

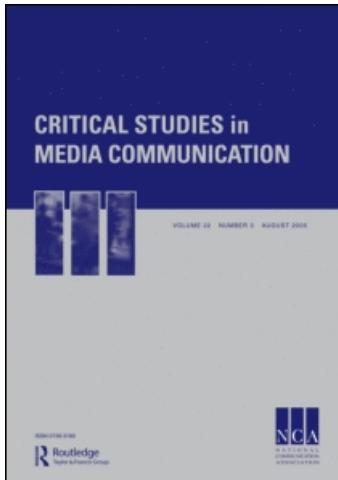
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A New Contract for the Press: Copyright, Public Domain Journalism, and Self-Governance in a Digital Age

M. Ananny & Daniel Kreiss

Many scholars argue that digital technologies are creating unprecedented opportunities for democratic expression, but fear that the networked public sphere is threatened by overly broad intellectual property rights. Focusing on journalism, we argue that this literature too narrowly emphasizes legal and technical restrictions on the fair use of cultural goods, and that more attention needs to be paid to whether expression in public spheres is inclusive, diverse, and of sufficient quality to meet the needs of democratic publics. Drawing on the underlying principle of copyright—as a public subsidy to promote and protect access to social expression—and positive interpretations of the First Amendment, we propose a two-tiered, content-neutral, opt-in system of state-funded incentives for journalism. Our first tier reverses the mechanism of copyright and subsidizes journalistic content produced for the public domain. Drawing on the “public journalism” tradition, we define a second tier of state-support for journalistic producers engaging in practices—transparency, accountability, dialogue, reliability, and collaboration—that can increase the quality of content. We conclude by suggesting a preliminary institutional model for administering these state incentives.

Keywords: Networked public sphere; Peer production; Public journalism; Copyright; First Amendment

Over the last decade scholars have argued that digital, networked technologies possess an extraordinary potential to create a broadly participatory public sphere. Yochai Benkler (2002, 2006), for instance, argues that digital media have unprecedented capacities to realize a more participatory and critical public culture and bring about a

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robust “networked public sphere.” Yet Benkler and others (e.g., Gillespie, 2007; Lessig, 2008) caution that excessive intellectual property claims, repeated extensions of copyright terms, technical regulations, and the subsequent withering of the range of presumptive “fair uses” of content all limit the internet’s promise as a platform for public life and truncate the shared information “commons.” Culture is progressively being “wired shut” (Gillespie, 2007) through code (Lessig 2006, 2008) and regulations (Boyle, 2008) that foreclose on forms of expression that have historically been available to citizens, even things as simple as sharing newspaper articles with friends for the purposes of discussion.

As these scholars celebrate the potential richness, and rail against the over-regulation, of the networked public sphere, the professional news industry slides deeper into a financial crisis. The print readerships of many major newspapers is declining, audience shares for news broadcasts are falling, and advertising continues to migrate to the internet at lower rates than print—threatening the financial and organizational security of the professional press (Meyer, 2004; Pew, 2009; Starr, 2009). The diminished economic viability of the professional press in turn leads to a dwindling resource base for reporting. Media firms are shuttering foreign bureaus, consolidating reporting staffs, closing local newspapers, scaling back coverage of public affairs, and abandoning investigative journalism. Even in the midst of the flowering of the networked public sphere, it is currently unclear where citizens can turn to for reliable information and how the public can hold elected officials accountable—institutional functions of the professional press. Finally, as local and regional newspapers alongside the ethnic press wither away, entire geographic and cultural communities lose an important symbolic vehicle for imagining themselves as a community and their representation in national debates on matters of public concern.

Much of the literature on the networked public sphere and the online commons is silent on the crisis facing the news industry. Indeed, this scholarship generally proceeds from the assumption that everyone will have equal opportunities to participate in public life once the overbearing hands of the state, and the cultural industries it often empowers, cease to regulate online life. While expressive freedom is vital to democracy, this account generally fails to consider the important questions of how the public is represented in the corridors of power and how citizens can hold elites accountable. At the same time, amid the celebration of a world where everyone can create information, few scholars have considered which publics are empowered to form and who is entitled to be heard in the networked public sphere. For example, many theorists are notably silent on questions relating to the quality of information in online public spheres, the raw materials available to citizens to *remix* and reuse in the service of democratic debate.¹ Few account for the persistence of socioeconomic and cultural barriers that systematically exclude some social groups from online political discourse.

This article argues that the First Amendment requires both that citizens have broad legal and technical freedom to express themselves and that democratic public spheres are robust, inclusive, and diverse. This democratic ideal will not come about on

its own; the state must actively foster the conditions for the networked public sphere.

