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Photographic Memory: Expanding “News Deserts” Threaten to Erase the Visual Record of Contemporary American History

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Cover Page Footnote

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Photographic Memory: Expanding “News Deserts” Threaten to Erase the Visual Record of Contemporary American History

Frank D. LoMonte* & Lila Greenberg**

As local newspapers close their doors across America, one of the unheralded casualties of their demise may be the loss of the institutional memory of their communities. Photo morgues maintained by newsroom librarians are an invaluable reference for researchers and filmmakers seeking to trace the visual history of localities. While some forward-thinking news organizations have donated their archival photos for preservation, there appears to be no industrywide plan for doing so, meaning that countless thousands of unpublished—but historically valuable—photos are at risk of destruction as cost-cutting newspapers eliminate their libraries, sell off their buildings, or go out of business entirely. While industry-watchers and scholars have long decried the growth of “news deserts,” these accompanying “history deserts” have scarcely been documented or studied. This Article attempts to sound the alarm about the ongoing loss of irreplaceable photographic archives and to point toward a possible solution, drawing on the example of one community—Poughkeepsie, New York—that took affirmative steps toward making sure its news photo archives would survive as a

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community resource. The Article looks at the copyright concerns that may deter publishers—as well as libraries and historical societies—from displaying and preserving archival materials. Drawing on lessons learned in Poughkeepsie about overcoming legal and institutional obstacles, the Article concludes by suggesting a governmental and industry-wide commitment to halt the rapid disappearance of visual history. The authors suggest that a nationwide rescue could include expanding an existing newspaper preservation grant program offered by the National Endowment for the Humanities to also cover preserving the millions of unpublished photos that help make a community’s visual memory complete.

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INTRODUCTION

The rapid disappearance of local newspapers is recognized as a crisis of awareness for community news.¹ Less-appreciated is how the disappearance of these repositories of community history will affect authors, documentarians, and historians, because when newspapers vanish, troves of historical photographs (many of them never-before-published) are likely to disappear along with them.² Newspaper archives are invaluable resources for historians, filmmakers, and others interested in recreating the appearance of local communities or reconstructing the early lives of people who attain prominence.³ Irreplaceable pieces of history are at risk, as the work of generations' worth of news photographers lose their archival home.⁴

Traditionally, newspapers publish only a tiny fraction of the images their photographers capture. The rest reside in files (or "morgues") maintained by newsroom librarians, available for the newspaper's own future use, as well as for researchers looking to

¹ See Clara Hendrickson, *Local Journalism in Crisis: Why America Must Revive Its Local Newsrooms*, BROOKINGS (Nov. 12, 2019), <https://www.brookings.edu/research/local-journalism-in-crisis-why-america-must-revive-its-local-newsrooms/> [<https://perma.cc/3DJW-QEYQ>] ("The declining capacity of newsrooms to investigate potential stories not only renders newspapers less valuable to news consumers, but also results in a newspaper that is less valuable to its community. When important stories are not told, community members lack the information they need to participate in the political process and hold government and powerful private actors accountable.").

² See Sharon Ringel, *Digitizing the Paper of Record: Archiving Digital Newspapers at the New York Times*, 24 JOURNALISM 245, 250 (2023) ("Most morgues did not survive the economic crisis faced by newspapers in the 21st century.").

³ See Keith Greenwood, *Digital Photo Archives Lose Value as Record of Community History*, 32 NEWSPAPER RSCH. J. 82, 82 (2011) ("[S]tored in newspapers' archives, photographs constitute an important part of the historical record and have been called one of the 'most important and straightforward ways in which people understand the past.'" (quoting Howard Bossen et al., *Digital Camera Use Affects Photo Procedures/Archiving*, 27 NEWSPAPER RSCH. J. 18, 19 (2006))).

⁴ See Richard L. Saunders, *Too Late Now: Libraries' Intertwined Challenges of Newspaper Morgues, Microfilm, and Digitization*, 16 J. RARE BOOKS, MANUSCRIPTS, & CULTURAL HERITAGE 127, 138 (2015) ("[Newspapers' library files' existence are] threatened by a general lack of administrative understanding of just how precious morgues are, despite being large, unwieldy, and seemingly duplicative of microfilm. [They] have been discarded all too often, and special collections risk becoming further perpetrators of this historical tragedy.").

document the history of a community.⁵ But neither “newsrooms” nor “librarians” reliably exist in an increasing number of communities across the country.⁶ When the keepers of records and the associated repositories both disappear, so too may the records.

Anecdotally, some forward-thinking publishers have made arrangements for what might be considered “estate planning” for sickly local news. In Louisville, for instance, the *Courier Journal* donated an estimated 3 million images from its visual archives to a local university library for preservation and public access.⁷ But there seems to be no industry-wide process—or even a visible sense of industry-wide urgency—by which visual artifacts of America’s contemporary history can be systematically preserved. In the absence of such an effort, untold photographic artifacts are at risk of ending up in the wastebin as newspapers sell off their buildings or go out of business entirely.⁸

This Article examines the consequences of the destruction of community newspaper photo archives, and how one community—Poughkeepsie, New York—took measures to preserve an irreplaceable slice of visual history. Poughkeepsie’s experience offers

⁵ See Jan Lauren Boyles & Jared Meisinger, *Automation and Adaptation: Reshaping Journalistic Labor in the Newsroom Library*, 26 CONVERGENCE 178, 181 (2018) (explaining how newsrooms created in-house repositories of editorial content intended primarily for internal reference use).

⁶ See Steve Waldman, *Our Local-News Situation Is Even Worse Than We Think*, COLUM. JOURNALISM REV. (Feb. 25, 2022), https://www.cjr.org/local_news/local_reporters_decline_coverage_density.php [<https://perma.cc/JW5F-W9EY>] (describing the “collapse” of local news organizations and citing federal statistics documenting a 57% decrease in people employed as reporters for local news organizations since 2004); see also Saunders, *supra* note 4, at 136 (stating that, as a result of “the economics of the news industry,” newspaper morgues have often been discarded unless they are donated to local libraries or academic institutions).

⁷ See Billy Kobin, *Courier Journal Donates ‘Priceless’ Photo Collection to University of Louisville*, COURIER J., <https://www.courier-journal.com/story/news/local/2022/09/25/courier-journal-donates-photo-archive-to-university-of-louisville/69503842007/> [<https://perma.cc/X5UE-6TV5>] (Sept. 26, 2022, 2:23 PM).

⁸ See Terry Pristin, *Struggling Newspapers Sell Off Old Headquarters*, N.Y. TIMES (Oct. 22, 2013), <https://www.nytimes.com/2013/10/23/realestate/commercial/struggling-newspapers-sell-off-old-headquarters.html> [<https://perma.cc/LZY5-BTS4>] (reporting on the trend of newspaper publishers, including the *Boston Globe* and the *Miami Herald*, selling off headquarters buildings for cash and then moving into smaller facilities).

lessons for those elsewhere who are concerned with the disappearance of their communities' photographic record. Part I provides an overview of the financial crisis afflicting community newspapers and how the COVID-19 pandemic accelerated an already-precipitous decline in revenue, prompting thousands of closures. Part II examines how newspaper photo archives have historically functioned as repositories of local history for researchers and filmmakers, and what is lost when these archives disappear along with their newspaper owners. Part III raises a threshold legal question that will affect any attempt to preserve and display archival news photographs: Who owns the rights to them? It explains the fundamental copyright principles that apply to photographs created for news publications and how the morgue of a long-lived community newspaper might contain photos falling into multiple different legal categories, ranging from wholly unprotected to highly protected. Part IV then describes a rescue operation mounted by journalists and community leaders in Poughkeepsie, New York to create a lasting archive of news photos that may outlive the business of printing local newspapers—a success story that could be replicated elsewhere. This Part relies on interviews with participants in the creation of the *Poughkeepsie Journal* archive, reconstructing how they surmounted obstacles including uncertainties over ownership of the photographic works. Finally, Part V concludes that, given the rapid deterioration of America's community news infrastructure, an urgent national commitment is needed from the government and industry to stanch the erasure of the nation's visual history before it is irretrievably lost.

I. THE ERASURE OF COMMUNITY MEMORIES

A. *Local Newspapers Suffer Economic Collapse*

The decline of American newspapers is well-documented. As of mid-2022, the United States was home to 6,377 newspapers, down from 8,891 in 2005, and, over roughly that same span, full-time employment in newsrooms diminished from 75,000 journalists to

31,000.⁹ Once-mighty daily newspapers serving Denver, Seattle, and other major urban centers have closed down.¹⁰ Many others—including those in New Orleans and Tampa—have stopped printing and delivering newspapers on a daily basis.¹¹ The disturbing statistics about closures understate the enormity of the true losses. In a 2020 report, University of North Carolina researcher Penny Muse Abernathy decried the growing phenomenon of “ghost newspapers” that, while still nominally in business, have been hollowed-out so that they no longer meaningfully cover the news.¹² In a 2022 follow-up to that report published by Northwestern University’s Medill School of Journalism, Abernathy and others documented that 200 of the nation’s 3,143 counties did not have a newspaper at all, while more than half of the others (1,630 counties) were served by just one newspaper, typically a “weekly” with a small staff.¹³

⁹ David Bauder, *US Newspapers Continuing to Die at Rate of 2 Each Week*, AP NEWS (July 1, 2022, 9:20 AM), <https://apnews.com/article/journalism-united-states-39ef84c1131267233768bbb4dcaa181b> [<https://perma.cc/V6BH-GXAK>].

¹⁰ See, e.g., Andrew Clark, *Seattle Mourns the Last Day of Its Venerable Post Intelligencer*, GUARDIAN (Mar. 17, 2009, 3:23 PM), <https://www.theguardian.com/media/2009/mar/17/seattle-post-intelligencer-last-day> [<https://perma.cc/2DCW-HJ8S>]; Richard Pérez-Peña, *Rocky Mountain News Fails to Find Buyer and Will Close*, N.Y. TIMES (Feb. 26, 2009), <https://www.nytimes.com/2009/02/27/business/media/27paper.html> [<https://perma.cc/8JU2-TALL>].

¹¹ See Elahe Azadi, *Newspapers Keep Eliminating Print Days. They Say It’s for the Best*, WASH. POST (Apr. 12, 2022, 7:00 AM), <https://www.washingtonpost.com/media/2022/04/12/gannett-newspaper-print-days/> [<https://perma.cc/4S2U-V2VW>] (cataloging newspapers that have ceased a seven-day-a-week print schedule for economic reasons, including those in Tampa, Cleveland and Akron); Kathy Finn, *New Orleans Newspaper Cuts Print Edition to Three Days a Week*, REUTERS (May 24, 2012, 9:58 PM), <https://www.reuters.com/article/media-neworleans-newspaper/new-orleans-newspaper-cuts-print-edition-to-three-days-a-week-idUSL1E8GOI5M20120525> [<https://perma.cc/Q24A-XP62>].

¹² PENELOPE MUSE ABERNATHY, *NEWS DESERTS AND GHOST NEWSPAPERS: WILL LOCAL NEWS SURVIVE?* 21 (2020), https://www.usnewsdeserts.com/wp-content/uploads/2020/06/2020_News_Deserts_and_Ghost_Newspapers.pdf [<https://perma.cc/2HK5-5N57>].

¹³ PENELOPE MUSE ABERNATHY ET AL., *THE STATE OF LOCAL NEWS 2022: EXPANDING NEWS DESERTS, GROWING GAPS, EMERGING MODELS* 18 (2022), https://localnewsinitiative.northwestern.edu/assets/the_state_of_local_news_2022.pdf [<https://perma.cc/GNV8-WG95>].

While the downfall of once-profitable local newspapers has many causes, one major factor is the shift in reader preferences from print to online, where the competition for advertising dollars is heavily dominated by the duopoly of Google and Facebook.¹⁴ The COVID-19 pandemic that began sweeping the United States in March 2020 only accelerated the diminution of already-declining advertising revenue, pushing hundreds¹⁵ of struggling publications into the grave.¹⁶ Many newspapers, including some of the largest newspaper chains, were forced to furlough and lay off employees, as well as enact pay cuts to compensate for the losses in revenue stemming from the economic shutdown during the pandemic.¹⁷ Other papers cut back print publication and focused on publishing e-editions in an attempt to avoid major revenue losses,¹⁸ while

¹⁴ See Bill Murphy Jr., *Google and Facebook Now Make More from Ads Than Every Newspaper, Magazine, and Radio Network in the World Combined*, INC. (June 28, 2017), <https://www.inc.com/bill-murphy-jr/google-and-facebook-now-make-more-from-ads-than-every-newspaper-magazine-and-rad.html> [<https://perma.cc/R77U-2TRH>] (observing that, as of 2017, Google was bringing in \$80.8 billion in ad dollars while Facebook collected \$36.3 billion, meaning the two companies accounted for 83% “of all new ad dollars worldwide”).

¹⁵ ABERNATHY ET AL., *supra* note 13, at 49 (reporting that between late 2019 and May 2022, the United States lost 360 newspapers, and these losses were likely accelerated by the pandemic).

¹⁶ See Gabby Miller, *More Than 6,150 News Workers Were Laid Off amid the COVID-19 Pandemic*, COLUM. JOURNALISM REV. (Dec. 10, 2021), https://www.cjr.org/tow_center_reports/more-than-6150-news-workers-laid-off.php [<https://perma.cc/VNK2-V5FQ>] (summarizing findings of a study by Tow Center that, during 2020–21, 6,154 newsroom jobs were eliminated and 128 news publications were lost due to either closure or merger); Marc Tracy, *News Media Outlets Have Been Ravaged by the Pandemic*, N.Y. TIMES, <https://www.nytimes.com/2020/04/10/business/media/news-media-coronavirus-jobs.html> [<https://perma.cc/3FBC-6MY4>] (Sept. 21, 2021) (reporting that, because many business stopped or decreased advertising during the pandemic as economic activity slowed down and people avoided in-person shopping, some 37,000 journalists nationwide were affected by layoffs, furloughs, or pay cuts).

¹⁷ See, e.g., Jacob Bogage, *Gannett Will Furlough Workers at More Than 100 Newspapers over the Next Three Months*, WASH. POST (Mar. 30, 2020), <https://www.washingtonpost.com/business/2020/03/30/gannett-newspapers-furloughs/> [<https://perma.cc/RB23-XBFK>].

¹⁸ See, e.g., *Tampa Bay Times Adopts Temporary Sunday, Wednesday Print Schedule Due to Coronavirus*, TAMPA BAY TIMES (Mar. 30, 2020), <https://www.tampabay.com/news/business/2020/03/30/tampa-bay-times-adopts-temporary-sunday-wednesday-print-schedule-due-to-coronavirus/> [<https://perma.cc/9MK3-6TZ5>].

others ceased print publication entirely.¹⁹ Instead of closing their doors, many papers merged with nearby publications to ensure survival. In April and May of 2020, at least 30 newspapers closed or merged, and throughout the next few years, at least 100 papers ceased operations or merged resulting from the pandemic and subsequent economic collapse.²⁰ Understandably, when newspapers are struggling to pay the bills for their daily survival, the expense of preserving archives can seem to be an unaffordable luxury.²¹ As one industry executive has observed: “Archival preservation is down the list a good way from getting out the news, and every newspaper is looking to cut legacy costs.”²²

Paradoxically, the coronavirus crisis highlighted the importance of reliable, accurate local news. People nationwide turned to local news to provide information about what was occurring in their communities.²³ Unfortunately, many communities did not have a local

¹⁹ See Isabella Simonetti, *Over 360 Newspapers Have Closed Since Just Before the Start of the Pandemic*, N.Y. TIMES (June 29, 2022), <https://www.nytimes.com/2022/06/29/business/media/local-newspapers-pandemic.html> [<https://perma.cc/MY3P-EBV2>].

