Before the
FEDERAL TRADE COMMISSION

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

I. Introduction

We are submitting this filing in response to the FTC's August 17th, 2010 notice of public workshop and request for comments on the future of journalism, *News Media Workshop – Comment, Project No. P091200* (the "Request").[1] We appreciate the opportunity to respond to the FTC Discussion Draft published on the FTC website prior to the June 15th 2010 workshop and specifically to Section I.A, "Additional Intellectual Property Rights to Support Claims against News Aggregators."

In the framework of an open Internet architecture, we address two issues of potential concern for those gathering and disseminating community news and information: (1) proposed changes to the Copyright Act (17 U.S.C. §101 *et seq.*) to codify a version of state law "hot news misappropriation" doctrine into federal copyright law; and (2) restrictions in existing copyright law that inadvertently impede emerging forms of online journalism and social media and exemplify the problems of hasty copyright expansion. As the FTC Discussion Draft recognizes, "expanded IP rights could restrict the current practices of the same news entities that seek to remedy free riding by aggregators [and] could restrict citizens' access to this news, inhibit public discourse, and impinge upon free speech rights." We believe that *balanced* IP is essential to the future of journalism. The FTC can help news producers and consumers by reaffirming that balance.

At the outset, we note that while Internet technologies and the new ventures they enable have at times challenged existing news organizations and business models, they have also

[1] Individual commenters are Fellows at Harvard University's Berkman Center for Internet & Society whose research, teaching, and entrepreneurial interests center on the open Internet and its success as a platform for uses as varied as journalism, education, politics, technology, business, and culture. Institutional affiliations of individuals are listed for identification purposes only

offered a wealth of new opportunities for innovative start-ups and local media outlets. Policy should therefore take into account the key features of Internet architecture to preserve its ability to spur innovation and experimentation. From its inception, the Internet has been an inherently peer-to-peer system: any two machines connected to the Internet can talk to each other. The largely unfettered connection between Internet hosts has led to the proliferation of a diversity of technologies at the edge of the network, including networked file systems, web servers, real-time messaging and group collaboration systems, video streaming, and many others. Ordinary users with residential or small business Internet connections can be full, first-class participants, creating new applications, services, and resources for others. That the Internet does not intrinsically discriminate against users or uses on the basis of how they are connected is core to the Internet's architecture and central to permitting and supporting participation and experimentation.

To characterize the Internet as a system for controlled "content" transmission is to undermine its salient characteristic as a participatory medium. The value of the Internet is created by the contributions of its participants and users.[2]

Some of these participants are large media outlets, but the vast majority of them are not. The essence of the "Internet" is not the content of any particular application, but carriage open to any application, known or as yet unanticipated. The Internet was not designed for web pages, voice, video, or multiplayer gaming, but its non-specific low-level communication protocols gave innovators the flexibility to design all those—and combinations among them—on top of the existing network architecture. Moreover, the Internet allows for such design to be completely decentralized. No one need ask a central authority for permission to deploy a new service;

[2] See Yochai Benkler, The Wealth of Networks: How Social Production Transforms Markets and Freedom, Yale Univ. Press (2006).

developers can launch and see what catches on. Choosing among profit and not-for-profit business models and competing vigorously for attention, such developers have brought us the World-Wide Web, graphical web browsers, weblogs and blog-readers, photo- and video-sharing, instant-message notifications from the Mars Rover, and collaboratively edited encyclopedias. None of these was in the original specification when a "LOGIN" was sent across the first links of the Internet, yet all have been possible on that basic architecture. Copyright regimes that would further enlist ISPs as monitors would threaten that architecture, and likely cartelize innovation on the Internet.[3]

II. We urge the FTC to exercise caution and reject an expansion of the Hot News Misappropriation Doctrine.

The "hot news misappropriation" doctrine has seen a recent resurgence, with well-known figures in the media and legal sectors calling for its codification as part of the Copyright Act (17 U.S.C. §101 *et seq.*), as well as a high-profile decision out of the Southern District of New York applying the doctrine to embargo the republication of factual information about stock recommendations issued by three large Wall Street firms. As the FTC Discussion Draft notes, some stakeholders suggest that expansion of that doctrine and establishment of broad, federal rights in so-called hot news will help stem losses currently being experienced by traditional media sources. For a variety of legal and policy reasons, we urge the FTC to exercise caution and reject such a radical change in copyright law and policy.

To support that position, we provide an overview of the hot news misappropriation doctrine and the position it currently occupies in our federal and state legal framework. We offer a summary of leading cases regarding hot news and the interplay between the doctrine and the

[3] *See* Tim Wu, *Copyright's Communication Policy,* 103 Mich. L. Rev.. 278. (2004); Wendy Seltzer, *The Imperfect is the Enemy of the Good: Anticircumvention Versus Open User Innovation*, *forthcoming*, 25 Berkeley Tech. L.J. __ (2010).

traditional idea/expression dichotomy that is at the heart of copyright law in the United States. We conclude that codifying the hot news misappropriation doctrine in the Copyright Act may not be feasible from a legal standpoint and that policy counsels against it.

A. Origins of the Hot News Doctrine.

The hot news misappropriation doctrine originated with a 1918 Supreme Court decision, *International News Service v. Associated Press*.[4] The case arose from a unique set of circumstances involving two competing newsgathering organizations: the International News Service ("INS") and the Associated Press ("AP"). Both INS and AP provided stories on national and international events to local newspapers throughout the country, which subscribed to their wire services and bulletin boards.[5] In this way, papers with subscriptions to either INS or AP were able to provide their readers with news about distant events without undertaking the expense of setting up their own foreign bureaus.[6]

During World War I, however, the two services were not equally well positioned to report on events occurring in the European theater. William Randolph Hearst, the owner of the INS, had been an outspoken critic of Great Britain and the United States' entry into the war, and openly sympathized with the Germans. In retaliation, Great Britain prohibited reporters for the INS from sending cables about the war to the United States, thus hampering INS's ability to report on war developments.[7] To ensure that its subscribers were still able to carry news about the war, INS engaged in a number of questionable practices, including bribing employees of newspapers that were members of the AP for pre-publication access to the AP's reporting.[8] At

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4 248 U.S. 215 (1918).
5 *See* 248 U.S. at 230.
6 *See id.* at 231.
7 Douglas G. Baird, *Common Law Intellectual Property and the Legacy of International News Service v. Associated Press*, 50 U. Chi. L. Rev. 411, 412 (1983).
8 248 U.S. at 231.

issue before the Supreme Court, however, was INS's practice of purchasing copies of East Coast newspapers running AP stories about the war, rewriting the stories using the facts gleaned from the AP's reporting, and sending the new stories to INS's subscribers throughout the United States. In some cases, this practice led to INS subscribers on the West Coast "scooping" the local competitor carrying the original AP story.[9]

In order to prevent this activity, the Supreme Court crafted a new variant of the common law tort of misappropriation, referred to by commentators as the "hot news" doctrine. As set forth in the Court's opinion, the essence of the tort is that one competitor free rides on another competitor's work at the precise moment when the party whose work is being misappropriated was expecting to reap rewards for that work.

