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Copyright, Competition and Publishers' Pursuit of Online Compensation

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INTRODUCTION

As print newspapers decline, the number of online newsreaders grows. However, readership and revenue are even more loosely correlated online than they are for print media, where subscriptions already make up only a small part of revenue. Online readers are usually not paying for their news, and are often reading their news away from the content originator's site. Online advertisers pay less for placement than they did in the traditional printed papers. Newspapers need to develop a new revenue stream. To this end, newspapers are seeking ways to profit from and protect their online content.

A host of laws in the intellectual property and competition fields both helps and hinders newspapers' plans to generate online revenue. These laws, like the news industry's struggle, are complicated by rapidly advancing technology. Traditionally, copyright violations occurred when someone manually recopied, then reprinted, large portions of someone else's story. The fair use doctrine allowed a newspaper on Sunday to comment on its competitors' Saturday storyline, making some selective quotes. Nowadays, copyrights are violated with the click of a mouse, and fair use commenting on a competitor's story can occur almost simultaneously with the original story's publication. Technology has made utilizing other people's work easy and instantaneous. This makes it extremely difficult for news content providers to protect and distinguish their content, and reap a profit from it where such profit is due. If diverse news production is important to our democratic society, the laws, like the news industry model, might need some revamping in light of the digital revolution. Copyright protection and its contours, developed in an analog world, should be reviewed and potentially revised to reflect the current ease of

copying. Misappropriation doctrine, which in some states can prevent a competitor from reprinting "hot news" for a limited amount of time, should be reconsidered given the vastly shortened news cycle and the widening field of "competitors." And competition laws, which can prevent competitors from working together too closely to overcome common threats, might need to be relaxed, allowing news producers to better develop successful content protection systems in the face of increased online threats.

This paper examines the interplay between legal rules and new revenue models—particularly new revenue models in the online space. First, it provides a brief overview of the relevant copyright, misappropriation, and antitrust laws that may constrain or support news originators' bids for online revenue. Next, it looks at proposals to develop revenue online, including increased legal protection for "hot news" content, paid-content systems that may require industry collaboration and antitrust exemptions, and other models that would provide revenue in exchange for the production of content. While legal changes may not be necessary to create a thriving news industry, the laws currently governing the industry and its content should be assessed in light of technical advancements and changes in the news media. In this way, legal rules may properly support whatever practical solutions are found that promote a healthy, thriving press.

LEGAL BACKGROUND

The legal rights of newspapers and other content originators come from numerous sources, chief among them the Copyright Act of 1976, a federal statute. State statutes and state common law govern other related issues, such as trade secrets, unfair competition, and "hot news" or misappropriation claims. While statutes are enacted by legislatures, state common law is judge-made law, as embodied in legal decisions accumulated over time. Because common law

develops over time through a large body of decisions, it often contains contradictions and ambiguities.

I. Copyright Law

The copyright law is a statute enacted by Congress, with authority from the Constitution.[1] The generally accepted rationale behind copyright protection in the United States is to promote the creation of creative works, by providing appropriate incentives to creators while balancing the rights of creators with those of the public. Congress created the first copyright statute in 1790.[2] Currently, copyright law is governed by the Copyright Act of 1976.[3] Copyright covers a wide range of works—"from traditional art (books, poems, musical works, drawings, paintings, and sculptures) to popular entertainment (sound recordings, movies, and video game displays) to computer software, databases, and architectural works."[4] Copyright gives to the author of the original work "the rights to (1) reproduce the work, (2) prepare derivative works based on the work, and (3) publicly distribute copies of the work."[5]

Under the 1976 Act, to receive protection a work must be original, fixed, and an expression--not an idea.[6] The work does not need to be registered or provide some notice in the form of a copyright symbol in order to receive protection.[7] Copyright law does not protect facts, which are considered "uncopyrightable 'discoveries.'"[8] This means that a news article, as expressed by the author's sentences and structure, is copyrighted, but that the facts underlying

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[1] Art. 1, §8, cl. 8, gives Congress 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."
[2] Act of 1790, 1st Cong., 2d Sess., ch. 15, 1 Stat. 124 (1790); *see* JULIE E. COHEN, LYDIA PALLAS LOREN, RUTH GANA OKEDIJI, AND MAUREEN A. O'ROURKE, COPYRIGHT IN A GLOBAL INFORMATION ECONOMY 28 (2002).
[3] Codified at Title 17 of the U.S. Code.
[4] COHEN ET AL., *supra* note 2, at 4; *see* 17 U.S.C. §102.
[5] COHEN ET AL., *supra* note 2, at 4, see 17 U.S.C. §106.
[6] The threshold for originality is quite low, the work must only "possess[ ] at least some minimal degree of creativity." *Feist Publications, Inc. v. Rural Telephone Service Co.,* 499 U.S. 340, 345-46 (1991).
[7] COHEN ET AL., *supra* note 2, at 4.
[8] As explained by the Supreme Court, "facts do not owe their origin to an act of authorship. The distinction is one between creation and discovery: The first person to find and report a particular fact has not created the fact; he or she has merely discovered its existence." *Feist,* 499 U.S. at 347, cited in COHEN ET AL., *supra* note 2, at 96.

the story are not. Instead, facts, like ideas, are "part of public domain available to every person."[9] Copyright law does not allow an author to have exclusive rights in the facts behind his story.

Further, copyright law tempers an author's rights with the fair use doctrine. Fair use permits the use and reproduction of the original work for "purposes such as criticism, comment, news reporting, teaching . . . , scholarship, or research."[10] Judges have recognized for over a century that "the nature of authorship requires an ability to build on certain aspects of past works."[11] Whether or not a certain use is fair, and therefore permitted, is determined by:

> "(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
> (2) the nature of the copyrighted work;
> (3) the amount and substantiality of the portion used in relation to the copy-righted work as a whole; and
> (4) the effect of the use upon the potential market for or value of the copy-righted work."[12]

Thus reprinting a few sentence excerpts of a novel in a magazine article is likely okay, but reprinting three chapters of the novel is likely not.

In sum, while news authors have legal rights in their original expressions, they cannot, under the Copyright Act, prohibit others from using the same facts and ideas, nor can they prevent others from making fair use of their stories.

II. Misappropriation and Hot News

The misappropriation or "hot news" doctrine was announced in a Supreme Court decision in 1918. The case pitted International News Service (INS) against the Associated Pres (AP). The AP argued to the Supreme Court that INS, its rival, was taking advantage of the AP's earlier

[9] *Feist,* 499 U.S. at 347-48.
[10] 17 U.S.C. §107.
[11] COHEN ET AL., *supra* note 2, at 29-30, (citing *Emerson v. Davies,* 8 F. Cas. 615 (1845)).
[12] 17 U.S.C. §107.

publication schedule on the east coast and rewriting stories with no attribution to be published by INS outlets on the west coast.[13] Though rewritten stories using only the underlying facts would not violate the copyright laws, AP argued that the INS was acting as an unfair competitor.[14] In its decision, the Supreme Court acknowledged the "dual character" of the news and the importance of "distinguishing between the substance of the information and the particular form or collocation of words in which the writer has communicated it"—in other words, between the words used to convey the facts, which could be copyrighted, and the facts themselves, which could not. Though the AP had no copyright in the facts underlying their stories, the Supreme Court saw INS's behavior as an issue of "unfair competition in business."[15] And the Supreme Court was worried that if INS continued to eat away at AP's profit by using AP's own work, AP would lose incentives to publish news reports in the first place.[16] The Supreme Court thus granted a limited right, derived from the law of unfair competition and misappropriation, to the AP enforceable against INS, allowing it to prevent INS from publishing stories based on the news AP had discovered for a limited time.[17] This right existed for the time necessary to allow AP to make a sufficient profit.[18]

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[13] *International News Service v. Associated Press,* 248 U.S. 215, 229-32 (1918) (hereinafter *INS v. AP*).
[14] *Id*. at 232-33. In some occasions, INS obtained information from AP employees, but the Supreme Court was considering only the question of whether AP could block INS from taking news from bulletins or newspapers published by the AP and its members in order to sell such news to INS clients. *Id.* at 232.
[15] *Id.* at 234-35, 240-41. The Supreme Court wrote, "Stripped of all disguises, the process amounts to an unauthorized interference with the normal operation of complainant's legitimate business precisely at the point where the profit is to be reaped, in order to divert a material portion of the profit from those who have earned it to those who have not; with special advantage to defendant in the competition because of the fact that it is not burdened with any part of the expense of gathering the news." *Id.* at 24041.
[16] *INS v. AP,* 248 U.S. at 235, 241-42.
[17] *Id.* at 245-46.
[18] *Id.* at 241. "It is to be observed that the view we adopt does not result in giving to complainant the right to monopolize either the gathering or the distribution of the news, or, without complying with the copyright act, to prevent the reproduction of its news articles, but only postpones participating by complainant's competitor in the process of distribution and reproduction of news that it has not gathered, and only to the extent necessary to prevent that competitor from reaping the fruits of complainant's efforts and expenditure." *Id.*

While the Supreme Court decision enabled the AP to prevent INS from publishing based on "AP's facts" for a brief period of time, the decision focused on the fact that the AP and INS were competitors.[19] The Supreme Court explicitly differentiated the AP's rights against a competitor versus its rights against the public: "although we may and do assume that neither party has any remaining property interest as against the public in uncopyrighted news matter after the moment of its first publication, it by no means follows that there is no remaining property interest in it as between themselves."[20] The AP did not have any rights in the underlying facts or news regarding the public's use of them.

