

March 26, 2010

**VIA HAND DELIVERY**

The Honorable Christine Varney  
Assistant Attorney General  
Antitrust Division  
Department of Justice  
Main Justice Building  
Room 3109  
950 Pennsylvania Ave., N.W.  
Washington, DC 20530

Re: Request of The Associated Press for Business Review Letter

Dear Assistant Attorney General Varney:

We represent The Associated Press ("AP"), a New York Not For Profit Corporation organized as a membership cooperative that includes approximately 1,300 daily newspaper members. The AP employs a staff of more than 3,000 journalists based in approximately 240 bureaus in nearly 100 countries. News stories, photos, graphics, audio, and video ("news content") created by both the AP's journalists and by journalists on the staff of AP's members serve over 1,700 print journalism outlets, more than 5,000 broadcasters, and other subscribers.

This letter requests a statement of the Antitrust Division's enforcement intentions, pursuant to the Division's Business Review Procedure, 28 C.F.R. § 50.6, respecting a proposal relating to the presentation, licensing and tracking of news content by the AP, its members, and potentially other journalism outlets.

The proposal involves the creation by AP or an affiliate of a voluntary registry available to the owners of rights in news content in which individual content owners can list their news content, specify the types of uses others may make of their registered content, and specify the terms on which such use may be made. The Registry will offer content owners and content users a more efficient (but non-exclusive) means of licensing content. Registered content users will be able to check the Registry (likely on an automated basis) in lieu of contacting each owner of news content, who may have different means (or no automated means at all) of informing users of the terms on which

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their content is made available. The News Registry will also use digital means to allow registered content owners to measure the use of their news content.

We describe the proposal below in greater detail, explain the market failure that has resulted in the need for this proposal, and describe why we believe that it does not raise concerns under the antitrust laws.

### *A News Presentation Format*

The News Registry will be built to work with a voluntary presentation format – the News Presentation Format – developed by the AP for the coding of news content with standardized metadata that would provide specific information about each news item’s attributes. For example, some of the standardized metadata included in the format are the source news organization, title, author, dateline, and geographic information relevant to the story. Of particular relevance here, the News Presentation Format would also provide a standard by which owners of news content could associate the terms and conditions applicable to republication of the news content and alert users to the existence of other potential terms and conditions applicable to published news content that the user can discover through registration with the Registry. This metadata would also be available to search engines for their use in indexing news content and identifying the most relevant news items to display.

AP developed the News Presentation Format in consultation with the UK-based Media Standards Trust (see [www.mediastandardstrust.org](http://www.mediastandardstrust.org)), which is leading an independent news transparency effort called “Value Added News” before introducing the format for formal consideration by the appropriate open standards community. The standards community recently released version 0.1 of the News Presentation Format, labeled as hNews (see <http://microformats.org/wiki/hnews>). It is a draft specification that builds on pre-existing, publicly-available information formats, but introduces a number of fields that more completely describe a journalistic work. Although the current version has been developed for news text articles, AP intends to work with interested parties to evolve it (or develop other similar means) for use other news formats such as still images and video.

### *The News Registry*

AP is currently the sole owner of the News Registry, which will be a database with information about a large number of individual items of news content from multiple participants. At launch, much of the content registered with the News Registry will be published in the News Presentation Format, although, because the News Presentation Format is an open standard, users of the News Presentation Format will have no

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obligation to utilize the News Registry. AP plans to use News Registry services for some of its content and to make that same opportunity available to both AP members and nonmembers. AP will not require arrangements with the News Registry to be exclusive. Participants will be free to include as much or as little of their content as they wish, and will be free to include their content in any competing registries that may be developed.