²⁰ See Kristen Hare, *More Than 100 Local Newsrooms Closed During the Coronavirus Pandemic*, POYNTER INST. (Dec. 2, 2021), <https://www.poynter.org/locally/2021/the-coronavirus-has-closed-more-than-100-local-newsrooms-across-america-and-counting/> [<https://perma.cc/G6EM-399M>] (listing newspapers that closed or merged in the early pandemic months); Kristen Hare, *Here Are the Newsroom Layoffs, Furloughs and Closures That Happened During the Coronavirus Pandemic*, POYNTER INST., <https://www.poynter.org/business-work/2022/here-are-the-newsroom-layoffs-furloughs-and-closures-caused-by-the-coronavirus/> [<https://perma.cc/J6LG-EVEL>] (Feb. 17, 2022).

²¹ See Andrew Egan, *Dead on Archival*, TEDIUM (Nov. 24, 2021), <https://tedium.co/2021/11/24/newspaper-archival-challenges/> [<https://perma.cc/E75U-PT5U>] (discussing the example of Washington State University, which received a \$324,000 endowment to preserve newspaper archives, an amount that likely did not even cover the full cost of the preservation effort and acknowledging that most defunct newspapers will not have access to such funds).

²² David Cohea, *The Newspaper Archivist's Good News*, MEDIUM (Apr. 23, 2015), <https://medium.com/local-and-thriving/the-newspaper-archivist-s-good-news-15c8fb5acc13> [<https://perma.cc/8YNH-GQ9Z>].

²³ See Elisa Shearer, *Local News Is Playing an Important Role for Americans During COVID-19 Outbreak*, PEW RSCH. CTR. (July 2, 2020), <https://www.pewresearch.org/short-reads/2020/07/02/local-news-is-playing-an-important-role-for-americans-during-covid-19-outbreak/> [<https://perma.cc/RXX9-EALZ>] (citing audience survey data which showed that 23% of respondents said they were paying more attention to COVID-19 news at the local level, whereas only 15% said they were following it more at the national level).

newsroom²⁴ and relied on larger regional papers for information, leaving local towns without comprehensive, tailored coverage of the public health crisis.²⁵ Researchers have documented meaningful civic costs when communities lose news coverage, including an increase in divisive partisanship as audiences lose an objective source of agreed-upon facts and instead consume more opinionated content.²⁶

The hollowing-out of local journalism has been hastened as more and more local newspapers, and even entire newspaper chains, fall into the hands of hedge-fund owners.²⁷ Sometimes derisively referred to as “vulture” capitalists, these investors prioritize short-

²⁴ See Clara Hendrickson, *Critical in a Public Health Crisis, COVID-19 Has Hit Local Newsrooms Hard*, BROOKINGS (Apr. 8, 2020), <https://www.brookings.edu/blog/fixgov/2020/04/08/critical-in-a-public-health-crisis-covid-19-has-hit-local-newsrooms-hard/> [https://perma.cc/RR6P-VDBT] (describing data analysis which showed that, as of April 6, 2020, 50% of the counties that reported COVID-19 cases were news deserts and 57% of counties with reported cases lacked a daily newspaper—many of which were rural counties).

²⁵ See Tim Franklin et al., *How the Local News Crisis Affects Coverage of COVID and Climate – And Vice Versa*, MEDILL LOC. NEWS INITIATIVE (Dec. 17, 2021), <https://localnewsinitiative.northwestern.edu/posts/2021/12/17/medill-adenauer-report/> (“The loss of local news may have cost lives during the pandemic because it paved the way for misinformation to take hold and hindered journalism on breakdowns in the official response.”).

²⁶ See Matthew P. Hitt et al., *Why Losing Our Newspapers Is Breaking Our Politics*, SCI. AM. (Mar. 26, 2019), <https://www.scientificamerican.com/article/why-losing-our-newspapers-is-breaking-our-politics/> [https://perma.cc/D3QY-CEGW] (describing the findings of a four-year study on communities with 110 documented newspaper closures, which found that voters crossed party lines to engage in “split ticket” voting less often in communities not served by newspapers); Kriston Capps, *The Hidden Costs of Losing Your City’s Newspaper*, BLOOMBERG (May 30, 2018, 9:07 AM), <https://www.bloomberg.com/news/articles/2018-05-30/when-local-newspapers-close-city-financing-costs-rise> (discussing a study by University of Notre Dame researchers that found a correlation between higher borrowing costs for bonded indebtedness and loss of a local newspaper, which researchers theorize was due to the lack of oversight of government activities, which subsequently made lending riskier).

²⁷ See McKay Coppins, *A Secretive Hedge Fund Is Gutting Newsrooms*, ATLANTIC (Oct. 14, 2021), <https://www.theatlantic.com/magazine/archive/2021/11/alden-global-capital-killing-americas-newspapers/620171/> [https://perma.cc/75KZ-SUDH]; see also Anna Nicolaou et al., *Media: US ‘Ghost Newspapers’ Struggle for Life*, FIN. TIMES (Feb. 24, 2019), <https://www.ft.com/content/e234b40a-292f-11e9-a5ab-ff8ef2b976c7> [https://perma.cc/S4FC-2UVH] (“[In acquiring local newspapers,] Alden’s strategy has been simple and blatant: once it takes over a company it strips out assets and in the process extracts as much value as possible.”).

term financial gain by selling off companies' assets and downsizing workforces.²⁸ While some newspaper chains have fended off acquisition bids,²⁹ Alden Global Capital pulled off a major coup in 2021 by acquiring Tribune Company, parent of the legendary *Chicago Tribune* and eight other daily newspapers, making the hedge fund the second-largest owner of newspapers in America.³⁰

B. *Archival Photos: A Casualty of the Crash*

Photojournalism has been devalued and deemphasized as news organizations downsize. Instead of teaming reporters and photographers together, news outlets increasingly expect young reporters to record their own photos and videos to save on labor costs.³¹ The decline in newspaper employment has disproportionately affected staff photographers. A 2012–13 census of newsroom employment by the American Society of News Editors documented that, as of that time, full-time positions for photographers, videographers, and other visual artists had decreased 43 percent since 2000, as compared with 32 percent for reporting jobs and 27 percent for editing,

²⁸ See David Folkenflik, 'Vulture' Fund Alden Global, Known for Slashing Newsrooms, Buys Tribune Papers, NPR, <https://www.npr.org/2021/05/21/998730863/vulture-fund-alden-global-known-for-slashing-newsrooms-buys-tribune-papers> [https://perma.cc/NY7A-FS46] (May 21, 2021, 2:13 PM) (reporting on the acquisition of the storied Tribune newspaper chain by New York-based Alden Capital, a company "known for slashing its newspapers' budgets to extract escalated profits").

²⁹ See, e.g., Kavahn Mansouri, *Hedge Fund Takeover of Midwest Newspaper Chain Ends as Investors Brace for Advertising Decline*, ST. LOUIS PUB. RADIO (Nov. 15, 2022, 9:02 AM), <https://www.kcur.org/news/2022-11-15/alden-global-capital-lee-enterprises-midwest-newspapers-hedge-fund-takeover> [https://perma.cc/LT8J-9J3W] (reporting that Alden Capital ended its pursuit of the Lee Enterprises newspaper chain after the Lee Enterprises board rejected an initial offer).

³⁰ Folkenflik, *supra* note 28; Elahe Izadi & Sarah Ellison, *Tribune Shareholders Vote to Sell Legendary Chain of Newspapers to a Hedge Fund*, WASH. POST, <https://www.washingtonpost.com/media/2021/05/21/tribune-sale-alden-hedge-fund/> [https://perma.cc/8W4F-ZDSD] (May 21, 2021, 5:13 PM) (reporting that shareholders of the Tribune Publishing Company voted to sell the company to Alden Global Capital).

³¹ See Brian Stelter, *Local TV Journalists Voice Concerns About One-Man-Band Reporting*, CNN BUS. (Jan. 27, 2022, 10:38 PM), <https://www.cnn.com/2022/01/27/media/local-tv-journalists-concern-reliable-sources/index.html> [https://perma.cc/ZB7C-S2PD].

layout, and other positions.³² By one count, staff photographer positions have declined by 80 percent since 2005 as the industry has become increasingly dependent on freelance photographers and stock images.³³ In 2013, the *Chicago Sun-Times* stunned the industry by laying off its entire 28-member photography staff, intending to get by with freelancers.³⁴ As we will see in Part II, the move toward replacing salaried employees with freelancers can have legal consequences for ownership of the resulting works.

One of the first casualties of shrinking newsroom budgets was the loss of librarians—the traditional keepers of the archives and of news organizations’ institutional memory.³⁵ As one study reports: “[N]ewsrooms hit hard by declining circulation and economic pressures began to streamline and automate most news library functions in the late 1990s and early 2002, displacing humans with machine labor in the library.”³⁶ A 2015 study of ten U.S.-based news organizations by researchers Kathleen A. Hansen and Nora Paul concluded that news library staffs “have been decimated since the mid-2000s” and that the downsizing has diminished publications’ ability to maintain their archives.³⁷ Even *The New York Times*, one of the few news publications successfully weathering the digital age, has reduced its staff of librarians and archivists from twenty-one to just one.³⁸ The diminution of these professional curator positions created something of an informational perfect storm, as the remaining

³² Monica Anderson, *At Newspapers, Photographers Feel the Brunt of Job Cuts*, PEW RSCH. CTR. (Nov. 11, 2013), <https://www.pewresearch.org/fact-tank/2013/11/11/at-newspapers-photographers-feel-the-brunt-of-job-cuts/> [https://perma.cc/EA94-VLNY].

³³ ABERNATHY ET AL., *supra* note 13, at 26–27.

³⁴ See Robert Channick, *Chicago Sun-Times Lays Off Its Photo Staff*, CHI. TRIB. (May 30, 2013, 12:00 AM), <https://www.chicagotribune.com/business/ct-xpm-2013-05-30-chi-chicago-sun-times-photo-20130530-story.html> [https://perma.cc/KF3B-Z2D8].

³⁵ See Boyles & Meisinger, *supra* note 5, at 184 (describing the results of a survey of major U.S. newspapers indicating that, as of mid-2017, only half still employed one or more full-time librarians, with all respondents stating that staffing had contracted).

³⁶ *Id.* at 182; see also *id.* (“With a limited sphere of influence and waning on-the-job duties, newsroom librarians were often the first victims of newsroom downsizing.”).

³⁷ Kathleen A. Hansen & Nora Paul, *Newspaper Archives Reveal Major Gaps in Digital Age*, 36 NEWSPAPER RSCH. J. 290, 293 (2015) [hereinafter Hansen & Paul, *Archives*]; see also Greenwood, *supra* note 3, at 83 n.5 (citing a survey by the Special Libraries Association indicating that, as of 2010, at least 217 librarian positions had been eliminated at fifty-six responding newspapers).

³⁸ See Ringel, *supra* note 2, at 250.

librarians confronted an increased workload that required not just stewarding physical archives but also preserving “born digital” materials that might never have been printed on a page.³⁹

Economic reality did not toll just for newsroom jobs, but for the brick-and-mortar newsrooms themselves. In recent years, daily newspapers in Miami, St. Louis, and elsewhere have sold off their landmark headquarters buildings as a way to raise cash and forestall financial disaster.⁴⁰ As Professor Nikki Usher has observed, shedding office space was the logical business decision in light of diminishing newsroom employment: “First came shrinking staff. Then came shrinking newsrooms. This makes economic sense: old buildings are expensive to maintain. The spaces are too big for the size of the staff.”⁴¹ Entire newspaper chains have liquidated their capital assets as a business strategy, forcing employees to adapt to remote work.⁴² The trend toward a work-from-home business model was

³⁹ See Boyles & Meisinger, *supra* note 5, at 182 (describing the complexity of archiving “born digital” materials, including social media posts); see also *id.* at 185 (stating that several newsroom librarians interviewed for the study indicated that, as a cost-saving measure, only portions of newsroom archives were being digitally preserved).

⁴⁰ See, e.g., Tom Daykin, *The Milwaukee Journal Sentinel’s Former Home Is Now High-End Apartments. Here’s a Look Inside.*, MILWAUKEE J. SENTINEL, <https://www.jsonline.com/story/money/real-estate/commercial/2022/11/15/a-look-at-the-apartments-that-replaced-the-journal-sentinels-old-site/69634403007/> [https://perma.cc/J9CE-RAT3] (Nov. 15, 2022, 2:17 PM) (describing how Milwaukee’s daily newspaper, the *Journal Sentinel*, relocated in 2020 “after years of workforce reductions,” and how its owner sold three former newspaper buildings to a real estate development firm); Marc Tracy, *The Daily News Is Now a Newspaper Without a Newsroom*, N.Y. TIMES, <https://www.nytimes.com/2020/08/12/business/media/daily-news-office.html> [https://perma.cc/LMG7-UCMA] (Sept. 20, 2021) (reporting that Tribune Publishing decided to close the newsrooms of New York’s *The Daily News* and four other publications, indicative of a larger nationwide cost-cutting trend); Rick Edmonds, *Finding a Sweet Business Model in Downsizing Newspaper Real Estate*, POYNTER (June 10, 2015), <https://www.poynter.org/reporting-editing/2015/finding-a-sweet-business-model-in-downsizing-newspaper-real-estate/> [https://perma.cc/8RJ2-3HNN] (describing the “accelerating and urgent” trend of selling off newspaper headquarters buildings, including those in Miami and St. Louis, which has spawned a mini-industry of companies that specialize in liquidating distressed newspapers’ assets).

⁴¹ NIKKI USHER, *MOVING THE NEWSROOM: POST-INDUSTRIAL NEWS SPACES AND PLACES* 55 (2014), <https://academiccommons.columbia.edu/doi/10.7916/D87S8111/download> [https://perma.cc/TA46-U XK7].

⁴² See Jonathan O’Connell & Emma Brown, *A Hedge Fund’s ‘Mercenary’ Strategy: Buy Newspapers, Slash Jobs, Sell the Buildings*, WASH. POST (Feb. 11, 2019, 6:31 PM),

only accelerated by America's abrupt transition to virtual work when the nationwide COVID-19 state of emergency was declared in March 2020.⁴³ As part of their quest to liquidate physical assets for cash, some newsrooms sold off their archives to private data vendors, which may or may not choose to make the archival images accessible.⁴⁴

All of these factors—diminished financial resources, loss of employees devoted to maintaining archival resources, remote

https://www.washingtonpost.com/business/economy/a-hedge-funds-mercenary-strategy-buy-newspapers-slash-jobs-sell-the-buildings/2019/02/11/f2c0c78a-1f59-11e9-8e21-59a09ff1e2a1_story.html [<https://perma.cc/SU5B-ASAJ>] (describing how Gannett, one of America's largest newspaper chains, had sold off more than \$150 million worth of properties as of 2015); *see also* Amita Sharma, *How the Union-Tribune's New Owner Downsizes Its Businesses*, KPBS (Nov. 9, 2023, 6:00 AM), <https://www.kpbs.org/news/economy/2023/11/09/how-the-union-tribunes-new-owner-downsizes-its-businesses> [<https://perma.cc/V95N-GZVY>] (stating that hedge fund Alden Capital, America's second-largest owner of newspapers, "often sells the newsroom as real estate and pushes reporters to work from home").

