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Before the Federal Trade Commission

"How Will Journalism Survive the Internet Age?"

March 9, 2010

Mr. Chairman and Members of the Commission:

Thank you for your leadership in addressing the unfair trade practices that are injuring journalism's capacity to continue its historic role in American democracy.

For almost 40 years, I have worked at a firm, Baker & Hostetler, which for almost 100 years has served American journalism. During that century, journalism has migrated from print publishing to electronic formats, and now digital and online distribution. But the consistent core of our work has been the protection of journalistic content – not just so that the producers of content can be fairly and reasonably compensated for their labors, but also because the public interest benefits from the culture of professional journalism.

Thus, in the 1970s and 1980s, we helped lead the revolutionary constitutionalization of American libel law to protect journalism from crushing libel lawsuits and also worked to expand the newsgathering rights of journalists and the public's right to receive information in a world threatened by information overload and secreted data. Nowadays, we focus on the threat to journalism posed by online parasitic exploitation of content and the resulting economic withering of journalism. Our partner David Marburger (and his economist brother) have offered a seminal analysis of the harm to the industry and suggestions for legal reform on a state basis. In Washington, my partner Bruce Brown and I have written and argued for reform of our copyright and unfair competition laws on a federal basis to make online users of journalism pay fairly for that use. (Articles attached.)

Journalism's struggle to find a way to prosper financially on the Internet mostly overlooks how Washington's laws have defined the economics of the communications business. Indeed, the anxiety over the Internet's impact on the business model for journalism ignores the underlying legal rules and public policy that structure any business on the web.

Laws pave the way for the business model. Before the Communications Act of 1934 organized the spectrum, for example, the airwaves were not a place for commerce to prosper but a wild arena of noise where competing speakers shouted over each other to be heard. With a legal structure in place, broadcasting came to flourish in the 20th century. Similarly, the technology entrepreneurs of the 1990s secured their futures through a series of legislative initiatives in Congress beginning in 1996 that granted safe harbors from liability for defamation and then in 1998 from copyright infringement. These companies are in the business of distributing content not producing it, and it's not hard to see why: Our laws have made it much more profitable to be on the Internet as a portal or search engine collecting advertising than to bear the cost of actually creating knowledge. But history teaches us that a lack of copyright protection for content leads to less content and less knowledge, not more.

Before England passed the first copyright act in 1710, the Statute of Anne, printers could freely copy and sell each others' books. As a result, books were underproduced because printers did not want to invest in printing works when free-riding could easily snatch away a reasonable return on capital for the publisher.

While the Internet companies were busy building the legal foundation for their businesses, media companies were focused on transitioning their content to new platforms. They did not receive the same governmental help that the fledgling technology companies did. Indeed, media companies have been hampered by clearly anachronistic cross-ownership restrictions that remain in effect. The cross-ownership rules may end up outlasting newspapers themselves. But, again, the lessons of Europe are instructive. Legislation was introduced in the British Parliament late last year called the Digital Economy Bill to ensure that England's legal infrastructure for communications fits the digital age; it is time for the United States to do the same.

A governmental role in providing the structure for journalism to prosper on the Internet is consistent with media autonomy and serves this Commission's mission to preserve competition in the marketplace for news and information. Making media companies non-profit, which some have suggested, is not a solution. Non-profit organizations may create a new, fertile meadow of journalism, but they cannot and should not replace the landscape of for-profit publishing. Moreover, pinning all of the hope for the future of journalism on non-profits ignores the fundamental unfair trade practices that are harming the industry in the first place. We need to solve the underlying legal issues, not sweep them under the rug.

We believe the Commission should help ensure fair compensation for journalism online by undertaking the following:

- **Issuing a fact-finding report that describes the online parasitic use of content and assesses the fairness of current trade practices.** An FTC study, prepared within the next six months, would benefit the public by documenting empirically the impact of new technologies on the functioning of the market for news and information. An authoritative FTC report would serve as a basis for the Commission's legislative recommendations to Congress.

- **Assisting the industry in creating uniform online audience measurement standards and in establishing an industry-wide licensing program.** Creating one, gold-standard definition of the audience for original content will help advertisers and content producers monetize the fair value for their inventory. Likewise, the Commission can support the efforts of the industry to build a convenient licensing program, similar to the music industry's, so that unauthorized users of content can pay reasonable fees for various usage.

- **Recommending copyright legislation which clarifies that the routine copying and repeated commercialization of an entire website's content is not fair use.** Courts may well

reach this result without congressional clarification, but if Congress adapts the fair use doctrine to the digital age, reasonable deals may be facilitated between the producers of journalism and the non-producers which distribute news on the Internet. It is in everyone's interest to find a legislative solution that avoids the possibility of a helter-skelter of inconsistent judicial decisions.

