SWEET FRUIT OR POISONED APPLE? THE IPAD'S EFFECT ON NEWSPAPERS

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INTRODUCTION

The release of Apple, Inc.'s iPad tablet computer in early 2010 sparked a wave of excitement among newspaper-industry watchers, who were hopeful that the iPad would revitalize the struggling business. News Corp.'s Rupert Murdoch famously called the device a "game-changer" that would get young people reading newspapers.[1] Although the iPad gives readers a larger reading surface than a smartphone while still allowing them to carry their newspaper anywhere, the iPad might not be the "game-changer" that some in the industry hope it can be. The iPad, like Apple's other devices, is a closed system that discourages innovation

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1. Andrew Clark, *Rupert Murdoch Says Apple's iPad is a 'Game-Changer' for News Media*, THE GUARDIAN (London), Aug. 5, 2010, at 27, *available at* http://www.guardian.co.uk/media/2010/aug/05/ipad-rupert-murdoch-apple-newscorp.

by others.[2] Although Apple allows outsiders to develop applications for its platform, Apple retains the power to deny developers access to the iTunes store.[3] So in order to have access to the iPad, newspapers must accept Apple's terms for access to the iTunes store. If the iPad is going to drive paid, electronic newspaper content, then newspapers will have to make Apple's distribution channel work for them instead of bowing to Apple's demands.

Because the iPad is currently the leading tablet device on the market,[4] this Note focuses on Apple and its content distribution channels. However, other companies, such as Samsung, either have released or will shortly release their own tablet computers.[5] The 2011 Consumer Electronics Show featured more than eighty portable, touch-screen computers.[6]

Part I of this Note looks at the reasons the newspaper industry is struggling in the first place and how the Internet has eroded its subscription and advertising models. Part II reviews Apple's agreements with other content-producing industries and examines how such agreements have affected those industries. Part III explores some of the challenges that newspapers might face in trying to make content on the iPad work for them while managing a relationship with Apple. It also raises the question of whether, in order to promote independent editorial voices in the United States, the government should protect the newspaper industry in some of its business ventures.

I. THE PROBLEM

Since the late 1990s, newspapers have undergone a steady decline in both circulation and advertising. Industry analysts cite the rise in Internet use as a major factor in those declines.[7] The overall number of

2. TIM WU, THE MASTER SWITCH: THE RISE AND FALL OF INFORMATION EMPIRES 290-93 (2010).

3. *Id.* at 292.

4. Apple is expected to account for three-quarters of the tablet application market in 2011. Zach Epstein, *Major Mobile App Store Revenue Will Grow 77.7% in 2011*, BOY GENIUS REPORT (May 5, 2011), http://www.bgr.com/2011/05/05/major-mobile-app-store-revenue-will-grow-77-7-in-2011/.

5. Brian Barrett & Matt Buchanan, *The Blackberry Playbook Tablet: 10 Things You Need to Know*, GIZMODO (Sept. 27, 2010), http://gizmodo.com/5649238/blackberry-playbook-tablet-an-ipad-killer-for-the-suits; Melissa J. Perenson, *First Impressions: Samsung's Galaxy Tab*, MSNBC (Sept. 17, 2010), http://www.msnbc.msn.com/id/39234134/ns/technology_and_science-tech_and_gadgets/39672835.

6. David Sarno & Alex Pham, *Tablets Are Talk of the Town at CES*, LOS ANGELES TIMES (Jan. 6, 2011), http://www.latimes.com/business/la-fi-ces-tablets-20110106,0,7680250.story.

7. *Who Killed the Newspaper?*, THE ECONOMIST, Aug. 24, 2006, at 9, *available at* http://www.economist.com/node/7830218?story_id=7830218.

newspaper readers continues to fall, and increasing numbers of the remaining readers get their news online (and for free) as opposed to in print.[8] Younger users are the most likely to get their news from some kind of mobile device rather than a newspaper.[9] In light of these trends, the iPad offers some promise as a way for newspapers to make money off of the delivery of their own digital content—which is something that search engines such as Google and Yahoo! have been more successful at than the newspapers that produced the content in the first place.

A. *What Happened to the Daily Newspaper?*

American newspapers have a broken business model. A litany of bleak statistics depicts an industry facing some serious changes: Newspaper circulation has declined steadily over the last few years, with a particularly steep drop in 2007 in concert with the recession.[10] Hundreds of daily newspapers have closed their doors in the last four years, including venerable publications such as the *Honolulu Advertiser* in Hawaii and the *Rocky Mountain News* in Denver.[11] Since 2007, 13,500 journalists have lost their jobs, bringing the total number of full-time newsroom employees to a level not seen since the mid-1970s.[12]

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8. In 2008, 39 percent of respondents to a Pew Research Center survey read a newspaper, in any form, down from 43 percent in 2006. Fourteen percent of those 2008 respondents read the online version, up from 9 percent of the 2006 respondents. *Newspapers Face a Challenging Calculus*, PEW RESEARCH CTR. PUBL'NS, (Feb. 26, 2009), http://pewresearch.org/pubs/1133/decline-print-newspapers-increased-online-news.

9. Forty-seven percent of adults now report getting their news from a mobile device. Seventy percent of those surveyed between the ages of eighteen to twenty-nine reported getting their news from some kind of mobile device. The study did not differentiate between cell phones and tablet computers. Tom Rosenstiel & Amy Mitchell, *Survey: Mobile News & Paying Online, The State of the News Media 2011*, PEW RESEARCH CTR., http://stateofthemedia.org/2011/mobile-survey/ (last visited Dec. 14, 2011) [hereinafter 2011 Pew Study].

10. Figures from the Audit Bureau of Circulations ("ABC") show a 5 percent drop over the six-month period ending September 30, 2010. Jeremy W. Peters, *Newspaper Sales Decline 5%, But 2 Big Dailies Show Gains*, N.Y. TIMES, Oct. 26, 2010, at B4. This was an improvement from the previous six months ending March 31, 2010, when newspaper circulation dropped 8.7 percent. Joseph Plambeck, *Newspaper Circulation Falls Nearly 9%*, N.Y. TIMES, Apr. 26, 2010, at B2, *available at* http://www.nytimes.com/2010/04/27/business/media/27audit.html; *see also*, Michael Liedtke, *New Rules Don't Stop Newspaper Circulation Fall*, THE ASSOCIATED PRESS, May 4, 2011 (stating that the March 2011 figures were calculated using new ABC guidelines, so the ABC did not make direct comparisons to the previous six-month period. Most large newspapers reported a drop in circulation, although the Wall Street Journal and USA Today made digital gains).

11. *See* NEWSPAPER DEATH WATCH, www.newspaperdeathwatch.com (last visited Dec. 14, 2011); *see also* PAPER CUTS, http://newspaperlayoffs.com/maps/closed (last visited Dec. 14, 2011) (providing a list and map of newspapers that have recently closed or stopped publishing).

12. *Decline in Newsroom Jobs Slows*, THE AM. SOC'Y OF NEWS EDITORS (Apr. 11, 2010), http://asne.org/article_view/smid/370/articleid/763.aspx.

Moreover, advertising revenue fell 28 percent between last quarter 2008 and last quarter 2009.[13] U.S. newspapers rely on advertising at a level that newspapers in other countries do not.[14]

Many blame the Internet for the demise of daily print publications. Some media analysts say that the Internet is transforming the news business and that the aforementioned job losses and disappearing newspapers are just a natural part of that process.[15] The newspaper industry fell behind in the rise of the Internet because publications were slow to put content online and even slower to think about charging for that content. Early newspaper websites were mere replicas of their print editions, with very little in the way of additional content, videos, animations or interactivity.[16]

A Nielsen survey taken in late 2009 found that about one-third of consumers surveyed worldwide were willing to pay for online newspapers, a figure that fell to 27 percent within North America.[17] The Pew Research Center asked adults if they would be willing to pay for local news content online if that was the only way to get their local newspaper, and 23 percent—less than a quarter—said they would do so.[18] In addition, print advertising, from which newspapers have historically derived a substantial portion of their revenue, plummeted, and online ads brought in only a fraction of the revenue.[19] Online ads' lower revenue figures are partially due to the fact that those ads are cheaper than print ads, and prices for online ads have fallen dramatically

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13. *See* Advertising Expenditures, NEWSPAPER ASSOC. OF AM., http://www.naa.org/Trends-and-Numbers/Advertising-Expenditures/Annual-All-Categories.aspx (last visited Dec. 14, 2011) (showing the decline does seem to be slowing: advertising in 2010 was down 8.2 percent).