⁴³ *See, e.g.*, Brian Hallenbeck, *The Day Listing Building for Sale, Plans Move to Leased Space in Downtown New London*, DAY, <https://www.theday.com/local/20220204/the-day-listing-building-for-sale-plans-move-to-leased-space-in-downtown-new-london/> [<https://perma.cc/W3MK-UJKJ>] (Feb. 6, 2022, 6:15 PM) (describing how a Connecticut newspaper's owners finalized a long-planned sale of the newspaper building once COVID-19 forced employees to work from home); Laura Layden, *NCH Buys Naples Daily News Building for Nearly \$28 Million*, NAPLES DAILY NEWS, <https://www.naplesnews.com/story/money/business/local/2020/12/16/nch-buys-naples-daily-news-building-undisclosed-amount/3926317001/> [<https://perma.cc/Y22V-E85T>] (Dec. 16, 2020, 11:11 AM) (discussing a South Florida newspaper's decision to sell its headquarters building, which was underutilized as most employees worked remotely); *Tribune Publishing Closing Offices of Capital Gazette, Carroll County Times; Papers Will Still Publish*, CBS NEWS (Aug. 12, 2020, 5:00 PM), <https://www.cbsnews.com/baltimore/news/capital-gazette-closing-annapolis-office-paper-will-still-publish/> [<https://perma.cc/C3ND-N4SY>] (reporting on the closure of, among others, a Maryland newspaper facility, which was hastened by COVID-19 work-from-home policies).

⁴⁴ *See* Boyles & Meisinger, *supra* note 5, at 184 (noting that while some morgues were donated to historical societies, others "were sold to generate revenue"); *see also* Hansen & Paul, *Archives*, *supra* note 37, at 294 (reporting that hard-copy collections of images are "spotty," in part because cash-strapped publications split up their photo archives by donating some to libraries or archives but selling others to commercial vendors, which means that "no comprehensive archive of photos and negatives" from the newspaper exist). In their interviews with newsroom leaders at ten publications, Hansen and Paul documented at least two instances in which the vendors who acquired photo archives had gone out of business or changed ownership, putting the continued accessibility of those archives under a cloud of uncertainty. Hansen & Paul, *Archives*, *supra* note 37, at 295.

ownership by corporate profiteers, and the loss of physical storage repositories—add up to existential peril for newspapers’ photography collections. When there is no one to steward the collections, and nowhere to store them, these resources are at risk of simply being discarded.⁴⁵

Library archivist Abraham A. Schechter witnessed this phenomenon when his hometown newspaper, the *Portland Press Herald*, sold its long-time headquarters building in 2009 after a new owner bought the paper and began downsizing.⁴⁶ Alerted by the founder’s family, Schechter showed up at the old building just in time to rescue discarded photo negatives from being smelted for their silver content.⁴⁷ His prize was more than 500,000 images spanning the period from 1936 to 2004, chronicling the evolution of Portland and memorializing the way local people lived and worked throughout the 20th century.⁴⁸ Bringing the story full-circle, the *Press Herald* now displays some of the images Schechter salvaged for the Portland Public Library on the newspaper’s own website, evidencing a belated recognition that there is value in sharing depictions of both monumental and mundane local history.⁴⁹

⁴⁵ See Saunders, *supra* note 4, at 138 (observing that morgues may be incorrectly perceived as duplicative of microfilm, and that therefore, “[n]ewspaper morgues have been discarded all too often”); see also Laura McCann, *The Whole Story: News Agency Photographs in Newspaper Photo Morgue Collections*, 80 AM. ARCHIVIST 163, 169 (2017) (“[As newspapers struggled financially and closed, s]ome surviving newspapers transitioned their photo morgues to digital format and relinquished their physical morgues to save money on storage.”).

⁴⁶ Abraham A. Schechter, *Keeping Time*, YANKEE (Jan. 3, 2022), <https://newengland.com/today/keeping-time-portland-maine-archival-photos/> [<https://perma.cc/8CTY-VEDH>]; see also *MaineToday Media Acquires Maine Newspapers, Online Information Portal and Related Real Estate Assets*, BUS. WIRE (June 15, 2009, 6:43 PM), <https://web.archive.org/web/20120924064541/http://www.businesswire.com/news/home/20090615006483/en/MaineToday-Media-Acquires-Maine-Newspapers-Online-Information> (describing the sale of the *Portland Press Herald*, amongst other media assets being sold, and the planned building sale of the newspaper).

⁴⁷ Schechter, *supra* note 46.

⁴⁸ *Id.*

⁴⁹ *From the Archive: Street Scenes from the Past*, PORTLAND PRESS HERALD, <https://www.pressherald.com/media/gallery/archive-street-scenes-past/> [<https://perma.cc/83XU-ZRCU>] (last visited Jan. 31, 2024) (displaying twenty-one photos from a library’s archive, which depict local street scenes from the years 1915 to 1976).

Chicago historian Elaine Egdorf recently shared her story of helping avert the near-erasure of archival photos when her neighborhood newspaper, the *Daily Southtown*, moved into less-spacious quarters to save money.⁵⁰ A freelancer for the *Southtown*, alarmed that the newspaper's photo archives were imminently headed for the garbage dump, called Egdorf and clandestinely invited her and other local preservationists to grab whatever they could salvage from the newspaper's storage room.⁵¹ Although Egdorf and her collaborators were able to save multiple boxes' worth of archival material, she said at least one *Southtown* photographer told her he had been instructed "to throw away his negatives because they wouldn't be able to find anyone that would take them."⁵²

While paper has a limited lifespan, digitally published images can last forever—theoretically. But in reality, news websites and their online archives have proven even less durable than newsprint.⁵³ Unfortunately, newsrooms only belatedly awakened to the fragility of online publishing. Having failed to take affirmative steps to archive their digital editions, news publications have lost years' worth of their online-only editions.⁵⁴ As Hansen and Paul found in their survey of ten U.S. newsrooms:

⁵⁰ Paul Eisenberg, *Landmarks: The Secret Behind the Last-Minute Rescue of a Century's Worth of Suburban Stories*, CHI. TRIB.: DAILY SOUTHTOWN (Jan. 8, 2023, 10:15 AM), <https://www.chicagotribune.com/suburbs/daily-southtown/ct-sta-eisenberg-landmarks-st-0109-20230108-chbk3ivvbbhsljqlwcmgr3satxq-story.html> [https://perma.cc/D8V2-HQTU].

⁵¹ *Id.*

⁵² *Id.*

⁵³ See Sharon Ringel & Angela Woodall, *A Public Record at Risk: The Dire State of News Archiving in the Digital Age*, COLUM. JOURNALISM REV. (Mar. 28, 2019), https://www.cjr.org/tow_center_reports/the-dire-state-of-news-archiving-in-the-digital-age.php [https://perma.cc/866M-EF7E] (reporting that nineteen of twenty-one news organizations surveyed had no plan for preservation of their digitally published content, and none of the twenty-one had any system for archiving materials they published to social networking platforms); see also John Ruch, *An LGBTQ News Site Disappears in a Warning to All Media in the Digital Age*, SAPORTA REP. (July 10, 2023), <https://saportareport.com/an-lgbtq-news-site-disappears-in-a-warning-to-all-media-in-the-digital-age/columnists/johnruch/> (reporting that fourteen years' worth of archival coverage from news organization specializing in LGBTQ coverage had disappeared from the Internet, and noting the disappearance is part of a larger trend of archival news sites vanishing after publications close).

⁵⁴ See Barbara Quint, *Where Have All the Archives Gone?*, INFO. TODAY, July–Aug. 2009, at 1, 1, <https://www.infotoday.com/it/jul09/Quint.shtml> [https://perma.cc/9KWJ-]

Not one publication has a complete archive of its website. Most can go back no earlier than 2008 The fact that these news organizations have no record of what their early Web publication looked like means the opportunity to do serious historical research about the dawn of the digital news age is lost.⁵⁵

The fragility applies not just to the online edition of newspapers, but also to photos taken using digital technology that might never have existed in hard-copy form in a morgue. The relative ease of capturing images afforded by digital photography, and the subsequent surge in the number of valuable images, is beneficial for photographers and archivists alike.⁵⁶ But these “born digital” materials may paradoxically be at higher risk of destruction or loss compared to their analog counterparts.⁵⁷ Protocols for physically storing prints and negatives of photographs did not readily translate to images existing only in digital form, so that—even though digital photos take up no physical space—many newsroom libraries have failed to retain copies of unpublished images.⁵⁸

Moreover, when newspapers are merged out of existence or simply go out of business, their websites (including any digital image repositories they once maintained) often go offline entirely.⁵⁹ In

SRM5] (“[S]adly, no matter what new policies and procedures may emerge in response to the dramatic changes in publisher practices in these challenging times, web-based content for the last half of the 1990s and the first decade of the 21st century from established, high-quality publications has been lost forever. Neither publishers nor third-party aggregators have stepped up to their responsibility to protect digital content as well as print content.”).

⁵⁵ Hansen & Paul, *Archives*, *supra* note 37, at 295.

⁵⁶ See Brian Keough & Mark Wolfe, *Moving the Archivist Closer to the Creator: Implementing Integrated Archival Policies for Born Digital Photography at Colleges and Universities*, 10 J. ARCHIVAL ORG. 69, 70 (2012).

⁵⁷ See *id.*

⁵⁸ Greenwood, *supra* note 3, at 85–86 (“Newspaper photographers report the adoption of digital technology has affected photographic archiving at newspapers. A lower proportion of digital photographs taken is preserved compared to film-based images, and the policies in place governing storage of digital images do not always result in sound practices.”).

⁵⁹ See, e.g., Egan, *supra* note 21 (describing the disappearance of local newspapers in Canada, where soon after the publications closed, “online access to their archives disappeared as well”).

2018, the Virginia Press Association reported that, of six Virginia newspapers known to have gone out of business during the preceding year, two of them (the *Hopewell News* and the *Tazewell County Free Press*) made no provision for maintaining their websites, meaning that all of their editorial content disappeared unless preserved by public librarians.⁶⁰ As the Press Association lamented, “[o]nce the proverbial website switch is flipped, the paper ceases to exist in two distinct forms—print and digital. With the flip of a switch, an archival void is created when the newspaper stories and photographs disappear for good from the internet.”⁶¹

The newspaper closure is not a brand-new phenomenon. As with any profit-motivated business, some businesses fail and go under, or merge with or are acquired by competitors.⁶² At times, the owners have arranged for photo archives to outlive the newspapers in libraries and museums, as the owners of New Jersey’s long-defunct *Newark News* did in the 1970s by donating its archives to the Newark Public Library.⁶³ The enormity of that one donation—reportedly, some 500,000 envelopes of paper clippings and 250,000 photographs⁶⁴—demonstrates just how much local history resides in newsroom archives throughout the country. What is different between the 1970s and today is both the pace of closures and the fact that relatively few troubled newspapers are locally owned, meaning

⁶⁰ *What Happens When a Newspaper’s Website Disappears?*, VA. PRESS ASS’N (Aug. 3, 2018), <https://www.vpa.net/articles/what-happens-when-a-newspapers-website-disappears/> [https://perma.cc/K4XH-J7UF].

⁶¹ *Id.*

⁶² *See, e.g.*, B. Drummond Ayres Jr., *Washington Star Is to Shut Down After 128 Years*, N.Y. TIMES (July 24, 1981), <https://www.nytimes.com/1981/07/24/us/washington-star-is-to-shut-down-after-128-years.html> [https://perma.cc/AYA8-LHF4] (reporting on the 1981 demise of the *Washington Star*, a Washington, D.C.-based competitor to the *Washington Post*, whose demise stemmed from declining readership and advertising revenues); Scott Sherman, *The Long Good-Bye*, VANITY FAIR (Nov. 30, 2012), <https://www.vanityfair.com/culture/2012/11/1963-newspaper-strike-bertram-powers> [https://perma.cc/RFN4-RYFX] (describing how the 1963 strike temporarily shuttered seven New York newspapers and led four to go out of business).

⁶³ *See* Josephine Bonomo, *Library Acquires the Newark News Files*, N.Y. TIMES (Apr. 15, 1973), <https://www.nytimes.com/1973/04/15/archives/library-acquires-the-newark-news-files-a-years-work-ahead-a.html> [https://perma.cc/2SVA-EKK2].

⁶⁴ *Id.*

their owners are less invested in the long-term welfare of each locality.⁶⁵

II. THE VALUE OF ARCHIVAL PHOTOS

A. *A Snapshot of the Past: Using Old Photos to Tell New Stories*

Relatively few of the images shot by photojournalists ever make it into the newspaper (or, even in the digital publishing era, onto news websites).⁶⁶ Only a tiny fraction of these troves of unpublished images have been digitized for preservation and public access.⁶⁷ For this reason, access to the published back-issues of newspapers provides only the proverbial tip-of-the-iceberg perspective on newsworthy local events and people.

Authors, filmmakers, and historians regularly draw on photos obtained from community newspapers to document the life of the community and country.⁶⁸ Media makers use archival material for a variety of purposes (e.g., capturing reality, sharing stories, and selling products).⁶⁹ Archival materials are regularly used to supplement fictionalized works and as visual evidence of the past and are featured in academic research and documentary programming.⁷⁰ According to a survey of repositories conducted by Jennifer Hain Teper, many repositories shared that their photo morgue collections

⁶⁵ See Michael Ewens et al., *Local Journalism Under Private Equity Ownership* 32 (Nat'l Bureau of Econ. Rsch., Working Paper No. 29743, 2022), https://www.nber.org/system/files/working_papers/w29743/w29743.pdf [<https://perma.cc/U9U6-FH84>] (“[F]ollowing buyouts of daily newspapers [by private equity firms], there is a shift in the composition of news away from local government issues and toward national politics topics. The absolute amount of local news declines as well.”).

⁶⁶ See, e.g., Ringel, *supra* note 2, at 251 (“[T]he materials preserved in [*The New York Times*] morgue include clippings and photos that did not always make their way into the published paper.”).

⁶⁷ See, e.g., *id.* at 252 (citing a *New York Times* archivist’s estimate that, until very recently, only 1% of *The New York Times* morgue’s holdings have been digitized).

⁶⁸ See KATHLEEN A. HANSEN & NORA PAUL, *FUTURE-PROOFING THE NEWS: PRESERVING THE FIRST DRAFT OF HISTORY* 4–5 (2017).

⁶⁹ See SHEILA CURRAN BERNARD & KENN RABIN, *ARCHIVAL STORYTELLING* 4-6 (Routledge 2d ed. 2020).