The News Registry will be designed to provide content owners and publishers with a system to (i) identify original content items to the News Registry, possibly, at a variety of levels (*e.g.*, an individual news story or all of the content owner's news items in a particular content category, such as all stories about the Washington Redskins or all stories about healthcare reform); (ii) specify the types of uses others may make of all or portions of the registered content (*e.g.*, no more than 3 items within a topical category can be used daily); (iii) specify the terms on which such use may be made (*e.g.*, content may be used only on a revenue sharing basis, subject to a minimum license fee); and (iv) affix unique tags (equivalent to bar codes on physical goods) to each content item registered with the News Registry, to connect the content item as it is being published and/or consumed with the News Registry. Individual content owners will be able to use the News Registry to facilitate their licensing of individual items of news content to users or to offer their terms for licenses for categories of their content. The News Registry may provide content owners with the ability to require tracking of usage through the News Registry when licensing their content to third parties, whether such licensing is through or independent of the News Registry. The News Registry will also be designed to provide participating content users with a system to identify content that they seek to license and specify the terms on which they offer to license that content from content owners participating in the News Registry.

After content has been registered in the News Registry, the Registry will employ a variety of digital means, including the tags specified by the News Presentation Format, to identify use of individual pieces of registered content on digital platforms. The information so gathered will be used to develop a searchable index of published news content, content usage metrics and other such analytics. These measurements will provide content owners with information about the nature and scope of use on the Web of each piece of registered content that is not possible today. For example, content owners can know how much of their content was used by a given republisher and for how long, allowing content owners to analyze both whether the use was authorized and the level of utilization (which may be relevant to the calculation of royalties).

The News Registry will also enable the creation of new products or services that may be of value to content owners, content licensees, or to readers. For example, data gathered by the News Registry could be used to create products that can be used to inform readers of the relevance and timeliness of a news item. The Associated Press may

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seek additional guidance under the business review letter process with respect to new products or services enabled by the News Registry in appropriate circumstances.

Users of the News Registry would participate as content owners or content users (though some users -- who both generate content and republish content from others -- would likely register as both). The News Registry will be designed to deny access via the Registry to competitively sensitive information (such as content usage data and licensing terms) belonging to other participants, taking into account that content users would need access to licensing terms applicable to content that is offered for licensing through the News Registry and that two participants would have access to common data under a bilateral content licensing arrangement between them. Thus, for example, a participating content owner will have access to usage data for its content even where such usage occurs on another News Registry participant's web site. Similarly, for example, a participating content user will have access to usage data for content that it publishes or syndicates even where the published or syndicated content belongs to another News Registry participant.

### *Participation in AP's Initiatives*

As noted above, AP has previously released a draft microformat specification underlying the News Presentation Format into the public domain (*see* <http://microformats.org/wiki/hnews>). Any publisher of news content is free to adopt the format when publishing news content online.

Participation in AP's News Registry will be open to AP, members of AP, and others who create and report news and information of public interest on an ongoing basis or have an archive of such content, as well as to those who use such content. The News Registry will open on an a nondiscriminatory basis to content owners and content users. Initially, for a period following launch, the News Registry will be made available to those who create and report news and information in the English language, though the AP intends to extend the News Registry to cover other types of content (both other languages, as well as photo and video content) in later stages.

Participants will be required to enter into an agreement with AP to receive News Registry services. AP anticipates that the agreement for content owners will vary from the agreement for content users, but expects the agreements to include commercial terms and conditions that are customary for similar arrangements. AP will develop and maintain contractual terms and conditions that reflect the representations made in this letter.

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The agreement between AP and content owners will prohibit the use of the News Registry by content owners to communicate, disseminate or gather revenue, traffic, use or transactional information about other participating content owners. In addition, it will require each participating content owner not to set, formulate, benchmark, or suggest licensing terms, including, pricing terms, for content made available through the Registry from any other participating content owner. It will also require that any content listed in the News Registry for licensing be available for immediate contracting and provide that participation in the News Registry does not limit the licensing terms for content that is licensed outside the News Registry.

For purposes of News Registry operations, AP, in its capacity as a content owner or user, would be required to comply with the requirements generally applicable to other content owners or users, respectively.

AP plans to support the News Registry activities by assessing fees on each participant for the services that the participant elects to receive pertaining to the News Registry. These fees may vary based on the nature and scope of the services delivered to a participant, but would be non-discriminatory between similarly situated content owners or similarly situated content users.

Once a participant has accepted these minimum conditions, it has flexibility to determine the extent of its participation in the News Registry. For example, a news organization can enter its content into the News Registry and use the Registry just to track use of the content, or it can also offer license(s) to registered content (to the extent such capability is supported by the News Registry). As noted above, participants will be able to include as much or as little of their content in the News Registry as they wish.

