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Supplemental Comments on the Federal Trade Commission's News Media Workshop and Staff Discussion Draft: "Potential Policy Recommendations To Support The Reinvention Of Journalism" Submitted by the Software & Information Industry Association

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In response to the Federal Trade Commission's ("FTC") Federal Register Notice published on October 7, 2009, announcing the Public Workshops and Roundtables on "How Will Journalism Survive the Internet Age?", the Software & Information Industry Association ("SIIA") files the following comments. These comments are intended to supplement the comments filed by SIIA on this same topic to address two possible changes to federal law alluded to in the Federal Trade Commission's "Staff Discussion Draft: Potential Policy Recommendations To Support The Reinvention Of Journalism" ("Discussion Draft") that are designed to protect against hot news misappropriation.

First, the Discussion Draft notes the suggestion that Congress "amend Section 301 of the Copyright Act to clarify that it does not preempt state law claims based on hot news misappropriation." Discussion Draft, at 10. Second, the Discussion Draft acknowledges the suggestion that "Congress amend the Copyright Act to provide express statutory federal protection of short duration and limited scope to the facts reported in news articles."[1] *Id*.

To be clear, SIIA has no formal position on -- and is not writing at this time to debate the merits of either of -- either proposal. We are writing because the constitutionality of the hot news misappropriation doctrine is firmly established and it is incorrect to assert, as some have before the Commission and elsewhere,[2] that the Supreme Court's decision in *Feist Publications*

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[1] The Commission was careful to underscore that it was not taking a position on these two or any other of the potential policy recommendations discussed in its Draft. *See* Discussion Draft, at 1-2.

[2] *See, e.g.*, Google's Comments on FTC's News Media Workshop and Staff Discussion Draft: Potential Policy Recommendations To Support The Reinvention Of Journalism, at 15-17, available at http://docs.google.com/viewer?url=http%3A%2F%2Fwww.google.com%2Fgoogleblogs%2Fpdfs%2Fgoogle_ftc_news_media_comments.pdf ("[p]rotecting hot news under state misappropriation law is not compatible with Constitutional principles enunciated in *Feis*t," "[a] hot news right would … run afoul of the First Amendment" and any proposal regarding the licensing of news content that "involve[s] the *licensing* of facts or other uncopyrightable

v. Rural Telephone Services, 499 U.S. 340 (1991), and the First Amendment bar the federal government and its state counterparts from enacting hot news misappropriation statutes. Such contentions should not deter the FTC or any other governmental body—federal or state—from considering hot news laws if they are otherwise inclined to do so.

The Supreme Court Decision in *Feist* Does Not Prevent the States and Congress From Enacting Hot News Laws or Other Laws Protecting Against the Misappropriation of Factual Materials

In *Feist*, the Supreme Court rejected the "sweat-of-the-brow" approach as inconsistent with Congress's authority under its copyright power, U.S. Const. Art. 1, § 8, cl. 8, and held that a factual compilation can enjoy copyright protection only if sufficient originality is present in the manner in which the facts are selected, coordinated, or arranged. 499 U.S. at 348. While *Feist* places restrictions on Congress's ability to enact a statute protecting facts pursuant to its authority under the *Copyright Clause*, it prevents neither Congress nor the states from passing such laws. This is true for several reasons.

First, the unanimous *Feist* Court expressly acknowledged that *non-copyright*-based protections may be available to protect fact-based materials in certain circumstances. Specifically, the *Feist* opinion approvingly quotes a passage from *Nimmer on Copyright*, stating that "[p]rotection for the fruits of [factual] research . . . may in certain circumstances be available under a theory of unfair competition." 499 U.S. at 354 (citing 1 M. Nimmer & D. Nimmer, *Copyright, § 3.04*, p. 3-2 (1990)). Whatever the limitations that the Copyright Clause places on federal copyright protection of factual collections, federal or state unfair competition remedies under *Feist* may still be invoked to thwart unfair and destructive business practices and courts have recognized these torts on numerous occasions both before and after *Feist*.[3]

Second, the fact that under *Feist* Congress cannot pass a copyright statute pursuant to Art. I, §8, cl. 8, to address the copying of facts, does not prevent it from using another constitutional power to remedy unfair competition caused by free-riding. Congress's several affirmative legislative powers are cumulative and complementary to each other; they are not mutually exclusive. Congress has the power to grant copyrights and patents, *and* the power to regulate

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material is unconstitutional" under *Feist*) and Brief for *Amici Curaie*, Google and Twitter, in support of reversal, *Barclay's Capital, Inc. v. Theflyonthewall.com* at p 6, available at http://www.citmedialaw.org/sites/citmedialaw.org/files/Google%20Twitter%20Amicus.pdf ("dissemination of factual information may not be enjoined absent a contractual or other special relationship"). In its FTC comments, Google also asserts that "[f]acts, hot or cold, cannot be protected by copyright…" and thus intimates that *Feist's* rejection of copyright protection based on the author's investment in creation forecloses protection for hot news under *any* federal law, copyright or otherwise." Google Comments, *supra*, at 16.

