

**A new contract for the press:
Copyright, public journalism, and self-governance in a digital age**

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Abstract: Many scholars argue that digital technologies have the potential to expand the range of voices in democratic discourse but fear that the “networked public sphere” (Benkler, 2006) is threatened by overly-broad intellectual property rights that restrict freedom of speech. While we agree that the breadth of the public domain is important, we argue that more attention must be given to the quality of discourse in the public sphere, especially as markets divest in journalistic institutions. Drawing from 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 incentives for journalism. To secure the public domain, through our first tier we reverse the mechanism of copyright and propose that the state subsidize organizations, networks, or individuals that voluntarily surrender the right to control the dissemination of their work. Drawing on the ‘public journalism’ tradition, we then define a second tier of state-support for any group or individual also engaging in practices – transparency, accountability, dialogue, reliability, and collaboration – that increase the overall quality of journalism. We conclude by proposing an institutional model for the administration of these state incentives.

Keywords: networked public sphere, peer production, public journalism, copyright, First Amendment

Over the last decade there has been considerable interest in how digital, networked technologies have seemingly limitless potential to create a broadly inclusive and participatory public sphere. While Michael Hauben (1996) declared as early as 1996 that networked “citizen journalists” were revitalizing democracy by subverting the ability of professional news organizations to control “who reports and what they say,” many scholars argue that the growth in blogs, online collaborative journalism projects, and dynamic new outlets that combine professional and amateur reporting is only now beginning to realize the democratic promise of “we media” (Gilmor, 2004). Among the most influential voices connecting changing modes of information production to democratic ideals are legal scholars who argue that a “networked public sphere” is emerging in which individuals can freely express themselves by creating and disseminating political and other cultural information on an unprecedented scale (Balkin, 2004; Benkler, 2006). For these scholars, however, this potential is threatened by what Boyle (2003, p. 36-37) describes as the “second enclosure movement” in which excessive intellectual property claims and interminable extensions of copyright terms limit the Internet’s potential to be a new platform for public expression. Indeed, not only are new, online journalistic aggregators and opinion-makers facing increased scrutiny over potential copyright violations (Stelter, 2009), as the case of street artist Shepard Fairey’s derivative use of an Associated Press image of President Obama suggests (Kennedy, 2009), the range of presumptive fair-uses is increasingly contested.

As these scholars write about the potential richness and over-regulation of the information commons, the news industry is in a deep financial crisis. Declining readerships and revenue for many major newspaper companies, decreasing audience share for network news outlets, and the continued migration of classified and other advertising to new online destinations with lower rates all threaten the financial and organizational security and autonomy of the

professional press (Baker, 2001; Hamilton, 2006; Meyer, 2004; Pew, 2009; Starr, 2009). The diminishing resource base for reporting and the more general failure of markets to produce quality journalism are paramount concerns: as the public lacks reliable information and deliberative forums, citizens are less able to hold elected officials accountable and participate in the expressive aspects of democratic life. Without strong and reliable fiscal support, news organizations are increasingly unable to fulfill the press's historic role as a key institution in American democracy.

This essay proposes that theories of the public sphere better account for the necessity of state-secured resources to create conditions for expressive, democratic self-governance. Scholars of peer production and the professional press largely speak past each other. Studies of the information commons are often silent on questions of journalistic quality, while many theories of the professional press fail to consider the implications of expansive content ownership. This essay interprets the First Amendment affirmatively and views copyright as a state-secured subsidy to argue for subsidizing the production of a diverse range of expression in the public sphere.¹ We propose a two-tier system in which the state supports 'opt-in' fiscal incentives for journalism that is either in the public domain or freely available to the public and – to earn an

