Before the
FEDERAL TRADE COMMISSION

In the Matter of	)	Project No. P091200
News Media Workshop: From Town Crier to Bloggers: How Will Journalism Survive the Internet Age?	)	

Comments of Public Knowledge

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Public Knowledge respectfully submits these comments in response to the Federal Trade Commission's ("FTC") staff discussion draft of *Potential Policy Recommendations to Support the Reinvention of Journalism*.[1] Public Knowledge is a non-profit public interest organization devoted to protecting citizens' rights in the emerging digital information culture and focused on the intersection of intellectual property and technology. Public Knowledge seeks to guard the rights of consumers, innovators, and creators at all layers of our culture through legislative, administrative, grass roots, and legal efforts, including regular participation in copyright and other intellectual property proceedings that threaten consumers, trade, and innovation. As Public Knowledge's relevant expertise is in intellectual property, these comments focus on the FTC's potential intellectual property policy recommendations.

SUMMARY

The FTC should not recommend policy changes with regard to intellectual property. These potential intellectual property policy recommendations are not aimed at aiding journalism as a whole, but instead seek to protect a particular subset of news organizations. Furthermore, these recommendations may not solve the problems faced by the journalism industry, but will have widespread negative consequences. The ramifications of any adjustment to intellectual property law would be far reaching and extend to a wide variety of content, creators, users, and consumers. Changes to intellectual property law may endanger free expression and First Amendment rights, the

[1] Federal Trade Commission, *Potential Policy Recommendations to Support the Reinvention of Journalism* (Staff Discussion Draft) (2010), *available* at http://www.ftc.gov/opp/workshops/news/jun15/docs/new-staff-discussion.pdf [hereinafter Staff Discussion Draft].

cornerstone of journalism, without actually aiding journalists. As the benefits to journalism of any change in intellectual property law are tenuous, but the harms to all citizens great, the FTC should not recommend expanding hot news, limiting fair use, or creating an undeveloped news licensing regime.

The problems faced by the news industry today are not a product of current intellectual property law, but instead are—at least in part—a product of business decisions made by news organizations themselves.[2] Many news organizations chose to go public during the 1960s, beginning a shift in focus from improving journalism to increasing profits.[3] Beginning in the 1990s, many news organizations began to consolidate to form regional clusters, reducing competition and increasing profits.[4] Finally, ownership of many news organizations shifted from the hands of media companies to banks and private investment firms, who viewed these institutions more as investments than sources of information and public good.[5] In this environment, news organizations chose to increase short-term profit margins rather than invest in improving news operations for the long term.[6] News organizations have become greatly indebted and overleveraged[7] due more to these short sighted, profit-centric business decisions than any weaknesses in intellectual property law. As such, changing intellectual property law is not the answer to the industry's woes.

Instead, journalism should be brought into the 21st century by other means. News organizations should look to developing innovative business models to right themselves

[2] Victor Pickard et al., Free Press, *Saving the News: Toward a National Journalism Strategy* 7 (2009), *available at* http://www.freepress.net/files/saving_the_news.pdf.
[3] Joint Comments of Free Press et al., Federal Communications Commission GN Docket No. 10-25, at 33-34 (dated May 7, 2010), *available at* http://www.freepress.net/files/FoM_Comments_NAF_FP_MAP.pdf.
[4] *Id.*
[5] *Id.* at 34-35.
[6] Pickard et al., *supra* note 2, at 7.
[7] *Id.*

and thrive in the digital age. In order to bring digital journalism to the masses and encourage the development of new journalists and news organizations, broadband access should be expanded to all citizens, regardless of location, wealth, or disability. Furthermore, net neutrality principles should be enforced to ensure that this access is to an open Internet, where all content is free from invidious discrimination. More attention should be given to these goals, rather than to harmful and unnecessary changes to intellectual property law.

