FEDERAL TRADE COMMISSION STAFF DISCUSSION DRAFT:[1]

POTENTIAL POLICY RECOMMENDATIONS TO SUPPORT THE REINVENTION OF JOURNALISM

Please note: This draft does not represent conclusions or recommendations by the Commission or FTC staff; it is solely for purposes of discussion.

Introduction and Brief Background

In May 2009, the Federal Trade Commission announced a project to consider the challenges faced by journalism in the Internet age. Now, one year later, staff responsible for this project present this draft for discussion of 1) the tentative conclusions outlined here about the current and likely future environments for news gathering and reporting, and 2) potential policy recommendations to address the issues raised during this proceeding. We note that this draft does not represent conclusions or recommendations by the Commission or FTC staff; it is solely for purposes of discussion, in particular at FTC roundtable discussions to be held on June 15, 2010, at the National Press Club.

Journalism is moving through a significant transition in which business models are crumbling, innovative new forms of journalism are emerging, and consumer news habits are changing rapidly. We are greatly indebted to the many journalists, newspaper publishers and editors, creators of new online news organizations, economists, lawyers, academics, and others who have contributed their time and expertise to describe and analyze this transition, thus providing the foundation for this document. Many have already organized conferences and written reports that expertly aggregate and assess the vast majority of the relevant information. We are well aware that we are in no way writing on a clean slate.

Rather, through this document, we seek to prompt discussion of whether to recommend policy changes to support the ongoing "reinvention" of journalism, and, if so, which specific proposals appear most useful, feasible, platform-neutral, resistant to bias, and unlikely to cause unintended consequences in addressing emerging gaps in news coverage. The list of proposals in this document is no doubt incomplete, and we

welcome additional proposals, which can be submitted at: http://public.commentworks.com/ftc/newsmediaworkshop. Members of the public also may submit comments on proposals in this document at the same web address.

We anticipate that different participants in the roundtables at which this document will be discussed will criticize some or all proposals, improve others, and add ideas of their own. The purpose of this document is precisely to encourage such additional analyses and brainstorming.

To provide background, staff's key observations and conclusions to date are as follows.

The Current State of the News

1. Although many of the issues confronting journalism cut across different news media platforms, such as broadcast television and radio, most of the discussion in this document will use the perspective of newspapers to exemplify the issues facing journalism as a whole. Studies have shown that newspapers typically provide the largest quantity of original news to consumers over any given period of time. We include within the term "newspapers" online news websites run either by an existing newspaper or by an online-only news organization. Other sources of news are also important, of course, and proposals for action should not favor newspapers over other news platforms.

2. Advertising paid for the vast majority of the news produced in the twentieth century in the United States. For most newspapers, about 80% of revenues came from advertising and 20% came from subscribers. Advertisers paid newspapers (as well as radio and television broadcasters and cable) to bring together audiences to view advertisements. As an ancillary benefit, consumers received news about a wide variety of topics, including important public affairs.

3. Newspapers' revenues from advertising have fallen approximately 45% since 2000. For example, classified advertising accounted for $19.6 billion in revenue for newspapers in 2000, $10.2 billion in 2008, and is estimated to be only $6.0 billion in 2009.[2]

4. With the advent of the Internet, advertisers have many more ways in which to reach consumers, including, for example, through a marketer's own website or through topical websites that relate to the products that an advertiser wants to sell (e.g., a soccer

blog for soccer equipment). Search engines also provide sites for advertising related to particular search queries.

5. Although some types of online advertising (e.g., advertising targeted to a consumer's known interests) can generate greater revenue than other types (e.g., banner ads), the vast supply of online sites for advertising reduces the amount that an online news site can charge for advertising at its site. This means that online advertising typically generates much less revenue than print advertising (often described as "digital dimes" as compared to the dollars generated by print ads). It appears unlikely that online advertising revenues will ever be sufficient to replace the print advertising revenues that newspapers previously received.

6. Although newspapers' print advertising revenues are significantly smaller than they were at the beginning of the twenty-first century, many newspapers still receive approximately 90% of their advertising revenues from print advertising, with somewhat less than 10% coming from online advertising. Print advertising revenues still account for more than half of newspapers' revenues. Thus, even though, in theory, newspapers could move to online-only and save approximately 50% of their costs (due to printing and distribution), such a move would not make economic sense. Most newspapers' circulation revenues now account for approximately 25% to 30% of total revenues.

7. Existing newspapers have responded to substantial declines in ad revenues by cutting staff. Financial problems due to the current recession and enormous debt loads from overleveraged transactions also have squeezed newspapers' resources and contributed to staff downsizing.

8. Staff downsizing has caused significant losses of news coverage. For example, coverage of state houses and state perspectives on news from Washington, D.C. has declined, as has coverage of local government issues, foreign affairs, and specialty beats such as science and the arts.

9. Existing newspapers are struggling to find a sustainable business model for the future. Severe cuts in expenditures, especially staff cuts, permitted most newspapers to break even or better during 2009. Advertising revenues are likely to improve in 2010 as some businesses recover from the recession and increase their advertising expenditures again. But the trend toward online, rather than print, advertising is very likely to continue over time, forcing newspapers to look for other sources of revenue.

New Sources of Revenue and New Types of News Organizations

10. Newspapers are experimenting, and will continue to experiment, with new ways to generate revenue. Experiments include special websites for certain types of in-depth reporting for which people are willing to pay (e.g., sports coverage of the local team), requiring payment for the news in some circumstances (e.g., must pay after reading 5 articles in a month), and developing ancillary services (e.g., research services). No one can be sure that any one of these or other similar strategies, even in combination, will generate sufficient revenues over the long run to maintain existing newspapers at their current (smaller) size.

11. Online-only news sites have emerged to fill some of the gaps in news coverage. The types of news they provide varies widely. For example, some cover hyper-local news; others do investigative reporting across the country; others focus on one community or region.

12. These "new" news sites typically have only a small staff (e.g., fewer than 15 journalists) and generally rely on a wide variety of funding sources, particularly foundations and other charitable sources. Even sites that earn advertising and other revenues typically must supplement those revenues with donations.

13. Although dozens of newly created online news sites have found sufficient funds to keep going through the early years of their existence, virtually no sites have yet found a sustainable business model that would allow them to survive without some form of funding from non-profit sources.

Will Experimentation Be Enough?

14. There are reasons for concern that experimentation may not produce a robust and sustainable business model for commercial journalism. History in the United States shows that readers of the news have never paid anywhere close to the full cost of providing the news. Rather, journalism always has been subsidized to a large extent by, for example, the federal government, political parties, or advertising.

15. Economics provides insight into why this has been the case. The news is a "public good" in economic terms. That is, it is non-rivalrous (one person's consumption of the news does not preclude another person's consumption of the same news) and non-excludable (once the news producer supplies anyone, it cannot exclude anyone). Because free riding is usually easy in these circumstances, it is often difficult to ensure that producers of public goods are appropriately compensated.

16. In addition, the news can produce benefits that spread much beyond their readers. For example, investigative reporting that results in a staff shakeup in a local hospital can produce better health care for patients in the future, but the news organization that produced that story will receive, at best, limited compensation (perhaps through increased readership) related to having spurred those benefits.

17. Finally, consumer demand for public affairs reporting in particular may be suboptimal, because citizens may decide their votes are unlikely to make a difference and therefore may choose to be "rationally ignorant" of public affairs.

18. In sum, newspapers have not yet found a new, sustainable business model, and there is reason for concern that such a business model may not emerge. Therefore, it is not too soon to start considering policies that might encourage innovations to help support journalism into the future.

Proposed Policy Recommendations

The first two sections below (copyright and antitrust, and indirect and direct government funding) address ways in which to increase revenues to news organizations. The succeeding two sections (tax and corporate innovations, and taking advantage of technologies) address ways to innovate so that journalism is accomplished at lower costs. We seek discussion that compares and contrasts these proposals on a number of dimensions. For example: How well would the proposal address emerging gaps in news coverage? How costly and feasible would it be to achieve? To what extent would the proposal likely contribute to more and better journalism? How susceptible is the proposal to creating bias – in terms of news platforms or government interference? How likely is the proposal to create unintended consequences? What will journalism and the news media look like in the future if none of the policy proposals are implemented? If we take a wait and see approach, what are the likely effects, both short- and long-term? Is a "wait-and-see" approach preferable at this time, when experimentation to find new revenue sources is ongoing and the likely effects of some proposals may be difficult to gauge? Comparisons on other dimensions also are welcome.

I. Potential Revenue Sources from Changes in Law

A. Additional Intellectual Property Rights to Support Claims against News Aggregators

Internet search engines and online news aggregators often use content from news organizations without paying for that use. Some news organizations have argued that existing intellectual property (IP) law does not sufficiently protect their news stories from free riding by news aggregators. They have suggested that expanded IP rights for news stories would better enable news organizations to obtain revenue from aggregators and search engines.

Other stakeholders, however, have raised concerns, noting that news organizations – including legacy print organizations and established broadcast media – depend heavily on reported news for source information. Thus, expanded IP rights could restrict the current practices of the same news entities that seek to remedy free riding by aggregators. Moreover, news is gathered and reported to inform citizens and enable them to freely discuss the news of the day; expanded IP rights could restrict citizens' access to this news, inhibit public discourse, and impinge upon free speech rights.

The policy proposals currently articulated lack sufficient specificity to fully assess their likely costs and benefits. For example, fundamental IP doctrines, such as the scope of copying aggregators are permitted under "fair use," is unclear and not resolved by existing case law. As a result, the "need" for expanded IP rights also is unclear.

This section provides an overview of copyright issues that pertain to news. Part 1 provides an overview of the Copyright Act and some of the key case law, including the "fair use" defense to claims of copyright infringement. Part 2 discusses the "hot news" doctrine. Section 3 sets forth some of the IP policy proposals specific to the use of news reports.

1. Copyright and Fair Use

The Copyright Act of 1976 (Copyright Act) grants several exclusive rights to authors or other owners of copyright in "works of authorship," including the rights to reproduce, display, or distribute copies of the work.[3] These rights, however, are subject to several significant limitations. For example, copyright protects an author's particular expression of ideas or facts, but does not protect the facts or ideas underlying that expression.[4] Thus, news stories as written and news images are protected by copyright, but the information reported in the news stories is not.

The "fair use" doctrine limits the scope of copyright protection by allowing third parties to reproduce, display, and distribute work protected by copyright, without authorization, if done for certain purposes, such as "criticism, comment, news reporting, teaching . . . scholarship, or research,"[5] and if the use strikes the appropriate balance under the four factors enumerated in Section 107 of the Copyright Act:

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
(2) the nature of the copyrighted work;
(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
(4) the effect of the use upon the potential market for or value of the copyrighted work.[6]

There is no precise formula for the application of these broad factors to particular facts and circumstances. Rather, these are "various factors that enable a court to apply an 'equitable rule of reason' analysis to particular claims of infringement."[7]

There are various views as to whether search engines and news aggregators infringe copyrights in news stories or fall within the fair use exception. One court of appeals has deemed search engine activity to be fair use. In *Perfect 10*, the 9th Circuit held that Google's use of thumbnail images of, and headings from, copyrighted works to create an on-line index was fair use.[8] Perfect 10, the plaintiff, maintained a subscription web site that displayed photographs. Thumbnail images of those pictures (small lower-resolution copies) could be found via Google's search engine, along with links to high resolution copies of Perfect 10's images that were stored on other computers. Perfect 10 filed suit for copyright infringement, alleging, among other things, that Google's indexing of thumbnail images and links infringed Perfect 10's copyrights by displaying, reproducing, and distributing the protected works. [9]

Although the court considered all four "fair use" factors in reaching its decision,[10] it emphasized the first factor. Google's use of thumbnails and headings was deemed "highly transformative," because "a search engine provides social benefit by incorporating an original work into a new work, namely, an electronic reference tool."[11] That transformative contribution was deemed to outweigh the commercial nature of Google's search engine and AdSense program,[12] as well as the potential for economic harm to Perfect 10.[13]

Some have suggested that the 9th Circuit's application of fair use reaches too far.[14] Other courts could decline to follow the 9th Circuit's holdings,[15] but so far, other courts have not squarely addressed these issues.[16]

News aggregators present an even less clear question of fair use, partly because aggregator conduct is so varied. As one workshop participant noted, "the word aggregator . . . is actually too broad a word in some ways. It covers a variety of sins, and it covers some things that aren't even close to being sins."[17] Existing case law does not provide definitive guidance as to how much or what type of news aggregation is too much to be considered fair use. A recent case, *Gatehouse Media*,[18] raised important questions about the extent of news aggregator conduct that might be allowed as fair use, but the case was settled before decision.[19]

More recently, Dow Jones filed suit against Briefing.com, alleging that the defendant "systematically copies verbatim or nearly verbatim substantial portions of Dow Jones' copyrighted articles . . . and distributes them in competition with Dow Jones . . . in some cases, within a minute or two after the article is published by Dow Jones."[20] That suit, and further litigation, may help to clarify some of the fair use issues, but a quick and clear resolution is unlikely.