⁷⁰ *Id.*

are highly requested.⁷¹ Teper's survey results regarding how photo morgue collections are used suggests that these morgue collections appeal to a diverse user base.⁷² The use of archival material is not limited to just journalists and journalism researchers; a wide variety of fields use archival images in their work, ranging from architects to movie producers.⁷³ As Hansen and Paul observe, "[h]istorians use newspaper archives to document a period in history and to understand how reality was shaped for and by news organizations Genealogists use newspaper archives to conduct research about family ties and kinship connections."⁷⁴

Journalists significantly rely upon an organized and available archive to support their reporting. Archival photographs enhance coverage by providing context to today's news in many ways, including illustrating the life experiences of famous people.⁷⁵ For example, when Senator Bernie Sanders of Vermont achieved nationwide prominence as a leading presidential candidate, journalists turned up an archival news photo of his arrest at an August 1963 Chicago protest, which helped him rebut questions about his claimed involvement in the civil-rights movement.⁷⁶ Archival images provide a brief

⁷¹ Jennifer Hain Teper, *Newspaper Photo Morgues—A Survey of Institutional Holdings and Practices*, 28 LIBR. COLLECTIONS, ACQUISITIONS, & TECH. SERVS. 106, 118 (2004) (reporting survey data showing that photo morgue collections are highly requested materials, and in some cases they are the most used collection in a repository, with 20% of analyzed collections receiving between 100 and 500 requests annually and 19% receiving over 500 requests annually, which averages out to between "one and two requests per day").

⁷² See McCann, *supra* note 45, at 176

⁷³ *Id.*

⁷⁴ Hansen & Paul, *Archives*, *supra* note 37, at 297.

⁷⁵ See, e.g., OSV News, *Late Singer-Activist Harry Belafonte Found Inspiration in Life of Sister Thea Bowman*, RECORD (May 2, 2023), <https://therecordnewspaper.org/late-singer-activist-harry-belafonte-found-inspiration-in-life-of-sister-thea-bowman/> [<https://perma.cc/E2KH-JFHK>] (using archival news-service photo from 1988 to accompany a 2023 obituary of legendary singer and civil-rights icon Harry Belafonte); Bill Chappell, *From Tracking Santa to Chinese Spy Balloons, Here's What We Know About NORAD*, NPR NEWS, <https://www.npr.org/2023/02/15/1157208361/military-norad-chinese-spy-balloon> [<https://perma.cc/U6FR-Q2SZ>] (last updated Feb. 15, 2023, 6:25 PM) (using an archival wire-service photograph to show what the mountainous entryway to NORAD's headquarters once looked like before its 2006 move).

⁷⁶ See Katherine Skiba, *Feb. 19, 2016: Arrest Photo of Young Activist Bernie Sanders Emerges from Tribune Archives*, CHI. TRIB., <https://www.chicagotribune.com/news/ct->

historical snapshot documenting community life. Canada's *Vancouver Sun*, for instance, dipped into its archives to retrieve a 55-year-old photo of a local nightspot that, according to local lore, was the first establishment in the community to sell pizza.⁷⁷

For historians and other researchers, news archives provide a window into the way people behaved and thought in earlier generations. Digitized archival photographs regularly turn up as an accompaniment to historians' accounts of decades-old news events.⁷⁸ For example, unpublished archival images have surfaced new information into a historically debated mountain expedition in Alaska.⁷⁹ The found photographic evidence alone confirmed that a groundbreaking 1910 climb really took place, putting to rest decades of skepticism that it might have been a hoax.⁸⁰ Library sciences professor Alexandra M. Chassanoff has examined the practices of historians in selecting images for study and publication.⁸¹ The value of archival images extends beyond the image itself; captions and descriptive information written on or included with the photograph are regarded as valuable contextual elements in historical studies.⁸² Preservationists draw on archival photographs as evidence to verify what places looked like, which supports authentic preservation and restoration projects.⁸³

Documentarians are one of the most notable users of archival material. News archives are rich sources of material for filmmakers,

bernie-sanders-1963-chicago-arrest-20160219-story.html [https://perma.cc/3XTD-UL37] (last updated Feb. 22, 2016, 7:39 AM).

⁷⁷ Dan Fumano, *Slices of the City: A Brief History of Vancouver Told Through Pizza*, VANCOUVER SUN, <https://vancouversun.com/news/local-news/slices-of-the-city-a-brief-history-of-vancouver-told-through-pizza> [https://perma.cc/L46V-824K] (Jan. 11, 2023).

⁷⁸ See Alexandra M. Chassanoff, *Historians' Experiences Using Digitized Archival Photographs as Evidence*, 81 AM. ARCHIVIST 135, 136 (2018).

⁷⁹ See Rod Boyce, *Newly Found Photos Shed Light on 1910 Denali Climb*, GEOPHYSICAL INST., U. ALASKA FAIRBANKS (Dec. 2, 2022), <https://www.gi.alaska.edu/news/newly-found-photos-shed-light-1910-denali-climb> [https://perma.cc/W3XL-HKCA] (explaining how the newly acquired photos challenge previously held beliefs and further clarify the oft-debated event).

⁸⁰ *Id.*

⁸¹ Chassanoff, *supra* note 78, at 136 (reporting findings based on interviews with historians about their use of digital archival photographs for research).

⁸² See *id.* at 145.

⁸³ See *id.* at 145–46.

both for background research and for visuals that appear onscreen.⁸⁴ To give one of hundreds of examples, George Clooney's Oscar-nominated 2005 film, *Good Night and Good Luck*, about the life of crusading television journalist Edward R. Murrow, drew on news archives to add veracity to its storytelling.⁸⁵ Archival material helps filmmakers clarify events and corroborate facts, as well as establish the tone and climate of earlier times.⁸⁶ Visuals acquired from archives are vital for audiences to connect with the film's topic and feel immersed in a setting that they have not personally observed.⁸⁷ Perhaps the most acclaimed contemporary U.S.-based documentarian, Ken Burns has spoken of "listening to the photographs" to make his films—which rely heavily on still photos, overlaid with narration and music—come alive.⁸⁸ Burns reviewed some 16,000 still photos in researching his signature Emmy-winning film series, *The Civil War*—3,000 of which made it into the final version that aired on PBS in 1990.⁸⁹ Having studied under the legendary photographer Jerome Liebling at Hampshire College, Burns "expressed his preference to tell his stories, wherever possible, with still photographs rather than motion picture footage."⁹⁰

⁸⁴ See SHEILA CURRAN BERNARD & KENN RABIN, ARCHIVAL STORYTELLING: A FILMMAKER'S GUIDE TO FINDING, USING, AND LICENSING THIRD-PARTY VISUALS AND MUSIC 49 (Elsevier 2009) (recommending newspaper morgues as sources for filmmakers and observing that "[g]ood photojournalism can be history changing and iconic"); see also *id.* at 81 (describing archival photos and videos as "a public treasure").

⁸⁵ *Id.* at 121–22.

⁸⁶ See *Factual Filmmaking: How to Use News Archives to Research Your Film*, LEXISNEXIS (Feb. 19, 2023), <https://www.lexisnexis.com/community/insights/professional/b/industry-insights/posts/how-to-find-news-sources-for-filmmakers> [<https://perma.cc/53AB-AESY>].

⁸⁷ See *Ken Burns Shares 9 Useful Tips for Sourcing Archival Footage*, MASTERCLASS (June 7, 2021), <https://www.masterclass.com/articles/ken-burns-shares-useful-tips-for-sourcing-archival-footage> [<https://perma.cc/5LWU-JYLQ>].

⁸⁸ MEGAN CUNNINGHAM, THE ART OF THE DOCUMENTARY 23 (2005) ("I put [the photograph] up, and I look through the viewfinder, and I shoot—five shots, ten shots, two shots, whatever it is, looking, listening to the photographs.").

⁸⁹ See John C. Tibbetts, *The Incredible Stillness of Being: Motionless Pictures in the Films of Ken Burns*, 37 AM. STUD. 117, 120 (1996).

⁹⁰ *Id.*

B. *The Unique Value of Unpublished News Photos*

Published editions of newspapers are widely archived already. Public libraries are reliable repositories for back issues of national and local newspapers.⁹¹ Scholars regularly draw on newspaper archives to document events of the past, including legal researchers, who use news accounts to supplement legislative history in analyzing how and why the law evolves.⁹² However, back-issue collections are notoriously incomplete. Library historian Richard L. Saunders has found that libraries routinely fail to archive all editions of newspapers that publish multiple updated versions throughout the day, often settling for just one daily “final” edition that omits significant swaths of the day’s news.⁹³ Further, he found that library collections do not reliably include specialized regional editions catering to different sectors of a newspaper’s circulation area.⁹⁴ Smaller publications—including the ethnic press serving non-majority audiences—often are not preserved at all.⁹⁵ The advent of digitization has not appreciably closed this gap, as commercial digital services, like libraries, may not capture multiple editions of the same newspaper.⁹⁶ The limited number of published editions of newspapers on

⁹¹ See Saunders, *supra* note 4, at 130–31 (describing how libraries began collecting newspapers on microfilm beginning in the 1930s and, by the 1950s, had largely stopped archiving paper copies at all).

⁹² See, e.g., George C. Thomas III, *Newspapers and the Fourteenth Amendment: What Did the American Public Know About Section 1?*, 18 J. CONTEMP. LEGAL ISSUES 323, 325–28 (2009) (reporting the findings of research in newspaper archives to document whether the Fourteenth Amendment was understood at the time of its ratification in 1868 to incorporate the Bill of Rights against state and local governments); Marco Brydolf-Horwitz, *Risk, Property Rights, and Antidiscrimination Law in Rental Housing: Toward a Property-in-Action Framework*, 45 L. & SOC. INQUIRY 871, 879 (2020) (using archival news articles to document the circumstances surrounding the enactment of local ordinances that restrict landlords from denying housing to people with criminal records); Clifford Rosky, *Anti-Gay Curriculum Laws*, 117 COLUM. L. REV. 1461, 1476 (2017) (drawing on newspaper archives to describe the political climate surrounding the enactment of decades worth of state laws both supporting and restricting LGBTQ rights).

⁹³ Saunders, *supra* note 4, at 132.

⁹⁴ *Id.*; see also *id.* at 137 (concluding that less than one-third of the contents of the print edition of a Memphis newspaper were preserved in microfilmed form).

⁹⁵ See *id.* at 133.

⁹⁶ See *id.* at 135 (making this observation in relation to a Pittsburgh-area newspaper and stating that large-scale efforts to digitize newspapers may “encourage a second round of American newspapers’ disappearance”).

microfilm may increase the value of morgue contents. The images in the morgue may very well be the only remaining evidence of community history, and although once published, these images may have never been seen by individuals today if the published edition was not preserved on microfilm.⁹⁷

Library back-issues can be invaluable research tools. To cite just one recent example, a College of Charleston graduate student made a breakthrough discovery about the enormity of the Charleston area's slave trade by combing through advertisements in digitized newspaper archives.⁹⁸ But unpublished photos supplement the historical record in important ways. For one thing, the quality of unpublished photos is likely to be far superior in distinctness and detail to the version that appeared on the printed page. For filmmakers, authors, and researchers, a small copy-of-a-copy appearing on the microfilm version of a printed newspaper may be a feeble substitute for the original photograph, especially since so many newspaper photos are printed in black-and-white rather than color.⁹⁹

Many photographs are not selected for publication for a variety of reasons—the images may have been deemed too graphic for publication, pose potential privacy violations, or are outtakes that never made the cut.¹⁰⁰ In 2006, Alabama's *Birmingham News* resurrected long-lost photos from the civil rights movement for a special

⁹⁷ See *id.* at 137 (“[O]nly about 25%–30% of the stories in [the *Memphis Press-Scimitar*’s] morgue clippings appeared in the microfilmed newspaper in any form at all. That means 70%–75% of the five hundred cartons of clippings were the *only* copies of those stories extant.”).

⁹⁸ See Jennifer Berry Hawes, *How a Grad Student Uncovered the Largest Known Slave Auction in the U.S.*, PROPUBLICA (June 16, 2023, 5:00 AM), <https://www.propublica.org/article/how-grad-student-discovered-largest-us-slave-auction> [<https://perma.cc/7YR8-4G4Y>].

⁹⁹ See, e.g., Will Higginbotham, *When the Gray Lady Started Wearing Color*, N.Y. TIMES (Oct. 4, 2018), <https://www.nytimes.com/2018/10/04/insider/history-times-color-photos.html> [<https://perma.cc/2V8J-W337>] (describing how *The New York Times* used exclusively black-and-white photos until 1993 and did not publish a color front-page photo until 1997).

¹⁰⁰ See MIGUEL FRANQUET SANTOS SILVA & SCHOTT ELDRIDGE II, THE ETHICS OF PHOTOJOURNALISM IN THE DIGITAL AGE 33 (2020) (disclosing rules and ethical considerations when choosing whether to publish an image).

retrospective edition titled “Unseen, Unforgotten.”¹⁰¹ An intern had discovered a box in a newsroom storage closet containing negatives of thousands of photos from the 1950s and ‘60s, most of which had not been published.¹⁰² Some theorize that the photos were suppressed because they were regarded as too upsetting for the audience, but others suggest that the *Birmingham News* was complicit in downplaying the severity of racial violence and unrest.¹⁰³ In this way, images that might have been deemed unpublishable in an earlier generation can attain newfound life.

Unpublished photos can capture individuals and events in their purest form, which at times may not have been deemed appropriate for public viewing but are essential to understanding the whole story. For instance, mainstream news organizations generally do not show identifiable images of victims of violence, as a matter of ethics and professional judgment.¹⁰⁴ But their archives may contain uncensored images that fully capture the depth of a human tragedy, such as a mass murder or a war crime.¹⁰⁵ On a much lighter note,

¹⁰¹ Bob Carlton, *Birmingham 1963: Photographers Were on the Front Lines to Capture the Civil Rights Movement*, ADVANCE LOC., https://www.al.com/spotnews/2013/08/post_979.html [https://perma.cc/J45R-2HXL] (Aug. 4, 2013 11:30 AM) (“In February 2006, about 30 of [the newspaper’s photographers’] unpublished photos . . . finally appeared in print for the first time in an eight-page special section of *The Birmingham News* titled “Unseen, Unforgotten.”); *Birmingham Gets New Look at Past Civil Rights-Era Photos Uncovered*, WASH. POST (Feb. 26, 2006) [hereinafter *Birmingham Gets New Look*], <https://www.washingtonpost.com/archive/politics/2006/02/27/birmingham-gets-new-look-at-past-span-classbankheadcivil-rights-era-photos-uncoveredspan/b133feb2-1f51-4c4e-8f1e-e6b230bec3/> [https://perma.cc/MR53-JPBU] (discussing *Birmingham News*’ discovery of the unpublished civil rights era photographs and the “Unseen, Unforgotten.” article).

¹⁰² Carlton, *supra* note 101; *Birmingham Gets New Look*, *supra* note 101.

¹⁰³ See Carlton, *supra* note 101.

¹⁰⁴ See Paul Farhi, ‘*Show the Bodies*’: Mass Shootings Spark Media Debate on Gory Photos, WASH. POST (July 13, 2022, 7:00 AM), <https://www.washingtonpost.com/media/2022/07/13/media-july-4-massacre-photo/> [https://perma.cc/9R64-B8GY].