The Court used a straightforward Lockean argument in favor of establishing the common law doctrine of hot news misappropriation: it wanted to reward the AP for the time and expense involved in gathering and disseminating the news. The Court viewed INS's activities, through which it was able to reap the competitive benefit of the AP's reporting without expending the time and money to collect the information, as an interference with the normal operation of the AP's 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."[10] The Court reasoned that "he who has fairly paid the price should have the beneficial use of the property," sidestepping arguments that there is no true "property" to be had in the news by relying upon the court's equitable powers to address unfair competition.[11] The Court affirmed the circuit court's decision, leaving in place an injunction against the taking of facts from the AP by the INS "until [the facts'] commercial value as news to the complainant and all of its members has passed

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9 Baird, 50 U. Chi. L. Rev. at 412.

10 248 U.S. at 240.

11 *Id.*

away."[12]

In historical terms, the *INS* case is a fluke; it was a type of "perfect storm" for newspapers. At the time, the costs of reporting on the war in Europe fell entirely on the AP because of one man's vocal support of Germany. Transatlantic travel was long and dangerous, and there was only limited access to electronic forms of communication, access which could be controlled by British censors.

B. The modern Hot News Misappropriation Doctrine.

The modern doctrine of hot news misappropriation relies on the same theoretical underpinnings as those described by the Supreme Court in *INS*. Today, however, recognition of the misappropriation doctrine has shifted to the states. As an instance of federal common law, *INS* is no longer authoritative after *Erie Railroad v. Tompkins* eliminated federal common law.[13] Today, only five states have adopted the *INS* hot news tort as part of state unfair competition law.[14]

The Second Circuit's decision in *NBA v. Motorola* typifies the modern, much constrained, application of the hot news misappropriation doctrine and stands as its leading case.[15] In *NBA*, the National Basketball Association sued Motorola over a pager service by which Motorola provided its customers with scores and other statistics about ongoing NBA basketball games. Motorola paid people to watch or listen to the games and upload game statistics into a data feed, which Motorola sent to its pager customers. The NBA claimed that Motorola's operation of the pager service constituted a form of misappropriation and sought an

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12 *Id*. at 245.

13 304 U.S. 64 (1938).

14 *See*, *McKevitt v. Pallasch*, 339 F.3d 530 (7th Cir. 2003) (Illinois); *Pollstar v. Gigmania Ltd.*, 170 F.Supp.2d 94 (E.D. Cal. 2000) (California); *Fred Wehrenberg Circuit of Theatres, Inc. v. Moviefone, Inc.*, 73 F.Supp.2d 1044 (E.D. Mo. 1999) (Missouri); *Pottstown Daily News Publ'g Co. v. Pottstown Broad. Co.*, 192 A.2d 657 (Pa. 1963) (Pennsylvania); *NBA v. Motorola*, 105 F.3d 841 (2nd Cir. 1997) (New York).

15 105 F.3d 841 (2nd Cir. 1997).

injunction prohibiting the service.

At the start of its analysis, the Second Circuit Court of Appeals had to address whether or not the 1976 Copyright Act, which provides copyright protection only for original expression, preempted the state-law misappropriation claim.[16] After looking at the legislative history behind the Act[17] the Second Circuit concluded that a narrow version of the hot news misappropriation tort survived the enactment of the 1976 Copyright Act.[18] The *NBA* court formulated the elements of the surviving hot news tort as follows:

> (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 the plaintiff or others would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened.[19]

As articulated by the Second Circuit, the modern form of the misappropriation doctrine thus affords plaintiffs some limited copyright-like protection for facts under narrowly defined circumstances. Applying its test to the facts of the case, the Second Circuit found that the NBA failed to make out a hot news claim because operation of Motorola's pager service did not undermine the NBA's financial incentive to continue promoting, marketing, and selling professional basketball games. In other words, this was not a situation in which "unlimited free copying would eliminate the incentive to create the facts in the first place."[20]

The plaintiffs were more successful in a recent case out of the Southern District of New

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16 *Compare Feist Publications, Inc., v. Rural Telephone Service Co.,* 499 U.S. 340 (1991), where the Supreme Court held that the Copyright Act's "originality" standard precluded protection for facts.

17 *Id*. at 850-53. (finding three extra elements in hot news misappropriation claims).

18 It is unclear whether the Second Circuit's finding that the hot news misappropriation doctrine is not preempted by the Copyright Act would survive the Supreme Court's holding in *Dastar Corp. v. Twentieth Century Fox Film Corp*., 539 U.S. 23 (2002).

19 105 F.3d at 845.

20 Richard Posner, *Misappropriation: A Dirge*, 40 Hous. L. Rev. 621, 631 (2003).

York. In *Barclays Capital Inc. v. TheFlyOnTheWall.com*,[21] the district court issued a permanent injunction requiring the Internet-based financial news site FlyOnTheWall.com ("Fly") to delay its reporting of the stock recommendations of research analysts from three prominent Wall Street firms, Barclays Capital Inc., Merrill Lynch, and Morgan Stanley. The injunction, which was issued after a finding by the district court that Fly had engaged in hot news misappropriation, requires Fly to wait until 10 a.m. E.S.T. before publishing the facts associated with analyst research released before the market opens, and to postpone publication for at least two hours for research issued after the opening bell. Notably, the injunction prohibits Fly from reporting on stock recommendations issued by the three firms even if such recommendations have already been reported in the mainstream press.[22] The decision is currently on appeal to the Second Circuit Court of Appeals.

