

>> Susan DeSanti: Good morning. Could you please take your seats? My name is Susan DeSanti. I'm the Director of Policy Planning at the Federal Trade Commission, and my staff and I organized this workshop. I want to welcome you. This is the second FTC two-day workshop on the future of journalism. And now I'm going to start with the boring required security reading. So if you have to snooze for a couple of minutes, this would be the time to do it. Okay. Anyone who leaves the building without an FTC badge will be required to go through the magnetometer, an x-ray machine, prior to re-entry in the conference center. In the event of an emergency, fire, or evacuation, the alarms will sound. At that time, please gather your personal belongings if the situation permits and leave the building in an orderly fashion. Once outside of the building, orient yourself to the corner of 7th Street and Constitution Avenue Northwest where you will enter the National Gallery of Art. That is our rallying point. Everyone will rally by floors, so please stay together. You will need to check in with the conference meeting coordinator. In the event that it is safer to remain inside, known as shelter in place to those of us in the government, you will be advised where you should report to while inside the building. Information and updates will be distributed via the public address system, and please remain with the conference meeting coordinator. Finally, if you spot suspicious activity, please alert the conference meeting coordinator and/or security staff. Okay, duty done, now we can get down to business. Now, as most of you know, we held a two-day workshop on December 1 and 2, 2009 to explore the economics of journalism in print and online, how changes in advertising are affecting revenues for news organizations, and the ongoing creation of new types of news organizations, most on a smaller scale than traditional newspapers. That workshop confirmed the significant transformation that journalism is undergoing as a result of the digital age. Now, additional work published since that workshop has underscored the transformation. A new report from the PEW Research Center titled "Understandings the Participatory News Consumer" included this key finding -- the Internet has surpassed newspapers and radio in popularity as a news platform on a typical day and now ranks just behind TV. So TV remains the most popular source of news, but the Internet is now the second most popular with newspapers as the third. At the same time, another recent PEW study suggested that newspapers are still the primary source of original news stories. That study examined all of the outlets that produced local news in Baltimore, Maryland, for one week, surveying their output, and then taking a closer look at the six major narratives that emerged during that week. The study found that much of the news people received contains no original reporting. Fully 8 out of 10 stories that were

studied simply repeated or repackaged previously published information. Of the stories that did contain new information, nearly all, 95%, came from traditional media, most of them These newspaper stories then tended to set the narrative agenda for most other media outlets. So now we begin two days of workshops that are intended to illuminate some of the policy proposals that have been made to help ensure that such original news stories continue to be produced. We're going to begin today with presentations on the economics of newspapers, both online and offline, followed by a presentation on the state of advertising. Then we will examine copyright issues. Although copyright law provides important protection to news stories, new questions have arisen about the extent to which aggregators' use of the original news stories of others complies with copyright law, and whether modifications to that law might be desirable or feasible. In the afternoon, we begin with presentations on ways to reduce the costs of journalism, and then we will explore corporate and tax solutions that might be applicable to faltering newspaper businesses. Tomorrow we will discuss additional topics. We're looking forward to learning from all of our distinguished speakers and panelists, and we thank all of you for joining us. Let me note that all of my introductions of the panelists will be short, because otherwise we could spend the whole two days here just reporting on all of their accomplishments and distinctions. You can find all of those in the biographies that are provided and, trust me, they are impressive. Now, we're going to begin with Dr. Hal Varian, who is the Chief Economist at Google and also holds academic appointments at the University of California Berkeley in three departments -- Business, Economics, and Information Management. Dr. Varian has been involved in many aspects of Google's business, including auction design, econometric analysis, finance, corporate strategy, and public policy. He will address newspaper economics online and offline. Hal?

>> Dr. Hal Varian: Thank you. Wow, thank you very much for that kind introduction. I'm quite happy to be here. As you heard, I'm going to talk about online and offline economics of newspapers. And basically this is going to be mostly a fact-based presentation, looking at revenue and costs, advertising, level change, composition, and so on. And most of the talk is based on publicly available data from the Newspaper Association of America, who's put up a very nice website on trends and numbers, a U.S. Statistical Abstract of PEW Foundation and some of the other sources. There'll be a little bit of Google data that's also emerged with this report. So I want to start off with a little overview of what revenues and costs look like for newspapers. And

basically the bottom line here is 80% of the revenue roughly comes from advertising, 20% from sales, and if you break down the cost side of newspapers, it turns out that about 50% of the costs are production and distribution -- that is the physical production and distribution of the newspaper. Obviously it would be very attractive if you can reduce your costs by 50% for any business. So the promise of the Internet is to reduce costs. And I understand we're going to hear much more detail about that this afternoon. If you look at ad spend by medium in the United States -- I pulled this data from the U.S. Statistical Abstract. Of course, the big gorilla in the room is TV, where if you look at broadcast and cable TV, you've got by far the largest expenditure on advertising on those two media. Surprising enough, the next biggest thing is direct mail. And then after direct mail comes the -- comes newspapers. If you look at how things have changed over the years, broadcast TV has gone down a little bit. Cable TV has grown by quite a bit, almost a factor of three. The Internet's grown from nothing in 1995 to about 5% of ad expenditures in 2008. And newspapers, As you can see, have contracted from about 23% down to maybe 13% or so. So the big changes are apparent in this diagram. And I guess the next talk is going to be perhaps some more up-to-date figures on the advertising business and newspapers. Newspapers, of course, are still about three times as large in terms of ad revenue as the Internet, so they're still quite a major force in the advertising world. This is another chart showing pretty much the same thing. If you look at newspapers, that's the blue line, they've been going down since basically 1950 in terms of media share. If you look at the yellow line, that's TV and cable. That's been going up quite dramatically over the same period. And way down there in the bottom right-hand corner, that light-blue line is the Internet, which came from pretty much nothing up until the maybe late 1990s started to become a force in -- in advertising. Other media stayed more or less the same. Now this is a plot of GDP, which is just -- I just put there to have a general measure of economic activity and newspaper-ad revenue. And I've adjusted it by the consumer price index so you can see what the changes have been in real terms. So basically we have real GDP and real newspaper ad revenue. And you can see it's pretty much peaked back in the late '80s. Since then was more or less constant up until the last couple of years where it took a big drop-down. By the way, the vertical grade bars are recessions. One thing to note is that typically during recessions, advertising expenditures are quite sensitive to cyclical conditions. So you'll see both GDP typically dropping, and advertising expenditures dropping as well. The last couple of years have been dropping outside and even more than the economy would indicate, and we'll see an echo of that in one of the -- one of the later

slides. The important point is that newspaper ad revenue pretty much maxed out way before the Internet came on the -- on the scene. This is a picture of what ad revenue looks like by type, again, measured in constant dollars. So typically it's broken down into four different categories -- Retail, which would tend to be local stores, National, which would be national brand advertising, Classified, the blue segment there, and then online is that tiny little green segment that kind of popped up a few years ago. So you can see what's been going on is retail advertising has actually been growing over this period. The brand advertising has been contracting, and classified advertising stayed pretty much the same up until the last few years, at which point it dropped fairly precipitously. This is the same chart only measured in shares. So you can see the share issue a lot more clearly. I think the important point to note here is the online ad revenue is still -- as of 2008, at least -- is substantially less than 5%. What about circulation? Well, if you look at circulation, that chart on the upper left-hand corner, the daily circulation stayed constant for a long period of time and dropped in the last couple of years, but, of course, it's a little bit misleading just to look at total circulation. What you're most interested in, most likely, is circulation per household. So if you look at paid circulation per person over on the right, you can see it was declining since the '60s in pretty much a steady manner. The interesting thing is, if you look at ad revenue per reader, or ad revenue per circulation, it actually was increasing since the late '60s with a few ups and downs during these recessionary periods and so on, but, by and large, increasing up until very recently in the last few years. But the ad revenue per circulation has been going up even though ad revenue is going down because the circulation has been going down so much. So it's the denominator that's been causing this effect. And here's another chart just showing circulation which, again, has been remarkably constant between say 55 million and 60 million copies. And here's a chart of circulation per household, which has also been pretty stable in terms of its decline. Back in 1947, you were seeing a little over one newspaper per household, which I presume is morning and evening editions in many cases. But that's gone down to something like 40 -- .4 newspapers per household in today's world. And this is the chart that -- well, we just heard Susan refer to -- that now the Internet has surpassed physical newspapers as the popular way of accessing information. I would say television is -- got a pretty substantial lead on both of them. And, of course, most of the Internet access is access to newspaper sites, although they aren't, of course, the physical paper. In that same report, there were some interesting trends about getting news by phone. 26% of all Americans said they actually access news on their phones, and 43% of those under 50. So this is

yet another medium by which people can access news. But in many cases, given the interface that's available, people are looking at weather and current events because reading in-depth on your phone may be somewhat inconvenient. I thought one of the more fascinating numbers that came out of that PEW report is that 80% of people get news from e-mailed links. That's actually one of the most popular distribution mechanisms now because if you see an interesting story, you send it to your friends. And if you go look at newspaper websites, you see the most mailed stories -- well, many of those are accessed on people's computers, and now, increasingly, on handheld devices. And, of course, we shouldn't think of just a single medium per person. About half the population surveyed said they used four to six different media for accessing news. So it's important to distinguish in these discussions between newspapers traditionally considered as the physical newspaper and, of course, all the other ways you can access news -- on TV, on your phone, on your computer, your laptop, et cetera. Now, if you add it all up and you look at the difference between physical newspaper reading and online newspaper reading, you get this kind of amazing statistic. This is due to Martin Langeveld at Harvard. Only about 3% of the total news-page views comes on the computer. Most of it come through looking at physical newspapers. And you get very nice numbers by looking at the web data. This is data from the Newspaper Association of America. People are spending about 38 minutes per month on online news, which works out about 70 seconds a day, whereas a person who reads a physical newspaper tends to spend about 25 minutes a day. There's also some time-use studies to back these numbers up. So even though accessing news online is a very popular thing to do, it's actually the case that people are not spending nearly as much time on the newspaper online as those people are who are reading the physical newspaper. Of course, they're different populations, so you have to compare these carefully. But roughly speaking, about 3% of either page views or time accessing online news -- sorry -- 3% of the total access to newspapers is done online. On the other hand, it's accessed quite often. This is from data from the U.S. Statistical Abstract -- also, it came from PEW -- that roughly 40% of adult Internet users say that they accessed news yesterday, and, in fact, if you look at those with household incomes of \$75,000 or more, it's about 53%. So it's very popular to access that online news, it's just that people aren't spending a huge amount of time on it, at least compared to those people who are reading the physical newspaper. If you look, for example, at total number of hours per year where people are accessing newspapers or reading newspapers, it's about -- let's see, in 2008, 168 hours per year, so roughly works out to 25 minutes a day or so in terms of

physical newspaper. Consumption -- and that's the same order of magnitude as the time that people spend on the Internet. And news is the third most popular activity online, sending a reading e-mail, using a search engine, getting news online -- those are, again, the three top things that people do on the Internet, but they're spending a lot more time, for example, reading e-mail than they are looking at the online news. Now, this is a little bit of a paradox. So let me just sort of stop for a minute at showing you the charts. The paradox is, it's popular to access news online, lots of people access news online, but they don't seem to spend very much time doing it. So why is that? That's the little bit of a mystery is how much time they spend doing it compared to physically reading the newspaper. So I pulled some Google data, and I looked at the time-use pattern of access to Google news. So what you got down there on the bottom are the hours in over a couple of weeks. The two little small bumps are the weekend access. And the -- the five bumps between them are the daily access. So the red line is search activities. This is how many people are searching Google for things. And the blue line is the news activity. So I plotted both of these charts, and the area underneath each graph is normalized to be one, so it's measured in percentage terms. So what's the first thing you see? Well, the blue line is a lot further up than the red line. So what that says is that people are accessing the news during the day a lot more frequently than they're doing searches. And if you go over and look at the weekend, you can see that the searches dramatically exceed the news. So people are doing searches a lot more on the weekend than they're accessing the news. And what that suggests to me is, well, people are accessing online news a lot during business hours. Okay? So now it's not so surprising that they're not spending a whole lot of time on it because offline news reading, that's a leisure-time activity. You do it over your cup of coffee, you do it in the evening, maybe. Whereas online news reading, that's a labor-time activity. That's something where people are snatching a few minutes out of the day to go check the sports scores or the headlines or something of that sort. So it's absolutely true that people are spending much less time looking at online news than they've traditionally spent reading offline news because they're doing it mostly during working hours, much less during leisure hours. During leisure hours, well, you might sit and watch TV, as a matter of fact. It would be a very common thing to do. So the challenge, I think, that's facing the newspaper industry is to try to turn that online news access, which is much more cost-effective and a much more attractive way to reach a broad audience is to increase involvement with the news by turning it back into a leisure-time activity. Now, if you look at the value of clicks sent to newspapers, according to comScore, search engines drive about