¹⁰⁵ See Elizabeth Williamson, *From Sandy Hook to Uvalde, the Violent Images Never Seen*, N.Y. TIMES (May 30, 2022), <https://www.nytimes.com/2022/05/30/us/politics/photos-uvalde.html> [https://perma.cc/4HAQ-5GQX] (discussing the debate over whether news organizations are sanitizing history by refusing to publish crime-scene photos of mass school shootings); Fred Ritchin, *Why Violent News Images Matter*, TIME (Sept. 2, 2014, 4:00 AM),

unpublished photos might capture off-guard moments in which people are more genuine because they are unposed. Photographer Terry O'Neill created “one of the most recognizable celebrity portraits of the 20th century” when actress Faye Dunaway posed by her swimming pool with the Academy Award she had won the night before for starring in *Network*.¹⁰⁶ But to get the “iconic” 1977 image of Dunaway in her shimmering party dress, eyeing the statuette with some mixture of fatigue and ambiguity, O'Neill shot more than 170 variations with Dunaway trying out various poses and moods—images that only recently went on exhibition, giving a much fuller depiction of Dunaway's playfulness.¹⁰⁷ It can be argued that access to unpublished photos is *more* valuable than access to published ones, because of their completeness and candor.

In 2016, a group of *The New York Times* staff members discovered stacks of archival images and proceeded to explore the depths of history within the newfound snapshots.¹⁰⁸ The photographs featured prominent personalities and captured both historic landmarks in Black history as well as slice-of-life images of everyday life for Black New Yorkers.¹⁰⁹ These photos were cataloged into the month-long *Unpublished Black History* series.¹¹⁰ *Times* staff members collected hundreds of the archival photographs in the book *Unseen: Unpublished Black History from The New York Times Photo*

<https://time.com/3705884/why-violent-news-images-matter/> (explaining that publications sometimes rationalize disturbing photos as a way of protecting child viewers, but that some critics argue editors “are unethically withholding from readers certain horrific imagery of contemporary conflicts and disasters because of fear of offending or shocking, or even from a fear that readers will abandon the publication altogether.”).

¹⁰⁶ Jacqui Palumbo, *Why This Morning-After Portrait of Faye Dunaway Became an Iconic Hollywood Moment*, CNN (June 6, 2023, 1:03 PM), <https://www.cnn.com/style/terry-oneill-faye-dunaway-snap/index.html> [<https://perma.cc/9ARN-E87L>].

¹⁰⁷ *Id.*

¹⁰⁸ See Shan Wang, *The New York Times Is Unearthing Unpublished Photos from Its Archives for Black History Month*, NIEMAN LAB (Feb. 3, 2016, 10:55 AM), <https://www.niemanlab.org/2016/02/the-new-york-times-is-unearting-unpublished-photos-from-its-archives-for-black-history-month/> [<https://perma.cc/MY24-T8MQ>].

¹⁰⁹ *Id.*

¹¹⁰ See Rachel L. Swarns et al., *Unpublished Black History*, N.Y. TIMES, <https://www.nytimes.com/interactive/projects/cp/national/unpublished-black-history> [<https://perma.cc/BVD7-2U6N>] (last visited Feb. 1, 2024).

Archives.¹¹¹ The *Times* archive houses millions of photographs, sitting in drawers for decades, raising the prospect of dozens of other such buried-treasure stories waiting to be told.¹¹²

It is easier than ever for photos to reach a mass audience now that the constraints of the printed page are no longer a limiting factor. Excellent-quality photos may well have been shelved in earlier decades for no other reason than limited space on the page, meaning that archives undoubtedly are filled with unseen images every bit as good as the ones selected for publication. The ability to display multiple photos in online galleries provides a more comprehensive understanding of events, as the *Birmingham News* experience demonstrates.¹¹³

III. WHO “OWNS” HISTORY?

One uncertainty that may complicate efforts to rescue newspapers’ photo repositories is copyright ownership. Libraries and other organizations might understandably hesitate to take responsibility for curating vast collections of images without a clear chain of ownership, especially if the images are intended for public display and even more so if they are intended to be scanned and made accessible online. As discussed below, anyone who republishes or redistributes the original, creative work of others is—at least theoretically—running the risk of a copyright infringement claim without the approval of the person with authority to give legally valid consent. For a library of thousands of photos gathered over many decades of publication (Denver’s *Rocky Mountain News*, for instance, was in business for 150 years until it folded in February 2009),¹¹⁴ it may be an insurmountable undertaking to sort out which images are protected

¹¹¹ Tobi Haslett, *What Could Have Been Iconic*, N.Y. TIMES (Dec. 1, 2017), <https://www.nytimes.com/2017/12/01/books/review/unseen-unpublished-black-history-photography.html> [<https://perma.cc/7AHX-TG4T>].

¹¹² *Id.*

¹¹³ See Carlton, *supra* note 101 (explaining that *Birmingham News* used its website to supplement the thirty archival photos of the civil-rights era selected for publishing in an eight-page special section).

¹¹⁴ See Pérez-Peña, *supra* note 10.

by copyright law, and of those, who could consent to their republication.

A. *The Fundamentals: Intellectual Property Law and Photo Ownership*

Copyright law recognizes that the creator of a piece of original, creative work is legally entitled to control how the work is used.¹¹⁵ Among the bundle of rights protected by the Copyright Act is the right to decide how the creator's work is displayed or republished.¹¹⁶ The creator only forfeits ownership by signing a contractual transfer of rights, or by way of a "work made for hire" employment relationship.¹¹⁷ The foundational purpose of copyright law, going back to its earliest roots in the Constitution, is to provide incentives for creators to share their knowledge and ideas, thereby advancing societal progress.¹¹⁸ Properly understood, copyright law does not exist to protect profiting from creative work merely for its own sake, but as a means to the ultimate end of enriching culture.¹¹⁹

While copyright is strong and seemingly absolute, its harshest effects are blunted by the doctrine of fair use, a statutorily recognized defense that legitimizes some reuse of copyright-protected

¹¹⁵ See Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569, 1573 (2009) ("[The dominant view of U.S. copyright law is that] copyright exists primarily (if not entirely) to provide creators with an incentive to produce creative expression through the promise of limited exclusionary control over their creative work.").

¹¹⁶ 17 U.S.C. § 106 (enumerating rights that adhere to authorship).

¹¹⁷ 17 U.S.C. § 201(b) (describing transfer of ownership by way of a "work made for hire" relationship); 17 U.S.C. § 204(a) (describing transfer of ownership by way of signed writing); see also *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 750–51 (1989) (holding that, in deciding whether ownership of a work has transferred from the creator to the entity that commissioned the work, courts should refer to principles of agency law to determine whether an employer-employee relationship or an independent contractor relationship existed).

¹¹⁸ See U.S. CONST. art. I, § 8, cl. 8 ("The Congress shall have the Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.").

¹¹⁹ See *Andy Warhol Found. for the Visual Arts v. Goldsmith*, 598 U.S. 508, 560 (2023) (Kagan, J., dissenting) ("The law does not grant artists (and authors and composers and so on) exclusive rights—that is, monopolies—for their own sake. It does so to foster creativity . . .").

works even without the owner's approval.¹²⁰ Fair use recognizes that cultural advancement requires allowing creators to build on prior works, so long as they add some of their own creative value.¹²¹ The Copyright Act singles out certain uses as presumptively fair, including commentary, research, and news coverage.¹²² It is possible to have a justifiable fair use in the for-profit commercial setting, so long as the new use is sufficiently "transformative" from the original.¹²³ In deciding whether a use is defensibly "fair," the Act directs courts to consider a bundle of factors, but the most important consideration is whether the subsequent use unduly detracts from the market for the original work by serving as a substitute.¹²⁴

Historically, copyright protection lasted for 28 years after the date of publication, with the possibility of applying for one 28-year extension for a total maximum of 56 years.¹²⁵ But Congress has repeatedly extended the duration of exclusivity, most recently in 1998.¹²⁶ As a result, a photo taken today will remain the creator's exclusive property for 70 years beyond the creator's death, meaning

¹²⁰ See Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600, 1602 (1982) ("[T]he fair use doctrine allows an individual, in certain circumstances, to make use of at least a part of an author's work without obtaining that author's consent or recompensing the author for that use.").

¹²¹ See Mary L. Shapiro, *An Analysis of the Fair Use Defense in Dr. Seuss Enterprises v. Penguin*, 28 GOLDEN GATE U.L. REV. 1, 18 (1998) ("In part, the fair use privilege, including its application to a parodic infringement, exists to advance and disseminate culture and knowledge.").

¹²² 17 U.S.C. § 107.

¹²³ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 594 (1994) (finding that a rap group's parody of a classic rock song was sufficiently transformative to qualify as a fair use, notwithstanding the group's commercial purpose).

¹²⁴ See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1985) (stating that the effect of purported fair use on the market for an original work is "undoubtedly the single most important element of fair use").

¹²⁵ See *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U.S. 643, 644 (1943) ("[Under the Copyright Act of 1909], a copyright . . . lasts for twenty-eight years from the date of its first publication, and the author can renew the copyright . . . for a further term of twenty-eight years . . .").

¹²⁶ See *Eldred v. Ashcroft*, 537 U.S. 186, 195 (2003) (interpreting the Copyright Term Extension Act of 1998 and describing it as "the fourth major duration extension of federal copyrights").

the creator's great-grandchildren might still profit from it.¹²⁷ And if the photo is created as a work made for hire, exclusivity applies for 95 years from the date of publication or 120 years from the date of creation (whichever expires first).¹²⁸ Once the term of the copyright expires, the work is said to enter the "public domain," meaning that anyone can republish, adapt, or otherwise use it without consent.¹²⁹

A newspaper is regarded as a "collective work" for purposes of copyright law so that the newspaper's publisher—not each individual contributor—owns the compilation.¹³⁰ The owner of a collective work is presumed to have the right to redistribute that work, including providing updates and revisions to it.¹³¹ For that reason, it has been a relatively simple matter for public libraries to obtain all the consent they need to archive, and make publicly available, decades' worth of back issues of newspapers in microfiche or, more recently, digitized format.¹³² Such archives are a staple of public library collections, and are widely used community research resources.

¹²⁷ See 17 U.S.C. § 302(a) ("Copyright in a work . . . subsists from its creation and . . . endures for a term consisting of the life of the author and 70 years after the author's death."); see also *Eldred*, 537 U.S. at 194–96 (tracing the history of congressional actions extending duration of copyright coverage).

¹²⁸ 17 U.S.C. § 302(c).

¹²⁹ See Brad Frazer, *Open Source Is Not Public Domain: Evolving Licensing Philosophies*, 45 IDAHO L. REV. 1, 4 (2009) (explaining that the concept of "public domain" refers both to works whose period of copyright protection has expired and works that were never eligible for copyright protection in the first place, such as works created by U.S. government employees in the course of duty); see also *Tams-Witmark Music Libr. v. New Opera Co.*, 381 N.E.2d 70, 74 (N.Y. 1948) ("[Once the copyright term expired, the work] passed, finally, completely and forever into the public domain and became freely available to the unrestricted use of anyone.").

¹³⁰ See 17 U.S.C. § 201(c) (explaining the concept of "collective works"); U.S. COPYRIGHT OFF., CIRCULAR 62A: GROUP REGISTRATION OF NEWSPAPERS 2 (2021) ("Newspapers are considered collective works because they contain a number of contributions constituting separate and independent works in themselves that are assembled into a collective whole.").

¹³¹ See Rod Dixon, *Profits in Cyberspace: Should Newspaper and Magazine Publishers Pay Freelancer Writers for Digital Content?*, 4 MICH. TELECOMMS. & TECH. L. REV. 127, 150 (1998).

¹³² See Sheila Rabun, *Copyright and Historic Newspapers*, OR. DIGIT. NEWSPAPER PROGRAM (Apr. 1, 2014), <https://odnp.uoregon.edu/2014/04/01/copyright-and-historic-newspapers/> [perma.cc/ES9W-ZXYU] (explaining that the copyright status of newspapers depends on age and other variables).

Nevertheless, once pieces of the compilation are disaggregated, the work ceases to be “collective,” and the individual contributor’s copyright interests can be reawakened, as the U.S. Supreme Court recognized in *New York Times Co. v. Tasini*.¹³³ In *Tasini*, freelance contributors to the *Times* prevailed in asserting their interest in compensation for digital reproductions of their articles, which the *Times* had licensed to Lexis/Nexis (“Lexis”) and other electronic database services.¹³⁴ The Court rejected the assertion that making the *Times*’ archives accessible through services such as Lexis constituted a mere “revision” of the collective work owned by the newspaper; rather, the Court found that because each article was viewable without the context of the full edition, displaying it in Lexis’ digital service amounted to a new publication that required rightsholder (i.e., the freelance author) consent.¹³⁵

Unpublished work gets a special measure of protection against infringement.¹³⁶ Indeed, at common law, an unpublished work was understood to be the exclusive property of its creator indefinitely.¹³⁷ It is understood that copyright law protects the creator’s right to determine whether, and under what terms, a piece of creativity is

¹³³ 533 U.S. 483, 488 (2001).

¹³⁴ *Id.* at 506.

¹³⁵ *Id.* at 503–04. Note that the difference appeared to be the sale of the disaggregated archives through a third-party publisher; when a publisher makes its own archives viewable online, a different analysis applies. Courts have generally agreed that the act of archiving the entire publication is not a new publication requiring a new agreement with freelance contributors. *See, e.g.*, *Greenberg v. Nat’l Geographic Soc’y*, 533 F.3d 1244, 1258 (11th Cir. 2008) (distinguishing *Tasini* and finding that archival presentation of *National Geographic* magazine in digital form, in which articles were displayed with original context, did not constitute new-and-different publication infringing contributors’ copyright interests); *Faulkner v. Nat’l Geographic Enters. Inc.*, 409 F.3d 26, 38 (2d Cir. 2005) (finding that a magazine publisher’s digital archiving of past magazines essentially presented the same material as the print versions, and thus the publisher was allowed to reproduce this copyrighted work).

¹³⁶ *See Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 564 (1985) (observing that a work being unpublished is a “critical element” to the “nature” of that work, and the ability to make a defensible fair use of another’s work is more limited when the work is unpublished).

¹³⁷ Note, *Necessity for Infringement of Common-Law Copyright*, 54 Yale L.J. 697, 699 (1945) (stating that, at common law, copyright in unpublished works was understood to last as long as the work remained unpublished).

published.¹³⁸ If a third party non-consensually distributes the work before the creator does, the creator is deprived of control and the work can lose value if it is already out in the marketplace.¹³⁹ Because there is no publication date to commence the running of the copyright clock, the duration of copyright protection for unpublished work is keyed to the lifespan of the creator.¹⁴⁰ Congress has adjusted the law several times, with the result that works of different vintage qualify for different durations of protection.¹⁴¹ As a product of the 1976 Copyright Act revisions, which took effect on January 1, 1978, unpublished works were placed on similar footing to published works.¹⁴² This means that, for both published and unpublished works, copyright affixes—and the clock begins running—at the time the work is fixed in a tangible form, regardless of whether it is formally registered with the Library of Congress.¹⁴³ Works that are never published are protected until 70 years after the death of its creator.¹⁴⁴ However, out of solicitude for creators who might have been adversely affected by the statutory revisions, Congress provided that, if the rightsholder published the previously unpublished work before the end of 2002, then the work would qualify for 45 more years of protection, not expiring until January 1, 2048.¹⁴⁵ In other words, a person coming across an unpublished photograph in an archival collection will have to know quite a bit about the provenance of the photo, including whether and when its creator died, to determine whether the photograph still has copyright protection.

¹³⁸ See *Harper & Row Publishers*, 471 U.S. at 564 (“The right of first publication encompasses not only the choice whether to publish at all, but also the choices of when, where, and in what form first to publish a work.”).

