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Intellectual Property in News? Why Not?

Sam Ricketson^{*} and Jane Ginsburg^{}**

Abstract

This Chapter addresses arguments for and against property rights in news, from the outset of national law efforts to safeguard the efforts of newsgathers, through the various unsuccessful attempts during the early part of the last century to fashion some form of international protection within the Berne Convention on literary and artistic works and the Paris Convention on industrial property. The Chapter next turns to contemporary endeavors to protect newsgatherers against “news aggregation” by online platforms. It considers the extent to which the aggregated content might be copyrightable, and whether, even if the content is protected, various exceptions set out in the Berne Convention permit its unlicensed appropriation.

I. INTRODUCTION

Just as one asks ‘Intellectual property in news, why not?’, the contrary question ‘why, indeed?’ immediately poses itself. The following chapter attempts to make sense of both questions, considering them from an historical and international perspective as well as from the perspective of modern communications technologies, most notably the internet.

We begin with a consideration of what is meant by ‘news’ and the competing arguments for and against protection. We then move to a consideration of some early national efforts to corral and safeguard the efforts of news gatherers, and the various unsuccessful attempts to fashion some form of international protection during the early part of the last century. We then conclude with an analysis of the way the issue of news protection and international norms presents itself in the networked environment.

II. WHAT IS ‘NEWS’?

We probably approach this question with the same kind of initial certainty as we approach the questions of what is a chair or table, or when we properly describe a man (or woman) as being bald, bearded or possessed of a full head of hair. Our immediate response is, of course, I know one when I see one. Further reflection, however, reveals that there are shades of meaning and degrees of chair and table likeness, baldness, beardedness and

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hairiness which we will all readily recognize in the most obvious cases, but where the drawing of a bright dividing line in the shaded middle is difficult.

In the case of news, the *Shorter Oxford English Dictionary* provides the following definition: ‘Tidings; new information of recent events; new occurrences as a subject of report or talk’.¹ In terms of something of commercial value for which people were prepared to pay, however, it appears that news, and news gathering, are of fairly recent provenance. One historian has even described it as a ‘nineteenth century creation’,² and certainly the rapidly growing popularity of newspapers in this period was linked to increasing literacy rates and the advent of the telegraph that made communication of ‘news events’ from one place to another so much easier. This was particularly so in the case of colonial readers in places far removed from the main sites of political and economic activity in Europe. Thus Lionel Bently, in his detailed study of Australian colonial newspapers and telegraphy in the late nineteenth century, points to a proliferation of daily, bi-weekly and weekly newspapers in the sparsely populated young colonies, particularly in Victoria.³

For example, in Melbourne in 1871, there were 4 daily newspapers for a population of just less than 56 000, while there were regional and country newspapers established throughout the rest of the colony, which was less than 40 years old.⁴ There was an obvious hunger among the colonists for ‘news’, meaning information about current events occurring within their own locality. This is revealed by a brief perusal of the pages of one of the city’s leading daily newspapers, *The Argus*, for Monday, 2 January 1871: these include detailed reports on mining (a significant activity in the colony at that time), markets more generally, company and business meetings, sporting and social activities, political and legislative developments, short items of ‘news’ from other colonies, notices and advertisements of all kinds.⁵ *The Argus*, then, was a much valued means of information exchange within the colony, and this appears to have been the same for its competitors — *The Age*, *The Daily Telegraph*, and *The Herald*. Reports of events outside Australia, however, were few at this time and always stale, because of the obvious delays in communications — sailing, and more recently steam, ships were the main carriers of mail and other material between Europe and Australia (and vice versa, as there was much interest in the former, as well as in North America, in the discoveries of gold in Australia from the mid-1850s).

However, as Bently notes, a large business opportunity was just about to arise, with the pending completion of the Anglo-Australian telegraph, linking Europe to Australia, via North Africa, the Middle East, India, Ceylon, Java, Port Darwin, and finally the southern Australian colonies: this would provide much more immediate access to ‘news’ from abroad, with transmissions occurring within the space of a day rather than weeks or months.⁶ The costs of this new technology were not altogether clear at this stage, nor were its capacities,⁷ but it was certainly evident that it would be expensive to arrange for telegraphic messages to be transmitted from one side of the world to the other, giving rise to the risk that, once the

¹ *Shorter Oxford English Dictionary* (Book Club Associates edn, 1983) vol I, 1400.

² Lucy Brown, *Victorian News and Newspapers* (Oxford University Press 1985) 1.

³ Lionel Bently, ‘Copyright and the Victorian Internet: Telegraphic Property Laws in Colonial Australia’ (2004) 38 *Loyola of Los Angeles Law Review* 71.

⁴ Bently (n 3) 76. Melbourne was founded in 1834.

⁵ Available at ‘Trove: Digitised Newspapers and More’ (*National Library of Australia*) <<http://trove.nla.gov.au/newspaper>>.

⁶ Bently (n 3) 78–80.

⁷ *ibid* 80–88.

information was published in the pages of the local newspaper that had paid for it, competitors might then freely help themselves to the ‘news’ and republish it.

Here, in microcosm, was a classic legal and policy dilemma: new technology was about to make it easier to serve the interests of a news-hungry and demanding public, but those who invested in bringing this about might find themselves robbed of the benefits by third party free riders. Quite apart from any incipient sense of unfairness — reaping without sowing — it could be argued that this might remove the incentive to invest in these new sources of information, at least in the event that ‘first mover’ advantage could not be realized.

In such situations, assertions of the need for legal protection come quickly to the fore — and this was certainly the case in the young Australian colonies. The following questions — which have a striking contemporary resonance — presented themselves for consideration:

- 1) What protection was there already under existing laws for these activities? This was a difficult question to answer and, in fact, underlines the complexities that arise here. Copyright was an obvious candidate, but the putative works were short telegraphic messages of no more than 40 words — classic summaries of facts and events that would be difficult to shoehorn into the existing category of ‘book’ under the relevant imperial or local legislation, even assuming that the registration and publication requirements of these statutes could be met.⁸ More fruitful, perhaps, might be reliance upon notions of common law copyright subsisting in unpublished works, but the status of these doctrines under UK and Victorian law was uncertain.⁹ There were also troubling issues as to the ownership of whatever copyright might subsist in the telegraphic messages, as these would not be originated by the local newspaper proprietors but by agents situated abroad (probably by the Reuters agency, which turned out to be the case¹⁰).
- 2) The real concern of the local newspaper proprietors, however, was with purely temporal issues: their perceived need for protection was only for a short time to enable them to be first into the market; after that time, which might be less than 24 hours, they were not greatly concerned with what happened to their ‘news’ — even in 1871 it became stale very quickly. What was sought here in reality was some kind of unfair competition remedy against misappropriation — the very result that the US

⁸ Copyright Law Amendment Act 1842 (UK) 5 & 6 Vict c 45 (Copyright Act of 1842) s II; Copyright Act 1869 (Vic) 33 Vict No 350, s 14. In this regard, however, it is worth noting one striking instance in which the proprietors of *The Argus* newspaper, which was registered as a newspaper under the Copyright Act 1869 (Vic), were able to gain an injunction preventing a provincial newspaper situated in Gippsland from republishing summaries of telegraphic news items received and paid for by *The Argus*: see *Wilson v Luke* (1875) 1 VLR (E) 127. This protection arose without reference to the then expired Telegraphic Messages Act 1871 (WA), which is discussed in the principal text below. In the memorable words of Molesworth J at 139–40, invoking orthodox copyright principles as to copying:

The defendant represents that he employs a correspondent in Melbourne to collect and send him all the news which is in circulation; and his counsel have argued that the news may be thus learned in Melbourne as a matter of common talk, and sent by the correspondent, and so inserted by the defendant. If that were so I would say that the news was like gas escaped into the atmosphere, the property in which was lost, but here the odour of defendant’s publication is so perfectly identical with the plaintiffs’, that I think it clear that it is as of gas taken from the plaintiffs’ pipes.

For an earlier case before the same judge to similar effect, see *Wilson v Rowcroft* (1873) 4 ALR 57.

⁹ See, for example, the remarks of Molesworth J in *Wilson v Luke* (n 8) 140 and see further the excellent discussion of these various legal avenues of protection in Bently (n 3) 88ff.

¹⁰ See further Bently (n 3) 85ff.

Supreme Court was to adopt in the context of transcontinental transmissions in *International News Service v Associated Press*¹¹ nearly 50 years later.

- 3) There was also a problem of inconsistency that arose in the case of the Australian colonies, in that there already appeared to be a practice whereby newspapers freely copied extracts from the reports appearing in other newspapers with respect to matters occurring within the colony (and possibly in neighbouring ones).¹² This practice was generally not objected to: the burning commercial issue concerned the use of reports emanating from outside — that is, over the new international telegraphic link.

The upshot of these concerns was that three colonies — Victoria, South Australia and Western Australia — legislated to provide short-term protection for telegraphic messages, doing this by way of a ‘copyright’ of between 16 and 48 hours duration.¹³ This was followed by a number of other colonial and self-governing British dominions over the next 50 years.¹⁴ The descriptor ‘copyright’ is, of course, misleading here, as there seems to be no doubt that this was conceived of as a form of protection separate from, and additional to, that already provided to ‘books’. In reality, it was a limited and special statutory protection given to a particular interest group — newspaper publishers, and by no means all of them¹⁵ — against an activity that was characterized as ‘unfair’.

While these early colonial initiatives may now be largely forgotten, they are significant forerunners to subsequent debates that have occurred at the international level over the protection of news. It is to these that we now turn.

III. THE BERNE CONVENTION

¹¹ 248 US 215 (1918). For a recent reinterpretation of this decision, see Shyamkrishna Balganesh, “‘Hot News’: The Enduring Myth of Property in News” (2011) 111 *Columbia Law Review* 419, 496:

[H]ot news misappropriation was developed as an attempt to avoid creating an exclusionary interest in factual news. It was aimed instead at preserving the common property nature of such news, while allowing industry participants to compete on equitable terms in drawing economic value from it. Recognizing that the maintenance and sharing of this common property resource required sustaining the self-organized cooperative framework that newspapers had developed, hot news misappropriation sought to raise the costs of free riding through a private law-based liability regime.