35% to 40% of the traffic to major U.S. news sites, and if you assume that that monetizes about as well as other traffic, well, then that means that search engines are driving about 35% to 40% of traffic -- of revenue to online news sites, which is a pretty substantial amount. However, I have to remind you that the online news revenue is only about 5% of the total. So even though they're driving a substantial fracture of the online revenue, that's still a relatively small amount of the total revenue. Now, one thing that's interesting to do is if you look at a search click that goes to a newspaper site, the newspaper is sent the query -- or any site, not just the newspaper site. The site is sent the query that generated that search click. And that means that the site that receives that search click can then direct the user to the appropriate section of the site. So you can take those queries that people are issuing when they click on news sites and ask, "what are the categories? What are people looking for when they go to these online news sites?" And I've done that. It turns out that the kinds of things that people are looking for when they're going to these online news sites are sports, news and current events, and local. Those are the top-level categories that we use at Google to categorize search clicks. But there's relatively fewer news clicks proportionally than search clicks in the area of travel, health, shopping, and so on. And there's roughly about the same in entertainment and computers and electronics. So what I'm doing is I'm comparing searches that go to newspapers to just searches in general that go to sites that aren't specifically classified as newspapers. And here when I say newspapers, I mean sites that are indexed by Google News. Now the bad thing, or maybe not the bad thing, just a fact is, that if you look at the money in online advertising, the money is in categories like travel, health, shopping, and consumer electronics. But if you look at the revenue that's going to newspapers, that's in sports, news, and current events, and local. And, believe me, it's very, very hard to monetize those categories 'cause there isn't as much consumer dollars spent in those areas than there are in areas like travel, health, and shopping. So the news narrowly defined is pretty hard to monetize. Despite the fact that it's popular and frequently accessed, there's a relatively low level of involvement because of the time constraints that people face, and it's typically not a highly commercial activity. In fact, newspapers have never made money from news. If you go look at where the revenue came from, they made money from the business page, the automotive page, home and garden, travel, real estate, technology -- all those sections of the newspapers that you wouldn't consider as being raw news, not the front page. Why? Because you can contextually target ads. It's not surprising that people who read the automotive page are interested in buying cars, or people who look at the travel section might be interested in

taking trips. So you'll see contextually targeted ads in the physical newspaper that are tied to the sections, and then it's the revenue generated from those sections which are used to cross-subsidize the actual production of news. And what's happened is, this has been a problem with this intermediation that now people can go directly to finance sites, to auto sites, to consumer electronics and books, to travel sites, real estate sites, and so on, so as people go directly to seeking those specific sources of information, they tend to bypass the traditional sections of the newspaper, and so the cross-subsidization model, which has worked for so many years, has not really worked now. And it's very, very hard to do contextual targeting for pure news. If you're reading the travel section, and you see a story about Hawaii, you wouldn't be surprised to see ads for trips to Hawaii next to that story. But if you read the news section, and you see bombing in Baghdad, you're not likely to see travel ads or anything else that's particularly relevant to that story. So it's very, very difficult to do the same kind of cross-subsidization that we've seen work in the past. And, in fact, if you go look at advertising verticals for newspapers, you can see that about 20% has been general merchandise, 14% financial. That would tend to be in the business section of the paper, home supplies, furniture, and so on. So you look at the breakdown of where the money is coming from, and it tends to be somewhat different than the kinds of things that people are making money on on search engines and general Internet advertising. Of course, all this doesn't mean that newspapers aren't valuable. We heard earlier -- and I would absolutely second that -- it's critical both from individuals and from the societal point of view. People find it valuable because people are going to look at news online. We saw that half of the Internet users read news online at some time or another. They just don't spend a whole lot of time on it. I've seen this big debate about whether you can charge for news and replace the advertising model. I mean, my view is, yes, I mean, you should try for sure, but there is this difficulty that you run into when you start thinking about the economics of it, is you can really only charge for things if they're differentiated. If there are a lot of close substitutes for a product, it's very hard to charge for it, and you have this problem with what economists call Bertrand Competition. If one seller sets a price here, the other seller undercuts him a little bit, gets the market, gets the -- and so on. You get this kind of competing down to the lowest common denominator. So you really have to have news that's highly differentiated in order to support a charging model. So one time I thought, "well, local news, that's highly differentiated" -- local football scores and things like that. But then I realized if all the moms and dads are sitting in the audience on Twitter with their mobile phones, maybe that news isn't so highly differentiated

after all. There's also issues of specialized industry content, or, you know, points of view or opinions or analyses that can't easily be imitated are also a case where you can differentiate news. So I'm agnostic on this question of whether the charging will work. I think it's certainly worth a try, but, of course, you can only charge for something that's going to be unique content. It's very hard to charge for, let's say, the weather, or something of that sort. So, in summary, when you go through and look at all of this, newspaper ad revenue has been pretty much cost-and-inflation adjusted for dollars. The circulation per capita is going down since 1947. The really big increase in advertising revenue has come from cable TV, and that was way before the Internet. You do have this problem with online news, that people are using it differently than they've used offline news. They tend to access it more episodically, and the challenge that newspapers face is how can they use that to -- I mean, how can they turn that sort of brief access to the news into the kind of deeper involvement that you'd like to have? Well, what you need -- maybe everybody has said this -- is not news, is engagement. You need to increase people's engagement with news, and the three things newspapers should do is experiment, experiment, experiment. So Google has been working on doing some of these experimentations. I think a promising avenue is try to link news access during the day so you move this rather brief occasional access to stories, to a much bigger engagement partially by shifting some of that access into leisure time as it traditionally was used. So we've done things like living stories where you work with major newspapers to try to string together all of the items about a particular story as the news developed through the day. Got this capability called star stories, where you can look at a story and star it and then you can follow what happens in that story. Maybe look at it later when you have some free time, fast-flip, and other things like that. I'm a big fan of the new devices. I think that things like the iPad or the Kindle and this whole group of tablet computing is going to potentially make a big difference because it gives you a completely different ergonomics for accessing the news. If people are accessing online news at their workstation, or their computer, or their laptop during the day, and they've got a lot of things going on, when you come home, probably you don't want to go sit in front of your laptop or your workstation at home to do the same thing. What you might want to do is sit in you easy chair and look at your tablet where you can follow some of the stories that you might have seen accessed originally at work. And, of course, this isn't going to be a flat textural description. There's going to be multimedia in those devices, and so what I believe they'll see is a merger of the TV, magazine, radio, and newspaper experience. You'll have a device which will access all of those different

medias, give you a deeper -- potentially deeper involvement with the news. Because what happens with TV is you get this emotional experience from the visual side, but in many cases, it's frustrating because you can't go deeper into the story with a newspaper, physical newspaper. With textual material, you can go much deeper into the story, but maybe don't have the same emotional involvement. If you get them both together, then potentially you can have a really positive, interesting, and worthwhile experience. So I would like to see this -- this area develop, and we're doing what we can to help that happen. And, finally, the last point is newspapers should better exploit the information they have. You know, in many cases, the newspaper website is seen as -- as something that's for the techies, or the person who's managing the web blog is doing it just to look at how performance is working. But there's hugely variable information in those web logs -- both from an editorial point of view and from a marketing point of view. There's lots of interesting things that you can do when you understand why people are coming to your site, where they're spending the most time, what they're coming back to. It's just extremely valuable information. I think newspapers can spend more time on analyzing that information and end up with better ad effectiveness measuring better contextual targeting and better editorial targeting. So I think I'll end there. And thank you very much for your attention. Thanks. [Applause]

>> Susan DeSanti: Thank you very much, Hal. And those economists who are running out of the room, who just came for Hal, you're missing out totally by not staying around for Bob Garfield. And, now, as they say, for something completely different, Now we're gonna hear from Bob Garfield, who is co-host of National Public Radio's "On The Media" program, and a columnist, critic, essayist, pundit, international lecturer, and inveterate broadcaster. He is the author of two books, "The Chaos Scenario," and a collection of his work titled, "Waking Up Screaming from the American Dream," and so I am quite sure that Bob will wake us up.

>> Bob Garfield: Thank you, Susan, ladies and gentlemen, parents, teachers, boys and girls. My presentation will, indeed, be a little different than Hal's because Hal knows things like data and facts and stuff. [Chuckles] How that must feel. [Laughter] Anyway, for reasons that will soon enough be obvious, I'm going to begin this morning with my favorite subject in the whole wide world -- Me. Just by way of introduction, I'm Bob. [Chuckles] Yeah, Bob Garfield. [Laughter] James, John, and to the far right, may I call your attention to the bane of my freaking existence?

He is filthy rich and globally famous despite not even actually existing. I, on the other hand, probably do exist and have spent 35 years pounding boulders with a journalistic sledgehammer only to be extremely not rich, and famous on about this level. [Laughter] All right. That -- that's just mean. But you take my point. I asked you to listen to me today not because I'm some sort of big K-nocker. Listen to me, please, because... of that. That is right. I'm fairly useful, but largely obsoleted by technology. In a microwave world, there's still a market for toaster ovens, but it's nothing like what it once was, and it is shrinking all the time. Because, ladies and gentlemen, some things just -- phht -- go away. [Laughter] Let me go back. I don't know how to go back. For those of you under 50, that thing I just showed you was a fondue pot. Very, very big at about the time that Kennedy was shot. For those of you under 30, Kennedy was like this totally cute President who played hide the ICBM with both Khrushchev and Marilyn Monroe. Now, let's see. What else came and went. This. [Chuckles] The point I'm trying to make here is that very little in our world is permanent, and I'm not talking about buggy whips and Super-8 cameras, I'm speaking of entire species, entire institutions, entire economies that we imagined to be somehow guaranteed to us, but which turn out to be as endangered as the snail darter. So, as the -- just, for instance, NBC. Maybe you've been reading about the Comcast deal? The giant cable company has basically acquired NBC Universal from General Electric in a multibillion-dollar transaction. Now, it's going to be -- it's going to be interesting to see if Comcast can run a TV network 24/7, considering it can't even seem to get a repair truck to your house in a four-hour window -- but never mind that, because NBC, the broadcast network, is not going to be around for long. In the next 10 years, and my best guess is most likely five, NBC will be just another cable channel on the way to being no channel at all. And there are many reasons for this. [Chuckles] The chopping block -- now, there's a self-fulfilling prophesy for you. But the fact is unbelievably terrible programming is not the main reason NBC as a broadcast network is doomed. The real reason is a convergence of technology and simple economics to undermine television's business model. Now, forgive me here 'cause this -- it's a little bit technical. But as you shall soon see, not just NBC, but all TV and all newspapers and all magazines and radio and Hollywood and what's left of the record business are all in some big, big trouble. Also, the advertising industry and a little boutique soap company called Procter & Gamble, along with the other 1,000 leading national advertisers. But I'm getting a little ahead of myself. Where this all begins, of course, is with the digital revolution. Now, I know that sounds like some sort of news magazine cover headline -- because -- and by the way, I put a