As one means of doing so, we return to the copyright clause in the United States Constitution.² In the debate over copyright, few scholars have dwelt at length on its underlying principle: “to promote the Progress of Science and useful Arts.” Copyright is fundamentally a positive state subsidy that provides incentives for socially desirable forms of expression while guaranteeing the public’s rights of access to original works after a limited term. We embrace this principle, but reverse copyright’s specific mechanism of granting creators exclusive rights to control the use, dissemination, and derivations of their work in outlining a two-tier system of public subsidy for journalism. First, the state will provide an alternative form of “opt-in” fiscal incentives for journalism that is produced for the public domain.³ Second, the state will offer an additional level of subsidy for journalism that is both freely available to the public and produced through a set of practices designed to ensure the quality of information in public spheres: transparency, accountability, dialogue, reliability, and collaboration. Meanwhile, in keeping with the insights of theories of communicative justice and participatory culture, these subsidies will be available to a vast range of producers including—but not necessarily limited to—newspapers, cultural and ethnic organizations, civic associations, cable television networks, local broadcast news, self- or collectively-run blogs, and community magazines.

This paper has four parts. We begin by outlining the literature on the networked public sphere and argue that this work would benefit from interrogating assumptions that a just and robust democratic dialogue will emerge on its own with only minimal state regulation. We then turn to a discussion of the underlying principle of copyright as a subsidy for desirable forms of social expression and demonstrate how this reading complements positive theories of the First Amendment. Drawing from this literature, we detail our proposal for a two-tiered system of public subsidy that ensures the quality of information, inclusivity of debate, and diversity of voices in public spheres. Finally, we conclude by outlining a preliminary institutional model for administering these subsidies as a starting point for debate.

The Information Commons and Limits of Networked Production

Scholars refer to large-scale, distributed projects such as Wikipedia and the open source operating system Linux as two paradigmatic examples of “commons-based peer production” (Benkler, 2002, 2006) supported by the affordances of digital media. As a collaborative, voluntaristic mode of producing informational “public goods” that are both nonexcludable (no one can be prevented from using them) and nonrival (one person’s consumption does not reduce what is available to others) (Hallgren & McAdams, 1997), many scholars argue that peer production has the potential to bring about a broadly participatory and decentralized networked public sphere. For example, citizens now have unprecedented opportunities to express themselves, interact with content, and collaborate with others to produce new

political expression—especially when compared with a public sphere dominated by mass media. These scholars celebrate, for instance, how digital information lets amateur bloggers cheaply and easily create forms of political speech that are then available for others to use—often without any financial or commodity markets for their work.

Freedom of Speech and Copyright

The extension of copyright terms and the design of technical regulations that enforce them through code, harm these unique opportunities for expression afforded by digital media. Overly broad copyright terms and claims prevent citizens from using original materials to produce new information goods, resulting in the under-use of knowledge and cultural resources (Boyle, 2008). For example, the extension of copyright across generations precludes the use of material that no longer has commercial value. The threat of a lawsuit is often enough to curtail even legal “fair uses” of copyrighted content—the noncommercial, transformative, and educative uses of information in ways that do not harm the market for the good. At the same time, copyright owners have unprecedented extra-judicial means to regulate what citizens do with information, such as the use of “digital rights management” technologies to technically preclude both illegal and fair uses of content (Gillespie, 2007; Lessig, 2006, 2008; Vaidhyanathan, 2004).

A number of scholars argue that these legal and technical regulations infringe upon individuals’ freedoms of speech. Netanel (2001), for instance, argues that the Copyright Act of 1976 should be subject to judicial scrutiny on First Amendment grounds given that it expanded both the scope of intellectual property rights and dramatically extended the length of time under which works enjoy protection. In his view, these mechanisms greatly restrict the expressive freedom of cultural consumers and become an unconstitutional state restriction on the freedom of speech. Similarly, Gillespie (2007, p. 261) likens digital rights management technologies to “prior restraints” on speech, blocking expression before it occurs. While courts have recognized very limited scope for prior restraints on speech by the state, technical regulations that routinely force consumers to use digital goods in certain, approved ways are supported by federal law. For example, the Digital Millennium Copyright Act prevents users from circumventing these restrictions, even for fair uses of content.

These concerns are not simply matters of legal and cultural theory. News producers have asserted their rights to control the circulation of their products through copyright. The Associated Press (AP) has been at the forefront of these efforts in recent years, issuing takedown requests to bloggers and website owners who have reproduced portions of the organization’s content. The AP is also currently exploring technical ways of monetizing all uses of its material, including charging citizens for excerpting as few as five words (Pérez-Peña, 2009).

Inclusion, Diversity, and Quality in the Networked Public Sphere

Scholars are right to critique these cases as examples of how content producers use copyright to foreclose, not promote, democratic expression. Yet, many scholars proceed from the assumption that a robust networked public sphere will come about on its own once the state stops promoting overly expansive intellectual property rights. In the process, there is little discussion of the need for inclusive, diverse, and quality journalism, and the *positive* role the state must play to ensure it.

Many scholars of copyright and democratic expression embrace—if not always in these terms—a conception of the public sphere as a ‘marketplace of ideas.’ This view posits that democratic speech requires freedom from state interference, a negative reading of the First Amendment, as truth will emerge from a vigorous clash of ideas. In the context of copyright, scholars argue that freedom from state interference (i.e., shorter terms and protections for fair use) will most reliably ensure the conditions for democratic self-governance. For these scholars, what is important are the ways that digital media dramatically lower “the cost of becoming a speaker” (Benkler’s 2006, p. 212) and thus promote the clash of ideas. For example, Benkler’s influential account argues that new opportunities for “communicating effectively *into* the public sphere” (Benkler, 2006, p. 213, emphasis added) will realize public conversation and dialogue.