2. "Hot news" Protection of Facts

Copyright protects an author's articulation of facts, but not the facts themselves. State law versions of the "hot news" doctrine, however, can protect a news organization's investment in fact gathering to a limited extent. In *International News Service* (*INS*),[21] the AP challenged the use of its news wire stories by INS, which immediately rewrote the stories and distributed them to its own clients. Based on common law misappropriation principles, the Supreme Court recognized a "quasi property" right of very short duration in the facts that were gathered, digested, and disseminated at great expense by the AP.[22]

The *INS* holding in 1918 was based on federal common law that is no longer binding.[23] Nonetheless, several cases have recognized the cause of action under state law. In doing so, these cases have held that federal copyright law's refusal to protect the facts underlying a news story does not preempt a narrowly tailored state law misappropriation claim.[24] For instance, in a recent case, *Associated Press v. All Headline News*, the AP alleged that All Headline News (AHN) had, among other things, misappropriated the AP's news stories when AHN located news stories on the Internet, paraphrased some, digested some, and reproduced others whole, and then posted such

news under its own banner at its own web site. The court denied the motion to dismiss the hot news misappropriation claim, holding that the claim remained valid under New York law and was not preempted by federal copyright law. [25]

In the 1999 case, *NBA v. Motorola*, the Court of Appeals for the Second Circuit provided the seminal modern statement identifying the elements of a hot news claim as follows:

> (i) the plaintiff generates or collects information at some cost or expense, (ii) the value of the information is highly time-sensitive, (iii) the defendant's use of the information constitutes free-riding on the plaintiff's costly efforts to generate or collect it, (iv) the defendant's use of the information 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 would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened. [26]

Beyond this statement of elements, the case law does not clearly delineate the scope of the hot news doctrine. Questions such as the length of time the doctrine would prohibit the use of news content and the degree of competition required to support a claim remain largely unanswered. One recent case, *Barclays Capital Inc. v. TheFlyOnTheWall.com*, does address those questions in the context of financial news. There, a federal district court enjoined FlyOnTheWall.com from re-publishing Barclays Capital's stock recommendations until at least 10 a.m. and two hours after its release.[27] Although the injunction applies specific time limits, they appear particularly tailored to the reporting of stock market analyses, and it is not clear whether courts would apply them to other types of news information. In addition, the Second Circuit recently stayed the district court's order and agreed to hear the appeal of TheFlyOnTheWall.com on an expedited basis,[28] so it is unclear whether the district court's order will be upheld.

3. Policy Proposals

Proposal 1: Federal Hot News Legislation.

Some stakeholders have proposed amending the Copyright Act to specifically recognize hot news protection. Advocates argue "the copyright act allows parasitic aggregators to 'free ride' on others' substantial journalistic investments,"[29] by protecting only expression and not the underlying facts, which are often gathered at great expense. They define parasitic aggregators as those that, without permission, post

enough material to render the original news stories redundant. This free-riding undercuts revenue for those who make investments in journalism and undermines their incentive to do so, according to advocates.[30] They suggest that federal hot news legislation could help address revenue problems facing newspapers by preventing this free-riding.[31]

Hot news advocates are divided, however, on whether federal law should be revised to encourage state law development of hot news doctrine or to provide uniform, statutory federal hot news protection. Proponents of the first course recommend that Congress amend Section 301 of the Copyright Act to clarify that it does not preempt state law claims based on hot news misappropriation.[32] They worry that the uncertainty surrounding the preemption issue discourages some news organizations from filing state law hot news claims. At the same time, they argue that specific statutory hot news protections would likely be too rigid to deal efficiently with the rapid evolution of news media and markets. State common law provides a more flexible tool for development of hot news doctrine, they assert.[33]

Others proponents of the hot news doctrine recommend 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.[34] They are concerned that state law evolution cannot provide the clarity or uniformity required for interstate news media. One author has criticized state-based hot news proposals as too variable and uncertain to be workable. [35]

The likely effects of a more vigorous hot news doctrine are controversial. For example, one workshop participant noted that New York's hot news doctrine was important to the AP's efforts to protect its intellectual property,[36] but recognized that any "federalization" of the doctrine would need to be very carefully drafted to avoid unintended costs.[37] Federalization of the hot news doctrine would entail difficult line-drawing between proprietary facts and those in the public domain. Moreover, it is unclear how to draw the scope of hot news protection broadly enough to provide significant incentive for news gathering, but narrowly enough to permit competition in the news, as well as free public discourse.

Others also have argued that expanded IP protections for the news would be too costly.[38] News organizations and writers, including print, broadcast, op-ed writers, and other commentators, routinely borrow from each other. One panelist suggested that "[m]uch of what is done by newspapers with each other is actually problematic under existing hot news doctrine."[39] 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.[40] Such problems would likely be magnified under a federal hot news statute, especially as new competitors – less likely to have cooperative understandings with legacy news organizations – entered news and information markets.[41] One academic also criticized the hot news doctrine, the initial *INS* decision, and the restrictions they impose on the communication of facts based on First Amendment grounds.[42]

Proposal 2: Statutory Limits to Fair Use

One panelist suggested amending the Copyright Act to limit the fair use doctrine that might otherwise protect from copyright infringement the activities of aggregators and search engines, such as the types of search engine activities blessed by the 9th Circuit in *Perfect 10*. In particular, he recommended legislation clarifying that the routine copying of original content done by a search engine in order to conduct a search (caching) is copyright infringement not protected by fair use.[43] Others who did not necessarily support statutory amendments to fair use nonetheless suggested that clarification of how the doctrine applies to aggregators would be useful.[44]

Statutory amendment of fair use raises difficult questions about unintended consequences. News organizations themselves rely on fair use in multiple ways to support news reporting and commentary. Fair use also protects copying done for purposes other than news reporting, such as "criticism, comment, . . . teaching . . . scholarship, or research," subject to the balancing of the four factors.[45]

The suggestion that an amendment be somehow tailored to reject *Perfect 10*'s attribution of fair use to search engines raises further practical questions. First is the concern about the public's ability to find and access information on the web without comprehensive search engines.[46] Second, as one federal district court observed, major search engines such as Google already follow instructions by copyright holders, in meta-tags and programs such as robots.txt, that, for example, can prohibit the search engines from searching or indexing web pages.[47] Thus, some could argue that search engines, as well as some aggregators, have implicit permission from newspaper web site owners to copy and distribute content, which may negate the need for a fair use defense.[48] Moreover, newspapers can stop search engines from copying their content by coding express instructions prohibiting it.

Proposal 3: Licensing the News

Finally, some suggest that some sort of industry-wide licensing arrangement be adopted, perhaps with the government's help and support.[49] Foreign governments have considered how to provide adequate incentives and funding for the news and are exploring, for example, the creation of government-fostered pilot programs to investigate new business models for IP and discourage free-riding.[50] Such programs might enable newspapers and other content providers to experiment with "micropayments" and other means to monetize digital content.[51] Such market and policy experiments may provide useful insight to continued IP policy discussions.

Licensing, including statutory licensing, has long been part of U.S. copyright law for certain industries. The Copyright Act provides a compulsory licensing scheme for "making and distributing phonorecords,"[52] as well as one for "jukebox" operators.[53] Standardized licensing arrangements offer the potential to reduce contracting and other transaction costs and may be especially useful for relatively simple, but frequent transactions.

One workshop participant presented a specific proposal to modify the copyright laws to create a licensing arrangement. The proposal appears to be based on two concerns. The first concern appears to be that the AP Registry or other licensing proposals might result in copyright payments to some content producers, but not all, and that any system adopted should create a level playing field among all content providers. Second, implicit in this proposal appears to be a concern that private, coordinated attempts to collect licensing fees may not be successful (and perhaps violate the antitrust laws) if initiated and enforced collectively by the content creators and publishers.

Thus, this speaker suggests amending the copyright laws to create a content license fee (perhaps $5.00 to $7.00) to be paid by every Internet Service Provider on each account it provides. He suggests creating a new division of the Copyright Office, which would operate under streamlined procedures and would collect and distribute these fees. Copyright owners who elect to participate would agree to periodically submit records of their digitized download records to the Copyright Office. The Copyright Office could verify these records by commissioning market-by-market sampling by organizations like Nielsen, ARB, and Comscore. He suggests these fees could provide a financial floor that allows publishers to leverage additional income, and would encourage, not discourage, the operation of market forces, and stimulate experimentation and innovation.[54]

Nonetheless, a compulsory license places an effective tax on certain conduct.[55] In the context of the news, this raises numerous questions about what conduct, entities, or utilities to tax, at what rate, and on behalf of what entities. The particulars of such a scheme have not been specified for the news, and many have expressed concerns about the unintended consequences of mandatory licensing.[56] Mandatory licensing fees for news content raise complex issues related to the hot news and fair use doctrines, and the extent to which access to information about the news should be constrained by proprietary rights or fees. Moreover, licensing raises complicated questions about how to calibrate fees to properly balance the interests of copyright holders and fair use by others.[57]

B. Collaborative Actions and Antitrust Exemptions

Representative Waxman noted at the FTC's December 2, 2009 workshop that an "examination of the antitrust laws and whether changes there might be of assistance" had been raised as a possible response to the current difficulties facing the press and journalism.[58] This is not the first time an examination of the antitrust laws has been suggested in the context of the newspaper industry. The Newspaper Preservation Act of 1970 (NPA) provides limited antitrust immunity for some joint operating agreements (JOA) between newspapers that combine certain business operations.[59] The NPA, however, also requires that the newspapers in the JOA remain separately owned or controlled, that they maintain separate newsroom staffs, and that their editorial policies be "independently determined." Congress's goal in enacting the NPA was to assist two newspapers in the same city to survive by allowing them to combine their business operations to reduce overhead costs and at the same time to maintain competition in reporting and other editorial policies. Discussed below are two closely related proposals for antitrust exemptions and the arguments for and against these proposals.

Proposals:

- **Allow news organizations to agree jointly to erect pay walls so that consumers must pay for access to online content.**

- **Allow news organizations to agree jointly on a mechanism to require news aggregators and others to pay for the use of online content, perhaps through the use of copyright licenses.**

Some in the news industry have suggested that an antitrust exemption is necessary to the survival of news organizations and point to the NPA as precedent for

Congress to enact additional protections from the antitrust laws for newspapers. For example, one public comment recommended "the passage of a temporary antitrust exemption to permit media companies to collaborate in the public interest," noting that "Congress first came to journalism's defense in 1970 when it granted [a] limited antitrust immunity." This commenter noted that: "Publishers are rightly fearful that erecting pay walls will only be effective if it can be accomplished industry-wide, and they need an exemption to accomplish these reasonable policies."[60] Similarly, a newspaper publisher and member of the executive committee of the Newspaper Association of American (NAA) testified in May 2009 at a U.S. Senate Hearing that "Congress should act quickly on legislation that would provide newspapers with a limited antitrust exemption to experiment with innovative content distribution and cost saving arrangements."[61] More recently, it appears that industry requests for an antitrust exemption have abated.[62]

Others have suggested that the NPA was not successful in achieving its goals, and additional antitrust exemptions are ill-advised. According to one report, the NPA "did not work as intended, and most joint operating agreements ended with just one of the newspapers surviving."[63] One workshop participant asserted that the NPA "failed to save papers in the long run, harmed consumers by increasing circulation and advertising prices between 15-25 percent, and was misused in a variety of ways [for] corporate benefit that were not intended when the law was enacted."[64]

Other speakers and commenters also have opposed any additional antitrust exemptions.[65] For example, one public comment contended that many of the current problems facing newspapers stem from recent consolidation, and that easing antitrust laws could put "smaller, emerging media companies at a distinct competitive disadvantage."[66] Another participant noted: "It has been suggested that newspapers should receive an antitrust exemption to allow them to collude in charging for online news. . . . [T]here is no evidence that providing the exemption would actually create demand and willingness to pay."[67] Moreover, "The question facing us is not whether newspapers might benefit from an antitrust exemption, but if there is anything about the online setting that actually warrants it in economic terms. They never were allowed to collude on prices and payment systems in print. Why is it warranted online?"[68] Yet another participant noted he was "optimistic to a fault about the future of news and journalism. The barrier to entry into media has never been lower . . . But what we do need is a level playing field."[69]

Several new types of collaborations among news organizations are emerging. These collaborations appear to pass muster under the antitrust laws, which brings further into question the need for an antitrust exemption. At least two proposed collaborations for tracking online content and creating platforms potentially to allow individual content holders to monetize the use of content have received business review letters from the Department of Justice's Antitrust Division indicating that DOJ "has no present intention to challenge the development or operation" of the specific arrangements.[70] Other collaborations include online news organizations partnering with traditional print newspapers to provide investigative journalism reports for publication and collaborations to share other types of content as well.[71]

II. Potential Revenues from Indirect and Direct Government Support

Many people, including journalists, recoil at the thought of government assistance to sustain journalism. This is understandable, given the vital importance of avoiding government interference with truthful news reporting. Nonetheless, in assessing whether government funds ever could or should be used to support journalism, a historical perspective is crucial. The federal government has supported journalism through indirect means since the founding of this Republic. State governments also have provided indirect support for journalism. The Corporation for Public Broadcasting has received direct support for over 40 years. This section first reviews the history of government subsidies and then presents proposals that have emerged to date to provide additional government funds to sustain journalism.

A. History of Government Subsidies

Postal Subsidies. The Post Office Act of 1792 provided the first postal subsidies by charging less to recipients of newspapers than that charged to the recipients of letters.[72] At this time, newspapers were viewed as a "means to provide information to the geographically dispersed public so they might ably discharge their duties as citizens."[73] Throughout the 1800's and the first half of the 1900's, reduced rates remained in place.