¹² See further Bently (n 3) 121–2.

¹³ See, for example, the Victorian Act, *An Act to Secure in Certain Cases the right of Property in Telegraphic Messages 1871* (Vic) 35 *Vict No 414*, s 1:

Where any person in the manner hereinafter mentioned publishes in any newspaper any message sent by electric telegraph from any place outside the Australian colonies, no other person shall, without the consent in writing of such first mentioned person or his agent thereto lawfully authorized, print and publish, or cause to be printed and published, during a period of twenty-four hours from the time of such first mentioned publication: Provided that such before mentioned period shall not extend beyond thirty-six hours from the time of receipt of such telegram, Sundays excepted, the whole or any part of any such message, or (excepting the publication of any similar message in like manner sent) of the intelligence therein contained, or any comment upon or any reference to such intelligence, which will in effect be a publication of the same.

It should be added that this Victorian Act was time limited and came to an end on 31 December 1872 before the international telegraph links had been completed.

¹⁴ Bently lists these as the Cape of Good Hope (1880), New Zealand (1882 and 1884), Natal (1895), Ceylon (Sri Lanka) (1898), Straits Settlements (1902), Transvaal (1902), Orange River Colony (1904), Federated Malay States (1911), Union of South Africa (1917), Palestine (1932) and Kenya (1934): Bently (n 3) 167–8. It is equally noteworthy, however, that a number of the Australian colonies refused to adopt such protection, highlighting the fact that local circumstances varied significantly from one colony to another: see further Bently (n 3) 133ff (Tasmania), 143ff (New South Wales) and 154ff (Queensland).

¹⁵ See further the discussion by Bently of the competing interests within Victoria: Bently (n 3) 125ff.

On its face, the current (Paris) Act of the Berne Convention for the Protection of Literary and Artistic Works deals explicitly with the matter of news by providing for an express exclusion in article 2(8):

The protection of this Convention shall not apply to news of the day or to miscellaneous facts having the character of mere items of press information.¹⁶

This text has been part of article 2 only since the Stockholm Revision of 1967,¹⁷ but its history goes back to the first Berne Convention of 1886. Adopting an approach that prompts the inference that many Berne countries outside the then British Empire also followed the practice of colonial newspaper copying described above, the original Berne Convention provided that articles from newspapers or periodicals published in any of the countries of the Union might be reproduced in the original or in translation in the other countries of the Union, unless the authors or publishers had expressly forbidden it.¹⁸ The Berne Convention further provided that this prohibition did not ‘in any case’ apply to ‘articles of political discussion or to the reproduction of news of the day or miscellaneous information’.¹⁹

The scope of these provisions — the first, permissive in the absence of express reservation by the author or publisher, and the second an absolute exclusion of protection — was gradually reduced or qualified in subsequent revisions. Thus the exclusion of articles of political discussion was removed in the Berlin Act,²⁰ and the range of articles that might be copied in the absence of reservation was steadily restricted, beginning with the removal of the reference to articles in ‘periodicals’ and the exclusion of ‘serial stories and tales’ from the scope of the expression ‘any newspaper article’.²¹ References to ‘newspapers’ were then removed in the Rome Act, with the scope for reproduction by the press being limited to ‘articles on current economic, political or religious topics’,²² together with a further requirement, added under the Berlin Act, that the source be indicated.²³ Finally, even this facility was removed in the Stockholm Act, which left it now as a matter for national legislation to determine whether articles of this description might be reproduced, broadcast or communicated by wire in the absence of express reservation, subject, of course, to the

¹⁶ Berne Convention for the Protection of Literary and Artistic Works (Paris, 4 May 1896), 1161 UNTS 3, entered into force 5 December 1887, as revised at Paris on 24 July 1971, as amended on 28 September 1979 (Berne Convention), art 2(8).

¹⁷ See Berne Convention for the Protection of Literary and Artistic Works (Paris, 4 May 1896), 828 UNTS 221, entered into force 5 December 1887, as revised at Stockholm on 14 July 1967 (Stockholm Act).

¹⁸ Berne Convention for the Protection of Literary and Artistic Works, Paris Additional Act (Paris, 4 May 1896), entered into force 5 December 1887 (Original Berne Convention), art 7. In the case of periodicals, it was provided that it would be sufficient if this prohibition was ‘indicated in general terms at the beginning of each number of the periodical.’ All translations from the French are ours.

¹⁹ *ibid.*

²⁰ Berne Convention for the Protection of Literary and Artistic Works (Paris, 4 May 1896), entered into force 5 December 1887, as revised at Berlin on 13 November 1908 (Berlin Act), art 9. Under the Rome Act art 9(2), it was stipulated that this indication must be made ‘clearly’, and that the ‘legal consequences of the breach of this obligation [the giving of a clear indication of source] shall be determined by the laws of the country where protection is claimed’: Berne Convention for the Protection of Literary and Artistic Works (Paris, 4 May 1896), entered into force 5 December 1887, as revised at Rome on 2 June 1928 (Rome Act), art 9(2).

²¹ Berlin Act (n 20) art 9.

²² Rome Act (n 20) art 9(2).

²³ Berlin Act (n 20) art 9.

requirement of a clear indication of source.²⁴ Otherwise, newspapers were left to rely upon the quotation right in article 10(1) that had been introduced in the Brussels Act,²⁵ and the three-step exceptions allowable under the new art 9(2) of the Stockholm Act.²⁶ The exclusion of ‘news of the day’ (*nouvelles du jour*) and ‘miscellaneous information’ (*faits divers*) remained a constant throughout these other changes, although the latter expression was qualified by the addition of the words ‘having the character of mere items of news’ (*qui ont le caractère des simples informations de presse*) at the time of the Berlin Revision.²⁷ At the Stockholm Revision, art 9 (where these provisions had appeared since the time of the Berlin Act) was extensively amended with the express recognition, for the first time in the Convention’s text, of the author’s exclusive right to reproduction.²⁸ It was therefore thought more appropriate that the exclusion for news of the day and news items in the previous article 9(3) should now be included in article 2 which dealt with works to be protected, rather than article 9, and it therefore became article 2(8) of the Stockholm and now Paris Acts.²⁹

Viewed in isolation, the wording of article 2(8) makes it difficult to discern its purpose. The latter is important, as it has a significant effect on the interpretation to be given to the terms ‘news of the day’ and ‘miscellaneous information’. Is this a public policy exception to the Convention, in the sense that it excludes news items from the scope of the Convention in the interests of freedom of information? Alternatively, does it embody a juridical conception of the nature of authors’ rights, which excludes protection on the basis that these items are incapable of constituting literary or artistic works in the first place? If the latter is the correct view, it could then be said that such an exclusion is strictly unnecessary as these items are not, in any event, covered by the Convention, as they fall within the category of facts and items of information which cannot be the subject of copyright protection. The expressions ‘news of the day’ and ‘miscellaneous information’ do not in themselves indicate which view is correct, and it has been suggested elsewhere by the authors³⁰ that the following problems of interpretation therefore arise here:

- 1) If article 2(8) is a public policy exception, it could operate to exclude accounts or reports of daily news that would otherwise be capable of being regarded as literary works within the meaning of article 2(1). This might, in turn, be something of a slippery slope, because news reports differ greatly in their form, from the bald ‘telegraphic’ dispatches that featured in the colonial legislation described above to sophisticated analyses of the events reported. Would article 2(8) therefore require that protection be denied in the case of this second kind of article? If it would not, where and how would the line between protectable and non-protectable items be drawn?

²⁴ See Stockholm Act (n 17) art 10*bis*(1). Note that this extends to ‘broadcast works of the same character’ and it still remains a matter for national legislation to determine the legal consequences of a breach of the obligation of indication of source. This could, for example, allow a national law to provide for some consequence other than the withdrawal of the permission to reproduce, broadcast, etc. For example, the consequence might be a fine or even a requirement to pay the author or publisher in question in the form of some kind of compulsory licence.

²⁵ See Berne Convention for the Protection of Literary and Artistic Works (Paris, 4 May 1896), 331 UNTS 217, entered into force 5 December 1887, as revised at Brussels on 26 June 1948 (Brussels Act), art 10(1).

²⁶ Stockholm Act (n 17) art 9(2).

²⁷ Berlin Act (n 20) art 9(3). See further *Actes de la Conférence réunie à Berlin du 14 octobre au 14 novembre 1908* (Bureau de l’Union internationale littéraire et artistique 1909) 249ff.

²⁸ Stockholm Act (n 17) art 9(1).

²⁹ *Records of the Intellectual Property Conference of Stockholm, June 11 to July 14, 1967*, vol 2 (Stockholm Intellectual Property Conference, WIPO 1971) 1155.

³⁰ Sam Ricketson and Jane C Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond*, vol 1 (Oxford University Press 2006) 498–9.

- 2) If the second interpretation is to be preferred, this would not cause as much difficulty, as it simply embodies the basic principle that copyright protection does not extend to facts and information per se, but only to the form in which those facts are presented. Even if such a statement is strictly unnecessary, its inclusion in the Convention could then be defended on two grounds:
- a) As the basic principle is not expressly stated elsewhere in the Convention, its inclusion in article 2(8) provides a useful confirmation that the principle is generally applicable under the Convention.
 - b) If a member country of the Union does, in fact, accord copyright protection to bare items of news and press information, the authors of such items have no right to claim equivalent protection under the Convention in other Union countries. Unlike the other paragraphs of article 2 which lay down the bare minimum of what each country must protect as literary or artistic works, article 2(8) provides a definite exception to this. On the other hand, it only excludes protection under 'this Convention', and this clearly does not prevent member countries from according protection to foreign authors under other heads — for example, under their laws of unfair competition, or even their copyright laws. However, because the Berne Convention excludes this subject matter, its obligation of national treatment does not apply. As a result, in the latter case, a Union country which accords such protection to its own authors would be under no obligation to extend this coverage to authors from other Union countries.

Public policy, in any event, underpins the second 'juridical' interpretation in that the basic principle that copyright protects only the form in which works are expressed is clearly intended to leave ideas, facts and information in the public domain for all to use. However, this is a more limited application of public policy than that suggested under the first interpretation above.