While we do not doubt the many opportunities for speech afforded by digital technologies, especially when compared with mass media, we believe that peer production theorists must take seriously a “politics of inclusion” (Young, 2000). There is a developed body of literature critiquing the metaphor of a “marketplace of ideas” (Peters, 1989), most notably on the grounds that in this conception individuals enjoy the right to free expression, to “speak *in* public,” as opposed to the right to “speak *to* the public” (Salmon & Glasser, 1995, p. 445). Thus, the paramount value is self-expression, not communication, which requires dialogue. In contrast, for Young (2000, p. 107) democratic communication requires the presence of “differently situated voices that speak across their difference and are accountable to one another.” To take inclusion seriously is to try and achieve “participatory parity” (Fraser, 1992) among differently situated social and cultural groups. In this view, the state must account for the structural relations that systematically produce inequality in the right to speak to and be heard by the public and thus be represented in public debate. One strong argument for participatory parity is that differently situated groups articulate qualitatively diverse forms of expression. What is of paramount importance in this view is not the right of individuals to express themselves, but that “everything worth saying is said” in the context of democratic debate (Fiss, 1996, p. 26).

Mounting evidence suggests that the networked public sphere fails to support the participatory parity, diversity of perspectives, and quality of information necessary for robust democratic expression. An emerging body of empirical literature suggests that a host of technical, economic, social, and cultural processes amplify patterns of

political exclusion online. For example, in an analysis of over three million web pages, Hindman (2008) shows how those who have the opportunity to be heard by a public online share the same demographic characteristics as the elites of an earlier era; they are white, male, and highly-educated. Meanwhile, there may be less diversity of perspective online, as national, professional outlets dominate the online market for cultural and journalism products (Hindman, 2008). Yet, even as they provide the raw materials for much of a derivative “remix” (Lessig, 2008, emphasis added) political culture online, these professional outlets face an eroding resource base for quality investigative or even routine reporting on public officials (Green, 2010; Leibovich, 2010). Meanwhile voluntaristic, collaborative information production lacks the capital and formalized structures (Kreiss, Finn, & Turner, forthcoming) necessary to engage in the hard, sustained work of routinely monitoring elite decision makers. Although there are experiments in online “hyper-local” news (e.g., *EveryBlock* and *Outside.in*), there is little to suggest that these efforts can make up for the decline and loss of small, independent, mid-market, and ethnic news gathering institutions.

Copyright and Positive Theories of the First Amendment

We do not intend to denigrate peer production efforts, but to argue that new forms of online collaborative journalistic production deserve to be supported not only legally and technically but, as importantly, *financially*. An inclusive networked public sphere that features a diversity of social perspectives and quality information will not come about on its own. What is needed is both a theory and mechanism for proactively ensuring public communication in accordance with these values. In the pages that follow, we discuss how *positive* theories of the First Amendment require the state to ensure that the public is exposed to more ideas than it would otherwise hear expressed solely through markets. At the same time, we argue that copyright can be interpreted and legislated in a way that focuses on the collective rights of publics to both hear and, especially important today in the context of digital technologies, to express.

There is a long tradition of positive theories of the First Amendment. It asserts that the state must both protect expressive liberty and promote equality, such as creating policies and institutions to ensure that certain voices are not systematically discriminated against and there is parity in terms of opportunities to speak and be heard. In this view, the First Amendment not only shields individuals from unwarranted state intervention. It requires that the state create conditions in which publics can hear from minorities and others without the economic, social, or political power needed to compete in weakly regulated speech markets. Indeed, much positive First Amendment theory proceeds from the perspective that a collective right to hear is as important as an individual’s right to self-expression. In Meiklejohn’s (1948, p. 25) famous formulation, the First Amendment’s “point of ultimate interest is not the words of the speakers, but the minds of the hearers.”

Drawing on positive theories of the First Amendment, many scholars argue that positive rights for the press are necessary to protect its autonomy from the market. Sunstein (1995, p. 119), for instance, argues for state support of journalism “to

promote democratic self-government by ensuring that people are presented with a broad diversity of views about public issues.” The state has long subsidized American journalism, often based on this logic that the press is the custodian of public debate (e.g., Anderson, 1983; Cook, 1998; Sparrow, 1999; Starr, 2004). Newspaper and magazine publishers, for instance, enjoy lower postal rates for the circulation of their publications, an indirect form of support that was essential to their growth and the robustness of public communication early in the American republic. Governmental public relations offices help to organize information for journalists by giving them easy access to documents and officials. Since 1939, Congress has “exempted news deliverers from minimum wage, overtime, social security, and child labor laws” (Cook, 1998, p. 58). While often unacknowledged as a state subsidy, the U.S. government developed radio, television broadcasting, and cable technologies and then licensed their use to news media outlets. Thus, while American journalists are wary of any state involvement in their trade, this sentiment does not acknowledge the origins of their industry’s organizations, professions and economics. And, this support is granted by the state with few claims that it compromises the press’s “watchdog” role.