¹ For conceptual clarity our argument proceeds from a body of American scholarship and case law regarding copyright and the public sphere. While the scope of this paper is necessarily limited, future avenues of research can draw productive connections between the arguments presented here and international copyright treaty and law. The challenge of addressing this here are the varying national approaches to copyright treaties and domestic law in this domain. For an excellent overview of these issues, see Paul Goldstein's (2001) International Copyright and Ricketson and Ginsburg's (2006) International Copyright and Neighbouring Rights. For a detailed history of the Berne Convention, the main international treaty governing this area, see Ricketson (1987) The Berne Convention for the Protection of Literary and Artistic Works. For reviews of the World Intellectual Property Organization Copyright Treaty, which includes regulation related to information technology and updates certain aspects of Berne, see Ficsor (2002) The Law of Copyright and the Internet; Maskus (2000) Intellectual Property Rights In the Global Economy; and, Sell (2003) Private Power, Public Law. Finally, for an engaging discussion and critique of U.S. copyright law and its place in the international system see Vaidhyathan's (2003) Copyrights and Copywrongs

additional level of subsidy – produced through a set of practices that demonstrate a commitment to transparency, accountability, dialogue, reliability, and collaboration.

Building on the work of theorists of the commons, we aim to ensure that journalistic content is available in the public domain for citizens to use freely as they participate in – and deliberate on – public affairs. To address this, our first tier proposes that content creators receive direct material support from the state as an incentive to produce work that is in the public domain. This is faithful to the principle of copyright but reverses its specific mechanism: in exchange for a producer giving up her right to determine how her content is used, the state will subsidize her efforts. This proposal is voluntary – it does not replace markets for news or require organizations to join a public system – and extends a novel form of support to a vast range of producers. These incentives are available to commercial and non-commercial organizations, individuals, and new forms of networked “commons-based peer production” (Benkler, 2002) that produce journalism including, but not limited to, newspapers, cable television networks, local broadcast news, self- or collective-run blogs, and community magazines.

At the same time, we see expanding the range of works in the public domain as a necessary but fundamentally insufficient way of promoting the robustness of the public sphere. For example, recent theoretical and empirical work points to the limitations of peer production with respect to ensuring the quality of complex social and cultural tasks (Duguid, 2006). To this end, we combine the underlying principle of copyright law with positive theories of the First Amendment to propose direct state incentives that create the conditions for the broad progress of science, culture, and political dialogue. Instead of seeing the state as a guardian of individuals’ free speech rights, we see it as “trying to protect the interest of the audience – the citizenry at large – in hearing a full and open debate on issues of public importance” (Fiss, 1996, p. 18).

Drawing from models of ‘public journalism’ that are tightly coupled with such affirmative interpretations of the First Amendment, we argue for an expanded public subsidy for organizations, individuals, or networks that commit to practices intended to ensure a certain type of journalistic quality: transparency, accountability, dialogue, reliability, and collaboration. We anticipate that these content-neutral, practice-based criteria will help to increase the overall quality of discourse required for democratic self-governance. As with the first tier, this is an entirely voluntary system.

This paper has four parts. We begin by outlining the literature on the commons and peer production and argue that this work would benefit from closer consideration of the quality of information in the public sphere given the challenges of generating, allocating, and using collaborative resources. 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 model complements positive theories of the First Amendment. Drawing from this literature, we then detail our proposal for a two-tiered system of public subsidy that seeks to ensure both the breadth of information in the public domain and the quality of democratic expression. Finally, we conclude with an overview of an institutional model for administering these subsidies.

THE INFORMATION COMMONS AND NETWORKED PRODUCTION

A growing body of literature suggests that digital media are greatly expanding the possibilities for democratic communication. The dramatic successes of large-scale distributed projects like Linux, an open-source operating system, and Wikipedia, the online encyclopedia, demonstrate that inexpensive information dissemination and new forms of collaborative, networked production give rise to unprecedented opportunities for the generation of

informational “public goods” that are both nonexcludable (no one can be prevented from enjoying them) and nonrival (in which one’s consumption does not reduce what is available to others) (Hallgren & McAdams, 1997). In a series of highly influential works, Yochai Benkler (2002, 2006; Benkler and Nissenbaum, 2006) argues that this new mode of “commons-based peer production” is premised upon non-market collaboration and ethical relationships among citizens. One consequence is a broadly participatory, decentralized “networked public sphere” that greatly expands beyond physical spaces, such as town squares, to support the expression and collaboration essential to democracy (Hess and Ostrom 2007, p. 13; Benkler, 2006).