¹³⁹ See *id.* at 555 (“The author’s control of first public distribution implicates not only his personal interest in creative control but his property interest in exploitation of prepublication rights.”).

¹⁴⁰ See Kenneth D. Crews, *Copyright Duration and the Progressive Degeneration of a Constitutional Doctrine*, 55 SYRACUSE L. REV. 189, 205–09 (2005).

¹⁴¹ *Id.* at 222.

¹⁴² *Id.*

¹⁴³ See Vigdis Bronder, *Saving the Right Orphans: The Special Case of Unpublished Orphan Works*, 31 COLUM. J.L. & ARTS 409, 415 (2008).

¹⁴⁴ 17 U.S.C. § 303(a).

¹⁴⁵ *Id.*; see also Crews, *supra* note 140, at 223 (explaining that the forty-five-year extension was meant as “an inducement to publish the work and share it with the public”).

This inherent uncertainty can deter archivists from putting such works on public display.

B. Copyright in the Newsroom

Photographs produced by salaried newspaper staff photographers belong to the newspaper's owners as works made for hire within the scope of an employment relationship.¹⁴⁶ But newspaper archives will predictably contain at least three different types of images with three different sets of ownership rights: (1) photos taken by salaried employees, (2) photos licensed by freelancers, who may retain ownership of the work,¹⁴⁷ and (3) photos purchased from subscription wire services, which retain ownership of the work.¹⁴⁸ A fourth category is also possible: "handout" photos, which may be provided by businesses, organizations, or government agencies for promotional purposes.¹⁴⁹ This makes it especially confusing to transfer the ownership of newspaper archives to a third party, such as a library, or for that third party to determine what can be displayed to the public without risk of an infringement claim.

The ownership analysis is not always straightforward. As with any other piece of property, the bundle of rights associated with owning a photograph can be possessed by several parties at once if an agreement conveys some rights and reserves others. If a piece of freelance work is not sold outright to a newspaper publisher but is

¹⁴⁶ See 17 U.S.C. § 201(b) (defining copyright ownership for works made for hire).

¹⁴⁷ See Don E. Tomlinson & Christopher R. Harris, *Free-Lance Photojournalism in a Digital World: Copyright, Lanham Act and Droit Moral Considerations Plus a Sui Generis Solution*, 45 FED. COMM'NS L.J. 1, 6 (1992) (stating that, as of 1992, approximately one-half of all photos appearing in weekly news magazines were shot by freelancers rather than staff photographers).

¹⁴⁸ See McCann, *supra* note 45, at 170–71 (reporting on the author's review of a newspaper morgue archive maintained at New York University, where "roughly half" of the photos turned out to be from the Associated Press, United Press International, and other wire services); see also *id.* at 176 ("The inclusion of news agency photographs [in archival collections] introduces further challenges due to the retention of copyright by the news agencies . . .").

¹⁴⁹ See Phil Bicker, *Public Service or Propaganda? Top Handout Photos of 2013*, TIME (Jan. 8, 2014, 4:00 AM), <https://time.com/3806118/public-service-or-propaganda-top-handout-photos-of-2013/> [<https://perma.cc/U7W2-D98H>] (explaining the concept and origin of handout photos).

merely licensed for a single use, then residual ownership—and the copyright rights associated with ownership—remain with the creator.¹⁵⁰ Freelancers typically retain the right to license their work beyond the initial client after some period of exclusivity because they can also earn a living from future clients such as “stock image” agencies.¹⁵¹ Freelancer contracts with news publications traditionally have been simplistic and—if the contracts can even be located at all, after the passage of decades—may not provide for the disposition of copies of the work that reside in newsroom morgues.¹⁵²

Some photojournalists have foresightedly provided for the images they own to be preserved after their deaths, or their heirs have arranged for the works to be archived by libraries or historical societies.¹⁵³ But there is no institutionalized method of making this work findable and accessible to researchers.

¹⁵⁰ See John D. Shuff & Geoffrey T. Holtz, *Copyright Tensions in a Digital Age*, 34 AKRON L. REV. 555, 567 (2001) (stating that, when an author licenses an article to a publication, the publication has authority to publish the article and include it in future collective compilations, but the author is presumed to retain all rights in their article unless the author expressly transfers the copyright).

¹⁵¹ Tomlinson & Harris, *supra* note 147, at 5; see also *id.* at 24–25 (explaining that national news magazines typically demand a specified exclusivity period, within which only the news magazine may use the freelancer’s photos and after which the photos revert back to the creator and can be sold or licensed to others).

¹⁵² Dixon, *supra* note 131, at 149–50 (“Historically, freelance writers and publishers have been lax in creating written, let alone unambiguous, contracts. Until recently, magazines and newspapers bought articles simply on the basis of oral agreements”); see also *id.* at 154 (commenting on the uncertainty surrounding rights in digital content and noting the prevalence of “crude agreements” in the publishing industry, “which until recently had been sufficient”).

¹⁵³ See, e.g., Derek Gentile, *Iconic Collection of Photographer Lucien Aigner Finds a Home*, BERKSHIRE EAGLE (Apr. 14, 2016), https://www.berkshireeagle.com/archives/iconic-collection-of-photographer-lucien-aigner-finds-a-home/article_54918b6c-31cb-552d-abb1-c221e9c0ca76.html [https://perma.cc/BV3D-JUA7] (reporting that “tens of thousands” of photos and negatives belonging to a prolific photojournalist, known for iconic photos of historical figures including Winston Churchill and Albert Einstein, would be held jointly by three local galleries and libraries); Eliot Elisofon, HOWARD GREENBERG GALLERY, <https://www.howardgreenberg.com/artists/eliot-elisofon> [https://perma.cc/Q7KA-J7QB] (last visited Jan. 31, 2024) (describing how a New York-based photojournalist, who died in 1973, donated 80,000 photos from his extensive African travels to a Washington, D.C.-based museum of African art).

In some instances, news agency photographs, or wire photos, are included in photo morgues and can present additional complications. These agency photographs, although not generally originating in the newspaper's locality, "are valuable documents revealing the distinctive ways in which a newspaper, and its community, perceived and interpreted nonlocal events."¹⁵⁴ Since wire services do not themselves make images freely available—if they are retained at all, they come with a fee—a newspaper's morgue may be the only place where prints of decades-old wire service photos are accessible.¹⁵⁵ The inclusion of wire photos in archival collections presents a major challenge to fully digitizing morgue collections due to the agencies retaining copyright of the photos.¹⁵⁶

C. "Orphan Works": A Special Sensitivity

To complicate the ownership analysis even further, some images that reside in newspaper morgues may be "orphan works"—that is, works of the proper vintage to qualify for copyright protection, but whose creator cannot be found.¹⁵⁷ Untold millions of photographs have become "orphaned" in recent years because the relaxation of copyright formalities and extension of copyright duration simply means that far more works qualify for protection.¹⁵⁸ If librarians did not rigorously label each image by origin, then the inheritor of a newsroom's photo archives may not be able to identify the person who is in a position to give legally effective consent to reproducing the work. Orphan works understandably pose special concerns for

¹⁵⁴ McCann, *supra* note 45, at 176.

¹⁵⁵ For example, the Associated Press offers a web portal through which its archival photos, and those of partner news organizations, are made available for a fee. AP NEWSROOM, <https://newsroom.ap.org/editorial-photos-videos/plans-pricing> [<https://perma.cc/SCS8-PP4L>] (last visited Jan. 31, 2024).

¹⁵⁶ See McCann, *supra* note 45, at 179.

¹⁵⁷ See *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 92 (2d Cir. 2014) ("An 'orphan work' is an out-of-print work that is still in copyright, but whose copyright holder cannot be readily identified or located.").

¹⁵⁸ See Kelu L. Sullivan, *Orphan Works at the Dawn of Digitalization*, 18 RICH. J.L. & TECH. 67, 75–76 (2012) ("[T]he extension of copyright protection has led to the widespread orphanage of creative works [T]he monopoly rights of absentee copyright holders forecloses the social value of having orphan works adopted, adapted, and made generally accessible." (emphasis omitted)).

archivists, since unknown owners might surface and assert their rights only after a library or museum has invested in compiling a collection. Because it is difficult to prove the *non*-existence of a claimant's ownership rights, it can be challenging for an archivist to mount a defense if a putative rightsholder emerges by surprise.

Whether it violates copyright for a library to offer public access to a photograph without getting a release from the rights-holder is not a settled proposition. There is some school of thought that merely providing access to an image as part of a library collection should qualify for the fair-use defense to copyright infringement.¹⁵⁹ Arguably, organizing visual material into a searchable database for research purposes qualifies under copyright law as a “transformative” use of the material so that a library could safely take advantage of fair use even without a release from the owner for every single image.¹⁶⁰ However, not all experts agree. Professor Rebecca Tushnet has cautioned that libraries are on thin legal ice in relying on fair use if they allow members of the public to copy others' work, or download it from the internet, without a legally valid license.¹⁶¹ As Professor Tushnet sees it, the act of making a work available for copying, or running it through a copy machine, is not at all “transformative” for purposes of a fair use defense, and it does not fit within statutorily recognized fair-use preferences for criticism, commentary, news reporting, and the like.¹⁶² While libraries have largely avoided being sued by content creators, Professor Tushnet argues, the dearth of adverse copyright judgments is a product of self-restraint on the part of rightsholders hesitant to take on a publicly

¹⁵⁹ See, e.g., Jennifer M. Urban, *How Fair Use Can Help Solve the Orphan Works Problem*, 27 BERKELEY TECH. L.J. 1379, 1385 (2012) (arguing that, in the event of copyright claims, courts should regard archiving orphan works for nonprofit purposes as a legally defensible fair use).

¹⁶⁰ See *id.* at 1417 (“Organizing materials and facilitating information access through full-text searchable databases of these [orphan] works, as search engines have done with images on websites, is likely to be considered transformative under current case law.”).

¹⁶¹ Rebecca Tushnet, *My Library: Copyright and the Role of Institutions in a Peer-to-Peer World*, 53 UCLA L. REV. 977, 998 (2006) (“Libraries thus have reason to be concerned that the legal and factual landscape has shifted enough that copyright owners can credibly threaten a successful (or at least prohibitively expensive) lawsuit unless the libraries obtain licenses for many of their core activities.”).

¹⁶² *Id.* at 995.

popular defendant.¹⁶³ In the absence of legally conclusive guidance from Congress or the courts, librarians and archivists understandably may opt for the risk-averse choice of not accepting photos of unknown origin at all or closeting those photos away from public view.

IV. THE POUGHKEEPSIE PROJECT: RESCUING HISTORY

A. *Introduction and Background*

Based in Poughkeepsie, New York, *The Poughkeepsie Journal* (“*Journal*”), is the oldest paper in the state and the second-oldest in the nation.¹⁶⁴ The *Journal*, founded in 1785, houses valuable photographic archives that supplement the historical record of the Mid-Hudson Valley and the nation.¹⁶⁵ *The Poughkeepsie Journal* is owned by the Gannett Company, which purchased the paper in 1977.¹⁶⁶ Publishing for over 200 years, the *Journal* has covered prominent events in Dutchess County and the Mid-Hudson Valley, including the ratification of the United States Constitution by New York state.¹⁶⁷ With an archive dating literally to the dawn of photo-journalism,¹⁶⁸ the *Journal*’s morgue has enormous historical value.

¹⁶³ *Id.* at 992–93 (“Very few copyright owners are willing to sue such venerated institutions . . .”).

¹⁶⁴ John Ferro, Poughkeepsie Journal *Anniversary: 230 Years of Local History*, POUGHKEEPSIE J., <https://www.poughkeepsiejournal.com/story/news/local/2015/08/10/poughkeepsie-journal-230th-anniversary/31103373/> [<https://perma.cc/8RDB-7UVJ>] (Aug. 11, 2015, 11:05 AM) (“[T]he *Poughkeepsie Journal* . . . [is] New York’s oldest newspaper and the second oldest in the nation after the *Hartford Courant*.”).

¹⁶⁵ *Page Through History: Journal Digital Archives Available*, POUGHKEEPSIE J. (Sept. 22, 2015), <https://www.poughkeepsiejournal.com/story/news/local/2015/09/22/page-through-history-journal-digital-archives-available/72589650/> [<https://perma.cc/BXK8-3JGA>] (describing the extent of the newspaper’s photo archive).

¹⁶⁶ Stuart Shinske, *New Era Today For Gannett*, Poughkeepsie Journal, POUGHKEEPSIE J., <https://www.poughkeepsiejournal.com/story/news/2015/06/27/new-era-gannett-but-journal-always-here-you/29119517/> [<https://perma.cc/3V82-V4DR>] (June 29, 2015, 12:10 PM).

¹⁶⁷ Ferro, *supra* note 164.

¹⁶⁸ See Grant Piper, *The First Photograph Ever Used in News*, MEDIUM (July 2, 2021), <https://medium.com/exploring-history/the-first-photograph-ever-used-in-news->

In November 2022, the *Journal* vacated its historical building located in downtown Poughkeepsie, New York, and transitioned into a digitally focused news service.¹⁶⁹ Gannett and *The Poughkeepsie Journal* sold the building in 2009, but have continued to lease space in the building where its archives were stored.¹⁷⁰ In 2019, an impending Gannett corporate merger¹⁷¹ and the potential loss of space in the building spurred an urgent “rescue” project led by current and previous *Journal* employees and concerned citizens.¹⁷² The rescue project illustrates one possible outcome when newspapers close their brick-and-mortar offices and no longer have space to store their archival photos.

B. Research Methodology

During 2022 and 2023, researchers from the University of Florida’s Brechner Center for Freedom of Information conducted a combination of in-person and video-conference interviews with the principal players involved with transferring the management of *The Poughkeepsie Journal*’s archive. The interviews aid in capturing the approach of the *Journal*, Gannett, the Poughkeepsie Public Library District, and other stakeholders.¹⁷³ The following people were interviewed about their participation in the rescue project or about the *Journal* generally:

e87fa3f9eebf [https://perma.cc/U9WZ-FHHG] (stating that the first newspaper photograph was published in 1848).

¹⁶⁹ See *As Journal Leaves Longtime Office, Mid Hudson Valley News, Local Reporting, Remains Focus*, POUGHKEEPSIE J. (Nov. 16, 2022, 5:19 AM), <https://www.poughkeepsiejournal.com/story/news/local/2022/11/16/poughkeepsie-journal-leaves-city-building-remains-locally-focused/69648782007/> [https://perma.cc/C9XF-EVCR].

¹⁷⁰ *Id.*

¹⁷¹ See Nathan Bomey, *GateHouse Media Owner to Acquire USA TODAY Owner Gannett*, USA TODAY, <https://www.usatoday.com/story/money/2019/08/05/gannett-gatehouse-media-new-media-investment-group/1902550001/> [https://perma.cc/EDS9-L7UM] (Aug. 5, 2019, 10:36 PM).

¹⁷² See *infra* Section IV.D.

¹⁷³ For a synthesis of interview responses, see discussion *infra* Section V.C. When a specific interviewee’s recollection or quote is relevant, that interview is cited and footnoted.