There are many more ways the state has historically subsidized journalism and public expression, models that are analogous to what we propose below. The government provides direct subsidies to content and culture producing, public-oriented organizations, such as appropriations made by the federal government to the Corporation for Public Broadcasting and National Endowment for the Arts. Another model is a second-order form in which public policies mandate private money to support public-oriented news and information organizations. For example, although C-SPAN is a private, non-profit organization that receives no direct support from the state, its revenues derive from government-mandated license fees charged to cable system providers. A third type of subsidy is the federal 501(c)(3) tax-exemption, which supports organizations that fulfill a public mission, such as those that serve charitable, religious, scientific, and educational purposes. A number of journalistic endeavors take advantage of being exempt from federal taxes, as well as provisions that lessen the tax burden of donors to these organizations. For example, ProPublica is a privately run non-profit news organization that produces content that others are free to use for non-commercial purposes. As these examples suggest, publicly funded news—whether through direct subsidies of news and information organizations, or indirect support through tax codes used by private foundations to fund news organizations—already exists in the United States.

The state-granted copyrights that publishers hold over their news products are another form of subsidy for journalism, although they are seldom recognized as such. Indeed, that the state should “promote” forms of socially desirable expression is the principle that animates the constitutional copyright clause. To ensure the “progress” of speech, the state secures “for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries,” a property right that lets creators control the use, dissemination, and derivations of their work.⁴ This property right is a direct, state-provided financial incentive intended to make it economically viable for

creators to continue to invest the time and resources required to produce information goods.

Yet, there is a deep tension in the mechanism of copyright when viewed through a First Amendment lens. As McGowan (2004, p. 301) points out, there are irreconcilable interests between “upstream” (original creators) and “downstream” (makers of derivative and transformative works) producers. The state cannot adjudicate between these speakers on the basis of what is the more socially desirable form of expression. This tension is only heightened with digital media and readily apparent in contemporary journalism. Bloggers and journalists produce derivative works almost instantaneously with original creations—indeed, a 24-hour news cycle demands it. Both the citizens who fashion commentary on public affairs using source material in the daily newspaper and the reporters who draw on the work of others to extend stories should enjoy the legal protection, and the financial subsidies for information production, that copyright currently provides upstream creators.

Therefore, while the principle of the state promoting expression remains as important as ever, given the unique affordances of digital media the specific mechanism of copyright prescribed to promote expression often impedes it. In this light, the current copyright system undermines its own fundamental purpose and without reform it will continue to do so.

Two Tiers of State Subsidy for Public Communication

Tier One: Support for Public Domain Journalism

We share the concerns of scholars and advocates who argue that overly expansive and lengthy copyright claims “lock down” culture and restrict a wide range of expression. To ensure the rights of citizens to participate in democratic cultures while continuing to promote the progress of expression, the first tier of our proposed subsidy involves sponsoring journalistic outlets that produce informational goods for the public domain. In this, we are faithful to the principle of copyright but reverse its current mechanism. Journalism producers—whether they are professional media outlets, individual or group blogs, or informal collaborative networks—can “opt-in” and forego the right to control the production and distribution of their work in exchange for direct state support. This ensures both the fiscal incentives that copyright currently provides, while guaranteeing that the output is legally and technically available for public use.

Tier One of our proposal will be entirely voluntary, automatic, and content-neutral. In exchange for an alternative subsidy for the creation of original works, news organizations will be required to release their content to the public domain and clearly designate it as such through Creative Commons’s “CC Zero (CC0)” tool. Creative Commons (2010) is a non-profit organization that provides a set of copyright licenses to “help you license your works freely for certain uses, on certain conditions; or dedicate your works to the public domain.” Organizations not wishing to waive all of their rights in their content will be free to continue claiming

proprietary rights. As importantly, subsidies for Tier One will be automatic once the work is released to the public domain, just as the incentives currently granted through copyright automatically apply to expression when it is fixed in a medium. This will ensure that the subsidy is applied on a content-neutral basis. Finally, as is clear, we do not want to define what a ‘journalist’ is, suggest that the state license journalists, or judge one organization or individual to be more worthy of subsidy over another. To promote inclusive debate, we do not limit subsidies to traditional news organizations or institutions.

Monies to support both of our tiers of direct incentives could come from a variety of sources, including taxes on digital software and hardware, license fees for internet services (similar to the model used to partly support the BBC), or funds raised by the Federal Communications Commission (FCC) auctions of the broadcast spectrum. It is important that these funds are *dedicated* revenue streams so that this system will be insulated from political pressure. We envision that the allocation of this subsidy for public domain works could function similarly to what Fisher (2004, p. 202) proposes in the context of cultural goods: if a producer chose to register her work, its online distribution would be tracked so that “each registrant would then periodically be paid by the agency a share of the tax revenues proportional to the relative popularity of his or her creation.” While the details of the specific monetary allocation for these works are beyond the scope of this article, and alternative models based on systems such as royalties for broadcast music are also available, following Fisher, we conceive of a system that calculates payments based on forfeited online ad revenues given the free circulation of public domain works. Our expanded subsidy tier, outlined below, will go beyond this market-based mechanism to support the creation of content that may not be commercially viable.