14. Eric Pfanner, *Preserving Journalism, if Not Papers*, N.Y. TIMES (June 13, 2010), http://www.nytimes.com/2010/06/14/business/media/14cache.html ("In 2008, advertising contributed 87 percent of newspapers' revenues in the United States, compared with 53 percent in Germany, 50 percent in Britain and 35 percent in Japan.").

15. Bartholomew Sullivan, *Journalism's Digital Flight — The Internet is Transforming the News Business With Stunning Speed, But No One Knows Just Yet What Might Come*, MEMPHIS COMMERCIAL APPEAL, Aug. 22, 2010, at V1, *available at* http://www.commercialappeal.com/news/2010/aug/22/journalisms-digital-flight-generation-issues-for/ ("The Internet is transforming the news business into something different, but no one knows quite what, and only visionaries and hard-skulled business people grasp what could be. Like every revolution, this one is causing casualties, the guillotinings this time seen in lost jobs, even disappearing newspapers.").

16. "The Net changed America, but newspapers remained mired in two-dimensional thinking. They created sites that were largely a static replica of their print editions. There was little updating, little sense of the dynamism of the Web . . . ." Howard Kurtz, *Lack of Vision to Blame for Newspaper Woes*, THE WASHINGTON POST, May 11, 2009, at C1.

17. THE NIELSEN CO., CHANGING MODELS: A GLOBAL PERSPECTIVE ON PAYING FOR CONTENT ONLINE 6 (2010), http://blog.nielsen.com/nielsenwire/reports/paid-online-content.pdf [hereinafter Nielsen Survey].

18. 2011 Pew Study, *supra* note 8.

19. Kurtz, *supra* note 16.

since their introduction.[20]

By the time newspaper editors realized that they were in trouble, the public had become accustomed to getting its news from online news aggregators powered by search engines like Yahoo! and Google. "To date the biggest moneymakers in the online news business—Google, Yahoo!, MSN, AOL—mainly sell advertising next to news headlines and other content they don't produce, maximizing linking and aggregation practices of the Internet."[21] Websites like Google do not pay to produce the content, so they do not incur the same upfront costs and can derive some profit from their online ad revenue, no matter how minimal the revenue from each ad might be. In addition, they can target ads to entered search terms, whereas newspaper websites merely offer electronic versions of their advertisers' print ads that are the same for every viewer.[22] Newspaper publishers such as Arthur Sulzberger of the New York Times now acknowledge that in order to keep their publications alive, they will have to find a way to start charging subscribers for online content.[23]

Confronted with this bleak forecast, publishers and media analysts hailed the release of the iPad as a way to allow readers to take their electronic newspapers on trains, outside, and even to the bathroom. "It's the best chance especially newspaper and magazine content publishers have," enthused media analyst Kaan Yigit.[24] News Corp.'s Rupert Murdoch calls the device a game-changer that will revolutionize the way news content is presented. "In five, seven years there's going to be a billion of these. Everyone will have one, but for different reasons. I think it'll bring newspapers to people in a big way."[25]

B. What's an iPad, and Why Do Newspapers Care?

The iPad is a tablet computer—a small, lightweight device that does many of the same things a traditional laptop computer can do, allowing

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20. *The Future of Newspapers: The Impact on the Economy and Democracy: Hearing Before the S. Joint Econ. Comm.* 111th Cong. (2009) (testimony of Tom Rosenstiel, Pew Research Center's Project for Excellence in Journalism).

21. Sullivan, *supra* note 15.

22. *Id.*

23. "We believe that serious media organisations [sic] must start to collect additional revenue from their readers," Arthur Sulzberger as quoted by Emma Heald, *Arthur Sulzberger on Charging Online: To Succeed, We Need to Take Risks*, EDITORSWEBLOG (Sept. 8, 2010, 7:15 PM), http://www.editorsweblog.org/newspaper/2010/09/arthur_sulzberger_on_charging_online_to.php.

24. John Barber, *Why Old Media Loves Apple's Newest Thing*, TORONTO GLOBE & MAIL, Jan. 28, 2010, at B1.

25. Telephone Interview with Rupert Murdoch, CEO of News Corp. (Sept. 15, 2010) (notes on file with author).

users to access the Internet and check their e-mail on-the-go. While smartphones also perform many of the same functions, the iPad doubles as an e-reader, like Amazon's Kindle, displaying books in a readable format. Its 9.7-inch screen provides a larger viewing area than the 3.5-inch screen of an iPhone, which allows for easier reading of printed content, such as a newspaper.[26] Apple describes its device as "magical" and "revolutionary,"[27] and initial reviews were nearly as laudatory.[28] Apple sold 3.3 million of the devices in the first quarter it was available and 7.46 million through October 2010, a number that does not include holiday sales.[29] Apple's March 2011 release of the iPad 2 sold out in a day.[30] Much of the content for the device is available through applications, known colloquially as "apps," that are sold through Apple's iTunes store.

Why is this small tablet computer a big deal? It could offer newspapers the chance for a do-over—a way to get their content in front of people in a digital format just as this new device is being adopted. Early studies show that owners of the iPad and other tablet computers report spending 75 percent more time on newspaper articles than do the general public or those who own e-readers.[31]

The tablet market also attracts more affluent consumers who are more willing to pay for content through this delivery method. Consumers are accustomed to the idea that they need to pay to use an application on their mobile devices,[32] whereas they balk at paying for their news online,

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26. *See* APPLE, INC., http://www.apple.com, for the screen sizes of both the iPad and the iPhone (last visited Dec. 14, 2011).

27. *Id.* at http://www.apple.com/ipad/ (last visited Dec. 14, 2011).

28. "After using a loaner iPad nonstop for several weeks, I am inclined to agree that the device can, for many people, become an addictive and indispensable device. Using an iPad almost entirely with finger tapping and swiping is remarkable." Julio Ojeda-Zapata, *It's a Start: Apple's iPad Short on Revolutionary but Long on Magical*, ST. PAUL PIONEER PRESS, Apr. 25, 2010, at E1.

29. Jessica Mintz, *Market Debut of iPad Pushing Apple Higher*, ASSOCIATED PRESS (as printed in the Charleston Gazette & Daily Mail), Oct. 13, 2010, at 2C; Joshua Brustein, *Rivals to the iPad Say This Is the Year*, N.Y. TIMES, Jan. 3, 2011, at B1, *available at* http://www.nytimes.com/2011/01/03/technology/personaltech/03tablet.html?_r=1&ref=ipad.

30. Seventy percent of the purchases were to first-time iPad users. Philip Elmer-DeWitt, *Piper Jaffray: iPad 2 Totally Sold Out, 70% to New Buyers*, FORTUNE (Mar. 13, 2011), http://tech.fortune.cnn.com/2011/03/13/piper-jaffray-ipad-2-totally-sold-out-70-to-new-buyers/.

31. Tablet users report dedicating 75 percent more time to reading newspaper articles than non-owners, while owners of e-readers spend 50 percent more time reading newspaper stories. Alex Pham, *Digital Device Owners Read More*, LOS ANGELES TIMES, Oct. 6, 2010, at Business 9; *see also*, Jeff Bercovici, *Tablets and E-Readers Give Hope to Publishers, but Not Broadcasters*, DAILY FINANCE BLOG (Oct. 4, 2010, 8:45 AM), http://www.dailyfinance.com/story/media/tablets-and-e-readers-give-hope-to-publishers-but-not-broadcast/19658821/.

