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Federal Trade Commission
600 Pennsylvania Avenue, NW
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Re: FTC Workshop: How Will Journalism Survive The Internet Age?

Mr. Chairman and Members of the Commission:

Thank you very much for inviting me to participate in the “Current Copyright Issues in Journalism” panel. I would like to take this opportunity to follow-up on comments I submitted for the record and yesterday’s presentations.

First, while the survey of newspaper economics was very informative, I believe that the Commission will benefit from additional fact-gathering in this area. Specifically, any report the Commission issues should not only document the experience of newspaper companies in their efforts to attract online advertising but also explore the extent to which Internet advertising is migrating toward aggregators, search engines, and social networks that may link to or otherwise take from publishers’ original content. Without that data, the picture is incomplete. This information will undoubtedly assist the Commission and Congress in determining how unfair trade practices are harming journalism and in proposing viable solutions.

Second, I have encouraged the Commission to recommend that Congress create some form of “sweat of the brow” protection for journalistic content. There was a suggestion yesterday that congressional action would violate the Constitution and contradict the Supreme Court’s decision in Feist Publications v. Rural Telephone Service Co., 499 U.S. 340 (1991). In Feist, the Court considered a telephone directory whose contents were not copyrightable because they lacked sufficient originality. In the case of journalism’s battle with aggregators, we are talking about works that are plainly covered by copyright but which may be unprotected under the fair use doctrine as it is currently codified because the “links” on an aggregator’s site might be found by a court to appropriate an insignificant amount of expression. For these cases, Congress could require courts to consider “sweat of the brow” as an independent factor under fair use to

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ensure that the creators of original content are not denied meaningful compensation for their efforts simply because an aggregator only takes the headlines and a few snippets of text. Such protection would function in ways somewhat similar to a federal "hot news" law, but would remain within the copyright framework. Amending the copyright statute in this manner is consistent with both Feist and the Constitution.

I applaud the Commission for examining how it can help journalism thrive in the Internet age and look forward to continuing this dialogue.

Yours very truly,

Bruce W. Sanford *l*