Some might rightly wonder how voluntaristic Tier One of our proposal will ultimately be. As is clear, we anticipate that news organizations will find it economically advantageous to participate in this system. Many profit-maximizing news organizations will choose participate, putting them at a relative advantage to their competitors that rely on copyright’s existing subsidy. In essence, this means that many profit-seeking organizations will opt-in to remain competitive. We see no problem with that. The state creates the conditions under which market-based competition occurs through regulation. In journalism, this occurs through such mechanisms as the licensing of television stations and media ownership regulations—all of which are designed to protect certain public principles while setting the terms under which economic activity is conducted. If all news organizations migrate to the public domain system based on their economic interests, our proposal will simply replace one system for subsidizing content (copyright) with an alternative one (public domain journalism). Indeed, central to our argument is that this system better achieves the principle of copyright: promoting the progress of expression. At the same time, along with peer production theorists we believe that increasing the number of works in the public domain has the potential to foster economic growth (Benkler, 2006).

Tier Two: Subsidies for Public Domain Journalism

The first tier of subsidy is a necessary but, on its own, insufficient system for creating the robust public debate democracies require. The state should provide an expanded level of fiscal support for the public domain content of any formal organization, individual, or network that produces information in accordance with a set of five interrelated and mutually dependent journalistic practices inspired by the “public journalism” movement: transparency, accountability, dialogue, reliability, and collaboration.⁵ While we do not stipulate any particular type of content for this tier of subsidy, we believe that these practices will help support more inclusive, diverse, and quality public communication. In addition, these practices are designed to create a more credible and publicly accountable journalism that can better hold other powerful institutions—ranging from the state to private corporations—accountable for their actions.⁶ As in Tier One, we believe that these practices are not the exclusive purview of professionals nor do they require the resources of large, formal organizations. At the same time, they are relevant across many different genres of public communication, from partisan mobilization and professional objectivity to citizen journalism. Finally, we only outline the general principles behind these practices here. As we detail in our preliminary institutional model, appointed experts and elected representatives of varying media sectors will create guidelines for what these journalistic practices entail.

Our first practice is *transparency*. By this, we mean that journalistic processes, ideals, and principles are open to public scrutiny before, during, and after news content is created. In short, individuals and organizations do not commit to producing a particular kind of content, but to creating content in a particular way (Plaisance, 2007). This makes it possible for the public to see and critique how stories were identified, researched, sourced, and produced—making clear the motivations and principles that guided journalists. Such transparency may involve making some of journalists’ background notes, research and communications—alongside their finished stories—publicly available, providing explanations for when and why off-the-record or background sources were used. Other practices to satisfy the transparency criteria may include journalists: revealing any actual or perceived conflicts of interest in their stories; revising already published online stories using mark-up notations that show when and why stories were changed; participating in “meta-forums” (e.g., online forums or periodic interviews) to answer questions about how and why their stories developed as they did, akin to the role played by the ombudsperson in some news organizations.

Defining and achieving transparency will be difficult, especially given questions surrounding issues such as the use of anonymous sources and the added time and attention such practices may require of journalists. Yet, the challenge of creating news transparently creates new opportunities to practice journalism, including using technology to convene networks with the explicit goal of critiquing journalism in progress.

Related to transparency is the concept of *accountability*, broadly conceptualized by McQuail (2003, p. 4) as the “purposes and also the consequences of publication. It refers to all ways in which public communication is ‘accounted for,’ by its originators, its recipients and those affected by it.” Accountability may be secured by laws and regulations, markets, publics, or professionals. It is insufficient simply to make visible the processes and principles that guide journalism; citizens need a means to ensure that journalists fulfill their mission of serving the public (Hodges, 1986). For example, journalists or news organizations who consistently fail to abide by the other four criteria of this tier of subsidy may be warned by the subsidy’s governance body and be asked to explain how they are meeting the criteria. Individual journalists and news organizations may be asked regularly to publish publicly available reports that detail how their practices and policies meet these criteria, and make available to researchers and other third-party evaluators documents and analyses that demonstrate their compliance. In addition to being accountable to their peers, there must be a means for citizens to hold journalistic organizations accountable for their work. This may be through such mechanisms as public comments during the subsidy review process, similar to the way that the FCC’s Rulemaking process works.

While defining exactly how this practice may be achieved will be the responsibility of representatives of each media sector, with input from citizens, the principal point to make here is that the individuals, networks, and organizations that accept state subsidies must be accountable to the public they serve. This kind of accountability ensures press freedom by putting journalists under a trustee model (e.g., Hutchins Commission, 1947) in which they are ultimately responsible to the public, instead of to their sources, advertisers, shareholders, or other social actors.

