14 40:4,4 41:6 47:14 48:24 55: 6 62:23,24 69:16,21 71:16 76:16 78:10 80: 4 82:20 83:17 84:11, 23 85:16 93:15 104:9 106:6 116:2,11,17 117:13 119:7 121:25 125:8 128:5,21 130: 13 131:2 134:10 135: 11 137:4,4,18 138:24 139:9,22 140:3,10,13 144:3 146:20 147:7 148:4 151:12 152:21, 24 156:4,15 158:8 161:16 162:12,14 163: 9 170:14,19 172:5,17 175:23 177:15 178:4, 13,18,25 179:8,21 180:13,18 181:3 182:</p>	<p>1,19 185:3 187:20 188:3,3 194:7 198:2 201:7 203:11,14 204: 6,7,16 205:1,18 207:6 210:4 <b>reap</b> [1] 30:7 <b>reason</b> [19] 22:2 30: 17 31:11,11 42:12 44: 5 51:16 93:25 95:25 105:20 110:2 112:18 135:25 137:20 156:8 161:14 175:17 203:22, 25 <b>reasonably</b> [1] 157: 16 <b>reasons</b> [14] 9:18 66: 12 67:25 109:25 126: 17 170:6 173:21 175: 20 176:19 183:11,16 192:17 203:9 207:10 <b>rebuttal</b> [1] 116:25 <b>recalibrate</b> [1] 170:9 <b>recall</b> [1] 34:24 <b>receive</b> [9] 14:19 45:9 61:23 62:13,15 86:9, 9 159:23 172:16 <b>received</b> [4] 49:9 69:5, 7 74:20 <b>recent</b> [3] 69:24 76:12 165:18 <b>recenter</b> [1] 115:13 <b>recently</b> [2] 8:10 48: 10 <b>recess</b> [2] 73:4 208: 14 <b>recessed</b> [1] 142:4 <b>recharacterize</b> [1] 154:9 <b>reciprocity</b> [2] 159:22 166:16 <b>reckon</b> [1] 109:15 <b>recognition</b> [1] 157:9 <b>recognizable</b> [1] 157: 7 <b>recognize</b> [7] 33:11 116:1 117:11 172:25 173:3 188:20 206:15 <b>recognized</b> [1] 43:8 <b>recognizing</b> [1] 136:3 <b>recommend</b> [2] 71:8, 8 <b>recommendation</b> [2] 138:18,20 <b>recommendations</b> [2] 139:1 140:3 <b>reconvene</b> [1] 142:4 <b>record</b> [11] 36:25 37:7 45:6 46:7 123:1 132: 15,17 135:23 136:1 184:17 191:14 <b>record's</b> [1] 125:22 <b>Recording</b> [3] 6:18</p>	<p>157:5 167:4 <b>recordings</b> [2] 188:6, 9 <b>recordings'</b> [1] 189: 13 <b>records</b> [1] 135:10 <b>recoup</b> [1] 46:5 <b>recurring</b> [1] 75:1 <b>red</b> [2] 130:9 163:18 <b>refer</b> [3] 83:19 105:6 119:24 <b>reference</b> [1] 82:18 <b>referenced</b> [3] 15:11 71:22 121:2 <b>referred</b> [1] 123:3 <b>referring</b> [4] 26:23 33: 20 34:2 166:6 <b>reflect</b> [2] 18:8 27:13 <b>reflects</b> [1] 129:5 <b>reform</b> [4] 164:14 197: 14,18 198:3 <b>reframing</b> [3] 91:25, 25 92:8 <b>refused</b> [1] 201:14 <b>refusing</b> [1] 200:7 <b>reg</b> [2] 178:11,12 <b>regard</b> [7] 37:24 38:14 71:12 137:24 138:8 155:4 202:12 <b>regarding</b> [4] 109:14 124:5 153:21 167:15 <b>regardless</b> [3] 44:7 190:19 192:18 <b>regime</b> [4] 51:9 146: 12 147:12,16 <b>regimes</b> [2] 133:10 136:18 <b>regional</b> [2] 55:20,24 <b>Register</b> [14] 3:6 4:9 11:18 13:8 38:7,12, 16,23 40:18,19 41:1,3, 18 42:25 <b>registerable</b> [1] 11: 22 <b>registering</b> [2] 11:18 197:22 <b>registration</b> [49] 37: 13,18,21,23 38:4,10, 14,20 39:23 40:6 41: 11 42:1,2,8,11,13 49: 25 71:10 89:6 104:6 114:21,25 123:22 124: 3,4,23 126:14,16,17, 17,20 127:4,9,12 138: 8 140:12,13 197:5,10, 14,16,19 198:4,9 202: 13,16,20 203:1 209:3 <b>regulation</b> [3] 43:13 146:24 181:20 <b>regulations</b> [4] 119: 10 140:23,24 176:13 <b>regulatory</b> [2] 6:24 51:</p>	<p>19 <b>reinvestment</b> [1] 158: 2 <b>reiterate</b> [12] 9:2 60: 25 70:18,19 71:6 115: 3 163:10 185:8 196: 23 203:7 207:4,11 <b>rejected</b> [2] 130:2,4 <b>rejects</b> [1] 43:24 <b>relate</b> [1] 68:22 <b>related</b> [10] 26:20 34: 13 36:9 67:25 105:12 115:12 130:8 131:10 174:18 189:10 <b>relatedly</b> [1] 75:1 <b>relates</b> [1] 58:1 <b>relationship</b> [2] 65: 25 79:23 <b>relationships</b> [1] 29: 25 <b>relative</b> [2] 46:22 119: 3 <b>relevant</b> [7] 125:8 151: 12 159:2 167:20 180: 25 181:3 206:11 <b>reliable</b> [3] 22:18 24:2 66:21 <b>reliance</b> [1] 150:10 <b>relief</b> [2] 148:9 201:18 <b>relies</b> [1] 173:14 <b>religious</b> [1] 200:19 <b>relinquishing</b> [1] 45: 7 <b>rely</b> [11] 20:1 25:7,8 56:23 65:9,19 66:22 170:8 186:23 187:6, 13 <b>relying</b> [1] 210:5 <b>remain</b> [2] 163:8 208: 3 <b>remains</b> [3] 196:9 197: 14,23 <b>remark</b> [2] 97:13 134: 14 <b>remarks</b> [15] 3:6 4:24 5:3 18:7 60:18 70:14 73:23 74:2 106:4 130: 25 132:6,6 137:13 138:2 201:23 <b>remedies</b> [2] 86:4 203:2 <b>remedy</b> [3] 138:23 201:16 210:5 <b>remember</b> [1] 193:3 <b>remembered</b> [1] 198: 7 <b>remind</b> [4] 102:6,12 106:3 133:20 <b>reminder</b> [2] 72:10 143:21 <b>remunerating</b> [1] 66: 8</p>
--	---	---	--	--	---

<b>remuneration</b> <sup>[5]</sup> 49: 9 78:4 115:24 172:17 174:11	23 149:3,23 151:24 <b>requirements</b> <sup>[2]</sup> 127: 5 197:5	25,25 31:1,2 34:19 39:19 45:10 48:12 51: 13 53:12 58:1,9 60:8 62:7 63:7 69:6,6 74: 22 91:15 92:18 93:24 101:12 112:3 113:5 180:10 182:15	<b>road</b> <sup>[1]</sup> 50:25 <b>robot.text</b> <sup>[3]</sup> 162:3 184:3,9	<b>saying</b> <sup>[29]</sup> 18:10 27: 19 38:22 41:25 52:6 56:13 67:12 80:10 85: 20 94:3 98:25 99:4 103:10 108:23 113:13 114:16 116:2 133:7 147:7 160:3,24,25 166:14,15 193:5 197: 7 201:16 206:8 210: 10	<b>second</b> <sup>[29]</sup> 10:6,7 16: 7 42:23 73:8 83:19 88:3,8 97:13 110:16 111:1 115:13 124:7 131:10 132:2 138:17 154:15 156:9 157:11 160:14 165:7 166:24 170:3 171:9 182:23 192:14 194:19 200:4 202:8