Despite this potential, the unique opportunities for expression afforded by the networked public sphere are under assault by legislation that expands and lengthens the term of copyright. The enclosure, or privatization, over a 500-year period of shared, communal spaces (including grazing lands and urban parks) provides a compelling metaphor for those who fear the “tragedy of the anti-commons,” where overly-broad information property rights result in the under-use of knowledge resources, the curtailing of individual expression and collective action, and, more generally, the truncation of the public sphere (Boyle, 2003, 2008; Heller, 1998). As digital, networked media become more ubiquitous, copyright expansion’s restrictive nature becomes even more apparent. Given the ease with which content can be replicated, manipulated, and disseminated copyright extension and enforcement precludes many of the unique possibilities for citizen expression, discussion, and debate afforded by new technologies, whether the platform is digital text, video, or even code. For example, extending copyright claims across generations and using technical means to preclude sharing and even legal fair uses of material (Lessig, 1999 2002, 2004, 2006) constrain audiences from re-working and re-creating commercially produced

content for political, cultural, and economic ends (Gillespie, 2007; Jenkins, 2006; Lessig, 2008; Mosco, 1996; Vaidhyanathan 2001, 2004).

Given this, a number of scholars argue that interminable copyright extension and restrictive technical measures infringe upon the First Amendment's guarantee of individual freedom of expression. For example, Netanel (2001) argues that changes in the law implemented through the Copyright Act of 1976 should be subject to judicial scrutiny on First Amendment grounds given that they restrict the expressive freedom of cultural consumers. In this line of argument, the First Amendment is construed as a negative right that guarantees individual freedom of expression by limiting state-granted intellectual property claims. In essence, copyright's expanded legal and technical mechanisms are an unconstitutional state restriction on the freedom of speech.

These concerns are not simply matters of legal theory. In the context of journalism, there are a number of recent cases where owners of news outlets have asserted their right to control the circulation of their products – effectively wielding copyright claims to limit citizens' access to the informational materials with which they might exercise their First Amendment rights. In addition to the high-profile Shepard Fairey case cited above, the Associated Press has issued takedown requests to bloggers and Web-site owners and still has an unclear policy on how their content might be re-used (Hansell, 2008). FOX News has not yet agreed that presidential debates are in the public domain. Many news outlets enforce their copyrights through technical restrictions, releasing content in formats that are difficult reuse or rework, such as using proprietary forms of streaming video. This does not just impact citizens. C-SPAN sent House Speaker Nancy Pelosi's office a cease and desist letter in 2007 for the use of copyrighted video on the speaker's blog "The Gavel" (Cohen, 2007). While each of these cases are complicated and

these news organizations' policies continually evolve, all point to the deeper underlying problem that there are irreconcilable interests given that copyright's fundamental purpose is to support "the production of expression that does not exist yet" (McGowan, 2004, p. 301). News organizations rightfully argue that there needs to be ways of ensuring that the production of original work is supported, while citizens have a legitimate claim on using these materials for their own political expression.

To date, the debate over the applicability of First Amendment scrutiny to questions of copyright offers little in the way of adjudicating between these claims, primarily because the literature largely fails to comment on what it might mean to encourage and define quality expression. The general assumption is that a negative role for the state, or more narrowly tailored enforcement of copyright claims, will most reliably support individual speech and the robustness of the public sphere, in the process helping to guarantee expressive freedom and ensure the conditions for democratic self-governance (Benkler, 2006). Importantly, this view is premised on minimal state intervention. As Netanel (2001, p. 86) argues, since the First Amendment protects individual expression from the state, judicial scrutiny should be applied to intellectual property legislation to ensure "that the provisions in question are narrowly tailored to further copyright's fundamental purpose, that of promoting the progress of science and the arts by providing an incentive for the creation and dissemination of original expression." Framed in this way, while Netanel recognizes the value of copyright for content creators, his argument generally echoes marketplace approaches that assume less state intervention will most reliably result in more diverse democratic expression. Unfortunately, while in other contexts Netanel (1996, p. 359) has suggested that there may be a need for more expansive state subsidy to preserve democratic debate in the face of an "unregulated media market," among commons scholars there has been

little discussion toward this end. Indeed, the quality of public discourse is generally assumed given the presumed diversity of voices that participate in the networked public sphere.