32. *See Wikipedia Founder Bullish on the Future of News Industry*, SOUTH FLORIDA SUN-SENTINEL (Fort Lauderdale), Sept. 6, 2010, at 6D, *available at* http://www.odt.co.nz/news/technology/125232/wikipedia-founder-bullish-future-news-

whether it comes from a dedicated news service or an aggregator.[33] Forrester Research found that while consumers resist paying for online news, they show some willingness to pay for news on mobile devices.[34] U.S. mobile readers were willing to pay a third of the print-subscription price to access news on their iPads.[35] The percentage of tablet-owning readers is growing fast, nearly doubling in the four months between September 2010 and January 2011.[36] Thus, the tablet market could present newspapers with a renewed opportunity to charge for digital content delivery, which is an opportunity that they missed with the advent of the Internet.

Advertising opportunities on the iPad are also tantalizing to publishers because data suggests that advertisers are more willing to pay for advertising on the iPad than for more general Internet advertising.[37] One such advertiser found success in this medium: J.P. Morgan Chase & Co. sponsored the early version of the New York Times iPad app. Chase used its sixty-day sponsorship to showcase its Sapphire credit card, targeted at the top 15 percent of earners.[38] More readers clicked on the ad than on the average online ad.[39] Since tablet readers spend more time reading newspapers than the average reader, it follows that they are more likely to see associated ads and to spend more time on them.[40] Ads can also be "embedded" in iPad subscription apps in a way they cannot in Internet advertising, a model the New York Times is exploring.[41] The sponsored ad is a presence throughout the application, and messages referring to the sponsor appear as the user navigates through the app version of the publication. This differs from an online ad in that most online ads appear only once during the reader's online session. Publications can also command higher prices for ads within an app than for web ads: USA Today charges five times as much for an ad on its iPad

industry.

33. *See* Nielsen Survey, *supra* note 17.

34. *Conference Looked to Make E-Reading, Tablets Work for News Media*, EDITOR & PUBLISHER (Oct. 13, 2010), http://www.editorandpublisher.com/Article/Conference-Looked-to-Make-E-Reading-Tablets-Work-for-News-Media.

35. *Id.*

36. Kenny Olmstead, Amy Mitchell, & Tom Rosenstiel, *Online: Key Questions Facing Digital News*, PEW RESEARCH CENTER'S PROJECT FOR EXCELLENCE IN JOURNALISM—THE STATE OF THE NEWS MEDIA 2011, http://stateofthemedia.org/2011/online-essay/.

37. Andrew Vanacore, *Publishers See Signs the iPad Can Restore Ad Money*, ASSOCIATED PRESS (June 8, 2010), http://www.usatoday.com/tech/products/2010-06-03-ipad-advertising_N.htm.

38. *Id.*

39. *Id.*

40. Pham, *supra* note 31.

41. Gideon Spanier, *Newspapers Must Think Like Brands*, EVENING STANDARD (London), Oct. 4, 2010, at 44, *available at* http://www.thisislondon.co.uk/markets/article-23884472-newspapers-must-think-like-brands.do.

app than for a web ad.[42] Newspapers also hope to offer a more affluent iPad subscriber base to advertisers. Purchasers of the device are typically younger men who "tend to be more susceptible to advertising than most (which may be how they ended up with an iPad to begin with). . . . Advertisers targeting the platform really couldn't ask for a better audience than relatively wealthy, young men who are receptive to your message."[43] More expensive iPad advertising might serve to buffer some of the revenue gap left from print advertisers' disappearance.

Additionally, newspapers now have the chance to design content specifically for the iPad. Early newspaper websites were "shovel sites" that merely reproduced the content of the print versions of their product without incorporating videos or interactivity.[44] Editors now realize that digital formats offer possibilities that print does not, and the first generation of iPad apps reflects that realization. For example, the Wall Street Journal's current app allows subscribers to save stories they find interesting and return to them later.[45] Other publications have also found new and creative ways to leverage the digital format. For instance, crosswords in USA Today's free app are interactive, and users can save their progress and return to them later.[46] The Financial Times allows subscribers to alter the order of the publication's sections so that those articles that they are most interested in appear first.[47] Designers have incorporated start screens and other novel features that make it easier for the consumer to find an article of interest than on the current, cluttered websites associated with many newspapers.

Some in the industry wax enthusiastic about the possibilities of creating iPad-specific newspapers. The device's screen—larger than a smartphone—and the possibilities for interactivity offer newspapers the chance to include video, interactive games, and links between related content in a portable format. News Corp. on February 2, 2011, unveiled the first iPad-only newspaper.[48] Called "The Daily," it features lots of

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42. But print ads still cost twice as much as iPad ads. Josh Ong, *USA Today Looks to iPad As "Real Positive" for Struggling Newspaper Industry*, APPLE INSIDER (Jan. 31, 2011), http://www.appleinsider.com/articles/11/01/31/usa_today_looks_to_ipad_as_real_positive_for_struggling_newspaper_industry.html.

43. Darrell Etherington, *Nielsen: IPad Owners Younger, More Receptive of Ads*, GIGAOM (Sept. 29, 2010), http://gigaom.com/apple/nielsen-ipad-owners-younger-more-receptive-of-ads-2/; *The Connected Devices Age, iPads, Kindles, Smartphones and the Connected Consumer*, NIELSEN WIRE (Sept. 28, 2010), http://blog.nielsen.com/nielsenwire/consumer/the-connected-devices-age-ipads-kindles-smartphones-and-the-connected-consumer/.

44. *See* Kurtz, *supra* note 16, at C1.

45. Amy-Mae Elliott, *Hands on With 4 iPad Apps*, MASHABLE (Oct. 13, 2010), http://mashable.com/2010/10/13/ipad-newspaper-apps/.

46. *Id.*

47. *Id.*

48. Patrick May, *"New Times Demand New Journalism": News Corp. Unveils its*

multimedia and interactivity, including some 3-D features, and has a dedicated staff of 150 people.[49] News Corp. lined up an array of sponsors for The Daily that included Macy's, Verizon Wireless, Land Rover, Pepsi Max, and Virgin America, some of which offered incentives, such as Virgin frequent-flier miles to Daily subscribers.[50] "You can present the news with videos, everything there," Murdoch says.[51] "The tablet as a reading and information device more closely approximates the opportunity newspapers had to package [content]," says Randy Bennett, senior vice president of business development for the Newspaper Association of America ("NAA").[52]

However, it's not likely that any technical wonders in the current iPad versions will trump newspaper websites. "[T]he real bonus with a mobile newspaper app is the instant access, rather than any stunning design or interface improvements over a standard online publication."[53] The key differences between the iPad apps and newspaper websites are the increased willingness of advertisers to spend money on ads that are designed for the iPad and the willingness of subscribers to pay for an app, whereas they are unwilling to pay for online content.

C. Why the iPad Might Not Be a Savior

Not everyone sees the iPad as a benefit to the newspaper industry. Mark Contreras, the chairman of the NAA, points out that revenue from the iPad and future tablets will not make up for newspapers' lost classified advertising revenue.[54] Moreover, Murdoch has attempted to create a national newspaper venture before and failed, and The Daily may or may not prove to be successful.[55] Initial reviews of The Daily were mixed, although analysts agree the publication has potential.[56] That

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Digital Publication, Aims to "Re-Imagine Our Craft," SAN JOSE MERCURY NEWS (Calif.), Feb. 3, 2011, at 1D.

49. *Id.*

50. May, *supra* note 48.

51. Murdoch, *supra* note 25.

52. Telephone Interview with Randy Bennett, Senior Vice President of Business Development for the Newspaper Association of America (NAA), and John Sturm, President and CEO of the NAA (Sept. 20, 2010) (notes on file with the author).

53. Elliott, *supra* note 45.

54. Dick Smillie, *iPad, Kindle Won't be Newspapers' Saviors*, FORBES.COM BLOG, (Feb. 3, 2010, 4:20 PM), http://www.forbes.com/2010/02/03/newspapers-kindle-ipad-business-media-contreras.html.

55. Paul Carr, *Murdoch's New iPaper: One Last Tragic Roll Of The Digital Dice*, TECHCRUNCH (Aug. 15, 2010), http://techcrunch.com/2010/08/15/crazy-like-a-fox/; Ryan Tate, *Why the iPad Newspaper is Doomed*, GAWKER (Nov. 24, 2010), http://gawker.com/5697754/why-the-ipad-newspaper-is-doomed.