copy of "U.S. News" up there, but it no longer has a print edition because it itself is a particularly victimized victim of the digital revolution, a tectonic technological shift with consequences akin to the industrial revolution. Many of those consequences, of course, are extremely positive. But some of them certainly are not. That's a porn site... Jihadist site... [Laughter] Sorry, Hal. And it's actually not such a joke as we'll see in about three minutes. But to explain why, first I'm going to -- I'm going to have to go all PowerPoint on you. [Laughter] But I promise you, this will be very simple and very brief. There's something like 1,000 cable channels. There's PlayStation and Wii and massively multiplayer online gaming. Almost 200 million websites, including online gambling and online porn, at least that many blogs, not to mention Facebook and MySpace and YouTube. Last year, Susan Boyle generated more than 120 million YouTube views, astounding the world by somehow miraculously singing while ugly. [Laughter] Media-wise, there are gazillions of choices. Overall, more people are consuming more stuff, including newspapers, magazines, and TV than ever before in human history, but the audience is carved into smaller and smaller slices. Consider this. In the last week of December, last year, the highest-rated TV series was CBS's "The Big Bang Theory." Has anyone here seen "The Big Bang Theory"? One, two... That actually -- that seems to make sense. It was viewed by 5.6% of households. 50 years earlier, the top show was "Gunsmoke." It was viewed by 40% of U.S. households. The thing is, as audiences fragment, the amount of revenue coming in for any given piece of content goes down, down, down below the point where the publisher or broadcaster can continue to pay to produce the thing. That's, you know, why until very recently there were five days a week of Jay Leno in prime time, and, like, I think now it's like nine days a week of "Dancing With The Former Stars," or whatever. [Laughter] It's cheaper. It's just cheaper to do. But it's also suckier and therefore draws still fewer viewers to the ratings, still less revenue, and so on into oblivion. It is expensive to set up a Hollywood studio and to build 1,000 multiplexes. It's expensive to have headquarters in Rockefeller Center and Burbank and to support 200 affiliates. It's expensive to have 700 reporters and 100 trucks in huge printing plants, which, till now, is exactly how the media tycoons liked it. If you were Warner Brothers or Hearst or NBC, there were a limited number of potential competitors with the kind of capital to try to steal away your market share. The capital requirement of -- that kind of capital requirement is what economists call a barrier to entry. And for the past 300-plus years, those barriers have been damn near insurmountable. Well, now Steven Spielberg and Rupert Murdoch and CBS's Les Moonves has someone nipping at their heels. He's a blogger. A

very popular blogger, as a matter of fact, and he has exactly the same access to audience as Murdoch... only his cost of production and distribution is zero. That's unless he wants to make movies. A digital video cam can set him back nearly \$200. I mean, can you see how this spells trouble for the tycoons? 200 bucks is a barrier to almost nobody, and when it comes to selling your content to audiences and advertisers, free is a tough price to compete with. I'm happy to report that in 2009, Apple sold more than 3 billion songs on iTUNES, accounting for most of the \$3.5 billion consumers spent on music downloads. Unfortunately for the record industry, 95% of downloads, \$70 billion worth were illegal. Stolen. Pirated. As technologies like BitTorrent proliferated, and file-sharing hubs like Pirate Bay pop up, the same will rapidly happen with TV and movies, and, in fact, is happening already. In 2009, the movie "Star Trek" was illegally downloaded and estimated 10.9 million times, siphoning off at least \$100 million in box-office receipts. And maybe it isn't exactly piracy, but online aggregators like Huffington Post and Google News sell ads against excerpts of content created by others, siphoning off ad revenue from every newspaper in the world. Hal was talking about the 35% that the newspapers get. Well, it's the 65% that they don't get. And that's why Google, our friend, is also Google, our enemy. Between 50% and 75% of DVR owners fast-forward through the commercials. When very soon 50% of U.S. households are equipped with DVRs, that means between 25% and 35% of all ad spending on TV will be zapped into oblivion. And, increasingly, advertisers are refusing to pay broadcasters for reaching the zappers, putting yet more revenue pressure on the networks. And why does Mr. Viewer skip past the commercials? Why? Well, for the same reason he deploys spam filters on his computer and refuses to click on any banner ad at any time for any reason. What is the matter with you people? [Laughter] Do you not see how vulgar and inappropriate that slide is? [Laughter] Anyway, advertising people like to give trophies to one another for creative genius, and, you know, and to parade Tony the Tiger down Madison Avenue once a year. But if they think people love their ads, they are sorely, tragically mistaken. For more than three centuries, consumers have put up with ads as part of the deal. It's the quid pro quo, the unspoken compact that provided all of us with free or subsidized content in exchange for having to sit through 20 years of Mr. Whipple fondling toilet paper. Yes, some of the commercials are very clever and funny, and some of them even worm their way into our hearts, but, by and large, they are and always have been a nuisance. To most people, all advertising is spam -- the proof being that the moment technology afforded us the opportunity to skip them, skip them we have. I mentioned the Internet's ever-expanding supply of content. Well,

much of that content, millions and millions of websites and blogs and Facebook pages accept advertising... which means an ever expanding supply of ad inventory. As you know, there is an immutable principle of economics called the law of supply and demand. As supply increases, prices are pressured downward. And the price that any advertiser can fetch for any ad anywhere is going to be reduced, especially online. That's yet another reason newspapers can't convert their huge online audiences into big bucks. On display advertising, they're competing with 11-year-old bloggers whose ad space comes very cheap. And on classified, one again, they're competing with free. As I said, they don't call it a revolution for nothing. And by the way, never mind the ongoing demand for media in general. Just because people want it doesn't mean they'll pay for it. They've been trained for the whole history of the Internet to believe that all content is free. And neither all the king's horses nor all the king's men can put that Humpty Dumpty together again. And if advertisers won't pay, and if individuals won't pay, the grim fact is, media and marketing have been a mutually sustaining yin and yang for, depending on how you measure it, 350 years, a symbiosis that has been simply fantastic for everyone. We got free and subsidized content, Mr. Whipple got an audience, and media companies got filthy rich, allowing, you know, most of the people I speak to -- to make a nice, tidy living. It was a magnificent ecosystem. But it turns out to have been just an accident of history, a happy accident, but an accident nonetheless. It was an epoch, an epoch in its waning days, which means -- and I've singled out individual entities, but what I'm speaking of is not just NBC and The Washington Post, but the entire broadcast and newspaper industries. And I'm pleased to report that magazines are far better off than newspapers in exactly the same way it is much better to have multiple sclerosis than Lou Gehrig's disease. In the past two years, 900 North American magazine titles have vanished from the face of the earth. According to the Bureau of Labor of Statistics, in the past year, 86,000 former employees of the periodical and public industries have lost their jobs. And there's just no reason to think that that's going to slow down. Cable's not pictured here, but, you know, that's no better position than the long run than broadcast. Not only is it exactly as vulnerable to TiVo, it's suffering from a sort of autoimmune disease. The very cable that brings the expensive programming into your house also pipes in the broadband which enables you to get virtually the same programming online without the \$100-a-month cable fee. So, you know, choose your metaphor -- the body attacking itself, being shot with your own gun -- either way, it is fatal. The last one on that slide is Ogilvy & Mather, the global ad agency. The agency business isn't just a toaster oven, the agency business is toast. Because no matter what

anyone tells you, it derives its income from creating and placing large ad campaigns, and the larger, the more lucrative. But mass is going away, and the agency business model does not adapt to micro. So, you know, once again, choose a metaphor. You think toaster oven is a little, I don't know, strained? Okay, here's another way of looking at it. Think of the people who make and place ads as not living in 2010 but in 1810. And imagine them not as crafters of commercials, but as crafters of shoes. They're cobblers. They're cobblers who have for a century themselves earned tidy livings making custom shoes only to see a steam-powered shoe factory mass producing shoes for tuppence on the pound. Got the picture? Huh? Okay. So to bring this back to where we began, how would you like to be the guy who earns a living covering the cobbling industry? See what I'm saying? There are toaster ovens, and there are toaster ovens. And if my chaos scenario is correct, I'm the toaster ovenest. Complicating matters, ladies and gentlemen, and, you know, not to get too personal here, but I am old. When I started out in this business, there was one ringtone. [Laughter] It went, "ring." I'm so old, that I've had two colonoscopies. [Laughter] It actually wasn't too bad. The last one, the results just came in. They found a couple of small polyps and a Starbucks. In college, I took chemistry. You know the periodic table of elements? when I was in school -- 29 elements. [Laughter] Zinc was a rumor. So, with all of respect to the President, it is a little late for me to re-train. And that's actually why I'm here today. My plan "A" was to collect paychecks and paid healthcare and journalize my way to retirement. But that is not going to happen. So my plan "B" is to be a scavenger feeding on the bloated corpse of my industry. But, you know, I don't want to be too negative. I do have some positive news. As other sessions in these workshops have highlighted, the very same forces that are destroying mass media and mass marketing are creating the most exciting, most inclusive, most democratized times in human history. Thanks to digital tools and conductivity, the power shift between the media and the group formerly known as the audience is also happening to other institutions -- business, government, politics, science, the church. It's happened to graphic design, music, even sports. The time when folks at the apex of the pyramid got to dictate to the audience, the electorate, the congregation, the customers, that is coming to an end. Ladies and gentlemen, the herd will be heard. And the same sort of thing is happening in journalism. Blogs, Twitter, hyperlocal news sites, aggregation, crowd sourcing, podcasts -- all power to the people, baby, sticking it to the man. There's only one teensy problem... [Laughter] There's tyrants at the top of the pyramid dictating what content the news audience would receive. That's pretty much the likes of me. We are the dictators, the

establishment, the elite. When the unruly mob empties the Bastille, they will repopulate it with us. Well, I mean, did I not say at the beginning of this presentation that I represent something larger than myself? I'm just a toaster oven. I'm a poster toaster oven -- the individual standing for the whole doomed lot of us -- the whole universe of trained, experienced, professional journalists who for three centuries could maintain the livelihood plying our trade. Our numbers are dwindling by the thousands and thousands and thousands. This is not good news. Our society, our democracy needs me. I mean, not me, but the world of experience and judgment that I, at least for the purposes of this slide show, represent. In the short term, news organizations will simply retrench with painful cutbacks, not only on investigations and enterprise reporting, but on the basis of monitoring local, state, and national government. The medium term will be much worse as liquidation and consolidation reduces the number of newspapers and broadcasters by at least half -- a number I can -- the percentage I can cite with confidence because I've just now made it up. [Laughter] It's going to be a frightfully barren period of chaos for advertising as an industry and for the media industry it has for 350 years supported. In the long run, that milk and honey of digital innovation will begin to flow, and maybe micropayments will be a model that emerges to -- to guarantee resources and professionalism. But meantime, I can only see dark clouds with no silver lining. Okay. Maybe one silver lining. Because if there's no newspapers, why, then... [Chuckling] Thank you very much. [Applause]

>> Susan DeSanti: Now we move from reporting on the facts to getting into some of the proposals that have been made for ways to deal with the issues that have been laid out for us to deal with. Our first panel of this workshop will discuss copyright issues in journalism, and it'll be moderated by Suzanne Michel, Deputy Director of the Office of Policy Planning, and Dan Gilman, an attorney advisor in our office. So, would the panelists and the moderators please come up? [Indistinct talking]

>> Female Speaker: You good? You good to go? All right, thank you. Thank you.