- **Recommending that Congress recognize the "sweat of the brow" theory of copyright protection.** In Feist Publications v. Rural Telephone Service Co., the U.S. Supreme Court saw congressional intent as protecting only expression, not the effort necessary to create that expression. This question looks very different today in the age of online exploitation of original content than in 1991 when the Court considered telephone directories that were easily compiled. This adaptation to the digital age will stop aggregators from stealing the value of content simply by truncating, paraphrasing, or linking.

- **Recommending the creation of a federal unfair competition law that protects content creators from "hot news" misappropriation.** The "hot news" doctrine, currently recognized by five states, protects media companies from competitors who evade copyright infringement by stealing the "guts" of their content rather than the expression itself. A federal law would give publishers an additional source of legal leverage outside of copyright to demand fair compensation for their content.

- **Recommending the passage of a temporary antitrust exemption to permit media companies to collaborate in the public interest.** Congress first came to journalism's defense in 1970 when it granted limited antitrust immunity to permit endangered newspapers to combine their business operations as long as their newsrooms remained independent. The "public interest," Congress said then, is served by "a newspaper press editorially and reportorially independent and competitive in all parts of the United States." Publishers are rightly fearful that

erecting pay walls will only be effective if it can be accomplished industry-wide, and an exemption will advance the creation of these reasonable policies.

At the heart of the Federal Trade Commission's historic work is the mission to prevent unfair trade practices in a constantly-mutating marketplace. We thank the Commission for its initiative in addressing the current threat to the economic viability of journalism from such practices.

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# Google and the Copyright Wars

**By Bruce W. Sanford And Bruce D. Brown**

On Monday, a federal court in Manhattan granted yet another extension to Google and a group of authors and publishers as they try to reach a settlement in the landmark digital books case. They are expected to submit a revised proposal today. But whatever the ultimate agreement, this case is a giant missed opportunity.

The class action suit, brought in 2005, challenged Google's unauthorized scanning of copyrighted works to create a vast searchable database of books. It raised a critical question: Are search engines allowed, under the legal doctrine of "fair use," to make and store full copies of texts to power their search functions, profit from this material, and at the same time demand that copyright holders opt out if they don't want to be googleable?

The answer has importance far beyond the book-scanning project—it involves the very legality of how search engines operate on the Internet. If search engines cannot make full copies of books and Web sites without permission from copyright holders, their own business model would be jeopardized. When leading publishers and authors sued Google for violations of copyright, it appeared that the first serious test case was at hand.

And yet, as the litigation proceeded, the question that prompted the lawsuit—whether search engines are fair users—fell away entirely. The settlement agreement doesn't even address fair use standards for the future. Instead, the focus is now on the competitive concerns of allowing one company to have such a dominant role in digital book publishing, specifically on the treatment of "orphan works" (texts whose authors cannot be found).

Search engine caching—the process through which automated crawlers travel across the Internet, sweep up the contents of Web sites, and index them into searchable databases—is so fundamental to how information is distributed today that it's too big for any one case. It's a policy question that Congress has to tackle to give copyright owners a fair share of the revenue that their content generates on the Web.

The "snippets" of text that appear on your screen after you've entered a term in a search engine are produced from a complete copy stored in a search engine's server. True, the search results are only a few lines of text. But copyright is not limited to "display" rights. It includes exclusive rights to "reproduction" as well. And that surely means the storing of the complete text.

The search engines argue that they do not have to pay rights holders because the full copies they index are for a purpose different from the original. In addition, they say that they help make Web sites more valuable by driving readers to them. Publishers certainly like the traffic. But since only a few search engines control the market, publishers have had little choice but to play by their rules.

> The reach of search engines should be regulated by Congress, not the courts.

Google has consistently compared itself to the neighborhood library. When it was sued by Agence France Presse for copyright violations in 2005—a case that also settled before any judge ruled on the fair use issue—Google described itself "as important to the web as a card catalog is to a library." A public library, Google said in *Agence France Presse v. Google Inc.*, "would be of limited use without an index or some other means to organize and find particular volumes of interest."

The copyright code allows public libraries to copy texts as long as there is no "direct or indirect commercial advantage." But that does not describe what search engines do. They use the complete copies they take for free to sell the advertising that has made them enormously profitable. This has a direct impact on book publishers, and on the publishers of magazines and newspapers that are losing the advertising that once supported them. According to Ken Auletta's recently released book "Googled," its search business alone now takes in 40% of all advertising across the Internet.

Consistent with the handling of copying by libraries, indexing without any commercial gain should be protected as fair use. But it should not be controversial to legislate that once the cache is monetized for the benefit of the search engine, the line of copyright infringement is crossed. The absence of such defined rules gave Google a green light to proceed with its book scanning project and establish itself as the proprietor of the world's largest digital bookstore.