56. "[The Daily] makes full use of the iPad's unique capabilities—swiping, coverflow navigation, hot spots to pop out additional text and fade-ins and morphing of images." Ced Kurtz, *News Product Debuts on Only iPad, Plows Ground*, PITTSBURGH POST-GAZETTE, Feb.

said, since consumers are so used to getting their news from aggregators like Google News, it may be difficult to lure them to an electronic version of the newspaper.[57]

Even assuming for the sake of this Note that the iPad subscription model will be successful, the newspaper industry still has a problem: Apple's subscription service allows customers to opt out of sharing information, so publishers will not have complete access to customer names or other personal information.[58] Although subscription revenue never was a big part of newspapers' income, newspaper publishers depend on having their own database of subscriber information.[59] This is how they attract advertisers and tell them whom their ads will be reaching, and the advertising does form the lion's share of their revenue.[60] Traditionally, newspapers offered cheap subscriptions on the theory that the low prices would drive up circulation and the increase in advertising revenue would offset the subscription revenue.[61] When the *Dallas Morning News* decided to start charging readers for access to their full online content (including its iPad app), the editors' decision was based on the additional advertising the newspaper could attract if it could show advertisers that it had loyal readers of its digital content.[62] Publishers also mine subscriber rolls to help them target new offers to readers, as anyone who has canceled a subscription and been the target of numerous phone calls and mailings asking to re-subscribe can attest.

"Apple's been reluctant to provide [subscriber] data to any of the publishers. Newspapers want to be able to market to those people," says

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6, 2011, at C2, *available at* Westlaw, 2011 WLNR 2360382. "The Daily is a decent app with some potential. But it could learn a few things from other apps ranging from Angry Birds to The Weather Channel." Damon Kiesow, *5 Things the Daily Should Learn from Flipboard, Angry Birds, The Huffington Post and Other IPad Apps*, POYNTER.ORG (Feb. 10, 2011, updated Feb. 11, 2011, 12:51 PM), http://www.poynter.org/latest-news/media-lab/mobile-media/118662/5-things-the-daily-should-learn-from-flipboard-angry-birds-huffington-post-and-other-ipad-apps/.

57. Because a discussion of the pros and cons of tablet-only versions of newspapers is beyond the scope of this Note, the rest of this discussion assumes arguendo that there is a market for newspapers on tablet devices and that readers will want to purchase iPad subscriptions.

58. "If people don't share their information with publishers, Apple will still hold onto it, though it will not pass it on to third parties." *Apple Announces Subscriber Service,* DETROIT FREE PRESS, Feb. 16, 2011, at C2, *available at* 2011 WLNR 3060938.

59. "Even before the Internet, subscription revenue didn't amount to much for most news organizations." BILL GRUESKIN, AVA SEAVE, & LUCAS GRAVES, THE STORY SO FAR, TOW CENTER FOR DIGITAL JOURNALISM AT COLUMBIA JOURNALISM SCHOOl 79 (May 11, 2011).

60. *Id.* (Newspapers gained by having lots of cheap subscribers because increased subscriber numbers helped them attract more advertising.).

61. *Id.* at 79.

62. *Id.* at 70.

Randy Bennett of the NAA.[63] Although newspapers can gather information from their websites about how many hits stories get and how long subscribers linger there, they want access to details about iPad app purchasers in order to distinguish new subscribers from the regular subscriber pool and to determine which subscribers transferred from the print edition. Furthermore, signing on with Apple will require newspapers to give the company a cut of their revenue. In exchange for allowing publishers to sell subscriptions by the year, month, week or another unit of their choosing, Apple takes its standard thirty percent cut of revenue.[64]

A look at how other content industries have fared in working with Apple shows that how the content industry fares depends on the health of the industry and how much leverage they have when they negotiate. Part II of this Note examines how the music industry, the movie industry, and book publishers have adapted to Apple's platforms.

II. A LOOK AT OTHER CONTENT INDUSTRIES

Apple has secured access to media content in ways that its rivals have had trouble matching.[65] Apple's iTunes store is the largest vendor of digitally downloaded music in the United States, and its dealings with the music industry have shown the effects of this dominance. Record labels are now dependent on Apple to sell downloads. Music publishers have not been able to get terms they want from Apple, such as protection from their songs being copied. The film, television, and book industries have fared better. Apple has competition in these non-music industries for digital downloads, including Netflix and other online movie and television sources, and Amazon's Kindle reader and other e-readers for books. Newspapers can take a lesson from the music industry in what Apple does when it has little-to-no competition. Additionally, newspapers can take a lesson from Hollywood, the television producers and the book publishers in seeing how Apple behaves when there are other players in the market.

A. Music

The music industry has become dependent on Apple and its iTunes music distribution store. In the United States, iTunes is the largest music retailer and largest digital music store, with a digital music market share of about 70 percent. The number two digital music seller, Amazon, trails

63. Bennett & Sturm, *supra* note 52.

64. *Apple Unveils App Store Subscription Service*, NATIONAL PUBLIC RADIO MORNING NEWS, Feb. 16, 2011, *available at* 2011 WLNR 3082095.

65. Wu, *supra* note 2, at 292.

iTunes with less than a 10 percent market share.[66] Global music sales "have shrunk from $26.5 billion in 2000 to $17 billion" in 2009.[67] Although Apple has held the upper hand during the setup of iTunes and subsequent dealings with the music industry, the U.S. Department of Justice has begun to inquire into Apple's practices and possible antitrust violations.[68] Further, Amazon's market share, while far and away trailing Apple's, is rising, while iTunes's market share essentially remains flat.[69]

The music industry in 2001 was threatened by the rise and fall of Napster, the free downloading service that allowed users to share songs and download other users' songs to their computers.[70] While consumers loved the freedom of not having to travel to a brick-and-mortar store to buy music and little-known artists benefited from the exposure, the industry got no revenue from the downloads.[71] As a result, the Recording Industry Association of America ("RIAA") sued, alleging copyright violations.[72] Napster shut down in July 2001 to comply with an injunction issued by the Ninth Circuit Court of Appeals,[73] and the company filed for bankruptcy in 2002.[74] The rise and fall of Napster was only the beginning of users' desire to download music instead of drive to a store to purchase an artist's entire album.

The RIAA was uneasy after seeing the popularity of downloaded music, and in 2001 it began talks with Apple to sell music downloads. Apple unveiled the music store portion of iTunes in 2003, boasting that the new service was an unprecedented way to legally download music.[75] Initial music sales on iTunes were brisk, with the store selling 6.5 million songs in its first three months.[76] Within three years, iTunes accounted for

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66. Yinka Adegoke, *U.S. Probes Apple Digital Music Dominance*, REUTERS NEWS (May 26, 2010), http://www.reuters.com/article/2010/05/26/us-apple-probe-idUSTRE64P6Z920100526.

67. *Id.*

68. Brad Stone, *Apple Is Said to Face Inquiry About Online Music*, N.Y. TIMES, May 25, 2010, at B1, *available at* http://www.nytimes.com/2010/05/26/technology/26apple.html.

69. Eric Engelman, *Amazon Builds Digital Music Market Share Versus Apple*, TECHFLASH (May 26, 2010), http://www.techflash.com/seattle/2010/05/amazon_ties_wal-mart_as_no_2_music_retailer_behind_itunes.html.

70. *NewsHour Extra: The Napster Debate*, PBS (May 31, 2000, last updated Dec. 13, 2001), http://www.pbs.org/newshour/extra/features/jan-june00/napster.html.

71. *Id.*

72. A&M Records, Inc v. Napster, Inc., 114 F. Supp. 2d 896 (N.D. Cal. 2000), *aff'd*, 284 F.3d 1091 (9th Cir. 2002).

73. Jim Hu, *Napster: Gimme Shelter in Chapter 11*, CNET NEWS (June 3, 2002), http://news.cnet.com/Napster-Gimme-shelter-in-Chapter-11/2100-1023_3-930467.html.

74. *Id.* A version of Napster now exists through the electronics store Best Buy, offering a set amount of music for a monthly subscription fee. *See* NAPSTER, http://www.napster.com (last visited Nov. 14, 2010).

