

Before the
**OFFICE OF MANAGEMENT AND BUDGET,
EXECUTIVE OFFICE OF THE PRESIDENT**
Washington, D.C.

In the Matter of Coordination and Strategic
Planning of the Federal Effort Against
Intellectual Property Infringement: Request of
the Intellectual Property Enforcement
Coordinator for Public Comments Regarding the
Joint Strategic Plan

COMMENTS OF NEWSPAPER ASSOCIATION OF AMERICA

The Newspaper Association of America hereby submits its comments in response to the Federal Government's request through the Office of the Intellectual Property Enforcement Coordinator (IPEC) for written submissions regarding costs to the U.S. economy, and threats to public health and safety, resulting from intellectual property violations; and for recommendations regarding objectives and content of the Joint Strategic Plan under the Prioritizing Resources and Organization for Intellectual Property Act of 2008, Pub. L. No. 110-403 (Oct. 13, 2008).

The Joint Strategic Plan will be to improve the effectiveness of the U.S. Government's efforts to protect the rights of intellectual property owners and to reduce the costs of and threats posed by intellectual property infringement. The IPEC encouraged

detailed recommendations to improve intellectual property rights enforcement, including proposed legislative changes, regulations, executive actions, guidelines, policies or practices; methods to limit or prevent use of the Internet to sell or otherwise distribute infringing goods including digital content; examples of agreements, including voluntary agreements among stakeholders, that have had significant impact on intellectual property enforcement; measures to secure supply chains to minimize the threat posed by infringing goods or products; strategies to reduce demand for infringing goods; and suggestions on public education for consumers. *In the Matter of Coordination and Strategic Planning of the Federal Effort Against Intellectual Property Infringement: Request of the Intellectual Property Enforcement Coordinator for Public Comments Regarding the Joint Strategic Plan*, 75 Fed. Reg. 8,137 (Feb. 23, 2010).

The Newspaper Association of America (NAA) is a nonprofit organization representing the interests of more than 2,000 newspapers in the United States and Canada. Its members account for nearly 90 percent of daily newspaper circulation in the United States and a wide range of non-daily newspapers. NAA's key strategic priorities include representing the interests of newspapers before the Federal government, and highlighting issues that impact newspapers' digital businesses and customers.

The newspaper industry is among the copyright and information industries affected by online infringement of intellectual property rights. Unauthorized use of newspaper content on the Internet imposes an economic cost to the industry and to the U.S. economy, including with respect to the creation and maintenance of jobs. In 2008, the newspaper

publishing industry contributed 335,780 jobs to the U.S. economy,¹ with some 46,700 professionals directly involved in gathering and editing the news.² In 2009, the number of full-time professional reporters and editors was roughly 40,000, down from 55,000 in 2006 – a 27 percent decline over a three year period.³ Although a confluence of factors contributed to the staff cuts, shuttered bureaus, and shrinking news coverage of recent years, they are not without costs to public health and safety: as stated in the Pew Project for Excellence in Journalism 2009 State of the News Media report, “Fewer people and less space equates to significant erosion of the serious, accountability reporting that newspapers do more than any other medium.”

A study released in January 2010 by the Pew Research Center’s Project for Excellence in Journalism demonstrates that, while avenues to access news online have rapidly expanded, most of what the public learns “is still overwhelmingly driven by traditional media -- particularly newspapers.” After examining all outlets that produced local news in Baltimore, Md., the study found that much of the news people receive “contains no original reporting. Fully eight out of 10 stories studied simply repeated or repackaged previously published information.” Of stories that did contain new information, “nearly all, 95 %, came from traditional media – most of them newspapers.”⁴

¹ U.S. Bureau of Labor and Statistics, U.S. Department of Labor, May 2008 National Industry-Specific Occupational Employment and Wage Estimates, bls.gov; Newspaper Association of America, *Trends & Numbers*, naa.org (2010).

² American Society of Newspaper Editors, *Newsroom Employment Census* (April 2009).

³ American Society of Newspaper Editors, *ASNE Census Shows Newsroom Diversity Grows Slightly*, asne.org (April 2006); Pew Project for Excellence in Journalism, *The State of the News Media 2010*, stateofthemedias.org (March 2010).