<b>rent</b> <sup>[2]</sup> 47:7 53:16 <b>rents</b> <sup>[2]</sup> 51:13 60:2 <b>repackaging</b> <sup>[1]</sup> 8:6 <b>repeat</b> <sup>[2]</sup> 114:2 202:1 <b>repeating</b> <sup>[1]</sup> 170:3 <b>repetition</b> <sup>[1]</sup> 171:1 <b>replace</b> <sup>[1]</sup> 38:24 <b>replaced</b> <sup>[1]</sup> 110:15 <b>replicated</b> <sup>[1]</sup> 172:20 <b>reply</b> <sup>[2]</sup> 65:23 129:15 <b>report</b> <sup>[1]</sup> 34:23 <b>reported</b> <sup>[3]</sup> 17:15 65: 11 112:10 <b>reporter</b> <sup>[3]</sup> 4:25 65: 11 73:24 <b>reporters</b> <sup>[5]</sup> 19:1 56: 1,9,17 64:12 <b>reporting</b> <sup>[5]</sup> 46:24 57:21 65:12 67:10 200:23 <b>represent</b> <sup>[2]</sup> 7:11 144:9 <b>representation</b> <sup>[1]</sup> 101:13 <b>representative</b> <sup>[3]</sup> 38: 18,23 144:24 <b>represented</b> <sup>[3]</sup> 209: 23,24 210:2 <b>representing</b> <sup>[7]</sup> 6:8 79:4 88:23 136:15 144:22 145:6,14 <b>represents</b> <sup>[1]</sup> 114:6 <b>reprint</b> <sup>[1]</sup> 163:23 <b>reproduce</b> <sup>[1]</sup> 22:13 <b>reproducers</b> <sup>[1]</sup> 184: 7 <b>reproducing</b> <sup>[1]</sup> 13: 18 <b>reproduction</b> <sup>[3]</sup> 71: 9 155:11 166:8 <b>reproductions</b> <sup>[1]</sup> 200:16 <b>republishing</b> <sup>[1]</sup> 150: 17 <b>repudiated</b> <sup>[1]</sup> 128:20 <b>reputation</b> <sup>[1]</sup> 57:15 <b>reputational</b> <sup>[1]</sup> 57: 11 <b>request</b> <sup>[5]</sup> 27:24 157: 17,20 209:3,21 <b>requesting</b> <sup>[2]</sup> 3:16 99:13 <b>Requests</b> <sup>[1]</sup> 143:25 <b>require</b> <sup>[3]</sup> 55:2 106: 15 167:3 <b>required</b> <sup>[1]</sup> 19:16 <b>requirement</b> <sup>[13]</sup> 123: 23 124:3,4,23 128:16, 19 129:2,9 141:6 148:	<b>requires</b> <sup>[7]</sup> 14:14 33: 8 38:1 117:16 121:25 149:24 165:12 <b>requiring</b> <sup>[2]</sup> 12:20 181:16 <b>Research</b> <sup>[4]</sup> 54:11 92:22 144:11,12 <b>resembling</b> <sup>[1]</sup> 24:18 <b>resent</b> <sup>[1]</sup> 79:17 <b>reserved</b> <sup>[1]</sup> 200:21 <b>reserving</b> <sup>[1]</sup> 160:5 <b>resolution</b> <sup>[2]</sup> 38:9 50: 23 <b>resource</b> <sup>[1]</sup> 139:12 <b>resources</b> <sup>[1]</sup> 20:7 <b>respect</b> <sup>[13]</sup> 3:19 34:5 57:19 65:24 71:4 141: 16 153:8,22 161:9 168:14 179:24 198:11 206:20 <b>respected</b> <sup>[1]</sup> 15:16 <b>respectfully</b> <sup>[2]</sup> 12:22 106:14 <b>respects</b> <sup>[1]</sup> 162:5 <b>respond</b> <sup>[16]</sup> 4:22 12: 6 15:5 30:13,21 32: 24 36:19 47:13 73:20 118:7 132:12 143:17 153:7 159:14,14 184: 1 <b>responding</b> <sup>[4]</sup> 28:24 91:4 125:14 159:16 <b>response</b> <sup>[9]</sup> 13:20 17:1 48:7 74:19 107: 20 190:7 198:8 206:1 209:17 <b>responses</b> <sup>[2]</sup> 131:3 190:8 <b>responsibility</b> <sup>[1]</sup> 134:5 <b>responsible</b> <sup>[1]</sup> 29:23 <b>restate</b> <sup>[1]</sup> 202:5 <b>restrict</b> <sup>[1]</sup> 35:4 <b>restriction</b> <sup>[1]</sup> 154:2 <b>result</b> <sup>[9]</sup> 69:4 93:2 107:24 108:1,1,6,7,8, 9 <b>results</b> <sup>[4]</sup> 22:9 36:14 108:8 109:24 <b>resume</b> <sup>[1]</sup> 208:10 <b>retailers</b> <sup>[1]</sup> 20:24 <b>retain</b> <sup>[1]</sup> 182:17 <b>return</b> <sup>[6]</sup> 46:2 48:17 62:6,8 63:9 141:22 <b>returning</b> <sup>[1]</sup> 49:14 <b>revealed</b> <sup>[1]</sup> 190:25 <b>revenue</b> <sup>[35]</sup> 14:19 19: 20 20:3 22:16 23:15, 16 26:9,14 29:17 30:	<b>reverse</b> <sup>[1]</sup> 75:4 <b>review</b> <sup>[2]</sup> 4:19 154: 16 <b>revising</b> <sup>[1]</sup> 154:1 <b>revisit</b> <sup>[1]</sup> 129:3 <b>reward</b> <sup>[4]</sup> 30:7 56:17 57:14 189:11 <b>rewarding</b> <sup>[1]</sup> 56:18 <b>rewards</b> <sup>[3]</sup> 23:5 58:3, 3 <b>rich</b> <sup>[1]</sup> 28:18 <b>richest</b> <sup>[1]</sup> 94:17 <b>Ricketson</b> <sup>[2]</sup> 146:15 147:22 <b>rid</b> <sup>[2]</sup> 124:8 129:9 <b>ride</b> <sup>[1]</sup> 96:23 <b>riding</b> <sup>[2]</sup> 100:22 101: 13 <b>right-based</b> <sup>[1]</sup> 206:4 <b>rightholder's</b> <sup>[1]</sup> 116: 6 <b>Rightholders</b> <sup>[2]</sup> 111: 7 115:24 <b>rights</b> <sup>[90]</sup> 3:13 4:3 14: 22 78:1,6,9 80:22 82: 7,10,10 85:4,12 87:7, 8,16,17,19,22,25 88:6 97:22 100:17,19 103: 11 104:22 105:21 111: 9,17 114:19,23 115: 16,18,19 122:22 124: 25 125:17,17 138:6 141:23,24 143:8 144: 25 148:2 155:10,24 156:2,7,25 157:1,6,18, 24 158:18 161:20 162: 9,10,17,18 164:9 165: 2 166:2,18,19,20,23 167:5,17,18 172:4,5 174:11,23 181:2,4 183:18,20,20 185:6, 16 186:17,18 189:11 196:17,24 197:4,12 201:14 202:5 203:10 208:1 <b>rightholders</b> <sup>[6]</sup> 174:22 193:6 198:12, 25 199:6 200:15 <b>Ringer</b> <sup>[2]</sup> 4:13 73:14 <b>rise</b> <sup>[2]</sup> 53:24 195:5 <b>risk</b> <sup>[1]</sup> 22:20 <b>risks</b> <sup>[1]</sup> 22:25	<b>role</b> <sup>[8]</sup> 9:19 21:10,11 92:16 134:8 138:14 160:17 185:7 <b>roles</b> <sup>[1]</sup> 173:23 <b>Rome</b> <sup>[1]</sup> 188:1 <b>roof</b> <sup>[3]</sup> 7:13 19:4 86:8 <b>root</b> <sup>[1]</sup> 204:14 <b>round</b> <sup>[3]</sup> 129:15 132: 2 206:5 <b>roundtable</b> <sup>[15]</sup> 3:10 46:4 52:12 71:1 77: 22 116:7 137:11 138: 11,15 142:3 143:4 208:8 210:10,18,20 <b>roundtables</b> <sup>[2]</sup> 3:4 139:25 <b>ROUTHIER</b> <sup>[4]</sup> 86:21, 22 125:6 140:6 <b>routinely</b> <sup>[1]</sup> 157:20 <b>royalties</b> <sup>[1]</sup> 159:23 <b>royalty</b> <sup>[1]</sup> 112:12 <b>rulemaking</b> <sup>[1]</sup> 130: 11 <b>rules</b> <sup>[4]</sup> 10:21 135:18 157:1 201:8 <b>ruling</b> <sup>[3]</sup> 191:13,17, 21 <b>run</b> <sup>[9]</sup> 34:14 36:13 46: 21 47:6 51:19 53:10 96:20 132:7 173:19 <b>running</b> <sup>[4]</sup> 47:1 96: 17,19 174:20	<b>scale</b> <sup>[2]</sup> 117:12 183:7 <b>scary</b> <sup>[1]</sup> 95:4 <b>scenario</b> <sup>[2]</sup> 47:2,9 <b>scenarios</b> <sup>[1]</sup> 16:15 <b>scene</b> <sup>[1]</sup> 110:25 <b>schedule</b> <sup>[1]</sup> 210:15 <b>scheme</b> <sup>[2]</sup> 112:12 136:7 <b>schemes</b> <sup>[2]</sup> 113:5 136:24 <b>scholar</b> <sup>[2]</sup> 77:24,24 <b>scholars</b> <sup>[1]</sup> 146:9 <b>School</b> <sup>[2]</sup> 6:13 80:12 <b>schools</b> <sup>[1]</sup> 18:22 <b>Schwartz</b> <sup>[13]</sup> 145:10, 11,12 148:13,14 152: 2,3 154:8 164:18 169: 19 182:3 194:13 201: 23 <b>science</b> <sup>[3]</sup> 64:1 78:6 175:5 <b>scope</b> <sup>[22]</sup> 3:22 72:4 101:23 105:7 119:24 147:3 154:13 156:2 162:13 163:5,12 166: 2 177:17 182:1 190:1 196:22 198:1 202:5 203:23 207:10,14,17 <b>score</b> <sup>[3]</sup> 193:18 194: 3 205:6 <b>scrape</b> <sup>[1]</sup> 22:12 <b>scraped</b> <sup>[1]</sup> 27:23 <b>scrapes</b> <sup>[1]</sup> 91:22 <b>screen</b> <sup>[1]</sup> 118:4 <b>screwed</b> <sup>[1]</sup> 41:6 <b>screwing</b> <sup>[1]</sup> 185:18 <b>scrutiny</b> <sup>[4]</sup> 54:6 176: 7 181:19,19 <b>se</b> <sup>[4]</sup> 43:20 96:15 105: 6 148:2 <b>Search</b> <sup>[27]</sup> 15:14,17 28:1,11,14 36:10,11, 14 44:6 45:15 57:4 62:24 63:1,6 100:17, 20,25 106:18,23 108: 8 119:6,9,13 124:14 141:8 165:11 207:8 <b>searches</b> <sup>[2]</sup> 36:13 37: 5	<b>Section</b> <sup>[6]</sup> 89:24 128: 2 129:20 170:18 198: 14 203:2 <b>sector</b> <sup>[1]</sup> 20:14 <b>secures</b> <sup>[1]</sup> 98:2 <b>securing</b> <sup>[1]</sup> 157:25 <b>see</b> <sup>[35]</sup> 17:11 21:19 25:14 34:16 39:24 42: 24 51:24 52:15 53:23 54:8 56:3 64:9 69:13 77:16 101:6,8,25 110: 19 121:13,20 122:14 138:25 140:21 144:6 155:12 158:8 171:9, 12 173:21 183:10 200: 14 201:7 204:21 206: 23 208:13 <b>seeing</b> <sup>[4]</sup> 110:25 138: 16 193:8 194:1 <b>seeking</b> <sup>[5]</sup> 18:17 117: 3 148:15 169:22,23 <b>seemed</b> <sup>[3]</sup> 74:21 88: 14 146:23 <b>seems</b> <sup>[10]</sup> 87:1 147:6, 12 170:25 178:14 182: 5 193:24 200:1,7 201: 2 <b>seen</b> <sup>[11]</sup> 16:11 35:8 50:22 76:18 77:5 83: 2 109:10 112:12 136: 8,9,10 <b>segment</b> <sup>[4]</sup> 85:4 86: 2 114:10,10 <b>selected</b> <sup>[1]</sup> 168:24 <b>self</b> <sup>[3]</sup> 173:1,23 184: 16 <b>semantics</b> <sup>[2]</sup> 103:22 104:14 <b>Senate</b> <sup>[1]</sup> 34:23 <b>Senator</b> <sup>[4]</sup> 71:3 156: 1 160:8 209:21 <b>Senators</b> <sup>[1]</sup> 125:14 <b>send</b> <sup>[2]</sup> 15:7 61:21 <b>sending</b> <sup>[1]</sup> 112:21 <b>sends</b> <sup>[1]</sup> 112:7 <b>Senior</b> <sup>[5]</sup> 4:11 73:11, 13 145:17 153:5 <b>sensationalism</b> <sup>[1]</sup>
<b>S</b>					
<b>sadly</b> <sup>[1]</sup> 172:1 <b>safeguarded</b> <sup>[1]</sup> 189: 7 <b>sake</b> <sup>[1]</sup> 59:24 <b>salary</b> <sup>[1]</sup> 169:15 <b>sales</b> <sup>[1]</sup> 62:2 <b>Sam</b> <sup>[1]</sup> 147:22 <b>same</b> <sup>[24]</sup> 8:7 17:21 19:12,13,14 46:25 77: 5,6 92:3 115:6 137: 22 142:5 163:25 187: 22 188:7,15 190:15 192:11 193:4 197:9 200:20 201:6,11 206: 21 <b>sample</b> <sup>[2]</sup> 157:7,8 <b>samples</b> <sup>[1]</sup> 157:4 <b>sampling</b> <sup>[1]</sup> 157:3 <b>Sara</b> <sup>[1]</sup> 10:25 <b>satisfied</b> <sup>[5]</sup> 193:8,13, 22 194:1,9 <b>saved</b> <sup>[1]</sup> 18:6 <b>savings</b> <sup>[2]</sup> 99:5,15 <b>saw</b> <sup>[5]</sup> 53:3 69:14 92: 20 108:13 133:23					

<p>57:21  <b>sensationalizing</b> <sup>[1]</sup>  58:4  <b>sense</b> <sup>[4]</sup> 59:24 102:  22 125:8 135:13  <b>sensible</b> <sup>[1]</sup> 157:19  <b>separate</b> <sup>[6]</sup> 54:4 55:  1 180:5,14,14,18  <b>separated</b> <sup>[1]</sup> 20:22  <b>Separately</b> <sup>[1]</sup> 180:3  <b>serious</b> <sup>[5]</sup> 58:5,23 75:  13,23 163:7  <b>seriously</b> <sup>[1]</sup> 54:13  <b>serve</b> <sup>[4]</sup> 58:24 78:15  84:14 172:9  <b>services</b> <sup>[3]</sup> 93:19,19  140:13  <b>service</b> <sup>[9]</sup> 13:22 29:3,  7 85:8 112:21 113:9  136:2,12,15  <b>services</b> <sup>[28]</sup> 15:11  25:22 26:1,1,11 36:1,  4 45:3 47:24 63:9 76:  20 79:15,21 80:2 98:  10 101:4,6 112:15,23  113:18,19 136:11,17,  19,20 147:2 163:9  167:17  <b>session</b> <sup>[7]</sup> 4:16 143:  6,11,23 144:1 208:11,  17  <b>sessions</b> <sup>[2]</sup> 5:8 74:7  <b>set</b> <sup>[5]</sup> 7:9 21:23 125:  22 147:17 210:12  <b>sets</b> <sup>[1]</sup> 64:16  <b>several</b> <sup>[4]</sup> 145:23  146:9 148:16 207:5  <b>Shades</b> <sup>[1]</sup> 169:12  <b>shape</b> <sup>[2]</sup> 121:18 150:  8  <b>share</b> <sup>[13]</sup> 45:13,16,18  46:4 51:12 94:19 112:  17 118:22,25 119:1  135:1 172:16 177:20  <b>shared</b> <sup>[2]</sup> 35:17 134:  4  <b>sharing</b> <sup>[6]</sup> 47:7 53:  16 83:12 113:3,5 173:  18  <b>she's</b> <sup>[2]</sup> 12:10 147:6  <b>SHEERIN</b> <sup>[14]</sup> 6:19,19  8:17,18 12:12 15:5  25:11 35:23 44:4 47:  13 60:14 61:12 71:19  93:14  <b>shift</b> <sup>[1]</sup> 53:16  <b>shifting</b> <sup>[1]</sup> 53:18  <b>Shira</b> <sup>[2]</sup> 3:8 4:17  <b>Shocked</b> <sup>[2]</sup> 209:15,  20  <b>shop</b> <sup>[2]</sup> 111:12,13  <b>short</b> <sup>[46]</sup> 7:5 10:11,</p>	<p>20,22 11:4,7,9,12,15  15:8 17:22 22:23 42:  19,21 43:4,8,19,21,22,  24 44:6,12,20 46:13  49:17 69:25 89:7 104:  6 151:3 152:1 154:2,  3,19 162:25 167:13  168:19 191:15,22,24,  24 192:9,20 195:4,5,  19 209:2  <b>shortage</b> <sup>[2]</sup> 161:25  162:18  <b>shorter</b> <sup>[4]</sup> 158:7,11  192:9 209:2  <b>shouldn't</b> <sup>[7]</sup> 120:24  136:23,23 141:7 148:  11 169:5 201:8  <b>show</b> <sup>[3]</sup> 36:12 38:19  150:4  <b>showed</b> <sup>[1]</sup> 16:11  <b>showing</b> <sup>[3]</sup> 14:14  108:8 167:20  <b>shown</b> <sup>[1]</sup> 18:11  <b>shows</b> <sup>[3]</sup> 27:25 138:  19 191:15  <b>shut</b> <sup>[1]</sup> 51:11  <b>side</b> <sup>[18]</sup> 47:10 48:12,  19,20 53:12 59:11 62:  2,2 113:16 120:7 155:  7,7 160:20 182:16,17  189:12,12 206:20  <b>sided</b> <sup>[1]</sup> 20:18  <b>sides</b> <sup>[2]</sup> 31:19 187:21  <b>sight</b> <sup>[1]</sup> 175:11  <b>sign</b> <sup>[1]</sup> 74:11  <b>signatories</b> <sup>[1]</sup> 151:  14  <b>signed</b> <sup>[5]</sup> 5:10 74:9  208:17,20 210:9  <b>significant</b> <sup>[9]</sup> 9:13  16:24 37:12 46:18 48:  15 56:9 84:1 154:14  185:3  <b>Silberberg</b> <sup>[2]</sup> 88:23  145:13  <b>Silbey</b> <sup>[7]</sup> 58:14 77:20,  21 85:15 94:11 121:  10 135:5  <b>silly</b> <sup>[1]</sup> 135:23  <b>similar</b> <sup>[9]</sup> 26:1 42:18  77:15 89:23 122:13  157:14 176:3 188:8  192:8  <b>similarity</b> <sup>[1]</sup> 11:24  <b>similarly</b> <sup>[2]</sup> 81:19  113:21  <b>simply</b> <sup>[34]</sup> 8:6 11:4  35:14,16 47:5 50:18  51:9,16,22,23 52:6  54:12 58:16 110:3,5  156:2 160:8 166:21  189:3,15 192:10 193:</p>	<p>18,19 194:1,3,6 199:9,  13 201:4 204:23 205:  6,12,19 206:4  <b>since</b> <sup>[13]</sup> 7:10 8:2 10:  8 32:23 39:13 61:16  119:22 124:14 143:9  