In the face of these conflicting views, it is permissible to have regard to supplementary aids to interpretation in determining which to apply.³¹ Little guidance is to be found in the records of the Berne and Paris Conferences, but at the Berlin Conference the committee of the Conference implicitly indicated its preference for the second view.³² Indeed, the Conference program prepared by the German Government and the International Berne Bureau had proposed that there should be a requirement to identify the source of information for a limited (24 hours) period from first publication of 'news of the day' communicated in telegraphic or telephonic form, 'whether or not they constitute works to be protected'.³³ Although not as sweeping as the earlier colonial prohibitions on third party use, this proposal was clearly going beyond the remit of the Convention, as the Committee of the Conference explained in its final report.

The Committee's view was shown by a significant vote. It had first accepted that the reproduction of news of the day and miscellaneous information should be accompanied by an indication of the source. It ended up by adopting an entirely

³¹ As a matter of customary international law, as codified in art 32 of the Vienna Convention on the Law of Treaties (Vienna, 23 May 1969), 1155 UNTS 331, 8 ILM 679 (1969), entered into force 27 January 1980.

³² *Actes de la Conférence 1908* (n 27) 251ff.

³³ *ibid* 45.

different proposal after a further discussion in which it was asserted in particular that the obligation would be imposed by the idea, not of protecting the copyright, but of protecting a commercial interest, which was just what we had wanted to avoid. Finally, with regard to news of the day and miscellaneous information, the Committee is proposing a formula which differs from those adopted hitherto and which it thinks is more in keeping with the truth. It is not a question of stating that their reproduction is always permitted or cannot be forbidden — which would prevent any claim even in relation to acts which quite obviously constituted unfair competition; we merely declare that the protection of the Convention does not apply here because this does not come within the province of copyright. Commercial questions may arise in this regard but they are outside our sphere.³⁴

These comments make it clear that, by the expressions ‘news of the day’ and ‘miscellaneous information’, the Committee meant only the facts constituting those items, and did not intend to exclude from protection as literary works the articles or reports in which these facts were contained.³⁵ On the other hand, protection analogous to that for literary works was not to be conferred willy-nilly on items of information simply because a ‘commercial interest’ was involved, but neither did the drafters intend to deprive that interest of all protection of any kind — in such instances, it would be a matter for national laws to determine how to proceed, whether by recourse to doctrines of unfair competition or otherwise. The resultant draft, adopted by the Berlin Revision Conference was now placed in the third paragraph of a new article 9, which provided:

The protection of the present Convention shall not apply to news of the day or to miscellaneous information which is simply of the nature of items of news.³⁶

This provision remained unchanged in the subsequent revisions of Rome (1928) and Brussels (1948), now numbered as article 9(3) with a slightly rephrased English translation adopted in the latter (‘miscellaneous information having the character of mere items of news’³⁷). At the same time, as seen above, both those revised texts significantly reduced the flexibility allowed to national laws with respect to the making of reproductions by the press of ‘articles on current economic, political or religious topics’.

However, the issue of news was addressed again in the preparations that were undertaken for the 1967 Stockholm Revision Conference by the Swedish Government and the United International Bureaux for the Protection of Intellectual Property (‘BIRPI’).³⁸ In the view of the 1963 Study Group, the immediate object of article 9(3) (as it then was) was:

to recall the general principle whereby the title to protection of articles of this kind, as in the case of other intellectual works, pre-supposes the quality of literary or artistic works within the meaning of the Convention. At the same time, the provision also permits the conclusion that if the articles are protected by virtue of other legal provisions — for example, by legislation against unfair competition — such protection is outside the field of the Convention. There are grounds, therefore, for

³⁴ *ibid* 251–2.

³⁵ *ibid*.

³⁶ Berlin Act (n 20) art 9.

³⁷ Brussels Act (n 25) art 9(3).

³⁸ *Records of the Intellectual Property Conference of Stockholm, June 11 to July 14, 1967*, vol 1 (Stockholm Intellectual Property Conference, WIPO 1971) 115.

drawing, *inter alia*, a second conclusion: the right to assimilation to national authors established by the Convention does not extend to the protection claimed by virtue of these other rules.³⁹

The Study Group went on to say that, while this provision could be viewed as superfluous from a systematic perspective, it had formed part of the Convention for a long time and was ‘a good expression of a principle from which legislation and jurisprudence . . . [could] take their lead, as well as a reminder of the freedom of information’.⁴⁰ It was therefore useful as it recognized the ‘practical importance of fixing . . . the line of demarcation between copyright and other means of protection’.⁴¹ The Study Group recommended the retention of the article without any change, but with some discussion of its interpretation in the documents of the Conference.⁴² In keeping with this proposal, the following interpretation of what is now art 2(8) of the Stockholm Act was adopted by Main Committee I of the Stockholm Conference in its report to the Conference:

[T]he Convention does not protect mere items of information on news of the day or miscellaneous facts, because such material does not possess the attributes needed to constitute a work. That implies a fortiori that news items or the facts themselves are not protected. The articles of journalists or other ‘journalistic’ works reporting news items are, on the other hand, protected to the extent that they are literary or artistic works. It did not seem essential to clarify the text of the Convention on this point.⁴³

This embodies an authentic interpretation of article 2(8) which can be followed in national legislation. Its distinction between literary and artistic works — the proper subject matter of copyright protection — and facts, information, etc contained in those works — which are not protected — is now amplified in art 2 of the 1996 WIPO Copyright Treaty⁴⁴ which provides the following regarding the scope of protection:

Copyright protection extends to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such.⁴⁵

IV. THE PARIS CONVENTION

Excluded from protection under the Berne Convention, the obvious other place in which to seek international protection for news items was under the Paris Convention for the Protection of Industrial Property,⁴⁶ which had adopted a general obligation to protect Union

³⁹ *ibid.*

⁴⁰ *ibid.*

⁴¹ *ibid.*

⁴² *ibid.*

⁴³ *Records 1967*, vol 2 (n 29) 1155. The wording was proposed in the program for the Conference: *Records 1967*, vol 1 (n 38) 115–18.

⁴⁴ WIPO Copyright Treaty (Geneva, 20 December 1996), 2186 UNTS 121, 36 ILM 65 (1997), entered into force 6 March 2002.

⁴⁵ *ibid* art 2. To similar effect, see TRIPS art 9.2: Agreement on Trade-Related Aspects of Intellectual Property Rights (Marrakesh, 15 April 1994), Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 321 (1999), 1869 UNTS 299, 33 ILM 1197 (1994), entered into force 1 January 1995 (TRIPS), art 9.2.

⁴⁶ Paris Convention for the Protection of Industrial Property (Paris, 20 March 1883), entered into force 7 July 1884, as amended on 28 September 1979 (Paris Convention).

claimants against acts of unfair competition in its Washington Revision of 1911.⁴⁷ New art 10bis of the Washington Act provided:

All the contracting countries undertake to assure to nationals of the Union effective protection against unfair competition.⁴⁸

An obligation expressed in such terms left a great deal of latitude to national laws to interpret and particularize, and subsequent revision conferences⁴⁹ therefore sought to add content to the obligation by providing a general definition of unfair competition as meaning every act of competition ‘contrary to honest practices in industrial or commercial matters’,⁵⁰ as well as listing specific instances of unfair competitive acts that were to be ‘repressed’ by Union countries. Obvious examples were activities involving some form of deceptive, misleading or disparaging conduct,⁵¹ but the issue of news misappropriation also received early attention. The desire of newspapers and news agencies to protect the commercial value and currency of their news reports was as intense in the period following the First World War as at any time previously; indeed, it appeared to be even more emergent with the development of radio communications and public broadcasting. News was more international than ever, and newspapers and news agencies continued to be aggrieved when their news reports were taken and paraphrased without permission by rivals. This led to pressure from international news agencies, in particular, for these practices to be brought within the Paris Convention under the newly adopted article 10bis.⁵²

Initially, such a proposal had figured in the amendments considered for The Hague Revision Conference in 1925,⁵³ but it was then removed from the Conference program before the delegates met, on the basis that the provision would encounter strong resistance and was premature.⁵⁴ It was then revived in an amendment moved by the Serbs-Croats-Slovenes delegation,⁵⁵ which sought to include the unauthorized taking or dissemination of press information and news of the day as an act of unfair competition, so long as such material retained its commercial value. The ground of rejection of this proposal by the Conference appears ironic: having failed previously to make the cut so far as the Berne Convention was concerned, on the basis of its lack of ‘literary’ character, it was now asserted that it did not fit within the objects of the Paris Convention⁵⁶

⁴⁷ Paris Convention for the Protection of Industrial Property (Paris, 20 March 1883), entered into force 7 July 1884, as revised at Washington on 2 June 1911 (Washington Act).

⁴⁸ *ibid* art 10bis.

⁴⁹ Notably those at The Hague (1925), London (1934) and Lisbon (1958): see Paris Convention for the Protection of Industrial Property (Paris, 20 March 1883), entered into force 7 July 1884, as revised at The Hague on 6 November 1925 (The Hague Act), as revised at London on 2 June 1934 (London Act), as revised at Lisbon on 31 October 1958 (Lisbon Act).

⁵⁰ The Hague Act (n 49) art 10bis.

⁵¹ *ibid*; London Act (n 49) art 10bis(3)(1)–(2); Lisbon Act (n 49) art 10bis(3)(1)–(3).

⁵² Resolution of the International Congress of Press Agencies, Berne 1924, reproduced in *Actes de la Conférence réunie à La Haye du 8 octobre au 6 novembre 1925* (Bureau international de l’Union 1926) 100–101.

⁵³ *Actes de la Conférence 1925* (n 52) 253–4. See further Sam Ricketson, *The Paris Convention for the Protection of Industrial Property: A Commentary* (Oxford University Press 2015) 700–702..

⁵⁴ *Actes de la Conférence 1925* (n 52) 254.

⁵⁵ *ibid* 350–51. This followed the proposal advanced in the Resolution that had been adopted by the International Congress of Press Agencies, Berne 1924 (for the text of this resolution, see *Actes de la Conférence 1925* (n 52) 100–101).

⁵⁶ *Actes de la Conférence 1925* (n 52) 478–9 (report of fourth sub-committee).