⁴ Pew Research Center Publications, *How News Happens -- Still: A Study of the News Ecosystem of Baltimore*, pewresearch.org (Jan. 11, 2010).

Unlicensed Reuse and Monetization of U.S. Newspaper Content Online

Like other industries, newspapers are adapting business models to the mobility and interactivity of the Internet, and developing distribution platforms for legitimate online uses of their intellectual property. A key component of this development was the emergence last year of vendors and other entities that provide services and tools for the online licensing and tracking of content. These tools enable authorized re-use of published news content, and are providing the first data on the scope of infringement and misappropriation of newspaper content, and its associated impact.

In 2009, The Associated Press announced a vanguard news registry to “tag and track” all online AP content to assure compliance with the rights owners’ terms of use. The news registry will employ a microformat to “encapsulate AP and member content in an informational ‘wrapper’ that includes a digital permissions framework that lets publishers specify how their content is to be used online and which also supplies the critical information needed to track and monitor its usage.”⁵ Such measures were envisioned by the Digital Millennium Copyright Act of 1998 (DMCA) to help protect copyrighted works online.⁶ AP’s efforts are designed to improve publishers’ understanding of all online uses of their

⁵ The Associated Press, *Associated Press to build news registry to protect content*, ap.org (July 23, 2009). The microformat was endorsed last year by the Media Standards Trust, a London-based nonprofit working to establish consistent online news formats.

⁶ Section 1201 of the Copyright Act, added by the DMCA, prohibits circumvention of technological measures that protect access to a work protected under copyright law. Section 1202 prohibits the intentional removal or alteration of “copyright management information” and the knowing addition of false copyright management information, if done with intent to induce, enable, facilitate or conceal a copyright infringement. 17 U.S.C. §§ 1201, 1202.

news content and the opportunity costs of unauthorized use.⁷ This will help to establish data sought by the IPEC on costs to the industry and U.S. economy resulting from intellectual property violations.

Another new approach is illustrated by Redwood City, Calif.-based Attributor, Inc. Attributor uses its proprietary software program to track online uses from the newspaper content feed, and provides services in the licensing and enforcement of intellectual property rights. Newspapers may respond to unlicensed, apparent infringing uses in a variety of ways, including license proposals, cease-and-desist letters, or “take-down” notices under section 512 of the Copyright Act. Section 512 provides limited liability for third-party content to online service providers that qualify under terms and conditions set forth in the statute, including the taking down of potentially infringing content upon receipt of notification.⁸

Attributor launched a “Fair Syndication Consortium” in 2009, in an effort to provide an easy and reasonable way for advertising networks to ensure that newspapers receive a share of advertising revenues from websites that display unlicensed newspaper content.⁹

Advertising networks represent multiple web sites in selling ad space (inventory), to allow

⁷ Telephone interview with Srinandan Kasi, Vice President and General Counsel, The Associated Press (March 18, 2010).

⁸ 17 U.S.C. § 512.

⁹ To date, Google AdSense does not participate in the consortium. However, its terms of service state that “AdSense publishers may not display Google ads on webpages with content protected by copyright law unless they have the necessary legal rights to display that content.” Regardless of whether the service may be liable for such infringement, Google cautions, “our response to these notices may include removing or disabling access to material claimed to be the subject of infringing activity...” google.com/adsense_dmca.

See also Perfect 10 v. Amazon.com, Inc., 508 F.3d 1146 (9th Cir. 2007) (suggesting that a search engine could be contributorily liable for copyright infringement if it had knowledge infringing content was available on its search engine and failed to take simple steps available to mitigate such damage, and while search engine advertising networks cannot control content on third-party websites, they can terminate participation of infringing third-party sites).

media buyers to reach broad audiences using ad buys across hundreds or thousands of sites. The Pew Center Project for Excellence in Journalism, among others, has called for news organizations to create such consortia to collect licensing fees from Internet service providers and aggregators for the content upon which these business models are built.¹⁰

In a study released December 2009, Attributor and the Fair Syndication Consortium for the first time sought to quantify the extent to which U.S. newspaper content online is reused and monetized by unlicensed websites.¹¹ The study covered 100,000 articles from 157 American newspapers monitored for one month. During a 30-day period ending in November, more than 75,000 unlicensed websites reused U.S. newspaper content. On these sites, many of which are supported through the selling of ads, Attributor's tracking technology detected 112,000 unlicensed, near-exact copies reproducing more than 80 percent of the original article; 163,000 uses of less than 80 percent and more than 125-word excerpts of the article; and 357,000 uses of headline and up to 125 words of the original article, such as verbatim use of the story headline and lead.¹² Articles from large national newspapers were reused as often as 15 times.