In 1976, when the new Copyright Act was drafted, it included a section (§301) saying that the federal copyright statute overrode "equivalent" state laws.[21] Initially, this section had a list of state laws that remained (i.e., were not considered equivalent), and misappropriation, the right recognized in *INS v. AP*, was on the list.[22] However, the Justice Department objected to misappropriation being on exempted list. As Cohen et. al explain:

> "[The Justice Department] argued that limiting state law claims to property in uncopyrightable facts should be one of the purposes of §301, and that excluding such claims would render §301's preemption provisions ineffectual. During debate on the bill before the full House, the list of allowable state law claims was removed by amendment. Neither the colloquy over the amendment nor any subsequent commentary explains whether Congress intended this deletion to have particular significance. The more likely explanation is that the deletion was

[19] *Id.* at 235, 239.
[20] *Id.* at 248 U.S. at 236.
[21] 17 U.S.C. §301. The most common way to determine if something is equivalent to a copyright claim is to ask if the other claim requires different elements than would be necessary to prove the copyright claim. LOUIS ALTMAN AND MALLA POLLACK, CALLMANN ON UNFAIR COMPETITION, TRADEMARKS, AND MONOPOLIES §15:8 (2009) (hereinafter CALLMANN), discussing Melville Nimmer's extra element test.
[22] The House Report on the bill read: "'Misappropriation' is not necessarily synonymous with copyright infringement, and thus a cause of action labeled as 'misappropriation' is not preempted if it is in fact based neither on a right within the general scope of copyright as specified by section 106 nor on a right equivalent thereto. For example, state law should have the flexibility to afford a remedy (under traditional principles of equity) against a consistent patter of unauthorized appropriation by a competitor of the facts (i.e., not the literary expression) constituting 'hot' news, whether in the traditional mold of *International News Service v. Associate Press,* 248 U.S. 215 (918) . . . or in the newer form of data updates from scientific, business, or financial data bases." H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 131-32 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5747-48, cited in COHEN ET AL., *supra* note 2, at 622-23.

> simply a convenient way of avoiding substantial differences of opinion regarding §301's intended effect. The result is a legislative history that cannot reliably be cited as evidence of either intent to preempt or intent not to preempt particular state law claims."[23]

Thus, it is arguable whether or not a misappropriation/hot news claim is still valid; it is not clearly exempted after its removal in §301, but its removal may have meant that Congress was simply trying to "leave State law alone."[24] What is certain is that "the scope of misappropriation narrowed after the passage of the 1976 Copyright Act and the introduction of the preemption section."[25] Since 1976 these claims have been less successful in courts overall; from 1976-1996 only 11 out of 40 court rulings favored finding misappropriation.[26] As of 2005, the doctrine existed in around 14 states,[27] most visibly New York.

In 1997, a New York case, *National Basketball Association v. Motorola, Inc*., confirmed that a "narrow" hot news claim continues to exist under New York law, despite the federal Copyright Act. In the case, the NBA took issue with Motorola's almost simultaneous broadcasting of scores, ball possession, and other details that the NBA sought to exclusively provide in close to real time. Much of this information was not copyrightable, and the NBA sought common law misappropriation protection.[28] The court held that a hot news right would exist when:

> "(i) a plaintiff generates or gathers information at a cost; (ii) the information is time-sensitive; (iii) a defendant's use of the information constitutes free riding on the plaintiff's efforts; (iv) the defendant is in direct competition with a product or service offered by the plaintiffs; and (v) the ability of other parties to free-ride on the efforts of

[23] COHEN ET AL., *supra* note 2, at 623.
[24] CALLMANN §15:8, discussing Congress' discussions.
[25] VICTORIA SMITH EKSTRAND, NEWS PIRACY AND THE HOT NEWS DOCTRINE: ORIGINS IN LAW AND IMPLICATIONS FOR THE DIGITAL AGE 108 (2005).
[26] EKSTRAND, *supra* note 25, at 107.
[27] The states were: Missouri, Texas, New York, Pennsylvania, California, Alaska, Colorado, Illinois, North Carolina, South Carolina, Wisconsin, New Jersey, Maryland, and Delaware. *Id.* at 96n.61.
[28] *National Basketball Ass'n v. Motorola, Inc.,* 105 F.3d 841, 844-45 (2d Cir 1997).

> the plaintiff or others would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened."[29]

The court found that this hot news right continued even after the Copyright Act because a successful hot news claim required proving extra elements than a copyright claim, namely, "(1) the time-sensitive value of factual information, (ii) the free-riding by a defendant, and (iii) the threat to the very existence of the product or service provided by the plaintiff."[30] However, the court found that Motorola was not free riding on NBA's work, and NBA therefore could not prevent Motorola's actions.[31]

The New York Courts confirmed the continued existence of a hot news claim in that state in *Associated Press v. All Headline News Corporation,* a digital *INS*-style case where the AP sued All Headline News (AHN) for, among other things, having authors rewrite breaking AP news stories and publish them on the internet as AHN stories. There, the court stated "[a] cause of action for misappropriation of hot news remains viable under New York law."[32] Because preemption is an issue of federal law, if the Supreme Court were to find state law overridden by the Copyright Act, it could overturn the decisions of the New York Courts recognizing a right to hot news. However, the Supreme Court has not addressed the issue, and it is unclear what it will say if and when it does. For now, at least, a hot news right does exist in New York and some other states under state law.

If hot news protection does exist, its scope has to be considered in light of recent technological changes. How would it grant a newspaper rights against various digital "competitors"—other newspapers, aggregators, bloggers, and the public? Rivals come in all shapes and sizes online. Bloggers in particular may be much closer to the "public" than

[29] *Id.* at 845.
[30] *Id.* at 853.
[31] *Id.* at 852, 854.
[32] *Associated Press v. All Headline News Corp.,* 608 F. Supp. 2d 454, 461 (S.D.N.Y. 2009).

competitors, and thus even if the old right still exists, it may be of limited comfort to news publishers. If the rule is expanded, such that it may restrict a potentially broad audience's speech about facts, it will raise constitutional concerns.

III. Technology and IP Law

The legal tools available to news originators are complicated and full of ambiguities. The modern-day digital era has only exacerbated this.

To begin with, copyrighted material is in some ways more difficult than ever to protect—with a few clicks, an entire article can be copied and transmitted, unauthorized, anywhere in the world. To combat the ease of copying, copyright owners have turned to digital protections for their works. These digital protections have received federal sanction in the Digital Millennium Copyright Act (DMCA), an amendment to the Copyright Act that provides protection for copyright management information, identifies the copyright of digital material, and makes illegal the circumvention of technological protections that protect a copyright owner's rights.[33] Critics claim that digital rights management often prevents purchasers of copyrighted material from making fair use of what they own.[34]

The fight over the DMCA continues in the courts and between many academics, who often believe fair use is being improperly constrained under the new laws. With more people making public more copies than ever before, many authors believe traditional fair use allows too much, and are turning to digital protections or asking for enhanced legal protection. Another new fair use issue is automated copying by machines, for example making copies humans will never read. Search engines often use automated software to copy whole web pages in order to

[33] 17 U.S.C. §1201; *see* discussion in COHEN ET AL., *supra* note 2, at 597, 578-81.
[34] COHEN ET AL., *supra* note 2, at 579-81.

present relevant information to searchers.[35] Litigation over whether or not such automated copying and/or the display of results is allowed has recently occurred and will likely continue as the issues have not been clearly resolved.[36] Any changes to fair use law will also require keeping the First Amendment in mind. It is up for debate whether copyright law itself, with fair use, sufficiently takes into consideration the balances required by the First Amendment, or whether copyright rules must be expressly considered in light of whether they infringe on freedom of speech.[37]

IV. Antitrust Laws

In addition to caring about laws governing content, newspaper publishers, like all other businesses, must act with an awareness of antitrust laws. Antitrust laws, which are governed by federal statutes as well as at the state level, apply to "restraints of trade," "monopolization," and activities that "substantially lessen competition."[38] Certain acts are always ("*per se"*) illegal; all other acts are analyzed on a case-by-case basis on their effects on competition (a "rule of reason" test).[39] Antitrust violations can be enforced by private plaintiffs filing suit in court, as well as by the Department of Justice and the Federal Trade Commission. Although the following discussion is focused on federal antitrust regulation, newspapers should also be aware of state laws regulating competition.