75. Bob Keefe, *And Now, Apple, The Music Store Net Site to Sell Tunes for 99 Cents*, COX NEWS SERVICE, Apr. 29, 2003, *available at* 2003 WLNR 2156223.

76. Rex Crum, *Apple Rises After Beating Q3 Estimates*, CBS MARKETWATCH (July 17,

two-thirds of the digital music market.[77] CD sales were down 8 percent, and CD singles had fallen 27 percent in the same time period.[78]

One of the perks the music industry received under the initial iTunes agreement was digital rights management, or DRM.[79] The industry wanted DRM to prevent users from making endless copies of songs once they had paid to download them on iTunes, and it also restricted iTunes songs to Apple devices, which at the time included only iPod music players and computers loaded with iTunes. In response to pressure from Apple, record label EMI agreed to lift the DRM protection in April 2007.[80] The price of the unprotected songs was raised to $1.29 per song.[81] At the time, EMI said that selling songs without the DRM was not an Apple-exclusive deal, and it also disclosed that the pricing structure was "strictly dictated by Apple."[82] The rest of the record labels agreed to give up DRM as part of a January 2009 deal that allowed variable music pricing in iTunes.[83] Songs on iTunes no longer have DRM protection, so buyers can burn as many CD copies as they like, as well as play the songs on other devices.[84] Analysts now recognize that Apple dominates the digital download market, despite the existence of competing services such as Amazon's digital music sales and streaming services like Pandora and Spotify.

In 2009, global recorded music sales dropped by 7.2 percent, from $18.3 billion to $17 billion.[85] This reduction marked the tenth straight year of declining music sales. Global digital sales, which grew 9.2 percent in 2009, now account for a quarter of all music sales; however, the growth in digital sales did not offset the drop in CD sales.[86] The statistics for U.S. music sales are even grimmer: Single-track digital sales

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2003), http://www.marketwatch.com/story/apple-rises-after-beating-q3-estimates.

77. Therese Poletti, *Apple: Don't Mess With 99 Cents*, SAN JOSE MERCURY NEWS (Calif.), May 3, 2006, at Business 1.

78. *Id.*

79. DRM is a "far-reaching term that refers to any scheme that controls copyrighted material using technological means." Julia Layton, *How Digital Rights Management Works*, HOWSTUFFWORKS, http://computer.howstuffworks.com/drm.htm (last visited Dec. 14, 2010).

80. Owen Gibson & Bobbie Johnson, '*Big Step Forward in Music Revolution' Hailed As EMI Drops Copy Protection*, THE GUARDIAN (London), Apr. 3, 2007, at 11, *available at* 2007 WLNR 28335533.

81. Michael E. Rau, *Is the Music Industry Getting Smart?*, DAILY PRESS, (Newport, Va.) Apr. 9, 2007, at D3, *available at* 2007 WLNR 6776136.

82. *Id.*

83. Tim Arango, *iTunes Agreement Fails to Quell Discontent at Music Labels*, INT'L HERALD TRIB., Feb. 3, 2009, at Finance 11, *available at* 2009 WLNR 2004598.

84. Christopher Breen, *DRM-Free ITunes: What It Means for You*, PCWORLD.COM (Apr. 7, 2009), http://www.pcworld.com/article/162732/drmfree_itunes_what_it_means_for_you.html.

85. Robert Andrews, *2009 Music Sales Shed $1 Billion While U.S. Downloads Stagnant*, THE GUARDIAN (London), Apr. 29, 2010, *available at* 2010 WLNR 8813579.

86. *Id.*

were basically stagnant in 2009, showing a 1.1 percent rise.[87]

There are some storm clouds on the horizon for Apple and for the record labels that contracted with it. (Analysts refer to the music industry as firmly in Apple's pocket.)[88] Streaming services gain in popularity, possibly cutting into Apple's digital download model.[89] In 2010, the U.S. Justice Department began a preliminary investigation into whether Apple had pressured music labels to exclude Amazon from certain licensing agreements.[90]

The music industry's example shows that newspapers should avoid becoming too tied to Apple when it comes to bargaining for a presence on the iPad. The movie and television industries, taking a lesson from the record labels, are driving a harder bargain when it comes to Apple's hopes for its Apple TV device.

B. Movies and Television

Apple did not promote movies on the iPad at the device's launch in late January 2010. This could be because the small, portable iPad simply is not an ideal platform on which to view movies, but it could also be because the movie industry has been more successful than the music industry in hanging onto its rights. Apple has struggled to promote its Apple TV device, which debuted in 2007, largely because it has not been able to acquire movies and television shows for the iTunes store.

The movie industry is healthier now than the music industry was in 2003. "According to the Motion Picture Association of America, the worldwide movie box office has grown steadily, from $23.1 billion in 2005 to $29.9 billion in 2009. Attendance has also increased slightly, from 1.38 billion in 2005 to 1.42 billion in 2009."[91] Numbers did drop in 2010, with an attendance drop of 5.4percent from 2009. Revenues, however, were down less than expected due to more expensive 3-D tickets.[92]

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87. *Id.*

88. "Since 2000, the music industry has most spectacularly flailed (and failed) to combat the Net's effect on its business model." Tim Jones, *12 Trends to Watch in 2010*, ELEC. FRONTIER FOUND. (Jan. 13, 2010), https://www.eff.org/deeplinks/2010/01/trends-2010.

89. Antony Bruno, *In Pursuit of a Stream: Mobile Downloads Give Way to On-Demand Streaming*, BILLBOARD, Feb. 13, 2010, at 12, *available at* 2010 WLNR 3523855; *see also* Allie Townsend, *Spot On! Online Jukebox Spotify Streams Free Music and Shares It With Friends*, TIME, Aug. 8, 2011, at 60.

90. Miguel Helft, *Apple Shifts From Underdog to Role of Bully*, INT'L HERALD TRIB., June 25, 2010, at Finance 1, *available at* 2010 WLNR 12756661.

91. Victor Godinez, *Movie, Book, Game Companies Fight to Survive Plunge Into Internet Age*, THE DALLAS MORNING NEWS, Apr. 5, 2010, *available at* 2010 WLNR 7046498 (stating analysts attribute the increased sales to the rise of 3-D movies with more expensive tickets).

92. *2010 a Terrible Year for Movie Attendance*, IMDB.COM (Jan. 3, 2011),

Hollywood has proved resistant to agree to Jobs's desire to set price controls for films, much as he had for songs.[93] Apple struggled to acquire movies for the iTunes store, which led to slow sales for the early version of its Apple TV, on which Apple hoped to link visuals from iTunes to televisions. Apple brought out a new, $99 version of Apple TV in late August 2010, which sold 1 million units in the space of three months.[94] The new device came with new pricing: Apple offered rentals of television shows for ninety-nine cents, as opposed to its old pricing, which ranged from $1.99 to $2.99 per show. However, iTunes only offered shows from two major television networks.[95] ABC and News Corp.,[96] the parent of Fox, signed on, but NBC, CBS, and the majority of the Hollywood studios declined to offer content through iTunes.[97] Apple reportedly keeps 30 percent of the revenue from the Apple TV sales.[98]

iTunes is far from the only game in town for television and movie downloads. The popular subscription service Netflix offers all-you-can-watch subscriptions to television shows along with cheap movie rentals.[99] Recent episodes of most television shows can be watched for free on Hulu.com.[100] Armed with options for selling content that the music industry does not have, movie and television studios have found themselves in a better position to resist Apple and the iTunes store, and iTunes' offerings reflect that fact.

The book industry, similarly, used an Apple competitor to gain some leverage in its negotiations, although—interestingly—it wound up with terms that were nearly identical to those given the music industry.

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http://www.imdb.com/news/ni6605376.

93. Godinez, *supra* note 91.

94. Heather Leonard, *The Apple Investor: Apple TV Should Surpass 1 Million Units This Week, Where's the TV and App Store?*, BUSINESS INSIDER (Dec. 22, 2010), http://www.businessinsider.com/the-apple-investor-dec-22-2010-12.