- Meg Downey, former Executive Editor of *The Poughkeepsie Journal* (1979–2006)¹⁷⁴
- Jim Fogler, former Publisher and President of *The Poughkeepsie Journal* (2016–20)¹⁷⁵
- Tom Lawrence, Executive Director at the Poughkeepsie Public Library District¹⁷⁶
- Albert Rosenblatt, retired judge and community leader¹⁷⁷
- Thomas Curley, Associate General Counsel at Gannett Co., Inc.¹⁷⁸
- Margot Williams, former newsroom librarian at *The Poughkeepsie Journal* (1988–90)¹⁷⁹

The information in Sections IV.B–C was sourced directly from these interviews.

C. *A Look Inside the Archives*

The Poughkeepsie Journal's morgue was organized; the photos were tagged and sorted by category and date. The extensive repository indexed both published and unpublished microfilm and photo negatives.

Meg Downey began working at the *Journal* in 1979. At that time, the *Journal* had a newsroom librarian who created a unique numeric system to organize the archives. As executive editor, Downey oversaw the modernization of archival preservation at the paper in the 1980s and '90s. As technology developed, archival systems had to, as well. In 2000, the *Journal* began to shift to an electronic archiving system. She recalls:

¹⁷⁴ Video Interview with Meg Downey, former Exec. Ed., *Poughkeepsie J.* (Aug. 5, 2022).

¹⁷⁵ Interview with Jim Fogler, former Publisher & President, *Poughkeepsie J.*, current President & CEO, the Fla. Press Ass'n. (Oct. 4, 2022).

¹⁷⁶ Video Interview with Tom Lawrence, Exec. Dir., Poughkeepsie Pub. Libr. Dist. (Dec. 16, 2022).

¹⁷⁷ Video Interview with Albert Rosenblatt, retired judge (Oct. 13, 2022).

¹⁷⁸ Video Interview with Thomas Curley, Assoc. Gen. Couns., Gannett Co., Inc. (May 10, 2023).

¹⁷⁹ Video Interview with Margot Williams, former Newsroom Libr., *Poughkeepsie J.*, current Rsch. Ed., *The Intercept* (Jan. 12, 2023).

We went to an electronic archive in 2000 The morgue we had . . . was ranged from . . . the late 1940s up to 2000s. Those were all clippings as well as images and negatives. It is the images and negatives that I really felt were valuable, they are a smaller part of the collection For smaller papers [that lose archives], that's where the loss is. And that's the loss that really shows a community and what most of the country is like.¹⁸⁰

Downey left the *Journal* in 2006 to work for the *Tennessean* in Nashville, Tennessee. She relocated back to the Poughkeepsie area in 2014. From then on, Downey was focused on preserving the *Journal* archives.

Margot Williams, who has experience as a reporter, researcher, and librarian oversaw *The Poughkeepsie Journal* archives from 1988 to 1990. When Williams interviewed for a library position at the *Journal*, she recalls, “[t]he editor did not want to take me into the room to show me the library, because that's how bad it was.”¹⁸¹ Notwithstanding the disarray, Williams began working in the *Journal*'s library alongside the resident librarian, who, as Williams recalls, was overwhelmed by the enormity of the material:

She was there by herself for forty years and she had fallen behind at some point. So, there were tables all over with these piles of things that she hadn't gotten to yet. So, after I worked there with her for a few months, she had to leave, and I started making an electronic database Meanwhile, when I wasn't doing that, I'd go through the drawers and look around to see what was in there. And there were the photos, interfiled with the clips, which were pasted, and inside some of the envelopes were photos and negatives stapled together

¹⁸⁰ Video Interview with Meg Downey, *supra* note 174.

¹⁸¹ Video Interview with Margot Williams, *supra* note 179.

I am pulling things out and there are photos of Franklin Delano Roosevelt, who lived in the local area, Hyde Park The whole set of photos that a photographer had taken Amazing, amazing historic photos. It was such a mess I had no idea how many photos could've been in those drawers or how many decades of photos were interfiled with the clips.¹⁸²

Williams recalls her time developing the *Journal's* first electronic database. This was a time before digitized news, at the dawn of the World Wide Web, before Internet use had reached widespread public adoption. Instead of clipping the daily paper to index and preserve, the electronic system allowed newsrooms to send text directly to a digital database. Williams indexed each published newspaper edition: "I had to process the paper every morning the day after it was published It would go into an archive that the reporters were able to search from their desks. That was a real innovation at the time."¹⁸³ Williams said that after she departed the *Journal*, the database was no longer used.

D. Anatomy of a Rescue: Racing Erasure

The archival preservation initiatives arose in 2019 when Gannett was going to be acquired by GateHouse Media¹⁸⁴ and the *Journal* remained a tenant in its historic flagship building. The uncertainty regarding the *Journal's* long-term office and storage space added to the urgency of the rescue operation. Decades of photographs and newspaper clippings were stored in the basement of the historic headquarters building. In addition to ensuring continued preservation, it was essential to assign responsibility for the archive upon the impending Gannett corporate merger.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ See Jonathan O'Connell, *Gannett, GateHouse Approve Merger, Creating Nation's Largest Newspaper Publisher*, WASH. POST (Nov. 14, 2019, 10:43 AM), <https://www.washingtonpost.com/business/2019/11/14/gannett-finalizes-deal-become-nations-largest-newspaper-publisher-setting-stage-million-cuts/> [https://perma.cc/Z28Y-FE6R].

Downey, Fogler, and Rosenblatt launched the rescue project and were determined to locate an entity that had the capacity to manage the archival collection. According to Rosenblatt:

We learned that *The Poughkeepsie Journal* was no longer being published in Poughkeepsie and that there [was] a skeleton staff. But while it may be partly published in Poughkeepsie, the major operation was elsewhere. . . . It came to our attention that the archive was in danger of being lost or destroyed or taken away or allowed to fall through the cracks. Meg [Downey] and two or three others of us thought that it was important to somehow preserve it.¹⁸⁵

Finding a fit suitor to preserve the archives proved to be a difficult task. The rescue team sought out potential suitors to defer ownership of the photograph archives to, many of which were not viable for various reasons: the inability to preserve archives, lack of funding, and lack of resources and knowledge.

The Poughkeepsie Public Library District had the resources to devote to the archival preservation efforts. The *Journal* entered into a partnership with the library and the local Historical Society. The photographs are currently being housed in a climate-controlled environment in the basement of the flagship building. The Poughkeepsie Public Library will continue to preserve the archive.

Tom Lawrence, executive director at the Poughkeepsie Public Library District, has been at the library for nearly three decades. The library was the primary access point for microfilm of the *Journal* and antecedent titles dating back to 1785. During the declining years of Gannett ownership of the *Journal*, Lawrence recalls discussing the future of the archives with Downey:

There was this rich archive of visual history that there had been some growing concern what was going to happen to it This [archive] was here. It was a bit of a time bomb going off that if we didn't

¹⁸⁵ Video Interview with Albert Rosenblatt, *supra* note 177.

figure out a way to preserve it, it could go the way of the garbage, if we weren't careful.¹⁸⁶

Lawrence worked with Downey, Rosenblatt, Fogler, and a Gannett representative to arrange the transfer of archival management. Gannett still legally owns the archives but the Poughkeepsie Public Library District handles all aspects of managing them. At first, Lawrence said, “we were reluctant to let anybody in and do anything with the archive absent permission from Gannett on how to provide the access and what the terms would be.”¹⁸⁷ Representing the *Journal*, the rescue team negotiated with Gannett on how the archives would be permitted to be used. Lawrence said, “Gannett is willing to allow us to use the archives for almost any nonprofit purpose, including fundraising, as long as there is credit given to the *Journal*.”¹⁸⁸ Lawrence recalls the idea of digitizing the archive meeting with initial corporate skepticism. He credits Downey with bringing the conversation to the attention of Gannett representatives and opening up the door to negotiation.¹⁸⁹

Prior to the library's acceptance of the archives, the photos were in the basement of the flagship building in an unmanaged environment. The vast majority of the preservation cost is warehousing—ensuring that the photographs are in a safe, self-contained, and climate-controlled space with decent lighting and air exchange. The upgraded storage environment better preserves the photos that are stored there.

Lawrence believes that the repository is a public good, and the preservation of the repository is beneficial for the entire community. The library funds the ongoing lease in the historic *Poughkeepsie Journal* building to house the archive. The photographic interest in the community is strong, Lawrence said: “[Here are] community tax dollars helping to preserve a community asset.”¹⁹⁰ Lawrence also noted: “Honestly, I don't think a community could have asked for a

¹⁸⁶ Video Interview with Tom Lawrence, *supra* note 176.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

more positive outcome. . . . We feel comfortable that we're going to be able to provide the community with what they want."¹⁹¹

As archival access begins to open up, Lawrence and the library staff will go through a "discovery" stage where they process the photographs and aim to understand what each drawer contains. They hope to create more search tools based on what they discover. There is still no plan for complete digitization; the archive will be maintained in its native form, while digitizing individual pieces on-demand for research, nonprofit, or library use.

Lawrence believes that the Poughkeepsie experience can provide insight into the future of preservation: "Using this case study as a model is important to show communities how they can reach agreements with media publishers to help preserve their local history."¹⁹² He continued:

We are in a time of transference, where the wealth is being transferred to younger generations or to charitable youth, and I think that when families and communities look at what's available to archive their past, they need to look into the local newspapers because it provides a robust and unorganized history of what had happened. I would encourage communities to really engage in figuring out how to preserve not only media's archives but family archives. And so that they are digitized and stored in a way that future generations can learn from it and enjoy

Communities need to keep all of this on their radar and not be in reactive mode, but sort of plan for how this transference is going to occur in order to preserve what everybody will lament being gone once it's gone

Archivists are going to be able to lead the conversation [about preserving archives in a polarized news environment]. Good, bad,

¹⁹¹ *Id.*

¹⁹² *Id.*

or ugly, we need to save the archives because they are a part of our history.¹⁹³

E. Navigating Ownership and Rights Issues

Gannett owns much of the copyright to the photos accessible in the archive, both published and unpublished.¹⁹⁴ The Library District and Gannett agreed to an “Archives License Agreement” (“Agreement”) that provides stipulations on how the archive can be used.¹⁹⁵ The licensing agreement was approved at the Poughkeepsie Public Library District’s Board of Trustees meeting on December 28, 2022.¹⁹⁶

The Agreement affirms that Gannett is the copyright holder and legal owner of the archive, notwithstanding the Library’s management and physical possession of the archives.¹⁹⁷ Therefore, Gannett retains discretion to license, or even sell, the archives or any portion, if the company chooses to do so.¹⁹⁸

The rescue group wanted to provide the rights for publications, organizations, and individuals seeking to use the photographs in the public interest to do so at no cost.¹⁹⁹ When drafting the Agreement, the group wanted to ensure an accessible and affordable repository for all library users.²⁰⁰ Under the Agreement, any commercial interest in the archive must be cleared by Gannett and will be evaluated on a case-by-case basis.²⁰¹ The finalized Agreement states that the Licensee (the Poughkeepsie Public Library District) may reproduce and distribute portions of the archive for noncommercial,

¹⁹³ *Id.*

¹⁹⁴ Video Interview with Meg Downey, *supra* note 174.

¹⁹⁵ *Id.*

¹⁹⁶ POUGHKEEPSIE PUB. LIBR. DIST., MINUTES OF MEETING OF DECEMBER 28, 2022 2 (2023), <https://poklib.org/wp-content/uploads/2023/04/012523-1-December-28-2022-minutes.pdf> [<https://perma.cc/XSD6-BS2C>].

¹⁹⁷ POUGHKEEPSIE PUB. LIBR. DIST., ARCHIVES LICENSE AGREEMENT (2023), <https://drive.google.com/file/d/1od7NW9asfB8LfJvh8Ci88GTpJ12kgApC/view?usp=sharing> (last visited Jan. 31, 2024).

¹⁹⁸ *Id.*

¹⁹⁹ Video Interview with Meg Downey, *supra* note 174.

²⁰⁰ *Id.*; Video Interview with Tom Lawrence, *supra* note 176.

²⁰¹ ARCHIVES LICENSE AGREEMENT, *supra* note 197.

educational, and historical use.²⁰² Non-profit entities, such as libraries or historical societies, are permitted to use archival material for fundraising purposes.²⁰³

F. Obstacles and Limitations

While merely gathering and housing materials do not raise any legal issues, making a digital copy of an image—particularly if it is to be displayed on a publicly accessible website—can implicate copyright concerns.²⁰⁴ The rescue team found that untangling copyright ownership issues was a challenge when relocating the archive.²⁰⁵ As it turned out, Gannett owned the copyright to most of the photographs, as staff photographers' images belonged to the company under the work-for-hire doctrine or under a signed agreement.²⁰⁶ In the case of freelance photographers, freelance agreements were drafted with similar terms: Gannett owned the copyright for any image taken for the purpose of newsgathering.²⁰⁷ There were exceptions at times when freelance photographers were permitted to use the photo for additional uses, and in some cases, resell it.²⁰⁸

Under the Gannett-library licensing Agreement, the library is allowed to make only limited uses of the images; they can be copied and displayed—but not digitized—for “education, catalog, and publicity purposes,” with notice to Gannett.²⁰⁹ Many organizations, such as Gannett, hire external licensing agents to handle content licensing to interested parties.²¹⁰ Those interested in using images would have to purchase or acquire licensing rights through the agent. Although most of the profits from the images go to the hiree (e.g., licensing agents), the hirer (e.g., Gannett) does receive a

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ See Jean Dryden, *The Role of Copyright in Selection for Digitization*, 77 AM. ARCHIVIST 64, 65 (2014).

²⁰⁵ Video Interview with Meg Downey, *supra* note 174.

²⁰⁶ Video Interview with Thomas Curley, *supra* note 178.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ ARCHIVES LICENSE AGREEMENT, *supra* note 197.

²¹⁰ See, e.g., Laura Lee, *EVG — Gannett's Licensing Partner*, EVG MEDIA (Jan. 18, 2021), <https://evgmedia.com/evg-gannetts-licensing-partner/> [https://perma.cc/3L7Y-VLDB].

percentage of any reprint.²¹¹ To acquire commercial usage rights for archival images, this would likely be the path one must take.

Fogler recalls *The Poughkeepsie Journal* having a documentation system that noted the publication status of images.²¹² This proved to be a significant asset for the rescue team and the library; without knowing whether a photo was published or unpublished, it is more difficult to ascertain its copyright status, and potentially riskier to display or republish it. Not every newsroom will be fortunate enough to have a well-organized documentation system, which portends complications for others trying to emulate the Poughkeepsie project. If photos cannot safely be shared for, potentially, many decades until it can safely be assumed that the copyright term has run, the practical usefulness of the archive is limited.

Whether a public library like Poughkeepsie's can lawfully make copyright-protected works of uncertain ownership available to the public—and if so, to what extent and for what purposes—is not entirely settled. There are compelling legal and policy-based arguments that the copyright workaround of fair use should protect a non-profit custodian, such as a public library or museum, against infringement claims for compiling collections of photos for preservation. Professor Jennifer M. Urban has argued that, if the owner of a work cannot be readily found and the work has sat uncommercialized for years, it indicates that any hope of monetizing the work has been abandoned, which cuts in favor of the preservationist.²¹³ If the animating purpose of the Copyright Act is to make creativity more widely available, resurfacing an out-of-circulation work that would otherwise go unseen seems to advance—not violate—the objectives of the statute.²¹⁴

In a much-watched case pitting authors against archivists, the Second Circuit decided in favor of a consortium of university librarians who were accused of copyright infringement for compiling a

²¹¹ Video Interview with Thomas Curley, *supra* note 178.