The third criterion of this model is that the actions of subsidized journalists encourage *dialogue*. This element is motivated by Carey’s (1997, p. 219) assertion that “the press maintains and enhances the conversation of the culture, becomes one voice in that conversation, amplifies the conversation outward, and helps it along by bringing forward the information that the conversation itself demands.” If the press has the responsibility to use its powers and skills to convene spaces for public communication, then publicly subsidized journalists must do more than transmit information to passive citizens. Examples include having publics talk with journalists about their stories in meta-forums and news organizations documenting how their reporting was used by or helped spur discussion among citizens, civic groups, governments, corporations, or other stakeholders. The aim here is for news organizations to trace their participation *within* public spheres, showing how and when their reporting created or shaped public discussion. We intend our state-secured subsidies to foster and support institutions that actively foster public dialogue given that we cannot expect face-to-face and online conversation to aggregate into collective deliberation and shared understandings.

Our fourth practice is *reliability*. Societies depend upon a certain amount of communicative trust (Bok, 1999). The essential idea is that if publicly subsidized journalism is to be transparent, accountable, and dialogic it must also be reliable. By “reliable,” we mean reporting that has a

mature subjectivity...tempered by encounters with, and regard for, the views of significant others in the profession; and subjectivity aged by encounters with, and regard for, the facts of the world. (Schudson, 1978, p. 192)

This statement outlines a *methodological* goal for journalism as a reflective practice (Schön, 1983). Reliable journalism cannot be equated with the mistaken notion that “facts speak for themselves” (Tuchman, 1972, p. 676). It is a journalism wherein a set of practices and norms provide the rules that enable statements about the world to be produced and evaluated. While these rules are grounded in the codes of professionals developed over the course of a century, they can relate more generally to socially legitimate modes of producing knowledge that require individuals to act in good faith, weigh evidence, and make the criteria through which they create and evaluate information visible to their publics. A number of mechanisms that support reliable journalism might be implemented. For instance, journalists can provide direct links to evidentiary material, detailed biographical information on themselves and their sources, and access to archives that help put an issue or public debate in social and historical context.

Our final criterion is that publicly subsidized journalism be *collaborative*. Collaboration may take different forms, but it should impact the production of journalism in a meaningful way (Wahl-Jorgensen, 2002). For example, readers may suggest topics to be reported or alternative sources that might be cited. Audiences might work with journalists by doing complementary research and co-authoring stories. We also see great promise in new collaborations between journalistic and civil society organizations and the state, which has historically organized information for the press (Cook, 1998). One example is the efforts of the Obama Administration to make more governmental agency data public in digital formats that are then easily accessible for journalistic and open government organizations such as the Sunlight Foundation.

Collaboration is motivated by two main ideas. First, the state will subsidize journalistic practices that provide the spaces in which such collaboration might take place given that citizens are not simply passive recipients of what information professionals think they should know, but active interpreters, critics, and creators of messages that reflect their interests and conversations. Second, collaboration may serve an educative function, helping citizens acquire the skills, attitudes, and relationships necessary to become more active participants in—and teachers of—public life.

Institutional Design

We recognize how difficult it will be to administer these subsidies, especially given the inherently contestable and subjective nature of these practices. In this section we sketch a model for administering and evaluating these subsidies as a starting point for discussion and critical debate, rather than a definitive proposal for media governance. We do not think it would be productive or workable to have a system designed and imposed from the outside. The specifics of institutional design must have buy-in

from all the stakeholders involved for this proposal to succeed politically. We thus recognize that this proposal can only take shape over a timeline far longer than what is optimal from the standpoint of a news industry in crisis. But adjudicating copyright claims in court will take even longer, cost more money, be even less effective, and have a fundamentally detrimental effect on the creation of robust online public spheres.

Drawing from James Curran's (1996) work, we propose that five different media sectors—professional, civic, partisan, market, and citizen—broadly constitute the contemporary U.S. media system and represent different genres of public communication (see Figure 1). For each sector, appointed experts and elected representatives will be tasked with defining public journalism practices and evaluating proposals for Tier Two subsidies. Representative evaluators and administrators will be elected by their peers and appointments made by the executive branch (similar to the FCC). We suggest combining elected representatives with appointed experts to provide for the continuity of these panels and to insulate them as much as possible from political influence. Importantly, as detailed below, many of these bodies will be housed within existing institutions. Finally, our model relies on self-categorization, where outlets seeking public subsidies determine for themselves which sector they, or particular segments of their content, are a part of and apply to that sector's body of representatives.

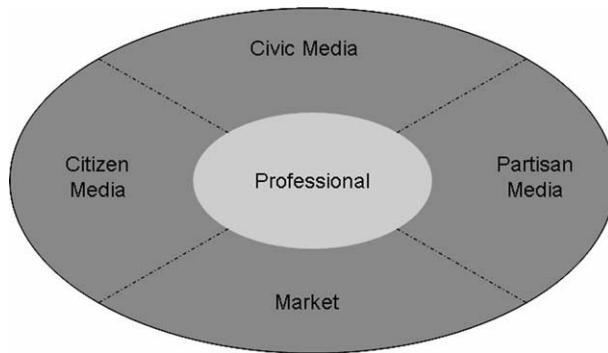


Figure 1. U.S. Media Sectors and Genres of Public Communication.