As any changes intellectual property law would create new problems for all citizens, without necessarily solving any of the problems faced by journalists, the FTC should refrain from recommending any changes in intellectual property law.[8]

I. The FTC Should Not Recommend Expanding the Hot News Doctrine

The FTC's Staff Discussion Draft lays out two potential recommendations to expand the hot news doctrine.[9] The hot news doctrine is not part of copyright law, but is instead a common law tort of misappropriation[10] that enables an organization to protect the facts it gathers to a limited extent for a limited period of time.[11] There is no longer

[8] Furthermore, criticism of the potential policies in the Staff Discussion Draft has come from news sources themselves. *See, e.g.*, Nate Anderson, *Annals of Imbecility: $5 ISP Tax to Fund Online Journalism?*, ARS TECHNICA, June 7, 2010, http://arstechnica.com/tech-policy/news/2010/06/worlds-stupidest-ideas-for-saving-journalism-in-the-internet-age.ars; Editorial, *FTC Floats Drudge Tax*, WASH. TIMES, June 4, 2010, http://www.washingtontimes.com/news/2010/jun/4/ftc-floats-drudge-tax/; Michael Gonzales, *The FTC Confuses Newspapers with Journalism as it Seeks New Media Tax*, HUFFINGTON POST, June 7, 2010, http://www.huffingtonpost.com/michael-gonzalez/the-ftc-confuses-newspape_b_602937.html; Jeff Jarvis, *How Not to Save News*, N.Y. POST, June 3, 2010, http://www.nypost.com/p/news/opinion/opedcolumnists/how_not_to_save_news_2g7IgzaZNuwuZU80CVcQ7M; Jeremy W. Peters, *Government Takes on Journalism's Next Chapter*, N.Y. TIMES, June 14, 2010, at B7, *available at* http://www.nytimes.com/2010/06/14/business/media/14ftc.html?scp=2&sq=FTC&st=cse. -

[9] Staff Discussion Draft, *supra* note 1, at 9-10.

[10] *See* Clay Calvert et al., *All the News That's Fit to Own: Hot News on the Internet & the Commodfication of News in Digital Culture*, 10 Wake Forest Intell. Prop. L.J. 1, 3 (2009).

[11] *International News Service v. Associated Press*, 248 U.S. 215, 245-46 (1918).

any federal hot news doctrine, but the doctrine still exists in a number of states.[12] The first proposal laid out in the Staff Discussion Draft is to amend the Copyright Act to create a federal hot news statute.[13] The second proposal seeks to encourage the development of the hot news doctrine in state common law by amending the Copyright Act to clarify that it does not preempt state hot news law.[14] Currently, there is some confusion as to whether the many state variants of the hot news doctrine are preempted by Section 301 of the Copyright Act,[15] arguably chilling development of the doctrine. Because copyright and hot news are not merely unrelated, but in fact antagonistic, extension of hot news (particularly, by amending the Copyright Act) would have widespread negative consequences, and the FTC should therefore refrain from making this recommendation.

Copyright and hot news are two vastly different doctrines with vastly different goals. The purpose of copyright is to promote creativity and the public good by protecting creative expression.[16] Copyright law balances the development of proper incentives for authors to create against the ultimate goal of benefiting the public by "promoting broad public availability of literature, music, and the other arts"[17] and "encourag[ing] others to build freely upon the ideas and information conveyed" by these works.[18] A foundational concept in meeting these goals, as stated by the Supreme Court,

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[12] *X17, Inc. v. Lavandeira*, 563 F. Supp. 2d 1102, 1104 (C.D. Cal. 2006); *see, e.g.*, *Alcatel USA, Inc. v. DGI Technologies, Inc.*, 166 F.3d 772, 788 (5th Cir. 1999) (Texas law); *National Basketball Ass'n v. Motorola, Inc.*, 105 F.3d 841, 843 (2d Cir. 1997) (New York law); *GAI Audio of N.Y., Inc. v. Columbia Broad. Sys., Inc.*, 340 A.2d 736, 748 (Md. Ct. Spec. App. 1975) (Maryland law).
[13] Staff Discussion Draft, *supra* note 1, at 10.
[14] *Id.* at 9-10.
[15] *X17*, 563 F. Supp. 2d at 1104; *see also* 17 U.S.C. § 301 (2010).
[16] *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991).
[17] *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 432 (1984).
[18] *Feist*, 449 U.S. at 350

is that "facts are not copyrightable."[19]

The hot news doctrine, on the other hand, serves opposite goals by contrary means. The hot news doctrine was developed to enable news organizations to profit from their news gathering, by prohibiting others from using the facts underlying the news "until its commercial value . . . has passed away."[20] As opposed to copyright law, the goal of hot news is to protect private gain, rather than ensure that benefits run to the public. Copyright law *already* protects particular expressions of news, but the hot news doctrine, unlike copyright, extends a new "quasi property" right to the facts underlying this expression.[21] The hot news doctrine is controversial and has been criticized both in the courts and academia.[22] Furthermore, the concept has never gained enough ground to be embodied in a federal statute.