According to Attributor, bloggers represented less than 10 percent of top reusing sites. Of the thousand sites reusing the most articles, 38 percent were ranked in the 100,000 most trafficked websites. Google and Yahoo ad networks dominated the "unlicensed

¹⁰ Pew Project for Excellence in Journalism, *State of the News Media 2007*, stateofthemediamedia.org (2007). See also *infra* notes 30-33 and accompanying text (discussing recent proposals for such fees).

¹¹ Fair Syndication Consortium, *Research Brief: How U.S. newspaper content is reused and monetized online*, fairsyndication.org (Dec. 1, 2009).

¹² No single factor is determinative in a fair use analysis under section 107 of the Copyright Act. In *Quinto v. Legal Times of Washington, Inc.*, 506 F.Supp. 554 (D.C. 1981), ninety-two percent of an article was held not a fair use because it reprinted nearly the entire article and preempted the market for the work.

monetization” of U.S. newspaper content, Attributor reported, with Google AdSense and DoubleClick representing 53 percent of monetization, through selling ads on websites displaying unlicensed content and splitting ad revenue with the website.¹³

This month, the Fair Syndication Consortium launched a 90-day trial of Attributor’s anti-piracy services, to enforce intellectual property rights on behalf of more than a dozen news organizations, including newspapers and news agencies.¹⁴ As a threshold matter, the trial will focus on websites that make unlicensed uses of 80 percent or more, including at least 125 words, of an article, more than 10 times a month. By combining technology with “trained human reviewers” and issuing a first notice that invites discussion and inquires whether use is authorized, the trial seeks not to impact “aggregators, folks who provide original content around portions of other’s work, educational reuse, or any other form of fair use.”¹⁵ The trial will offer licenses to websites making unauthorized uses of full articles; will send notifications under section 512 of the Copyright Act to ad networks that serve ads to those sites; and will notify search engines that point to them, asking them to remove pages containing the infringing content from search results. Where these approaches fail, Attributor will ask service providers hosting the infringing sites to take them down.¹⁶ Meant to allow “free flow of content online” while “removing economic benefit for those who reuse content

¹³ Fair Syndication Consortium, *Research Brief: How U.S. newspaper content is reused and monetized online*, fairsyndication.org (Dec. 1, 2009).

¹⁴ Also using FairShare Guardian services are book publishers HarperCollins, Macmillan, Hachette Book Group, John Wiley & Sons, and Harvard Business School Publishing. Press Release, “Attributors FairShare Guardian Selected by Major Book Publishers for Piracy Protection,” marketwire.com (Feb. 25, 2010).

¹⁵ Attributor, Inc., *In Pursuit of a New Content Syndication Model*, attributor.com (March 5, 2010).

¹⁶ Alan Mutter, *First web copyright crackdown coming*, newsosaur.blogspot.com (March 4, 2010).

without appropriate permission,”¹⁷ the trial is aimed at repeat offender websites, ad networks selling ads on them, and search engines that point to and include them in search results.¹⁸

A separate debate has arisen on the extent to which commercial aggregations of newspaper website content, including the use of headlines, story leads, excerpts and links to sell advertisements, may require a license or otherwise represent lost licensing revenue at an economic cost to news content providers. In the United Kingdom, the Newspaper Licensing Agency, formed in 1996 by a group of eight newspaper publishers, announced last year it would begin licensing commercial links to newspaper websites in 2010; that initiative is suspended pending a Copyright Tribunal challenge by a commercial aggregator.¹⁹ In this country, The Associated Press took the position last year that some online uses of headlines, leads, excerpts and links should be licensed.²⁰ Commercial aggregators have argued that newspapers make content available through feeds and optimize search through site maps, and can “opt out” of participation in services such as Google News using a robots exclusion protocol. Given the nature of the Internet, “Search and links are how the majority of traffic

¹⁷ Attributor, *supra* note 15.