During the 1960's, the Post Office's deficit, created in large part by subsidizing the rates for periodicals, became an issue.[74] Since that time, the amount of subsidies for newspapers and periodicals has substantially decreased. According to some, if the federal government in 2008 had "devoted the same percentage of the Gross Domestic

Product to press subsidies as it did in the early 1840s, it would have spent some *$30 billion* to spawn journalism."[75]

Public and Legal Notices. Newspapers also receive financial support from government public and legal notice requirements.[76] "Public agencies have required paid publication of this kind of information for decades as a way to ensure that citizens are informed of critical actions."[77] Although smaller newspapers benefit more than larger newspapers from the publication of public notices, most newspapers receive some revenue through this source.[78] As federal and state governmental entities push to save costs by publishing legal and public notices online, however, this revenue source is likely to decline substantially.[79]

Tax Breaks. Federal tax law allows newspapers to deduct their expenditures to "maintain, establish or increase circulation" in the year these expenditures are made, thereby providing beneficial treatment of circulation revenues. Print publications' ability to deduct these costs as a current expense increases cash flow and provides approximately $100 million in tax subsidies to newspapers and magazines. [80]

Two tax breaks are commonly available at the state level. The first is an exemption from sales and use taxes of revenues from the sale of newspapers and magazines, and in some cases from the sale of advertising services. This tax subsidy was worth about $625 million in 2008. The second tax break, worth about $165 million in 2008, is an exemption from sales and use taxes on items such as newsprint, ink, machinery, and other equipment used in the production of newspapers. Not all states report industry-specific tax data, however, so the tax breaks could be significantly more than the nearly $800 million reported by 37 states.[81]

Corporation for Public Broadcasting. The Public Broadcasting Act of 1967 created and provided funding for the Corporation for Public Broadcasting (CPB), which oversees both the Public Broadcasting System (PBS) and National Public Radio (NPR). President Lyndon B. Johnson summarized the reasons behind the act: "We must consider new ways to build a great network for knowledge – not just a broadcast system, but one that employs every means of sending and storing information that the individual can use."[82] According to CPB, "the fundamental purpose of public service media is to provide programs and services that inform, enlighten and enrich the public… CPB invests in programs and services that are educational, innovative, locally relevant and reflect America's common values and cultural diversity."[83]

According to a recent national poll, CPB has succeeded in its mission – more than 75 percent of the public believe PBS addresses key news, public affairs, and social issues "very/moderately" well. This poll also named PBS the most trusted and unbiased institution among nationally known news organizations.[84]

The 2009 federal budget included $409 million for the CPB. The U.S. government's support for public broadcasting is very small compared to other democratic countries. For example, "if the United States spent at the same per capita level as Canada, our federal commitment would be $7.5 billion."[85] Per capita spending by Finland and Denmark is approximately 75 times greater.

B. Proposals for Increased Government Subsidies, Indirect and Direct

A variety of proposals have emerged to allow further government support for journalism through either indirect or direct means. Whatever the means, care must be taken to ensure that government support does not result in biased and politicized news coverage.[86]

Increase Government Funding

- **Establish a "journalism" division of AmeriCorps.** AmeriCorps is the federal program that places young people with nonprofits to get training and do public service work.[87] According to proponents, this proposal would help to ensure that young people who love journalism will stay in the field. "It strikes us as a win-win; we get more journalists covering our communities, and young journalists have a chance to gain valuable experience – even at a time when the small dailies where they might have started are laying reporters off."[88]

- **Increase funding for the CPB.** According to one report:

> Public radio and television should be substantially reoriented to provide significant local news reporting in every community served by public stations and their Web sites. This requires urgent action by and reform of the Corporation for Public Broadcasting, increased congressional funding and support for public media news reporting, and changes in mission and leadership for many public stations across the country.[89]

Various commentators agree that CPB funding needs to be increased,[90] and many believe that NPR and PBS stations need to build and maintain strong newsrooms at the state and local levels.[91] NPR announced in October 2009 that it would launch a

new journalism project to develop in-depth, local coverage on topics critical to communities and the nation. The project is being funded with $2 million from the Corporation for Public Broadcasting and $1 million from the Knight Foundation. One speaker suggested that with additional federal funding, this initiative could be expanded.[92] The president and CEO of NPR explained that this project will "beef up local online content at the station level" and will be done in "partnership with other public media players [and] new not-for-profits."[93] Similarly, one public comment noted that "Congress should adopt legislation that would provide substantial additional resources to the Corporation for Public Broadcasting for the purpose of supporting local newsgathering by public service media. These resources would be directed toward public broadcasting stations and other nonprofit or low-profit local news organizations."[94]

- **Establish a National Fund for Local News**. One report recommends that: "A national Fund for Local News should be created with money the Federal Communications Commission now collects from or could impose on telecom users, television and radio broadcast licensees, or Internet service providers and which would be administered in open competition through state Local News Fund Councils." The report notes that the FCC currently uses surcharges and other fees to underwrite telecom services for rural areas and the multimedia wiring of schools and libraries, among other things. These fees support the public circulation of information in places the market has failed to serve. If such a "Fund for Local News" were created, measures would need to be in place to reduce the potential for political pressures and interference as to how the money is distributed.[95]

- **Provide a tax credit to news organizations for every journalist they employ.** This could help pay the salary of every journalist. Although the proponent of this idea died before it had been fully developed, one speaker noted it is one way to subsidize journalists without the government picking one paper over another.[96]

- **Establish Citizenship News Vouchers**. Citizenship news vouchers would allow every American tax payer to allocate some amount of government funds to the non-profit media organization of their choice. People could indicate on their tax return whether and to which nonprofit organization they want a specific amount (perhaps up to $200) to be donated, but they would not be required to designate a donation. They could split their "federal funds" donation among several different qualifying nonprofit media. Proponents of this approach suggest it would create a funding mechanism to encourage viable independent Internet journalism while avoiding

government control or the creation of a bureaucracy that could influence the recipients of the money based on politics. This proposal also could give foundations a role to play. Foundations could provide start-up funding for 3 to 5 years to help new ventures, "and then see if there is popular support for the venture in the form of Citizenship News Vouchers."[97] If desired, this proposal could be structured to apply to commercial, as well as non-profit, news entities.[98]

- **Provide grants to universities to conduct investigative journalism**. According to one speaker, "if the nation's 200,000 journalism and mass communications students spent 10 percent of their time doing actual journalism, that would more than make up for all the traditional media jobs that have been lost in the past 10 years." Such grants also could encourage training journalists to use digital technologies to conduct investigative journalism.[99]

  If students are to conduct such journalism, however, they will need the same protection as professional journalists with respect to confidential sources**.** Many of the shield laws do not protect the nation's 200,000 journalism and mass communications students because they are not considered "journalists" under such laws.[100]

<u>Use Current Government Funding More Productively</u>

- **Allow the Small Business Administration to insure loans to fund new nonprofit journalism organizations.** The Small Business Administration (SBA) was created in 1953[101] to aid, counsel, assist, and protect the interests of small business concerns. The SBA defines a business concern, among other things, as "one that is organized for profit."[102] Expanding the SBA program to include non-profit news start-ups could provide significant help in spurring innovative online news sites.

- **Allow content developed for international broadcasting to be used domestically.** Almost $700 million of taxpayers' money is spent on content generated for use by Voice of America and Radio Free Europe/Radio Liberty for international dissemination. This news would be valuable to U.S. citizens as well. A 60-year old law, however, prohibits the rebroadcast of this government-funded international news to U.S. consumers and taxpayers.[103]

- **Increase postal subsidies for newspapers and periodicals**. Postal subsidies have gone from covering about 75 percent of the cost of mailing in 1970 to approximately 25 percent in 2010. This represents a decrease from approximately $4 billion to $500-

$600 million.[104] Thus, some suggest increasing these subsidies.[105] The Chairman of the Postal Rate Commission explained some of the concerns with having non-periodical mail cross-subsidize the mailing costs of periodicals. She noted that the current subsidy is approximately $641 million and that letter mailers have been complaining about the cross-subsidization and want it addressed.[106] Nonetheless, she stated that it might be appropriate:

> for both the periodical community and the Postal community to approach Congress with the notion that there is this symbiotic relationship and support for both parts of this communications network that supports democracy are necessary, and I think if the Congress understands this unique relationship, arguments can be made for finding financial support in one way or another that may address both of our concerns.[107]

C. Proposals to Pay for Increased Public Funding

Representative Waxman noted in remarks to the FTC workshop on December 2, 2009, that those advocating for public funding "need to articulate the scope of such support, in terms of the activities to be supported and the dollars required. They need to respond to the concern that government support of journalism would lead to government control of content. And they need to explain the source of revenues."[108]

Two authors estimate that the various subsidies they propose – "postal subsidies; journalist tax credits; News AmeriCorps; student media; public media; and especially Citizenship News Vouchers – could run as high as $35 billion annually."[109] Although they recognize that convincing the government to allocate this amount of money to journalism and the news media would be extremely difficult, they argue "this level of spending would be similar to the U.S. government's commitment to subsidizing journalism in the first half of the 19th century," and the government should be willing to allocate funds to journalism as a public good.[110] They recognize that suggestions for funding sources, especially apart from federal income taxes, are helpful and suggest the government establish a distinct "Citizenship Media Fund." Funding sources could include the following suggestions.[111]

- **Tax on broadcast spectrum**. They argue "commercial radio and television broadcasters are given monopoly rights to extremely lucrative spectrum at no charge," and this is a massive public subsidy. They therefore suggest the revenues generated by that spectrum be taxed at a rate of 7 percent, which should result in a fund of between $3 and $6 billion. In exchange, commercial broadcasters would be

relieved of any obligations to engage in "public-interest programming," which the broadcasters claim costs them $10 billion annually.

- **Tax on consumer electronics**. A 5 percent tax on consumer electronics would generate approximately $4 billion annually.

- **Spectrum auction tax.** They suggest there be a tax on the auction sales prices for commercial communication spectrum, with the proceeds going to the public-media fund.

- **Advertising taxes**. They note a considerable amount of our broadcast spectrum has been turned over to disseminating commercial advertisements, and a 2 percent sales tax on advertising would generate approximately $5 to $6 billion annually. In addition, they suggest that changing the tax write-off of all advertising as a business expense in a single year to a write-off over a 5-year period would generate an additional $2 billion per year.

- **ISP-cell phone tax**. They suggest consumers could pay a small tax on their monthly ISP-cell phone bills to fund content they access on their digital services. A tax of 3 percent on the monthly fees would generate $6 billion annually. They note, however, this is the least desirable approach because demand for these services is "elastic" and even a slight rise in price could result in people dropping the service.

III. Legal Changes to Encourage New News Organizations

Businesses and non-profits in a number of different areas of the economy are exploring how best to organize their efforts to blend for-profit business activities with one or more social purposes, such as economic redevelopment or environmental protection. To find organizational structures within which both to make profits and achieve a social purpose requires consideration of complex federal and state legal issues. In some cases, efforts have begun to change or clarify federal and state laws to permit a transition to new, hybrid business models.

Some experts see an opportunity for news organizations to think creatively about the optimal organizational design(s) for news entities in the future and then to seek legislative changes as needed to implement that design. For example, some news entities may wish to explore hybrid organizational structures that integrate the pursuit of social purposes with business activities.[112] These organizational designs include, among others, "Flexible Purpose" and "Benefit" corporations and low-profit limited

liability companies (L3Cs). These hybrid designs may make sense for news entities, because journalism can fit a "social purpose" paradigm – that is, good journalism improves social welfare by educating the public through truthful and insightful reporting.

In addition, some "new" news organizations, especially new online sites, have chosen non-profit status to encourage a variety of funding sources and because they do not anticipate profitability any time soon. Such non-profits may confront some uncertainties in assessing their tax-exempt status, however, which could deter innovation in this area.

This section identifies and examines some issues that could be clarified to encourage the growth of news entities that would like to use tax-exempt, non-profit or hybrid organizational models.

A. Tax-Exempt News Organizations

1. Issues Regarding News Organizations and Tax-Exempt Status

For a news organization to qualify for tax-exempt status, it must be organized for one of the exempt purposes listed under Section 501(c)(3) of the IRS code: charitable, educational, religious, scientific, or literary purposes, to foster national or international sports competition, to prevent cruelty to animals or children, or to test for public safety. News gathering and reporting is not specifically listed as a tax-exempt purpose, but it may be considered to have educational or literary purposes.

In addition, for tax-exempt status, a news organization (like any other organization) must operate primarily to serve its tax-exempt purpose in a non-commercial capacity -- that is, it must insure that earnings do not inure to the benefit of a private shareholder or individual, and it must not operate a trade or business that is not related to the exempt purpose. Moreover, it must not engage in forbidden political discourse (even though it may report on political matters).[113]

Non-profit news entities have suggested that tax uncertainty exists in the following three key areas.

a. Qualifying for Tax Exempt Status

News organizations are unsure whether providing general news reporting (as opposed to, e.g., religious news) qualifies as a tax-exempt purpose, and if not, what

types of news reporting do qualify for tax-exempt status. To qualify for tax-exempt status, a news organization must be established for at least one of the exempt purposes defined in the tax code.[114] Although the IRS has explicitly granted tax-exempt status to a few specific news organizations, those news entities provided religious news, and the tax-exempt status of other types of news organizations has not been clarified. The tax-exempt purpose must be central to the operations of the news organization and not ancillary to other non-exempt business purposes.

The application of IRS requirements has been explained through case-by-case IRS Revenue Rulings. For example, IRS Rev. Rul. 68-306 (published in 1968) found that a non-profit organization that "published a newspaper primarily devoted to news, articles and editorials relating to church and religious matters" could qualify for tax-exempt status by "accomplishing a charitable purpose by contributing to the advancement of religion."[115] In Rev. Rul. 67-4, the IRS concluded:

> An organization engaged in publishing scientific and medical literature may qualify for tax-exemption under Section 501(c)(3) if (1) the content of the publication is educational, (2) the preparation of material follows methods generally accepted as "educational" in character, (3) the distribution of the material is necessary or valuable in achieving the organization's educational and scientific purposes, and (4) the manner in which the distribution is accomplished is distinguishable from ordinary commercial practices.[116]

Conversely, there are revenue rulings that suggest a non-profit corporation whose only activity was the publication and distribution of a weekly newspaper with an ethnic emphasis did not qualify for tax-exempt status. The IRS also asks whether the news provided is "useful to individuals and beneficial to the community,"[117] and whether any position advocacy is done in such a way "that there is a sufficiently full and fair exposition of pertinent facts to permit an individual or the public to form an independent opinion or conclusion."[118]

These revenue rulings provide very limited guidance, however, because they are very fact-specific and were published decades ago. The same is true of the revenue rulings discussed in the next two sections.

b. Business Organization and Operation Issues

News organizations are unsure how to structure their activity adequately to fulfill the tax-exempt purpose and avoid operating in the ordinary commercial course of

business. In addition, news organizations are unsure, logistically, how much space may be devoted to otherwise non-exempt content and how that "space" is measured.