The extension of the hot news doctrine would have a number of widespread negative consequences. Public discourse may be stifled if the hot news doctrine is extended. If the transfer of particular facts may violate hot news law, discussion of these facts among citizens may be chilled. Extending property rights to facts will directly inhibit all citizens' freedom of speech. This sort of harm is exactly the kind to be prevented by the First Amendment, and enforcing suits against this factual speech can easily run afoul of Constitutional rights.

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[19] *Id.* at 344; *see also* 17 U.S.C. § 102(b) (2010); *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 556 (1985) ("No author may copyright his ideas or the facts he narrates.").
[20] *International News Service*, 248 U.S. at 245-46 (emphasis removed).
[21] *Id.* at 242.
[22] *See, e.g.*, *International News Service*, 248 U.S. at 248-67 (Brandeis, J., dissenting); *Cheney Bros. v. Doris Silk Corp.*, 35 F.2d 279, 280-81 (2d Cir. 1929) (refusing to apply the misappropriation tort created in *International News Service* to dissimilar facts); Restatement (Third) of Unfair Competition § 38 cmts. b-c (1995) (discussing concerns with and development of the misappropriation doctrine); Jason R. Boyarski, Note, *The Heist of Feist: Protection for Collections of Information and the Possible Federalization of "Hot News,"* 21 CARDOZO L. REV. 871 (1999); Shane M. McGee, Case Note, *Cooling Off the Hot-News Exception: Nat'l Basketball Ass'n v. Motorola, Inc., 105 F.3d 841 (2d Cir. 1997)*, 66 U. Cin. L. Rev. 1019, 1041-43 (1998) (discussing concerns with and difficulty outlining the misappropriation doctrine).

Furthermore, news organizations themselves may be harmed. News organizations often build off of the facts reported by other news organizations.[23] Extending property rights to facts would eliminate secondary uses of news. Other newspapers, bloggers, and journalists could not provide additional analysis, explanation, or detail on a particular story, if its underlying facts were controlled by another organization. This would harm the overall quality and richness of journalism. Additionally, the harm caused by the inability to utilize the underlying facts reported by news organizations would extend to both incumbents and new entrants. This latter category includes bloggers and citizen-journalists who, though not necessarily performing the same role as traditional news organizations, perform a valuable service in providing commentary, practical perspectives, first hand reports, and analysis on current events.

Extending the hot news doctrine would not encourage better journalism. To the contrary, hot news places greater emphasis on profiting off of plain facts reported, and not on the quality of reporting and the level of analysis that remain the pride of news organizations and the best lure for their readers. The status quo of the law requires news organizations to adapt and add value to their journalism, whereas the proposed changes merely would allow these organizations to lock in bad and inefficient business models, while creating widespread negative consequences. As the harms to society and to journalism itself would be great, the FTC should not recommend expanding the hot news doctrine.

II. The FTC Should Not Recommend Limiting the Fair Use Doctrine

The Staff Discussion Draft also lays out a recommendation to amend the

[23] Staff Discussion Draft, *supra* note 1, at 10.

Copyright Act to limit the fair use doctrine.[24] The doctrine would be limited to remove protections from the potentially infringing activities of search engines and aggregators. Additionally, it was proposed that legislation explicitly hold that fair use does not apply to search engine caching. A limitation on the fair use doctrine would be problematic to define, overbroad, and have widespread and negative consequences. The FTC should not recommend this policy.

Copyright law's goals of promoting progress of knowledge and expression require balancing its restrictions with the First Amendment right to free speech.[25] In particular, fair use enables copyright law to serve its public benefit goals by excluding from infringement certain uses of copyrighted works. These uses include "criticism, comment, news reporting, teaching . . ., scholarship, or research. . . ."[26] Indeed, fair use "permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster."[27] This necessary flexibility of the copyright law is expressly necessary for news reporting, as well as countless other beneficial activities, ranging from educational presentations to buffer copies that allow computers to process information for display.

The broadly framed and notoriously fact-specific application of fair use does not readily admit of broad changes, especially since so many types of speech rely upon its protection. Limitations on fair use intended to protect news reporting could easily be overbroad. Since fair use protects uses of news beyond just reporting – including

[24] Staff Discussion Draft, *supra* note 1, at 11.
[25] *See Eldred v. Ashcroft*, 537 U.S. 186, 219-20 (2003) (discussing how copyright is balanced against the First Amendment).
[26] 17 U.S.C. § 107 (2010).
[27] *Stewart v. Abend*, 495 U.S. 207, 236 (1990) (quoting *Iowa State Univ. Research Found., Inc. v. American Broad. Cos.*, 621 F.2d 57, 60 (2d Cir. 1980)).

criticism, comment, scholarship, research, and teaching[28] — any limitation on the fair use of news risks encumbering these other fair uses.