²¹² Interview with Jim Fogler, *supra* note 175.

²¹³ Urban, *supra* note 159, at 1396–97 (explaining that the market harm factor in fair-use analysis should weigh against the creator if the work has been “economically abandoned”).

²¹⁴ *See id.* at 1397 (citing a Senate report that indicates reproduction of a work may be easier to justify when a work is “out of print” and not commercially available for purchase).

digital repository of more than 10 million works that could be keyword-searched online.²¹⁵ The court deemed the libraries' creation of a full-text database search function to be "a quintessentially transformative use" of the original works.²¹⁶ As the court explained: "[T]he full-text search function does not serve as a substitute for the books that are being searched."²¹⁷ Thus, copyright law recognizes that there is inherent value in making works more easily searchable and that library archives can coexist peaceably alongside the creator's interest in commercially exploiting the original work.

Even when a book is available for inspection and loan at a public library, the rights-holder retains ultimate ownership rights and can enforce those rights if a borrower uses the book in an infringing way (e.g., by running it through a copy machine and selling knockoff versions).²¹⁸ Similarly, making a photojournalist's work available in libraries and archives does not prevent the creator from pursuing an infringement claim against a profiteer who commercializes the photo in an infringing way, such as selling reproductions on posters or T-shirts without adding any transformative creativity.²¹⁹ That case-specific recourse—not a total prohibition on archiving photos of historical value—strikes the proper balance between the competing interests of copyright in incentivizing creators versus affording the public access to creativity.

²¹⁵ *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 105 (2d Cir. 2014).

²¹⁶ *Id.* at 97 (explaining that a search of the database produces results that are materially different from the experience of reading the actual books).

²¹⁷ *Id.* at 100.

²¹⁸ *See Jacobsen v. Katzer*, 535 F.3d 1373, 1379–80 (Fed. Cir. 2008) (“[Where] a license is limited in scope and the licensee acts outside the scope, the licensor can bring an action for copyright infringement.”).

²¹⁹ *See* Frank D. LoMonte, *Copyright Versus the Right to Copy: The Civic Danger of Allowing Intellectual Property Law to Override State Freedom of Information Law*, 53 LOY. U. CHI. L.J. 159, 206–07 (2021) (describing this point in the context of overbroad state statutes and court interpretations that recognize copyright law as an impediment to producing government-held records sought by freedom-of-information requesters, which can inhibit civically valuable information sharing that in no way threatens any rightsholder's commercial interests).

CALL TO ACTION AND CONCLUSION

While copyright provides some period of exclusive control enabling creators to monetize their work, it is important to stay focused on the underlying purpose of copyright law: “[T]o stimulate the production of creative works in order to get them before the public.”²²⁰ That is to say, copyright law is understood to include an element of the audience’s interests as well as the creator’s, since incentivizing creativity assumes an audience interested in consuming it.²²¹ Properly understood, copyright should not operate as an insurmountable barrier to the creation of publicly usable libraries of photographic works that would otherwise exist only inside a drawer—or a dumpster. When the choice is between the public getting free access to a creative work versus the work being destroyed, the policies that underlie copyright law plainly weigh in favor of access and against destruction.

The National Endowment for the Humanities already underwrites digitization of published newspapers.²²² The federal government has thus recognized that local newspapers represent an irreplaceable repository of information that, once gone, may never be recovered. The same is true of newsroom photo archives. Whatever the law will end up saying about republishing or displaying an unpublished photographic work, it is urgent to rescue this work from

²²⁰ Dixon, *supra* note 131, at 152.

²²¹ For instance, the Second Circuit explicitly weighed the public’s interest in being informed about the life of influential and reclusive tycoon Howard Hughes in deciding to vacate a lower court’s injunction against publication of a biographical book that was alleged to infringe the copyright in a series of *Look Magazine* articles about Hughes. See *Rosemont Enters., Inc. v. Random House, Inc.*, 366 F.2d 303, 304, 309 (2d Cir. 1966). The court relied on the foundational purpose of the copyright clause in the Constitution and its subsequent statutory codification: “To Promote the Progress of Science and the Useful Arts.” *Id.* at 307. The court went on to find that “[t]o serve that purpose, ‘courts in passing upon particular claims of infringement must occasionally subordinate the copyright holder’s interest in a maximum financial return to the greater public interest in the development of art, science and industry.’” *Id.* (quoting *Berlin v. E.C. Publ’ns Inc.*, 329 F.2d 541, 544 (2d Cir. 1964)).

²²² *National Digital Newspaper Program*, NAT’L ENDOWMENT FOR HUMANS., <https://www.neh.gov/grants/preservation/national-digital-newspaper-program> [<https://perma.cc/76TD-PMN9>] (last visited Jan. 31, 2024).

irrevocable destruction so that legally sound decisions can be made about its preservation and accessibility.

Encouragingly, there is a discernible sense of urgency among policymakers about the disappearance of independent local news media and its civic consequences.²²³ Bipartisan federal legislation has been proposed in support of local media outlets, with provisions including an antitrust exemption enabling news organizations to collectively negotiate with Google, Facebook, and other online gatekeepers toward sharing in the revenue that ad-supported platforms receive when their users share news stories.²²⁴ Despite the introduction of the Journalism Competition and Preservation Act, some states refuse to wait any longer for national legislation to support local journalism.²²⁵ There has been an uptick in proposed state legislation, with benefits including newsroom tax credits, and deductions and reimbursements for newspaper subscriptions.²²⁶ For example, House Bill 2605 was proposed in Oregon in 2023 with the aim of infusing new money into local news outlets.²²⁷ The bill was originally proposed as a tax credit to local news subscribers but was

²²³ See Perry Bacon Jr., *America Should Spend Billions to Revive Local News*, WASH. POST (Oct. 17, 2022, 7:00 AM), <https://www.washingtonpost.com/opinions/2022/10/17/local-news-crisis-plan-fix-perry-bacon/> [https://perma.cc/9ABH-CYCU] (“There is a growing recognition that the collapse of local news and information is a crisis undermining the United States’ politics and communities.”).

²²⁴ See Journalism Competition and Preservation Act of 2023, S. 1094, 118th Cong. § 5(b) (2023); *News/Media Alliance Applauds Members of Senate for Reintroducing Journalism Competition & Preservation Act*, NEWS MEDIA ALL. (Mar. 31, 2023), <https://www.newsmediaalliance.org/release-news-media-alliance-applauds-members-of-house-and-senate-for-reintroducing-journalism-competition-preservation-act-2023/> [https://perma.cc/B3MV-2X3M].

²²⁵ See Ray Schultz, *States Consider Bills to Subsidize Local Newspaper Subscriptions*, MEDIA POST (Feb. 13, 2023), <https://www.mediapost.com/publications/article/382500/states-consider-bills-to-subsidize-local-newspaper.html> [https://perma.cc/3QAF-8NAE].

²²⁶ *Id.*

²²⁷ H.B. 2605, 82nd Legis. Assemb., Reg. Sess. (Or. 2023); see also Julia Shumway, *Oregon Lawmakers Ponder Grants for Local News*, OR. CAP. CHRON. (Feb. 9, 2023, 5:43 PM), <https://oregoncapitalchronicle.com/2023/02/09/oregon-lawmakers-ponder-grants-for-local-news/> [https://perma.cc/N4XS-FVHF] (detailing the extent of the local news crisis in Oregon, including two counties classified as “news deserts” and fifteen others with only a single newspaper).

changed as a result of public recommendations.²²⁸ To foster healthy local journalism, the bill would implement a statewide resource center that would assist local publications and provide grants to a select number of small news outlets to bolster their methods of delivering information or modernize their business structures.²²⁹ The bill has gained significant support and is being watched nationally as a potential model.²³⁰

Industry, as well as government, has a role to play in securing America's visual history. Digital photos are all-too-easily deleted—and even if preserved, they may exist only on memory cards kept in individual photographers' personal collections rather than in a repository where researchers can locate and use them.²³¹ The importance of unpublished photos may become evident only years after the fact.²³² For instance, the award-winning photo of President Bill Clinton embracing White House intern Monica Lewinsky at a

²²⁸ Shumway, *supra* note 227 (stating that conversations with local and statewide organizations, along with additional public input, gleaned insight that tax credits were unable to provide the stable support legislators had sought); *see also* Peter Wong, *Legislation Seeks Ways to Avert 'News Deserts' in Oregon*, PORTLAND TRIB., https://www.portlandtribune.com/news/legislation-seeks-ways-to-avert-news-deserts-in-oregon/article_629d0d82-a8f6-11ed-a2ae-f774f13bc954.html [<https://perma.cc/7W8F-88Z4>] (Feb. 28, 2023) (supporting claim that tax credits would not be the best option as it is unlikely that legislators would approve tax credits given that the credit would reduce the number of total taxes collected).

²²⁹ Shumway, *supra* note 227 (“The bill calls for giving grants to [two existing nonprofit conduits] to facilitate the local journalism resource center . . . [for purposes that might include] helping small newsrooms develop or update websites or newsletters, train reporters or transition to a nonprofit model instead of a for-profit company.”).

²³⁰ *See, e.g.*, Brier Dudley, *West Coast Steps up to Save Local Journalism*, SEATTLE TIMES (Apr. 26, 2023, 4:35 PM), <https://www.seattletimes.com/opinion/west-coast-steps-up-to-save-local-journalism/> [<https://perma.cc/NX37-W7M4>]; Andrew Cutler, *From the Publisher: Bill Could Be Critical to Future of Rural Journalism*, E. OREGONIAN (May 20, 2023), https://www.eastoregonian.com/opinion/columnists/from-the-publisher-bill-could-be-critical-to-future-of-rural-journalism/article_ee18988c-f4db-11ed-91c3-b7e2d6f7ed45.html [<https://perma.cc/M68N-59DL>].

²³¹ *See* Greenwood, *supra* note 3, at 82 (“Even if some unpublished images are saved, photographers may delete others in the field and later may save only the images submitted to editors who may delete more.”).

²³² *See, e.g.*, Tomlinson & Harris, *supra* note 147, at 5–6 (citing example of freelance photojournalist's 1970s-era photo of young Ku Klux Klan member that attained new salience when that Klan member, David Duke, became a leading candidate for governor of Louisiana in 1991).

speaking appearance became significant only when their adulterous affair was later revealed—and came to light only because the photographer, Dirck Halstead, was shooting with film rather than a digital memory card and had saved the photo negatives.²³³ History is too valuable to be left to such happenstance. Newsrooms (or their successor institutions) need protocols for retaining and labeling born-digital materials so future generations of researchers need not rely on the memories of future Dirck Halsteads.

In 2018, *The New York Times* and Google announced a partnership to digitize the newspaper's archive of six million photos dating back to 1896.²³⁴ The aim of the project is not just to preserve the archive, but to make the images, including contemporaneous explanatory notes, searchable and usable.²³⁵ Making once-obscure images findable is also benefiting the *Times*, which is drawing on the morgue to generate stories and social media content.²³⁶ For instance, archivists found dozens of photographs of baseball legend Jackie Robinson, enabling them to create a visual tribute to the pioneering Brooklyn Dodgers star in commemoration of what would have been his 100th birthday.²³⁷ By mid-2019, the five technicians working on the project had already scanned 1 million images.²³⁸ “The technicians,” the *Times* reported, “often stumble upon photographs that shed light on important moments in history.”²³⁹ While ambitious, the Google project underscores the “haves-and-have-not” status of archiving. Future researchers will have little difficulty documenting,

²³³ See Terry Sullivan, *How Film Saved an Infamous Photo*, PRO. ARTIST (July 30, 2015), <https://professionalartistmag.com/how-film-saved-now-infamous-clintonlewinsky-photo/> [https://perma.cc/SJU5-3K7E].

²³⁴ Katie Van Syckle, *The Times's Capsule of History Goes Digital*, N.Y. TIMES (Nov. 10, 2018), <https://www.nytimes.com/2018/11/10/reader-center/past-tense-photos-history-morgue.html> [https://perma.cc/8T68-WNTS].

²³⁵ See Ringel, *supra* note 2, at 252.

²³⁶ See Van Syckle, *supra* note 234.

²³⁷ See Terence McGinley, *From The Times's Photo Vault, the Many Dimensions of Jackie Robinson*, N.Y. TIMES (Jan. 31, 2019), <https://www.nytimes.com/2019/01/31/pageoneplus/jackie-robinson-100-birthday.html> [https://perma.cc/6ZVP-KREB].

²³⁸ Elisha Brown, *How Our Photo Archive Team Has Scanned a Million-Plus Pictures*, N.Y. TIMES (July 2, 2019), <https://www.nytimes.com/2019/07/02/reader-center/past-tense-archive-million-photos.html> [https://perma.cc/2JDD-3TPG].

²³⁹ *Id.*

as the *Times* characterized it, important moments in the history of New York.²⁴⁰ But they may have far less luck piecing together the visual history of Pittsburgh, Birmingham, and other places that have lost daily print newspapers in recent years where no Google-funded rescue is underway.²⁴¹

In addition to financial support, Congress could provide legal support by clarifying that the act of digitizing works for preservation and research is not legally actionable copyright infringement.²⁴² Libraries and archives already enjoy some degree of statutory amnesty from infringement claims.²⁴³ But immunity is limited; for instance, if an unpublished work is maintained by a library or archive for purposes of preservation, statutory immunity applies only to the act of making the work available for on-premises inspection.²⁴⁴ This limited scope of protection disincentivizes libraries from making unpublished photos available online without the assurance of an explicit license granted by the rightsholder. A 21st-century update to the Copyright Act, contemplating the way information is stored and viewed today, would help unlock the vault of local history—in communities that are fortunate enough to have a photographic record that still exists.

As library preservationist Laura McCann has written, “[p]reserving the entirety of a photo morgue collection is necessary to document comprehensively the newspaper and its community.”²⁴⁵ Once these irreplaceable image collections are gone, they cannot be

²⁴⁰ *Id.*

²⁴¹ See, e.g., Debbie Elliott, *For 3 Big Alabama Newspapers, the Presses Are Grinding to a Halt*, NPR (Dec. 29, 2022, 4:32 PM), <https://www.npr.org/2022/12/29/1143410955/newspaper-alabama-digital-journalism-birmingham-huntsville-mobile> [<https://perma.cc/Z2ZW-A7UJ>]; Joe Concha, *Pittsburgh Becomes Largest US City Without a Daily Print Newspaper*, HILL (Aug. 27, 2018, 8:19 AM), <https://thehill.com/homenews/media/403746-pittsburgh-becomes-largest-us-city-without-a-daily-print-newspaper/> [<https://perma.cc/3P6T-WBUG>].

²⁴² See Christopher Van Le, *Opening the Doors to Digital Libraries: A Proposal to Exempt Digital Libraries from the Copyright Act*, 1 CASE W. RESV. J.L. TECH & INTERNET 121, 135–36 (2010) (arguing that, because fair use is context-specific and “unpredictable,” libraries need legislative assurance that their digitized collections are lawful).

²⁴³ See 17 U.S.C. § 108.

²⁴⁴ See 17 U.S.C. § 108(b).

²⁴⁵ McCann, *supra* note 45, at 176.

recreated. To be sure, it is important for policymakers and industry leaders to secure local journalism's future. But while doing so, they cannot overlook the need to also secure the past.