C. The recent push for codification of the Hot News Misappropriation Doctrine.

In discussing the news industry's ongoing financial woes, many commentators have focused on perceived problems created by the Internet. Such commentators believe that the World Wide Web has reduced incentives to engage in socially valuable original reporting, and that new media sources (like blogs, news aggregation websites, and search services) are displacing traditional news outlets by free-riding on the factual information they gather at great cost. Rupert Murdoch has gone so far as to call Google's aggregation and display of newspaper

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[21] No. 06 Civ. 4908, --- F. Supp.2d ----, 2010 WL 1005160 (S.D.N.Y. Mar. 18, 2010), appeal docketed

[22] The district court noted that Fly obtained the information it reprinted from a variety of publicly-available sources, describing the process thus:

> According to Etergino, he checks first to see what Recommendations have been reported on Bloomberg Market News. Then he checks Dow Jones, Thomson Reuters, and Fly's competitors such as TTN, StreetAcount.com, and Briefing.com. Next, he visits chat rooms to which he has been invited to participate by the moderator. . . . Etergino also receives "blast IMs" through the Bloomberg, Thomson Reuters, or IMTrader messaging services that may go to dozens or hundreds of individuals. Finally, Etergino exchanges IMs, emails, and more rarely telephone calls with individual traders at hedge funds, money managers, and other contacts on Wall Street.
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> 2010 WL 1005160, at *12.

headlines and ledes "theft."[23] Dean Singleton, Chairman of the Associated Press, has similarly criticized the free movement of news information through the web, pledging to seek legal and legislative remedies against parties who refused to reward the AP for its newsgathering efforts.[24]

While some in the industry have taken the position that such reuse of news headlines and article ledes violates existing copyright law, others, perhaps fearing that these uses would be excused as a "fair use," have argued that codification of the hot news misappropriation doctrine is the answer to the industry's problems. For example, the authors of a recent editorial featured in *Communications Lawyer* advocated for inclusion of the *NBA v. Motorola* factors in the Copyright Act as a potential way to save journalism.[25] In urging Congress to modify copyright law to provide some protection to the collection of facts by news organizations, the authors see hot news misappropriation as a way to give news organizations leverage in negotiations with news aggregators and search engines.

For all of the recent attention paid to the hot news misappropriation doctrine, the doctrine as it currently exists is limited. As noted above, only five states have adopted the doctrine since the Supreme Court's decision in *Erie* eradicated any federal cause of action.[26] The small number of reported decisions addressing the doctrine show not only how disfavored the claim is, but also how exceedingly narrow the current contours of the doctrine are. As articulated in *NBA*, a plaintiff must show both that the defendant is a competitor, *and* that the continuation of

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[23] David Sarno, *Murdoch accuses Google of news 'theft'*, Los Angeles Times, December 2, 2009, available at http://articles.latimes.com/2009/dec/02/business/la-fi-news-google2-2009dec02. Murdoch has pointed to free riding by aggregators as a hurdle to the creation of quality news: "Without us, the aggregators would have blank slides. Right now content producers have all the costs, and the aggregators enjoy [the benefits]. But the principle is clear. To paraphrase a great economist, [there is] no such thing as a free news story." Mercedes Bunz, *Rupert Murdoch: 'There's no such thing as a free news story'*, guardian.co.uk, December 1, 2009, available at http://www.guardian.co.uk/media/2009/dec/01/rupert-murdoch-no-free-news.

[24] Remarks by Dean Singleton, AP Annual Meeting, April 6, 2009, AP Press Release available at http://www.ap.org/pages/about/pressreleases/pr_040609c.html.

[25] Bruce W. Sanford, Bruce D. Brown, and Laurie A. Babinski, *Viewpoint: Saving Journalism With Copyright Reform and the Doctrine of Hot News*, Communications Lawyer, December 2009.

[26] *Id.* at 9.

defendant's actions is likely to threaten the continued existence or quality of the information being appropriated.[27] In almost all of the reported decisions, the defendants did not bear liability because they were not in direct competition with the plaintiffs or their actions did not threaten the continued existence of the service in question.[28] The fact that plaintiffs have succeeded on hot news misappropriation claims in only a small number of reported cases during the last century demonstrates that the doctrine, as currently articulated, is unlikely to solve the news businesses' ills. If the doctrine becomes codified as part of the Copyright Act, it will of necessity either be completely ineffective at "saving" newspapers,[29] or expand by leaps and bounds beyond its common law roots. Reading much of the commentary calling for codification of the hot news misappropriation doctrine, it becomes clear that what is sought is in fact the latter — a dramatic expansion of the doctrine.

When considering such an expansion of the doctrine, it is important to note that what is being sought is federal protection for news stories that goes beyond the existing contours of copyright law in two important ways: first, by prohibiting the copying of headlines and short excerpts which would likely qualify as fair use under current copyright doctrine, and second, by extending protection not just to the original expression contained within an article, but to the underlying facts and information contained in that article. Granting protection to the underlying facts and information contained within news articles conflicts with the idea/expression

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[27] 105 F.3d at 850-53.

[28] *See*, *e.g.*, *Scranton Times, L.P. v. Wilkes-Barre Pub. Co.*, Slip Copy, 2009 WL 3100963 (M.D. Pa. Sept. 23, 2009) (finding there was no threat to the existence of the publication); *McKevitt v. Pallasch*, 339 F.3d 530 (7th Cir. 2003) (finding no threat to the existence of the publication); *Fred Wehrenberg Circuit of Theatres, Inc. v. Moviefone, Inc.*, 73 F.Supp.2d 1044, (E.D. Mo. 1999) (finding the two companies were not direct competitors); *NBA v. Motorola*, 105 F.3d 841 (2d Cir. 1997) (finding no threat to the source of the information). Most of the remaining cases dealing with the doctrine merely state that the plaintiffs have pled enough to survive a motion to dismiss: *see*, *e.g.*, *Associated Press v. All Headline News Corp.*, 608 F.Supp.2d 454 (S.D.N.Y. 2009); *X17, Inc. v. Lavandeira*, 563 F.Supp.2d 1102 (C.D. Cal. 2007); *Pollstar v. Gigmania*, *Ltd*., 170 F.Supp.2d 974 (E.D. Cal. 2000).