Setting up a tax-exempt news entity requires an organization to assess its tax-exempt purpose and its methods for achieving the tax-exempt purpose. When deciding if operations are pursuant to an exempt purpose, the IRS and courts will look at several factors, including the price of the publication relative to costs.[119] For example, under Rev. Rul. 68-306 the IRS granted tax-exempt status to a religious publication because the organization knowingly priced its publication below costs, and the organization did not operate as an ordinary business.[120]

By contrast, IRS Rev. Rul. 60-351 denied tax-exempt status to a non-profit corporation that published a foreign language magazine. Although the corporation's stated purpose was charitable, the activities of the corporation were "devoted solely to publishing the magazine."[121] The IRS concluded that the corporation was organized for the primary purpose of publishing a magazine, a "per se business activity,"[122] and was therefore not a tax-exempt organization under Section 501(c)(3). The magazine at issue in Rev. Rul. 60-351, however, was published "regardless of charitable, educational or literary purposes,"[123] and several other magazines, with a more literary focus, have successfully operated as tax-exempt non-profits for many years.

Again, these revenue rulings provide little guidance. Clarifying operational rules would give news organizations a better indication of what conduct is exempt, what conduct must be avoided, and how an organization can better determine whether a change in its operations might lead to a loss of its tax-exempt status. Otherwise, operational uncertainty may restrict investment in non-profit news start-ups.

c. Political Endorsements and Analysis

News organizations are unsure what types of content and speech will constitute political endorsements.[124] Thus, political content restrictions create another uncertainty for news organizations seeking tax-exempt status, especially those that have historically taken positions on candidates and other political issues. To adhere to the legislative policy for tax-exempt organizations, news organizations must "refrain from participating in political campaigns and lobbying activities."[125]

The IRS has explained that, "The fundamental distinction here is between what is news coverage and what is an attempt through editorial policy to promote or oppose a

particular candidate."[126] One panelist noted that political endorsements are "an absolute no, no for 501(c) (3). It's not even a gray area."[127]

Under §1.501(c)(3)-1(d)(3)(i), tax-exempt news organizations that provide political information must do so in a "sufficiently full and fair" manner, so as to avoid "participating in, or intervening in (including the publishing or distributing of statements) any political campaign on behalf of any candidate for public office." Thus, the reporting must provide an exposition of pertinent facts that allow the reader to form an independent opinion.

When determining if an organization is participating or intervening in any political campaign, the courts and IRS consider various factors in their "facts and circumstances" analysis, including: (1) the organization's preexisting commitment to promoting the issues outside of the election, (2) statements by the officers about the issues outside the context of the election, (3) research and analysis about the issue outside the context of the election, and (4) appropriate disclaimers of any endorsement of candidates.[128] The analysis also includes an inquiry into whether the news entity expressly or even tacitly endorsed a candidate, which involves examining the totality of the evidence to reach a conclusion.

Rev. Rul. 78-248 provides hypothetical situations illustrating instances when a previously qualified tax-exempt organization may lose this status because of its political activities. For example, a tax-exempt organization that "annually prepares and makes generally available to the public a compilation of voting records of all Members of Congress on major legislative issues involving a wide ranges of subjects," which contains no bias or slant, would not be engaging in prohibited political activity. Furthermore, a tax-exempt organization that publishes a "brief statement of each candidate's position on a wide variety of issues" with no bias or preference would also not be engaging in prohibited political activity. Conversely, a tax-exempt organization that "publishes a voter guide that is a compilation of incumbents' voting records on selected land conservation issues of importance to the organization" would be engaging in prohibited political activity because it concentrated on a narrow range of issues and therefore indicated bias.[129]

2. Potential Tax Policy Recommendations

1. The IRS should change its regulations to clarify when news gathering and reporting may be a tax-exempt purpose under Section 501(c) (3). Alternatively, Congress

should amend the statute to add a separate subsection to Section 501(c) specifically exempting qualifying news organizations.

2. The IRS should issue guidance to clarify which business operations, such as an increase in profits or advertising space, will cause a news organization to lose its tax-exempt status.[130]

3. The IRS should issue guidance on how a news organization can avoid prohibited political activity.

Each of these potential recommendations involves some challenges. For example, how should a "qualifying news organization" be defined? At what point would an increase in advertising space tip the balance of the operation away from a tax-exempt purpose? Nonetheless, answering these questions could encourage more entry into the news business by non-profit start-ups that could fill some of the emerging gaps in news coverage.

B. Hybrid Corporations

Hybrid organizations that blend social purposes with business methods are emerging at the intersection of the three traditional sectors (for-profit business, non-profit, and government). Some for-profit corporations are looking to pursue socially beneficial goals in addition to profits. Similarly, some socially-oriented non-profits and government entities are incorporating traditional business practices and principles. Collectively, all of these changes are culminating in the formalization of a "Fourth Sector" of organizations, with an archetype sometimes referred to as a for benefit corporation.[131]

1. "Benefit" and "Flexible Purpose" Corporations

The development of "benefit" corporations has been stymied by restrictions in the law, including business judgment laws. Most state laws establish that an officer's fiduciary duty is to maximize a business's profits.[132] This business judgment rule requires officers and directors to prefer business conduct that improves profitability over conduct directed toward a particular socially beneficial purpose.[133]

In April 2010, the state of Maryland passed a statute to create a new corporate form known as a "benefit corporation."[134] Under this law, a corporation may qualify as a "benefit corporation" if it establishes that its mission provides a "general public

benefit."[135] "General public benefit" means that the corporation must make a positive impact on society and the environment, "as measured by a third-party standard, through activities that promote a combination of specific benefits." The law makes clear that to qualify for "benefit" status, a corporation must be evaluated by the approved third-party entity, which must measure its social and environmental impact.

Similar initiatives are underway in several states.[136] For example, a proposed bill in California would enable more entrepreneurs to pursue social-purpose-oriented activities through business means. Under the proposed bill, a corporation may qualify as a "Flexible Purpose Corporation" if it establishes that its mission is one that a non-profit or public purpose corporation would be qualified to carry out.[137] A flexible purpose corporation may operate as a for-profit business, but it must establish ways to measure success in accomplishing its public or charitable purpose,[138] and comply with additional transparency and reporting requirements.

The Maryland statute and proposed bills elsewhere provide some flexibility for officers and directors who make decisions involving trade-offs between profitability and the charitable purpose. For example, the Maryland statute delineates several factors to be considered when evaluating decisions by officers, including choices made regarding the designated public benefit.[139]

As news organizations shift from their traditional ad-revenue based models, and focus more on other sources of revenue, their businesses may fit within the paradigm of the "benefit" or "flexible purpose" corporation. This model could allow news organizations to choose higher standards of journalism over greater profitability. For example, local community lenders for whom a modest profit would suffice might be willing to invest in a "Flexible Purpose" news organization that would provide high-quality journalism for the community.

2. L3Cs

Like "benefit" and "flexible purpose" corporations, an L3C is a for-profit business entity established to advance a charitable or educational purpose as well.[140] Under the Vermont statutory model, which has been adopted in several other states, an L3C must be established pursuant to state laws governing limited liability companies (LLCs) and incorporate a charitable purpose (as defined under the federal IRS Code) as a primary goal in its mission.[141] Unlike California's proposed "Flexible Purpose Corporation" law, Vermont's L3C law does not require that L3Cs establish metrics to

measure achievement of the charitable mission or report its success in achieving its mission.

The L3C is designed to spur a particular type of investment from private foundations – a "program-related investment" ("PRI").[142] A private foundation may make a PRI if it furthers the foundation's charitable purpose and has "no significant purpose" to achieve "the production of income or the appreciation of property."[143] Both private foundations and their managers can be fined a percentage of the amount invested if the investment is inconsistent with the foundation's exempt purpose.[144]

Some have misunderstood L3Cs as automatically complying with IRS regulations that govern PRIs, because under state law, L3Cs must incorporate those regulations into their operating documents.[145] However, this is not accurate. First, each foundation must assess whether its particular charitable purpose will be advanced by the PRI. Second, L3Cs are a relatively recent development and their status for purposes of accepting PRIs has not been tested under federal tax law. Because the foundation and its manager face potential penalties if they wrongly assess the legality of a PRI, foundations typically seek advice of counsel and letter rulings from the IRS before making PRIs. The letter ruling process is costly, cumbersome, and takes a long time to complete, which has deterred PRIs, according to some.

L3Cs are designed to accept contributions from both for-profit investors and non-profit foundation investors. Such side-by-side investors, however, can create concerns about a PRI. First, Treasury Department regulations limit PRIs to investments that "would not have been made but for such relationship between the investment and the accomplishment of the foundation's exempt activities."[146] In determining if the PRI is primarily for the foundation's exempt purpose, it is relevant (but not conclusive) whether for-profit investors would make the investment on the same terms as the private foundation.[147] Because L3C's can invite side-by-side investments, critics suggest that this broad invitation may undermine the charitable purpose as the primary purpose of the investment. Second, side-by-side L3C investors can create concerns over how profits are assessed and attributed back to specific investors. For example, an equal division of profits among dissimilar investors may signal that the primary purpose of the investment is not necessarily the charitable purpose. Third, if the L3C's operations result in the "production of income" or the "appreciation of property," profits attributed to the investing foundation must be re-directed to further the foundation's charitable purpose. Thus, the foundation may incur added costs to assess

and monitor the L3C up front, and must make judgment calls to ensure that the investment remains a legitimate PRI to guard against potential IRS penalties.

Despite these issues, several states have adopted L3C laws to encourage organizations to pursue socially beneficial enterprises. Greater clarity in the tax code as to the types of news organizations that qualify for a tax-exempt purpose could help encourage investment, as could a speedier private letter ruling process to help foundations determine whether they can make a proposed PRI. Finally, L3C news organizations likely will benefit if they make it easy to identify funding sources and track revenues back to their source for tax purposes. Such policies may invite greater investment in this model.

3. Potential Policy Recommendations

1. **Identify news organizations as an example for program-related investments under IRS regulations**. In March 2010, the ABA's Section on Taxation filed comments with the IRS proposing examples to supplement existing guidance in Regulation §53.4994-3(b) related to PRIs. Example 16 highlights how a foundation could use a PRI to support a for-profit news organization's foreign affairs coverage, which could serve as an educational resource for the public in general. According to the Section, the example "highlights the need to support for-profit newspapers struggling to exist in the age of digital media."[148]

2. **Promote the Consideration of News Entities as Flexible Purpose or Benefit Corporations**. Promoting benefit and flexible purpose corporate designs might encourage greater investment in news organizations. The IRS could facilitate this process by specifying that news organizations have a tax-exempt purpose. In addition, news organizations would need to design measurements to evaluate their success in achieving their tax-exempt purpose. This approach could entail costs to achieve the necessary legal changes to promote the use of this business model.

3. **Promote federal and state partnerships to resolve regulatory hurdles that prevent development and investment in socially oriented LLCs, including L3Cs, seeking tax-exempt and non-tax-exempt funding**. LLCs, including L3C entities, would benefit from a "safe harbor" that would specify actions an L3C and foundation could take to qualify for a presumption that the PRI qualifies under federal tax law. Similarly, foundation investors in L3Cs would benefit from greater clarity as to how their investments will be evaluated by the IRS. Furthermore, new

models such as the L3C may require changes to IRS standards that regulate tax-exempt investments, which are already calibrated to guard against fraud and other risks.[149]

IV. Innovations to Accomplish Journalism with Lower Costs

The Internet and related digital technologies have unleashed many changes in the media, including changes that enable journalists to collect, aggregate, and analyze information in new ways. Journalists and interested citizens now can quickly search and locate large amounts of publicly available information using Internet search engines, compile and analyze information using widely available spreadsheet and database software, and inexpensively publish and distribute stories online. These technologies can help journalists find and investigate stories more efficiently.

Nonetheless, people still must read and interpret much digital information manually. Most digital documents historically have been created in a plain-text format with limited search capability, such as searching for certain keywords. Thus, even when information is made available digitally, searching documents and extracting and analyzing particular information can be time consuming.

In addition, obtaining some government records via FOIA can be costly and time consuming. For example, the Center for Public Integrity noted that the government told the Center it would cost $90,000 to process a FOIA request for certain Medicare data, because the data required some difficult work to clean it up and eliminate non-public data. After one year, the Center did receive 10 years worth of Medicare data containing 1.5 billion records.[150] Government development of software programs that would enable non-public data to be easily segregated from public data could reduce or eliminate such costs. An improved FOIA process also might obviate the need for private parties to resort to costly and time-consuming litigation, which could conserve the scarce legal resources of both news organizations and government entities.

A. Proposals to Maximize Easy Accessibility of Government Information

- Federal, state, and local government entities should maximize the amount of information online and establish the routine release of common records used to monitor the activities of government entities.[151] Such information should be in a text-searchable format at public websites.[152]

- Government policies should mandate that government software be written so that personally identifiable and other non-public information can quickly and easily be extracted from any government database.[153]

- The federal government should liberalize and clarify eligibility for public interest fee waivers and reductions under FOIA.[154]

- States should adopt FOIA-type laws applicable to both the state and localities within the state, and apply the above suggestions to those laws.[155]

- Government entities should webcast and subsequently archive online all public government meetings, hearings, and town hall events. If webcasting is not practical or available, government entities, including courts, should archive online audio recordings of public proceedings, as well as transcripts and other related materials.[156] Currently, every state legislature and the District of Columbia provide either a live audio or video webcast of floor proceedings. However, only about 60 percent of states archive such proceedings for later review online. Similarly, only about half provide a live audio or video webcast of committee hearings and only about 40 percent archive them for later review.[157] Thus, there appears to be significant room for improvement in this regard.