Attempts to bring such matters within the scope of unfair competition, both at the national and international levels, continued in the years after The Hague Conference, with strongly worded resolutions in favour of protection being adopted by such bodies as the International Chamber of Commerce and the International Association for the Protection of Industrial Property ('AIPPI').⁵⁷ No proposal touching on this was included in the program for the London Revision Conference of 1934 prepared by the British Government and the Paris Union Office, but an amendment advanced by the Czech delegation proposed that there should be protection of news during the period of 24 hours following first publication while its currency gave it commercial value.⁵⁸ A proposal to similar effect was advanced by the German delegation, and this attracted some support from other delegations.⁵⁹ On the other hand, there were those who still thought that this was a matter more properly belonging within the Berne Convention,⁶⁰ while others argued that the proposal was not yet sufficiently 'mature' enough for inclusion in the Paris Convention.⁶¹ All that was achieved therefore was a resolution of the Conference calling for the countries of the Union to 'study' the question of introduction in their legislation of an effective protection against the unauthorized disclosure of press information (news) during its period of commercial value and where such disclosure had occurred without any indication of its source.⁶²

Subsequently, there has been no other proposal to include news items within art 10*bis* of the Paris Convention (at either the 1958 Lisbon or 1967 Stockholm revision conferences), although Ladas recounts other efforts that were made at the international level after 1934 through such bodies as the League of Nations and the International Chamber of Commerce, and later the United Nations and international press organizations post World War II, to agitate for protection, either within the Berne or Paris Conventions or both.⁶³ Perhaps the most significant initiative in this regard came in the late 1950s from the European Alliance of News Agencies, which requested the Paris International Office to convene a committee of experts to study the protection of news. This committee, consisting of experts from AIPPI, the International Chamber of Commerce and the various international press associations, met in Geneva in September 1959 and prepared a draft treaty that would be a special agreement within article 19 of the Paris Convention (article 1(1) of the draft treaty) and with a number of articles that began with a general undertaking for countries to ensure an effective protection of news against any act of unfair competition (article 1(2) of the draft treaty).⁶⁴ This was followed by more specific obligations to prohibit (a) the reproduction and public communication of news without a clear indication of source, (b) the reproduction and public communication of news within an unspecified number of hours following publication, and (c) the systematic reproduction and communication of news, published or communicated to the

⁵⁷ See the resolutions of AIPPI (London 1932), the International Chamber of Commerce (Paris 1932 and 1933, Vienna 1933) and also the 'Conference of Experts on the Press' convened by the League of Nations (Geneva 1927). The texts of these resolutions are collected in *Actes de la Conférence réunie à Londres, du 1 mai au 2 juin 1934* (Bureau international de l'Union pour la protection de la propriété industrielle 1934) 94–6.

⁵⁸ *Actes de la Conférence 1934* (n 57) 289.

⁵⁹ *ibid* 420–21 (report of fourth sub-committee, noting support from the Belgian, Hungarian and Polish delegations).

⁶⁰ *ibid* 421 (in particular, the Spanish and Portuguese delegations: report of fourth sub-committee).

⁶¹ *ibid* 421 (the Danish, Austrian and British delegations: report of fourth sub-committee).

⁶² *ibid* 469 (report of drafting committee), 477 (general report of drafting committee), 592 (text if resolution was adopted).

⁶³ Stephen P Ladas, *Patents, Trademarks, and Related Rights: National and International Protection*, vol 3 (2nd edn, Harvard University Press 1975) 1724–5.

⁶⁴ For the text of the proposed convention, and the report of the committee of experts, see (1959) 75 *La Propriété Industrielle* 184–88.

public, even if the stipulations under (a) or (b) had been met (article 2(2) of the draft treaty).⁶⁵ Ladas comments that ‘nothing came of this project’, mainly because many countries objected to the widely framed obligations in proposed articles 2(2)(b) and (c), and proposals to protect news as part of unfair competition obligations thereafter dropped off the Paris Convention agenda, leaving this therefore as a matter for national regulation.⁶⁶ Nonetheless, there is an interesting link in this 1959 text to an initiative that had been prepared 20 years earlier by another committee of experts, this time in relation to neighbouring rights.⁶⁷ It is to this that we now turn.

V. PROTECTION OF NEWS AS A NEIGHBOURING RIGHT

While successive Berne revision conferences, from Berlin to Stockholm, had made it clear that the protection of news did not fall under the umbrella of authors’ rights, it is noteworthy that one of the draft treaties prepared by a committee of experts convened by a non-Berne body — the International Institute for the Unification of Private International Law (often referred to at this time as the ‘Rome Institute’ and, more commonly today, as UNIDROIT) — at Samedan, Switzerland, in July 1939 dealt specifically with the protection of news or ‘press information’ (*informations de presse*). This was part of a broader exercise that resulted in the drafting of a series of draft treaties on the emerging subject of ‘neighbouring rights’, namely rights for performers, producers of phonograms and broadcasting organizations.⁶⁸ These were rights that, to date, had been denied protection as authors’ rights under the Berne Convention, and which ultimately were to find an international home two decades later in their own separate treaty, the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations.⁶⁹

In the case of press information, the draft treaty (the ‘Samedan draft’) followed closely the model proposed for these other categories of claimants, providing for a *sui generis* form of protection based on national treatment and rights ‘specially accorded by the present

⁶⁵ *ibid* 187–8.

⁶⁶ Ladas (n 63) 1725.

⁶⁷ See here the remarks of Counsellor Ronga at the commencement of the meeting of the committee of experts on 7 September 1959: (1959) 75 *La Propriété Industrielle* 185.

⁶⁸ For the text of the treaties, see (1940) 10 *Le Droit d’Auteur* 109; (1940) 11 *Le Droit d’Auteur* 121; (1940) 12 *Le Droit d’Auteur* 133. Included also was a draft treaty relating to *droit de suite*, although this was subsequently to come into the Berne Convention in 1948 as part of the Brussels revision: see Brussels Act (n 25) art 14*bis*. While this committee did not meet under the auspices of the Berne International Office, the draft treaties it considered were, in fact, prepared by Fritz Ostertag, the recently retired Director of the joint Berne and Paris Union offices, and were published in June 1939 under his name in *Le Droit d’Auteur* with the suggestive heading ‘*Nouvelles propositions pour la Conférence de Bruxelles*’ [‘New Proposals for the Brussels Conference’]: (1939) 6 *Le Droit d’Auteur* 62–72. Ostertag also took a leading role in the meeting of the committee itself and the drafting of the various texts that were adopted, as did his successor as Director, Benigna Mentha: (1940) 12 *Le Droit d’Auteur* 138. As the citations at the commencement of this footnote indicate, the most accessible accounts of the Samedan committee also appeared in *Le Droit d’Auteur*.

⁶⁹ International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (Rome, 26 October 1961), 496 UNTS 43, entered into force 18 May 1964. This treaty was adopted under the auspices of three international organizations: the World Intellectual Property Organization (WIPO, formerly the United International Bureaux for the Protection of Intellectual Property), the United Nations Educational, Scientific and Cultural Organization (UNESCO) and the International Labour Organization (ILO).

convention'.⁷⁰ No definition of *informations de presse* was provided, but the persons entitled to claim protection were identified specifically as the proprietors of newspapers, other periodical publications, and press agencies, with the country of origin being defined as the country in which these enterprises or agencies were headquartered.⁷¹ The rights specifically to be accorded to enterprises and agencies were also spelt out in more detail, albeit in relatively limited terms: to require that their press information should not be reproduced without an indication of its source, and that it should not be reproduced by third parties before publication if obtained by illicit means.⁷² Certain matters were reserved to national legislation, including the right to determine what were illicit means of collecting information,⁷³ and the right to prevent, after publication, the systematic reproduction or broadcasting of such information for profit.⁷⁴ Likewise, matters of duration, the prescription of any formalities, the imposition of compulsory licences, remedies and transitional provisions were left as matters for national legislation to determine.⁷⁵ Curiously, although Berne membership was a prerequisite for joining this proposed agreement (article 9), there was no inclusion of a non-derogation provision in relation to authors' rights protected under the Berne Convention, as in the case of the draft treaties on performers, phonogram producers and broadcasters.⁷⁶ This, perhaps, suggests that the drafting committee did not see the protection of press information as being connected in any way with authors' rights, notwithstanding the requirement of Berne membership; the protection thus envisaged was purely separate, and hardly 'neighbouring'.

VI. FALLING BETWEEN TWO STOOLS?

So far as the 'traditional' intellectual property conventions of Berne and Paris are concerned, the protection of news items appears to fall between the two, while attempts at fashioning an alternative form of international protection under a separate treaty have also failed. Although not excluding the possibility of journalists' articles reporting news items from being protected as original literary works under Berne,⁷⁷ it seems clear that the facts or news items themselves do not fall within the scope of that instrument. However, in the absence of any specific mention in art 10*bis* of the Paris Convention, any unfair competitive aspect that arises when such items are appropriated by rivals therefore remains a matter for national legislation, whether under local unfair competition rules or some other special head of protection.

In this regard, the wry observation of an anonymous commentator in 1926 continues to hold true:

⁷⁰ '[D]es droits spécialement accordés par la present convention': Article 2, *Texte de l'avant-projet de convention assurant la protection des informations de presse* (the 'Samedan draft'), [1940] 12 *Le Droit d'auteur* 136.

⁷¹ Samedan draft), article 2: (1940) 12 *Le Droit d'Auteur* 136.

⁷² Samedan draft, article 5: (1940) 12 *Le Droit d'Auteur* 136.

⁷³ Subject to the proviso that it was always to be considered illicit to make reproductions, without authorization, in whole or in part, of the information bulletins distributed by agencies: Samedan draft, art 6.1: (1940) 12 *Le Droit d'Auteur* 136.

⁷⁴ Samedan draft, article 6.2: (1940) 12 *Le Droit d'Auteur* 136

⁷⁵ Samedan draft, articles 3 and 7: (1940) 12 *Le Droit d'Auteur* 136.

⁷⁶ *Texte de l'avant-projet de convention assurant la protection des artistes interprètes et des artistes exécutants, ainsi que des producteurs de disques phonographiques et d'instruments similaires* [Draft treaty on performers and phonogram producers] arts 5, 7: (1940) 11 *Le Droit d'Auteur* 125; *Texte de l'avant-projet de convention assurant la protection des radioémissions* [Draft treaty on radio-transmissions] art 5: (1940) 12 *Le Droit d'Auteur* 134.