>> Suzanne Michel: Good morning. My name is Suzanne Michel. I am Deputy Director here for Susan, and with me is Dan Gilman. We will be talking about copyright. The process of investigative journalism is certainly expensive, and most probably all of everyone in the news

industry would argue that the product of that investigation, the news story itself, requires some protection so that the news organization can recoup its expenses. But how much protection is a notoriously difficult question. The answer to that question raises issues that reach far beyond the content of any one news story and implicates broader principles like free speech, public discourse, and creativity that always builds on something that came before. So today we're going to explore those difficult issues. We're going to talk about how the legal doctrines that afford the protection to that content of news stories, including copyright law and the hot news doctrine, can be balanced with these other principles. To help us with this process, we have a great panel, and I thank you all for coming today. We have Professor Yochai Benkler, who is the Berkman Professor of Entrepreneurial Legal Studies at Harvard Law School, and the faculty Co-Director of the Berkman Center For Internet And Society. He's also the author of a fascinating and insightful book relevant to this topic, "The Wealth of Networks: How Social Production Transforms Markets and Freedom." Next we have Professor James Boyle. James is the William Neal Reynolds Professor of Law and co-founder of The Center for Study of the Public Domain at at Duke Law School. He is also the author of an entertaining and very readable book. I think you don't need to be a lawyer to get to enjoy this one -- "The Public Domain: Enclosing the Commons of the Mind." Laura Malone is Associate General Counsel for Intellectual Property at The Associated Press. She's in charge of protecting, managing, and enforcing the intellectual property rights of AP, and so you can say she's in the trenches on this one. Also with us is Jim Marcovitz. Jim is Senior Vice President and Deputy General Counsel at News Corporation. He's responsible for, among other things, intellectual property matters there. We have with us Ken Richieri. He is Senior Vice President and General Counsel of The New York Times, and so deals both with these issues and the broader legal issues for his newspaper and organization. And, finally, Bruce Sanford. Bruce is partner at Baker Hostetler, where he chairs the interdisciplinary media and technology industry group. He's also the author of several books on the media, free speech, and libel and privacy matters. We're looking forward to a lively discussion. We're going to run this panel as a moderated discussion because I think these panelists have a lot to share with each other. As I throw out questions, and we start the process, I'll ask you to turn up your table tent like this. I'll leave mine as a cue there so that we -- I can call on you, and we can keep the process going. I want to start with a bigger-picture question. Does it matter, these legal issues that we want to talk about, and how much does it matter? Many news organizations are facing financial difficulty. But to what extent are those financial difficulties

caused by the use of others on the Internet of the original news content of news organizations?

Yeah, James?

>> James Boyle: Thank you. I think comparing how Hal Varian's very instructive presentation to Mr. Garfield's, I think, is a great way to begin that, and I think Hal's presentation really shows how vanishingly small the -- even the percentage that it is possible that illicit use of news content makes up for in the actual problems of newspapers -- both the issue of continuing to decline from the 1950s, the fact of disintermediation, where you have specialized sites providing the same information, the difficulty in providing illicit business model. Never forget the illicit uses, right? Where's the illicit business model, right? If you put all of these things in together, and then I say, okay, so, what percentage -- supposing we have absolutely perfect enforcement of copyright law, and I'm perfectly happy to enforce copyright law against the people who are genuinely taking whole pieces of content and copying on the Internet illicitly, imagine perfect enforcement. I think it's a vanishingly small percentage of the newspaper's problems. So I think that to some extent, I really think that this is little bit of a distraction from a real social issue. The real issue is how is investigative journalism going to be paid for is the one I care about a great deal. But the idea that we solve that potentially by tweaking copyright law, I think, is just a fundamental mistake.

>> Suzanne Michel: Yeah? Any responses? Um, yeah, yeah, Professor Benkler.

>> Yochai Benkler: Yes, I unfortunately missed -- because I just flew in, missed Hal Varian's presentation. So I don't know to what extent I'll be repeating. But it's important to recognize that we're looking at a business that is used to monopoly rates -- highly concentrated industry what is on the order of 95% of small and midsized towns are single newspaper towns. One major source of competition is simply the fact that people can get roughly similar news from other places. Other newspapers next door three towns away, this is a massive component of the rent -- and, of course, classifieds, et cetera. So the question is, what aspect of any of this are we willing to give up? Are we willing to actually give up other newspapers being a source? Are we willing to give up the idea that national and global sources of news becomes a way in which people get to know the news so that in some sense they don't need to read the local paper that's brought to the door. In order to find out the news of the day, they can read The New York Times or The L.A. Times wherever

they happen to be. Those, to my mind, are major questions. Do we actually want to limit craigslist or monster.com? And if not, what on earth could we be imagining that's happening here other than identifying a business source that has succeeded in creating revenues and finding a way of generating a right to draw the rents back from there where they were lost when trucks did stop being the only way to deliver local -- locally relevant advertising.

>> Suzanne Michel: Ken?

>> Ken Richieri: I'll go back to your initial question. I very much agree. You know, copyright law did not create situation newspapers and content providers find themselves. I mean, that has been created by -- by splitting off one of the major revenue sources -- some of the major revenue sources -- the cheap one being classified ads from the content that it was associated because it's a delivering mechanism. That said, I do think that copyright law or some kind of law that protects the creation of content online is important for the solution. It may not have caused the situation that we're in, but if someone is going to -- to support the investment that is required to create news, one needs to be able to monetize that in some kind of way. And one can't do that if the entire work product can be taken pretty much instantaneously.

>> Suzanne Michel: All right. Bruce?

>> Bruce Sanford: Yes, Suzanne, I think, you know, going back to your original question, the -- I think one of the things that the Commission could do in this entire process is to do some fact-finding and issue a report that may serve as a basis for any kind of legislative recommendations or proposals. Fact-finding in this area has shown, I think, from a group called a Fair Syndication Consortium. In one 30-day period, they found 175,000 unlicensed sites showing U.S. newspaper content and 112,000 full copies of newspaper content in -- being used in an unauthorized way. The amount of unauthorized usage -- and that's the point here -- unauthorized usage of newspaper content is staggering. And that, I think, is something that we need some real fact-finding on. I agree with Ken the copyright didn't cause the problem. It ought to be for copyright-like/copyright-type of protection, such as the sort that England is now considering in their style that just proposed

the Digital Economy Act. That's something that we really ought to do in order to try to protect journalistic content in the digital age.

>> Suzanne Michel: Jim?

>> Jim Marcovitz: Thank you. Going back to your original question and adding on to sort of Ken and Bruce's comments. Consumers are, you know, reading and accessing the news.

>> Suzanne Michel: Jim, could you please speak a little louder, please? Thank you.

>> Jim Marcovitz: I'm sorry. Consumers are accessing and reading the news, you know, quite differently than they did, say, 20 years ago. There's a completely different type of readership base as you look at people under 50, under 40, under 30. Newspapers, according to the PEW Study, you know, are the primary source of original news reports. You know, newspaper organizations invest a substantial amount of time and resources in gathering and creating original news reports, you know. We are looking for, you know, a way to get a return on our investment. You know, copyrights didn't cause this problem, but there are laws that we could look at that could co-exist alongside copyrights that could help news organizations continue to make this investment, being one of the largest contributors to the worldwide knowledge base.

>> Suzanne Michel: Laura.

>> Laura Malone: Thanks very much. I want to address a few points that were brought up. I agree with my newspaper colleagues here that we do need the protection -- no, copyright law did not cause the problem. I don't think anybody in this room is -- is contending that copyright law caused the problem. Copyright law is one remedy that we have in order to protect our valuable content that we deliver. We're a little bit different at The Associated Press and sit a little bit differently than the newspapers 'cause we are specifically not relying on classified ads, though our customers are, not specifically relying on advertising, though our customers are. I can sit and look from my perspective at all of the different AP stories that have been distributed to the various different customers and see how they've been lawfully and legally used and also unlawfully, and as you said,

Professor, illicitly used. And I can say absolutely it's causing -- it causes quite a bit of harm. When I get a call from a member newspaper, member news organization, or a member broadcaster from somewhere in the country that says, "why am I paying these membership dues and why am I paying the fees to you that I have to pay when the guy across the street is just copying and pasting and putting it up on his site, and it's all over Facebook, and everybody can access it? Why am I paying for legitimate reporting --" I'm looking at you, too. I don't mean to be after you. "But why am I paying for legitimate reporting from the original source, from The Associated Press, or whatever source I'm paying for when the guy across the street sitting at his computer and retyping or cutting and pasting or scraping and posting?" I mean, those are serious issues that we have to deal with, so, yes, it does have quite an economic effect. Copyright Law is just one of the remedies that we can engage. I think Jim is alluding to a few other things. Contract law as misappropriation, of course, that we can talk about, as well.

>> Suzanne Michel: James?

>> James Boyle: Thank you. I think that the call for fact-finding is profoundly well-judged 'cause, I mean, I think if you compared Hal's speech to Mr. Garfield's speech, I don't think I'll insult Hal when I say that Mr. Garfield's speech was far more entertaining largely because it was almost -- I would say about 50% of it was what is commonly believed and simply factually wrong. It's much more entertaining to be wrong with, you know, cute slides than it is to actually get into data. So, you know, you can't compete with free. Absolutely. It's totally impossible. No one can compete with free. If there were free water, the bottled-water industry would disappear. It's just happens not to be true, but it's very entertaining. So, yes, there are illicit copies of newspapers. "A," that's already illegal. It's a violation of Section 106 the Copyright Act, and there are powerful federal penalties available, both civil and criminal. "B," you cannot confuse, as Mr. Garfield's presentation did, the number of illicit copies with actual negative effect. So he says, "oh, there's this 'Star Trek' movie out, and it's been downloaded," and then he gives the, forgive me, somewhat inflated numbers given. I understand why they do that. And then he goes, "and, therefore, it lost \$100 million," right? It's like, yeah, because each one of those is definitely someone who would have paid \$8.50, and we currently see no box-office blockbusters actually in the cinemas. Again, very entertaining and totally false, right? It's just not the case. In fact, some big-picture movies are

getting larger revenues. So I think what we have to do is look at actual impact from illicit copying. That doesn't mean the number of times the stuff is copied, right? Nor even the number of page views. That would be starting to get something. It's the foregone revenue stream produced by it, right? That's the first thing we have. And then we have to say, "how much of this is not already illegal under existing law?" And then we have to say, "how much of the remainder should be illegal?" And I think once you've gone through all of those things, the answer in the end is hardly any and not at all.

>> Susan DeSanti: A lot of this discussion is focused on illicit copying, wholesale copying. There are other ways that Internet news sites use content from original news stories, however. Call it the gray area, call it activity that's perhaps completely illegal under current copyright law. We're thinking about the news aggregators and the headlines and the links. Let's talk -- let's focus on that then -- how much of a problem is that for news organizations to be able to recoup their investment and investigative journalism? And does intellectual property copyright law have any role to play in addressing those issues? Would anyone like to take that up? Bruce, please.

>> Bruce Sanford: Sure, Susan. I think the problem here is that you do -- when you're talking about aggregators -- [Clears throat] excuse me -- you do have to say, "what specific activity are we talking about?" And you do have to categorize as James says, you know, from the ones who are clearly creating copyright infringement to those that would have a fair-use defense. And then the question, if you start litigating those, as a litigator, I will tell you what happens. What happens is the plaintiffs tend to pick strong cases where the fair-use defense is not very viable. And they win many of those cases, plaintiffs being plaintiffs, and you will find some aggregators going down the tubes basically in copyright infringement cases. That, I think, is almost certain to happen if the status quo continues. You may find some cases where an aggregator will beat the wrap with a fair-use defense, and then you will end up with a sort of chaotic bunch of judicial decisions that are inconsistent or difficult to apply factually. It does seem to me if that's the likely scenario that happens, and I think it is from a litigation standpoint, that it is it's in everybody's interest, the interest of the aggregators, the interest of the search engines, the interest of publishers and content providers to agree on some sort of rules of the road, and they can do that in either a legislative format or as business matters, but that, it seems to me, needs to be done before this begins to

disassemble into judicial decisions in the scenario that I painted. And that's really why I want to thank the Chairman and the Commission for this initiative because I think it is the -- it can be the fact-finding basis for advancing that discussion, that legislative discussion.

>> Susan DeSanti: You suggest we haven't seen that litigation yet. Do you have any sense of why not? And are you suggesting that there may be more in the future?