[29] It is not clear that free riding by online media is even a major factor in the financial problems faced by the news industry today. More likely causes include the introduction of competition in advertising and the availability of more diverse avenues of expression for political and social commentary.

dichotomy that is at the heart of this nation's copyright law, and is one of the fundamental mechanisms by which the limited monopoly granted to creators by the copyright laws are reconciled with the strictures of the First Amendment.[30] As the Supreme Court explained in *Harper & Row Publishers, Inc. v. Nation Enterprises*, the idea/expression dichotomy "strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication for facts while still protecting an author's expression. No author may copyright his ideas or the facts he narrates."[31] As illustrated by the recent *Barclays* decision, codification of the hot news misappropriation doctrine threatens to destroy copyright's delicate balance by granting copyright-like protection to facts (such as the issuance of a stock recommendation), stifling speech and depriving the public of access to material in the public domain. For the reasons outlined below, this would be untenable as a matter of both law and public policy.

D. Expansion of the Hot News Misappropriation Doctrine would raise serious First Amendment concerns.

The limits of the Copyright Clause, as interpreted by the Supreme Court, place certain bounds on the power of Congress with respect to the scope of federal copyright protection. As the Supreme Court has noted, these limits are the primary mechanism by which the limited monopoly on speech granted by the copyright laws are harmonized with the free speech protections of the First Amendment.[32] Specifically, the Copyright Clause empowers Congress "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."[33] In its seminal

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[30] Stated simply, current U.S. copyright law does not protect facts; it protects specific expressions of those facts while leaving the facts themselves, even those gathered at considerable expense, free for use and commentary by all, including competitors.

[31] *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S 539, 556 (1985) (internal quotation marks and citations omitted).

[32] *Eldred v. Ashcroft*, 537 U.S. 186, 218-221 (2002); *see also Golan v. Gonzales*, 501 F.3d 1179, 1187-88 (10th Cir. 2007).

[33] U.S. Const. art. I, § 8, ¶ 8.

decision in *Feist Publications*,[34] the Supreme Court ruled that the language of the Copyright Clause limits Congress' ability to grant copyright protection, requiring that protection be granted only to those works that meet a minimum level of originality.[35] Facts (and likewise information contained in news reports), by their nature, lack such creativity; they are discovered, not created. Thus, the Supreme Court's holding in *Feist* appears to bar any direct modification of the Copyright Act to include protection for mere facts.

Even if the Copyright Clause did not prohibit the grant of copyright-like protection to factual information contained in news stories, codification of the hot news doctrine would risk upsetting the balance between the protections of copyright and the requirements of the First Amendment. As described by the Supreme Court in *Eldred*, copyright law has historically contained two built-in doctrines which have ensured that the protection of authors' works does not violate the free speech protections embodied in the First Amendment: the idea/expression dichotomy and the fair use doctrine.[36] The former permits "free communication of facts while still protecting an author's expression."[37] Or as the Court put it in *Eldred*: "Due to this distinction, every idea, theory, and fact in a copyrighted work becomes instantly available for public exploitation at the moment of publication."[38] In contrast, extending copyright protections to "hot" facts would be a radical departure from the traditional contours of copyright law and would thus demand a high level of constitutional scrutiny.

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[34] *Feist Publications v. Rural Telephone Service Co.*, 499 U.S. 340 (1991).

[35] At issue in *Feist* was whether the defendant could copy wholesale and repackage the listings from its competitor's phonebook. While acknowledging the effort expended by the plaintiff in compiling the information, the Court nonetheless found that the defendant was free to directly copy from the plaintiff's phonebook because the facts embodied in the phonebook listings lacked the minimum level of originality to be constitutionally eligible for copyright protection. The Court rejected protection for facts regardless of whether the person discovering, compiling, and/or publishing such facts invested so-called "sweat of the brow" in doing so, finding that the Constitution only extended protection to creative works, not just works in which authors invested resources.

[36] *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003).

[37] *Harper & Row*, 471 U.S. at 556 (internal citations omitted).

[38] 537 U.S. at 219. The Supreme Court upheld the Copyright Term Extension Act in *Eldred* because "Congress ha[d] not altered the traditional contours of copyright protection" merely by extending the term of copyright. Id. at 221.

E. Expansion of the Hot News Misappropriation Doctrine could threaten the free flow of information, privilege old media over new media entities and result in unworkable legal complexity and ambiguity

Aside from the above described First Amendment concerns, however, there remain three main policy considerations that counsel against codification: (1) a reinvigorated hot news doctrine threatens to impede the free flow of information and creativity that is one of the hallmarks and strengths of the Internet age; (2) federal adoption of the doctrine would have the effect of advantaging old media over new media, inhibiting the growth of new business models; and (3) the resulting legal complexities and ambiguities would be unworkable, resulting either in a multiplicity of wasteful litigation or the stifling of acceptable and socially useful activities.

If codified in the copyright law, the hot news misappropriation doctrine would restrict the free flow of information and speech, hampering creativity and innovation. One of the primary benefits of the current idea/expression dichotomy in copyright law is that it helps to ensure a lively and fact-based public debate surrounding events of public import. Codifying the hot news misappropriation doctrine would impede these goals by limiting, even temporarily, who can use the disclosed facts and by narrowing the pool of consumers that are able to access information as it is developed. This undermines the very purpose of copyright. Congress should be encouraging innovation and creation with copyright, not seeking to lock valuable information behind a paywall until all commercial value has been exhausted.

An unacknowledged truth in the hot news misappropriation debate is that some authors create original work, but all authors (and news outlets) use materials that others have created. The cornerstone of the copyright regime is that authors may build and improve upon others' work. Professor Wendy Gordon gets to the crux of the issue: "As many observers have noted, a kind of reciprocity is inherent in the authorial role: authors are continually both creators of

original work and users of material others have created."[39] This is particularly true in the news industry, such that the protection of facts would pose challenges for the very practice of journalism. The job of a journalist is to collect and sift facts from various sources and to present them to the reader in an interesting or useful manner. Journalists harvest facts from a variety of sources: eye witnesses, documents, video, and other media.[40]

Original reporting is only a small part of what many journalists and journalism organizations do. For example, in February 2010, Jonathan Stray of the Nieman Journalism Lab did a study to see how stories are created and repeated in the current news ecosystem. He chose a single big news story — a revelation about the Google/China hacking case — and read every version of the story he could find on Google News. He determined that, out of the 121 distinct versions of the story, only 13 (11 percent) included at least some original reporting.[41] Those pushing for hot news protection ignore the fact that all journalists engage in "aggregation" of news created by other sources. And they are asking Congress and the courts to preference one type of journalism over others in a way that is unfair and potentially incompatible with the evolution of the profession.