⁷⁷ *Records 1967*, vol 2 (n 29) 1155 (report on the work of Main Committee I).

Items of press information are repudiated by the Union for the protection of literary property, which deems them too commercial, but also by the Union for the protection of industrial property, which finds them too literary. From an international perspective, they therefore are *res nullius*, by virtue of the principle that that which is not expressly forbidden is permitted. It has been necessary to leave to national legislations the task of protecting news items against manifest abuses . . .⁷⁸

VII. FROM THE TELEGRAPH TO THE INTERNET: FREE-RIDING AND NEWS AGGREGATION

International treaties, having failed to keep pace with misappropriation of news communicated by telegraph, may prove more equal to the task of remedying a current-day form of free-riding that may be even more pervasively international than retransmitting content from intercontinental newswires. The internet practice of ‘crawling’ and ‘scraping’ the websites of news organizations — that is, the practice of copying the headlines and sometimes the initial sentence or two from the source website, in order to recommunicate that content on an aggregation service such as Google News (usually with a link back to the source story for the full account of the news item) — has attracted the ire of the news organizations, because the news aggregators generally do not seek licenses or pay for the copied content.⁷⁹ News organizations contend that the services are effectively stealing their content,⁸⁰ and fear that most users do not follow the aggregator-provided link back to the source site, and therefore that the copied material substitutes for reading the story on the source site (and being exposed to its advertisers).⁸¹ In this section we examine the extent to which the norms of the Berne Convention might apply to news aggregation, and briefly consider national case law and statutory responses to the practice.

A. News aggregation as copyright infringement

⁷⁸ ‘*Le droit de reproduction en matière de journaux et de publications périodiques*’ (1926) 7 *Le Droit d’Auteur* 73, 79.

⁷⁹ For a general description of types of news aggregation and of legal theories advanced by news organizations and technology platforms, see, eg, Kimberly Isbell, ‘The Rise of the News Aggregator: Legal Implications and Best Practices’ (2010) Berkman Center for Internet & Society at Harvard University Research Publication 2010–10 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1670339> accessed 5 February 2016.

⁸⁰ See, eg, Bill Keller, ‘All the Aggregation That’s Fit to Aggregate’ *The New York Times Magazine* (New York, 10 March 2011) <www.nytimes.com/2011/03/13/magazine/mag-13lede-t.html> accessed 15 February 2016 (‘[T]oo often it amounts to taking words written by other people, packaging them on your own Web site and harvesting revenue that might otherwise be directed to the originators of the material. In Somalia this would be called piracy. In the mediasphere, it is a respected business model.’); letter from News Corp Chief Executive Robert Thomson to the European Commissioner for Competition (8 September 2014), describing Google as a ‘platform for piracy’, quoted in News Corp, ‘News Corp Opposed Google’s European Commission Settlement Offer; Welcomed Competition Commission Reconsideration’ (Press Release, 17 September 2014) <<http://newscorp.com/2014/09/17/news-corp-opposed-googles-european-commission-settlement-offer-welcomed-competition-commission-reconsideration/>> accessed 5 February 2016.

⁸¹ Whether news aggregation in fact substitutes for the full articles is a matter of some contention. Compare Eleonora Rosati, ‘The German “Google Tax” Law: Groovy or Greedy?’ (2013) 8(7) *Journal of Intellectual Property Law & Practice* 497 (‘According to two studies by the Iowa University and ETH and Boston University respectively, not only are news aggregators unlikely to have complementary effects on the number of visits received by newspapers’ homepages, but rather appear to have a substitution effect, which is said to have contributed to declining online traffic in the past few years.’), with Raquel Xalabarder, ‘The Remunerated Statutory Limitation for News Aggregation and Search Engines Proposed by the Spanish Government; Its Compliance with International and EU Law’ (2014) IN3 Working Paper Series, 18–19 <<http://ssrn.com/abstract=2504596>> accessed 4 February 2016 (contending no proof of economic harm).

While international copyright norms establish that the information disclosed within a news report remains free of protection, what of verbatim copying of headlines and initial sentences? If, as discussed above, the Berne art 2(8) exclusion of the ‘news of the day’ rather than remitting all news reporting, whatever its expressiveness, to the public domain, affirms copyright law’s idea/expression (or fact/expression) dichotomy, then news reports may be literary works entitled to protection under the Berne Convention. (Moreover, photographs and other illustrations incorporated in the aggregation will almost certainly be ‘intellectual creations’ within the meaning of Berne art 2(1).) But two series of questions remain. First, regarding the copied literary content, do news aggregators copy too little to infringe? That is, even if a headline may be very expressive (brevity being the soul of wit), is it too short to be protected as a work of authorship? Similarly, where the aggregator has taken more than the headline, but still a very small quantity of content, has it taken too little to infringe the reproduction right? (For photographs, if the aggregators render them in thumbnail form, would courts consider reduced-size, low-resolution images the visual equivalent of *de minimis* takings of text?) Second, even if the copied content is protectable, does either the Berne art 10(1) quotation right, or its art 10*bis*(1) permissible exception for ‘articles published in newspapers or periodicals on current economic, political or religious topics, and of broadcast works of the same character’ apply to insulate news aggregation practices?

The Berne Convention does not set a threshold for the quantum of creativity required for a work to be an ‘intellectual creation’. ‘Literary works’ under article 2(1) include a long list of works, ‘pamphlets’ being the shortest specified example, but one should not thereby infer that ‘literary works’ do not also include shorter works such as poetry, a form that may encompass expressions no less pithy than a news headline and its accompanying first one or two sentences. In other words, subject to the general condition of originality, the Berne Convention appears to leave the question of quantum to national legislation. By the same token, the Berne art 9(1) reproduction right covers ‘any manner or form’, but that phrase does not clearly address the matter of quantity. As the authors have previously indicated:

Berne does not dictate the standard for finding infringement. It does not instruct member states as to whether there is a threshold of substantiality that the defendant’s copying must cross before it can be held liable. Nor does it indicate, if a member state imposes such a threshold, whether any substantiality standard encompasses qualitative as well as quantitative substantiality.⁸²

On these issues, national solutions differ. The US Copyright Office denies registration to ‘words and short phrases’,⁸³ and many US courts’ infringement analyses impose a *de minimis* threshold.⁸⁴ The European Court of Justice, by contrast, has held that 11 consecutive

⁸² Ricketson and Ginsburg (n 30) [11.26].

⁸³ See Copyright Office Regulations, 37 CFR § 202.1:

Material not subject to copyright.

The following are examples of works not subject to copyright and applications for registration of such works cannot be entertained:

(a) Words and short phrases such as names, titles, and slogans . . .

⁸⁴ See, eg, *Newton v Diamond*, 349 F 3d 591 (9th Cir 2003) (musical sample of three notes held *de minimis*); *Ringgold v Black Entertainment Television, Inc*, 126 F 3d 70 (2d Cir 1997) (providing a thorough discussion of the variant uses of the *de minimis* doctrine in copyright, but rejecting the doctrine’s application in that case). See also *Gottlieb Development v Paramount Pictures Corp*, 590 F Supp 2d 625 (SDNY 2008) (holding *de minimis* the fleeting incorporation into the set of the Mel Gibson film *What Women Want* of plaintiff’s ‘Silver Slugger’ pinball machine that depicted copyrighted designs on its front and sides).

words excerpted from a newspaper article may contain sufficient expression to meet the EU's copyright originality requirement that the work be the author's 'own intellectual creation'.⁸⁵ While the European Court of Justice was considering quantity as a matter of infringement, its analysis would appear to apply equally to the question of whether a 'work' could consist of as few as 11 words, or potentially even fewer, so long as their assemblage constituted an 'intellectual creation'. The difference between the US and the EU may be especially pertinent to the protection of headlines, particularly if these are considered works in their own right, rather than components of the news article as a whole, whose total word count is likely to satisfy any quantity threshold.

Whether headlines are separate works, rather than components of the larger articles, matters at the international level because Berne requires national treatment only for works 'for which [authors] are protected under this Convention'.⁸⁶ Thus, if a headline is not an 'intellectual creation', a Berne member state would have no obligation to protect a foreign news site against the 'scraping' of its headlines, even if that member state protected local news sites. By contrast, if headlines are subsumed within the larger articles, then copyright owners of foreign websites would be entitled to the same protection as nationals, but national law will determine whether an infringement occurs only if the defendant has engaged in more than a *de minimis* quantum of copying.

On the first question, then, a delegation to national law to determine quantity thresholds both for protectability and for infringement may produce inconsistent results given the disparities in national approaches. Thus a news aggregator might find its liability engaged with respect to its copying from any given site depending on whether or not the countries to which the aggregation service is made available would find the content protectable and infringed.⁸⁷

On the second question, regarding press exceptions and quotation rights, copying headlines and initial sentences, even if *prima facie* infringing under national law, may be exempted under international norms. In the case of press exceptions, member states may permit the copying by the press of works from other press sources which have not 'expressly reserved' against such copying; in the case of the quotation right, if the use meets the specified criteria, Berne member states must permit qualifying copying from foreign sources. We will consider each exemption in turn.

B. Article 10bis(1) press reporting exception

Article 10bis(1) of the Berne Convention gives member states the option to:

⁸⁵ Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening* [2009] ECR I-656 [48].

⁸⁶ Berne Convention (n 16) art 5(1).