95. David Sarno & Dawn Chmielewski, *Apple's 99-Cent Gamble*, BALTIMORE SUN, Sept. 2, 2010, at 14A.

96. Because Rupert Murdoch and Steve Jobs have a good relationship, Fox's participation was not a surprise. *See* the discussion of The Daily, *supra* note 56.

97. *Id.*

98. *Id.*

99. Netflix charges $7.99 a month for all-you-can-watch streaming to any device that will play its content. NETFLIX, https://www.netflix.com/MediaCenter/HowNetflixWorks (last visited Dec. 14, 2011).

100. "Hulu brings together a large selection of videos from over 260 content companies, including FOX, NBCUniversal, ABC, Criterion, A&E Networks, Lionsgate, Endemol, MGM, MTV Networks, Comedy Central, National Geographic, Digital Rights Group, Paramount, Sony Pictures, Warner Bros., TED and more." HULU, http://www.hulu.com/about (last visited Dec. 14, 2011). Hulu also has a premium service, costing $7.99 a month, to access its full catalog from smartphones and other devices. *Id.*

C. Books

Book publishers have, for the most part, welcomed the iPad because it has given them some leverage in their fight with online retailer Amazon over e-book prices. Amazon released the first version of its Kindle reader in late 2007 to lukewarm reviews.[101] Although Amazon does not release exact sales figures,[102] the device caught on, and the online bookseller now claims more than 775,000 titles in its Kindle division.[103] Moreover, as of March 2010, just prior to the release of the iPad, Amazon held a comfortable 90 percent share of the American electronic book market.[104] Amazon prices best-sellers and new releases at $9.99, far below the print cost of hardcover new releases, which are usually priced in the $25 range, with some titles as high as $35.[105] In addition, publishers' agreements with Amazon were punishing: Amazon's take of book revenue in the original Kindle agreement was reportedly 65 percent.[106]

Apple signed on five of the six major publishers—Hachette Book Group, HarperCollins Publishers, Macmillan, Penguin, and Simon & Schuster—in time for the iPad launch.[107] Its iBookstore pricing ranges from $12.99 to $14.99. Apple reportedly keeps 30 percent of the revenue, and publishers get the other 70 percent.[108] Although these are similar to the terms Apple gave to music publishers and has offered to newspaper publishers, Apple's deal with book publishers is much better than the deal the book publishers originally received from Amazon. Publishers negotiated a deal with Apple that gave them power over pricing, because they "had all but lost that power on Amazon's Kindle e-

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101. Wailin Wong, *A New Chapter for E-book Producers*, CHICAGO TRIBUNE, Nov. 20, 2007, at C1.

102. The New York Times reports that "[w]e don't know the size of Amazon's Kindle business because the company is averse to disclosing details of its operations." Randall Stross, *E-Book Wars: The Specialist vs. the Multitasker*, N.Y. TIMES, Aug. 8, 2010, at BU3, *available at* 2010 WLNR 15766076.

103. KINDLE STORE, http://www.amazon.com/kindle-store-ebooks-newspapers-blogs/b/ref=topnav_storetab_kinc?ie=UTF8&node=133141011 (last visited Dec. 14, 2011).

104. Motoko Rich & Brad Stone, *A Rift at Amazon on E-Book Prices*, N.Y. TIMES, Mar. 18, 2010, at B1, *available at* 2010 WLNR 5630732.

105. AMAZON, http://www.amazon.com/Kindle-eBooks/ (last visited Dec. 14, 2011); interview with Suzanne Fischer, chief buyer at The Bookies bookstore, Denver, Colo., in Scottsdale, Ariz. (Mar. 24, 2011). Disclosure: Fischer is the author's mother.

106. Sipho Hlongwane, *Apple, Soon-to-Be an eBook Dominator*, THE DAILY MAVERICK (South Africa), Sept. 22, 2010, *available at* http://www.thedailymaverick.co.za/ article/2010-09-22-apple-soon-to-be-an-ebook-dominator.

107. Motoko Rich, *Publishers Get Chance to Rewrite E-Book Prices*, INT'L HERALD TRIB., Jan. 29, 2010, *available at* 2010 WLNR 1830968. Random House, the largest publisher of trade books, held out and did not sign with Apple. *Id.*

108. *Id.*

reader."[109] Amazon acquired books wholesale and set the consumer price. The Apple deal is not a sweetheart deal for publishers by any means, however: Apple requires publishers not to sell e-books through other retailers for less than they sell in the iBookstore.[110]

Amazon has responded to the competition. In November 2010, the online retailer announced new terms for its Kindle books. Amazon now mimics Apple's 30 percent / 70 percent revenue share.[111] Amazon remains the top online bookseller as well. Apple's iBookstore does not yet have the full range of titles that Amazon does, although it is catching up. The lone holdout among the major publishers, Random House, made its titles available through the iBookstore as of March 1, 2011.[112]

The iPad was a boon to book publishers because it provided an alternative to the Kindle, which threatened to hold book publishers in the same near-monopoly grip in which Apple and the iTunes store hold music producers. Electronic books, in contrast to music and newspaper sales, but much like television downloads, are a booming market. Book publishers did not need the iPad as the only vehicle by which to sell e-books, so they were in a much better position to negotiate with Apple than was the music industry.

III. CAN NEWSPAPERS USE THE IPAD WITHOUT BEING AT APPLE'S MERCY?

While in the short term, the iPad and capability to distribute through the iTunes store look extremely attractive, newspapers could in the long run find themselves in the same position they were before the iPad's January 2010 debut. Newspapers can take a lesson from iTunes offerings of the past and cultivate competitors in order to wring the best terms from Apple that they possibly can. There is a possibility that the federal government will step in, perhaps with an antitrust exemption to allow newspapers to collude on pricing. But free-speech concerns about how independent the press can be if it is getting government funding will probably nip such efforts in the bud.

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109. *Id.*

110. Rich & Stone, *supra* note 104.

111. Dan Frommer, *Amazon Opens the Door to an Apple Newspaper Store*, BUSINESS INSIDER, Nov. 8, 2010, *available at* 2010 WLNR 22340426.

112. *See* RANDOM HOUSE, www.randomhouse.com/ebooks (last visited Mar. 27, 2011). Random House adopted the "agency model" across the board, and also sells its books through independent bookstore websites. *ABA Applauds Random House Move to Agency Model for E-Books*, AMERICAN BOOKSELLERS ASSOCIATION (Feb. 28, 2011), http://news.bookweb.org/news/aba-applauds-random-house-move-agency-model-e-books.

A. Ceding Control and Revenue to Apple

Newspapers need a presence in the app market. The Reynolds Journalism Institute at the University of Missouri reports that more than nine out of ten of those who spend at least an hour a day reading news on their iPads said they are much more likely to read the newspaper through an app as opposed to through the newspaper's website on a browser.[113] The survey also showed a "moderately strong" correlation between subscribers who used the iPad apps and those who canceled print subscriptions or reported that they soon planned to do so.[114] The Reynolds Institute study raises the specter that the iPad, rather than luring in new subscribers, will simply convert newspapers' current subscribers to the digital version. News Corp.'s James Murdoch expressed this fear in November 2010 when he called newspaper apps "much more directly cannibalistic of the print products" than their websites.[115] Yet, the Reynolds survey also contained some good news for publishers: News reading is the most popular activity on the iPad, and more than three-fourths of the survey respondents reported spending thirty minutes or more using the iPad to follow the news.[116] Thus, newspapers are going to want their piece of the tablet market, which—at least right now—means cooperating with Apple.

The main "hang-ups" reported in early news coverage of Apple's proposed iNewspaper store were who would control data about users and how subscription revenue would be split.[117] Analyst Ken Doctor[118] called Apple a "middleman" trying to insert itself in a way that does not exist in other industries, comparing the company to Sony demanding a cut of revenue for television shows that air on its sets.[119] Other leaders in the newspaper industry were also nervous about the idea of ceding any control to Apple. At the 2010 World Editors Forum in Hamburg, Germany, Juan Senor cautioned newspapers to not "impulsively bite the

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113. Respondents were very likely (71.8 percent) or somewhat likely (21.2 percent) to use a newspaper's app for reading news and feature stories as opposed to using a Web browser. Roger Fidler, *RJI-DPA Fall 2010 iPad Survey Highlights*, DONALD W. REYNOLDS JOURNALISM INSTITUTE, Oct. 20, 2010, *available at* http://www.rjionline.org/news/rji-dpa-fall-2010-ipad-survey-highlights.