Not only does the protection of facts conflict with common journalistic practices, it also conflicts with the way information is created and shared on the Internet. The Internet is an open system. The advantage of the medium and the source of its popularity is the ability for users to access large amounts of information globally and upload their own content at a low cost. It is

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[39] Wendy Gordon, *Harmless Use: Gleaning From Fields of Copyrighted Works*, 77 Fordham L. Rev. 2411, 2417 (April 2009).

[40] In fact, many of the "old media" seeking the protections of the hot news misappropriation doctrine themselves look to the "new media" – bloggers, Internet commenters, and sources like the Drudge Report – for information about stories and as starting points for their own reporting.

[41] Jonathan Stray, *The Google/China hacking case: How many news outlets do original reporting on a big story?*, Nieman Journalism Lab (Feb. 24, 2010), available at http://www.niemanlab.org/2010/02/the-googlechina-hacking-case-how-many-news-outlets-do-the-original-reporting-on-a-big-story/.

this open nature that has led to many of the most popular innovations on the World Wide Web.[42] The Internet has sparked the creation of a plethora of new media and has expanded access to information. In many ways, the Internet acts as the new town square, where people gather and discuss political and social issues. The unencumbered movement of factual information around this network is essential to its new societal role. Bloggers now pluck information out of the news and discuss its importance from a variety of different vantage points. Aggregators and search engines provide an efficient way to find information that would have been time-consuming and laborious, if not impossible, to find before the advent of these services.

In today's media environment, a typical misappropriation claim would likely be directed at websites that publish aggregated crime statistics,[43] or news aggregators that comment on and gather many articles about a particular issue or town in a central location, while linking back to the original sources of the content.[44] Not only are many of these new media outlets innovative, they add value to news by creating commentary and synthesizing information from many different sources. It is also not clear that such uses of "misappropriated" information are bad for the news media. Readers of blogs and other new online media can usually click through to the original source of the news, and such linking may actually increase the number of visits to the source websites. It is thus particularly telling that many established media outlets, while decrying Google News as theft, have nonetheless made the business decision not to block Google from indexing their content. (Indicating to Google that its indexing mechanism should ignore pages is a trivial task easily accomplished in minutes.) Presumably, it is because these outlets believe

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[42] *E.g.* Twitter, various search engines, Wikipedia, and blogs.

[43] On April 9, 2010, Public Engines, Inc. sued ReportSee, Inc. in federal court claiming, *inter alia*, hot news misappropriation over the publication and aggregation of crime statistics on SpotCrime.com. Public Engines, Inc. v. ReportSee, Inc., No. 10-cv-00317 (D. Utah filed Apr. 9. 2010).

[44] E.g. http://news.google.com http://www.theatlanticwire.com/, and the http://slatest.slate.com/ all aggregate and link back to original articles

that the traffic to their websites generated by links on Google outweighs the harm of having portions of their content reproduced on Google's website.

The open platform of the Internet also allows for a multiplicity of experimental business models to compete. We do not — and likely cannot — know what the next innovative use will be. Just as no one could have predicted that Facebook would overtake Google as one of the key drivers of web traffic,[45] it is impossible *ex ante* to guess which will be the next online media innovation to succeed in becoming part of the fabric of American life. The codification of hot news misappropriation could deprive us of the next great media project. In order for experimental business models to flourish, we need legal rules that promote flexibility and access to factual information, not closed systems that tilt the playing field in favor of incumbents.

Furthermore, adoption of such a hot news misappropriation policy also threatens to create a significant information deficit among consumers, as only those with the time, inclination, and ability to access multiple sources of information would be able to stay informed on a timely basis. As documented by the Pew Project for Excellence in Journalism in their 2010 state of the news media report, 57% of consumers rely on between two to five websites for their news.[46]

It is important to note that the codification of the hot news doctrine would not have a uniform effect on all media sources. With the development of new technology and the growth of the Internet, "the Media" is no longer a monolithic entity. Some speculate that codifying misappropriation doctrine will help "the Media," but at best it will only help traditional media companies and newspapers. The doctrine would have seriously detrimental effects on many new media companies, which should not be summarily dismissed as mere copiers. They add value to

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[45] Benny Evangelista, *Facebook directs more online users than Google*, SFGate.com, February 15, 2010, available at http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2010/02/14/BUU51C0AMN.DTL.

[46] Pew Project for Excellence in Journalism, Online: Audience Behavior, available at http://www.stateofthemedia.org/2010/online_audience.php.

the facts by providing context, organization, curation and commentary. This type of news dissemination actually ensures that more people have access to the news of the day.

Congress should not lightly engage in the business of playing favorites. Changes in the law that help a subset of the media at the expense of another subset threaten to distort the marketplace, artificially propping up past business models and stifling innovation. The application of misappropriation in this setting makes even less sense because it will almost certainly hurt new and innovative media with no guarantee that it will help old media companies. There is no doubt that even without government intervention, old media companies are adapting and innovating to stay competitive in today's media market.[47] Codification of misappropriation will likely halt this innovation. Chris Anderson, editor in chief of *Wired*, believes the market should be determining who the media winners are in these circumstances:

> In the past, the media was a full-time job. But maybe the media is going to be a part-time job. Maybe media won't be a job at all, but will instead be a hobby. There is no law that says that industries have to remain at any given size. Once there were blacksmiths and there were steelworkers, but things change. The question is not should journalists have jobs. The question is can people get the information they want, the way they want it? The marketplace will sort this out. If we continue to add value to the Internet we'll find a way to make money. But not everything we do has to make money.[48]

The codification of hot news misappropriation also might undermine competition in the market for news and information. In a free market economy, actors have an interest in imitation and duplication. Vigorous competition helps ensure dissemination of facts and information through the most efficient means. Allowing a monopoly on facts threatens to raise the price of

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[47] In fact, one fairly recent hot news misappropriation case pitted one "old media" company – GateHouse Media – against another – The New York Times Co. – with The New York Times Co. cast in the role of defendant. *See* GateHouse Media, Inc. v. The New York Times Co., No. 0-12114-WGY (D. Mass. filed Dec. 22, 2008).