152:23 166:15 182:9  207:1  <b>SINGER</b> <sup>[9]</sup> 91:7,7  106:6 118:2,6 131:2  140:18 165:8 182:22  <b>single</b> <sup>[1]</sup> 184:18  <b>singling</b> <sup>[2]</sup> 27:13 181:  17  <b>siphoned</b> <sup>[1]</sup> 92:18  <b>siphoning</b> <sup>[1]</sup> 204:20  <b>site</b> <sup>[8]</sup> 8:13 27:25 70:  3,4 79:6 195:14  <b>sites</b> <sup>[7]</sup> 8:15 15:7 25:  20 101:8,9 177:5 178:  1  <b>sitting</b> <sup>[3]</sup> 30:19 65:12  125:13  <b>situated</b> <sup>[2]</sup> 81:20 113:  21  <b>situation</b> <sup>[16]</sup> 18:12  29:15 42:24 50:11 77:  6,16,16 96:22 97:24  105:25 134:22 160:22  177:23 178:3,3 188:4  <b>situations</b> <sup>[1]</sup> 109:9  <b>six</b> <sup>[1]</sup> 61:18  <b>size</b> <sup>[7]</sup> 34:19 101:2  103:4 114:5,25 115:1  117:15  <b>sleep</b> <sup>[1]</sup> 141:15  <b>slice</b> <sup>[1]</sup> 36:8  <b>slightly</b> <sup>[2]</sup> 37:11 65:  24  <b>small</b> <sup>[22]</sup> 34:18 36:7  55:16,17,20,24 66:11  76:24 77:4 110:3 111:  2,14,25 118:14,15  120:17 124:12,15 136:  13,22 137:5 141:1  <b>smaller</b> <sup>[8]</sup> 34:21 35:  14 53:2 56:6 112:2  114:7 120:10 136:17  <b>smalls</b> <sup>[6]</sup> 118:8,18,20,  21 119:2,5  <b>snippet</b> <sup>[4]</sup> 15:12 83:  13 132:21 157:3  <b>snippets</b> <sup>[12]</sup> 7:5 8:21  28:11 75:14 76:22 91:  23 92:7 101:1 124:9  191:14,17 207:8  <b>social</b> <sup>[13]</sup> 57:5 83:8  91:19 92:12,13 106:  24 117:21 121:16,22  131:6 141:8 165:12  183:16  <b>societal</b> <sup>[1]</sup> 21:24</p>	<p><b>society</b> <sup>[9]</sup> 24:3 56:20  57:6 64:22 95:7,11  96:18 134:6 148:6  <b>solution</b> <sup>[23]</sup> 40:23 41:  24 51:21 52:5,7,14  56:11,12,15 58:11 60:  4,6 92:24 94:5 175:  13 178:19,22,24 179:  8,10,14,16 206:12  <b>solutions</b> <sup>[6]</sup> 52:3,19  59:11 72:16,17 206:  11  <b>solve</b> <sup>[5]</sup> 54:17 100:7  136:4 175:15 178:18  <b>solves</b> <sup>[1]</sup> 94:21  <b>solving</b> <sup>[2]</sup> 50:21 104:  2  <b>somebody</b> <sup>[1]</sup> 16:7  <b>somebody's</b> <sup>[1]</sup> 57:2  <b>somehow</b> <sup>[11]</sup> 119:23  120:9 140:20 151:18  169:22 180:11 194:25  204:19,20,25 205:7  <b>someone</b> <sup>[8]</sup> 45:8 59:  3,16 89:25 103:21  105:18,24 177:8  <b>sometimes</b> <sup>[4]</sup> 23:1  166:8 191:5 192:12  <b>somewhat</b> <sup>[3]</sup> 7:7 30:  5 43:3  <b>sorry</b> <sup>[19]</sup> 6:11,12 10:6  23:19 36:17 37:17 59:  19 62:13 75:7,8 76:3  100:12 103:9 118:2,3  153:16 175:3 193:1  205:21  <b>sort</b> <sup>[36]</sup> 31:18 34:14  49:14,22 53:15 57:10,  17 64:9 65:18 75:9  93:3 95:5 99:1,18  100:22 112:6 124:20  133:17 134:19 135:6  139:13 148:17 152:20  154:8 168:11 176:6  178:7,12,23 179:25  180:2,12,13 202:2,9  206:15  <b>sorts</b> <sup>[3]</sup> 79:6 127:8  192:17  <b>soul</b> <sup>[1]</sup> 85:24  <b>sound</b> <sup>[6]</sup> 157:5 167:4  174:6 188:6,9 189:13  <b>source</b> <sup>[12]</sup> 8:13,15  18:16 69:19 70:3,4  127:7 134:20 149:25  194:21 200:21,25  <b>sources</b> <sup>[7]</sup> 13:5,14  17:17 30:24 59:12 64:  21 67:10  <b>South</b> <sup>[1]</sup> 145:6  <b>space</b> <sup>[3]</sup> 21:19 107:8  136:15</p>	<p><b>Spain</b> <sup>[9]</sup> 103:6 107:  23 108:13,19 109:15,  16 110:2,10 112:9  <b>spare</b> <sup>[2]</sup> 66:22,23  <b>speaker</b> <sup>[1]</sup> 209:14  <b>speaking</b> <sup>[10]</sup> 5:6 74:  4 76:9 79:9 101:3  108:5 111:24 112:11  137:5 143:19  <b>speaks</b> <sup>[1]</sup> 131:1  <b>special</b> <sup>[1]</sup> 106:17  <b>specific</b> <sup>[11]</sup> 26:24 33:  17 46:20 58:9,11 77:  14 84:3 90:4 104:3  111:7 161:10  <b>specifically</b> <sup>[8]</sup> 24:15  90:20 114:24 153:10  172:15 192:20,21 204:  8  <b>specificity</b> <sup>[1]</sup> 97:22  <b>specified</b> <sup>[1]</sup> 95:10  <b>speculative</b> <sup>[1]</sup> 205:  11  <b>speech</b> <sup>[12]</sup> 99:24 100:  5,9 106:14 108:25  156:14 163:20,21,22  164:9 167:17,20  <b>spend</b> <sup>[5]</sup> 22:25 23:4,  4 54:24,25  <b>spending</b> <sup>[1]</sup> 187:3  <b>spends</b> <sup>[1]</sup> 140:15  <b>spent</b> <sup>[2]</sup> 165:7 205:9  <b>Spiegel</b> <sup>[1]</sup> 157:11  <b>spike</b> <sup>[1]</sup> 18:15  <b>spiked</b> <sup>[1]</sup> 19:3  <b>split</b> <sup>[1]</sup> 131:11  <b>spoke</b> <sup>[1]</sup> 209:25  <b>spoken</b> <sup>[2]</sup> 40:5 91:2  <b>spread</b> <sup>[1]</sup> 26:6  <b>Springer</b> <sup>[3]</sup> 76:9 125:  10 160:9  <b>square</b> <sup>[1]</sup> 206:5  <b>squeezes</b> <sup>[1]</sup> 62:10  <b>stacks</b> <sup>[1]</sup> 188:3  <b>staff</b> <sup>[7]</sup> 4:19 73:17 95:  16 139:19,20 143:15  184:15  <b>staffing</b> <sup>[1]</sup> 95:14  <b>stage</b> <sup>[4]</sup> 7:10 89:11  90:21 110:6  <b>stand</b> <sup>[1]</sup> 39:2  <b>standard</b> <sup>[12]</sup> 57:5 64:  23,25 65:18 95:24  144:2 176:7 184:10  200:5 201:6,11 208:  11  <b>standards</b> <sup>[3]</sup> 114:18,  20 153:17  <b>standing</b> <sup>[4]</sup> 11:21 14:  12 102:25 203:1  <b>Star</b> <sup>[2]</sup> 94:2,2  <b>start</b> <sup>[20]</sup> 5:17,22,24 7:</p>	<p>1 26:16 37:15 41:15  52:18 67:12 72:25 74:  18 75:6 113:4 127:5  132:8 169:4 174:7  188:22 196:20 207:1  <b>started</b> <sup>[3]</sup> 70:20 103:  10 125:17  <b>starting</b> <sup>[3]</sup> 6:2 9:17  72:24  <b>starts</b> <sup>[3]</sup> 143:23 144:  6,7  <b>state</b> <sup>[10]</sup> 9:17 43:18  59:23 73:22 74:22  126:22 127:13 129:5  188:7 198:18  <b>stated</b> <sup>[2]</sup> 85:7 129:14  <b>statement</b> <sup>[3]</sup> 114:8  154:21 199:17  <b>statements</b> <sup>[2]</sup> 129:3  199:18  <b>States</b> <sup>[32]</sup> 3:13 55:10  68:10 78:16,21 88:1  99:22,23 100:1 103:  20 109:1 110:17 117:  7 125:16,18 126:10,  10,21 127:16,22 128:  5 149:11 151:18,22  152:16 153:12 155:11  157:1 159:5 167:3,6  175:19  <b>static</b> <sup>[1]</sup> 40:17  <b>staticness</b> <sup>[1]</sup> 133:3  <b>stations</b> <sup>[1]</sup> 176:5  <b>statistic</b> <sup>[1]</sup> 16:11  <b>statistics</b> <sup>[2]</sup> 165:21  182:11  <b>stats</b> <sup>[2]</sup> 114:12 137:  14  <b>status</b> <sup>[5]</sup> 51:23 52:7  116:19 119:3 201:4  <b>statute</b> <sup>[12]</sup> 89:17,18,  25 90:4,18,21 104:18  105:3 120:6 121:4  129:24 168:10  <b>statutes</b> <sup>[2]</sup> 121:3 122:  2  <b>statutory</b> <sup>[3]</sup> 41:2 105:  5 203:2  <b>stayed</b> <sup>[1]</sup> 19:3  <b>staying</b> <sup>[1]</sup> 207:18  <b>steal</b> <sup>[1]</sup> 23:5  <b>step</b> <sup>[6]</sup> 8:19 81:1 98:7,  7 151:20 167:24  <b>steps</b> <sup>[1]</sup> 135:3  <b>Sternburg</b> <sup>[14]</sup> 145:15,  16,16 150:21,22 162:  22 167:10 170:12 180:  20 189:19,20 195:16  203:5 207:3  <b>Steve</b> <sup>[1]</sup> 210:12  <b>still</b> <sup>[21]</sup> 11:8 19:2,20  31:1 37:15 65:12 68:</p>