>> Bruce Sanford: Yes and yes. I think we haven't seen that much of it yet because I think business -- it's a matter of business deals. A lot of the players in the industries are talking business. They're trying to find a way to resolve it in the marketplace, and I think there's a lot of that going on, a lot of posturing going on. I think there will be litigation coming on. There are going to be people who feel that they have strong cases that the fair use defense, in some situations, with aggregators is fatuous, to say the least, and they will sue, and you will get some powerful decisions, I think, in that area. And I think that may or may not be -- James knows a lot more about this than I do, but that may or may not be good for the fair use defense and copyright law because the fair use defense in copyright law has not really been working out in a gym in the digital revolution. It is not a doctrine, it seems to me, that has really been tested or can easily be tested in a digital world, in an online world, and that's why I think it's probably time to look at this from a legislative standpoint, public-policy standpoint, and say, "What should the fair use doctrine be in this context?" I think, you know, we have this one case in the wonderful "New York Times" people who have sued in the Gateway case, and the expert witness in that case, who made, I think, a very interesting article about -- or argument about the application of the fair use doctrine to aggregating against "The New York Times," in that case, and it really -- He put the touchstone on the frequency of use and whether the aggregators were supplanting the economic value of the content, and that, I think, will boil down to be the test, and I think that, in many cases, will be a very difficult test for aggregators to meet, because I think their products do supplant the economic value of the content. I think demonstrably so.

>> Suzanne Michel: Was that Professor Doug Lichtman's expert report?

>> Bruce Sanford: Yes, yes, exactly.

>> Suzanne Michel: Professor Benkler?

>> Yochai Benkler: So, I think it's important to go back to the beginning of your question, which is to say there's a class of behaviors that are legal at the moment. They're legal at the moment because they reflect a certain judgment about the limitations and the severe ambiguity of the benefits of the effective copyright and proprietary-like models in information production. There's always a tradeoff 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. The continuous flow of news through a system is absolutely central to all of these organizations and particularly in a context in which a wide, new set of lower-cost models -- some commercial, some noncommercial, some nonprofit, some completely voluntary -- is emerging. The risk of introducing a proprietary-like right as a solution vastly outweighs whatever discreet advantages there are, and, again, I'll note how many people around the table said, "Copyright is not the problem." Right? So, the question is how precise a hammer this is for the particular set of problems that there is. You could go around and say, "You know what? People have come up with solutions that say, 'Let's tax Internet access to pay for musicians and movies.'" That's been a proposal. That's been a serious proposal on the table for eight or nine years. There's no fundamentally bigger reason not to simply say, "Let's tax Internet access and subsidize newspapers" than there is to say, "Let's take a subset of producers, introduce a right that is not itself coherent on its own bottom as a cause and siphon off revenues to subsidize this industry." When you have a system of rules that we know produces inefficient rents, we know produces higher cost for information production, and we know has its own political dynamic that always ratchets up over time as you get concentrated interests being interested in extending the right and deepening it and relatively diffuse interests on the other side. So, it's an extremely volatile material to use as a solution that is not fundamentally different from simply saying, "The threat is the Internet. Let's tax the Internet and pay these organizations so they can keep doing business in the particular model that they've done in the 20th century." I'm not sure that's acceptable. As to the particular cases, you know, you're not the first industry to come up against this. If you look at Kelly vs. Arriba, at the search engine, we already know that searching the data, identifying discreet little components that are the basis for them to link is perfectly fine. We also know from copyright that just taking

the whole content and putting it up there and displacing it is not fine. So, maybe at the margin, there'll be a poorly decided or a well-decided case that will go one way or the other, because judges will or won't have sympathies in one form or another, and, as you say, the litigation will choose the best case or whatever it is. But the whole solution space that this looks at is a highly ambiguous and problematic solution space for this kind of problem that goes to the very heart of the fact that information, when it's controlled, undermines and increases the cost of information production itself.

>> Suzanne Michel: That solution space and those questions may be worked out in the courts through the common law process of interpreting the fair use doctrine. Is that a process that you feel confident in to get us to the right place to provide the protection that some need and also the freedom to use information that others need?

>> Yochai Benkler: No, I don't, actually. I'm not at all thrilled with the way in which courts have been able to develop fair use doctrine. It's not been completely useless, but it's relatively expensive, it's relatively susceptible to local manipulation in terms of who the defendant is and who the plaintiff is so that it's far from an ideal setting, but the baseline current copyright law is one that tilts against many of the practices that are in the gray area and might be the solution and for things that I don't think anyone around this table argues are illegal, should be illegal, but won't make a difference to the revenues of the industries. They're irrelevant. But fair use itself is a highly uncertain doctrine.

>> Suzanne Michel: Do you have any thoughts on what to do about that? Is it, like, the worst situation, worst case except for all of the others? How do we deal with that, then?

>> Yochai Benkler: I don't think the solution is a government-created new right at all.

>> Suzanne Michel: Okay.

>> Yochai Benkler: I think we have the baseline that we have. There'll be battles within the political economies that exist. There'll be battles within the courts. It'll move a little bit this way, a

little bit that way. There's enough sufficient money on both sides to suggest that the litigation won't clearly go in one direction or another, and a whole new set of business models is emerging. Some of them you'll get global news sites that continue to use advertising and will have much larger numbers of people looking at smaller sets with more refined advertising. You'll have some nonprofit models. You'll have some hyperlocal models. You'll have some people who are completely dedicated to professional journalism and are willing to live with lower returns and able to leverage the enormous abilities that the Net provides in order to produce new journalism. You have already the rise of the party presses in the large-scale blogs. It's not as though we're in a universe where -- I remember this. There were papers in the early '90s talking about putting cars on the information superhighway. If we don't have copyright, there will be no content here. Well, as it turns out, we didn't quite clamp down on everything, and it turns out there's one or two things to stumble across on the Net, so it's -- There is an emergence of a particular industry that has used to extremely high rents in a new competitive environment. It is looking for a set of interventions that will change the present law, create barriers to particular forms of competition so that it can extract values. The simplest solution is do nothing. At this point, it's not at all clear that -- Do nothing of this kind of containing information flow. You can imagine situations with increasing investment in making government data more easily available so that relatively low-cost models can collect. You can maybe decide that you want to invest some, although you don't want too much of the whole media environment being supported by government. You might imagine some subsidies or others. You might convene about new nonprofit models in one form or another. You might convene about how journalism school teach journalists to be their own small-scale businesspeople. There are all sorts of things you could do other than interjecting this new right that's intended to basically make it more expensive for new business models to find out what's going on there and get people the information they want.

>> Suzanne Michel: Ken? Thoughts on aggregators?

>> Ken Richieri: Yeah, my comment was so long ago, I'm not sure -- [Laughter]

>> Suzanne Michel: Let me take us back.

>> Ken Richieri: I'm gonna go back to the aggregation. I think, for one thing, when you look at the headlines and the links issue, you know, most of our sites, you know, sponsor RSS feeds -- okay? -- which make that easier. So, I think we need to understand, you know, we are in a Net. It's called a Net 'cause it's interconnected and that any vibrant news or information site is going to -- that's gonna be a component of that. So, the first thing I would say is that the word "aggregator," "aggregating," 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. So, I think when people discuss, you know, aggregation, either the good things or the evil things about aggregation, you really need to focus on what you are talking about. You know, taking the time, as an example -- We have RSS feeds where we have our content linked out to others, and in many of our news -- not the news article but adjacent to the news article, there will be links out to other sites who are discussing these same contents -- same content. And I think that's both perfectly appropriate, and that is, in some way, shape, or form, how the Net is evolving, and that's how it's gonna be. But I would take Bruce's point. Some people use these tools to create substitutability. It's -- There is, you know, a Potter Stewart aspect of it, you know, when you see it, and I'll be the first to say that. But that is a different kettle of fish. I'm not sure they're really adding anything. Don't forget, it is true. You know, Garfield's presentation was entertaining, but some things he said were exactly true. You know, a 10-year-old kid does have access to everybody anywhere. It's not like someone who's -- I'm making an example -- taking "The New York Times" content and putting it on his site is reaching a population that couldn't, with the same click, get to the original source of the content. They're not creating a new market or anything like that -- not exploring worlds, not exploring more.

>> Suzanne Michel: Is substitutability a touchstone, then, for how we ought to be thinking about this -- that our concern is for sites that are substituting for the original news content?

>> Ken Richieri: Well, it's -- It -- Again, I say to you, it's something you know when you see, to some extent. I mean, a headline and clean link back that's not interrupted by an ad that's designed to essentially give the user of that site a cue to say, "You want more? Here it is" -- I think that's perfectly fine and everyone benefits by that. Where one's content is used, oftentimes, frankly, in ways that don't directly violate copyright but are used to create an audience at the other site --

okay? -- commentary about your content, your content is used to create somebody else's audience, yeah, that's a substitutability issue.

>> Suzanne Michel: Jim?

>> Jim Marcovitz: To add on to Ken's point, when Ken talks about "The Times" making available RSS feeds and the like, you know, he's talking about a permission-based system where he's allowing access to those RSS feeds based on permission and the permissions that they establish. What we would like to see is a permission-based economy where we could set the value for our content and people come to us and seek permission to use it. Just like an RSS feed, there are permissions attached to it. Aggregators would like to build businesses based on the use of our content. They should come to us to seek permission to obtain it on terms that we would set.

>> Suzanne Michel: Laura and then James.

>> Laura Malone: Yeah, I just want to add a little bit more to what Jim said, and saying that, the Associated Press is -- has relationships with the major aggregators, so I just need to preface my remarks that way. When we're talking about the usurping the value of the content, usurping the economic gain from the original site and from the originator, one of the things that I think that we need to talk about is the way viewers and consumers are reading their news and the habits in which they are now consuming their news compared to the way it was several years ago when people sat with newspapers. And I've heard people say a few times, "Sure, we understand that copyright law protects when someone takes an entire story and republishes that entire story somewhere else without the permission or, as Jim says, without the RSS permission, even. What we're talking about is news-aggregation sites where they take headline and lead, which can be, if it's a well-written lead and a well-written headline, the way they teach in "J" schools and the way most news organizations teach their reporters, that's the heart of the story, and the way people consume their news is to look at the top two or three things, read real quickly, move on to the next article. They're not going -- They're not clicking through -- To Ken's point, not clicking through to the original source to read the entire detailed 'graph 4, 'graph 5, 'graph 6. They've got what they need in the headline and the lead, which can be one or two 'graphs. And that is supplanting what's happening

out there with people not going to "The New York Times" because they're reading it on Google News or they're not going to "The Washington Post" 'cause they're reading it aggregated somewhere else. And I think that there is a problem with that. We do need to be able to say that we, the content owners, we, the copyright owners, get to set the parameters by which people can republish our stuff. If people want to build sites based on the news that is published by any of the news organizations, that's great. We'll give them a license. Licenses are not difficult to get, and they're not terribly expensive. Talk about a barrier to entry. It's not that difficult. It's just that people, because they can do it for free, are doing it for free and assuming that that's all right and then raising a stink if news organizations bring a copyright-infringement claim or send a DMCA takedown notice, make a stink and say, "News is free. What's the matter with you? Don't you know anything about the First Amendment? And why are you keeping the information away from us?" So, there's that social thing of the uproar and the uprising when news organizations try to enforce their copyrights. That's a whole bunch of things. I just thought I'd throw them out.

>> Suzanne Michel: James?