[48] Frank Hornig, *Who needs newspapers when you have Twitter?*, Salon, July 28, 2009, available at http://www.salon.com/news/feature/2009/07/28/wired/index.html.

and decrease access to news and information, thereby frustrating the very aim of the doctrine. The Internet has changed the nature of competition among news providers. As Anderson writes, twentieth century newspapers and traditional media had a monopoly on the news because they controlled the airwaves and printing presses.[49] Since the advent of the Internet, "you don't need this access to a commercial channel to distribute (news), anyone can do it. What [media companies] do is still useful but what other people do is equally useful. I don't think our way is the most important and it is certainly not the only way of conveying information."[50]

Application of the hot news misappropriation doctrine also presents practical problems. During the past 90 years, courts have been inconsistent — at best — with respect to application of the hot news misappropriation doctrine.[51] Judge Richard Posner has expressed skepticism of both the economics behind the misappropriation doctrine and its lack of defined bounds:

> Misappropriation doctrine, in contrast, is alarmingly fuzzy once the extreme position of creating a legal right against all free riding is rejected, as it must be. I am aware of no case in which the effect of free riding on the plaintiff's activity was quantified. One inference is that misappropriation that is not actionable under copyright, patent, trademark, trade-secrecy, or right-of-publicity law is generally rather trivial, which indeed seems a reasonable inference from the cases I have discussed. But another inference, scarcely less comforting to the advocates of the doctrine of misappropriation, is that quantification is infeasible and we are stuck with a doctrine of irreducible vagueness--if we retain it.[52]

Moreover, it is difficult for judges to determine whether two companies are "direct competitors," and the question will only get more difficult as we move into the multifaceted online news ecosystem. Hot news misappropriation doctrine is also not clear on how long any particular piece of information is protected. Do the facts get protection for an hour, a day, or a year? The

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[49] Hornig, *supra* note 26.

[50] *Id*.

[51] Compare *Pottstown Daily News Publ'g Co. v. Pottstown Broad. Co.*, 411 Pa. 383 (Pa. 1963) (finding that a newspaper is a direct competitor of a radio station) with *Loeb v. Turner*, 257 S.W.2d 800 (Tex. Civ. App. 1953) (finding radio stations in different cities are not competitors) and *Fred Wehrenberg Circuit of Theatres, Inc. v. Moviefone, Inc.*, 73 F.Supp.2d 1044 (E.D. Mo. 1999) (finding a movie theater and a listing service were not in competition because listings were not the core of the theater's business).

[52] Richard Posner, *Misappropriation: A Dirge*, 40 Hous. L. Rev. 621 (2003).

only hint the theory of misappropriation gives is a vague notion that the protection should last as long as is necessary to ensure there is an incentive to collect the information. In the past, even the country's highest court has struggled with this question.[53]

These types of difficulties would be exacerbated were hot news misappropriation codified in the Copyright Act and applied to the types of online conduct that proponents of hot news misappropriation seek to prohibit. For example, a federal hot news law might force a judge to determine whether a technology blogger who cites to facts reported in a *New York Times* piece is in competition with the *Times*. The judge might determine that they compete for the same readership or that they compete because the *New York Times* could start a technology blog. A different judge might find that the specificity of the blogger's subject matter distinguishes his work from that of the *New York Times*. A third judge could see the blogger as commentary and the *Times* as a news source.

It would also be extremely difficult for any prospective plaintiff to prove misappropriation. Facts can be repackaged and presented in a myriad of ways, making spotting the misappropriation of facts difficult if the website didn't attribute the information.[54] Without resorting to discovery, it would be difficult to determine whether a potential defendant had obtained the facts through their own time and effort or from the original source. This independent generation issue would likely turn these types of actions into a "he said, she said" controversy.

Most importantly, under the hot news doctrine a plaintiff must show that the free riding at

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[53] In *INS v. AP*, the Court left a prohibitory injunction against INS in place "until [the facts'] commercial value as news to the complainant and all of its members has passed away." *INS* at 245. The Court noted this phrasing might be improved to be more specific but left it up to the parties and the lower courts to modify the injunction.

[54] Which would, perversely, decrease the incentives for websites to link back to the source of the information, further decreasing traffic to the original source.

issue, if left unchecked, "would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened."[55] As Judge Posner cautions, it may be "infeasible" to determine when free riding meets this "source endangerment" requirement. Indeed, the complexity of modern economic affairs makes this inquiry fraught with difficulty, and courts are not particularly qualified to take on the task. Moreover, this element of the hot news tort asks courts to evaluate a counterfactual scenario that posits the demise of a company if the court refuses to take action. This places courts in the position of choosing between (1) not protecting the information and potentially being proven wrong when the plaintiff discontinues information collecting; and (2) protecting the information and never having the possibility of being proven wrong. The codification of the doctrine would likely lead to the over protection of information. None of the proponents of codifying hot news misappropriation have explained how such a federal law would answer these threshold questions, beyond simply incorporating the *NBA* test.

III. Aspects of existing copyright law threaten the growth of media.

In addition to "hot news," several aspects of current copyright law raise concern for those gathering and disseminating news and information: First, restrictive interpretations of copyright fair use combined with misuse of the DMCA's notice-and-takedown process against non-infringing works threaten both the availability of source material and the persistent availability of news and the viability of non-profit media (the problem is less acute, but not absent for commercial media players). Second, the anti-circumvention provisions of the DMCA give legal force to technical measures that impede fair use of media content and innovation in technologies of media distribution. Recent past experiences with the 1998 Digital Millennium Copyright Act show the hazards of copyright expansion.

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[55] *NBA v. Motorola, Inc.*, 105 F.3d 841, 845 (2d Cir. 1997).