⁸⁷ *Lex loci delicti* (or *protectionis*) being the most prevalent choice of law rule for copyright infringement, this conclusion assumes that the member state to which the aggregation site was made available would apply its own copyright law. See, eg, *Google Inc v Copiepresse, Cour d'appel Bruxelles* [Court of Appeal Brussels], *neuvième chambre* [9th chamber], 2007/AR/1730, 5 May 2011 [13]–[20] <http://www.copiepresse.be/pdf/Copiepresse%20-%20ruling%20appel%20Google_5May2011.pdf> accessed 15 February 2016 (applying the law of the country targeted by news aggregation service; aggregated sources were Belgian news sites, advertisers were Belgian, Belgian law therefore applied). The *Copiepresse* court found the copying of headlines and three lines of text to be substantial. 'Contrary to what Google maintains, "Google News" is not a "signpost" which allows cybernauts to find press articles on a specific subject more efficiently, but is a slavish reproduction of the most important sections of the inventoried articles': at [28].

permit the reproduction by the press, the broadcasting or the communication to the public by wire of articles published in newspapers or periodicals on current economic, political or religious topics, and of broadcast works of the same character, in cases in which the reproduction, broadcasting or such communication thereof is not expressly reserved. Nevertheless, the source must always be clearly indicated; the legal consequences of a breach of this obligation shall be determined by the legislation of the country where protection is claimed.⁸⁸

This provision allows (but does not oblige) member states to permit the reproduction and communication ‘by the press’ of articles on ‘current economic, political or religious topics’.⁸⁹ As we have seen, it represents a significant reduction in the scope of the Convention’s authorization of copying of articles relative to the texts of previous Berne revisions. Nonetheless, as the provision still permits the taking of entire articles where the relevant conditions are met,⁹⁰ it would follow that it also authorizes the reproduction and communication of portions of articles, such as headlines and initial sentences. For news aggregation sites to benefit from state-enacted exceptions of this sort, the content they copy must be limited to ‘current economic, political or religious topics’; the privilege does not appear to extend to human interest stories, coverage of sports or culture, or any topic that is not ‘current’.⁹¹ Article 10bis(1) thus does not authorize the systematic ‘scraping’ of the headlines and first sentences of a news source’s entire contents.

Article 10bis(1) is also not technologically neutral. It covers ‘reproduction by the press, the broadcasting or the communication to the public by wire’ of the relevant articles;⁹² this wording raises the question whether the provision permits communication to the public by means other than broadcasting or by wire. On-demand access by web users is not ‘broadcasting’, and most internet communications today are wireless. Thus, unless ‘reproduction by the press’ is interpreted to imply other modes of communication of the copied articles (but then, why specify two modes of communication?), most news aggregation will not qualify for the exception.

Most importantly for our inquiry, the limitation of article 10bis(1) to uses ‘by the press’ raises the question whether a site that copies from ‘the press’ is itself a member of ‘the press’, particularly if the site carries no self-produced content.⁹³ Legal analysts differ, some doubting that mere aggregation without independent content warrants the ‘press’ denomination,⁹⁴ while others caution against what they fear to be merit-driven distinctions between information sources.⁹⁵ Within the profession of journalism,

⁸⁸ Berne Convention (n 16) art 10bis(1).

⁸⁹ *ibid.*

⁹⁰ Ricketson and Ginsburg (n 30) [13.53].

⁹¹ Some news aggregators do not so confine the targeted topics: see, eg, *Copiepresse* (n 87) [28] (Google News copied headlines and initial sentences from Belgian news sources, and grouped the excerpts in the following categories: ‘the “Google News” page features a summary of three or four suggestions which are all grouped according to different themes, such as “Starred”, “World”, “Belgium”, “Business”, “Sci/Tech”, “Sports”, “Entertainment”, “Health”’).

⁹² Berne Convention (n 16) art 10bis(1).

⁹³ The *Copiepresse* court stated, without elaboration, that Google was not a ‘press organ’: *Copiepresse* (n 87) [32].

⁹⁴ See, eg, Raquel Xalabarder, ‘Google News and Copyright’ in Aurelio Lopez-Tarruella (ed), *Google and the Law: Empirical Approaches to Legal Aspects of Knowledge-Economy Business Models* (Springer 2012) 144–5 (‘Despite [the ample scope of Art. 5(3)(c) EUCD], the exemption of news aggregation under the corresponding national limitations would find many obstacles since most national laws require that the reproduction of news articles be done “by the press” or by other media similar to the original source, and news aggregators hardly

generally speaking, organizations that aggregate journalism but do not produce it themselves — [that is], do not conduct or commission reporting — are not typically thought of as journalism actors or ‘the press.’ That said, not everyone involved in journalism agrees on this, and the definition of the press is certainly in flux today.⁹⁶

Finally, news organizations may override the exception if they ‘expressly reserve’ their exclusive rights of reproduction, broadcasting and communication to the public by wire.⁹⁷ But the Convention does not explain how to make that reservation. At the 1908 Berlin Revision Conference that gave rise to this text, it seems to have been assumed that the reservation would have been made by means of a notice in the newspaper or periodical upon initial publication.⁹⁸ It is unlikely that the drafters envisioned further formalization of the reservation through some kind of governmental filing in the country of origin, much less in multiple countries: such a requirement would have too closely resembled the multiple formalities rejected from the outset of the Berne Union.⁹⁹ But if including a notice of

qualify as “press.”); ‘ALAI Report and Opinion on a Berne-Compatible Reconciliation of Hyperlinking and the Communication to the Public Right on the Internet’ (Report and opinion, Association Littéraire et Artistique Internationale 2015) <www.alai.org/en/assets/files/resolutions/201503-hyperlinking-report-and-opinion.pdf> accessed 5 February 2016 (‘On the other hand, the beneficiaries of this exception are “the press”; as a result not every linking intermediary will qualify. It is not clear, for example, that every news aggregator or every blogger would be considered the “press,” particularly if the former provides no independent content’: at 6).

⁹⁵ See, eg, Institute for Information Law, ‘Study on the Implementation and Effect in Member States’ Laws of Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society’ (Final Report, Institute for Information Law 2007) 52–4 <www.ivir.nl/publicaties/download/605> accessed 14 February 2016. ‘[D]istinguishing between value-added news media that “deserve” to benefit from the exemption, and other media that do not, bears the risk of passing judgment on the social value of the media, and would therefore rest uneasily with freedom of expression’: at 53–4. See also New Zealand Law Commission, *The News Media Meets ‘New Media’: Rights, Responsibilities and Regulation in the Digital Age* (NZLC Report No 128, 2013), <http://r128.publications.lawcom.govt.nz/Chapter+3+-+Defining+news+media+for+the+purposes+of+the+law/Our+proposed+statutory+definition+of+news+media>

(proposing changes to the country’s regulation of the media, specifically, at paras. 3.63 and 3.101, proposing an expansive definition of ‘news media’ that would include aggregators). The government subsequently declined to adopt these recommendations. See New Zealand Parliament, *Government Response to Law Commission Report on The News Media Meets ‘New Media’: Rights, Responsibilities and Regulation in the Digital Age* (Paper presented to the House of Representatives, 2013) <[www.mch.govt.nz/files/News-media-meets-new-media-government-response-to-law-commission-report%20\(D-0503423\).PDF](http://www.mch.govt.nz/files/News-media-meets-new-media-government-response-to-law-commission-report%20(D-0503423).PDF)> accessed 14 February 2016.

⁹⁶ Email from David Hajdu, Professor, Columbia University School of Journalism to Jane Ginsburg (4 January 2016). The denomination debate extends to bloggers who summarize or extract from articles appearing in more traditional journalism venues. See, eg, Mathew Ingram, ‘Are Aggregation and Curation Journalism? Wrong Question’ (*Gigaom*, 22 February 2012) <<https://gigaom.com/2012/02/22/are-aggregation-and-curation-journalism-wrong-question/>> accessed 15 February 2016; Melanie Coulson, ‘The “New Journalist”: The Tale of a Sexy SEO Headline’ (*MelCoulson.com*, 2 February 2012) <<http://melcoulson.com/2012/02/21/the-new-journalist-the-tale-of-a-sexy-seo-headline/>> accessed 14 February 2016 (‘[A]ggregation is *not* journalism. As a curator and aggregator you may well function as an efficient newstand [sic], but you’re not reporting what’s *new*.’ (emphasis in original)).

⁹⁷ Berne Convention (n 16) art 10*bis*(1).

⁹⁸ See *Actes de la Conférence 1908* (n 27) 253 (quoting the German delegation proposal). In passing, it may be noted that in the Paris Additional Act 1896, provision was made for periodicals, though not newspapers, to the effect that it would be sufficient if the prohibition (reservation) was ‘indicated in general terms at the beginning of each number’: Paris Additional Act (Paris, 4 May 1896), entered into force 9 December 1897, art 2, IV. This provision was deleted in the Berlin Act (n 20).

⁹⁹ On the problem of multiple national formalities before the promulgation of the Berne Convention, see, eg, Ricketson and Ginsburg (n 30) [1.19], [2.05], [2.07]–[2.08], [2.11]; Jane C Ginsburg, “‘With Untired Spirits and Formal Constancy’: Berne Compatibility of Formal Declaratory Measures to Enhance Copyright Title-Searching’ (2013) 28 Berkeley Technology Law Journal 1583, 1588–9.

reservation upon the newspaper's initial publication satisfied the reservation condition in the analog world (it is less clear how the reservation would have been made when the source was a radio broadcast), how may one transpose that solution to the digital context? Perhaps it should suffice to include the reservation on the homepage of the source website, or in its metadata.

A kind of metadata reservation already exists, in the form of 'robots.txt', which instructs search engines not to crawl, and therefore not to copy from, the source website. But robots.txt is a very blunt instrument, since it is an on/off switch; it does not allow the operator of the source website to permit crawling and excerpting, but only under certain conditions, such as where there is payment for copied content. For the moment, search engines ignore more fine-grained instructions, such as those implemented under the Automated Content Access Protocol ('ACAP') favoured by newspaper publishers.¹⁰⁰ It is problematic, to say the least, to leave solely to the news aggregators the determination of which metadata notices of rights reservations they will choose to respect. The legal effectiveness of the news source's reservation of rights should not turn on whether it has complied with technological rules written by potential infringers.¹⁰¹ That said, if the notice is to work in the automated environment of news aggregation, its implementation should not excessively burden the aggregator's operations. It may be necessary for publishers and aggregators to cooperate in developing a technological standard for expressing reservations from the article 10*bis*(1) exception.¹⁰² In the interim, assuming news aggregators qualify for the article 10*bis*(1) exception, and in the absence of treaty specification of how to communicate the rights reservation, member states should refrain from adopting a news aggregation exception under article 10*bis*(1) unless they have also articulated an effective means for news sources to opt out.