Often, businesses receive antitrust exemptions from the federal government permitting conduct that would otherwise be illegal. "By statutory or judicial exemption, approximately 20

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[35] *Id.* at 539.
[36] *See Kelly v. Arriba Soft Corp*, 280 F.3d at 941-42, 47 (9th Cir. 2002) (thumbnail images held to be non-infringing), discussed in COHEN ET AL., *supra*, at 540. A continued example of the ambiguity of the law is lawsuits over Google's use of headlines and brief "snippets" as copyright violations. *See* Dirk Smillie, *AP's Curley Has Fightin' Words For Google,* Forbes.com, Apr. 30, 2009, http://www.forbes.com/2009/04/30/associated-press-google-business-media-apee.html.
[37] COHEN ET AL., *supra*, at 526.
[38] Sherman Act §1, 2, and 3 and Clayton Act §2, 3, and 7, codified at Title 15 of the U.S. Code; *see* discussion in CALLMANN §4:19.
[39] CALLMANN §4:19.

percent of the nation's economic activities, more or less subject to other regulation, are outside the sphere of free competition and the sweep of the antitrust laws."[40] Economic, political, and social rationales support these exemptions, as well as a "belief that in a particular economic area, free competition as such is not workable, some sort of governmental regulation being more in the public interest."[41] Unfortunately for the newspaper industry, the Department of Justice has most recently indicated that it does not foresee that newspapers require any such special treatment.

One path the newspaper industry is considering is a joint venture, potentially in the form of a mass paywall and universal site for downloading content, or a combined effort to track digital content and license it or pursue copyright violators. In all of these instances, the news companies would be working together instead of competing with one another (at least for this specific project), and that would almost certainly draw antitrust scrutiny from enforcement agencies. "Any efforts by competing businesses to join forces risk running afoul of antitrust law, which forbids teaming up in ways that could limit consumer options and increase prices."[42] Newspapers are well aware of this and in recent industry discussions have been careful to have antitrust attorneys present. If newspapers do form a joint venture, the DOJ or FTC might investigate it, and if either agency makes a determination that the venture poses a risk to competition, it might seek to have the venture disbanded, or, perhaps more likely, it could work out a consent agreement that would govern what specific actions the joint venture can and cannot take (such as selling stories exclusively or giving favorable terms to one person or another).[43] If the matter must go to the courts, they will most likely analyze it under a "rule of reason" analysis

[40] *Id.* §4:4.
[41] *Id.* §4:4.
[42] Russell Adams and Shira Ovide, *To Beat Antitrust Rap, Papers Take Cues from Songwriters*, WALL STREET JOURNAL, June 4, 2009.
[43] *See* discussion in PHILLIP AREEDA, LOUIS KAPLOW, AND AARON EDLIN, ANTITRUST ANALYSIS, PROBLEMS, TEXT, AND CASES 52 (6th ed. 2004). Consent agreements are far less expensive than taking the matter all the way to court.

(as opposed to being automatically, *per se*, illegal), as joint ventures "often have legitimate purposes as well as anti-competitive effects."[44] In particular, joint ventures can reduce transactions costs—sometimes "so substantially that they virtually create a new market or make a market much larger than it had been before."[45]

Examples of joint ventures that have withstood legal scrutiny in another content-producing industry are ASCAP and BMI in the music world. (Professor Jonathan Taplin notes that these are also the only type of media content organizations where there is increased revenue of late.[46]) These organizations provide blanket licenses to allow groups, like radio stations, to play copyrighted material. They have saved "untold millions of dollars in transactions costs" even though they have "completely eliminated price competition among artists."[47] They have produced "matchless efficiency in allowing contracts to form between hundreds of composers and millions of consumers,"[48] and in some sense created a "different product" with their blanket licenses.[49] This, in addition to the fact that the licenses they confer are non-exclusive (any content owner can continue to transact on an individual basis if they chose), led the Supreme Court to find them not *per se* illegal but to analyze them under the rule of reason and allow them to continue.[50] Whether a similar arrangement between newspapers would be upheld is unclear: both ASCAP and BMI exist under consent decrees from the antitrust enforcement agencies. That was another factor in the Supreme Court's decision, although it is unclear whether the Court's reasoning would be the same even if it weren't the case.

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[44] CALLMANN §4:38.
[45] HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE §5.2c (3d Ed. 2005).
[46] Interview with Jonathan Taplin, Clinical Professor, Annenberg School at University of Southern California (Sept. 29, 2009).
[47] HOVENKAMP, *supra* note 45, §5.2c.
[48] Richard A. Epstein, Presentation to Joint Committee of the Department of Justice and the Federal Trade Commission: Structural Remedies in Section 2 Cases (Mar. 28, 2007).
[49] *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.,* 441 U.S. 1, 22 (1979) (hereinafter *BMI v. CBS*).
[50] *Id.* at 4; *see* discussion in HOVENKAMP, *supra* note 45, §5.2c.

Experts believe that newspaper executives could have a successful joint venture if they structured it appropriately. Professor Herbert Hovenkamp says that, "the model could fly so long . . . as there are no exclusive agreements and the arrangement accomplishes something individual publishers otherwise could not."[51] It seems likely that publishers could be successful in arguing that what they can accomplish together is far different than what they can accomplish alone, and that together they are creating either a new licensing market or other content distribution system that did not exist or would have been thwarted by huge transactional costs if everyone acted alone. Indeed, "antitrust attorneys say there is a compelling argument that not creating such an arrangement will diminish the organizations' ability to survive and compete."[52] Their actions will then be analyzed under a rule of reason analysis, with positive efficiencies and anticompetitive effects considered.

Publishers, in addition to or instead of a joint venture, may also prefer to work alone but have everyone take the same step—i.e., happen to put up paywalls at the same time. Indeed, some prominent executives of news organizations have given speeches saying they believe that is likely to happen soon. This sort of parallel behavior is per se illegal if it is found to result from an agreement to set prices. While happening to act at the same time is not enough to prove antitrust liability, any evidence of an actual agreement between publishers could be sufficient for courts to find an antitrust violation, and such evidence could include past meetings, shared business plans, etc. In short, while most legal experts do not believe publishers have currently violated any antitrust rules with their meetings and actions, they do believe "publishers need to avoid setting prices or telegraphing business plans to their rivals."[53]

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[51] Ashby Jones*, Come Together! On Newspapers' Big Antitrust Hurdle*, The Wall Street Journal Law Blog, June 4, 2009, http://blogs.wsj.com/law/2009/06/04/come-together-on-newspapers-big-antitrust-hurdle/.
[52] Adams and Ovide, *supra* note 42.
[53] *Id*.

V. Looking Forward

Whether or not the law should be changed in order to enable a healthy news industry, the law could benefit from clarification. What content should the law protect, and for whom? How collaboratively should news organizations be able to work together as they seek solutions to their digital disaster? Below, this paper will discuss proposals to protect the news industry, by allowing it to make the most of its shift into the online space—in short, by helping to create revenue for news originators. Some require a change in the law, while others might not. All seek to encourage a lively news culture worthy of our democratic tradition. To that end, some snapshots of how other countries are grappling with this problem are first presented.

INTERNATIONAL TRENDS

Internationally, publishers are seeking ways to revive revenue as well. Some of these proposals claim to be simply leveraging, or relying on, current law, while others seek greater legal rights. It is important to look at international legal trends not only because they may provide useful polices, but because the U.S. is a member of international intellectual property treaties, and "Congress has made some of the most significant changes to U.S. copyright law in the last two decades in response to international treaties or legislative developments."[54] The treaties the U.S. has signed include The Berne Convention and the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement, which set minimum substantive standards for copyright protection, and the World Copyright Treaty, which considers copyright and new technology.[55] These treaties do not require that each country have the same copyright law, and countries vary widely in their intellectual property protection. However, all the treaties basically

[54] COHEN ET AL., *supra* note 2, at 48; see *e.g.* Digital Millennium Copyright Act, 17 U.S.C. §1201.
[55] COHEN ET AL., *supra* note 2, at 48, 51-53, 579.

agree that "news of the day or miscellaneous facts" do not receive copyright protection.[56] Further, most countries allow for copyright exceptions that are similar to, though often more narrow than, the U.S. fair use doctrine. These usually include a right to comment on others' work for the purpose of news reporting or the like.[57] How countries are responding to the news industry's concerns given specific national laws, and what countries see as the requirements under international treaties, may be illuminating. In addition, if the U.S. has signed a treaty that many countries now read to require a certain amount of protection, the U.S. arguably may need to take additional steps to be compliant.

a. The UK: Newspaper Licensing Agency

In the UK, the Newspaper Licensing Agency (NLA), which has managed copyright collection for the UK national newspapers (eight national papers and over 1000 local and regional papers[58]) since 1996, announced its intention to extend its licensing operation to newspaper websites beginning in January 2010.[59] The Newspaper Licensing Agency makes available to subscribers digital and paper copies of copyrighted newspaper content on a license basis, and then distributes over 18 million pounds to national and regional newspapers in return.[60] According to the NLA website, subscribers include "over 150,000 businesses and

[56] Berne Conv., art. 2(8). Both the TRIPs Agreement and the WIPO Copyright Treaty state, in almost identical language, that copyright protection extends 'to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such." TRIPs Agreement, art. 9(2); WIPO Copyright Treaty, art. 2, discussed in COHEN ET AL., *supra* note 2, at 90.
[57] *See* COHEN ET AL., *supra* note 2, at, 494-95.
[58] Newspaper Licensing Agency: Newspaper Websites "FAQ," *available at* http://www.nla-web.co.uk/downloads/generalFAQ%20ah.pdf.
[59] Newspaper Licensing Agency: Media Centre, "June 2009: NLA launches new database, extends licensing to web content," http://www.nla.co.uk/index.php?option=com_content&task=view&id=6&Itemid=7.
[60] Newspaper Licensing Agency, The Role of the NLA: "Who We Are, What We Do" and "Information for Publishers," http://www.nla.co.uk/index.php?option=com_content&task=view&id=14&Itemid=88 and http://www.nla.co.uk/index.php?option=com_content&task=view&id=16&Itemid=90.