Professional Sector

The professional sector anchors our model and will be represented by an elected body of reporters and editors from news outlets across the United States in addition to appointed experts. These journalists will interpret public journalism practices and evaluate applications in accordance with professional norms and in the context of their existing professional associations. These norms include a commitment to objectivity and an often adversarial or “watchdog” relationship to the state. The point here is not to defend these norms uncritically, or claim that journalists live up to

them in practice, but to suggest that the profession occupies a unique institutional role as the representative of the public, interpreter of social life, and critical monitor of power.

This body of elected professionals tasked with administering the subsidies can be housed within the Society for Professional Journalists (SPJ), the largest journalistic association in the United States that is instrumental in articulating professional norms, standards, and ethics. We recognize, and even welcome for the purposes of this proposal, that the SPJ defines “professional” narrowly to exclude amateur and non-traditional content. Not only are there ample opportunities for bloggers and others to apply to other sectors, but this ensures that professional norms are represented.

Civic and Partisan Media Sectors

We define the “civic media” sector as encompassing journalism produced by nongovernmental and nonpartisan organizations that adhere to the requirements stipulated under the 501(c)3 status of the United States tax code. These requirements include prohibitions on attempting to influence legislation and participating in electoral activities. While the cultural, social service organizations, universities, and religious institutions that fall into this category cannot directly engage in campaign activities, these organizations play an important role in public spheres. They communicate to their members and wider publics, helping to raise awareness of particular issues and define perspectives on public affairs. In addition, their spokespersons and memberships often serve as sources for the professional press, state agencies, and elected officials. As such, they are an important influence on public debate and policy making. Organizations that fall into this category will be eligible for subsidies to support their communications if they are produced for the public domain and in accordance with the practices detailed above. Importantly, this public support will strengthen the “linkages” (Young, 2000) between these social groups and organs of the state by building their capacity to speak to a wider public.

While 501(c)3 organizations do not directly engage in electioneering, the “partisan media” sector is made up of the organizations that shape much campaign communication and participate directly in the legislative, policy-making process. Similar to the civic media sector, this is also an important site for the development, inclusion, and amplification of a diverse set of social voices. These organizations include political parties alongside advocacy, interest, and lobbying groups, many of which are designated as 501(c)4 “social welfare,” 501(c)5 labor union, 501(c)6 professional, or 527 organizations under the United States tax code. We also include here a host of independent, alternative, and oppositional media, for example outlets such as The Village Voice and Pacifica. Similar to civic media organizations, they pursue a range of communicative practices, including speaking to their members and to broader publics, but they have wide latitude to engage directly in electoral and legislative activities, including urging their members to vote for or against specific

policies. Historically, these organizations have played important roles in public spheres, and many have long traditions of printing newspapers and producing media that speak to their own members and the general public. Many have also been quick to adopt new, digital communication platforms. As such, the general values of public domain information and the practices of public journalism are of wide relevance to this sector.

Of all the sectors, we anticipate that the civic and partisan media will be the most fraught with regard to evaluating proposals and administering subsidies for public journalism practices. We naturally expect there to be a plurality of competing ideological and cultural perspectives within these sectors. To that end, and to help ensure that this is both a representative and deliberative body, we propose that the appointed and elected representatives for these sectors be housed within a new “Office of Civic Media.” This could be modeled on the current White House Office of Faith-Based and Neighborhood Partnerships, which has an advisory board that gathers together diverse, and often ideologically opposed, representatives from religious and secular organizations to deliberate and help determine the guidelines for governmental support of the social services provided by these agencies. The Office of Civic Media could be governed by a similar body of representatives that are appointed and elected from the organizations that are part of these sectors. We are not naïve enough to believe this process will be tension-free, but we are hopeful that these groups can define appropriate standards to guide their communicative practice in the context of state support.

Market Sector

While the professional press in the United States is broadly commercial, and has been so historically, by naming a separate “market sector” we hope to capture here those outlets that produce journalistic content with an eye more towards market concerns. This includes broadcasters and print publications that produce ‘soft’ news features, such as celebrity, sports, and lifestyle reporting, as well as forms of opinion journalism and political talk shows that do not require substantive resources for original reporting. Research suggests that these more popular market-oriented formats both attract different audiences than other types of professional journalism and may even serve as important vehicles for political information (Baum, 2005). For example, the 2007–2008 presidential election was regularly covered in lifestyle magazines and on programs including *The View*. In recognition of the fact that popular culture is an important realm for crafting political values and communicating political information we hope to create a mechanism that will further support these outlets. As such, if the content of these organizations is produced in accordance with public journalism practices and available in the public domain for citizens to reuse, the production of this work should be subsidized. Administration of this sector can fall to an elected body of representatives housed within the FCC, which has long been responsible for media oversight, including mandating public interest content.

Citizen Media Sector

Our final sector encompasses “citizen media,” a broad category that refers to forms of peer production. This includes political blogging, distributed reporting organizations such as *Talking Points Memo*, professional-amateur collaborations including *Off the Bus*, and online content aggregators. This sector is not limited to digital formats; similar collaborations in the realm of print, radio, and television, or any combination of these media, are all included. Given that there are many competing definitions of what exactly constitutes “citizen media,” and indeed professional journalists often collaborate with citizens and some amateurs have parlayed their writing into paid journalistic and political positions, we suggest that a genre of communication exists that can be contrasted with the professional norms cited above.