C. Article 10(1) quotation right

The Berne Convention art 10(1) provides:

It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with

¹⁰⁰ See, eg, Valérie-Laure Benabou, Joëlle Farchy and Cécile Méadel, Commission du Conseil supérieur de la propriété littéraire et artistique relative au référencement des œuvres sur Internet, *Le référencement des œuvres sur Internet: Rapport du CSPLA* (2013) 88 (comparing robots.txt and ACAP). The granularity that makes ACAP appealing to news publishers incites hostility from technology platforms: see, eg, Jon Stokes, 'European Publishers Want a Law to Control Online News Access' (*Ars Technica*, 10 July 2009) <<http://arstechnica.com/media/news/2009/07/european-publishers-want-news-access-controls-legislated.ars>> accessed 14 February 2016.; Ryan Paul, 'A Skeptical Look at the Automated Content Access Protocol' (*Ars Technica*, 13 January 2008) <<http://arstechnica.com/business/news/2008/01/skeptical-look-at-acap.ars>> accessed 14 February 2016.

¹⁰¹ Accord, *Copiepresse* (n 87) [50], quoting Carine Bernault, 'La tentation d'une régulation technique du droit d'auteur' (2006) *Revue Lamy Droit de l'immatériel* 61:

One should therefore refrain from trying to impose recourse to these technological measures, otherwise one could go so far as to consider that the rightholder who did not use the technological solution available to him to prevent his work from being exploited is deprived of all recourse against the infringer. . . . It would not be acceptable that software programs would become some sort of normalization tool of the so called information society, a technical 'law' that would be imposed surreptitiously!

¹⁰² See Berne Convention (n 16) art 10*bis*(1).

fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries.¹⁰³

The meaning of ‘quotations’ is subject to considerable debate, particularly regarding whether an entire work can be a quotation.¹⁰⁴ Nonetheless, even concepts of quotations limited to modest (albeit not necessarily ‘short’¹⁰⁵) excerpts would accommodate the copying of an article’s headline and initial one or two sentences — so long as national law did not consider the headlines to be works in themselves. In that event, it still may be possible to avoid a general interpretation of the meaning of ‘quotation’ when entire works are copied, because article 10(1) itself appears to encompass the possibility of quoting full headlines. This possibility derives from the final phrase of article 10(1), authorizing ‘quotations from newspaper articles and periodicals in the form of press summaries’.¹⁰⁶ It seems reasonable to expect that these ‘summaries’ (*revues de presse*’ in the authoritative French version) might include the headlines of the surveyed news stories. Arguably, it would still be permissible under article 10(1) to quote a full headline, even if the quotation served a purpose other than populating a *revue de presse*.

As for whether news aggregation practices produce *revues de presse* within the meaning of the quotation right, the Court of Appeals of Brussels held to the contrary in *Google Inc v Copiepresse*,¹⁰⁷ an action brought by a Belgian press agency and society of journalists alleging that Google News’s systematic copying of headlines and three lines of text infringed the copyrights in the copied articles. The Belgian court interpreted art 21(1) of Belgian copyright law, which closely tracks the Berne Convention art 10(1). The court adopted the French case law definition of a *revue de presse* as ‘a conjunct and comparative presentation of various comments from different journalists on one particular theme or one particular event’.¹⁰⁸ It then articulated criteria for application of a *revue de presse* exception:

the development by a press medium, which could not oppose the reciprocal use of its own articles by other press bodies quoted for their own press reviews;

the classification by theme or event: press reviews must show that a compilation effort was made which attests to classification work . . .¹⁰⁹

Google News failed to meet these criteria, the court held, because Google was not a ‘press organ’. The court inferred a reciprocity requirement: the press organ that copies from another in creating a *revue de presse* should be subject to having its content excerpted for the same purpose by another member of the press. As an aggregator that does not create its own content, Google News, by contrast, takes, but has nothing to give in return. Moreover, held the *Copiepresse* court, Google’s presentation of copied material was more akin to a ‘round

¹⁰³ *ibid* art 10(1).

¹⁰⁴ Ricketson and Ginsburg (n 30) [13.42] (‘length of quotation’).

¹⁰⁵ *ibid* [13.41]–[13.42].

¹⁰⁶ Berne Convention (n 16) art 10(1).

¹⁰⁷ *Copiepresse* (n 87).

¹⁰⁸ *ibid* [32], citing *Cour de cassation France* [Court of Cassation France], 30 January 1978. See also Ricketson and Ginsburg (n 30) [13.41] (A *revue de presse* is ‘a collection of quotations from a range of newspapers and periodicals, all concerning a single topic, with the purpose of illustrating how different publications report on, or express opinions about, the same issue’).

¹⁰⁹ *Copiepresse* (n 87) [32] (the court listed a third requirement that the ‘quotation’ not substitute for the source work; this condition is of general application to Berne article 10(1), see discussion at text at nn. 112-113.).

up’ than a ‘review’ because Google News lacked the comparative and analytical features that characterize a ‘review’:

‘Google News’ is only a reproduction of sections of press articles, classified into sections, and does not contain any comments or links between them. It has even been confirmed that this is automated, and that there is no human intervention involved. It thus follows that these excerpts are not reproduced to illustrate a suggestion, to defend an opinion or to make a summary of a specific topic.¹¹⁰

News aggregation sites that collect headlines and initial sentences from a variety of sources, whose excerpts neither focus on a single topic, nor stress comparisons in how the sources cover the same topic thus do not qualify as *revues de presse*. ‘Specialty aggregator’ sites, however, may fulfill the *revue de presse* criteria. A specialty aggregator ‘is a website that collects information from a number of sources on a particular topic or location’.¹¹¹ These sites, many of which focus on politics or technology, may perform the kind of selection and comparison of news coverage that the *revue de presse* privilege was designed to foster.

In any event, it does not suffice that the use be for purposes of a *revue de presse*, or that the copied content constitute a quotation. Article 10(1) poses the further conditions that the ‘extent’ of the quotations ‘not exceed that justified by the purpose’, and that their ‘making’ be ‘compatible with fair practice’.¹¹² Since the purpose of the news aggregation is to inform internet users of the stories that the ‘scraped’ news sources have published, one might contend that copying the news article’s title is enough to fulfill that informatory purpose. But that assertion may raise matters of fact resistant to bright-line rules. Rather, the principal impediment to the application of the quotation right may be the ‘fair practice’ limitation. If news aggregation unfairly competes with the quoted articles, for example by substituting for recourse to the source website, then the quotation right would not apply.

Arguably, if the aggregation dispenses the user from consulting the full article because the quoted portions convey the essential *facts*, the quotation does not substitute for the article’s *expression*, and it would not be unfair practice, *as a matter of copyright law*, to offer a competing informational substitute. But it may be difficult in this instance to separate the ‘facts’ from their ‘expression’: because the copying is verbatim, perhaps doubts should be resolved in favour of considering the quoted content to be expressive. Moreover, it is not clear that article 10(1)’s ‘fair practice’ restriction is limited to fairness as a matter of copyright law, as opposed to a broader connotation, which would encompass competitive practices more generally.¹¹³

¹¹⁰ *ibid.*

¹¹¹ Isbell (n 79) 3.

¹¹² Berne Convention (n 16) art 10(1).

¹¹³ Ricketson and Ginsburg (n 30) [13.41] states that there is little in the records of the 1967 Stockholm Revision Conference regarding the meaning of ‘compatible with fair practice’, but suggests that ‘the criteria referred to in article 9(2) would appear to be equally applicable here in determining whether a particular quotation is “fair”: does it conflict with a normal exploitation of the work and unreasonably prejudice the legitimate interests of the author?’

Arguably, ‘fair practice’ might also ‘take into account other public interests involved with aggregation and search engines services, such as the fundamental freedom to provide and access to information granted in Art.11 EU Charter and Art.10 ECHR’: Xalabarder (n 81) 31. Despite their surface appeal, invocations of rights of ‘access to information’ are redundant: Berne Convention (n 16) arts 2(8) and 10(1) already serve the goal of access to information; the fair practice condition is more appropriately seen as a constraint on the application of the quotation right rather than a basis for broadening the right’s application. Interpreting ‘fair practice’ as a

A final limitation on the application of the quotation right may also disqualify some news aggregation practices. Article 10(3) of the Berne Convention requires that

Where use is made of works in accordance with the preceding paragraphs of this Article, mention shall be made of the source, and of the name of the author if it appears thereon.¹¹⁴

Thus the quotation right does not apply if the aggregation site does not also include the by-lines of the authors of the quoted articles.

D. Preemptive effect of article 10(1)?

Supposing a given aggregation site met all of article 10's conditions, it would follow that a Berne member state could not, consistently with international norms, provide copyright protection to authors or news publishers whose works originate on foreign news sources against an aggregation site's communication of quoted content from that state. Would the Berne Convention also preclude remedies for foreign authors or publishers under national norms of unfair competition or misappropriation? In other words, does article 10(1) effectively preempt other legal bases of protection, or does its force apply only within the Berne Convention's direct ambit, thus leaving member states free to address news aggregation under other, non copyright, theories of national law?

The recent enactment in Germany and in Spain of 'ancillary copyright' (essentially publisher's neighboring rights) laws granting press publishers exclusive rights (Germany¹¹⁵) or remuneration rights (Spain¹¹⁶) against the commercial making available of aggregated content brings the preemption question to the fore. We have seen that the 1908 Berlin and 1967 Stockholm drafters excluded 'news of the day' from the Berne Convention's ambit, but their rejection of copyright coverage did not imply preclusion of all forms of protection. On the contrary, member states would be free to devise appropriate unfair competition remedies if needed. But, as we have also seen, 'news of the day' implies the facts without their literary

limitation on the application of the quotation right is also consistent with a reading that interprets that term coextensively with the second and third of the art 9(2) three step test.

¹¹⁴ Berne Convention (n 16) art 10(3).

¹¹⁵ The German ancillary copyright law ('*Leistungsschutzrecht*') is codified at §§ 87f and 87g of the German Copyright Act. Section 87f provides in part:

The producer of a press product (press publisher) shall have the exclusive right to make the press product or parts thereof available to the public for commercial purposes, unless this pertains to individual words or the smallest of text excerpts.

See *Gesetz über Urheberrecht und verwandte Schutzrechte (Urheberrechtsgesetz)* [Copyright Act] (Germany) 9 September 1965, *Bundesgesetzblatt* [Federal Gazette] I S 1273, §§ 87f, 87g.