AP may also provide supplemental services, such as implementation and customer support, to participants in connection with their adoption and use of the News Registry. AP will institute and maintain appropriate firewalls to prevent those engaged in managing AP's role as a participant in the News Registry from accessing competitively sensitive information belonging to another News Registry participant through the News Registry. For example, when providing implementation and customer support services, the AP will implement appropriate procedures to ensure that the confidential information of other content owners and users is used only for the purpose of supporting such users, and not for purposes of competition by AP as the owner or user of content.

### *Need for the News Registry*

According to a study by the Pew Research Center for the People and the Press, the Internet has overtaken newspapers and surpassed all media other than television as a

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source for national and international news.<sup>1</sup> More than 40% of Americans rely primarily on the Internet (versus 70% for television and 35% for newspapers), and as many Americans under thirty rely primarily on the Internet (59%) as look to television for news.<sup>2</sup>

A significant portion of the news available on the Internet is, however, used without the permission of or compensation of owners of the rights in news content. For example, within a few hours of AP breaking an exclusive story about a personal matter concerning the Governor of South Carolina, entire copies of the story or material portions of the story with no new original expression added were discoverable through a popular search engine on approximately 23,000 Web pages. This kind of widespread use of the intellectual property of content owners without compensation -- a form of free riding -- diminishes incentives to invest in the creation of news content in the first place.

AP believes that this free riding on the investment of content owners is in part the result of a significant market failure. Confirming AP's view, on December 1, 2009, a consortium that is said to include more than 1,500 publishers released a research report on the proliferation of U.S. newspaper content, showing that over a 30-day period more than 75,000 unlicensed websites reused U.S. newspaper content online. Almost 112,000 unlicensed near-exact copies of unlicensed articles (and more than 500,000 shorter excerpts of articles) were found on these sites.<sup>3</sup>

A principal reason for the market failure is the unique nature of the news business. Thousands of sources of news content gather and disseminate news on a continuous basis, but without advance awareness of an impending news development or its significance. It has proven infeasible for republishers of content to negotiate in advance with all of these thousands of rights owners regarding the terms on which their content may be used. Moreover, given that stale news is of limited value, it has not been feasible for republishers to contact and contract with content owners only after learning of content that could be republished.

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<sup>1</sup> Pew Research Center for the People and the Press, *Internet Overtakes Newspapers As News Outlet* (Dec. 23, 2008), available at <http://people-press.org/report/479/internet-overtakes-newspapers-as-news-outlet>.

<sup>2</sup> *Id.*

<sup>3</sup> See Fair Syndication Consortium, *Fair Syndication Consortium Research Brief: How U.S. Newspaper Content is Reused and Monetized Online* (Nov. 23, 2009), available at <http://fairsyndication.org/guidelines/USnewspapercontentreusementudy.pdf>.

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For example, nearly all news events have a unique local perspective, whether that involves a matter of finance, safety, sports, celebrity, publicity hoax or other subject matter. Until a news story breaks few republishers would have considered it important to have established republication license terms with a local news publisher. But after the story breaks, the local news publisher's content becomes far more relevant to search engines, news aggregators, bloggers, and other republishers. Absent an offering like the AP's proposed News Registry, it is costly and difficult for republishers to quickly learn the terms upon which content may be licensed and contract with the local publisher, and similarly costly and inefficient for the local publisher to identify unauthorized use of its content in order to secure the royalties to which it may be entitled. But if the local news publisher is able to utilize the News Registry, republishers would be able to quickly obtain information on the licensing terms applicable to use of content. And if the local publisher makes its content available for licensing through the News Registry, republishers would be able to contract with the publisher for rights.

AP believes that use of news content occurs without permission from the rights owners in part because there is today no ready way (let alone an automated way) for a content owner to ascertain all interested republishers as news stories break and develop and to communicate terms and conditions for use of its content, and because there is similarly no ready way for a republisher to quickly determine the terms applicable to licensing of content. AP believes that its proposal for a voluntary news registry will facilitate efficient disclosure and contracting regarding intellectual property rights and therefore redound to the benefit of both owners of rights in news content and republishers.

