

Good News: FTC Not Inclined to Halt the Internet

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Last week, I attended the latest of the Federal Trade Commission's [series of workshops](#) [1] held to explore how the Internet has affected journalism. The workshop fleshed out a few ideas suggested to the Commission during earlier stages of the series – some of which would alter copyright law to the severe detriment of the Internet. Thankfully, it seems that the FTC is not lending serious consideration to the most radical of these proposals, at least for now.

Back in March, the FTC held the first panels of its series, resulting in a Discussion Draft ("[Potential Policy Recommendations to Support the Reinvention of Journalism](#)" [2]) that summarizes third-party recommendations expressed during the workshop. As it turns out, the draft contains some rather radical suggestions about how to help journalism survive in the Internet age – some that could drastically alter the online experience as we know it.

One approach considered in the draft is whether or not the copyright doctrine of "fair use" should cover the actions of search engines and news aggregators that index news articles. The 9th Circuit held (in the *Perfect 10* case) that Google's use of thumbnail images of, and headings from, copyrighted works in search results did not infringe the copyright in those works. Apparently, though "Some have suggested that the 9th Circuit's application of fair use reaches too far," and maybe fair use should be "reined in." The draft counters this idea, however, with the fact that many search engines already obey instructions from copyright holders (usually in the form of meta-tags or robots.txt instructions) who do not want their works indexed. Thus, search engines and aggregators may have "implicit permission from newspaper web site owners to copy and distribute content" – even absent the application of a fair use defense.

Another suggestion proposes strengthening the "hot news" doctrine. First recognized in the *International News Service* case in 1918, the Supreme Court crafted the hot news doctrine to create a short-term "quasi property" right in the facts gathered at great effort and expense by the Associated Press and expressed in its news articles. The doctrine prevents a second-comer from free-riding on the original reporter's efforts. While free-riding creates problems for journalists and newspapers, recommendations to strengthen the hot news doctrine (or even adopting it into the Copyright Act itself) are troubling not only to the Internet environment, but also traditional journalism. Ultimately, giving one newspaper a property right in the facts of a story would forbid another paper from covering that story, and would discourage public discourse on important events and issues. The FTC draft acknowledges the problems this would cause to free expression and public discourse in relation to current newsgathering practices: "Expanding hot news protection to limit unauthorized borrowing of facts from news sources could substantially raise the costs of the 'second round' of content creators and thus impede the routine practice of journalism by all news organizations, not just aggregators."

Early last week, the FTC held the second series of panels to discuss the potential recommendations summarized in its draft. After clarifying that the document was only a summary of third-party ideas – and [not endorsed by the FTC in any way](#) [3] – FTC Chairman Jon Leibowitz and Commissioner J. Thomas Rosch also emphasized that some of the more controversial views (such as suggestions to alter copyright law) are not being seriously considered by the FTC. [Insert huge sigh of relief here.]

During the workshop, while a few of the panelists commented on the possible need to amend copyright law or expand the hot news doctrine, more [rightfully recognized](#) [4] that statutory revision is too drastic of a response. Limiting fair use's application to the news is simply not a solution to the problems faced by journalism, and not a good policy decision because of dangers to free expression and other unforeseen consequences. Moreover, expanding hot news protections would also impede many newsgathering practices traditionally used by journalists. Furthermore, as one panelist noted, the facts of the *INS* case (decided in 1918) are just not relevant to today's world – especially considering the rise of the Internet.

In an environment where more people can express ideas, opinions, and viewpoints than ever before, and where readers can find information faster, more efficiently, and from more diverse sources than previously imagined, the market for news is potentially larger than ever. While the Internet's speed and openness creates problems for traditional journalism, it also creates opportunity. Expanding copyright protection would hinder innovation and free speech by affording protection to facts and ideas and discouraging discourse on important issues. Better suggestions are those that encourage journalism to harness the powers inherent in this new environment, including: finding ways to use aggregators and search engines to attract new readers, employing and training citizen journalists or bloggers, and exploring new Internet business models.

While it is encouraging to hear the FTC is not seriously considering drastic measures such as revising copyright law, it is important to think about the broader effects of such suggestions should they ever resurface. Copyright should not be viewed as a "quick fix" for one industry's problems because it has wide-ranging implications, especially on the Internet, and must strike a careful balance between private rights on one hand and freedom of expression on the other.

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- [3] <http://www.ftc.gov/opa/2010/06/journalism.shtm>
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