>> James Boyle: I think some sort of legal clarity here might be useful. We're talking about fair use, but, in fact, fair use, although important, is perhaps the least important of the limitations on copyright around which all of this depends. The most important limitation on copyright, one which newspapers and the AP use all the time, is the idea-expression and fact-expression dichotomy. Copyright doesn't cover facts, and it doesn't cover ideas. And thank goodness for the newspapers, because if it did, and some of their current proposals seem close to suggesting that it did, they'd be almost incapable of doing their business, because if anyone actually was the first person to uncover a fact or an idea, they would be prohibited from using it, which, of course, would be devastating to newspapers, to the First Amendment, to our polity in general. So, the first limitation is simply that facts and ideas go immediately into the public domain, even if they're contained within works that are otherwise originally protected under copyright. And that is one of the things that people are talking about here. It's also notable that people keep talking about return on investment. Return on investment is an extremely important issue for a business matter. It's very important for us to focus on the way it gets monetized. It is, however, something that is utterly foreign to copyright law. The Supreme Court has clarified that in the Feist case, so the idea that you get copyright by putting

labor in things or that rights follow labor is not only wrong but, the Supreme Court has said, unconstitutional, at least under the copyright clause. So, that's, I think, worth noting. So, then, I think, we can focus on the kinds of uses that are interfering with monetization, which, as I suggested, if you go to the list of things that are actually hurting newspapers and get to the illicit uses, I think it's small, but take the use by aggregators. Aggregators -- We've really got to differentiate, you know, Google News as compared to a splog, a spam blog, that simply scrapes everything. I mean, these are very different things, and we need to think about them differently. When you get to things like aggregators who simply do a headline, you know, headlines -- longstanding traditions of copyright law saying that titles in any event are not copyrightable, you're getting very close to what's called "merger," which is the facts and expression are very limited ways of writing something. As Ms. Malone points out, a well-written lead covers all of the facts in an intro sentence. There are very few ways of expressing those facts if it's a well-written lead and it's a story about facts, which means that copyright doesn't cover that at all because the copyright has merged with the expression, and, actually, an attempt to control the expression would be deeply problematic, problematic in ways that should deeply worry news companies which depend on their ability to reach out, including into copyrighted content, and extract facts and ideas. So, I really think that when we get all of these things and we say, "So, if you really don't want to be aggregated, why don't you put your robots.txt file and just say, you know, 'I don't want to be indexed'?" Well, the answer is, "But we want to be indexed." Okay. "We want to be indexed, and we want everyone to do that. But we want instead to exercise a right which currently isn't given by copyright law to make you pay for permission to link through to the story." I think that has deep legal problems, and I think its unintended consequences would be massive. There are even some Constitutional issues, but leaving all of those aside, I think the problem there is what Hal Varian mentioned -- competition. If you genuinely attempt to charge for something for which there are substitutable content, the price comes down to marginal cost, and marginal cost is close to zero. That's a problem for all of us, not just for the newspapers, because then we start worrying about investigative reporting, reporting that is far away, covering very powerful people who have lots of interest in shutting people up, right? That kind of stuff, we need to think about how it's gonna be paid for. I am deeply concerned about that. I pay for "The New York Times." I love "The New York Times." I pay for "The New York" -- I get pay for the other -- I get paid by the "Financial Times." I find my relationship with my paycheck deeply attractive. I wish for it to continue, right?

Don't get me wrong -- it's not that I'm not on your side. I'm on your side. This is the wrong tool. It would do a lot of damage, including to you, and it's a massive distraction from the real problems. So, I mean, this is not an expression of lack of sympathy or even lack of deep social interest. I think it's a different point that we're making, which is "Is this really the right venue to address these issues in ways that don't end up creating more problems than they cause?"

>> Suzanne Michel: Ken?

>> Ken Richieri: Let me confront that a little bit. I think, you know, part of what James says, I do agree with. I do think that, you know, the ability of a site to determine whether or not it's going to be aggregated by using a robots.txt or other protocol is fine, but I think we should recognize there's no law that requires aggregators to use any kind of protocol. And there are some, and Google is one that does use a protocol, and I think, you know, "The Times" has elected to be in Google News. But if it decided not to, it would -- that's perfectly fine. On the other hand, we have many aggregators, particularly in the mobile world. You know, they present themselves to our servers as a phone, an iPhone, and, in fact, they're aggregators. Once they're inside the system, they're aggregating hundreds of thousands, if not millions, of pages, and we're in their index. And I don't see why it would do any violence to anybody's copyrights or anything else to require someone who -- require an aggregator who wants to show up and index your site to present themselves in a technologically cohesive way so that the site can elect not to be aggregated in the index. I don't see that as a copyright or any other issue. I think that's a permission-based system in that aspect, and it ought to be fine. And in many cases, sites make choose, you know, to sign up and be in an index or certain aggregates, or they may choose to be in some and not others, but that ought to be the site's choice.

>> Suzanne Michel: Jim?

>> Jim Marcovitz: I mean, adding on to this, I think, again, we're talking about laws that could coexist along copyright. Hot news is something that could be looked at. I think what Ken just brought up about laws around, you know, technological standards -- you know, robots.txt is just fine. There is no law out there that says, "Yes. You know what? Website, you have to identify

yourself as a spider or an aggregator.” You know, robots.txt is great, but, you know, it's very limiting. You know, people haven't adopted the ACAP-type standard yet. It's really about developing a permissions-based, you know, system to allow people in and out and utilizing different tools to fight different forms of aggregation.

>> Suzanne Michel: Jim, do you see much of a distinction between an opt-out permissions-based system versus an opt-in? And robots.txt is -- you opt out. They don't have to seek the permission, but the concept provider can opt out.

>> Jim Marcovitz: I mean, you know, opt-in, you know -- it tells you it's an -- it's only opt-out now because there's nothing that says to someone that you have to abide by these instructions, and I think you have to shift that paradigm to one that is permission-based as opposed to opt-out-based.

>> Ken Richieri: I'm slightly different. I want to just say If people were required -- if there was a protocol that spiders were required to adhere to that had a simple, technological way for the sites to deal with it, I'd live with opt-out. You know, that's fine with me. That's my perspective.

>> Suzanne Michel: Bruce?

>> Bruce Sanford: Suzanne, this is probably a philosophical discussion between Professor Boyle and myself that is beyond the scope of this workshop. But I do think that the whole issue of whether you recommend some sort of federal law in the hot news area in the area of unfair competition, if you will, to address the unfair taking of, the extracting the value of, journalistic content on the web and whether that is addressed as a matter of unfair competition law or copyright law is a fair question. James refers to the Feist case, which is the 1991 case in the Supreme Court in which the Supreme Court examines the Congressional intent behind the copyright law. It's not their constitutional view,. They're doing a legislative history examination, it seems to me, and they're saying that Congress did not intend for copyright law to extend to sweat-of-the-brow type of copyright protection, that copyright law protects the expression, as James says, not the effort behind, underlying the thing. But that's a case involving telephone directories from Kansas, for goodness' sakes, and I think there's a reasonable discussion that could be had, either on the Hill or

in court, but I would think on the Hill in terms of what copyright policy should be in the Digital Age. There's a reasonable question of whether that should be true in the United States going forward. I think that conversation is gonna be had in Europe, and I think you're going to see a different kind of approach to copyright protection that does extend to some kind of recognition that copyright should protect the sweat of the brow, should protect the effort underlying the expression. James may not like that. I think philosophically, I think it's probably the way they go in the Digital, but that is a discussion that certainly will be had here in this country and around the world about the extent of copyright protection going forward.

>> Suzanne Michel: Before we move to that topic, which is our next topic, and I -- let me ask you, do you have any specific recommendations or suggestions or something you'd like to see happen with fair use?

>> Bruce Sanford: I think -- as I said before, I think it's in everybody's interest on fair use to come to some kind of resolution about practices, business practices, and uses and abuses of journalistic content on the web and to deal with that in a marketplace solution. I think that's preferable to litigation, and the history of copyright legislation on the Hill, as you well know, is that it is torturous. It takes a long time, lots of people get involved, everybody has their say, and it's not really suited for speedy solutions. On the other hand, if that must -- that dialogue or that discussion on the Hill has to take place in order to create leverage for marketplace solutions, then maybe it should take place. Clearly, there are issues about fair use that may start emerging in litigation and may advance the situation faster than anyone sees.

>> James Boyle: Suzanne, could I just clarify one legal point very, very quickly?

>> Suzanne Michel: Yes. Thank you.

>> James Boyle: Just on Feist, I think it's worth reading what they actually said. "While it may seem unjust, the publishers must share in certain situations their work product with others free of charge. That is not some unforeseen by-product of a statutory scheme, rather it is the essence of copyright and a Constitutional requirement.

>> Suzanne Michel: Professor Benkler?

>> Yochai Benkler: Not to be outdone by my professorial colleague, quoting not from Feist, quoting not from Kansas -- from Kansas phone directories, quoting from Justice Pitney in *International News Service versus Associated Press*, "It is not to be supposed that the framers of the Constitution, when they empowered Congress "to promote the Progress of Science and the useful Arts, by securing," et cetera, intended to confer upon one who might happen to be the first to report a historic event the exclusive right for any period to spread the knowledge of it." This beguiling idea of permissions everywhere -- permissions for whom? 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? When any reporter sits, combines what they hear with seven other reports they've listened to -- permissions? You want to live in a permissions system that facts are permitted? It is -- that is exactly the point about the fact-expression dichotomy. We exist in a world where facts are, as Justice Brandeis put it, in the same case. And remember, who were the ones who objected to the court in *INS v. AP*? Our First Amendment heroes, Brandeis and Holmes. Those were the two who thought the court went too far. What did the court do in this misappropriation? The British government wanted to penalize William Randolph Hearst for opposing U.S. entry into the war, so they blocked off his use of cables. Associated Press used that fact to competitive advantage, and the United States Supreme Court said, "That's fine." You can implement the censorial interest of the British government on internal U.S. politics by applying this right. That is the source. Who objected to it? The core lights of our modern First Amendment doctrine. Facts, as Louis Brandeis said, should be free as the air to common use. We do not have a permissions system for breathing.

>> Suzanne Michel: Let's talk about the "hot news" doctrine, then, which really raises the issue. [Laughter] And a difficult and interesting philosophical issue, also. We have a "hot news" doctrine in our law in the *INS* case that you mentioned. Do you see the contours of that doctrine as it currently stands as something that, depending on your viewpoint, is helpful to the news industry or harmful to public discourse? And then after we talk about how it currently stands, I think that will set us up for discussion of whether it should be changed in any ways. Any thoughts on that?

>> James Boyle: I think for the moment, it's really not -- it's very limited use. I mean, it's used occasionally because it's only a state right. I think it is used effectively, occasionally, to shut down. It was used initially by "The New York Times" and "The Washington Post" as a concomitant to a copyright claim which was a little shaky on a site in the '90s, prehistory of the Internet, to deal with a site that was framing -- I think it was, in fact a hot news site, right?

>> Jim Marcovitz: Oh, yeah. That's right.

>> James Boyle: And so you used a New York state, if I remember right, misappropriation claim there. But I think no one at the moment would claim that the "hot news" doctrine is of pervasive importance. I think it's probably, candidly speaking, extra boilerplate in a threatening letter or e-mail that gets sent to people which may have limited effects in a situation like the framing sites, but I don't think it's central at the moment.

>> Suzanne Michel: Laura?

>> I'm gonna surprise you. I disagree. [Laughter] Hot news misappropriation is a state right, as you've identified, and it is a misappropriation right, and the arguments on both sides are, "We have Feist. Feist says no more sweat of the brow. We can't protect it under copyright law." But the INS case, which has now been -- Motorola case, the NBA and Motorola versus STATS case, and most recently we had one in New York, which was Associated Press versus All Headline News. We were able to successfully bring at least -- at least bring the hot news misappropriation claim. The judge refused to dismiss it on a motion for dismissal, and so the hot news is alive and well, even in this Digital Internet Age, at least in the state of New York, which was good for us. Hot news misappropriation does protect what you could call "sweat of the brow." It protects people. It protects the news organizations who are sending their reporters out at a cost, and that cost is not just dollars and cents, that cost is also lives, that there are people who are sitting in their homes at their computers, reading what the AP has reported, at a cost, and retyping it, sending it, and reselling it, so there's the free writing that happens. There are direct competitors -- the Associated Press losing its customers because they were able to purchase it at a lower cost from the person

who sat in his living room and retyped the stories and stripped the Associated Press' credit off it. There's a disincentive for -- if the news organizations are not going to be able to continue to sell their product and still have to spend the kind of money and, as I say, cost in lives, in order to get that news reported and distributed and disseminated to people who want the information, there's gonna be a serious disincentive. We're gonna put fewer reporters out in the field. We're gonna have fewer people and fewer bureaus out there. We're gonna have fewer people to read those three Chilean reports, those three Chilean reports that were gotten by people who were there on the site doing original sourcing and doing original reporting. So, I don't think it's just a footnote, though I do put it in my copyright-infringement letters, as well. I rely very heavily on hot news misappropriation. I think it is absolutely appropriate, and right now, it's not codified, it's common law, and it's not probably in all 50 states -- hasn't been tested in all 50 states.