114. *Id.*

115. *James Murdoch Says Apps Cannibalise Newspapers,* REUTERS (Nov. 12, 2010), http://uk.reuters.com/article/idUKTRE6AB2L820101112.

116. Reynolds Study, *supra* note 113.

117. Sarah Rabil, Adam Satariano & Peter Burrows, *Apple Said to Negotiate With Publishers Over Digital Newsstand*, BLOOMBERG (Sept. 17, 2010), http://www.bloomberg.com/news/2010-09-17/apple-said-to-negotiate-with-publishers-over-digital-newsstand-for-ipad.html.

118. Doctor, the author of NEWSONOMICS (2010), writes about the business side of digital news for the Nieman Journalism Lab and other websites.

119. Rabil et al., *supra* note 117.

Apple" because he did not want to see the newspaper industry suffer the same fate as the music industry.[120] Losing the ability to control pricing and customers' data, Senor told conference attendees, was not worth access to the iPad.[121]

Analysts' and publishers' fears were founded. The subscription terms released in February 2011 included: 1) Apple takes a 30 percent cut of sales through iTunes; 2) newspapers cannot offer subscriptions elsewhere at prices lower than through iTunes, but they do still have the option to sell iPad app subscriptions through their own websites; and 3) subscribers have to opt in to allow Apple to share their information with publishers.[122] The price controls especially concerned publishers because Apple could offer subscribers the lowest possible price, knowing that their agreement prevents newspapers from undercutting Apple.[123] However, because of publishers' outcry, Apple quietly dropped this provision, allowing newspapers to sell subscriptions outside of iTunes at any price they chose.[124] Apple did still require that publishers, if they do offer an app through iTunes, not steer subscribers outside the app to newspaper websites.[125]

Those publishers—including The Wall Street Journal, the Financial Times and digital magazine newsstand Zinio—that Apple has allowed to sell subscriptions outside the iTunes store can still do so.[126] However, Apple is under no formal commitment to let such arrangements continue.[127] Newspapers that sell through the iTunes store can still track their print subscriptions, of course, but they will lose the ability to track subscribers that switch from their print product to the iPad app unless those subscribers opt in. "No one's suggesting that Apple has to be a common carrier, but I think people are starting to take notice of how they

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120. Marek Miller, *Does iPad Really Offer a Second Life for Newspapers?*, FORUM4EDITORS (Oct. 7, 2010), http://forum4editors.com/2010/10/does-ipad-really-offer-a-second-life-to-newspapers/.

121. *Id.*

122. Jeff Bercovici, *Why Publishers Don't Like Apple's New Subscription Plan*, FORBES (Feb. 15, 2011), http://blogs.forbes.com/jeffbercovici/2011/02/15/why-publishers-dont-like-apples-new-subscription-plan/.

123. "Apple's saying to subscribers, 'You'll never have reason to leave because your subscription will always be lowest here.'" Patrick May, *Apple Angles for Position of Power in Publishing World*, TRIBUNE NEWS SERVICE (Apr. 13, 2011), http://www.canada.com/story_print.html?id=4608167 (quoting Ron Adner, Associate Professor at the Tuck School of Business, Dartmouth College).

124. Miguel Helft, *Apple Gives Publishers a Sales Break*, N.Y. TIMES, June 9, 2011, *avaialble at* http://www.nytimes.com/2011/06/10/technology/10apple.html.

125. *Id.*

126. Shira Ovide & Yukari Iwatani Kane, *Apple Coaxes Publishers to Join it on iPad Subscriptions*, WALL ST. J., Sept. 20, 2010, *available at* http://online.wsj.com/article/SB10001424052748704416904575501912896373130.html.

127. *Id.*

deal with their potential," says John Sturm, president and CEO of the NAA.[128]

B. The Government is Not a Potential Solution

The Federal Communications Commission ("FCC") on June 9, 2011, released a report on the future of journalism in a digital age.[129] The FCC pointed out that although the Internet offered more choices than ever, those choices did not necessarily translate into quality reporting.[130] The lack of quality news means that journalism's traditional function as an independent watchdog is at risk.[131] The federal government has assisted newspapers in the past. For example, the 1970 Newspaper Preservation Act created joint operating agreements as a way to preserve unique editorial voices in markets with one failing newspaper.[132] But further help, such as possible government subsidies, raises red flags because of the First Amendment's guarantee of freedom of the press.

The Federal Trade Commission ("FTC"), which is in the middle of a study on the future of journalism, has proposed some policy ideas in order to generate discussion, although they are currently only ideas for staff discussion.[133] These ideas include:

- Give newspapers some copyright protection in the facts in their stories and/or limiting the fair use protections now enjoyed by aggregators;[134]
- Require a license fee for news content;[135]
- Create some sort of national antitrust exemption allowing news organizations to agree jointly to erect pay walls so that consumers must pay for access to online content, or allow

128. Bennett & Sturm interview, *supra* note 52.

129. STEVEN WALDMAN, FED. COMMC'N COMM'N, THE INFORMATION NEEDS OF COMMUNITIES (2011), *available at* http://transition.fcc.gov/osp/inc-report/The_Information_Needs_of_Communities.pdf [hereinafter FCC Report].

130. *Id.* at 6.

131. *Id.* at 5.

132. "In the public interest of maintaining a newspaper press editorially and reportorially independent and competitive in all parts of the United States, it is hereby declared to be the public policy of the United States to preserve the publication of newspapers in any city, community, or metropolitan area where a joint operating arrangement has been heretofore entered into because of economic distress or is hereafter effected in accordance with the provisions of this chapter." 15 U.S.C. § 1801 (2010).

133. FED. TRADE COMM'N, FED. TRADE COMM'N STAFF DISCUSSION DRAFT: POTENTIAL POLICY RECOMMENDATIONS TO SUPPORT THE REINVENTION OF JOURNALISM (2010), *available at* http://www.ftc.gov/opp/workshops/news/jun15/docs/new-staff-discussion.pdf [hereinafter FTC Draft].

134. *Id.* at 9-11. Copyright law traditionally does not protect facts. *See* Feist Publ'ns, Inc., v. Rural Tel. Serv. Co., 499 U.S. 340, 347 (1991).

135. FTC Draft, *supra* note 133, at 12-13.

newspapers to agree jointly on a mechanism to require news aggregators and others to pay for the use of online content;[136]

- Create a "journalism" division of the service program AmeriCorps that would allow young people to gain journalism experience and increase the number of journalists covering communities;[137] and/or

- Either increase tax breaks to newspapers or subsidize newspapers that hire more journalists.[138]

The reaction to these ideas was lukewarm at best. FTC chairman Jon Leibowitz said at a Senate hearing that any antitrust exemptions were a terrible idea, and opinion pieces on newspaper editorial pages expressed discomfort with the idea of government intervention.[139] Former FCC commissioner Meredith Attwell Baker told a Capitol Hill media summit that "[D]irect government funding of journalism would . . . erode the public's attitude towards media, an attitude already characterized by more skepticism than trust."[140] The FTC has not released a final report with recommendations.

The FCC report did recommend some changes in the way the government treats media, but its recommendations stop far short of any government assistance or subsidies. The report specifically said that the government was not the "main player" in the changing media landscape and that the First Amendment circumscribed any government efforts to assist local news media.[141] The FCC did recommend that the government direct its advertising efforts toward local news media outlets in order to funnel money toward their work.[142]

The newspaper industry is animated by Constitutional concerns that other industries that have contracted with Apple do not share. The free press plays a watchdog role, reporting on and, more importantly, criticizing the government. Justice Hugo Black called the press a "constitutionally chosen means for keeping officials elected by the people responsible. . . ."[143] This watchdog role makes any government action protecting newspapers' financial situation problematic. How can

136. *Id.* at 13.

137. *Id.* at 17.