¹⁸ The limitations on liability established by section 512 of the Copyright Act apply only if the service provider has adopted, implemented, and informs subscribers and account holders of a policy that provides for termination in appropriate circumstances of subscribers and account holders of the service provider’s system or network who are repeat infringers. 17 U.S.C. §512 (i).

¹⁹ See *In the Matter of a Reference to the Copyright Tribunal under Section 119 of the Copyright Designs and Patents Act 1988, between Meltwater Holding BV and Newspaper Licensing Agency Ltd.*, ipo.gov.uk (March 18, 2010); see also Mercedes Bunz, *NLA taken to the UK Copyright Tribunal by Software Firm*, Guardian.co.uk (Dec. 17, 2009).

²⁰ Richard Perez-Pena, *A.P. Cracks Down on Unpaid Use of Articles on Web*, The New York Times, nytimes.com (July 24, 2009). A lawsuit brought in 2005 by Agence France-Presse alleging that copyright in its headlines, story leads and photographs were infringed by Google, Inc., settled in 2007 with a licensing agreement. *Agence France-Presse v. Google, Inc.*, No. 05-CV-546 (D.D.C. filed Mar. 17, 2005). See also The New York Times Company, *Gate House Media and The New York Times Company Announce Settlement of Lawsuit* (Jan. 26, 2009).

arrives at newspaper websites.”²¹ Nonetheless, a January 2010 study by research firm Outsell, Inc., based on a survey of 2,787 news consumers, reported that 44 percent of visitors to Google News scan headlines without clicking through to individual newspaper sites. The same survey found that 57 percent go to digital sources for news, and found these consumers more likely to turn to an aggregator (31 percent) than to the newspaper website (8 percent) that originates the content and bears the costs of newsgathering.²² According to Pew, “Portal websites like Google News, AOL and Topix are the most commonly used online news sources, visited by over half of online news users on a typical day.”²³ While clearly a challenge that newspapers are endeavoring to meet, it is difficult, in the context of the IPEC inquiry or recent inquiries into the future of journalism, to isolate and identify the economic costs and more intangible impact of unlicensed and infringing uses of newspaper content online without addressing the question.²⁴

The business practices of aggregators and advertising networks are continuing to evolve with respect to linking and display of newspaper content, and there are some developments that may help continued viability of those investing in origination of that content. In December 2009, Google News said it would allow publishers to limit the number

²¹ Pew Project for Excellence in Journalism, *State of the News Media 2007*, stateofthemediamedia.org (2007).

²² Ken Doctor, *News Users 2009*, Outsell, Inc. (2009).

²³ Pew Internet & American Life Project, *Understanding the Participatory News Consumer* (March 1, 2010).

²⁴ See Letter from Bruce Sanford, Esq., Baker & Hostetler, LLP, to the U.S. Federal Trade Commission Workshop on the Future of Journalism (March 10, 2010) (any report “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.”).

of pages that users could access by link per day without registering or subscribing to the publisher website.²⁵ In January 2010, *The New York Times* announced it will introduce a metered model next year to allow users free access to a number of articles per month and to charge users once they exceed that number, an express effort to “stay connected to a search-driven Web.”²⁶ Regarding another new venture, the U.S. Justice Department issued a Business Review Letter last month stating that it would not challenge MyWire, Inc.’s Global News Service (GNS) creating an aggregated and syndicated “traffic marketplace” for Internet publishers to which access will be offered as a single paid subscription and for which news providers will share in subscription revenues and increased ad rates from subscriber views.²⁷

There have been other areas of exploration for monetization and protection of intellectual property in newspaper content. In July 2009, European newspaper and magazine publishers formally requested amended copyright laws in a letter to the European Union media and telecommunications commissioner, who called for “a simple, consumer friendly legal framework for accessing digital content in Europe’s single market, while ensuring at the

²⁵ BNA, *Google Limits Free News Content Through Updated ‘First Click Free’ Program*, Daily Report (Dec. 3, 2009). See also Erik Sherman, *Google Bowing to Pressure of Paid Content*, bnet.com (Dec. 2, 2009) (suggesting that move was in response to Microsoft’s discussions with news companies about its competing service, Bing).