A. Limits on copyright are important if media innovations are to be sustained .

News media are both creators and users of copyrighted works. While some news and media organizations advocate strengthening copyright protection for their own content, others, including journalists at those same organizations, depend on copyright's limitations and exceptions, particularly fair use, to produce their works. "The Daily Show with Jon Stewart" creates much of its news commentary around clips, sometimes unflattering, from other news outlets.[56] Stewart, and citizen journalists and videographers emulating his style, should be able to create and show such clips and commentary without fearing suit for copyright infringement. They benefit from the law's recognition that "the fair use of a copyrighted work… for purposes such as criticism, comment, [and] news reporting... is not an infringement of copyright." 17 U.S.C. § 107.[57]

Innovators in digital news distribution, the builders of feed-readers, aggregators, podcasters, and social discovery services also depend on the limits of copyright to bring media to news consumers in novel ways. Many of these tools incidentally "reproduce" works or enable end-users to do so. Like the earlier Betamax, they can rely on fair use rather than seeking permission or pre-approval.[58] Thus EveryBlock has filtered and aggregated news feeds to create truly local news collections, giving visibility to small news outlets and new data sources; Delicious enables users to collect and share social bookmarks, providing new means of media

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[56] "[Stewart] may well be television's pre-eminent fact-checker of Fox News, the nation's highest-rated cable news channel," said Brian Stelter in the New York Times, describing a segment that juxtaposed clips from "Fox and Friends" with a call to the White House for comment, Brian Stelter, *Jon Stewart's Punching Bag, Fox News*, THE NEW YORK TIMES, April 24, 2010, at C1 available at http://www.nytimes.com/2010/04/24/arts/television/24stewart.html; http://www.nytimes.com/2008/08/17/arts/television/17kaku.html. When Americans were asked in a 2007 poll by the Pew Research Center for the People and the Press to name the journalist they most admired, Mr. Stewart, the fake news anchor, came in at No. 4, tied with the real news anchors Brian Williams and Tom Brokaw of NBC, Dan Rather of CBS and Anderson Cooper of CNN. And a study this year from the Pew's Project for Excellence in Journalism concluded that "'The Daily Show' is clearly impacting American dialogue" and "getting people to think critically about the public square."

[57] *See also* Fair Use Reports from the Center for Social Media, http://www.centerforsocialmedia.org/resources/fair_use/.

[58] *See Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

discovery; and Miro's audio-video player offers subscriptions to independent media "channels," a platform for "broadcast" distribution not limited by spectrum scarcity.[59]

B. Errors and abuses of DMCA takedowns are resulting in the removal of non-infringing material from the Internet.

Misuse of the DMCA's notice-and-takedown provision exacerbates the challenges of fair use. The DMCA encourages "expeditious" takedown by intermediary service providers (web hosts, video hosts, and search engines), even when copyright claimants go beyond their rights to demand takedown of non-infringing materials.[60] As a result, non-infringing material is removed from these services on a regular basis, making the distribution channels less available for new media and nontraditional journalists. Students and activists had to sue to vindicate their rights to post materials exposing flaws in Diebold electronic voting machines at the time of an election using those very machines.[61]

More recently, in February 2010, a number of music blogs disappeared from Google's Blogger service.[62] According to reports, they had run afoul of Google's "repeat infringer" policy, after their blogs were the subject of several complaints from the IFPI, the International Federation of the Phonographic Industry. Pursuant to that policy,[63] inspired by the DMCA's requirement,[64] Google had opted to terminate their accounts, removing not only the allegedly

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[59] See http://everyblock.com, http://delicious.com, and http://www.getmiro.com/

[60] *See Free Speech Unmoored in Copyright's Safe Harbor: Chilling Effects of the DMCA on the First Amendment*, *forthcoming* 24 Harv. J.L.&Tech. __ (2010), available at http://wendy.seltzer.org/media/seltzer_free_speech_unmoored.pdf.

[61] Online Policy Group v. Diebold, 37 F.Supp.2d 1195 (N.D. Cal. 2004).

[62] The bloggers were notified that "Upon review of your account, we've noted that your blog has repeatedly violated Blogger's Terms of Service ... [and] we've been forced to remove your blog." Sean Michaels, *Google shuts down music blogs without warning*, Guardian.co.uk, February 11, 2010, available at http://www.guardian.co.uk/music/2010/feb/11/google-deletes-music-blogs (last visited Mar 22, 2010).

[63] *See* "Digital Millennium Copyright Act – Blogger" http://www.google.com/blogger_dmca.html, "Many Google Services do not have account holders or subscribers. For Services that do, such as Blogger, Google will, in appropriate circumstances, terminate repeat infringers."

[64] See 17 U.S.C. §512(i)(1)(A), "The limitations on liability established by this section shall apply to a

infringing entries, but all the blogs' content.

Some of those taken down in the "music blogicide"[65] were music critics linking to songs to enhance their commentary or alert readers to new music.[66] Some asserted that they operated with the permission, even encouragement, of the artists or music labels whose work they posted. "'I assure you that everything I've posted for, let's say, the past two years, has either been provided by a promotional company, came directly from the record label, or came directly from the artist,' Lipold [of "I Rock Cleveland"] wrote to Google."[67] Others reported that the complained-of links had been long-since disabled, having been active only a short time well before the time of notification.[68]

Many bloggers had never realized that removing entries on which they had received complaints was not sufficient to clear their records. At least one of the blogs was reinstated after Google apologized that notifications of prior DMCA complaints had failed to reach the blogger.[69] Many of the IFPI notices to Google in the Chilling Effects database[70] lack basic elements of the

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service provider only if the service provider (A) has adopted and reasonably implemented, and informs subscribers and account holders of the service provider's system or network of, a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider's system or network who are repeat infringers."

[65] The tag "#musicblogocide2k10" reached the trend charts on Twitter. *See* Michaels, *Google shuts down music blogs without warning*, Guardian.co.uk, February 11, 2010, available at http://www.guardian.co.uk/music/2010/feb/11/google-deletes-music-blogs

[66] See the relocated "I Rock Cleveland," <http://blog.irockcleveland.com/>.