>> Suzanne Michel: Laura, I think part of what James might have been alluding to is that the "hot news" doctrine as it's discussed in the Motorola case can be viewed as fairly limited. It doesn't hit every use of the facts of the news that -- that you're generating. You have to have free writing by a defendant that actually threatens the existence of the private itself. So, does that reach far enough to be useful for you?

>> Laura Malone: That's exactly right, and I totally agree. I think that a good -- if there is going to be any federalization of hot news misappropriation, it has to be very narrowly drafted. It has to absolutely protect the kinds of things that we're talking about protecting here. And it should not be a widely cast net, and it needs to be as strict as it is set forth, I think, in Motorola.

>> Suzanne Michel: Professor Benkler.

>> Yochai Benkler: Just a small point -- the narrowness of the doctrine is federalized. NBA vs. Motorola is a preemption case -- that is to say, it's how far can you go in a state without running afoul of the copyright, the exclusive rights clause, and the -- and the Copyright Act. And so the narrowness and particularly that fifth element of you have to actually threaten with this act the business model or the other is considered to be federalized and a limit, and there are very few states that have hot news misappropriation, not in the context of news but in the context of exclusive

rights to databases, which was a massive debate in the '90s. There has been a good bit of work on the Constitutional limits that the Exclusive Rights Clause -- Article I, Section 8, Clause 8 -- places on the ability of Congress to do something under Article I under the Commerce clause. That would essentially do an end run around the limitations within the Exclusive Rights Clause. So, it's not at all clear that what's federalized here is the ability to expand the right, as opposed to the constraints on just how far, and that's before you get the First Amendment questions, although in principal, the Supreme Court has been willing to extend a copyright, even if the -- even though it's -- it's problematic under contemporary First Amendment doctrine. The core argument there has been, to the extent that it's existed, not the right to use somebody else's words. It's a very different animal when you say, "In order to preserve a public good, in order to serve the public welfare, we, the government, will prohibit you, a person, in your own words describing a truthful fact over the limitations of the First Amendment." Very problematic. Not at all clear that you want to be in a universe where your -- Your news organizations are arguing that the First Amendment can allow the government, in the public interest of expanding welfare, to say to someone, "You may not report in your own words a true fact, because if you do so, you will be undermining some global public welfare concern that we have" -- the flow of news, very problematic, both on Article I, Section 8, Clause 8 and under the First Amendment. And a good bit of this work was done in the context of databases, where The First Amendment argument was less central although also important and -- and the Exclusive Rights Clause played the larger role.

>> Suzanne Michel: James?

>> James Boyle: I think the Constitutional issue is a really interesting one. I'd be happy to get into that. I don't know how deep you want to go into it, but I think there is a fascinating Constitutional question here, and I agree with Yochai that the database legislation is an interesting precursor. I do think it's just worth stepping back. One thing that I like to do is just reflect how wrong I have been about my confident projections about technology and war in the past, because I find it a useful corrective. Like, if someone told me in 1990, like, "What would the model be for putting together an encyclopedia?" You know, one person has this sort of Encyclopaedia Britannica model, lots of copyright, lots of trademarks, highly paid editors, whatever, and another guy goes, "I'll have, like, a website, and people can, like, put stuff up," I wouldn't have thought that the latter was a workable

business model. I would have been wrong. I wouldn't have thought that Linux open source was a viable generation model. I would have been wrong. And I think that the key here is permissions-based, and I would separate James and Ken's different solutions slightly. At the beginning of the Net, it was an open question whether linking would be permissions-based or not. Right?

Beginning of the Web, I should say, not the Net. There were people who thought, wrongly, I think, under American law, but who thought that there ought to be permissions every time there was any link to anyone. And you still have people, mainly school districts, who write to you, saying, "May I link to your website?" Right? Just, you know -- it's kind of like this is some hoar that has existed in school districts for some reason. It's sort of like what 10-year-olds tell each other about sex. There's a sort of continuing cycle of misinformation about copyright law that persists, particularly in school districts. I just find it fascinating. But, anyway, at the beginning of the Internet, if we had been debating in this room, "Hey, there's this new world wide web thingy, right? So, should we be permissions-based, or should we be kind of opt-out, right? Opt-in or opt-out?" We could have come up with great reasons why everyone should have permission. And it's like, "It's not that hard. You just have to write to the person and get permission to link. It's not that hard. You know, if you want to create a mash-up on Google Maps, you know, you just have to write to all the data sources that you're gonna get, all million of them, and, you know, just get permission. It's not that hard." And all that would have prevented is the world wide web, right? But, of course, the people in this room wouldn't have cared because they didn't know what the world wide web was and couldn't have imagined either its horrific side -- child porn, piracy, which appears more often than child porn. That's one of its horrific sides. Child porn, you know, spam, strangely articulate Nigerian oil ministers who happen to write to me personally. Okay, so there's all the bad stuff, but there's also this amazing world that is being built, and the point is we would have got it wrong, dramatically wrong, if we'd gone permissions-based, okay? Now, the good thing that we would have foregone, we wouldn't have cared about because we couldn't have imagined it, right? This, for me, suggests humility as the guiding principle of intervention. Right? And so major changes, like going permissions-based -- I would say -- I just think that that's -- that is going to be so wrong in so many cases with such tragic results that I would really push against it. There are actually sort of criteria that one can work with to have the least harmful government intervention, right? So, you know, acknowledge you're likely to be wrong about the future of the technology. Acknowledge you're likely to be wrong about the promise of technology. Jack Valenti said that the VCR is to the

movie industry as the Boston Strangler is to the woman alone. Within 5 years, it was 50% of their market, right? So, acknowledge that there are gonna be unintended consequences. The DMCA -- a laudable attempt by content industries, in some ways, to protect their online access to their stuff -- ends up being used by people who make toner cartridges, like, "You can't do this because it's a violation of the DFCA." Garage-door openers, right? No matter how precisely we craft the right, there are gonna be unintended uses. So, I just think that, given all of that and particularly given what we would have got wrong if we'd gone permissions-based with the web in the beginning, I just think that that is the real humility with which we should approach this, legally speaking, and I actually think that humility has some Constitutional reasons to it.

>> Suzanne Michel: Let's talk about, then, some of the legislative ideas that have been proposed for the -- for the "hot news" doctrine with the -- with the thought of humility and where it might go. There's been proposals to perhaps clarify the "hot news" doctrine's not been pre-empted by copyright law, generally. First, I'd like to know, does anyone think that this pre-emption issue is actually a problem for bringing cases? Is it necessary to have this kind of clarification through a statutory basis? Another issue that's come up is should "hot news" doctrine be federalized? Because it is a state claim. Should we have a federal statute? Would that be helpful in bringing cases? Would it limit our abilities too much to use facts? And, also, any thoughts about just the concerns that might surround opening up the legislative process? Laura, do you have any thoughts on, in particular, legislation and whether it would or would not be useful in this area?

>> Laura Malone: I think, too, we rely on it on a state-by-state basis. We're lucky, though, we're in New York and we're able to know that hot news misappropriation is there. I think the reason for federalizing it, one of the most compelling reasons, is so that there is some guidance from state to state, so that there is uniformity from state to state on what exactly what hot news misappropriation is or is not. I think to that extent, it's probably very helpful. Then you don't have to rely on what an Oregon court is gonna say as compared to a Michigan court or a Florida court. When they're relying on their own line of cases, their own common law line of cases, then they could get very different results, I think. So, I think, in that way, it probably would be good to federalize it.

>> Suzanne Michel: The pre-emption issue -- how much is that a concern to you?

>> Laura Malone: Not.

>> Suzanne Michel: Okay.

>> Laura Malone: Yeah, it's not a concern to me.

>> Suzanne Michel: Bruce, any thoughts on this?

>> Bruce Sanford: My partner David Marburger and his economist brother have written a lot on that, and they believe that it would be useful to clarify the pre-emption issue, and they also believe that common law state-by-state development would be one way to go. I think I come down on the side of the usefulness of the discussion of a federalized law, because what the chief objective here, as it seems to me, is getting fair and reasonable compensation to content providers and moving to what Jim calls the permission-based economy. The question really is fair compensation for content. Newspapers do not have an audience problem. I think Hal's charts show that. They have a revenue problem. And I think what this legislation should be designed to do is to -- is to address what your workshops do, and that is how can we adjust laws in an era where journalism and content needs more of an economic funding? There's no silver bullet in any of these laws -- I think we all agree on that -- to solve the revenue problems, but it can make a material, incremental helpfulness, and that's the chief reason for doing it, I think.

>> Suzanne Michel: James?

>> James Boyle: I do think -- I just stress, and I really commend you -- I haven't looked at the second day of the workshop, which, sadly, I'm not gonna be able to be here for, but to look at the full range of possible interventions that the government or the FCC might make and really weigh costs and benefits, there is a persistent, I think, mistake that people begin this. "We're just seeking enforcement of existing law." "Well, this stuff is ours," right? "It's ours, and so we want to just protect our existing rights." But, of course, to the extent that it's just protecting existing rights, then protect the existing rights. To the extent that it's not protecting existing rights but actually creating

new ones, federal ones, I think that we really have to weigh the costs of this intervention, some of which are unknown, benefits which are unknown, as against the alternatives, and there, I think, there are a great number of alternatives to be considered. I have to say, and I speak as someone who's -- I've written in and been paid by the existing media, and I think I'm probably more likely to be directly paid by them than future models which are being developed, so I'm a loser on the Net exchange. But, you know, there really is -- the sort of Boyle's Law of Technology government regulation is that there's a pervasive problem which is mistaking the current parties who deliver a particularly useful social service or the social service itself. Right? You know, the people who -- who sold whale oil -- whale oil for lamps -- you know, could well have come to Congress and say, "Illumination for reading is a valuable thing. These newfangled electric light companies need to be put out of business," and that would have been the wrong move. I think that the "hot news" doctrine has real negative consequences. Right now it operates as a kind of insider's club. Much of what is done by newspapers with each other is actually problematic under existing "hot news" doctrine but would never for a moment be considered litigant. So, if somebody -- if Woodward and Bernstein have the scoop and the same day, those facts are taken out and repackaged, you know, put into a story in a competing thing, the competitor newspaper is never in a million years gonna sue so long as credit is given to "The Post." Right? That's not what the doctrine says, right? So, the difficulty is, as you look, you could actually say, "Wow, if this practice were continued, would it pose a threat to the existence of the model itself, you know?" You can look at all of these things. Now, of course, it's an insider world. The people who worked at "The Washington Post" now work at "The New York Times" and vice versa. They would never sue each other. They have extremely literate, wonderful general counsel who are benign in most of the decisions that they make.

>> Ken Richieri: I'll take that. [Laughter]

>> James Boyle: And so -- And so they don't -- Of course they're not gonna -- You know, they're generally, although they're not always, on the right side of the fair use issues, and as a result, we don't see what could happen were these rights to be fully enforced in a malign rather than a benign way. But as new entrants enter the market, that gentleman's agreement stops existing, and you start having people saying, "Well, I'm just not sure whether I want to go along with that." And then you can have people invoking these rights in ways that I think newspapers themselves would find -- and

their successors -- would find profoundly problematic. I think that it's much better to focus on -- I think enforcing the existing states rights to the extent they're useful -- great. The idea of federalization, when we know what happens to intellectual property rights when they get into Congress, and it's not pretty -- right? -- and we know the special interests that come in and add things and we know, "Oh, let's just broaden a little bit for, like, real-estate prices, and I'm sure we can get something in there for," you know, name your special interest, you know? This is a -- this is a very dangerous process for us to open up with the newspapers, and I agree, being the most appealing, the poster children, right? They actually do perform a socially useful function. They have genuine concerns about the business model. This is, frankly, the wrong place to pursue those concerns, but I understand the inclination. I really fear what happens when you open that up.