Also in 2009, Google announced a news browsing product, Fast Flip, that aggregated content from 40 publishers, including *The Washington Post* and *The New York Times*, that did involve some ad revenue sharing with publishers. See Zachary M. Seward, *Google Sharing Revenue with Publishers for New Product*, Nieman Journalism Lab (Sept. 14 2009); But see Scott Karp, *What Google Understands about the Future of News and Publishing that Publishers Do Not*, publishing2.com (Sept. 14, 2009) (suggesting that revenue is shared because FastFlip goes beyond linking to partially reproducing entire web pages).

²⁶ The New York Times Company, *The New York Times Announces Plans for a Metered Model for NYTimes.com in 2011*, businesswire.com (Jan. 20, 2010).

²⁷ Letter from Christine A. Varney, Assistant Attorney General, U. S. Department of Justice Antitrust Division, to Charles E. Biggio, Esq. (Feb. 24, 2010).

same time fair remuneration of creators.”²⁸ German newspaper publishers have sought a copyright “neighboring right,” and adoption of an Automated Content Access Protocol, to allow publishers to set terms for search engine and aggregators’ use of their content.²⁹

Earlier this month, an independent inquiry into strengthening public life and civic society in the United Kingdom concluded that new taxes on Google and other news aggregators that carry news they do not produce would be needed to protect the public service value of the media to ensure “that revenues go to original news producers and not just to those who present and disseminate material.”³⁰ The report, by the Commission of Inquiry into the Future of Civil Society in UK and Ireland, and funded by the Carnegie Trust, concluded that “creative cannibalisation” is replacing original journalism.³¹

In the United States, some law professors have also called for a statutory fee or levy on commercial Internet service providers and news aggregators “who profit from news providers’ investment” to “ensure that papers receive compensation for their investment in reporting,” in order to maintain that investment “and the vital fourth estate benefits that flow from it.”³² At a workshop this month before the U.S. Federal Trade Commission, on the Future of Journalism, Stephen Nevas of the Yale Law School Information Society Project

²⁸ Eric Pfanner, “European Publishers Call on E.U. to Protect Copyright,” *The New York Times*, *nytimes.com* (July 9, 2009).

²⁹ *Id.*

³⁰ Commission of Inquiry into the Future of Civil Society in the UK and Ireland, *Making Good Society: Final Report*, *democracy.carnegieuktrust.org.uk* (March 2010) (“Original news reporting needs to be supported so that it is financially viable; this could require charging those who are not authorised to use and distribute this material.”).

³¹ *Id.*

³² See Neil Netanel, Professor of Copyright Law, University of California at Los Angeles, *balkin.blogspot.com/2008/05/demise-of-newspapers-economics* (May 5, 2008).

proposed a “content license fee to be paid by every ISP on each account it provides” into the Copyright Office to “help to create a level playing field” and a “hybrid licensing model for news and information distributed digitally, particularly when the purpose is to assure the continued production of public goods.”³³ A Seventh Circuit federal court judge suggested it may be necessary to amend the copyright law to bar linking without consent to copyrighted material, to the extent necessary to prevent “free riding” from impairing the incentive to engage in costly news-gathering operations.³⁴ As described in the United Kingdom’s 2009 *Digital Britain* report, “The growth of Internet aggregators has been good for advertisers [and] consumers”:

But what aggregators do not do in any quantity however is fund the creation of long-form professional content. The unintended consequence is that a significant part of the paid-for advertising revenues that used to fund long-form content locally now funds different sorts of services and applications for consumers or are repatriated to the global Internet aggregators in the form of returns to the shareholders behind these transformational business models. [These] are facts of the digital age. It is how we deal with them collectively that will determine how well many of our creative industries make the transition to the fully digital world.³⁵

³³ Stephen Nevas, Information Society Project, Yale Law School, “An Income Model for Digital Journalism,” Workshop before the U.S. Federal Trade Commission on the Future of Journalism (March 10, 2010).