Assuming that the proposals to amend fair use would be more narrowly tailored, this narrow exception to fair use would raise concerns as to how the limiting lines would be drawn. Fair use might be limited based upon use, creator, user, or content. What types of works and what content creators and users would be targeted by the proposed exception? If the fair use of news is limited based upon content creator or user, there is difficulty in identifying who exactly falls into the category of news organizations. The content of a certain group of news organizations may be protected by this limitation, while use by a different group of news organizations may be outside the protection of fair use. Even the sites of news aggregators and news bloggers could easily be included within this definition, meaning not only that the scope of copyright would be expanded at the expense of free expression, but also that a solution proposed to improve the position of traditional news outlets versus aggregators could just as easily create a copyright windfall for aggregators or bloggers at everyone's expense.

There are additional concerns if fair use is limited based upon the type of content. Limitations on the fair use of news would undermine the usually greater leeway afforded to fair uses of factual works.[29] Additionally, it is unclear what types of content would count as news. This may include only traditional printed articles or broadcasts, or it may include blog posts, forum commentary, or even email messages relaying information about current events. Creating special categories of users, creators, or content would run

[28] 17 U.S.C. § 107.
[29] *Sony*, 464 U.S at 455 n.40.

contrary to the "necessarily . . . flexible" fair use inquiry[30] and would require troublesome line drawing.

As with an expansion of the hot news doctrine, a limitation of fair use would also constrain the news industry. News organizations utilize the information reported by other organizations in ways that comprise fair use.[31] Blogs often report and comment on news first reported by major news organizations, and likewise major news organizations sometimes utilize reports first coming from bloggers.[32] The fair uses of other organizations' articles would be circumscribed by a statutory limitation, harming incumbent news organizations and new entrants alike.

Finally, the proposal to explicitly eliminate fair use protection of search engine caching would undermine efficient searching and browsing without providing substantial benefits to news outlets or copyright holders generally. Search engine caching is the process by which search "robots" make copies of web sites that are saved to the search engine's servers and indexed.[33] These cached copies are searched and links to the matching websites provided when a user queries the search engine.[34] Search engine caching is useful for improving Internet performance, archiving, and web site comparison.[35]

Caching itself does not threaten the copyrights of news organizations. Cached copies of works have a minimal impact on the value of the content. Users do not look to accessing the cache to obtain and enjoy content. Rather, the existence of the cache, as

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[30] *Id.* at 479-80.
[31] Staff Discussion Draft, *supra* note 1, at 11.
[32] *See, e.g.*, Danny Sullivan, *How the Mainstream Media Stole Our News Story Without Credit*, Daggle, http://daggle.com/mainstream-media-stole-news-story-credit-1906 (last visited June 14, 2010).
[33] Nicole Bashor, Comment, *The Cache Cow: Can Caching and Copyright Co-exist?*, 6 J. MARSHALL REV. OF INTELL. PROP. L. 101, 107-08 (2006).
[34] *Id.*
[35] *Id.* at 109.

utilized by search engines, drives people to the original location of the content. In analyzing search engine caching, the Ninth Circuit found that all four fair use factors weighed in favor of finding that browser caching is a fair use.[36] If we are to remove the similar practice of search engine caching from the realm of fair use, it should be because some fundamental purpose of the doctrine is not being served – if, for instance, the copies made in the cache are having a detrimental effect on the market for the cached works. However, the Ninth Circuit found that browser caching "has no more than a minimal effect on [a copyright holder's] rights, but a considerable public benefit."[37] A limitation on the fair use of search engine caching would undermine the fair use protection of browser caching and endanger the "considerable public benefit" provided by both forms of caching.