>> Suzanne Michel: Ken?

>> Ken Richieri: I have to say I think sort of the club analogy is not a particularly good one here, just in a sense. I mean, I think what Laura is talking about -- and which does exist. There are entities -- It's a totally one-way street. The entity exists to report on what "The Times" is reporting right now. That's what they do. Now, one could say, in the history of copyright solutions, that's the collective copyright. They're making a judgment that anything we say is news and only what we say is news is news. They're just taking it and rereporting it. But it's not -- it's not a two-way street. It's not that they sometimes do things that we take and whatever. It's just people exist solely -- solely to report on what we're doing, which really is a situation that you can run into with headline news. I mean, their day job was to look at whatever AP said was news and to rewrite it as news. So, I think that your analogy kind of falls apart on that. I mean, whether there's a -- putting aside whether -- your point on whether the legislative solution is the right solution, it's a different problem you're solving for. It's a different problem.

>> Suzanne Michel: Okay. Well, in that kind of circumstance where the user of the content is rewriting the content, so it might not be protected by copyright, which only reaches expression, what kind of tools -- Do you have tools other than hot news to reach that? Jim, you have any thoughts on that, or is hot news your main way to reach that problem?

>> Jim Marcovitz: Well, I mean, I think you look at copyright as one tool to reach that. I think hot news is another tool to reach that. I don't think there's necessary very many other tools in the arsenal that will reach that sort of activity.

>> Suzanne Michel: Yochai?

>> Yochai Benkler: I think one of the advantages of an administrative fact-finding process of the kind that you're engaged in is that you're not limited, like courts, to look at only unattractive defendants. [Laughter]

>> James Boyle: And attractive, please. [Laughter]

>> Yochai Benkler: You're so much better at giving compliments than I am.

>> James Boyle: I'm from Scotland. We all focus on the positive.

>> Yochai Benkler: I think that to describe the day of a journalist or journalism today as one that looks only to fully funded long trips and three months of -- of -- in the hills of Afghanistan finding a Taliban fighter whereas everybody online just looks at what The Associated Press says is news and copies it just profoundly misstates the way in which -- mischaracterizes the way in which the ecosystem is developing, and though you didn't say it and I presume you would resist my characterization of that of what you said, the implication that the thing you keep focusing on is the equivalent of a copyist spammer as opposed to understanding, and, again, going back to what the if not unintended consequences, at least not the consequences about which we speak -- looking at Wikipedia, looking at things like Yelp, looking at the wide range of models that have emerged in various different spaces in the information economy, an ecosystem is developing that includes all sorts of players. When you emphasize the way in which a particular doctrine will be used against a particularly unattractive player, you understate the negative implications for all of the other places where you're seeing -- As I said, you're seeing the emergence of party presses, both commercial and noncommercial. You're seeing the emergence -- They're not formal party presses. They're mobilized, and, in that regard, actually imposing some internal party discipline, for better or worse,

if you like parties or not, but imposing some party discipline on both major parties. You're seeing the emergence of research centers suddenly being able to be not only delivering one little particular discreet paper once in a while but actually being able to create blogs by people who maybe read very different materials that become sources for more sophisticated journalists to begin to read. So, all of these things will have to move from a system that assumes that I can report the facts to a system where I need to have special relationships, either in the aggregate or in the individual. And that puts a damper. That's the point of losing the web, and I think it's really important for this process, unlike a court that doesn't have jurisdiction to look beyond the attractive plaintiff and unattractive defendant, that you look at the systemic effects and that you look at how, given all of the players, the cost to all of these other models will increase when you try to solve this particular problem looking at a particular subset of unattractive defendants.

>> Suzanne Michel: James?

>> James Boyle: And I'd just like to say, particularly to Ken and to Laura, if I may -- I didn't express myself when I was talking about the club. It's this. Right now we don't understand the unattractive things about the "hot news" doctrine because the people enforcing it are people like you. You have the First Amendment wired in to your bones, right? And you are dealing frequently -- right? So, you're not going to enforce it in unattractive ways. You know, I don't particularly like the sploggers, either. We might disagree about the particular legal resolution that's appropriate. Let's take a concrete example. Remember the sort of political activist-filmmakers who broke the ACORN story, the -- So, they go in and they get them to say terrible stuff on -- on film. So, these people are highly politically motivated. They do something very socially valuable, which is they bring certain facts to light, right? But they're probably not gonna be repeat players. That's actually -- indeed, they aren't members of the club. Now, imagine with the "hot news" doctrine in place -- So, here's big news, right? This is really big news. And all of you guys are going to report it -- rightfully so, right? But now they're saying, "Well, actually, I have this new federal 'hot news' doctrine. Isn't it nice? It's really spiffy. And I'm not sure -- I think 'The New York Times' are a bunch of liberal milksofts, and I think they're gonna put, like, a different spin on it. They're gonna say, 'Is this really representative of what the organization does?' So I just really just don't want them getting access to these facts. And now give them a legal club that allows them to at least to slow

down your reporting -- and time is of the essence, as the "hot news" doctrine makes clear. Right? My point is, you have all had a sense of how hot news applies because the people enforcing it are the people whose interests are, broadly speaking, socially congruent with our social interests and access to the news. That would not be the case in the new brave online world. That's my point, right? And that's why you, too, should be more scared than I think you are about the possible consequences, because deep in your hearts, you're going, "Oh, come on. I'm not gonna enforce this. These academics make up pretty good stories, but I'm never gonna go out and do that." I actually largely believe you. But that's not the point, because it's not you I'm necessarily worried about. It's, on the one hand, the people who think, "I can get the real-estate prices locked up so that people don't get immediate access to those," and that matters. On the other hand, it's the people who are politically motivated, have broken a big story, and they want to shut down access. I could spin you 20 other parades of horrors, right? The point is once you acknowledge there are new entities breaking the news -- and we have to acknowledge that -- then you have to acknowledge that the rights holders are not just you. And they will use the rights in ways that you as well as we will not like. So, I think that's the club point. It's not -- It's not the -- I agree. They are just -- It's complete -- They are parasites. Parasites, occasionally, are using it.

>> Suzanne Michel: In our last five minutes, let's think about search engines a little bit. There have been some proposals that perhaps the caching activities of search engines, the copying of a web site in order to index it, should be considered copyright infringement. Reactions, either positive or negative, to that raises a host of questions. Is it copyright infringement now? Should it be? What would be the implications if it were? Bruce, I think you had some suggestions about this.

>> Bruce Sanford: Well, that's the big elephant in the room in the book publishers' case, again, obviously, and it's an open question, an unresolved judicial question as to whether it's -- The search engines believe it's not copyright intervention, and other people can argue that it is, and it hasn't really been resolved. Again, I think this is an issue where it makes -- what is important is maybe a marketplace solution and discussions between the search engines and people who feel that what they've done is copyright infringement. And that's what you see going on, and you just have to resolve or settle the book publishers' case, which may or may not -- may or may not be successful.

>> Suzanne Michel: Doesn't any market-based solution rest on a foundation of some kind of intellectual property right, though?

>> Bruce Sanford: Yes, I think it does. The question is whether the activity of the search engines in -- in caching and copying and then making some sort of repeated commercial use of the material that they copied is whether they're gonna have a fair use defense or not. And the strength or weakness of that fair use defense is obviously gonna be dependent upon the facts of the case. And what -- I think everyone believes it will turn on is the repetition of the commercialization in this substitutability of the usage and whether some value of the content or the journalistic content is being extracted by that process. As I said, I think that's -- whether it's book publishers or newspapers arguing it, that's the issue for that case. It's certainly one that can be resolved again with -- with the approach that England is taking by trying to address these issues in a legislative format. And even as one who said that copyright-- that discussions of amending copyright law is torturous on Capitol Hill, I do not agree that's not a good reason to engage in the legislative discussion and debate, and the healthcare debate on Capitol Hill is tortuous. Many legislative processes are torturous. That doesn't mean you shouldn't do them and have the conversation about how copyright law should apply in a digital or an online world or whether it should be adapted judicially by courts, which may be far more uncomfortable, as the professors have suggested, in trying to take a 1909 and 1976 and other copyright laws that really don't foresee the usage and apply them to some specific fact situation. So, I'm really -- at the end of the game, I really think there should be a legislative discussion about that.

>> Suzanne Michel: James, one point I took out of your book was that sometimes creating these kinds of property rights gives content producers control over technology. Do you have any thoughts about that?

>> James Boyle: I think so. There's a nice analogy here that Larry Lessig points out, which is that in the early days of aviation, property owners made the very reasonable argument that under the real-estate laws that we had all learned in property law that your property extends infinitely from a point at the center of the earth out to the farthest reaches of the universe, since nothing greater than

American property law could obviously be imagined -- no greater power. And so people started saying, "These newfangled airplanes, commercial airplanes, can't fly over my land 'cause they're violating my property rights." And it took the courts not very long to go, "This would be a disaster," right? "This permissions-based system would be a complete disaster. We would lose, as a society, far, far more than we could possibly gain." Similarly, any system which makes it a copyright infringement to index the web -- let's start with indexing it. You're supposed to promote science and the useful arts. Any system that basically says that, you know, "Hal has to write individually to every website and say, 'Hey, guys, can we index you?'" is a disaster for copyright, for Article I, Section 8, Clause 8, so, I mean, it's a disaster for knowledge. It makes the web effectively useless, because you simply -- stuff's there, but you can't find it, right? So that's -- So, an opt-in system is -- is terrible. An opt-out system, which we largely have through robots.txt, has worked quite well, and, thank God, Congress hasn't got involved in messing it up yet. We can always look forward to that with great happiness. Then caching -- caching is more complicated, though from a copyright perspective, there's a copy, you know, in the indexing, right? It may be stable enough to be perceived or seen if the wrongly decided case of MAI is taken as your basis for fixation. So, copy is copy is copy, so, to us, it seems different to us for the reasons that Bruce said, 'cause you're thinking about frequency of use and substitutability, whereas the copy for the purposes of indexing is clearly naught. It's covered by many things, including the Perfect 10 Doctrine that Yochai mentioned. So, what would we do if we got actually control over caching? I do think that where the cache simply becomes a substitute and the person effectively under the guise of being a search engine simply takes it and just offers it and says, "I'm just gonna feed you this," and particularly "I'm gonna feed you with my own hands," then I think a fair use argument becomes much, much weaker, so I agree with that. But I really -- again, unintended consequences is the theme, I would like to say. We could effectively end up giving control over a technology, i.e. the technology over the web, to a particular set of content providers in a way that would be profoundly anathematic not just to journalism and news but to the entire society. So, I think thank goodness we didn't legislate on this early and allowed it to develop with this kind of system that we have, and as soon as you start challenging that major premise and saying property rights, lest people specifically waive them -- Well, you know, we know what the current system got us. It got us the web. You want to change that fundamental premise and think that won't change the technology? I think not. So, that's where I would really be scared. Even though I'm perfectly

happy to discuss much more narrowly tailored, specific solutions on how you -- what robots.txt does, a lot of that, I think, is technical rather than legal, and there are lots of things that could be done under existing law and with existing technology which newspapers now are experimenting with. I mean, this is the most vibrant time for business experimentation in the newspaper world, which is the last time you want to spend imposing a new legal right. Let's see what happens, you know? Maybe the pay walls will work. Maybe they won't. We don't know. Maybe these new models will flourish. Maybe they won't. We don't know. You know, this is not the time to drop a new crystal into the supersaturated solution and see what it creates.

>> Suzanne Michel: This has been wonderful. We are out of time. If any panelists would like to make a final comment, please, we welcome that. All right. Well, thank you very much, and please join me in thanking our panelists. [Applause]