³⁴ Richard Posner, becker-posner-blog.com/archives/2009/06/the_future_of_n (June 23, 2009).

See also Perfect 10 v. Amazon.com, Inc., 508 F.3d 1146 (9th Cir. 2007) (“in-line linking” did not “display” a work where the only fixed, full-sized copy resided on a third-party infringing site). Google’s computers stored thumbnail versions of Perfect 10’s copyrighted images and communicated copies of those thumbnails to users, but did not display a “copy” of full-size images because it communicated only HTML instructions which directed a user’s browser to the location where a copy of the full-size image was displayed. *Id.*

³⁵ Department for Culture, Media and Sport and Department for Business, Innovation and Skills, *Digital Britain* Final Report (June 2009).

In the report and accompanying Digital Economy bill, the government of the United Kingdom proposes to require Internet service providers to send notifications to customers suspected of infringing copyright. ISPs would be required to record the number of notifications a user receives and to send the data to rights holders who could seek a court order for the identities of repeat infringers for purposes of civil enforcement. The government will also consider bandwidth reduction or protocol blocking and changes to the copyright licensing legislative framework. *Id.* *See also* Richard Wray, “Digital economy bill: Online piracy law unlikely to face major scrutiny,” Guardian.co.uk (March 16, 2010).

Another approach that has been utilized to enforce newspaper intellectual property rights in the online environment invokes the tort of misappropriation and other unfair trade practice law. Because copyright law does not protect “facts” (only the original and creative expression in which the facts are embodied), Congress recognized in the legislative history accompanying the 1976 Copyright Act that the law can and should protect “against a consistent pattern of unauthorized appropriation by a competitor of the facts (i.e., not the literary expression) constituting ‘hot’ news.”³⁶ Such protection does not exist under federal law, but may exist under statutory and common law in some states. That a limited hot news claim survives preemption under the federal copyright law is established in the legislative history and in cases such as *NBA v. Motorola*, 105 F.3d 841 (2d Cir. 1997), especially where the free-riding of others threatens the very existence or quality of the infringed product or service.³⁷

With respect to infringements, newspapers are reviewing their copyright registration practices to ensure their ability to bring a copyright infringement action if necessary and to

³⁶ H.R. Rep. No. 94-1476 at 132 (1976).

³⁷ See also *Associated Press v. All Headline News Corp.*, ___ F. Supp. 2d ___, 2009 WL 382690, No. 08 Civ. 323 (S.D.N.Y. Feb. 17, 2009) (denying AHN motion to dismiss ‘hot news’ misappropriation claim); *Barclays Capital Inc. v. Theflyonthewall.com*, No. 06-4908 (S.D.N.Y. March 18, 2010) (in collecting and redistributing portions of financial firms’ timely investment reports, online financial news service systematically misappropriated those firms’ ‘hot news’ and was subject to permanent injunction requiring publication delay).

In hearings on database protection, the U.S. Copyright Office has testified in general support of a federal legislative approach to codify “standards set forth in the Second Circuit’s decision in *National Basketball Ass’n v. Motorola, Inc.*” Statement of David O. Carson, General Counsel, U.S. Copyright Office before the Subcomm. on Courts, the Internet, and Intellectual Property Comm. on the Judiciary and the Subcomm. on Commerce, Trade and Consumer Protection Comm. on Energy and Commerce, U.S. House of Representatives, 108 Cong., 1st Sess. (Sept. 23, 2003). Any such approach should be balanced with considerations for the free flow of information that newspapers themselves require in their newsgathering and reporting.

obtain statutory damages and attorney’s fees if they prevail in such action. In August 2009, NAA asked if the U.S. Copyright Office would clarify registration and mandatory deposit practices for online-only works in the case of newspapers and newspaper websites, and to permit group registration of online-only newspaper content similar to practices allowed for print daily newspapers or for updates published over a three-month period for automated databases.³⁸ This month at the invitation of the U.S. Copyright Office and Library of Congress, NAA member newspapers began to participate in a “proof of concept” pilot study seeking to accomplish mandatory and registration deposit of online content of newspapers, newspaper websites, and other material that does not appear in the print edition.