The proactive production of government documents in an easy-to-access format could reduce the amount of resources the government devotes to complying with Freedom of Information Act ("FOIA") requests.[158] It also should enable journalists to acquire more quickly and inexpensively information related to potential stories, thereby reducing the time and cost of developing news items.[159] Many issues could be researched online, instead of requiring the physical production of hard-copy documents.[160] Reducing the costs of developing stories might help sustain journalism as news organizations adjust to reduced revenues and leaner cost structures. Making government information more accessible can help in creating journalism that facilitates transparency and accountability in government.[161]

On the other hand, implementing all of these technology proposals would require federal, state, and local governments to make a wide variety of investments, some of which likely would entail significant costs. For example, institutionalizing the general release of commonly requested documents could entail a significant labor cost to identify the appropriate documents, develop software programs to separate non-public from public information, and maintain the databases. Improving FOIA web

pages and building openness into information systems also likely would require significant information technology expenditures. Clarifying eligibility for newsgathering entities, liberalizing fee waivers, and streamlining the FOIA process would require legislative action. Establishing additional mechanisms to monitor or coordinate FOIA practices might potentially complicate current FOIA administration.

Nevertheless, once a government entity has created an appropriate web platform and relevant information is in an appropriate digital format, government-related content can be posted on official web pages for a relatively low cost. The New York State Senate provides one relevant example. It overhauled its public website from January to May of 2009 to make the Senate's activities and related information easier to access by the public.[162] The deployment and training for this initial overhaul was done primarily by an outside consulting firm at a cost of less than $100,000. The new public website uses open-source software that does not require licensing fees. Ongoing operation and maintenance has entailed the work of two full-time technical staff, as well as some ongoing work by training and quality assurance staff. Ongoing website costs include approximately $1,000 per month in external hosting fees, and several hundred dollars per month in fees for live webcast bandwidth. In addition, the IT staff has trained over one hundred non-technical Senate staff to post on the site content that they create in the ordinary course of their work. This training enables staff to quickly post content ranging from bills and other documents, data, and reports related to the processes of the New York State Senate to content created for the personal home pages, social media pages, and news feeds of individual Senators. Official Senate activities, such as floor votes and debates and committee meetings, are webcast live with the help of the Senate's media services staff and archived at the New York State Senate's official YouTube channel. Senate content is made available for use by the public under a Creative Commons license. Notably, the New York State Senate Office of the Chief Information Officer indicates that the template and all the software code for its overhauled web site is available to be used and leveraged by other government entities, allowing others to benefit from its effort.[163]

Thus, it appears that at least some public-facing government websites can be launched or overhauled in under one year for an initial up-front cost of significantly less than one million dollars and, if necessary, scaled-up over time. In some cases, existing information technology resources can be leveraged incrementally to make significant improvements. For example, some government hearings could be webcast using license-free software and subsequently archived at free video hosting sites for an incremental cost.

The federal government also has launched public-facing websites such as: USASpending.gov in 2007 to track how federal dollars are spent; Data.gov in 2009 to make available government data sets; and Recovery.gov in 2009 to track funds made available by the American Recovery and Reinvestment Act. Some sites can be started for relatively little money and scaled up over time. For example, in order to create USASpending.gov, the White House Office of Management and Budget ("OMB") spent $600,000 to purchase existing software on which the watchdog group OMB Watch's FedSpending.org site was based.[164] According to OMB, even with other support costs, the total initial cost of the site was less than $1 million.[165] Seven staff members working under the Federal Chief Information Officer initially launched Data.gov via the White House website with forty-seven federal data sets. [166]

In other cases, making available information that previously had not been collected may be more costly. For example, after its initial launch, a re-design of the Recovery.gov website is expected to cost between $9.5 and $18 million through 2014 to track funds from the recovery act.[167]

B. Implement Interactive Data

- Federal, state, and local government entities and other public stakeholders should collaborate to develop a common taxonomy of metadata tags for government-related information and then implement machine-readable interactive data for the information that they make publicly available in electronic format.[168]

Over the last decade, some interactive "semantic web" technologies that make information posted on the World Wide Web readable by machines have been developed. This interactive data is created by adding special informational data "tags" to electronic documents. Interactive data should significantly reduce the costs of finding information online because interactive metadata tags can be quickly searched, read, and analyzed by computers, not just by people.[169] Interactive data should enable journalists and others to quickly pinpoint facts and figures within otherwise dense documents, data sets, or other types of information using an appropriate software application interface. Thus, widespread implementation of interactive data by government should facilitate less expensive and more in-depth reviews of information, some of which might lead to investigative or accountability journalism.[170]

Although at least twenty states are using Extensible Markup Language ("XML") in some manner to add metadata to their bill drafting or legislative process,[171]

widespread implementation of interactive data across all levels of government will require the creation and maintenance of a commonly agreed-upon taxonomy for relevant data tags. Currently, such a harmonized taxonomy does not exist, at least in the U.S.[172] A wide array of government representatives engaged in a substantial and coordinated effort likely would be required to develop and periodically update a commonly agreed-upon framework of terms.

Nonetheless, some government entities have made significant progress in implementing interactive data. In 2003 the Federal Financial Institutions Examination Council ("FFIEC") announced it would spend $39 million over ten years to use eXtensible Business Reporting Language ("XBRL") and other technologies to modernize and streamline how federal bank regulators collect, process, and distribute quarterly bank financial reports. The XBRL standard uses interactive data tags based on standardized accounting terminology to make financial data more consistent and searchable. The resulting FFIEC Central Data Repository for filing and storage of such call report data for more than 8,000 reporting entities was implemented in 2005 as the first mandatory electronic filing system for financial data in the United States.[173]

The U.S. Securities and Exchange Commission ("SEC") currently is in the midst of a multi-year process to implement interactive data technologies for financial filings. In contrast to the federal banking agencies, which generally work with structured data, most of the data contained in over 350 unique SEC forms was unstructured and presented a complex challenge. In 2006 the SEC announced contracts totaling $54 million to transform its Electronic Data-Gathering, Analysis, and Retrieval system ("EDGAR") into a dynamic real-time search tool with interactive capabilities. In 2007, the SEC established the Office of Interactive Disclosure to help develop rules to formalize the XBRL reporting requirements, formalize a comprehensive taxonomy based on U.S. Generally Accepted Accounting Principles ("GAAP"), and create a technological infrastructure for interactive data formats. In 2009, the SEC published final rules that require large public companies, mutual funds, and credit rating agencies to report certain information in XBRL. The SEC plans to expand these interactive XBRL filing requirements to cover additional entities and more in-depth information.[174]

According to the SEC, interactive data in SEC filings will enable investors and others to quickly identify facts and figures within lengthy disclosure documents.[175] This capacity allows quick comparison of specific information among companies, such as past performance and industry averages. The availability of such data could help to level the playing field between large institutions, small institutions, and individual

investors.[176] The SEC hopes that as more filings include interactive data, sophisticated analysis tools now used by financial professionals could become available to the general public, making analyzing and reporting on financial data less expensive and easier.[177]

C. Leverage Other Government-Funded Information Technology Investments

- The federal and state governments should make excess capacity in federal and state funded computing centers available to journalists to conduct resource-intensive activities, such as optical character recognition ("OCR") scans of large document collections or other computational journalism activities.[178]

- The federal government should increase the research and development funding and availability of electronic tools that traditionally have been used by other professionals, but which might be used by journalists as well. Such tools could include: text analysis tools for analyzing original source documents and large document collections, digital speech recognition tools, the computerized analysis of complex networks, and improved electronic note-taking.[179]

The prospective benefits of these various proposals are difficult to measure with precision. Improving government information technology and making it available to journalists have the potential to reduce the cost of researching certain stories and, in some cases, also might enable journalists to research stories in ways not previously possible.[180]

Leveraging government-funded information technology investments likely would involve varying costs. Making existing facilities and tools available to journalists might entail relatively low costs in some circumstance, but greater costs in others. For example, allowing journalists access to government technology and computer capacity might involve costs to create firewalls and secure data to prevent unauthorized persons from accessing confidential, nonpublic information.

[1] This document does not necessarily reflect the views of the Commission or of any individual Commissioner. It reflects only the tentative analyses and possible policy recommendations assembled by FTC staff in the Office of Policy Planning.

[2] PEW PROJECT FOR EXCELLENCE IN JOURNALISM, THE STATE OF THE NEWS MEDIA: AN ANNUAL REPORT CH. Newspapers (2010) (citing Newspaper Association of America, Trends and Numbers, and for fourth quarter 2009, estimates by Rick Edmonds), *available at* *http://www.stateofthemedia.org/2010/printable_newspaper_chapter.htm*). [Hereinafter 2010 PEW REPORT].
[3] 17 USC § 101, *et seq*.
[4] *See* 17 USC at § 102(b) ("In no case does copyright protection … extend to any idea . . . concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.")
[5] 17 U.S.C. at § 107.
[6] *Id.*
[7] *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 449 (1984) (citing the House Report accompanying the 1976 Copyright Act, H.R. Rep. No. 94-1476, 94th Cong., 2d Sess., 51, 65-66 (1976)).
[8] *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1168 (9th Cir. 2007). Perfect 10 initially sued Google for infringement for thumbnails and linking, *Perfect 10 v. Google, Inc.*, 416 F. Supp. 2d 828 (C.D. Cal. 2006), and subsequently brought similar claims against Amazon.com and its subsidiary A9.com. Although consolidated by the district court, much of the 9th Circuit's discussion focuses on the nature of Google's search engine activities.
[9] *Perfect 10,* 508 F.3d at 1157 (photographs of nude models sold commercially and available at plaintiff's subscription web site).
[10] *Id.* at 1168. According to the 9th Circuit, Google's caching of Perfect 10 images and its linking to and framing of third-party copies of those images were probably not even *prima facie* infringement and, as such, would not require a fair use defense. *Id.* at 1160-1162 (upholding district court view that display and distribution rights not infringed); *see also Field v. Google Inc.*, 412 F. Supp. 2d 1106, 1115 (D. Nev. 2006) ("when a user requests a Web page contained in the Google cache by clicking on a 'Cached' link, it is the user, not Google, who creates and downloads a copy of the cached Web page").
[11] *Perfect 10*, 508 F.3d at 1165 ("Google's use of thumbnails is highly transformative"; certain other factors also in favor of fair use); *see also Kelly v. Arriba Soft Corp.*, 336 F.3d at 820 (search engine's use of images protected by copyright "promotes the goals of the Copyright Act and the fair use exception"); *Field v. Google*, 412 F. Supp. 2d at 1118 (allowing access to copyrighted works through cached links fair use, to extent Google itself copied or distributed works).
[12] *Perfect 10*, 508 F.3d at 1166-1167 (outweighed commercial and superseding use for first factor).
[13] *Id.* at 1166. In Perfect 10, the court found insufficient evidence of actual harm to Perfect 10's ability to market its full size images or, for cell phone use, its reduced size images. The nature of the copyrighted work did favor Perfect 10 in that the images were expressive photographs protected by copyright, although lessened because Perfect 10 had enjoyed the right to first publication.
[14] Bruce W. Sanford & Bruce D. Brown, Opinion, *Google and the Copyright Wars: The Reach of Search Engines Should Be Regulated by Congress, Not the Courts*, WALL ST. J., Nov. 12, 2009.
[15] Other courts could distinguish or reject *Perfect 10* in whole or in part, as the 9th Circuit addressed caching, indexing, and linking by search engines. Courts also could take a different view of the significance of web instructions in, e.g., robots.txt or meta-tags to questions of implied licenses or estoppel than the one articulated by a federal district court in the 9th Circuit decided prior to the *Perfect 10* decision, but generally consistent with its fair use holdings regarding Google's search engine. *See* Field v. Google, 412 F. Supp. 2d at 1116-1117.
[16] Federal courts outside the 9th Circuit have cited aspects of *Perfect 10's* fair use analysis. *See, e.g., U.S. v. American Society of Composers, Authors and Publishers*, 599 F. Supp. 2d 415, 426 and n. 10 ((S.D.N.Y. 2009) (citing *Perfect 10* and *Kelly* approvingly on the question whether search engines provide public benefits under fair use factor one, but distinguishing that benefit from ASCAP's use in the matter before the court); *London-Sire Records, Inc. v. Doe*, 542 F. Supp. 2d 153, 168 (2008) (citing *Perfect 10's* distinction between indexing images and proving thumbnails but distinguishing defendant's conduct indexing music files as not necessarily "distribution" of protected works); *A.V. v. IPARADIGMS, LLC*, 562 F.3d 630,

639-640 (4th Cir. 2009) (citing *Perfect 10's* first factor analysis on behalf of proposition that underlying works need not be altered for archiving of works to be deemed "transformative" on behalf of fair use determination for plagiarism detection program). However, we are not aware of cases outside the 9th Circuit that have squarely addressed the questions whether search engines, or search engine linking, indexing, or caching activities, are or are not properly regarded as fair use under the Copyright Act.

[17] Richieri, Mar. 9, 2010 Tr. at 63.

[18] *Gatehouse Media Mass., I, Inc. v. New York Times Co.*, Civ. Action No. 08-12114-WGY (Jan. 2009) (D. Ma.). An expert report prepared for the case, although suggesting infringement, recognized that headlines and ledes might be especially susceptible to a fair use defense because they are not paradigmatically expressive: "all else held equal, a court would be more willing to recognize fair use as applied to news headlines and ledes than it would be to recognize a comparable fair use defense as applied to pure fantasy or science fiction." Expert Report of Douglas Gary Lichtman, *Gatehouse Media Mass., I, Inc. v. New York Times Co.*, Civ. Action No. 08-12114-WGY, 17 (Jan. 2009) (D. Ma.).