---	--	--	--	--	--



<p>3,9 105:15 122:14,16, 18 132:2 139:12 175: 9 176:14,14 177:25 179:16 188:14 197:20  <b>stop</b> [12] 7:20 17:10 20:5 24:6,9 30:10 52: 20 69:12 111:12,13 187:15 193:10  <b>stopped</b> [1] 107:25  <b>stopping</b> [2] 204:23 205:12  <b>store</b> [1] 56:25  <b>stories</b> [4] 17:4 58:7 72:14 106:17  <b>story</b> [4] 17:2,10,19 46:25  <b>storytelling</b> [1] 17:8  <b>strangles</b> [1] 164:12  <b>strategies</b> [1] 77:9  <b>stream</b> [1] 29:17  <b>Street</b> [1] 6:5  <b>streets</b> [1] 65:17  <b>strengthening</b> [1] 78: 1  <b>stretching</b> [1] 102:21  <b>strict</b> [1] 181:19  <b>strictly</b> [1] 25:6  <b>string</b> [1] 68:10  <b>stringer</b> [1] 184:16  <b>stripping</b> [1] 54:3  <b>strokes</b> [1] 194:25  <b>Strong</b> [5] 4:9 100:6 173:21 174:21 176:20  <b>strongest</b> [1] 173:11  <b>strongly</b> [2] 56:16 60: 17  <b>struck</b> [1] 87:5  <b>structural</b> [1] 93:4  <b>structure</b> [2] 32:12 87: 3  <b>structured</b> [2] 93:6 175:23  <b>structures</b> [2] 25:2 121:17  <b>struggling</b> [3] 31:21 54:13 210:4  <b>studied</b> [1] 115:7  <b>studies</b> [2] 47:19 138: 25  <b>Study</b> [35] 3:5,11,17 27:2 72:2 75:13 81:2 85:19,22 86:14,18 87: 24 99:14 101:20,23 102:13 105:8 115:4 116:21 119:24 120:13 125:23 130:7 138:10, 11,15,19 156:5 162: 13,15 164:21 189:14 202:1 207:17 209:22  <b>studying</b> [1] 188:20  <b>stuff</b> [2] 35:15 175:20  <b>style</b> [1] 93:10</p>	<p><b>subject</b> [8] 68:7 107:6 149:23 158:12,24 186: 22 187:20 200:19  <b>submission</b> [3] 83:20 84:9 116:25  <b>submissions</b> [1] 120: 14  <b>submit</b> [4] 141:7 177: 22 193:12 210:16  <b>submitted</b> [5] 17:20 89:14 141:20 144:1 161:2  <b>Subscribe</b> [2] 61:15 92:9  <b>subscriber</b> [1] 81:17  <b>subscribers</b> [3] 28:7 63:5 101:12  <b>subscription</b> [6] 22: 16 23:15 30:24 31:18 101:12 182:17  <b>subscriptions</b> [3] 44: 18 61:15,17  <b>subsequent</b> [3] 24:24 138:15 202:21  <b>subset</b> [2] 34:7 84:7  <b>subsidize</b> [1] 35:3  <b>subsidy</b> [1] 24:19  <b>Substack</b> [3] 132:25 133:3,11  <b>Substack-based</b> [1] 133:5  <b>substantial</b> [6] 11:23, 24 33:19,19 100:23 107:2  <b>substantive</b> [2] 58:21 168:13  <b>substitute</b> [5] 8:12 15: 23 22:10 25:22 28:19  <b>substitution</b> [4] 25: 17 204:25 205:4,19  <b>substitutional</b> [1] 194:22  <b>succeed</b> [4] 79:10,13, 20 80:4  <b>succeeded</b> [1] 113: 15  <b>success</b> [1] 30:2  <b>successful</b> [1] 69:4  <b>successfully</b> [1] 190: 24  <b>succinct</b> [1] 11:13  <b>sudden</b> [1] 80:2  <b>suddenly</b> [1] 109:20  <b>sue</b> [2] 50:9 203:1  <b>sued</b> [1] 190:24  <b>suffer</b> [1] 53:9  <b>suffering</b> [1] 19:24  <b>sufficient</b> [2] 75:3 157:13  <b>suggest</b> [5] 35:11 102: 24 126:2 135:14 199: 3</p>	<p><b>suggested</b> [4] 58:12 78:10,25 123:18  <b>suggesting</b> [2] 166: 14 169:21  <b>suggestions</b> [2] 40:1 202:11  <b>suggests</b> [3] 25:18 193:24 194:9  <b>sui</b> [2] 69:11 153:20  <b>suit</b> [1] 108:22  <b>suited</b> [2] 21:4 135:18  <b>sum</b> [1] 25:7  <b>summaries</b> [1] 92:7  <b>summarize</b> [1] 189:2  <b>summary</b> [1] 72:9  <b>superficial</b> [1] 111:24  <b>superstar</b> [1] 34:16  <b>supply</b> [3] 66:6,21 84: 1  <b>support</b> [20] 3:11 9:2 25:5,9,13 35:9,10 39: 21 43:5 51:21 54:16 58:20 61:1 66:10,25 78:20 94:19 135:19 175:8 191:21  <b>supported</b> [1] 60:21  <b>supporting</b> [2] 49:12 134:8  <b>supportive</b> [2] 49:6 95:1  <b>supposed</b> [4] 63:14 78:5 112:15 188:18  <b>Supreme</b> [7] 70:8 75: 21 128:12,20 165:18 186:15 189:24  <b>surface</b> [1] 146:17  <b>surprising</b> [1] 118:9  <b>surrender</b> [1] 93:14  <b>sustain</b> [1] 104:25  <b>sustainable</b> [3] 25:15 61:2 134:1  <b>sweat-of-the-brow</b> [2] 128:13,21  <b>switch</b> [1] 78:24  <b>Switzerland</b> [2] 145:4, 5  <b>swoop</b> [1] 23:5  <b>system</b> [19] 38:20 40: 6,24 41:11,11 51:14 53:6 66:24 67:3 95: 23 96:3 97:7 110:12 182:10 183:21 197:15 202:20,23 203:1  <b>systematic</b> [2] 11:19 166:9  <b>systematically</b> [2] 150:2,20  <b>systems</b> [6] 78:18,19 121:16,23 134:14 176: 4</p>	<p><b>table</b> [1] 110:23  <b>tablet</b> [1] 187:25  <b>tabloid</b> [2] 56:24 57:2  <b>tackle</b> [1] 134:4  <b>tag</b> [1] 98:4  <b>tail</b> [2] 112:3,4  <b>tailored</b> [1] 90:4  <b>tailwind</b> [1] 110:22  <b>TAKASH</b> [9] 6:23,23 24:11 34:4 46:11 51: 5 53:22 57:19 59:19  <b>takings</b> [2] 149:13 183:7  <b>talked</b> [10] 7:2 44:22 72:13 114:21 127:12 129:6 156:9 181:13 198:24 203:16  <b>talks</b> [2] 107:1 179:22  <b>tantamount</b> [1] 137:7  <b>target</b> [1] 112:15  <b>targeted</b> [5] 21:1 27:7 52:24 105:3 179:9  <b>Tasini</b> [2] 201:13,15  <b>tasked</b> [1] 130:13  <b>tax</b> [5] 48:15 60:3,8 66: 3 122:2  <b>taxed</b> [1] 107:5  <b>taxes</b> [1] 53:8  <b>team</b> [1] 111:14  <b>Tech</b> [7] 6:4 48:15 59: 11 86:7 107:8 134:5, 23  <b>Techdirt</b> [5] 79:6 80: 13 111:24 112:9 118: 10  <b>technical</b> [3] 5:13 74: 13 146:3  <b>technological</b> [1] 198:15  <b>technology</b> [6] 48:20 59:14 60:16 76:10 77: 7 79:7  <b>Telegram</b> [2] 94:2,2  <b>telescope</b> [1] 149:8  <b>television</b> [1] 176:2  <b>tells</b> [2] 114:13 125:12  <b>tend</b> [2] 76:22 161:10  <b>tens</b> [1] 177:5  <b>term</b> [1] 60:23  <b>terms</b> [26] 23:12 25:2, 3 29:3,7 31:24 32:9 33:5 34:8 52:5 74:22 81:5 97:9 102:16 126: 18 141:5 158:18,22 161:1 169:2 171:14 176:17 178:17 184:11, 21 190:18  <b>terrible</b> [1] 108:9  <b>territory</b> [1] 67:15  <b>test</b> [5] 151:20 176:11, 13,14,15  <b>testified</b> [1] 104:8</p>	<p><b>tests</b> [1] 185:3  <b>text</b> [2] 22:7 184:8  <b>Thanks</b> [83] 13:11 17: 11 21:21 30:11 34:3 37:9 40:3 51:4 52:21 53:4,21 55:5 57:7 60: 11 63:18 65:21,21 67: 6,18,22 68:5 70:10 71:18 72:20 75:6 76: 2 82:13 86:20,21,23 88:2 94:7,11 100:10 101:24 102:9 106:2,6 116:15 117:22 131:20 132:10 133:22 135:22 139:17 140:5,7 142:2 145:19 153:4 159:12 163:14 164:17 167:10, 22 168:17 169:16,19 170:11,24,25 171:11 174:2 180:19 182:2,3 183:22 189:20 190:10 192:2,24 194:12 196: 15 199:19 201:22 203: 5 204:2,3,4 205:21 206:23 207:20 208:4  <b>theme</b> [3] 75:1 202:2, 24  <b>themselves</b> [8] 5:25 47:10 66:11 105:25 144:5 167:18 175:16 178:2  <b>theory</b> [2] 146:15 157: 24  <b>There's</b> [102] 7:24 12: 13 24:16 34:20 36:5 37:5 40:12 41:8 48: 18 50:9,23 52:10 53: 11,15 56:23,24 58:16 61:25 63:14 64:20 65: 7,8 66:19 67:9 81:4 85:20 87:1 89:1,14 90:22 91:20 93:8 99: 8 101:14 105:12,19 106:15 108:12 112:7 116:23 120:22 121:1, 4 127:23 129:24,25 135:25 149:2 151:5, 17 154:14,25 155:2 159:3,13 160:7 161: 21,24 162:4,7,8,8,9, 17,17 163:1 166:24 167:14,16 169:22 170: 3,19 171:24 173:21 175:1 176:5 177:12 180:9 181:10 184:24 185:7 187:10 192:6,7, 17 194:13,15,22 195: 23 198:15,16 199:1 204:18,25 205:5,24 207:7,9 209:3,8,23 210:17  <b>thereby</b> [1] 92:2</p>	<p><b>therefore</b> [4] 42:1 43: 17 148:8 182:15  <b>they'll</b> [1] 72:18  <b>they've</b> [8] 10:4 30:20 32:3 62:20 68:25 106: 24 130:12 136:25  <b>thinking</b> [3] 103:4 154:1 190:13  <b>thinks</b> [4] 41:13 68:2 106:10 121:7  <b>thinktank</b> [1] 79:5  <b>third</b> [17] 9:7,7 74:24 79:14,21 80:2 88:5 96:20 97:3 109:19 133:15 143:6 152:13 155:4 189:7 200:10 208:6  <b>though</b> [11] 35:3 37:7 55:25 137:12 146:16 157:21 159:18 161:10 167:5 191:18 204:21  <b>thoughtful</b> [1] 156:4  <b>thoughts</b> [4] 18:3 102: 2 130:25 132:4  <b>thousands</b> [4] 177:3, 3,5,5  <b>threat</b> [7] 69:18 120: 17 133:12 163:19,21 164:3,4  <b>threatens</b> [1] 79:19  <b>threats</b> [1] 164:9  <b>three</b> [7] 28:10 66:9 132:24 151:20 156:23 199:20 205:15  <b>threshold</b> [5] 43:7 124:2,9,14,23  <b>throated</b> [1] 96:6  <b>throughout</b> [8] 7:15 44:9 47:17,18 60:18 140:9 203:7 207:5  <b>throughs</b> [1] 194:19  <b>thrown</b> [2] 115:10 137: 14  <b>thumbnail</b> [2] 101:2 207:8  <b>thumbnails</b> [1] 15:13  <b>Thursday</b> [1] 142:5  <b>Tillis</b> [2] 71:4 160:8  <b>Tillis's</b> [2] 156:1 209: 21  <b>Tim</b> [1] 12:18  <b>timeliness</b> [1] 69:20  <b>timely</b> [1] 23:2  <b>titles</b> [4] 78:25 169:8 191:6 195:19  <b>today</b> [42] 3:12 5:17 7: 15 12:24 31:16 32:13 45:3 46:23 49:10 56: 19 58:22 60:18 63:21 67:23 68:19 71:22,23 74:17 76:8,17 79:4 80:21 86:19 88:24 99:</p>
--	---	---	---	---	--



<p>13 107:4,9 120:14 123:24 134:23 137:8 138:11 141:19 145:13, 21 164:9 173:1 188:4, 16 206:14,18 207:5 today's [2] 67:9 189: 16 together [4] 38:5 57:4 71:20 104:22 tomorrow [1] 160:6 ton [3] 20:7 40:12 55: 24 took [5] 19:5 33:6 36: 9 191:8 210:14 tool [4] 9:24 68:11 134:11 135:12 tools [8] 21:5,6 34:18 61:14,19 62:17 63:8 83:21 top [4] 62:24 63:1 73: 16 113:4 topic [6] 3:12 37:10 74:20 168:21 207:18 208:18 topics [1] 200:19 total [1] 36:10 totally [1] 101:19 touch [2] 135:23 141: 1 touched [4] 22:1,8 61: 5 185:22 towards [7] 53:18 54: 1 56:19 58:15,25 102: 11 174:4 town [1] 184:18 track [1] 75:24 tracks [1] 18:1 trade [4] 141:25 166: 21 167:1,7 trades [1] 133:6 tradition [1] 174:10 traditional [2] 21:1 189:25 traffic [14] 48:13,14 61:13,20,23,24 83:25 107:4 112:16,21 113: 10,12 118:25 204:20 train [1] 196:1 trained [1] 80:10 trampled [1] 185:17 transactional [1] 113: 6 transcribed [2] 4:25 73:24 transformative [1] 8: 5 transformativeness [1] 13:2 transition [1] 30:20 transitioning [1] 199: 18 transpose [1] 125:2</p>	<p>transposed [2] 110: 18,20 treat [2] 84:12,13 treated [1] 165:14 treatment [7] 71:12 165:5 166:13,22,25 167:7 181:18 treaty [4] 4:5 143:9 150:18 196:18 tremendous [7] 18: 14 20:16 29:19 34:8 47:23 55:21 83:22 trend [1] 53:25 trends [2] 24:22 54:21 trespass [2] 198:16, 21 trial [1] 130:2 trickle [2] 58:17 173: 15 tried [5] 45:10 68:25 109:21 119:24 122:19 trigger [1] 181:18 trilogy [1] 156:22 TRIPS [1] 151:9 trite [1] 11:6 troubling [1] 74:21 true [6] 10:12 11:12 24:13 55:9 105:11 114:8 trumps [1] 151:24 trust [2] 23:23 29:25 trusted [3] 24:2 81:22 188:21 trustworthiness [1] 57:15 try [14] 4:23 21:6,10 73:20 89:21 102:6 103:14 106:3 119:21 121:1 129:1 133:9,9 136:17 trying [11] 31:21 49:21 53:7 67:17 78:15 107: 11 123:12 168:15 177: 24 178:2,18 turn [19] 4:14 5:18 17: 23 36:17 37:10 43:6 52:21 59:7 72:22 88: 19 91:5 102:2 119:20 131:21 137:1 153:2 183:23 190:9 208:10 Turner [2] 176:1,9 Turning [1] 92:12 turns [4] 12:2 46:25 49:25 201:1 TV [1] 176:21 tweaked [1] 114:22 tweaking [2] 114:20, 25 two [47] 5:4 14:16 20: 18 30:8 36:15 48:8 60:24 66:14 67:17 74: 2,18 83:6 86:10 88:3</p>	<p>91:20 92:14 96:10 98: 1,15 102:7 114:15 123:21 124:21 128:3 131:2 132:23 143:20 149:14 155:21 157:3 164:25 165:1,15 166: 17 169:20 178:16 180: 1,5,14,15 181:22 182: 14 183:3 192:4 194: 13 204:4 208:20 type [13] 3:14 18:17 23:6,10 64:2 77:14 99:8,9 117:6 127:4 178:23 191:16 202:20 types [5] 16:15 27:14 71:25 113:4 117:2 typically [1] 124:15</p> <p style="text-align: center;"><b>U</b></p> <p>U.S. [52] 3:4,7 8:23 23: 8 27:11 55:11,12 76: 1,12,12 77:17,19 87:4 98:13 105:15 115:17 123:7 134:15,19 135: 3 137:22,25 147:25 150:7 151:13 152:19 155:8,14,17 157:15 159:23,25 166:20,22 167:1 168:19 170:15, 22 173:19 181:15,22 182:9 188:7 191:20 198:10 201:14,19,21 203:11,13,23 207:7 U.S.