[3] Courts have recognized misappropriation causes of action in a variety of contexts involving fact-based information since the Supreme Court handed down its seminal hot news misappropriation decision in *International News Service v. Associated Press*, 248 U.S. 215 (1918), and before and after *Feist*, as well. *See generally* McCarthy on Trademarks and Unfair Competition § 10:51-58 (describing the development of the doctrine).

interstate and foreign commerce.[4] It would be a valid exercise of Congress's Commerce Clause power set forth in Art. I, §8, cl. 3, to proscribe unfair competitive acts that occur in interstate commerce and that threaten the health of an industry that is important to the public. In fact, Congress has repeatedly invoked the Commerce Clause to prevent different kinds of unfair competition.[5]

Finally, the claim that *Feist* prevents states from enacting hot news misappropriation laws ignores the fact that the Article I limitations of the Copyright Clause apply to Congress, not the States. As the Supreme Court unambiguously explained in *Goldstein v. California*, 412 U.S. 546 (1973), the Constitution's Copyright Clause "enumerates those powers which have been granted to Congress; *whatever limitations have been appended to such powers can only be understood as a limit on congressional, and not state, action." Id.* at 560 (emphasis supplied). Thus, for example, *Feist's* construction of the Copyright Clause places no limits on a state's ability to use its "hot news" misappropriation tort to prevent competitive activity that it deems destructive or unfair. States remain free to use their police powers to prevent destructive practices with respect to factual information *unless* Congress has exercised its Article I power to expressly preempt them from doing so.[6] In the most notable decision to address this issue in the context of hot news, the influential United States Court of Appeals for the Second Circuit held that New York's common law misappropriation tort is not preempted by § 301 of the Copyright Act, and may be applied to so-called "hot news" in the presence of certain factors.[7] Whatever limitations the Copyright Clause places on *federal copyright protection* of factual materials, state law "hot news" remedies remain available to thwart unfair and destructive business practices involving the providers of factual materials.

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4 For example, in *United States v. Martignon*, the Second Circuit held that the federal criminal bootlegging statute represented a valid exercise of Congress's authority under its commerce powers, notwithstanding the fact that it covered material that would not be protected under the Copyright Clause. 492 F.3d 140, 148-149 (2d Cir. 2007).

5 For example, the Supreme Court struck down the first trademark statute under the Copyright Clause, and since then Congress has based every trademark statute (including the modern Lanham Act) on the Commerce Clause without constitutional incident. *Compare, e.g., The Trade Mark Cases*, 100 U.S. 82 (1879) (finding the first trademark law unconstitutional as a *copyright* statute) *with* 15 U.S.C. § 1125 (prohibiting use of confusing and dilutive trademarks in interstate commerce).

6 *See also, Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 478-79 (1974) (noting that the states are entitled to take a diverse viewpoint in protecting intangible rights, provided that "they do not conflict with the operation of the laws in this area passed by Congress").

7 The factors set forth in *NBA* are:

> "(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 plaintiff; 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."

The National Basketball Ass'n v. Motorola, Inc., 105 F.3d 841, 845 (2nd Cir. 1997).

The First Amendment Permits Legislatures to Address Unfair Competition Between Providers of Factual Information

Congressional and state power to regulate the dissemination of information has important limits. Misappropriation statutes or common law doctrines must, of course, pass muster under the First Amendment. Legislatures can create hot news misappropriation laws or causes of action if they act with precision to protect their substantial governmental interest in preventing economically destructive conduct by those who threaten the incentive of original compilers of information to make their products available to the public by reaping where they have not sown. They can do so *if* those laws are content and viewpoint-neutral, a "substantial governmental interest" exists, and the statutes are "narrowly drawn" to further that interest. *United States v. O'Brien*, 391 U.S. 367, 377 (1968). Content-neutral state and federal doctrines that regulate the misappropriation of information would both have to meet this standard. The categorical assertion that the hot news tort cannot comport with the First Amendment is unsupportable.