[19] At issue were both the copying of individual headlines and ledes to news stories and the copying of the larger arrangement of stories on Gatehouse web pages. Gatehouse argued that the nature and extent of the copying made the defendant's news pages perfect substitutes for its own to the limited pool of local advertisers. Plaintiff's argument was supported by an expert report, which saw nothing transformative in the defendant's competing commercial use: "Bluntly, these are look-alike businesses and they are producing look-alike output from a copyright perspective." Expert Report of Douglas Gary Lichtman, *In the matter of Gatehouse Media Mass., I, Inc.*, at 15. Copying a headline plus a lede might involve relatively few words, but under present law, copying only a few words or a small percentage of a work is not necessarily permitted if the heart of a story is copied for competing commercial purposes. *See Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 549 (1985) (verbatim quotes – 300 words or 13% – were not fair use within meaning of Copyright Act).

[20] *Dow Jones & Co., Inc. v. Briefing.com, Inc.*, Case 1:10-cv-03321-VM (S.D.N.Y.) (complaint filed 04/20/10) (alleging copyright infringement and hot news misappropriation, among other things).

[21] *See International News Service v. Associated Press*, 248 U.S. 215 (1918). The *INS* Court did not settle the question of the time scale pertinent to a hot news claim and more recent cases generally have not resolved the question how much protection is appropriate and how much might run afoul of copyright preemption or other limitations on state law IP ("quasi" or otherwise).

[22] *See id.* at 245-246 (affirming injunction against immediate copying of news wire articles based on misappropriation and "quasi property" rights in news).

[23] *See, e.g., Alcatel USA, Inc. v. DGI Techs., Inc.*, 166 F.3d 772, 788 n. 59 (5th Cir. Tex 1999) ("International News was decided pre-Erie as a matter of federal common law, and thus nowhere is binding precedent.")

[24] *Nat'l Basketball Ass'n v. Motorola, Inc., 105 F.3d 841, 845 (2d Cir. 1997)* (claim for misappropriation of hot news is valid under New York law and not preempted by the federal Copyright Act); *X17, Inc. v. Lavandeira*, 563 F. Supp. 2d 1102, 1103 (C.D. Cal. 2007) (California law recognizes hot news misappropriation claims and 2d Circuit reasoning that "hot news" claims are not preempted by Copyright Act persuasive.). The Copyright Act expressly preempts state law provisions "that are equivalent to any of the exclusive rights within the general scope of copyright." 17 U.S.C. § 302(a).

[25] *Associated Press v. All Headline News Corp.*, 608 F. Supp. 2d 454, 459 (S.D.N.Y. 2009) (citing *NBA*).

[26] *NBA*, 105 F.3d 841, 852. The court concluded that "only a narrow 'hot news' misappropriate claim survives preemption for actions concerning material within the realm of copyright." *Id.*

[27] 06 Civ. 4908 (S.D.N.Y. Mar. 18, 2010). .

[28] *See* Chad Bray, *Update: Court Grants Stay of Order Restricting Theflyonthewall.com*, Dow Jones Newswires (May 20, 2010) (reporting that the "Second Circuit Court of Appeals agreed to hear an appeal by the website on an expedited basis and granted a stay pending appeal of a prior order that placed time restrictions on how quickly Flyonthewall.com can publish ratings after they are released to investment bank clients"), *available at* http://online.wsj.com/article/BT-CO-20100520-709763.html?mod=WSJ_World_MIDDLEHeadlinesEurope

[29] David Marburger & Daniel Marburger, *Reviving the Economic Viability of Newspapers and Other Content Originators of Daily News Content*, 19 (2009), *available at* http://www.bakerlaw.com/files/Uploads/Documents/News/Articles/MainAnalysis.pdf; *see also* Richard Posner, The Future of Newspapers, the Becker-Posner Blog (Jun. 23, 2009), *available at http://www.becker-posner-blog.com/2009/06/*.

[30] Marburger & Marburger, *supra* note 28, at 41, 48-49; *see also* Posner, *supra* note 28; Arthur R. Miller, *Common Law Protection for Products of the Mind: an "Idea" Whose Time Has Come*, 119 HARV. L. REV. 703 (2006) (defending expansion of state-law-based protection of ideas because current protections are inadequate for an "information economy").

[31] Sanford, Mar. 9, 2010 Tr. at 90.

[32] Marburger & Marburger, *supra* note 28 at 44 (recommending that law permit such claims under state common law unfair competition theories or some analogous, but yet to be developed, statutory provision).

[33] *Id.* at 46-47.

[34] *See, e.g.*, Bruce W. Sanford & Bruce D. Brown, Op-Ed., Laws that Could Save Journalism, WASH. POST, May 16, 2009; Ryan T. Holte, *Restricting Fair Use to Save the News: a Proposed Change in Copyright Law to Bring More Profit to News Reporting*, 13 J. TECH. LAW & POL'Y 1 (2008). The precise scope of protection and its interaction with fair use law have not generally been spelled out in these proposals, although some specify the duration of protection. *Compare, e.g.*, Holte (federal 24-hour hot news protection) *with* Brown & Sanford (advocating federal hot news protection without specifying scope or duration). *See also* Jane C. Ginsburg, *No "Sweat"? Copyright and Other Protection of Works of Information after Feist v. Rural Telephone*, 92 COLUM. L. REV. 338, 341-42, 388 (1992) (suggesting Congress has the power to adopt limited, tailored property rights for "information compilers" (such as authors of news stories)).

[35] *See* Jane C. Ginsburg, Replying to Arthur R. Miller, *"An Idea Whose Time Has Come" – But Where Will It Go?* 119 HARV. L. REV. 703 (2006).

[36] Malone, Mar. 9, 2010 Tr. at 81.

[37] *Id.* at 82; *see also* Boyle, Mar. 9, 2010 Tr. at 93-94 (federalization of hot news doctrine likely to have serious unintended results).

[38] Benkler, Mar. 9, 2010 Tr. at 60 (recognizing incentive problems facing journalism, but taking a dim view of the available policy proposals, stating that he did not "think the solution is a government created new right").

[39] Boyle, Mar. 9, 2010 Tr. at 92; *see also* Benkler, Mar. 9, 2010 Tr. at 57 (noting "[t]here's always a trade-off between providing some revenue to one round of information creators in exchange for increasing the costs of others. Information and opinion are made from information and opinion.").

[40] Boyle, Mar. 9, 2010 Tr. at 69-70; *see also* Benkler, Mar. 9, 2010 Tr. at 77 (asking, "Permissions for who? When a New York Times reporter who knows Spanish reads three newspapers from Chile and puts together insight about what is going on in the earthquake and how people think, permissions?").

[41] Boyle, Mar. 9, 2010 Tr. at 92-94.

[42] Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U.L. REV. 354 (1999) (criticizing, e.g., attempts by the Washington Post and Los Angeles Times to use copyright to suppress the use of their newspaper articles by on-line policy discussion groups). *See also* Larry Ribstein, *From Bricks to Pajamas: the Law and Economics of Amateur Journalism*, 48 WM. & MARY L. REV. 185 (2006) (suggesting open access IP policies present both costs and benefits, but these generally come out in favor of amateur journalism (bloggers) and open access); *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 556 (1985) (the idea/expression "dichotomy '[strikes] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression.'")

[43] Statement of Bruce W. Sanford, Baker & Hostetler LLP Before the Federal Trade Commission "How Will Journalism Survive the Internet Age?" March 9, 2010, at 4, *available at* http://www.ftc.gov/os/comments/newsmediaworkshop/544505-00041.pdf. Bruce W. Sanford & Bruce

D. Brown, Opinion, *Google and the Copyright Wars: The Reach of Search Engines Should Be Regulated by Congress, Not the Courts*, WALL ST. J., Nov. 12, 2009.

[44] See "Newspapers and Copyright in the Digital Era," Newspaper Association of America, at 10 (August 1, 2009) (calling for "fair use guidelines"); Ariel Fox, "Copyright, Competition and Publishers' Pursuit of Online Compensation," at 14 (Nov. 5, 2009) ("the law would benefit from clarification").

[45] 17 U.S.C. § 107.

[46] See *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003) (search and information gathering purposes facilitated by search engine consistent with purposes of copyright act and fair use).

[47] *Field v. Google*, 412 F. Supp. 2d at 1116-1117.

[48] This point does not depend on determinations, following *Field v. Google*, that newspapers necessarily have issued implied licenses or are subject to estoppel, having done so. In *Field v. Google*, the court granted Google's motion that it was entitled to the defense of implied license because it reasonably interpreted the absence of meta-tags as implied permission. *Id.* The court also granted Google's motion for summary judgment on estoppel, because Field was aware of his ability to warn Google against, e.g., caching and aware of Google's likely conduct absent such instructions, but chose not to provide limiting instructions to Google. *Id.* Our point about implicit permission is intended as a practical one, not a definitive legal analysis. We note simply that both major newspaper web sites – like the plaintiff author, Field – and major search engines are aware of certain standard instructions that the papers could issue against the searching and caching of web content. The newspapers could issue such instructions *explicitly*, but many knowingly refrain.

[49] *See* Statement of Bruce W. Sanford, *supra* note 43, at 3.

[50] *See* UK Department for Culture, Media and Sport and Department for Business, Innovation and Skills, Digital Britain: Final Report (June 2009), esp. C. 5, "Public Service Content in Digital Britain."

[51] *Id.* at chapter 4, which considers copyright policies and other issues raised by "Creative Industries in the Digital World."

[52] 17 USC § 115.

[53] *Id.* at § 116.

[54] *See* Stephen Nevas, "An Income Model for Digital Journalism: Back to the Future," Presented at the FTC's News Media Workshop on March 10, 2010, *available at* http://www.ftc.gov/opp/workshops/news/mar9/docs/nevas.pdf; Nevas, Mar. 10, 2010 Tr. at 186-97.

[55] Benkler, Mar. 9, 2010 Tr. at 57.

[56] *See* Boyle, Mar. 9, 2010 Tr. at 70; Benkler, Mar. 9, 2010 Tr. at 57.

[57] *See, e.g.*, Hannibal Travis, *Opting Out of the Internet in the United States and the European Union: Copyright, Safe Harbors, and International Law*, 84 NOTRE DAME L. REV. 331 (2008) (considering costs and benefits of, for example, opt-in versus opt-out regimes for "copyright disputes on Google, YouTube, ebay, Wikipedia, and other on-line services," arguing balance favors permissive "opt-out" system); JAMES BOYLE, THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND (2008), esp. C. 4 (arguing that many productive activities, technologies, and industries depend on access to information that could be restricted by new applications of copyright restrictions on information).

[58] REMARKS OF REPRESENTATIVE WAXMAN at 3. Waxman, Dec. 2, 2009 Tr. at 27-28.

[59] Newspaper Preservation Act, 15 U.S.C. § 1802(2).

[60] Statement of Bruce W. Sanford, Baker & Hostetler LLP, Before the Federal Trade Commission: "How Will Journalism Survive the Internet Age?" at 5-6 (Mar. 9, 2010). *See also* Bruce W. Sanford & Bruce D. Brown, *Laws That Could Save Journalism*, THE WASH. POST (May 16, 2009), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2009/05/15/AR2009051503000.html.

[61] Testimony of James M. Moroney III, Publisher & CEO of The Dallas Morning News, Before the Committee on Commerce, Science, and Transportation, Subcommittee on Communications, Technology, and the Internet (May 6, 2009).

[62] *See* Newspaper Association of America, Public Comment to the FTC (Nov. 6, 2009) (the comment did not discuss the industry request or need for such an exemption); s*ee generally* Baer, Mar. 10, 2010 Tr. at

180-85 (panel on competitor collaborations; Mr. Baer is counsel to the NAA and the Associated Press and similarly did not raise the need for an antitrust exemption, although he did note that he was not necessarily representing the views of his clients at the workshop).

[63] Leonard Downie, Jr., & Michael Schudson, *The Reconstruction of American Journalism,* COL. JOURNALISM REV. at 28-29 (Oct. 19, 20009), http://www.cjr.org/reconstruction/the_reconstruction_of_american.php?page=all&print=true. [Hereinafter the DOWNIE REPORT]. *See also* Stucke, Mar. 10, 2010 Tr. at 172 (noting that in 1970 there were 22 JOAs, in 2003 there were 12, and in March 2010 there were "five JOAs that still publish two newspapers"); *see also id.* at 170-73, 197-99 (discussing more generally concerns with the NPA and antitrust exemptions); Grunes, Mar. 10, 2010 Tr. at 199 (noting that JOAs under the NPA "were a sort of Faustian bargain where the circulation and advertising functions could be combined, but the editorials and reportorial functions would be kept separate and would continue to compete").

[64] Robert G. Picard, Ph.D., Tremors, Structural Damage and Some Casualties, but No Cataclysm: The News about News Provision, Background Paper to the Presentation by Mr. Picard submitted to the FTC at 11 (Nov. 7, 2009), *available at* http://www.ftc.gov/os/comments/newsmediaworkshop/544505-00029.pdf; *see also* Picard, Dec. 1, 2009 Tr. at 79-80 (noting that an antitrust exemption "will do substantial harm to consumers and advertisers").

[65] *See* Funk, Mar. 10, 2010 Tr. at 176 (noting that an antitrust exemption would not save the media and instead "would likely temporarily prolong an outdated business model"); Brouillette & Partners LLP, Public Comment to the FTC at 6 (Nov. 5, 2009), *available at* http://www.ftc.gov/os/comments/newsmediaworkshop/544505-00014.pdf (noting that the "existing antitrust exemption [1970 Act] together with the latitude granted businesses and individuals by the rule of reason under Sherman Act § 1 are two elements that should be given serious consideration regarding the advisability to grant further antitrust exemption to news organizations").