¹¹⁶ The Spanish law, which entered into force 1 January 2015, adds a new provision to art 32 of the 1987 Copyright Act and states:

The making available to the public by electronic content aggregation service providers of non-significant fragments of aggregated content which are disclosed in periodic publications or on websites which are regularly updated, for the purposes of informing, shaping public opinion or entertaining, shall not require authorization, without prejudice to the publisher's right, or if appropriate, other right holders to receive equitable compensation. This right shall be unwaivable and will be given effect by means of intellectual property rights management entities . . .

See *Ley 21/2014, de 4 de noviembre, por la que se modifica el texto refundido de la Ley de Propiedad Intelectual, aprobado por Real Decreto Legislativo 1/1996, de 12 de abril, y la Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil* (Spain), BOE 2014, 90404; *Ley 22/1987, de 11 de noviembre de 1987 de Propiedad Intelectual* (Spain), BOE 1987, 34163.

reportage. In the case of news aggregation, the copied content may constitute a literary work, and, if the Berne Convention's criteria are met, that work must be subject to the article 10(1) quotation right. Member state laws prohibiting news aggregation therefore would appear to clash with international norms.

On further reflection, however, the analysis requires greater nuance. Granted, international policies promoting freedom of information and expression underlie the article 10(1) quotation right and explain its mandatory character. But those same policies undergird the article 2(8) exclusion of the news of the day, a provision that also has a mandatory character, yet member states may devise non-copyright remedies, notably for the systematic taking of time-sensitive news information. It seems anomalous to conclude on the one hand that member states may provide unfair competition remedies prohibiting internet platforms from *extracting and rewriting* the facts from daily news reports, but on the other hand that member states may not prohibit the systematic extraction of *verbatim* portions of those reports. The latter practice ironically implies less expenditure of resources on the part of the copyist (thus, greater free-riding) than does providing a new account of the copied facts. The practice's insulation from national unfair competition remedies on the ground that the copied expression is copyrightable, but therefore is also mandatorily appropriable, gives the copyist not merely a free ride but first class passage.

Finally, even were member state laws prohibiting news aggregation incompatible with the policies underlying the article 10(1) quotation right, a member state law that instead permits aggregation, but subject to remunerating the authors or the press publisher, may well be consistent with article 10(1). As the authors have posited, with respect to the quotation right's 'fair practice' requirement:

There is no mention in article 10(1) of the possibility of uses taking place pursuant to a compulsory licence, but in principle where a use by way of quotation is remunerated and 'does not exceed that justified by the purpose' . . . this should more readily satisfy the requirement of compatibility with fair practice than would a free use.¹¹⁷

E. National case law and statutes on news aggregation

We have seen that Berne member states Germany and Spain have passed laws prohibiting or requiring compensation for news aggregation. Other member states have reportedly been contemplating similar measures,¹¹⁸ and the European Commission, having acknowledged the 'growing concern about whether the current EU copyright rules make sure that the value generated by some of the new forms of online content distribution is fairly

¹¹⁷ Ricketson and Ginsburg (n 30) [13.41].

¹¹⁸ See, eg, Greg Sterling, 'Sweden the Latest to Consider Google "Link Tax" For Newspapers' (*Search Engine Land*, 10 November 2014) <<http://searchengineland.com/sweden-latest-consider-google-link-tax-207706>> accessed 14 February 2016; Eleonora Rosati, 'An Ancillary Right Over News to be Soon Introduced (Also) Into Spanish Law?' (*IPKat*, 16 February 2014) <<http://ipkitten.blogspot.com/2014/02/an-ancillary-right-over-news-to-be-soon.html>> accessed 14 February 2016 (also discussing possible Italian measures); Nils Rauer, 'Austrian Copyright Reform' (*LimeGreen IP News*, 23 June 2015) <www.limegreenipnews.com/2015/06/austrian-copyright-reform/> accessed 14 February 2016; Nils Rauer, 'Austrian Copyright Reform: No Ancillary Copyright for Publishers' (*LimeGreen IP News*, 9 July 2015) <www.limegreenipnews.com/2015/07/austrian-copyright-reform-no-ancillary-copyright-for-publishers-update/> accessed 14 February 2016.

shared’, is considering ‘whether any action specific to news aggregators is needed, including intervening on rights’.¹¹⁹

In the US, Agence France Presse’s copyright infringement claim against Google News’s aggregation of headlines and initial sentences settled, on undisclosed terms, thus leaving unresolved Google’s contentions that it copied only ‘facts’, or that any copying of expression was fair use.¹²⁰ Extra-copyright claims invoking the tort of misappropriation have not focused on news aggregation, probably because the claim, as devised by the US Supreme Court in *International News Service*,¹²¹ and as interpreted in digital-era case law,¹²² has sought to remedy free-riding competitors’ taking of ‘hot news’ content (that is, of time-sensitive information) in order to ensure that the entity who invested in gathering the news should be the first to disseminate it fully to the public. News aggregators generally do not ‘scoop’ the news source’s dissemination; they do not interfere with the source’s first disclosure of the information to their readers.¹²³ While news aggregators may be free-riders, and their copying may compete with the source sites, their conduct probably does not involve the additional element of time-sensitivity that distinguishes a U.S. ‘hot news’ misappropriation claim from a copyright infringement claim.¹²⁴

VIII. SOME CONCLUDING THOUGHTS

History provides conflicting lessons for those coping with contemporary problems. On the one hand, nothing is ever ‘new’, in the sense that events and circumstances tend to repeat themselves.¹²⁵ On the other hand, it is all too easy to draw misleading analogies from things that look outwardly similar, although widely separated by time, place and other factors.

¹¹⁹ European Commission, ‘Communication From the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Towards a Modern, More European Copyright Framework’ (COM(2015) 626, European Commission 2015) 9–10 <http://ec.europa.eu/newsroom/dae/document.cfm?action=display&doc_id=12526> accessed 15 February 2016.

¹²⁰ Shannon Henson, ‘Google Settles Suit Over News Content’ (*Law360*, 9 April 2007) <www.law360.com/articles/22235/google-settles-suit-over-news-content> accessed 14 February 2016.

¹²¹ *International News Service* (n 11).

¹²² See, eg, *Barclays Capital v Theflyonthewall.com, Inc*, 650 F 3d 876 (2d Cir 2011). The narrow scope left to the ‘hot news’ misappropriation doctrine after the Second Circuit’s copyright preemption analysis has prompted the forecast that the ‘doctrine may well be on the tail-end of its lifecycle’: Shyamkrishna Balganesh, ‘The Uncertain Future of “Hot News” Misappropriation After Barclays Capital v Theflyonthewall.com’ (2012) 112 *Columbia Law Review Sidebar* 134, 145.

¹²³ But see *Associated Press v All Headline Corp*, 608 F Supp 2d 454 (SDNY 2009) (denying a motion to dismiss, the Court recognized AP’s emphasis on ‘timely, breaking news’. In holding that the claim could go forward, the Court gave some support to the argument that All Headline’s aggregation — which differed from the practices of aggregators such as Google News because All Headline published full articles and distributed them to subscribers — included ‘time-sensitive’ materials). The case subsequently settled: see Amanda Ernst, ‘AP Settles “Hot News” Lawsuit with AHN Media’ (*FishbowlNY*, 13 July 2009) <www.mediabistro.com/fishbowlny/ap-settles-hot-news-lawsuit-with-ahn-media_b12121> accessed 15 February 2016. It may also have been superceded by *Flyonthewall* (n 122).

¹²⁴ See *National Basketball Assoc v Motorola*, 105 F 3d 841 (2d Cir 1997) (discussing elements of a misappropriation claim that would survive copyright preemption). For a thorough (and skeptical) consideration of copyright and misappropriation liability under U.S. law for news aggregation, see Robert Denicola, ‘News on the Internet,’ (2012) 23 *Fordham Intell. Prop. Media & Ent. L.J.* 68.

¹²⁵ ‘Those who cannot remember the past are condemned to repeat it’: George Santayana, *The Life of Reason: Introduction and Reason in Common Sense* (Marianne S Wokeck and Martin A Coleman (eds), MIT Press 2011) 172.

As we have seen above, the problems in relation to protection of news that were presented by the advent of the international telegraph in the nineteenth century and the development of internet communications in the late twentieth and early twenty-first centuries seem very similar. On first inspection, there appears to be no satisfactory treatment of these matters under the long established intellectual property conventions, although there have been various unsuccessful attempts to craft some form of special protection for news. Drilling down, however, the problems begin to look somewhat different, and the international solutions less unappealing. If the correct view of the international telegraph was that this was really about temporal concerns and the activity of primary newsgathering, then the abstention of the Berne Convention from intervention appears defensible, both as a matter of principle and policy. It may, however, be regretted that this did not carry into a specific form of unfair competition protection under the Paris Convention, but neither the Paris Convention nor the Berne Convention precluded action at the national level here. Notwithstanding various attempts — at Samedan in 1939 and at Geneva in 1959 — to formulate separate international treaties on the protection of news, this has been left as a matter for national laws to determine for themselves.

By contrast, the activities discussed in the second half of this chapter — news aggregation and dissemination — are qualitatively different, and, unlike news gathering, may attract the application of the international norms of protection and exceptions embodied in the Berne Convention. The scope for the invocation of national unfair competition principles here appears more limited, because the conduct may more often appropriate copyrightable expression. In this situation, while article 10*bis*(1) may provide only limited solace for news aggregators, invocation of the mandatory Berne quotation exception may give rise to what we have suggested above may be an unmerited free ride on their part. On the other hand, everything that goes around comes around again, and the answer to this apparent conundrum may lie in the ‘fair practice’ compatibility requirement of article 10(1) — and in the payment of money, by way of compensation. At the end of the day, the balancing of interests here is not just about rights and freedoms — the rights of owners versus the free flow of information — but is also concerned with adjusting the commercial concerns of the parties involved. Both original news sources and news aggregators perform necessary and important roles in providing news and information to the public — both also profit from these activities. Fairness therefore suggests that both can continue their activities if systematic aggregation is paid for, and this kind of solution is both Berne-compatible and consistent with the role of national (and international) unfair competition regimes.