organizations ranging from large government bodies, plcs, and limited companies to partnerships and public relations agencies."[61]

The NLA's internet extension will have it license online newspaper content to web aggregators, press cuttings agencies, and, as it indicates in one place, others "who use digital cuttings *for direct commercial gain.*" Elsewhere it indicates a slightly broader license-base, indicating that people need "a license or permission from the publisher if you're sending links for commercial gain or in some other systematic way" including people who "regularly send[ ] links as part of your paid work."[62] The NLA notes that both bloggers, who generally provide a free service, and Google News, which "has a different business model [than relying on charging for forwarding links]", will not need licenses.[63] The NLA finds authority for such licensing in the Copyright Designs and Patent Act of 1988 and in the terms and conditions of the newspapers.[64]

The NLA move, particularly its plans to charge companies that forward on links to newspaper sites, has drawn ire. Critics are opposed to "the enlargement of the term 'press cuttings' to include the forwarding of a URL" and argue that the NLA may be overstepping what British copyright law protects, as there is no reproduction or aggregation of content involved in sending a link.[65] British copyright law and U.S. copyright law ultimately derive from the same source, the Statute of Anne, and British law considers infringement of copyright to be copying, issuing copies, broadcasting, performing, or adapting a copyrighted work.[66]

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[61] Newspaper Licensing Agency: The Role of the NLA, "Who We Are, What We Do," http://www.nla.co.uk/index.php?option=com_content&task=view&id=14&Itemid=88.
[62] Newspaper Licensing Agency: Newspaper Websites, "FAQ," *supra* note 58.
[63] *Id.*
[64] *Id.*
[65] Christie Silk, *UK: Newspaper Licensing Agency slammed for proposals to charge PR agencies for links to newspaper sites*, http://www.editorsweblog.org/multimedia/2009/07/newspaper_licensing_agency_slammed_for_p.php.
[66] Statute of Anne (1710); *see* British Copyright, Designs, and Patents Act 1988.

b. Europe: Hamburg Declaration

In June 2009, publishers and executives from the European Publishers Council and the World Association of Newspapers signed the Hamburg Declaration, which noted, "Numerous providers are using the work of authors, publishers and broadcasters without paying for it. Over the long term, this threatens the production of high-quality content and the existence of independent journalism." To this end, the signatories,

> "welcome the growing resolve of federal and state governments all over the world to continue to support the protection of the rights of authors, publishers and broadcasters on the Internet. There should be no parts of the Internet where laws do not apply. Legislators and governments at the national and international level should protect more effectively the intellectual creation of value by authors, publishers and broadcasters."[67]

The declaration does not contain any detailed policy proposals. But, as the host of a signing ceremony explained, "We want a fair share of the revenues, which are already being generated through the commercial exploitation of our content by others, as well as the development of a market for paid content in the digital world."[68]

The declaration was presented to the European Commission's Information Society Commissioner in July 2009. Some publishers indicated an interest in greater legal rights (for example in Germany, where publishers desire a right "similar to protections that already exist for music publishers and other content owners") while others indicated they "want stricter enforcement of existing legislation."[69] In addition to presenting the Declaration, the publishers proposed that the EC regulators support the Automated Content Access Protocol (ACAP), which allows content providers to "communicate their copyright terms and conditions online in a

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[67] European Publishers Council, *News Release: International Publishers Demand New Intellectual Property Rights Protection to Safeguard the Future of Journalism*, July 9, 2009, http://www.epceurope.org/presscentre/archive/International_publishers_demand_new_intellectual_property_rights.shtml.
[68] *Id.*
[69] Eric Pfanner, *European Publishers Call on E.U. to Protect Copyright*, THE NEW YORK TIMES, July 10, 2009.

machine-readable way."[70] This would enable "publishers to set the terms of search engines' and aggregators' use of their content."[71] The publishers sought to have EC regulators "mandate [that] search engines implement the standard."[72]

PROPOSALS TO MONETIZE CONTENT

As newspapers look for ways to survive, many in the industry are developing new ways to derive revenue from online content. A recent study found that "twenty two percent of users said they stopped their subscription to a printed newspaper or magazine because they could access the same content while online."[73] As newspapers move online and readership of physical papers declines, newspapers will have a wide revenue gap to fill—they used to derive a huge share of their revenue from classifieds and more costly ads,[74] which are not always finding their way to the internet news sites. Some key ways to fill this gap are getting more revenue from the end consumer or reader, and/or getting payments from secondary sites that post the same or partly the same content. Some of these proposals may require legal changes in intellectual property or antitrust laws.

I. Get money from secondary sites

Newspapers and content originators might find a revenue source in the sites that reprint or reuse their material. To start, without any change in the copyright law, they could go after sites that reprint their work wholesale, thereby violating federal copyright law. Attributor, a tracking service that allows companies to see where their content is being used on the internet,

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[70] European Publishers Council, *News Release, supra* note 67.
[71] Pfanner, *supra* note 69.
[72] Jeffrey D. Neuberger, *Changing the Law to Save Newspapers: Some Modest Proposals*, MediaShift, July 21, 2009, http://www.pbs.org/mediashift/2009/07/changing-the-law-to-save-newspapers-some-modest-proposals202.html.
[73] USC Annenberg: Annual Internet survey by Center for the Digital Future finds large increases in use of online newspapers, April 29, 2009, http://annenberg.usc.edu/AboutUs/News/090429CDF.aspx.
[74] Pew Project for Excellence in Journalism*, The State of the News Media, Annual Report on American Journalism 2009*: *Newspapers-Economics*, http://www.stateofthemedia.org/2009/narrative_newspapers_economics.php?cat=3&media=4.

could help news producers police this behavior. In a limited study, Attributor has estimated that, "for each person who reads a news story on an authorized Web site, five people access the same story on an unauthorized channel."[75] Content originators could demand payments from these sites for the use of their copyrighted material.

In addition, if intellectual property law was tweaked, such that fair use was severely limited or "hot news" rights existed more securely, news originators would have an even broader base of institutions to seek revenue from. Any aggregator who paraphrased or repurposed a story protected by hot news, or anyone who reprinted a headline or a snippet that current falls within fair use, could be liable to the content originator. Whether or not the law should be expanded to allow for this liability, and how such rules would be enforced, is a matter for deep consideration, and one that raises important First Amendment concerns as it would be limiting speech in a novel way.

Using hot news as an example, it is clear the debate has gotten quite heated. Daniel and David Marburger, an economist and an attorney, claim protection for hot news is required and they argue that certain internet aggregators, in addition to drawing away customers from the original news site, are able to undercut newspaper advertising revenue because they do not have the same costs the news originators do.[76] Eventually these news aggregators (whose start up costs are very little) will drive ad revenue so low that newspapers will be driven out of business.[77] Connie Schultz, a columnist at the Cleveland Plain Dealer, and Federal Judge Richard Posner, have thrown their support behind blocking aggregators and others from citing to or reprinting hot news stories during a hot news window, arguing that it could provide a

[75] Adams and Ovide, *supra* note 42.
[76] David Marburger and Daniel Marburger, *Reviving the Economic Viability of Newspapers and Other Originators of Daily News Content,* 2 (2009).
[77] *Id.* at 2, 30-31.

"lifeline" for the industry and prevent the "downward spiral toward extinction."[78] These concerns have been hinted at as well by James M. Moroney III, of the Dallas Morning News, who told Congress this spring that it should move towards a principle of "Fair compensation for Content"—making sure that "newspaper publishers have the means to obtain reasonable compensation from Internet companies that reproduce or repackage their content for their own commercial gain—perhaps through the establishment of a 'consent for content' principle that would apply to breaking news."[79]

Others are horrified at the idea. Many fear that protecting hot news will have drastic, First-Amendment-chilling consequences. Professor and blogger Jeff Jarvis, critiquing Schultz' proposal, complains that "if the Plain Dealer reported exclusively that, say, the governor had just returned from a tryst . . . no one else could so much as talk about that for 24 hours."[80] This may be an exaggeration, especially if the other sites found their information through independent sources, but it highlights a large concern. Still others critique the notion that "parasitic" news aggregators are actually driving down ad revenue received by legacy news sites. In particular, Judy Sims writes that Google is the main reason advertising revenue rates are going down. Many have pointed the finger at Craig Newmark and Craigslist.