[66] Northern California Chapter of the Society of Professional Journalists, Public Comment to the FTC at 3 (Nov. 6, 2009), *available at* http://www.ftc.gov/os/comments/newsmediaworkshop/index.shtm.

[67] Robert G. Picard, Ph.D., Tremors, Structural Damage and Some Casualties, but No Cataclysm: The News about News Provision, Background Paper to the Presentation by Mr. Picard submitted to the FTC at 10-11 (Nov. 7, 2009) (further noting that "Even if one excludes users who do not pay, the measure would be largely ineffective because the majority of news in most papers comes from news agencies and syndicates and is widely available elsewhere—notably at portals such as Google, MSN, and Yahoo!, which pay the agencies and providers significant amounts of money and provide it free to their users in exchange for exposure to advertising").

[68] *Id.* at 11.

[69] Jarvis, Dec. 1, 2009 Tr. at 238-39 (further noting that "If you're talking about surviving, you're talking about the perspective of the old legacy players who had a decade and a half to get their act together, and they didn't. The future of journalism is not institutional, we now know, it is entrepreneurial.").

[70] *See* Mar. 31, 2010 Letter from Christine A. Varney, Assistant Attorney General, Dept. of Justice Antitrust Division, to William J. Baer, Esq., Arnold & Porter, LLP, concerning the Associated Press's proposed News Registry; Feb. 24, 2010 Letter from Christine A. Varney, Assistant Attorney General, Dept. of Justice Antitrust Division, to Charles E. Biggio, Esq., Wilson Sonsini Goodrich & Rosati concerning MyWire's proposal to develop and operate an Internet media subscription news aggregation service.

[71] *See, e.g.,* Downie, Dec. 1, 2009 Tr. at 158 (discussing collaborations, including the New York Times with ProPublica, a large, nonprofit investigative reporting organization).

[72] *See* Goldway, Mar. 10, 2010 Tr. at 106 (noting that in 1792 postage for letters ranged from 6 cents to 25 cents; postage for newspapers ranged from 1 cent up to a 100 miles to 1 and a half cents over 100 miles); Cowan, Mar. 10, 2010 Tr. at 122; DOWNIE REPORT at 27-28. When the US postal system was established, senders of mail were not charged – instead, fees were collected from the recipients of the mail. This system changed in 1874, but the reduced rate remained intact for publishers delivering newspapers and periodicals.

[73] Kevin R. Kosar, *Postage Subsidies for Periodicals: History and Recent Developments*, Congressional Research Service Report R40162, January 22, 2009, at 3.
[74] *Id.* at 6 (noting the postage on periodicals covered only about a quarter of its delivery costs).
[75] *See* Robert McChesney & John Nichols, THE DEATH AND LIFE OF AMERICAN JOURNALISM: THE MEDIA REVOLUTION THAT WILL BEGIN THE WORLD AGAIN 207 (Nation Books 2009) [Emphasis in original]. [Hereinafter referred to as McChesney & Nichols, THE DEATH AND LIFE OF AMERICAN JOURNALISM]; McChesney, Mar. 10, 2010 Tr. at 145.
[76] Public notices include notice of public budgets, public hearings, government contracts open for bidding, unclaimed property, and court notices, such as the probating of wills or notifying unknown creditors. See Weber, *Public Notices* at 3-4.
[77] Geoffrey Cowan & David Westphal, *Public Policy and Funding the News*, USC Annenberg Center on Communication Leadership & Policy Research Series, January, 2010, at 10.
[78] *See* Cowan & Westphal at 10 (noting that in a four-week study, the USC Annenberg Center on Communication Leadership and Policy found that public notices accounted for the largest amount of advertising space, "by column inches," in *The Wall Street Journal*).
[79] Ed O'Keefe, *Trimming the Federal Fat: Part One*, Wash. Post, Apr. 20, 2009 (noting that the Justice Department announced the "U.S. Attorneys and the U.S. Marshals Offices' Asset Forfeiture program is converting publication of judicial forfeiture notices from newspapers to the Internet," saving $6.7 million over five years), http://voices.washingtonpost.com/federal-eye/2009/04/trimming_the_federal_fat_part.html; *see also* Cowan & Westphal at 10.
[80] *Tax Expenditures: Compendium of Background Material on Individual Provisions*, S. Prt. No. 110-667, at 443-44 (2008). *See also* Cowan & Westphal at 10.
[81] *See* Cowan & Westphal at 10-11.
[82] *Remarks of President Lyndon B. Johnson Upon Signing the Public Broadcasting Act of 1967*, http://www.cpb.org/aboutpb/act/remarks.html.
[83] *CPB's Goals and Objectives*, 2009, http://www.cpb.org/aboutcpb/goals/goalsandobjectives/.
[84] *New Research Confirms PBS the Most Trusted and Unbiased Source for News Ahead of Fox News Channel, CNN and Other Commercial Networks*, 2010, http://www.pbs.org/roperpoll2010/.
[85] Derek Turner, *Changing Media: Public Interest Policies for the Digital Age*, Free Press, 2009 at 267; *see also* McChesney, Mar. 10, 2010 Tr. at 147.
[86] *See, e.g.*, Murdoch, Dec. 1, 2009 Tr. at 54 (arguing the "prospect of the U.S. Government becoming directly involved in commercial journalism ought to be chilling for anyone who cares about freedom of speech" and that government help "props up those who are producing things that customers do not want").
[87] McChesney & Nichols, THE DEATH AND LIFE OF AMERICAN JOURNALISM at 169-70. *See also* Victor Pickard, Josh Sterns & Craig Aaron, *Saving the News: Toward a National Journalism Strategy* 27, Free Press, (noting that such a program could help train future journalists, and some funds might be used to provide multi-media training for laid-off journalists), *available at* www.freepress.net.
[88] McChesney & Nichols, THE DEATH AND LIFE OF AMERICAN JOURNALISM at 170.
[89] DOWNIE REPORT at 33; Downie, Dec. 1, 2009 Tr. at 161.
[90] *See, e.g.*, Writers Guild of America, East, Public Comment to FTC ("There is a different, workable model for presenting carefully-investigated, thoughtful news and public affairs programming – public broadcasting (or "public media" in the digital age). Unfortunately, public television and public radio have been systematically underfunded for many years, so a very large infusion of capital would be required to make this a viable alternative to the existing large newsgathering companies."), *available at* http://www.ftc.gov/os/comments/newsmediaworkshop/index.shtm. *See also* McChesney & Nichols, THE DEATH AND LIFE OF AMERICAN JOURNALISM at 198-99 (recommending that public broadcasting be guaranteed an annual appropriation from the federal government of $3.75 billion in 2009 dollars); Cowan, Mar. 10, 2010 Tr. at 132-33; Cowan & Westphal at 14; MacCarthy, Dec. 2, 2009 Tr. at 78-79.

[91] McChesney & Nichols, THE DEATH AND LIFE OF AMERICAN JOURNALISM at 197; Downie, Dec. 1, 2009 Tr. at 154, 161-62.
[92] Mark MacCarthy, Georgetown University, Public Comment, *available at* http://www.ftc.gov/os/comments/newsmediaworkshop/index.shtm; MacCarthy, Dec. 2, 2009 Tr. at 79.
[93] Schiller, Dec. 2, 2009 Tr. at 61.
[94] Mark MacCarthy, Public Comment *supra* n.105.
[95] *See* DOWNIE REPORT at 36 (further noting that "Local news reporting, whose market model has faltered, is in need of similar support"); *see also id.* at 6-8 (discussing decline in local journalism); *id.* at 27 (noting that "any use of government money to help support news reporting would require mechanisms, besides the protections of the First Amendment, to insulate the resulting journalism as much as possible from pressure, interference, or censorship").
[96] McChesney, Mar. 10, 2010 Tr. at 154 (referring to an idea of the late Professor Edwin Baker).
[97] McChesney & Nichols, THE DEATH AND LIFE OF AMERICAN JOURNALISM at 204; McChesney, Mar. 10, 2010 Tr. at 159-60.
[98] McChesney & Nichols, THE DEATH AND LIFE OF AMERICAN JOURNALISM at 201-206 (also noting that the core concept of this proposal was developed by economist Dean Baker and his brother, Randy Baker, but they embellished upon it); McChesney & Nichols at 202 (further suggesting that qualifying media should not be permitted to accept advertising); McChesney, Mar. 10, 2010 Tr. at 155-57 (noting that others think commercial interests, including those with advertising, should be eligible for the voucher).
[99] S*ee generally* Victor Pickard, Josh Sterns & Craig Aaron, *Saving the News: Toward a National Journalism Strategy* 27, Free Press.
[100] Newton, Dec. 2, 2009 Tr. at 72; Eric Newton, Vice President, Journalism Program John S. and James L. Knight Foundation, Public Comment at 4, *available at* http://www.ftc.gov/os/comments/newsmediaworkshop/544505-00039.pdf.
[101] 15 U.S.C. §631 (1953).
[102] http://www.sba.gov/contractingopportunities/officials/size/index.html. *See also* McChesney, Mar. 10, 2010 Tr. at 150-51 (noting that perhaps the SBA could help newspapers transition to viable, locally-owned entities).
[103] *See* Cowan, Mar. 10, 2010 Tr. at 133; Cowan & Westphal at 14.
[104] Cowan, Mar. 10, 2010 Tr. at 130.
[105] McChesney & Nichols, THE DEATH AND LIFE OF AMERICAN JOURNALISM at 168.
[106] *See* Goldway, Mar. 10, 2010 Tr. at 108-114 (describing the history of subsidies for periodicals, the changes in law with respect to subsidies, and the political and social concerns with other postal customers cross-subsidizing periodicals).
[107] Goldway, Mar. 10, 2010 Tr. at 118.
[108] REMARKS OF REPRESENTATIVE WAXMAN at 4.
[109] McChesney & Nichols, THE DEATH AND LIFE OF AMERICAN JOURNALISM at 206.
[110] *Id.* at 207.
[111] *Id.* at 209-11.
[112] *See generally* Sabeti, Mar. 9, 2010 Tr. at 164-69 (discussing emergence of mixed purpose businesses); Lang, Mar. 9, 2010 Tr. at 131-32 (focusing on L3Cs, but recognizing the benefit and flexible purpose corporation models as well).
[113] *See* Wellenfelsz and Carman, *Will Exempt Newspapers Be a New Page in Journalism*, Taxation of Exempts, at 27-31 (Nov./Dec. 2009).
[114] An organization may be tax exempt for many reasons. For example, an organization established under an act of Congress may be exempt under §501(c)(1), a social welfare organization is exempt under §501(c)(4), a business league or chamber of commerce is exempt under §501(c)(6), social clubs are exempt §501(c)(7), and qualifying cooperative and hospital service organizations are exempt under §501((e). Even though there is no specific exemption for newspapers and journalism, some news organizations have formed as tax exempt organizations under §501(c)(3).

[115] Rev. Rul. 68-306.
[116] Rev. Rul. 67-4.
[117] *See* Department of Treasury, Internal Revenue Service, *Publication 557: Tax Exempt Status of Your Organization,* at 23 (June 2008).
[118] *Id.*
[119] *See* Wallenfelsz and Carman at 29-30.
[120] *Id. See also* Rev. Rul. 67-4 (same). *But see* Rev. Rul. 60-351 (ruling non-exempt a foreign literacy magazine because the charter allowed for operations in an ordinary commercial fashion); *and* Rev. Rul. 77-4 (same).
[121] Rev. Rul. 60-351.
[122] *Id*.
[123] *Id*.
[124] Issues of IRS determinations of exempt purpose and political endorsements also impact flexible purpose and benefit corporations, as well as L3C organizations, discussed *infra*.
[125] Department of the Treasury, Internal Revenue Service, *Publication 557: Tax Exempt Status of Your Organization*, at 20 (June 2008).
[126] Kindell and Reilly, "Election Year Issues," *Exempt Organizations Continuing Professional Education Technical Instruction Program for FY 2002* at 369 (2001) *available at* http://www.irs.gov/pub/irs-tege/eotopici02.pdf.
[127] Bromberger, Mar. 9, 2010 Tr. at 188.
[128] Kindell and Reilly, "Election Year Issues," *supra* note 125, at 376-77.
[129] Rev. Rul. 78-248
[130] *Cf.* Bromberger, Mar. 9, 2010 Tr. at 186 (noting that advertising revenues in periodicals and newspapers is subject to the "unrelated business income tax" regardless of the tax exempt status of the news entity and whether the advertising content is related to what the charity does).
[131] *See* Sabeti, Mar. 9, 2010 Tr. at 166-67 (noting "for benefit is basically a reference to the archetype" and the "[t]wo criteria that consistently emerge are social purpose and business method").
[132] *See, e.g., Revlon v. MacAndrews & Forbes Holdings*, 506 A.2d 173 (Del. 1985) (ruling that a director violated his duty by making a decision based upon, "considerations other than the maximization of shareholder profits to affect their judgment.")
[133] *See* Clark, Mar. 9, 2010 Tr. at 156 (noting that one goal of his organization is to move from a "shareholder capitalist" to a "stakeholder capitalist, where business has a broader view of its mission and what it's about and a focus on accomplishing more than simply the profit for its owners").
[134] *See* Maryland HB 1009, *available at* http://mlis.state.md.us/2010rs/chapters_noln/Ch_98_hb1009T.pdf.
[135] *Id.*
[136] Other states considering similar legislation include Colorado, New York, North Carolina, Oregon, Pennsylvania, and Washington.
[137] Proposed California Senate Bill 1463 requires that flexible purpose corporations establish in their charter that the organization will engage in, "one or more charitable or public purpose activities that a nonprofit or public benefit corporation is authorized to carry out" §2602(b)(2)(A). Proposed SB 1463 is *available at* http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb_1451-1500/sb_1463_bill_20100405_amended_sen_v98.pdf. Under §23701(d) of the California code, corporations are exempt from taxes if they comport to mission and operational standards nearly identical to those contained in the IRS Code governing non-profit organizations.
[138] California SB 1463, §3500(b)(4) requires that flexible purpose corporations provide, "A description of the process for selecting, and an identification and description of, the financial, operating, and other measures used by the flexible purpose corporation during the fiscal year for evaluating its performance in achieving its special purpose objectives, including an explanation of why the flexible purpose corporation

selected those measures and identification and discussion of the nature and rationale for any material changes in those measures made during the fiscal year."