Economic Costs

Against this backdrop are the recent numbers on newspaper jobs, advertising and circulation. The industry has experienced an unprecedented assault on the revenues that ultimately support the level of news and other editorial content provided to the public.

- Employment. In 2007, according to the American Society of News Editors, 2,400 full-time professional newsroom jobs were lost at American dailies.³⁹ In 2008, that number more than doubled, with 5,900 more jobs lost.⁴⁰ Since 2006, full-time reporting and editing jobs have fallen from 55,000 to roughly 40,000 – a 27 percent

³⁸ See Comments of Newspaper Association of America, *In the Matter of Mandatory Deposit of Published Electronic Works Available Only Online*, 74 Fed. Reg. 34,286 (Aug. 31, 2009). Without timely registration, the copyright owner’s ability to bring an infringement action or to recover statutory damages and attorney’s fees is compromised or lost. See 17 U.S. C. §§ 411, 412.

³⁹ American Society of Newspaper Editors, *Newsroom Employment Census* (April 2008).

⁴⁰ *Id.*

drop in three years.⁴¹ The U.S. Department of Labor projects employment of news analysts, reporters, and correspondents to continue to decline.⁴²

- Advertising. From 1997 through 2007, newspaper print advertising expenditures (national, retail and classified) were more than \$40 billion annually. In 2005, that figure was \$47.5 billion. This spending began to decline in 2006. In 2007, newspaper print advertising fell 9.4 percent to \$42.2 billion, with an 18.8 percent increase in online newspaper advertising to \$3.2 billion.⁴³ In 2008, the start of a severe recession in the U.S. economy, total print and online newspaper ad expenditures dropped to \$38 billion, a 16.6 percent decline, with even online ad expenditures falling 1.8 percent.⁴⁴ In 2009, total print advertising was \$24.8 billion, a 28.6 percent decline from the previous year, and \$2.7 billion online, a 12 percent decline from 2008. From 2005 to 2009, newspapers suffered a 44 percent overall decline in total advertising expenditures, from \$49.4 billion to \$27.6 billion. Ad expenditures for 2010 are forecast to be \$21 billion for print newspapers and \$2.8 billion for online (newspaper websites), according to one industry analysis.⁴⁵ Another predicts newspapers ad revenues for 2010 to be \$22.3 billion for local

⁴¹ Pew Project for Excellence in Journalism, *The State of the News Media 2010*, stateofthemediamedia.org (March 2010). ASNE is expected to release its 2009 figures in mid-April 2010.

⁴² Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Outlook Handbook, 2010-11 Edition*, News Analysts, Reporters, and Correspondents, bls.gov/oco/ocos088 (2010).

⁴³ NAA Business Analysis and Research, *Advertising Expenditures*, naa.org (2010).

⁴⁴ *Id.*

⁴⁵ Glennco Consulting Group, Inc. (*NAA*) *Newspaper Advertising 2009-10 Forecast* (2009).

newspapers (print) and \$3.6 billion for locally owned digital media, including newspaper websites.⁴⁶

- Circulation. Until the 1990s, newspaper average daily paid print circulation (subscriber and single copy) remained above 60 million copies. By 2000, broadband Internet access began to penetrate U.S. households, and paid print circulation was in decline. In 2008, according to *Editor and Publisher International Yearbook* figures, paid circulation was 48.5 million.⁴⁷ Since 1990, newspaper paid print circulation has dropped about 22 percent.⁴⁸ NAA is working with Audit Bureau of Circulation to better reflect overall readership, including of newspaper digital issues, and new ABC guidelines will go into effect on October 1, 2010.⁴⁹

Americans today get news from a combination of sources, including newspapers, television, radio and the Internet, according to a March 2010 report of the Pew Research Center.⁵⁰ Sixty-one percent of all Americans say they get some news online, 50 percent from a local newspaper, 17 percent from a national newspaper such as *The New York Times* or *USA Today*, and 25 percent say they get some form of news via cell phone.⁵¹ According to

⁴⁶ Brian Wieser, Magna Global, *Media Supplier Advertising Revenues* (2009).