There's also debate as to whether protection for hot news should occur at the state level, or whether the federal government should step in to create such a right. If states are allowed to protect hot news, then each state could choose to protect it via statute or by allowing courts to continue to uphold the right in cases. If the federal Copyright Act does take the power away

[78] Connie Schultz, *Tighter Copyright Law Could Save Newspapers*, THE CLEVELAND PLAIN DEALER, June 28, 2009.
[79] James M. Moroney III, Publisher and Chief Executive Officer, The Dallas Morning News, Executive Summary of Testimony before Committee on Commerce, Science, and Transportation, Subcommittee on Communications, Technology and the Internet (May 6, 2009).
[80] Jeff Jarvis, *First, kill the lawyers – before they kill the news*, BuzzMachine, June 28, 2009, http://www.buzzmachine.com/2009/06/28/first-kill-the-lawyers-before-they-kill-the-news/.

from states to protect hot news, then the Copyright Act could either be modified with a clarification allowing states to protect hot news, or the Act could be modified to itself protect hot news at the federal level. Many scholars prefer allowing states and judicial common law to protect hot news, rather than having it explicitly protected at the federal statutory level, because that allows for more flexibility in the doctrine. For example, the Marburgers believe "the internet demands the flexibility of the judiciary's common law reasoning in adversarial contexts."[81] They propose "amending § 301 of the Copyright Act to make clear that, in the context of unfair competition among direct competitors, the unjust enrichment theory underlying the *INS* decision remains viable as a matter of state law."[82] Allowing hot news to continue to be protected via the common law may also be beneficial given the rapid phase of technology. Reviewing the history of hot news-like protection and misappropriation doctrine, Victoria Smith Ekstrand writes: "It is at these emerging technological outposts – the expanded use of the telegraph, the use of magnetic tape recording, the introduction of cable television, the introduction of pager systems—that the hot news doctrine, as common law, offers flexibility to the 'innovator/aggressor' while still protecting the work of the original creator."[83] Allowing the common law to protect hot news gives flexibility, but allowing it to be protected at the state level—and thus differently in different states—brings on ambiguities as well. If different states offer different protections, it will likely be difficult for news media and other organizations to determine in advance their rights, as they will not be subject to one uniform rule across the country.

If we were to protect hot news, in addition to considerations of whether hot news should be protected by statute or by judges, there is another question of what specific protection the law

[81] Marburger and Marburger, *supra* note 76, at 3-4.
[82] *Id.* at 44.
[83] EKSTRAND, *supra* note 25, at 156.

should provide for such news. Should a newspaper be able to block entirely other people from quoting from it? Or should there be a mandatory licensing system whereby no one can block others from quoting from them but payments are necessarily or automatically made? Copyright is currently protected under a liability regime, where you pay damages if you infringe on someone's copyrighted material. Hot news, in the past, has been protected via a limited injunction, which would prevent publication of the infringing material. Judge Posner, in his blog, threw out what seemed to be support for the blocking idea:

> "Expanding copyright law to bar online access to copyrighted materials without the copyright holder's consent, or to bar linking to or paraphrasing copyrighted materials without the copyright holder's consent, might be necessary to keep free riding on content financed by online newspapers from so impairing the incentive to create costly newsgathering operations that news services like Reuters and the Associated Press would become the only professional, non-governmental sources of news and opinion."[84]

Schultz has also thrown support behind an injunction. The Marburgers support injunctions, with the hope that they will lead to bargaining by individual parties and not injunctions: "The goal . . . is to create substantial legal and economic pressure on the aggregators to compete fairly with news originators in the market for advertising revenue. Eventually, that should lead to contracts, not lawsuits."[85] The Marburgers write that, "[i]t would take only a few strong precedents at the appellate level to show free-riders the futility in resisting publishers' demands."[86]

But the idea of enjoining speech is not without its problems. It seems very difficult to define a relevant time period for an injunction. The Marburgers propose that "[t]he injunction would last for a sufficient period of time to enable the originator to exploit the brief commercial life of its news reports before the aggregator can, and thus recoup the originator's investment in

[84] Richard Posner, *The Future of Newspapers,* The Becker-Posner Blog, June 23, 2009, http://www.becker-posner-blog.com/archives/2009/06/the_future_of_n.html.
[85] Marburger and Marburger, *supra* note 76, at 45.
[86] *Id.* at 47.

journalistic services."[87] Connie Schultz proposes 24 hours.[88] Others take issue with this timeframe—as Jeff Jarvis points out, 24 hours "is the cycle of newspaper publishing, not the cycle of news itself."[89] An injunction, blocked speech, is also most likely to violate the First Amendment. And what if an injunction did not lead to individual bargaining? There are many parties who may wish to repurpose a news story. Given the numbers of individuals involved and the heavy threat of deadlocked discussions, it may make more sense to create a mandatory licensing scheme along the kind that exists in the music industry for copyrightable content (ASCAP) to protect hot news, or the way NLA exists in Europe for copyrighted material. This scheme could be administered by the federal government (particularly if hot news is protected at the federal level), but experience with the cable and satellite industries and the copyright royalty tribunal seems to indicate private parties may be more flexible and better suited to the task.[90]

It would also be difficult to define who would be blocked from speaking under a system of injunctions, or who would be required to pay under a system of mandatory licensing. The First Amendment concerns here could be enormous. In *INS v. AP*, the Court focused heavily on the fact that INS was a competitor, for profit, of the AP. The Court emphasized that the AP had no news rights against the public—which is how many bloggers envision themselves. Bloggers run the spectrum from individuals with an internet connection to large networks that generate

[87] *Id.* at 44-45. They explain, "For example, newspaper publishers could pressure parasitic aggregators – including local broadcaster websites – either to carry the publisher's RSS links with headlines only, or to stop posting rewrites of publishers' news articles during the brief time when the publisher's reports have their greatest commercial value." *Id.* at 45.
[88] Schultz, *supra* note 78.
[89] Jarvis, *supra* note 80.
[90] The Copyright Royalty Board is slower moving than most private parties and may not be flexible enough to deal with rapidly changing technology. This has been a concern for the cable and satellite industries and the mandatory licensing systems for them that the royalty board oversees. *See* discussion of "antiquated" system, Marybeth Peters The Register of Copyrights, Statement before the Judiciary Committee, 11th Cong., 1st Sess.: Copyright Licensing in a Digital Age: Competition, Compensation and the Need to Update the Cable and Satellite TV Licenses (Feb. 25, 2009).

millions of dollars of ad revenue.[91] Community news sites, which currently fit into the more traditional model of competitors, may soon operate on a much more nonprofit basis. The months of stalling over the definition of a "journalist" in the federal shield law talks, particularly at the Senate Judiciary Committee, give a preview of how had the process of definition could be. On the one hand, it seems most fair to treat those who are protected by the shield law to be those who are considered competitors, and vice versa. On the other hand, a newspaper could very easily lose many of its visitors to sites even if they are not staffed by "professionals" under the definition in the latest proposed Shield Law bills.[92] Given the multitude of new and varied players in the news world, and the difficulty of defining them, if the hot news doctrine of old persists as defined in *INS v. AP* and clarified, at least in New York, in *Motorola*, it may not offer news originators quite the wide swathe of protection and revenue they hope for. A further expansion of the doctrine may be legally unsupportable (and even more politically unpopular than the doctrine as it exists).

Copyrighted content could be monetized in much the same way that hot news content could be monetized. A mass copyright licensing scheme, along the lines of the music industry's ASCAP or Britain's NLA, could seek to enforce copyrights using digital tracking and distribute fees to copyright owners just the way that music owners currently receive a percentage of ASCAP's royalties based on how often their songs are played. Since at least some of the revenue news originators are losing is due to illegal copying, no change in the law would be needed to seek revenue from the infringers and the move would cause less public outcry and First Amendment concerns than any large scale change in the hot news field. It is also possible that

[91] By some estimates the blog networks like Gawker media may generate in the low tens of millions of dollars in ad revenue. Some blog networks, like Gawker Media, have reported ad revenue is up 45 percent in the first half of 2009. Claire Cain Miller, *Ad Shift Throws Blogs a Business Lifeline*, THE NEW YORK TIMES, Sep. 13, 2009.
[92] Zachary M. Swear, *Definition of 'Journalist' Gets Professionalized,* Neiman Journalism Lab, Sep. 23, 2009, http://www.niemanlab.org/2009/09/shield-law-definition-of-journalist-gets-professionalized/.

subtle shifts in what constitutes fair use in the technological age, which might allow news producers to eke more revenue out of those who reuse their content, could create less of a backlash than a federal hot news injunction.

Using an ASCAP-like intermediary, for either copyrighted or hot news content, would require that the industry band together. This would probably attract antitrust scrutiny, and while, as discussed above, it is likely that the news industry could be successful with such a move, they would have to be able to defend it to regulators and courts as a pro-competitive, non-exclusive move, and there would always be the risk that courts would find the scheme illegal.[93]

II. Make Readers Pay

The failure of newspapers to charge readers for online content from the start has been referred to as journalism's original sin, and many see now as the time to overcome it. About half of publishers now believe a paid content model can succeed.[94] Many are interested in finding ways to allow newspapers to charge readers directly, including News Corp., Google, Microsoft, and new ventures like Steven Brill's Journalism Online.[95] News outlets of all stripes are interested: Variety has announced plans to make a subscriber model with one payment for online, mobile, or print access.[96] The mass movement comes at a time when newspapers across the board are struggling, and see others in a similar boat. Paywalls for general news will likely not work if only one or two newspapers do them: "The reality is that unless a lot of people who produce news act in unison to start charging for content, then individually they will fail."[97] This

[93] *See* discussion in Adams and Ovide, *supra* note 42.
[94] David Kaplan, *Glass Half Full? 51 Percent of Newspaper Publishers Believe Charging for Online Content Can Succeed,* paidContent, Sep. 14, 2009, http://paidcontent.org/article/419-glass-half-full-51-percent-of-publishers-believe-they-can-charge-for-on/.
[95] Richard Pérez-Peña, *Lots of Fee Ideas for Media Online*, THE NEW YORK TIMES, Sep. 11, 2009.
[96] David Kaplan, *Hollywood Trade Mags, Variety, THR, Look to Build Online Paywalls*, paidContent, Sep. 17, 2009, http://paidcontent.org/article/419-hollywood-trade-mags-variety-thr-look-to-build-online-paywalls/.
[97] Dawn C. Chmielewski, *News Corp. Pushing to Create an Online News Consortium*, LOS ANGELES TIMES, Aug. 21, 2009.

summer, the Chief digital officer of News Corp. is "believed to have met with major news publishers including the New York Times Co., Washington Post Co., Hearst Corp., and Tribune Co., publisher of the Los Angeles Times."[98] Given recent announcements of plans to charge for content, at least a few publishers will try their hand at this model.