For example, many of these citizen media efforts express a political and partisan viewpoint. Communication is often driven by moral judgments, cultural concerns, and the relevance of information for particular communities rather than professional news values. Often, citizen media practitioners intend to mobilize citizens for action—rather than simply inform them. There are also many different genres that encompass journalism in this sector, from more expressive, cultural forms of political speech to collaborative investigative projects. These characteristics do not apply to every network or organization in this sector, nor are they exhaustive. Of all the sectors this is the least institutionally defined at this point and there are no professional organizations or agencies that currently play an oversight role.

Given this, we envision a mechanism of peer-produced governance for this media sector. As a host of successful collaborative projects demonstrate, peer production processes can be directed towards a range of ends, from building an operating system to creating an encyclopedia. We take particular inspiration from Noveck’s (2006), *Peer to Patent* project, which involved the United States Patent and Trademark Office using a web-based system to enable open peer review of patent applications. Importantly, as a project *Peer to Patent* was both expert and participatory: networks of citizens contributed research and knowledge in evaluating these applications, while the patent examiner remained “the ultimate arbiter” and provided “feedback to the community” (Noveck, 2006, p. 12). This model avoids many of the perils of open participatory systems that lack the governance and structures necessary for realizing quality contributions (Fishkin, 2009). To this end, an online system that enables citizens to review, critique, rate, and vote on proposals for public journalism subsidies for citizen media can be designed and implemented by an “Office of Citizen Media.” These contributions, meanwhile, will be reviewed by a body of appointed experts that can include academics with experience founding similar projects or prominent citizen journalists.

Conclusion

The two-tier model of journalistic subsidy proposed here outlines a new contract between the press and public. It is both premised upon—and extends beyond—claims

made by those who celebrate the potential of the networked public sphere, taking seriously the notion that commons-based peer production might unlock expressive freedom but questioning whether unfettered participation alone will lead to the inclusive debate and diversity, and quality of information required for informed self-governance. Debates regarding the over-extension of copyright center on individuals' rights to express themselves using the raw information materials in the public domain, but largely fail to engage with broader questions about whether such expression realizes core principles of democratic equality. This reflects a limited and largely negative interpretation of the First Amendment, a perspective that portrays the state as simply a threat to individual communicative liberty.

It is unclear what the impact of digital networked technologies on American journalism will be, whether “[j]ournalism as it is, is coming to an end” (Deuze, 2007, p. 141) or whether professional norms will migrate to new platforms and be recast into new institutional forms. What is clear is that scholars and practitioners alike are struggling to create the business models that might rescue valued forms of journalism from widespread market failure. And yet, in the face of anxiety over the seeming death of an institution, only a handful of scholars and very few practitioners have questioned why we would entrust such a fundamental pillar of democracy to the market in the first place. Meanwhile, those looking to new production models of networked collaboration have an uncritical faith in voluntarism and fail to fully appreciate its limitations, especially with respect to providing platforms for many social voices or the resource base for routine and quality journalism. We share with these scholars the belief that contemporary media tools and the networked practices that have developed alongside them certainly offer new potentials for citizens to engage and participate in civic life. But we also note that there is as of yet little evidence that such collaboration alone is creating robust public spheres that foster and sustain the production of diverse viewpoints, democratic dialogue, quality information, and perspectives on what is happening around the corner as much as across the globe.

Our proposal for a two-tiered system of state subsidy for journalistic production will not only create a rich and public system that secures freedom of expression in a digital age, it will also actively support the diverse forms of communication called for by positive readings of the First Amendment. By returning to the underlying principle of copyright—“to promote the Progress of Science and useful Arts”—we can reinvent a very old approach to supporting socially desirable communication and help the state secure the twenty-first-century networked public sphere. At the same time, our expanded system of state subsidy will ensure that the heterogenous publics of the information age have access to, and can participate in, an inclusive, diverse, and robust public debate over matters of common concern.

Notes

[1] Drawing from critiques of Habermas's (1989) notion of a singular “bourgeois public sphere,” we use the plural term “public spheres” to refer to a “plurality of competing publics” (Fraser, 1992, p. 116).

- [2] For conceptual clarity our argument proceeds from a body of American scholarship and case law regarding copyright and the public sphere.
- [3] The “public domain” refers to information that is free from any claim of intellectual property rights. This conception is more expansive than what scholars refer to as the “commons.” In a commons, information is privately owned but accessible under certain conditions. For a discussion of the difference between these two concepts, see Boyle (2008, pp. 38–39).
- [4] While it is beyond the scope of our argument here, it is worth noting that all property rights are a form of subsidy in that they are contingent upon the security and backing of the state (Sunstein, 1995).
- [5] For a review, see Glasser (1999) and Glasser and Lee (2002).
- [6] Given space constraints, we focus here on these ideal journalistic practices as procedural values, although we believe that they will serve important substantive ends such as holding the state and professional communicators accountable to the diverse interests of the polity.

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