Yet, empirical evidence suggests that voluntaristic, collaborative information production may not be meeting the needs of large democratic publics. For example, initial forays into online citizen journalism have a checkered record (Rosen, 2007) and while The Huffington Post's co-sponsored "Off The Bus" project can claim some successes with regard to professional-amateur collaboration in the context of an electoral campaign (Michel, 2009), more work is needed before it is clear exactly how such reporting can be sustained as a qualitatively different form of journalistic discourse. And if public sphere discourse is ideally characterized by different viewpoints expressed by diverse participants, it is unclear whether peer production can independently sustain such heterogeneity. For example, in an analysis of over three million Web-pages, Hindman (2008) demonstrates that the networked public sphere is actually more concentrated in terms of audiences than many mass media outlets and finds that a new digital elite structures online political communication in conjunction with traditional political and media organizations. At the same time, recent experiments in online journalism business models suggest that Web-only publications might be able to fulfill some traditional roles of the press while expanding the public domain. Consider, for example, The Huffington Post's (2009) new Investigative Fund and its aim to produce original long-form investigative stories and shorter, breaking news pieces that will be "free for any media outlet to publish simultaneously." Meanwhile, ProPublica (2009) relies on a non-profit, foundation-funded business model to produce original investigative journalism stories that are then "offered exclusively to a traditional news organization, free of charge, for publication or broadcast."

Such experiments are promising ways of funding one aspect of the traditional mainstream press (investigative journalism) while making this work accessible to the public. However, there is little to suggest that new forms of peer production or nonprofit models can adequately compensate and support the labor (Ross, 2006) necessary to produce reporting of the kind that has traditionally appeared in mainstream press or replace the loss of foreign bureaus, local newspapers, and routine, beat-based reporting.

COPYRIGHT AND POSITIVE THEORIES OF THE FIRST AMENDMENT

Our intent is not denigrate these efforts, but to argue that they deserve to be fiscally supported outside of market or foundation mechanisms that fail to guarantee them sustainable resource bases for journalistic expression. In focusing on how copyright largely restricts freedom of expression, peer production and free culture scholars devote less attention to the underlying principle of the constitutional copyright clause: “to promote the Progress of Science and useful Arts.” Copyright is fundamentally a form of state subsidy that provides incentives for socially desirable forms of expression while guaranteeing the public’s right of access to original works after a limited term. As such, an active state secures this ‘progress’ by balancing the rights of creators and the public, granting a property right in the initial control of a work and collective rights to the public domain after a period of time.²

This role for the state in intellectual property complements affirmative interpretations of the First Amendment as both a legal construct (Fiss, 1996; Meiklejohn, 1948, 1961) and a

² 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. While he does not address copyright, this claim is powerfully advanced by Cass Sunstein (1995, p. 39) in the context of the First Amendment: “in a system of property rights there is...no such thing as “no regulation” of speech; property rights inevitably allow property owners to exclude prospective speakers. The question is what forms of regulation best serve the purposes of the free speech guarantee.”

socially meaningful concept (Emerson, 1966). In such positive theories of the First Amendment, the state is responsible for creating the conditions that enable free speech, just as the copyright clause provides for the progress of expression. In the context of the First Amendment, we expect both the absence of regulation that prevents the public from hearing certain ideas – and the presence of regulation to ensure that the public is exposed to more ideas than it would otherwise hear expressed solely through markets. While the former is more familiar, we already broadly recognize that it is acceptable to regulate speech in the interests of promoting the quality of public life. For example, the courts have long upheld the constitutionality of regulations imposed on the time, place, and manner of speech in public forums. Even further, the state actively subsidizes many forms of speech, even those that may challenge community norms, as when the police protect public protesters. Given this, the question becomes why American legal systems limit their valuation of diversity in public debate and rarely use regulation to encourage it? As Fiss (1996, p. 19) argues:

The phrase ‘the freedom of speech’ implies an organized and structured understanding of freedom, one that recognizes certain limits as to what should be included and excluded. This is the theory upon which speech regulation that aims to protect national security or public order is sometimes allowed; it should be equally available when the state is trying to preserve the fullness of debate. Indeed, the First Amendment should be more embracing of such regulation, since that regulation seeks to further the democratic values that underlie the First Amendment itself.

Underlying this argument is the idea that contemporary democracies need to ensure both expressive liberty (letting citizens speak as they wish and not interfering with their individual rights) and equality (creating policies and institutions to ensure that certain voices are not systematically discriminated against and thus absent from public communication.) Seen as such, the First Amendment not only shields individuals from unwarranted state intervention but also, ideally, ensures that societies hear from minorities and others without the economic, social, or

political power needed to compete in weakly regulated speech markets. In Meiklejohn's (1996, p. 100) famous formulation, with regard to the First Amendment "the point of ultimate interest is not the words of the speakers, but the minds of the hearers." Similarly, Sunstein (1995, p. 119) argues that positive rights for the press are necessary because they protect its autonomy "to promote democratic self-government by ensuring that people are presented with a broad diversity of views about public issues." He specifically cites the First Amendment's "structural goal of promoting a certain kind of deliberative process [emphasis added]" that goes far beyond the freedom from prior restraint that is at the center of many free press claims (ibid. 115). Many of these theorists advocate not only for state regulation but also for subsidies that might help the press fulfill this role.

American journalists' wariness of any state involvement in their trade is based on a fundamental misunderstanding of the history of the American news media. As numerous scholars document (e.g., Cook, 2005; Starr, 2004), American journalism has always been subsidized by the state; copyright is simply one example among many, and not even the most significant historically. Newspaper and magazine publishers have long enjoyed 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 organize information for journalists by giving them easy access to documents and officials (Cook, 2005). Radio, television broadcasting, and cable technologies were developed through governmental efforts and licensed to news media outlets. These state-secured subsidies suggest historical conceptions of the press as the custodian of public debate, a role that was considered necessary for the workings of democracy (Anderson, 1983). This view is articulated most clearly and expansively in *Red Lion Broadcasting Co. v.*

FCC (1969), where the Supreme Court held that the First Amendment required affirmative regulation of the press to protect debate in the interest of self-governance. As the Court ruled, while the speech clause protects individual self-expression, freedom of the press is construed in terms of a right to hear: “it is the right of the viewers and listeners, not the right of the broadcasters, which is paramount” (ibid.)

If granting intellectual property rights is essentially a state subsidy and there is a long precedent for positive readings of the First Amendment, copyright can be legislated and interpreted in a way that focuses on the collective rights of the public – the listeners in the First Amendment theory cited above – to both hear and, especially important today in the context of digital technologies, to express. This reorientation and extension – returning to the principle underlying copyright and applying it to an affirmative interpretation of the First Amendment – requires both that works exist in the public domain and that incentives are created to provide for their quality. If a democratic society requires dialogue (i.e., the ability to create) and expressive diversity (i.e., robustness), then we need to develop an alternative mechanism of state subsidy to protect the progress of expression.