In the last year, many fresh ideas have begun to circulate on how to help the publishing industry transition profitably to the online world. But without legal reform to back up these new business models, publishers will not have the bargaining power to make the search engines into true partners willing to compensate them meaningfully for their copyrights.

*Messrs. Sanford and Brown are partners at Baker Hostetler in Washington, D.C. Their firm is not involved in the Google books case.*

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# Laws That Could Save Journalism

Unless Congress embarks on far-reaching change in public policy to maintain the viability of journalism as it evolves online, we will soon find ourselves with the remnants of a broken industry incapable of providing the knowledge necessary to manage life in a complex world. Journalism does not need a bailout, but it does need a sort of "recovery act" to bring the legal landscape in line with today's publishing technologies.

The good news is that the transformational thinking needed to prevent the economic withering of the American press has begun. Sen. John Kerry held hearings last week on the future of journalism, and Sen. Ben Cardin has proposed helping media companies transition into nonprofit entities. While the Kerry initiative is an important first step, overlooked at the hearing was the way in which legal rules have defined business models on the Web. The law of the Internet was written for the technology companies seeking to protect their growth in a once-fledgling medium, not for the journalism outlets that are now handicapped trying to survive there. Regulatory reform is needed because the playing field has become so uneven.

The Internet innovators that have thrived online enabled their own success as early as 1996 by securing immunity from defamation and other liability caused by user postings on their sites. Two years later, they persuaded Congress to add another exemption, this one for user postings that violate copyright law. These safe harbors have allowed companies from Yahoo to YouTube to prosper from the content they carry with little concern of being held accountable for it.

Google Chairman Eric Schmidt tells newspaper publishers that the answer for journalism is to "invent a new product. That's the way Google thinks." But Google's products (and profit) would look a lot different if, for example, the law said it had to obtain copyright permissions in order to copy and index Web sites. Search engines have instead required copyright holders to "opt out" of their digital drag-nets, and so far their market power has allowed them to get away with it.

It is unrealistic to demand new business models from the press without giving it the legal tools to succeed. Here are a few things Congress can do:

■ Bring copyright laws into the age of the search engine. Taking a portion of a copyrighted work can be protected under the "fair use" doctrine. But the kind of fair use in news reports, academics and the arts — republishing a quote to comment on it, for example — is not what search engines practice when they crawl the Web and ingest everything in their path.

Publishers should not have to choose between protecting their copyrights and shunning the search-engine databases that map the Internet. Journalism therefore needs a bright line imposed by statute: that the taking of entire Web pages by search engines, which is what powers their search functions, is not fair use but infringement.

Such a rule would be no more bold a step than the one Congress took in 1996 rewriting centuries of traditional libel law for the benefit of tech start-ups. It would take away from search engines the "just opt out" mantra — repeated by Google's witness during the Kerry hearings — and force them to negotiate with copyright holders over the value of their content.

■ Federalize the "hot news" doctrine. This doctrine protects against types of poaching that copyright might not cover — the stealing of information not by direct copying but simply by taking the guts of the content. While the Internet has made news vulnerable to pilfering because of the ease of linking from one site to the next, the hot-news doctrine has limited use because it is only recognized in a few states.

Now that many news aggregator sites have taken "linksploitation" to a commercial level by selling ads wrapped around the links they post, Congress has the incentive it needs to pass a federal law protecting hot news. Such a law would give publishers an additional source of legal leverage outside of copyright to demand fair compensation for the content they create.

■ Eliminate ownership restrictions. Media insolvency is a greater threat today than media concentration. Congress should abolish caps on ownership of broadcast stations and bars on newspaper and television ownership in the same market. These outdated rules belong to an era when the Web was a home for spiders.

■ Use tax policy to promote the press. Washington state is taking a lead in the current crisis with legislation signed into law this week to slash business taxes on the press by 40 percent. Congress could provide incentives for placing ads with content creators (not with Craigslist) and allowances for immediate write-offs (rather than capitalization) for all expenses related to news production.

■ Grant an antitrust exemption. Congress first came to journalism's defense with antitrust relief in 1970, when it permitted endangered newspapers to combine their business operations without fear of antitrust suits if their newsrooms remained independent.

As noted in the Kerry hearing, publishers need collective pricing policies for their Web sites to finally break out of the expectation of free content that is afflicting the industry. Antitrust immunity is necessary because most individual news sites can't go it alone by walling off their content for fees — readers will simply jump to sites that are still free.

A temporary antitrust shelter would serve the public interest by enabling the industry to take steps today to preserve for tomorrow the journalism that benefits us all.

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