An initial frontrunner in the push for charging readers has been Journalism Online. Its founder, Brill, thinks that by providing online content for free but charging for paper versions, newspapers are "charging for the inferior product" while giving the better one away.[99] Brill has argued that dependence on advertising hurts publishers in a number of ways, including that they are more vulnerable to start-up competitors than those who depend on circulation, and that they are loyal only to advertisers, not readers. He prefers a model where readers can be the bosses, and says that "it changes the feel of the newsroom" when reporters know readers will be paying for content.[100] Others have noted another positive externality associated with readers paying for online content: more people may be willing to pay for print content, too. "For print publishers such as newspapers, this move toward paid access online will also restore the value proposition of the print medium by eliminating the fully free online alternative."[101]

What news will people be willing to pay for? At least one study indicates that a hybrid model, with a mix of free and paid news, is more financially successful than a pure paid

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[98] *Id*.
[99] Interview by David Lat with Steven Brill, founder, *The American Lawyer* and Journalism Online (Sep. 22, 2009).
[100] *Id*.
[101] Journalism Online, Response to Newspaper Association of America 2009 Request For Information. One newspaper, The Newport Daily News, is charging subscribers who only want the internet version more than those who want print or print-plus-internet. Edward J. Delaney, *Charging (a lot!) for News Online: The Newport Daily News' New Experiment with Paid Content,* June 8, 2009, http://www.newsweek.com/id/214607. The move seems to have paid off as people have returned to the print version. *See* Johnnie L. Roberts, *This News Doesn't Want to be Free*, Newsweek Web Exclusive, Sep. 1, 2009, http://www.newsweek.com/id/214607.

model.[102] Google, in selling its ability to make paywalls simple and customizable, wrote in its proposal to NAA:

> "There will be some set of news content that is inappropriate for putting behind a pay wall. For example, basic reporting on the news of the moment that is covered by multiple sources. Users are unlikely to pay for access to this type of content, given that it is highly likely to be available somewhere online for free. The type of content most suitable for a premium/pay subscription service will likely include deeply researched pieces, exclusive interviews, opinion pieces, enterprise journalism, and more."[103]

While Google puts a positive spin on which content readers will pay for, others take a different tack. As the chief executive of Trinity Mirror explains, "It is clear that a paid online model already exists for unique, high value and well-differentiated content. However, we very much doubt that it is possible for publishers to charge for general news content when the same content is given away free by the BBC, Google News and others."[104] While many agree that consumers are willing to pay for up-to-the-minute financial news, like that provided by the Wall Street Journal (which has one of the few successful online paywalls), they are not so sure about a readers' willingness to pay for general news.

In fact, it is unclear if readers have ever been willing to pay for general news. Industry scholars, like Rosenstiel, and blogger and former VP of Digital Media for Toronto Star Media Group, Judy Sims argue that what people may have been paying for in the past was the classifieds, the things that allowed them to "shop every week . . . decide what movie to see at what time and where." She continues, "[o]ur first job, car, rental apartment and purchased home were likely found in the classifieds section. . . . How much of the value of the newspaper was

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[102] Matthew Sollars, *Two Paid Models for Metro News,* CUNY Graduate School of Journalism New Business Models for News, Sep. 30, 2009, http://newsinnovation.com/2009/09/30/two-paid-models-for-metro-news/.
[103] Google, Response to Newspaper Association of America's 2009 Request For Information.
[104] Mark Sweeney and Andrew Clark, *Expert views on Murdoch's Online Pay-to-View Strategy*, THE GUARDIAN, Aug. 6, 2009.

derived from news and how much was derived from all these other things?"[105] If people are indeed unwilling to pay for general news, paywalls will hurt newspapers' bottom lines instead of buffering them, because they will drive away readers and page views. Vivian Schiller, who "dismantled" the TimesSelect online paywall, explains that "it would be foolhardy for news organizations to undermine what is the most lucrative form of online revenue, advertising, by cutting off the flow of readers."[106]

Exacerbating the problem of an existing and ingrained unwillingness to pay for the news is the existence of free alternatives. When faced with a paywall, people could flock to free sites. As Sims writes, "I believe that a large percentage of online readers are content to read someone else's analysis of the news, rather than the news itself. A pay wall encourages users to find commentary on the news rather than the story itself. Thus conversations about a particular news story will occur all over the web, but not on the originating site."[107] This concern is particularly relevant if current copyright laws are not enforced or hot news is not protected, and sites are able to summarize in a paragraph news stories that are otherwise behind a paywall. Newspapers are already concerned that few readers at Newser, Digg, or the Daily Beast eventually click through to their original stories—imagine how many fewer linking readers the papers might have if their content is paywall protected (as, for example, The Wall Street Journal's content is, though the Daily Beast still summaries stories it deems important).

Consumers have not indicated a great appetite for paying for the news. In a paidContent:UK/Harris Interactive poll done this fall, only five percent of readers would choose to pay to read their favorite news site (though 12 percent are not sure what they would do).

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[105] Judy Sims, *Top 10 Lies Newspaper Execs are Telling Themselves*, SimsBlog, Sep. 1, 2009, http://simsblog.typepad.com/simsblog/2009/09/top-10-lies-newspaper-execs-are-telling-themselves.html.
[106] Sweeney and Clark, *supra* note 105.
[107] Sims, *supra* note 106.

Three quarters "would simply switch to an alternative free news source."[108] These results are direr than those from News Corp.'s studies, which demonstrate, based on audience research in the US and Australia, that given the right product and price, people "will happily pay for news content online."[109] The paidContent results also contradicts the hopes of journalists: 68 percent of publishers believe "readers who don't want to pay for their content will have a tough time finding comparable news coverage" (though "52 percent also said getting the same news for free would still be 'very easy' or 'somewhat easy'").[110]

At the very least it seems people will likely only pay for the news if free alternatives are not readily available. This requires not having secondary sites with the same information, as well as protecting the information that is behind the pay sites. This could be done via technological protections, which may be easier for the average reader to circumvent at the text level than with a music or video file. People are currently quite adept at copying and pasting the text of articles they enjoy—even on paid content sites—and forwarding them on in email to their friends. New digital protection will likely be needed. The music industry has been able to recapture some revenue by providing low-cost, clean, easily available songs in places like iTunes and Amazon. Now some consumers are much more willing to simply pay a few bucks for a song rather than go through the hassle to find a decent black market copy, even though such copies still exist.

Concurrently, the music industry has, with the movie industry, tried to redirect social norms, so that it is not acceptable to download—or, as they prefer, pirate—free music. Perhaps newspapers can teach readers or online content generators to feel inappropriate about "stealing"

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[108] Robert Andrews, *Only Five Percent Of Readers Would Pay for Online News*, paidContent:UK, Sep. 20, 2009, http://paidcontent.co.uk/article/419-pcukharris-poll-only-five-percent-of-readers-would-pay-for-online-news/.
[109] Patrick Smith, *News Corp.: Our Research Proves People Will Pay Online*, paidContent, Sep. 25, 2009, http://paidcontent.org/article/419-news-corp.-our-research-proves-people-will-pay-online/.
[110] Kaplan, *supra* note 95.

news. The music industry initially had to face an uphill battle when Napster and others made music "freely" available online. Part of winning that battle has been publicly noted success in a few high profile cases where individuals are ordered to pay hundreds of thousands of dollars for illegal music.[111] The newspaper industries, after protecting their content behind paywalls, could sue a few users who violated the terms of the agreements, such that fear was sufficiently widespread. The newspaper industry likely has a more uphill battle in reconfiguring social norms than the music industry, because the news industry has by now given news away since its entry onto the internet.

A. Collecting Money from Consumers

How should payments from consumers be collected? Over the past half year, numerous proposals have sprung up to charge consumers. Many involve micropayments on a per article basis, daily passes, monthly subscriptions, yearly subscriptions, or some combination thereof. (As for what readers would prefer, at least readers in the UK would prefer subscriptions over per article fees or daily passes.[112]) Typically, these would be paid for by readers the same way other online purchases are made—at the computer. A lot of these include subscription systems that link consumers of news to more than one news producer—a MyWire proposal given to the NAA notes that "content from many news providers for one price—can succeed where single publication subscriptions often fail."[113] Some roll out plans for payment over time, so readers become accustomed to paying, and some keep some content free and other content protected.