While search engines do make copies of news articles in caching, their ability to do so under fair use seems far removed from the challenges faced by news organizations. The websites of newspapers would not gain additional traffic or advertising revenue without the search engine indexing, and non-caching aggregators and various other websites would continue to draw traffic away from news sites. The fact that some search engines also operate prominent news aggregators does not suggest that search engines are the proper parties to defray the costs of online journalism. Assuming for the sake of argument that aggregators are parasitically taking traffic and advertising revenue from newspaper websites, neither preventing search engines from caching, nor charging them

[36] *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701, 726 (9th Cir. 2007) (quoting *Perfect 10 v. Google, Inc.*, 416 F. Supp. 2d 828, 852 n.17) (caching "is noncommercial, transformative, and no more than necessary to achieve the objectives of decreasing network latency and minimizing unnecessary bandwidth usage (essential to the [I]nternet). It has a minimal impact on the potential market for the original work . . . .").
[37] *Perfect 10*, 487 F.3d at 726.

for the privilege would stop an aggregator from continuing its business, nor would it seem appropriate for a search engine to now be subsidizing newsgathering if it is not the source of the problem.

As limiting the fair use doctrine would be overbroad, problematic to define, and have widespread and negative consequences, the FTC should refrain from recommending a limitation on fair use.

III. The FTC Should Not Recommend Creating a News Licensing Scheme Without Further Examination

The FTC Staff Discussion Draft lays out a potential policy recommendation to create a news licensing scheme.[38] The potential proposal discussed would be mandatory and managed by the federal government. Under the proposed scheme, every Internet Service Provider ("ISP") would pay a set fee (of perhaps $5 to $7) on each of its accounts. ISPs would almost definitely pass along these fees to subscribers. These fees would be collected by a new branch of the Copyright Office, which would distribute the fees to copyright owners. These copyright owners would have to submit records of their content downloads to determine the amount of license funds to be paid to them. The basic outline of the proposal raised in the Staff Discussion Draft suggests several fatal complications, and the licensing proposal should not be recommended absent far more details on the formulation of this news licensing scheme.

A foundational concern with a news licensing scheme is that it presupposes either a change in copyright law or the imposition of a hot news right. While a copyright does currently exist in particular expressions of the news, no property right exists beyond this. Without major changes in the law, news organizations would have nothing to license. At

[38] Staff Discussion Draft, *supra* note 1, at 11-13.

base, a licensing regime may serve as an alternative means to create new property rights in news and limit the fair use of news.

It is unclear just what content would be licensed, who would be paid out of the license fund, and how much. If license fees are paid out to a designated list of news organizations, there would be endless debate as to who should be included on that list. Defining particular types of content as news or not faces similar definitional problems. News might include just printed articles or video segments, but it also might include blog posts, commentary, and endless other forms of user generated content. It is unclear, for example, whether Gawker would be eligible to receive funds if it reposts segments of a *New York Times* article in an article of its own, with its own original content and commentary added. And if allocation of funds is to be determined by traffic, funding would be distributed to those sites that are already generating the largest amounts of advertising revenue – hardly addressing the problem of funding underappreciated sources.

Additionally, a universal, compulsory licensing scheme could become overgrown. Other content providers, such as the creators of music, video programming, or fictional text, could demand similar licensing regimes, each with a fee to be passed by the ISP to the consumer. Such an increase in costs, passed along to consumers, would render Internet access burdensome to some and prohibitive to others.

A further consideration is what sorts of uses would be granted by the payment of the license. So long as the license fee was paid, would the licensees be permitted complete reproduction and distribution rights? If so, the ISP licensees would be able to do far more than is currently allowed by law – though whether or not ISPs would find it

useful to suddenly be in the news business is debatable. On the other hand, a licensing scheme may cover just a particular set of uses, but just where the line would be drawn between licensed and unlicensed uses is unclear and would be somewhat arbitrary.

Lastly, voluntary licensing regimes, like those established for the music industry – such as BMI, ASCAP, and SESAC – have functioned for a number of years.[39] Any news licensing scheme should similarly be operated on a voluntary, rather than mandatory, basis.

As the basis, merits, proper structure, and effects of a news licensing scheme are unclear, the FTC should refrain from making any recommendations regarding news licensing until it is further examined.

IV. Conclusion

Any change to intellectual property law would endanger the rights of free expression for all citizens, including journalists. These harms would result without necessarily solving the problems faced by journalists. For the foregoing reasons, Public Knowledge respectfully asks that the FTC refrain from making any policy recommendations with respect to intellectual property.

[39] Stephen Nevas, *An Income Model for Digital Journalism* 3, Presented at the FTC's News Media Workshop (Mar. 10, 2010), *available at* http://www.ftc.gov/opp/workshops/news/mar9/docs/nevas.pdf.