### *Antitrust Considerations*

We believe that the News Registry is a procompetitive response to a market failure and that it should not raise concerns under the antitrust laws.

First, since the initiative is a legitimate collaboration with demonstrable efficiencies, it must be assessed under the Rule of Reason; it cannot be characterized as a naked restraint or condemned as per se illegal. AP is creating a new service designed to facilitate transactions between content owners and republishers, a procompetitive goal and result. As in *Maple Flooring Manufacturer's Ass'n v. United States*, 268 U.S. 563 (1925), the purpose of the Registry would be to "gather and disseminate information" about news content and the terms on which it is available for license, but because participants would do so "without however reaching or attempt to reach any agreement or any concerted action with respect to prices or production or restraining competition," they would "not thereby engage in unlawful restraint of commerce." *Id.* at 586; *see also*

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*United States v. Citizens & S. Nat'l Bank*, 422 U.S. 86, 113 (1975) (“[T]he dissemination of price information is not itself a per se violation of the Sherman Act.”).

Given that the News Registry initiative must be analyzed under the rule of reason, it can be unlawful only where it can cause anticompetitive effect that outweighs its demonstrable, pro-competitive justification. Such anticompetitive effect is highly unlikely here.

It is difficult to see how use of the News Registry to create a market to facilitate licensed use of news content could reduce competition. Although the Registry may make it easier to identify unlicensed use of content by republishers, nothing about the Registry will force republishers to license content. AP believes that a vast majority of unlicensed republishers infringe the copyright of content owners and misappropriate the “hot news” rights of content owners under state law. (The doctrine of “hot news misappropriation” was created specifically to protect certain aspects of news content against free-riding. *See International News Service vs. Associated Press*, 248 U.S. 215 (1918); *see also Associated Press v. All Headline News Corp.*, 608 F. Supp. 2d 454, 458-61 (S.D.N.Y. 2009)). However, to the extent that republishers believe that content owners do not have enforceable rights in their news content or that republication does not violate such rights, nothing about AP’s proposal would limit republishers’ ability to continue their current mode of operating if they are willing to defend whatever infringement and misappropriation claims might be brought by rightsholders. (AP may offer services that assist participants in the News Registry with documenting and analyzing unauthorized use of content in their enforcement efforts.)

Nor is the News Registry likely to facilitate collusion on licensing terms among content owners. As noted above, the News Registry will be designed to deny access via the Registry to competitively sensitive information (such as content usage data and licensing terms) belonging to other participants, taking into account that some content owners may also participate as content users, that content users would need access to licensing terms applicable to content that is offered for licensing through the News Registry, and that two participants would have access to common data under a bilateral content licensing arrangement between them. But even if such information from one content owner became available to other content owners, collusion among owners of news content is implausible. AP cannot know at this stage how many content owners will participate in the Registry, but it seems likely that content owners collectively accounting for a significant share of available news content and information of public interest will not participate and thus that their licensing terms will not be available in the Registry. And even if a significant share of content owners did participate in the Registry, collusion among hundreds or thousands of content owners would not be practical.

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The proposed venture has also been structured in a way designed to minimize the risk that it can be used as an instrument of anticompetitive exclusion of either content owners or republishers. With respect to content owners, participation in the Registry will be open to all owners of news content and information of public interest (though open only to English-language text content during an initial phase after launch). Thus, even in the unlikely event that participation in the Registry were critical to the competitiveness of a content owner, there would be no risk that the Registry could be co-opted by a content owner as a tool to foreclose its rivals.

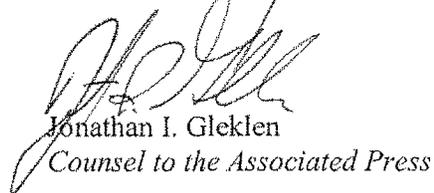
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AP appreciates the opportunity to avail itself of the Business Review Letter process and would respectfully request that the Division respond to this request as expeditiously as possible. We would be pleased to provide the Division with any additional information that it would find useful in evaluating our request.

Sincerely,



William J. Baer



Jonathan I. Gleklen  
*Counsel to the Associated Press*