Focusing on some of the more talked about proposals, News Corp. has announced plans to create pay walls in an online news consortium with a new payment system, Mosaic, that it

[111] The Joel Tenenbaum case, where the BU student was ordered to pay $675,000, is one example.
[112] Robert Andrews, *PCUK/Harris Poll: Only Five Percent of Readers Would Pay for Online News,* paidContent:UK, Sep. 21, 2009, http://paidcontent.co.uk/article/419-pcukharris-poll-only-five-percent-of-readers-would-pay-for-online-news/.
[113] MyWire, Response to Newspaper Association of America's 2009 Request for Information.

"has been offering to sell to other companies" like the Tribune Company and Hearst Corporation. Murdoch currently successfully uses a subscription model to the Wall Street Journal online, which has over 1 million paying subscribers.[114] The Wall Street Journal is also charging subscribers to Wall Street Journal Mobile Reader; along with the costs come enhancements to service including "personalization, stock tracking, advanced saving/sharing and 'enhanced' market data."[115] Google plans to offer a combination of subscription services and potentially micropayments via Google Check Out, and would allow people to access multiple subscriptions or a subscription bundle with an integrated login feature. Google would also offer ways for publishers to get ad revenue tied to their content. [116] Journalism Online plans to create an e-commerce platform that will reside at an individual publisher's site, so they will "not create a competing destination site or aggregate and host publishers' content"[117] Journalism Online also will have the ability to bundle print and online subscription, charge based on whether or not consumers are in or out of market, sell related goods (like books next to the book review), charge differently based on the times of day, and charge for features like the ability to comment or email to friends. By mid-September, Journalism Online had received nonbinding letters of intent from over 1000 "news and information Web sites—large and small, domestic and foreign."[118] Plans generally involve the platform provider keeping some share of ad or subscription revenue.

Many of these reader-pay proposals, particularly those responding to the NAA's Request for Information, also include ways to eke more revenue from the ad side. The proposals offer news publishers a targeted advertising solution, sometimes in combination with other

[114] Chmielewski, *supra* note 98.
[115] Staci D. Kramer, *WSJ Mobile Pay Plans Start Next Month; Includes Browser Access*, paidContent, Sep. 17, 2009, http://moconews.net/article/419-wsj-mobile-pay-plans-start-next-month-includes-browser-access/.
[116] Google, Response to Newspaper Association of America's 2009 Request for Information.
[117] Journalism Online, Response to Newspaper Association of America's 2009 Request for Information.
[118] Pérez-Peña, *supra* note 96.

personalization like targeted "further reading" links and other content. They offer to match reader demographics, profiles, and behavioral data with relevant advertising, which can command a larger advertising dollar. A potential problem for these targeted ad solutions is that Congress and the Federal Trade Commission are moving forward with online privacy investigation, and may soon introduce legislation that limits what information companies can require from readers/consumers, or at the very least makes readers aware of what information is being collected from them. This could be problematic for the news industry, which could benefit financially from further tapping into online reader information. While some readers will likely be perfectly willing to knowingly give up personal information in exchange for a more customized and relevant experience, others may opt out if given the choice. Indeed, a recent survey by University of Pennsylvania and Berkeley Professors indicated that 66% of people did not like tailored ads, and the "aversion" increased "once they learned about targeted methods." However, there were more mixed feelings regarding targeting coupons and content: 51% of readers felt that customized discounts were okay, and 58% were okay with customized news.[119]

Another concern for the news industry in charging readers, particularly through a joint venture, is the antitrust laws. If the publishers join together to create a consortium with a shared paywall scheme, it is "bound to attract scrutiny from federal regulators" who will be skeptical of its effects on competition.[120] A shared paywall structure may require government approval, potentially in the form of an antitrust allowance similar to the ones the recording industry has already received. Some, like attorneys Bruce D. Brown and Bruce Sanford, propose changing

[119] Stephanie Clifford, Two-Thirds of Americans Object to Online Tracking, THE NEW YORK TIMES, Sep. 29, 2009.
[120] Chmielewski, *supra* note 98.

antitrust law to allow newspapers to use collective pricing strategies.[121] However, depending on the collaboration taken by the newspaper industry, as discussed above, if the news organizations take the appropriate steps, antitrust law, even if left unchanged, may not be an insurmountable obstacle.

Another way of collecting money is to do it in a way that does not require a reader to click a button or use her credit card when faced with the news. Charging at a time distinct from news consumption would help to lessen fears that people would limit their news reading because they are aware, with every click, that they are being charged.[122] Rosenstiel has equated this to getting on a toll road only to be stopped every 50 feet to pay more money.[123]

Users who consume news could pay instead when they pay their monthly broadband bill. This could take many forms—a government tax rolled into the price of service and distributed based on page views, an opt-in subscription model like adding HBO to your cable bill, an optional fee paid into an agency like ASCAP or BMI that would distribute monies to the content providers, or something else entirely. Rosenstiel, among others, has suggested an additional fee on customers' monthly broadband bills that is tacked onto Internet access.[124] In the same way that an organization could license copyrighted or hot news material to secondary sites, news could be licensed to newsreaders and paid for at the ISP level, with payments distributed by the government or a non-profit intermediary body.

One potential problem with having users pay at the broadband level—if such payments are optional and not mandatory--is that many people read newspapers at the office, not at home.

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[121] Bruce W. Sanford and Bruce D. Brown, *Laws That Could Save Journalism*, THE WASHINGTON POST, May 16, 2009. They also propose federalizing the hot new doctrine, eliminating rules regarding ownership restrictions, using taxes to promote the news industry, and granting other antitrust exemptions.
[122] Rosenstiel expressed this concern at the USC Annenberg Center on Communication Leadership & Policy's Communication Leadership Open Forum (Sep. 2, 2009).
[123] Robert MacMillan, Newspaper Crisis Spurs Debate on Free Online News, REUTERS, Mar. 15, 2009.
[124] *Id.*

"Newspaper websites receive most of their visitors during working hours, Monday through Friday, suggesting that a larger proportion of readers visit newspaper websites using their employers' computer systems."[125] This distinguishes news consumption from cable consumption, and means that people might not be interested in paying to read the news at home, or might be annoyed to pay for access at home if they could not pay for it at work.

Academics are proposing mandatory fees, often in the context of the entertainment industry more generally. Professor William Fisher, focusing on the entertainment industry, has proposed an Alternative Compensation System—a tax—that could be paid via income taxes (it would be about $27 per person per year in additional taxes if it was applied evenly, though likely it would be rolled into our progressive system), or via taxes "on goods and services used to gain access to music and film." Fisher writes that the income tax would be the preferred method if it were politically viable. He also argues that the Alternative Compensation System financially benefits most consumers, who would save money off the $270 the average American household currently spends on access to audio and video records.[126] A mandatory tax, in his mind, is preferable to a voluntary option, perhaps one run by a non-profit coop that would let producers and consumers decided to opt-in, because such an option would "leak" content to non-members and it would be "difficult . . . to persuade enough musicians and filmmakers to sign up for the system in order to provide a sufficiently large stock of recordings to attract consumers."[127] Already, on a smaller scale, there are plans for ISPs to collect license money from their subscribers and share that with entertainment companies, such as with Choruss on college

[125] Marburger and Marburger, *supra* note 76, at 9.
[126] WILLIAM W. FISHER, PROMISES TO KEEP: TECHNOLOGY, LAW AND THE FUTURE OF ENTERTAINMENT LAW 202-223, 236-37 (2004)
[127] *Id.* at 252-58.

campuses.[128] Professor Jonathan Taplin recommends a global mandatory licensing fee for all types of content—video, audio, written—charged per broadband subscriber of about $3-4/month. He believes that "there clearly is no other solution" and notes that ASCAP and BMI are the only successful model in the entertainment industry at present, with their compulsory licensing scheme.[129] He equates people's use of broadband with their visiting a retail store with music playing in the background—they don't have a choice whether or not to pay if the store rolls the cost of music into their t-shirt (and the store will do so), and if you buy broadband it is in order to access content on the internet and you should not have a choice whether or not to pay copyright holders for that content. This fee would be split among content providers—including video/audio/news sources—with percentages determined first via sampling and eventually via digital content management. Content providers that are currently charging for their material or for downloads would continue. In an effort to sweeten the deal, ISP providers could be absolved of copyright violation liability, even more so than the protections they currently receive in American under the DMCA. Taplin's proposal would likely require some agreement at the World Trade or another global-body level. Currently, apriceformusic.com looks at different financial scenarios if the music industry were to start charging for at least some of its content in this way.