138. *Id.* at 19-21.

139. *See* Jeremy W. Peters, *Government Takes On Journalism's Next Chapter*, N.Y. TIMES, June 13, 2010, at B7, *available at* http://www.nytimes.com/2010/06/14/business/media/14ftc.html?_r=1&fta=y.

140. Meredith Attwell Baker, Commissioner, FCC, Remarks at the Capitol Hill Media Summit (Sept. 15, 2010), *available at* 2010 FCC LEXIS 5578 at *4.

141. "Government is not the main player in this drama, and the First Amendment circumscribes government action to improve local news." FCC Report, *supra* note 129, at 28.

142. *Id.* at 29.

143. Mills v. Alabama, 384 U.S. 214, 219 (1966).

the free press continue to criticize the government if government subsidies are helping it out? The FCC report and the reaction to the FTC's early recommendations show that any government intervention is unlikely and that newspapers are on their own when negotiating with Apple.

C. Possible Workarounds for Newspapers

Newspapers need to be on the iPad, but they should explore workarounds to being a part of the iTunes Store. Alternatively, newspapers should use competitors, like Google and Amazon, to gain leverage in their negotiations with Apple. Newspapers will have to give up some control in order to be a presence on the iPad because Apple is a closed universe and has full control over what goes into iTunes. Apple already has censored some proposed iPad applications for their content.[144] Tim Wu, among others, raises the specter of a content-controlling Apple that determines what gets to be on its devices.[145]

Some newspapers already have applications that circumvent iTunes. The Columbus (Ohio) Dispatch created an iPad app that's free to print subscribers and carries a nominal charge for nonsubscribers and is linked to the newspaper's digital subscriber database, not the iTunes store.[146] A company called Clickshare sells subscriptions and takes payments on newspaper iPad apps, allowing them to operate without tunneling through the App store.[147] The Columbus Dispatch approach looks promising for newspapers that want to deliver content through an iPad app but do not want to sign Apple's agreement in order to sell in the iTunes store. This option is still available, but Apple could step in at any time to prohibit it. Apple barred European publishers from bypassing the iTunes payment system, telling them to stop offering free editions elsewhere by April 1, 2011.[148]

Book publishers were successful in using the new competition—which for them, was Apple—to get more favorable terms out of Amazon. Newspaper publishers could use Amazon against Apple in much the

144. A Danish newspaper filed a complaint against Apple to the European Commission after Apple rejected its application featuring topless women. Martin Bryant, *Newspaper Complains to European Commission after Apple Rejects Topless Girls App,* TNW EUROPE (Apr. 12, 2010), http://thenextweb.com/eu/2010/12/04/newspaper-complains-to-european-commission-after-apple-rejects-its-topless-girls-app/.

145. Wu, *supra* note 2, at 292.

146. Damon Kiesow, *Columbus Dispatch Pairs iPad Edition with Print Subscription,* POYNTER (Sept. 26, 2010), http://www.poynter.org/latest-news/media-lab/mobile-media/105901/columbus-dispatch-pairs-ipad-edition-with-print-subscription/.

147. CLICKSHARE, http://www.clickshare.com/ (last visited Dec. 14, 2011).

148. *European Papers: Apple Pushing Sales Via iTunes,* ASSOCIATED PRESS, Feb. 7, 2011, *available at* Westlaw, 2/7/11 AP Alert - CA 19:36:47; *Rupert Murdoch's iPad Daily: Who Needs Paper?* ECONOMIST, Feb. 5, 2011, at 76, *available at* 2011 WLNR 2276337.

same way. Amazon sells newspaper subscriptions for its Kindle. While a Kindle does not have the interactivity possibilities of the iPad, Amazon is keen to stay in the newspaper business. The online bookseller carried versions of newspapers on the Kindle from the beginning, taking the same 70 percent of revenue it did from book publishers. But when Amazon changed its terms for book publishers in November 2010, it did for newspapers as well.[149] And Amazon now has a Kindle app that makes any subscriptions bought through Kindle available on the iPad.[150] While using this app requires that the reader also own a Kindle, 40 percent of iPad owners do also own Kindles, and the Kindle sold well during the 2010 holiday buying season.[151] Apple is responding to this loophole, however: Apple denied a Sony Reader app that would allow iPad owners to access the online Sony Reader store through the app and buy books there.[152]

Another competitor gives newspapers some leverage: Google. Google, whose Android operating system-backed smartphones are fast catching up with the iPhone, announced its own newspaper subscription plans just a day after Apple.[153] Google will take a 10 percent share of revenue through its "Google One Pass" subscription system.[154] Many of the new tablets shown at the 2011 Consumer Electronics Show feature Google's recently updated Android operating system or Microsoft's Windows operating system, so their users will not be able to access the iTunes Store, at least not on these devices.[155] The tablet-computer market is growing, with Amazon releasing its own alternative to the iPad in late 2011 and Google refining its Android-system tablets.[156] Although Apple's biggest rival, Samsung, has only a 12.5percent market share, it's investing in its tablet and has no intention of ceding the market to

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149. Mark Milian, *Amazon.com Courts Newspaper Publishers for Kindle*, CNN (Nov. 9, 2010), http://edition.cnn.com/2010/TECH/mobile/11/09/kindle.newspapers/.

150. *Id.*

151. Erick Schonfeld, *Survey Says: The iPad is Not a Kindle Killer*, TECHCRUNCH (Jan. 3, 2011), http://techcrunch.com/2011/01/03/ipad-not-kindle-killer/.

152. Claire Cain Miller & Miguel Helft, *Apple Moves to Tighten Control of App Store,* N.Y. TIMES, Feb. 1, 2011, at B9, *available at* http://www.nytimes.com/2011/02/01/technology/01apple.html?scp=1&sq=Apple%20Sony&st=cse. The article quotes an Apple spokes- woman: "We have not changed our developer terms or guidelines."

153. *Google Unveils Payment Platform for Online Content*, AGENCE FRANCE-PRESSE (Feb. 16, 2011, 16:33), *available at* www.google.com/hostednews/afp/article/ALeqM5g_X53Ir-X98eqaoMCzN70iP3ucbA [hereinafter *Payment Platform*].

154. *Id.*

155. Sarno & Pham, *supra* note 6; *Payment Platform*, *supra* note 153.

156. Tablet sales are expected to outpace netbook sales by 2012. Verne G. Kopytoff & Ian Austen, *As PCs Wane, Companies Look to Tablets,* N.Y. TIMES, Aug. 19, 2011, *available at* http://www.nytimes.com/2011/08/20/technology/as-pcs-wane-companies-look-to-tablets.html?pagewanted=1&_r=1.

Apple.[157] One city's newspapers teamed up to offer iPad competitors a boost. Philadelphia's *Inquirer* and *Daily News* are trying to entice subscribers to choose an Android tablet over the iPad, offering half-price Android tablets to subscribers of their digital editions.[158]

The presence of two competitors poised to take on Apple is good news for newspaper publishers. Where the music industry, desperately in need of a way to make money off of digital downloads, was at Apple's mercy, the film and television industries, with several other working models to make money off of digital content, did not really care if they had a presence on iTunes. And book publishers were able to play Amazon, Apple's biggest competition in the e-book world, against Apple, which wanted a piece of the e-book market. The newspaper industry has options for designing for the tablet, but yet not contracting with Apple in the iTunes store, and publishers should use those options to negotiate the best deal with Apple that they possibly can.

CONCLUSION

The iPad represents newspapers' best bet to reclaim some of their lost revenue and begin charging for content again. Unfortunately for newspapers, the iPad is controlled by Apple, which is not exactly known for offering generous terms to the industries with whom it contracts. While the government could offer newspapers some protection, this does not seem likely based on early reactions to the FCC and FTC reports. Consequently, newspapers' best shot at gaining readers through the iPad without selling out to Apple is to follow the lead of industries that have cultivated competitors and found other options for getting their content to users, and not sign on entirely to the Apple store.

157. *Id.*

158. Lucia Moses, *Philly Papers to Sell Android Tablets*, ADWEEK (July 11, 2011), http://www.adweek.com/news/press/philly-papers-sell-android-tablets-133285.