

Revamped Legal Structure Is Key To the Future of Journalism

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Journalism's struggle to find a way to prosper financially on the Internet has NOT GIVEN appropriate consideration to 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 broadcast spectrum, for example, the airwaves were not a place for commerce to prosper but rather 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.

Yet, the companies of these entrepreneurs 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 under-produced 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 would serve the Federal Trade Commission's mission to preserve competition in the marketplace for news and information. Making media companies nonprofit, which some have suggested, is not a solution. Nonprofit organizations may create a new, fertile meadow of journalism, but they cannot and should not replace the landscape of for-profit publishing. Pinning all of the hope for the future of journalism on nonprofits 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. Toward that end, the federal government (specifically, the Federal Trade Commission (FTC)) should undertake a number of steps.

First, the FTC should prepare and publish a fact-finding report that describes the online parasitic use of content and assesses the fairness of current trade practices. Such a study would benefit the public by documenting empirically the impact of new technologies on the functioning of the market for news and information. Further, an authoritative FTC report would serve as a basis for the Commission's legislative recommendations to Congress.

Second, assist 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 of their inventory. Likewise, the FTC can support the efforts of the industry to build a convenient licensing program, similar to the music industry's, so that once-unauthorized users of content could pay reasonable fees for various levels of usage.

Third, recommend copyright legislation to clarify 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 that 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.

Fourth, recommend that Congress recognize the "sweat of the brow" theory of copyright protection. In *Feist Publications v. Rural Telephone Service Co.*, 499 U.S. 340 (1991), 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.

Fifth, recommend 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.

And last but certainly not least, the FTC should recommend 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," said Congress, 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, because few of them will have the incentive to go down this path alone knowing that their major competitors might remain on the Web free of charge. An antitrust exemption to enable publishers jointly to develop reasonable subscription pricing for online news is an appropriate step and may be the only way to break the chokehold of "free" that is stifling the monetization of content on the Internet.

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At the heart of the Federal Trade Commission's historic work is the mission to prevent unfair trade practices in a constantly mutating marketplace. The future economic viability of journalism, as well as the critical role that journalism plays in a democratic society, may well depend upon the Commission's efforts to protect journalistic content from such unfair practices.

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