B. Google

Google, and in particular Google News, plays an intriguing and hard to capture role in publishers' search for online revenue. On the one hand, Google News seems least likely to be violating copyright law with its posting of headlines and very short snippets—all of which

[128] *See* Eliot Van Buskirk, *Three Major Record Labels Join the 'Choruss',* WIRED, Dec. 8, 2008.
[129] Taplin, *supra* note 46.

currently seems to fall within copyright's fair use exception.[130] Google News also provides a great benefit to newspapers: Over a quarter of traffic to news Web sites comes from Google News.[131] As Peter Chernin pointed out, "Google is making money by directing" people to news and other sites, not by "stealing" anyone's content.[132] Google News is thus problematic because it seems to be the company capturing the most ad-based revenue on the internet, but it is also the company that is allowing more people to access news content originator sites. People vehemently disagree about whether Google should be constrained by tighter copyright laws (as it has been in Europe) or encouraged. The Marburgers, in their proposal to protect hot news, see Google as a pure aggregator that would not be charged for providing links to hot news even if hot news was protected. The Marburgers believe, "that it probably would be fruitless if publishers charged fees to Google News . . . as a condition for those aggregators linking to the publishers' websites."[133]

> "If newspaper publishers charged fees to Google News and other pure aggregators for linking to the publishers' sites, competitive market forces would soon drive the publishers' fees down to zero, just as they have for broadcasters that provide TV listings to newspapers. . . . The influx of reader traffic from the pure aggregator's site apparently is valuable enough that other publishers will forgo the fee for the link"[134]

Connie Schultz, another hot news protection proponent, says she "has no beef with Google News . . . which posts a headline and a link to the original story."[135] Yet the WSJ editor Robert

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[130] As The Wall Street Journal notes, while "What portals like Google do—run headlines and snippets of stories—so far has been immune to copyright claims . . . the argument has been made successfully in Europe that even that type of reuse entitles publishers to a fee." Adams and Ovide, *supra* note 42.

[131] Rick Edmonds, *API Report to Exec Summit: Paid Content Is the Future for News Web Sites*, PoynterOnline, Jun. 4, 2009, http://www.poynter.org/column.asp?id=123&aid=164522.

[132] Peter Chernin, The Art of the Longview: The Media Company of 2020 Presentation (Sep. 24, 2009).

[133] Marburger and Marburger, *supra* note 76, at 22.

[134] *Id.* at 52. The Marburgers write that "Google News, for example, pays no fees to publishers to link to their sites." *Id*. This, however, conflicts with the AP licensing fees. *See* Smillie, *supra* note 36. Possibly the Marburgers do not consider the AP to be a publisher; they describe it later as differing from its member newspaper publishers. Indeed, they seem critical of the arrangement where the AP licenses content to Yahoo news and potentially does not share this revenue to member newspapers. *Id.* at 57-60.

[135] Connie Schultz, "Response to Buzz Machine," BuzzMachine, June 28, 2009, 3:51pm, http://www.buzzmachine.com/2009/06/28/first-kill-the-lawyers-before-they-kill-the-news/.

Thomson has called Google and other aggregators "parasites or tech tapeworms in the intestines of the internet."[136]

The AP appears to recognize Google's threat and its promise. It, like others, has sued Google News over running its headlines, presumably alleging copyright violations. Yet in 2006, when the suit settled, Google agreed to pay an undisclosed licensing fee *and* to give authorized AP stories priority in Google News—indicating that the AP understands the value that Google News's search provides it even as it tries to force Google to pay it for that value.[137] As of summer 2009, the AP is reportedly seeking to gain priority for its authorized stories in regular Google searches.[138]

Google's more recent actions may be softening publishers toward the company. It has made a paid-content proposal to the NAA (offering use of its Google checkout and other hosting capabilities) that would allow newspapers to charge readers and earn more ad revenue. It has also recently debuted Fast Flip, where publishers like the New York Times and Newsweek have agreed to allow Google to use logos and graphic images of their web content in exchange for being part of a new user interface and shared revenue from contextual based advertisements.[139] Fastflip has been described as "a bold attempt [by Google] to be seen as a friend" by the news industry.[140] Google sees major benefits in the speed with which Fast Flip allows readers to see the news, believing "that if reading news online was closer to the experience of scanning through physical newspapers or magazines, people would read more."[141] Participants like The Atlantic

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[136] Chmielewski, *supra* note 98.
[137] Smillie, *supra* note 36; Jeffrey D. Neuburger, *A Brief History of AP's Battles with News Aggregators*, MediaShift, http://www.pbs.org/mediashift/2009/05/a-brief-history-of-aps-battles-with-news-aggregators146.html.
[138] Neuberger, *supra* note 136.
[139] Staci D. Kramer, Google Fast Flip Goes Live; Experiment in News Reading And Revenue Sharing, paidContent, Sep. 14, 2009, http://paidcontent.org/article/419-google-fast-flip-goes-live-with-three-dozen-publishers-including-nyt-wa/.
[140] Miguel Helft, *Google Releases News-Reading Service*, THE NEW YORK TIMES, Sep. 14, 2009.
[141] *Id*.

note that they find it interesting (and presumably appealing) that Google is now offering revenue for them.[142] This may allow them to see Google as more of an ally as they stretch into new technological territory, as Google will likely be involved in whatever future online news publishers experience.

III. Subsidies in Exchange for Copyright

Instead of strengthening copyright or other laws to give the news industry more protection, some are proposing that the government go in the opposite direction: ask content producers to give up copyright rights in exchange for a direct financial subsidy. As proposed by Mike Ananny and Daniel Kreiss, the government could offer an optional, opt-in model in which individuals give up copyright protection—by making their work "in the public domain or freely available to the public"—in return for a subsidy.[143] Many view copyright as a form of government subsidy to encourage writers to create works. Ananny and Kreiss argue the subsidy could function more beneficially if it was paid out in two-tiers, the first going to those who make public their content and the second, additional subsidy paid based on an organization's support of "transparency, accountability, dialogue, reliability, and collaboration."[144] In this way, the government could encourage the creation of works as well as citizens' use and re-use of those works, and copyright claims would not be used "to limit citizens' access to the informational materials with which they might exercise their First Amendment rights."[145] The funding would be "a public subsidy that seeks to ensure both the breadth of information in the public domain and the quality of democratic expression."[146] Funding, at the initial level, would try and track

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[142] *Id*.
[143] Mike Ananny and Daniel Kreiss, Dep't of Communication, Stanford, working paper, *A New Contract for the Press: Copyright, Public Journalism, and Self-governance in a Digital Age* 4-5 (2009).
[144] *Id.*
[145] *Id.* at 8.
[146] *Id.* at 6.

what the authors could have received had they maintained their rights protection.[147] At the secondary level, additional funding would be paid out based on the principles listed above, with funding decisions determined by elected representatives of various sectors of journalism, such as the Professional Sector, the Partisan Media Sector, and the Citizen Media Sector.[148] In this way, content producers might fully embrace the opportunities for creativity and innovation afforded by new technologies, instead of running from the technology in fear and trying to protect content with ever more expansive copyright protection that limits citizen expression.[149] Ananny and Kreiss argue that "news producers, whether they are professional media outlets, individual or group blogs, or informal collaborative networks, should have access to comparable financial support but without explicit and exclusive property claims so that the public might freely use and rework their content in the service of the democratic dialogue." While Ananny and Kreiss envision their plan could work for many types of content, they focus on journalism because "of the press's role as a constitutionally protected information institution."[150] Because of the historic role of the press in our democratic society, it may be most pressing that this industry, above others, fully embrace the possibilities of the digital age in order to enhance our civic society. It is equally important to ensure that viewpoints in the press do not suffer unfair discrimination. Any system in which a group of people—elected representatives of their industries especially—determines how to dole out money, raises concerns about which viewpoints may be supported and which may be disadvantaged.

[147] *Id.* at 16.
[148] *Id.* at 23.
[149] *Id.* at 7.
[150] *Id.* at 15.

CONCLUSION

The move to the internet poses problems and possibilities for the news industry. It allows for increased collaboration between news producers and the timely provision of news stories. It also allows for the easy and instantaneous copying of others' news stories, a practice which decreases readership and the potential for ad revenue at the original content producers' site. Copies that violate current copyright law, and summaries and rephrasings that do not, abound online, drawing readers and ad dollars. A news originator, in order to earn some returns on its product, could try protecting its content via a paywall, or could seek a deal in which it licensed its content and customers paid via their monthly broadband bills. When paying for news is optional, either because free alternatives or exact copies of the same stories exist elsewhere, such revenue-seeking moves aren't likely to be successful. Social norms are such that most readers currently expect to read news for free, and would likely shift to free versions if the original stories became paywall-protected. Similarly, if paying for licensing in monthly bills was optional, and not mandatory, a few could pay and distribute to the many more who did not. Action taken at the individual business level, in the current legal climate, is likely to be ineffective. More strongly enforced laws, or even stronger laws, are likely necessary.

Content originators are currently gaining little revenue from the internet, or anywhere else. This threatens their viability. In order for news producers to thrive, they need financial incentives to produce content online. There are a number of ways to enable such incentives, and the government should carefully research which of these ways is least disruptive and most supportive of a diverse and vibrant press. It should understand the underlying technological and practical realities surrounding the online news marketplace before jumping in with a solution. Some strong contenders for a solution include ensuring robust copyright and other intellectual

property protection, either through strong enforcement of the laws currently in place or increased intellectual property protection, while keeping cognizant of the First Amendment. If the current copyright law is deemed effective enough, it could be made more easily enforceable, with a quicker path to judgment when obviously exact copies are found online. Alternatively, financial incentives could come more directly, in an exchange of copyright protection for more direct government subsidies. In the competition field, antitrust laws need not necessarily be changed to allow newspapers to derive revenue from online content, but the antitrust enforcement agencies and the courts should look to their experience with past content-industries to craft appropriate rules, potentially allowing news providers to work together in novel ways. With the right model supported by the right laws, the news producing industry may be able to thrive in the digital age.