⁴⁷ Newspaper Association of America, *Trends & Numbers, Total Paid Circulation*, naa.org (2010); see also Jennifer Saba, *FAS-FAX: Most Major Newspapers Continue Circulation Declines*, Editor and Publisher (October 27, 2008); Rick Edmonds, *Circulation Declines Driven by Cost-Cutting, Price Hikes, Voluntary Pullbacks*, Poynter Online, poynter.org (Oct 26, 2009).

⁴⁸ Newspaper Association of America, *Trends & Numbers, Total Paid Circulation*, naa.org (2010).

⁴⁹ See News & Tech, *ABC Issues New Circ Guidelines*, newsandtech.com (March 22, 2010).

⁵⁰ Pew Project for Excellence in Journalism and Pew Internet and American Life Project, *The New News Landscape: Rise of the Internet* (March 1, 2010).

⁵¹ *Id.*

survey data, most people use between two and five online news sources, and 28 percent of Internet users have customized their home page to include news from sources and on topics that particularly interest them.⁵² Pew reported that 70 percent of those surveyed found the amount of news and information available from different sources to be “overwhelming.” The effect, as media analyst Brian Weiser demonstrates in his 2010 U.S. Report, has been to create fragmented advertising audiences, increased ad inventory supply leading to lower market pricing -- and an increase in paid search ad revenues.⁵³

Conclusion

As newspapers adapt business models and develop distribution platforms for the Internet, new services and tools are emerging to enable the licensing and tracking of published news content online. These tools are providing the first data on the scope of unauthorized use of newspaper content online, and its associated impact.

NAA appreciates the efforts of the U.S. Government, through the IPEC and the interagency advisory committee, to formulate and implement strategy “to protect the rights of intellectual property owners and to reduce the costs of and threats posed by intellectual property infringement.” Although the drafters of the current 1976 Copyright Act were addressing now commonplace technologies such as photocopy machines and cable television,

⁵² *Id.*

⁵³ Brian Wieser, Magna Global, *Media Advertising Forecast* (July 2009); *First Quarter 2010 Forecast Update/Media Supplier Advertising Revenues* (2010). Weiser estimates \$164.4 billion dollars in total U.S. advertising revenues in 2009. *Id.*

One estimate places Google News page views at 200 – 300 million monthly. Paidcontent.org (referencing Nielsen Online Nielsen/NetRatings). In January 2010, newspaper websites as an industry had about 3.4 billion page views. NAA Business Analysis and Research, *Advertising Expenditures*, naa.org (citing Nielsen Online Nielsen/NetRatings and MegaPanel Data) (2010).

and could not easily have foreseen the development of the Internet, they had the foresight to draft the new law to accommodate future technologies.⁵⁴ NAA believes the federal government has a vital role to play, to ensure that intellectual property rights in newspapers and other creative works are protected regardless of the platform on which these works are published and distributed, to help ensure that producers of original news content are fairly compensated for dissemination of that content on the Internet, and to fulfill the constitutional purpose of copyright and other intellectual property laws to promote the Arts and Sciences.⁵⁵ This important role of the federal government will help preserve and foster the in-depth, original, accountability reporting that is typically done by newspapers and other news organizations each and every day. As related above, notwithstanding the availability of news content distributed today to the American consumer, the Pew Research Center has demonstrated that much of the news people receive contains no original reporting, with most stories simply repeating -- or repackaging -- previously published information. In one such study, of stories that did contain new information, “nearly all, 95 %, came from traditional media – most of them newspapers.”⁵⁶

NAA welcomes the opportunity to work with the administration and Congress to help identify ways to ensure the viability of investment in original news content in the Internet era,

⁵⁴ See 17 U.S.C. 101 (definitions) (“copies” are material objects “in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device”; and to “display” a work means “to show a copy of it, either directly or by means of a film...or any other device or process...”).

⁵⁵ “The Congress shall have power...To Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” U.S. Const. art I, § 8.

⁵⁶ Pew Research Center Publications, *How News Happens -- Still: A Study of the News Ecosystem of Baltimore*, pewresearch.org (Jan. 11, 2010).

and to continue to fulfill the newspaper's core mission of providing high-quality news and information to citizens on a daily basis.

Respectfully submitted,

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