-Canada-Mexic o [1] 167:2 UK [1] 168:20 ultimate [1] 205:2 ultimately [6] 19:16 51:1 113:10 162:11, 20 174:12 unambiguous [1] 151:4 unauthorized [1] 198: 20 uncertainty [1] 77:4 unclear [1] 124:10 uncommon [1] 184: 19 uncompensated [1] 115:18 unconstitutional [7] 100:9 129:22 130:3 168:15 175:19,22 176: 12 uncontroverted [1] 50:7 under [37] 8:22 10:21 42:19 43:16,18 51:8, 9,14 59:1 66:14 68: 19 75:20,21 87:18,24 102:7 123:7 125:12, 18 126:9 149:23 151: 19,22 157:4 159:4</p>	<p>163:6 170:17 176:12, 14 183:18 187:8,24 188:6,7 189:24 203: 11,23 underlies [1] 69:21 underlying [6] 32:11 105:4 132:19 168:7 192:12 193:16 undermine [1] 12:21 Underneath [1] 28:11 underpayments [1] 92:13 understand [16] 5:7 26:18 27:20 46:12 74: 6 99:12 101:5 117:13 121:25 123:9 141:2 151:19 154:2 156:6 204:7 206:18 understanding [3] 26:17 180:23 181:8 understands [1] 178: 13 understood [4] 43:14 83:18 115:17 140:23 undertaken [1] 149: 18 undertaking [4] 125: 9 149:15 183:6 202:1 underway [2] 98:9 109:24 undesirable [1] 46:15 undid [1] 108:17 unequivocally [1] 119:3 unfair [2] 52:9 189:7 unfavorable [1] 33:6 Unfortunately [3] 23: 8 34:14 172:18 unhappy [1] 136:1 unified [1] 110:12 uniform [1] 110:12 unintended [2] 78:14 206:7 Union [16] 3:18 110:8, 18 118:15,16,17 119: 5 144:22 148:20 155: 5,13,16,17 166:16,18 173:6 unique [2] 40:8 188: 21 uniquely [1] 170:15 United [29] 3:13 78:16, 21 88:1 99:22,23 100: 1 103:20 109:1 117:7 125:16,18 126:10,10, 21 127:1,16,22 128:5 149:11 151:18,22 152: 16 153:12 155:11 159: 4 167:3,6 175:19 universal [1] 134:21 universe [1] 83:5 unless [4] 26:23 88:</p>	<p>13 127:1 201:1 unlikely [1] 89:9 unmute [1] 193:3 unmuted [1] 208:22 unoriginal [1] 186:14 unprotected [2] 10: 17 39:8 unquestionably [1] 33:23 unspecified [1] 43:15 until [2] 130:25 181:4 unusable [1] 136:2 unwise [1] 82:25 up [71] 5:10 7:23 10:2 12:5 15:9,12,20 17: 12 18:1 20:19 21:23 27:25 37:11,15,16 53: 17 56:11,15 57:12 59: 1 63:20 64:6 69:13 70:4 72:24 74:9,11 82:2 90:10 91:3 96: 11 98:25 101:22 102: 1,24 104:9 106:5 107: 18 108:8 109:14 111: 14 118:23,24 122:15, 17,18 132:9,25 133: 23 134:24 136:14 140: 2 146:2,15,18 147:17 155:13 160:20 171:12 172:15 179:8,10 185: 4 190:20 191:16 206: 24 207:2 208:17,20 210:9,13 update [1] 40:14 upfront [1] 34:20 upheld [3] 90:14 104: 19 170:1 ups [1] 90:22 upset [1] 16:20 upstart [1] 136:17 urge [1] 189:14 urgent [1] 208:23 USA [1] 188:5 usable [1] 99:3 usage [1] 149:22 useful [5] 47:25,25 68: 11 158:2 175:5 user [4] 28:18 92:1,9 126:5 user's [1] 87:7 users [25] 13:5 15:23 22:21 25:19 29:20 44: 11 83:24 84:5,6,13 87:8,15 92:5 101:5 110:7 111:16 116:18 120:8 125:18 141:24 163:9 167:17,20 171: 22 196:17 users' [1] 88:6 uses [9] 27:2 28:16 44: 19 115:18,20,23 185: 5,5,14</p>	<p>using [8] 27:1 29:24 41:5 59:15 63:8 96: 25 127:3 140:2 utilized [1] 68:12 utilizing [1] 68:15</p> <p style="text-align: center;"><b>V</b></p> <p>vaccine [1] 95:8 valuable [8] 4:8 13:25 17:8 19:25 104:25 134:2 137:15 159:3 value [42] 14:4 47:15, 23 48:4,15 49:9,10 60:17 61:13 62:6 63: 12,13 67:9 69:5,7 76: 24,25 77:1,11 81:18, 24 83:22 84:15 91:11 93:21 97:20 100:22, 23 101:5,15 106:19 107:2,10,12 118:19 127:9 131:19 141:12, 13 188:20 199:5 205: 20 values [1] 78:19 variability [1] 117:15 varied [1] 83:4 variety [7] 17:15,17 26:5 59:12 66:12 82: 23 117:20 various [5] 27:14 83: 25 122:20 129:3 158: 21 vary [1] 103:3 vast [2] 161:11 177:6 verbatim [1] 103:19 version [7] 42:5,5 168: 9 186:1 189:21 190:3 198:19 versus [2] 56:6 65:3 verticals [1] 62:16 via [5] 24:17 25:6 35:9 54:10 131:17 viability [1] 27:11 viable [4] 68:3,9 128: 17 208:3 video [3] 5:2 73:2 74: 1 view [14] 49:15 51:20 87:3 129:8 139:9 149: 7 156:20 161:11 178: 25 195:10 202:4,25 209:22,24 viewers [1] 113:14 viewpoints [2] 64:19 140:1 views [2] 127:24 135: 2 vigorous [2] 206:1,13 vindicated [1] 87:19 Vint [1] 12:17 violate [1] 150:3 violated [1] 150:20 violates [1] 167:25</p>
--	--	--	---	---	---

<p><b>violation</b> [4] 100:4  <b>163:25 197:11 198:9</b>  <b>virality</b> [1] 58:3  <b>virtual</b> [1] 3:10  <b>virtually</b> [1] 87:24  <b>vis</b> [2] 126:9,9  <b>vital</b> [1] 7:12  <b>VOICE</b> [1] 6:18  <b>voices</b> [2] 117:13 210:2  <b>Vol</b> [1] 169:10  <b>volume</b> [1] 172:22  <b>voluminous</b> [1] 41:19  <b>voluntary</b> [3] 62:22  <b>93:3,11</b>  <b>vom</b> [1] 169:14</p> <hr/> <p style="text-align: center;"><b>W</b></p> <p><b>waive</b> [1] 14:21  <b>Wales</b> [1] 145:6  <b>walk</b> [5] 104:10 108:13,15 109:6,10  <b>walked</b> [1] 108:19  <b>walking</b> [1] 108:17  <b>walls</b> [1] 100:18  <b>wanted</b> [60] 7:17 8:19  <b>10:22 12:6 13:8,11</b>  <b>15:1,5 17:13 18:2 19:6 25:11 26:12,22 27:7,17,18 29:10 36:4,15</b>  <b>37:6 41:22 44:4 47:13 48:3,22 59:10 60:18,25 61:6,12,14 63:21 71:21 103:10 116:15 125:11 128:15 130:17 131:24 135:5,19</b>  <b>145:24 152:1 160:6,14 162:23 168:18 169:19 170:12,22 185:25</b>  <b>186:4 190:10 193:4,14,18 194:2,4 207:3</b>  <b>wanting</b> [3] 20:24 121:19 153:23  <b>wants</b> [5] 14:18 30:22  <b>93:17 118:23 205:6</b>  <b>warranted</b> [1] 206:2  <b>WASEME</b> [3] 84:21  <b>113:25 137:10</b>  <b>Washington</b> [7] 144:16 145:13,18 178:20  <b>179:11 184:13 205:8</b>  <b>watching</b> [1] 59:4  <b>wave</b> [1] 24:23  <b>way</b> [57] 12:15,15 21:18,22 22:8 25:5 28:3  <b>29:6 41:18 42:12 44:21 51:6,18 54:18 56:14 64:10 66:7,15,16</b>  <b>70:5 76:20 79:2 86:4</b>  <b>89:16 94:3 98:13 103:13 104:22,25 111:24</b>  <b>112:3 117:11 121:2,21 129:1 134:8 135:8</b></p>	<p><b>138:7,20 150:8 157:25 159:24 163:25 166:9,19 169:25 174:4</b>  <b>175:15,23 177:1 182:21 187:22 195:14 201:19 205:5 209:4,8</b>  <b>Wayne</b> [9] 6:2,3 9:15  <b>20:10 26:4 31:12 50:15 53:3 67:6</b>  <b>Wayne's</b> [1] 51:6  <b>ways</b> [21] 15:21 17:19  <b>28:1,15 29:8,12,19</b>  <b>30:6,21,22 63:1 99:16 121:5,25 151:10</b>  <b>158:9 161:24 166:17</b>  <b>185:15 202:14 203:19</b>  <b>weak</b> [1] 8:6  <b>weaker</b> [1] 176:11  <b>wealthy</b> [1] 66:10  <b>web</b> [13] 26:6 38:14,15,  <b>16 39:3,4,5,12 44:12</b>  <b>71:11 127:7 197:22</b>  <b>198:4</b>  <b>webcasting</b> [2] 112:12 136:14  <b>website</b> [16] 5:1 39:13  <b>40:7,11,13,15,20 41:1,19 42:15 73:25 74:11</b>  <b>83:12 99:25 100:5</b>  <b>202:16</b>  <b>website's</b> [1] 100:5  <b>websites</b> [9] 15:24 22:13 36:7 38:18 41:17  <b>42:14,14 202:13,19</b>  <b>weighed</b> [4] 12:14,18  <b>117:24 187:6</b>  <b>weird</b> [2] 47:6 79:17  <b>welcome</b> [7] 3:10 13:15 73:5 116:24 117:12 143:3 208:15  <b>welfare</b> [1] 121:16  <b>Weston</b> [83] 4:12,15,  <b>17 6:6,10,15,21,25 7:22 8:16,24 9:15 10:11:25 12:10 27:6 30:11 31:12 32:22 34:3</b>  <b>35:22 36:17,21 37:9</b>  <b>49:14 50:15 51:4,25</b>  <b>52:21 63:18 65:21 67:6,18 70:11 71:18 72:7,20 73:13 91:5 102:9 103:12 106:2 107:17 109:12 111:21 113:24 115:8 116:14 117:22 118:3 119:19 121:8 122:6 143:15 153:3,4,5 156:12 158:4 159:12 162:21 163:14 164:17 167:9,22 168:17</b>  <b>169:16 170:11,24 190:9,10 192:2,24 194:12</b>  <b>195:15 196:12 198:6</b></p>	<p><b>208:15,25 209:12,14,18 210:8</b>  <b>Whatever</b> [10] 24:7  <b>57:25 58:2 60:8 67:23 102:4 103:7 110:11 138:19 171:23</b>  <b>whatsoever</b> [3] 124:4  <b>168:13 191:18</b>  <b>whenever</b> [2] 202:17  <b>209:16</b>  <b>whereas</b> [1] 155:17  <b>Whereupon</b> [4] 73:4  <b>142:3 208:14 210:20</b>  <b>wherever</b> [1] 77:15  <b>whether</b> [74] 3:14,24  <b>10:19 12:5 14:17 15:13,13,14 16:7 18:22,23 27:21 35:16 36:2</b>  <b>42:14 43:9 48:25 49:24 51:12 52:8 56:4</b>  <b>64:18,19 65:14 68:2,4,20 73:9 75:10,11</b>  <b>76:14 78:12 86:2,25</b>  <b>87:8 89:9 94:17,21</b>  <b>95:7 102:20 110:14</b>  <b>111:1 123:6 124:10,16 127:3 130:7 148:10,19,22 149:2,11,12</b>  <b>152:7 153:11 160:21</b>  <b>161:8 162:17 168:10,11 177:9 184:12,13,14,15,16 190:18 194:15 195:2 196:17,17</b>  <b>197:6 207:22,23</b>  <b>white</b> [1] 175:10  <b>who's</b> [1] 53:7  <b>whole</b> [8] 9:20 16:8  <b>52:10 67:3 94:24 148:6 160:9 176:5</b>  <b>wholeheartedly</b> [1] 51:5  <b>whom</b> [1] 146:13  <b>wide</b> [1] 25:5  <b>widely</b> [3] 35:16,17  <b>184:4</b>  <b>wildly</b> [1] 158:9  <b>will</b> [84] 3:6 4:6,14,19,  <b>23 5:1,11,20 8:2 11:16 12:2 13:20 20:1</b>  <b>22:6 34:5 36:17 39:7</b>  <b>40:17 46:3 47:17,21</b>  <b>48:1 51:15 52:17,21</b>  <b>58:17,22 64:5 66:25</b>  <b>67:1,4,5 68:8 72:16,21,23,25 73:8,17,20,24 74:10 75:6 88:6</b>  <b>93:3,8,23,23 98:11</b>  <b>99:17 102:18 103:24</b>  <b>106:2 110:24 111:13</b>  <b>113:19 116:19,21 117:7 118:21 119:4 130:25 131:12 137:25 138:</b></p>	<p><b>13 141:14,22 143:6,15,24,24 150:4 153:2</b>  <b>179:16,18 190:8 200:14 205:2 206:25 207:25 208:10,13 210:16,18</b>  <b>WILLIAMS</b> [9] 88:21,  <b>22 103:9,14 119:21</b>  <b>122:14,18 128:24 139:18</b>  <b>Williams'</b> [1] 160:3  <b>willing</b> [1] 116:5  <b>win</b> [1] 194:4  <b>winded</b> [2] 59:4 94:3  <b>window</b> [1] 70:1  <b>WIPO</b> [2] 148:25,25  <b>wire</b> [1] 147:2  <b>wise</b> [1] 42:20  <b>wish</b> [1] 210:19  <b>wishes</b> [1] 70:16  <b>withhold</b> [2] 68:23,24  <b>withholding</b> [1] 69:3  <b>within</b> [8] 62:16 105:7  <b>126:4 147:3 171:19</b>  <b>181:21 198:3 207:16</b>  <b>without</b> [15] 22:4,12  <b>41:9 45:9 91:23 99:3</b>  <b>103:1 104:2 114:22</b>  <b>167:24 168:6 169:25</b>  <b>183:18 184:5 197:17</b>  <b>witnesses</b> [1] 36:23  <b>Wizards</b> [4] 193:19  <b>194:2,4 205:7</b>  <b>woe</b> [1] 30:19  <b>woes</b> [1] 74:24  <b>won</b> [1] 193:20  <b>wonder</b> [1] 201:17  <b>wonderful</b> [1] 81:14  <b>wondering</b> [2] 52:24  <b>190:17</b>  <b>word</b> [3] 43:15 44:2  <b>151:3</b>  <b>wording</b> [1] 200:12  <b>WordPress</b> [1] 28:5  <b>words</b> [14] 10:11,22  <b>11:12,15 17:22 43:6,19 89:7 104:6 115:24</b>  <b>129:13 154:3 192:13</b>  <b>196:6</b>  <b>work</b> [38] 6:20 33:10  <b>35:21 40:7 41:25 42:7,11 43:11 45:22 56:13,14 58:22 60:25 62:16 72:5,18 81:10,16,18 88:15,17 95:19 99:19 100:16 109:17 110:13 116:6 124:11,12,17 139:19 144:17 155:1,17 163:24 169:5</b>  <b>172:11 206:6</b>  <b>worked</b> [5] 38:5 110:14 115:15 130:10 164:</p>	<p><b>21</b>  <b>working</b> [9] 39:25 58:18 135:9 139:6 154:17,18 165:25 183:21  <b>202:14</b>  <b>works</b> [26] 12:16 33:24 37:14 41:3,12 64:2 67:4,4 95:23 115:14,19,23 129:12 152:15,19,19 165:17 166:9 170:8 184:24 191:15,22,24,25 199:24  <b>200:22</b>  <b>world</b> [12] 31:22 32:1  <b>33:3 35:15 53:14 61:18 67:9 88:12 104:23</b>  <b>121:13 138:9 188:12</b>  <b>worried</b> [5] 119:12,13,  <b>14 141:7 180:10</b>  <b>worry</b> [1] 78:13  <b>worse</b> [3] 177:23 178:3 199:25  <b>Worth</b> [4] 94:2 189:17  <b>191:5,20</b>  <b>writ</b> [1] 204:12  <b>write</b> [3] 17:2 80:13  <b>169:1</b>  <b>Writers</b> [3] 144:22,23  <b>171:22</b>  <b>writing</b> [2] 17:6 81:24  <b>writings</b> [1] 186:22  <b>written</b> [7] 84:9 120:13 122:20 147:24 150:24 163:24 210:16  <b>wrote</b> [4] 148:24 153:19 187:9,9  <b>WTO</b> [1] 151:9</p> <hr/> <p style="text-align: center;"><b>X</b></p> <p><b>XV</b> [6] 98:8 103:5 110:18,20 117:6 134:17</p> <hr/> <p style="text-align: center;"><b>Y</b></p> <p><b>year</b> [4] 18:13 34:23,  <b>24 36:9</b>  <b>years</b> [12] 18:13 21:14  <b>31:17 32:13 35:7 38:9 50:13 52:15 130:10,10 187:4 202:17</b>  <b>York</b> [5] 178:19 179:2,  <b>11 184:12,15</b>  <b>yourself</b> [1] 72:22</p> <hr/> <p style="text-align: center;"><b>Z</b></p> <p><b>zero</b> [1] 32:2  <b>Zoom</b> [2] 143:18 210:13  <b>Zoom's</b> [4] 4:21 5:12  <b>73:18 74:13</b></p>
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