[67] Quoted in Sean Michaels, *Google shuts down music blogs without warning*, Guardian.co.uk, February 11, 2010, available at http://www.guardian.co.uk/music/2010/feb/11/google-deletes-music-blogs; *see also* correspondence posted at Blogger Help forum, "Would like to speak to someone regarding the deletion of my blog I Rock Cleveland," available at http://www.google.com/support/forum/p/blogger/thread?tid=4ba979f2d9e7b6d9&hl=en.

[68] Providing further circumstantial indications that the IFPI's notification process does not include human review of all the URLs about which notifications are sent.

[69] *See* "musicblogocide2k10 : la vie continue," MASALA, available at http://www.masalacism.com/2010/02/musicblogocide2k10-la-vie-continue/ (last visited Mar 22, 2010); Rick Klau, *Blogger Buzz: A quick note about music blog removals*, Google, available at http://buzz.blogger.com/2010/02/quick-note-about-music-blog-removals.html.

[70] See Chilling Effects Clearinghouse, Search the Database: IFPI, <http://www.chillingeffects.org/search.cgi?q=IFPI"> (listing notices); e.g. "IFPI DMCA (Copyright) Complaint to Google," Ref: C26732, Feb. 3, 2010, <http://www.chillingeffects.org/dmca512c/notice.cgi?NoticeID=33815> ("We

DMCA §512(c)(3)(A) notification, including "identification of the copyrighted work claimed to have been infringed" §512(c)(3)(A)(ii), and "identification of the material that is claimed to be infringing" § 512(c)(3)(A)(iii) (as they list only URLs to posts, not to the linked files).[71] It appears that IFPI claims that as a U.K.-based organization, it need not meet the U.S. DMCA requirements, and that Google has chosen not to press the point.

C. Blockages imposed by legally-backed DRM (Anticircumvention Law) have significant unintended consequences

Finally, the Digital Millennium Copyright Act's anticircumvention rules restrict not only fair use of copyrighted works, but also user innovation in technology for distributing and playing media.[72] Copyright-backed technology lockdown, such as the closed environment of the iPad, may seem promising to some media companies, but in the long-term, closure harms the media ecosystem. When law locks media content with DRM (digital rights management), it limits the ways new technologies can interact, and restricts the pool of developers and modes of development from which new business models might arise.

Sometimes that lock-down is on the player side: Apple's control of the App Store "channel" for application delivery to the iPhone and iPad makes it a media gatekeeper for these increasingly popular devices. Pulitzer Prize-winning political cartoonist Mark Fiore found his iPhone animation application rejected "because it contain[ed] content that ridicules public

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have learned that your service is hosting the above web sites on your network. These sites are offering direct links to files containing sound recordings for other users to download. The copyright in these sound recordings is owned or exclusively controlled by certain IFPI Represented Companies.")

[71] Pursuant to §512(c)(3)(B)(i) "[A] notification from a copyright owner or from a person authorized to act on behalf of the copyright owner that fails to comply substantially with the provisions of subparagraph (A) shall not be considered … in determining whether a service provider has actual knowledge or is aware of facts or circumstances from which infringing activity is apparent."

[72] *See* The Imperfect is the Enemy of the Good: Anticircumvention Versus Open User Innovation, forthcoming, Berkeley Technology Law Journal (spring 2010) http://wendy.seltzer.org/media/seltzer-anticircumvention.pdf.

figures."[73] Apple relented only after substantial public attention and pressure,[74] but an association of political cartoonists called upon Apple, as "one of the primary ways people publish news and information," to change its rules more generally. Apple, meanwhile, has asserted that unlocking the iPhone to permit installation of independent software violates the DMCA.[75]

In other circumstances, the lock-down of content restricts what new applications and technologies can develop to distribute or display it. The DVD-CCA licenses DVD decryption only to those who agree to terms including hardening their players against external development. On these terms, Real Networks has been forbidden from offering its "Facet" product to enable end-users to manage a library of DVDs without constantly switching physical discs.[76] Open source developers cannot lawfully include DVD playback in their U.S. media packages. The Electronic Frontier Foundation's "Unintended Consequences" report discusses yet more restrictions on end-user innovation and research.[77]

D. Recommendations.

We anticipate that the FTC will receive recommendations for the expansion of copyright protections, following and expanding on those mentioned in the Discussion Draft. We recommend that you consider those critically, in light of the unintended negative consequences of previous copyright expansions. Government has a role here, in protecting and preserving the open environment for journalism innovation.

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[73] "Mark Fiore can win a Pulitzer Prize, but he can't get his iPhone cartoon app past Apple's satire police," Nieman Journalism Lab, <http://www.niemanlab.org/2010/04/mark-fiore-can-win-a-pulitzer-prize-but-he-cant-get-his-iphone-cartoon-app-past-apples-satire-police/>.

[74] "Apple approves Pulitzer winner's iPhone app; cartoonist now free to mock the powerful on cell phones," Nieman Journalism Lab, <http://www.niemanlab.org/2010/04/apple-approves-pulitzer-winners-iphone-app-cartoonist-now-free-to-mock-the-powerful-on-cell-phones/>; Brian Stelter, "Apple Allows a Cartoon App, and a Glimpse of Free Speech," New York Times, April 25, 2010.

[75] See Apple submission to Copyright Office, <http://www.copyright.gov/1201/2008/responses/apple-inc-31.pdf>

[76] *RealNetworks v. DVD-CCA* (N.D. Cal. August 11, 2009).

[77] Electronic Frontier Foundation, Unintended Consequences, Twelve Years under the DMCA, <http://www.eff.org/files/eff-unintended-consequences-12-years.pdf>.

For our part, we endorse the recommendations in the National Broadband Plan, 15.7-15.9, providing new exemptions for public media to put materials online, encouraging archiving and non-commercial re-use. We recommend narrow changes to the law to clarify end-user rights for noncommercial use and to balance the counter-notification provisions of the DMCA with the notification rules. We would support increasing service provider protections against liability for user activity — giving those media creators greater hosting security in their non-infringing activities.

IV. Conclusion.

We urge caution before adopting changes to the existing copyright laws, especially the adoption of such significant changes, as the hot news misappropriation doctrine, that would benefit certain forms of media over others.

We appreciate the opportunity to submit these comments. We hope that the Commission finds value in our research and perspective as it undertakes the daunting, yet critical task of its inquiry in to the future of journalism.

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