[139] The initiatives also differ in some key aspects: the California model links the social purpose designation to existing state laws relative to charitable organizations, and allows corporations to design their own social impact metrics. By comparison, the Maryland statute requires that benefit corporations obtain benefit designations and social impact measurements only through third-party assessments.

[140] *See, e.g.*, 11 V.S.A. §§3001(27) ("The Vermont Statute"):

> 'L3C' or 'Low-profit limited liability company' means a person organized under this chapter that is organized for a business purpose that satisfies and is at all times operated to satisfy each of the following requirements:
> (A) The Company significantly furthers the accomplishment of one or more charitable or educational purposes within the meaning of Section 170(c)(2)(B) of the IRS Code of 1986, 26 U.S.C. Section 170 (c)(2)(B); and (ii) would not have been formed but for the company's relationship to the accomplishment of charitable or educational purposes. (B) No significant purpose of the company is the production of income or the appreciation of property; provided, however, that the fact that a person produces significant income or capital appreciation shall not, in the absence of other factors, be conclusive evidence of a significant purpose involving the production of income or the appreciation of property. (C) No purpose of the company is to accomplish one or more political or legislative purposes within the meaning of Section 170(c)(2)(D) of the IRS code of 1986, 26 U.S.C. Section 170(c)(2)(D). (D) If a company that met the definition of this subdivision (27) at its formation at any time ceases to satisfy any one of the requirements, it shall immediately cease to be a low-profit LLC, but by continuing to meet all the other requirements of this chapter, will continue to exist as a limited liability company. The name of the company must be changed to be in conformance with subsection 3005(a)

available at http://www.leg.state.vt.us/statutes/fullsection.cfm?Title=11&Chapter=021&Section=03001. Nearly identical legislation has passed in Illinois, Michigan, Utah, and Wyoming.

[141] For example, under 11 V.S.A. §3001(27)A), the L3C's purpose must comport with the IRS Code, 26 U.S.C. §170(c)(2)(B), which describes an organization, trustee, community chest, fund or foundation, "organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals."

[142] *See* Lang, Mar. 9, 2010 Tr. at 137-39.

[143] *See* 26 C.F.R. §53-4944-3 (Treas. Reg.) ("Exception for Program Related Investment. For purposes of this Section, investments, the primary purpose of which is to accomplish one or more of the purposes described in section 170(c)(2)(B), and no significant portion of which is the production of income or the appreciation of property, shall not be considered as investments which jeopardize the carrying out of exempt purposes."); *available at* http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&sid=bd7f0d39513a311d517d1e6721bf8ca1&rgn=div8&view=text&node=26:17.0.1.1.3.5.1.3&idno=26; Phaup, Mar. 9, 2010 Tr. at 189; Lang, Mar. 9, 2010 Tr. at 141.

[144] *See* 26 U.S.C. §4944(a) (Private tax-exempt foundations are prohibited from making investments that "jeopardize the carrying out of [the foundation's] exempt purpose."). As a further deterrent, under 26 U.S.C. §4944(b), the foundation and manager can each face additional fines of up to 25% of the jeopardizing investment if such funds are not removed from the investment during the relevant taxable period.

[145] *See* Keatinge, Mar. 9, 2010 Tr. at 229-30 (noting that LLCs "can be organized for any lawful activity," including for-profit or non-profit, and thus L3Cs are "neither necessary nor sufficient for a vehicle" for PRIs). *But see* Lang, Mar. 9, 2010 Tr. at 130-44 (explaining the L3C concept) and *id.* at 230-31 (disagreeing with Keatinge's views on L3Cs).

[146] *See* 26 C.F.R. §53-4944-3 (A)(2)(i) ("An investment shall be considered as made primarily to accomplish one or more of the purposes described in section 170(c)(2)(B) if it significantly furthers the accomplishment of the private foundation's exempt activities and if the investment would not have been made but for such relationship between the investment and the accomplishment of the foundation's exempt activities.").
[147] *See* 26 C.F.R. §53-4944-3(A)(2)(iii) ("In determining whether a significant purpose of an investment is the production of income or the appreciation of property, it shall be relevant whether investors solely engaged in the investment for profit would be likely to make the investment on the same terms as the private foundation. However, the fact that an investment produces significant income or capital appreciation shall not, in the absence of other factors, be conclusive evidence of a significant purpose involving the production of income or the appreciation of property.").
[148] Stuart M. Lewis, Chair, American Bar Association Section of Taxation, Comments Concerning Proposed Additional Examples on Program-Related Investments, submitted to Commissioner Shulman, Internal Revenue Service at 24-25 (Mar. 3, 2010), *available at* http://www.abanet.org/tax/pubpolicy/2010/Comments_Concerning_Proposed_Additional_Examples_on_Program_Related_Investments.pdf. *See also* Lang, Mar. 9, 2010 Tr. at 184 (discussing ABA comments).
[149] *See* Bromberger, Mar. 9, 2010 Tr. at 223; *id.* at 224-25 (also recommending more outreach from the IRS to hybrids to understand what they are trying to accomplish and to then help clarify how to accomplish those goals).
[150] Buzenberg, Dec. 2, 2009 Tr. at 161-62; April 30, 2010 FCC workshop on Public and Other Noncommercial Media in the Digital Era, Buzenberg remarks at 3:15:56 – 3:16:25, *available at* http://reboot.fcc.gov/futureofmedia/public-and-other-noncommercial-media-in-the-digital-era. *But see* Chopra, Dec. 2, 2009 Tr. at 163-164 (noting that this request required some difficult work to cleanse the data and de-identify it).

[151] *See* Cohen, Mar. 9, 2010 Tr. at 109; Comments From Professor Sarah Cohen, Knight Professor of the Practice of Journalism and Public Policy, Duke University Regarding FTC Workshop From Town Criers to Bloggers: How Will Journalism Survive the Internet Age? at 1 (Mar. 2010), *available at* http://www.ftc.gov/os/comments/newsmediaworkshop/544505-00045.pdf. [Hereinafter Cohen Comments].
[152] A related recommendation is to require federal, state, and local governments to update guidance on the publication of government information, such as the Data Quality Act, to mandate reconsideration of how and how much information must be published in light of new technologies. *See generally* FCC, CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN 320 (2010).
[153] *See* Cohen, Mar. 9, 2010 Tr. at 109, 111 (noting that government data collection often comingles private and public information in ways that impede the release of data due to privacy and other concerns); Cohen Comments at 2; *see also* Aliya Sternstein, *White House Bars Agencies From Posting Some Statistics*, NEXTGOV, Jan. 27, 2010, *available at* http://www.nextgov.com/nextgov/ng_20100127_9912.php.

[154] The Information Society Project, Yale Law School, Written Comments Filed in Regard to FTC Public Workshops From Town Crier to Bloggers: How Will Journalism Survive the Internet Age? at 5-7 (Nov. 12, 2009), [hereinafter Yale Comments] (also suggesting the government coordinate a standardized application of the fee waiver provision or use a rebuttable presumption that, when a member of the public solicits government information, such a disclosure has a significant tendency to inform the public about the operations of government and, therefore, is eligible for a fee waiver, thus putting the burden on the government to demonstrate that the requested information is not likely to contribute significantly to the public's understanding of government activities). Currently, under the FOIA statute "[d]ocuments shall be furnished without any charge or at a charge reduced . . . if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or

activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii).

[155] *See generally* Cohen Comments at 3; Cohen, Mar. 9, 2010 Tr. at 113 (recommending the federal government include transparency requirements in federal grants to state and local governments to require that they release records having federal implications in conformance with the federal FOIA statute).

[156] *See generally* FCC Broadband Plan at 322 (noting that "The federal government should create and fund Video.gov to publish its digital video archival material and facilitate the creation of a federated national digital archive to house public interest digital content").

[157] *See generally* Nat'l Conference of State Legislatures, Broadcasts and Webcasts of Legislative Floor Proceedings and Committee Hearings (Feb. 18, 2010), *available at* http://www.ncsl.org/default.aspx?tabid=1347. According to the NCSL, 49 states plus the District of Columbia webcast floor proceedings live. However, only 30 states and the District of Columbia archive them. According to NCSL, only 27 states and the District of Columbia webcast committee hearings live and only 19 states and the District of Columbia archive them for later review. *Id*.

[158] Cohen Comments at 1-2 (also suggesting that the government could make commonly requested documents available online regardless of whether there is a specific FOIA request); Allison, Dec. 2, 2009 Tr. at 135 (noting that if "a government record is public, whether it's data or a document or some kind of disclosure, it should be put online in a searchable and downloadable form as soon as possible"). *See also* 5 U.S.C. § 552(a)(3)(A)(C) (statute states that: "[i]n responding under this paragraph to a request for records, an agency shall make reasonable efforts to search for the records in electronic form or format, except when such efforts would significantly interfere with the operation of the agency's automated information system").

[159] Cohen, Mar. 9, 2010 Tr. at 112; *see also* Cohen Comments at 1 (noting "the effort, time and often cost involved in obtaining public records remains one of the highest barriers to public affairs journalism").

[160] *See* Umansky, Dec. 2, 2009 Tr. at 174 (noting that "databases are a way in which you can reduce costs for journalists"); Allison, Dec. 2, 2009 Tr. at 176-77 (noting that in the mid-1990s journalists would have to come to Washington and spend days going to different government entities, and having the government information online is "a huge savings that just didn't exist ten years ago"). Although technology and more readily accessible information online is helpful, it likely does not entirely replace the types of contacts and understanding that journalists acquire by talking to people in the halls before and after governmental meetings.

[161] *See* Chopra, Dec. 2, 2009 Tr. at 128-132 (discussing President Obama's commitment to making government more transparent by creating public websites and proactively making information publicly available).

[162] http://nysenate.gov.

[163] See http:/drupal.org/project/nyss. *See also* Telephone interview with Andrew Hoppin, New York State Senate Chief Information Officer (Apr. 12, 2010); e-mail from Andrew Hoppin to Christopher Grengs (Apr. 26, 2010); Hidalgo, Mar. 10, 2010 Tr. at 67-81; Hidalgo, Mar. 10, 2010 Presentation, *available at* http://www.ftc.gov/opp/workshops/news/mar9/docs/hidalgo.pdf.

[164] OMB utilized that software because that site already had features similar to those required by USASpending.gov's enabling legislation.

[165] Gautham Nagesh, *Web Site on Federal Grants, Loans and Contracts Debuts*, GOVEXEC.COM, Dec. 14, 2007, *available at* http://www.govexec.com/dailyfed/1207/121407n1.htm.

[166] *Data.gov Heads for Overhaul*, COMMWEB NEWS (Dec. 9, 2009) (the effort has been expanded to more than 200 contacts throughout the federal government and the posting of over 168,000 data sets); Vivek Kundra, *They Gave Us the Beatles, We Gave Them Data.gov*, Federal IT Dashboard Blog, Jan. 21, 2010, *at* http://it.usaspending.gov/?q=content/blog.

[167] Press Release, U.S. General Services Administration, Recovery.gov Version 2.0 $18 Million Contract Awarded (Jul. 8, 2009).

[168] FCC Broadband Plan at 319.
[169] *See* Snider, Mar. 10, 2010 Tr. at 81 -102 (explaining the semantic web and meta-data and how it can be used); Snider Mar. 10, 2010 Presentation, *available at* http://www.ftc.gov/opp/workshops/news/mar9/docs/snider.pdf.
[170] *See* Snider, Mar. 10, 2010 Tr. at 85 - 86; Snider Mar. 10, 2010 Presentation.
[171] Minnesota Historical Society, Preserving State Government Digital Information, Comparison Chart of State Use of XML Bill Drafting Systems (Feb. 2009), *available at* http://www.digitalpreservation.gov/partners/states_mn/high/mn_xml_use_report0209.pdf.
[172] *See* Snider, Mar. 10, 2010 Tr. at 89 – 90.
[173] Ivan Schneider, *Banking Regulators to Launch XBRL-Powered Call Report Database*, INFORMATION WEEK (May 10, 2005).
[174] See Press Release, SEC, SEC to Rebuild Public Disclosure System to Make it 'Interactive' (Sep. 25, 2006) (SEC Press Release 2006-158), *available at* http://www.sec.gov/news/press/2006/2006-158.htm; SEC, Office of Interactive Disclosure, http://www.sec.gov/spotlight/xbrl.shtml; Blaszkowksy, Mar. 10, 2010 Tr. at 54-66 (discussing the SEC's efforts); Blaszkowsky Mar. 10, 2010 Presentation, *available at* http://www.ftc.gov/opp/workshops/news/mar9/docs/blaszowsky.pdf.
[175] Blaszkowksy, Mar. 10, 2010 Tr. at 54, 61-66.
[176] Blaszkowksy, Mar. 10, 2010 Tr. at 61-62, 65.
[177] *See* Blaszkowksy, Mar. 10, 2010 Tr. at 61-62, 65; Snider, Mar. 10, 2010 Tr. at 89 (noting that "Basically every advanced country in the world is rolling out XBRL").
[178] Cohen Comments at 4; Cohen, Mar. 9, 2010 Tr. at 114.
[179] Cohen Comments at 4; Cohen, Mar. 9, 2010 Tr. at 115-16.
[180] Cohen Comments at 4 (explaining that "some federally funded research projects result in software and tools that are provided back to the federal government or are used in academia, but are sometimes not freely available").