TWO TIERS OF STATE SUBSIDY FOR PUBLIC COMMUNICATION

Tier One: Support for Public Domain Journalism

Along with free culture and peer production scholars, we share the concern that expansive and lengthy copyright claims effectively ‘lock down’ culture, and that the affordances of digital information and technology make it particularly easy for such lockdowns to restrict a wide range of expression. Therefore we propose providing an alternative state-secured subsidy for journalistic outlets that forego the right to control the production, distribution, and content of

their work – the incentives that copyright currently grants. In essence, news producers, whether they are professional media outlets, individual or group blogs, or informal collaborative networks, should have access to comparable financial support but without explicit and exclusive property claims so that the public might freely use and rework their content in the service of democratic dialogue. The current copyright regime sharply curtails collective rights in public communication that are especially critical to the practices of networked peer production. Put another way, just as a positive reading of the First Amendment safeguards the public’s right to engage in self-governance, so too is there a collective right to create and expressively participate in democratic culture. While we see vast implications for this proposal with respect to various forms of culture, we narrowly focus here on its application to journalism because of the press’s role as a constitutionally protected information institution.

To this end, we propose that in exchange for a state-secured subsidy news organizations be required to release all content under a Creative Commons (2009) attribution license that allows commercial and non-commercial uses. Following the intent behind copyright but reversing its specific mechanism this federal subsidy is designed to create incentives for the future creation of public journalistic content. In essence, the state will fund the production of news, but the output will have to be in a format that encourages its widespread dissemination and re-use. Allocations will be entirely content-neutral and granted to a wide range of producers while remaining entirely voluntary: organizations not wishing to release their content in the public domain are entirely free to continue claiming proprietary rights. Monies to support these direct incentives can come from a variety of sources, including taxes on digital software and hardware, funds raised by Federal Communications Commission (FCC) auctions of the broadcast spectrum, or direct budgetary allocation. 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, where 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 regarding the specific monetary allocation for these works are beyond the scope of this essay, following Fisher we conceive of a system that calculates payments based on forfeited online ad revenues given the free circulation of public domain works (ibid).

Some might object that this system would interfere with markets for news. On the contrary, the first-tier of our proposal only supplements news markets by creating a new incentive for producing content. Indeed, this state-secured subsidy essentially monetizes digital informational goods, ensuring that content creators have the incentive to continue production. While this proposal may lead to audiences favoring material that is in the public domain, there is nothing currently preventing them from migrating in this direction. This proposal merely provides an alternative system of incentives for the production of journalistic content that is freely available for citizens to create with as they see fit. Thus, our proposal is a regulatory framework designed to promote the production of original political and cultural works that are widely available for public use as protected by the First Amendment.

Tier Two: Subsidies for Public Journalism

The first tier of subsidy is a necessary but, on its own, insufficient system for creating the kind of quality communication necessary for democratic self-governance. Thus, while the first tier provides creators with incentives to voluntarily cede their exclusive right to control the dissemination of original and derivative works, the second tier specifically addresses the quality

of information in the public sphere. As such, we necessarily propose specific criteria communication would have to meet to earn expanded state fiscal support. Drawing on the ideals of the public journalism movement, we argue that the state should subsidize the content of any formal organization, individual, or network that is both in the public domain and produced in accordance with a set of five journalistic practices: transparency, accountability, dialogue, reliability, and collaboration. These interrelated and mutually dependent practices define the minimum criteria that must be met. While we do not stipulate any particular type of content, we believe that these practices will help produce quality public sphere communication. We also avoid defining what a ‘journalist’ is and do not limit subsidies to traditional news organizations or institutions since these practices are not the exclusive purview of professionals nor do they require the resources of large, formal organizations. Finally, we only outline the general principles behind these practices here. As we detail in our institutional model, elected representatives of varying media sectors will be tasked with determining what these journalistic practices entail.

While there is no exact, shared definition of public journalism that describes it procedurally or normatively, it is based on a positive interpretation of the First Amendment. Many practitioners (Charity, 1995; Merritt, 1998) and researchers (Glasser, 1999; Glasser & Lee, 2002; Haas, 2007; Rosen, 1999) agree that the ideals of public journalism relate to promoting and improving democratic life by embedding the press within the communities they serve. Within these communities the First Amendment is seen as protecting a press that promotes self-government (not just self-expression), creates and manages public deliberation (not just public information), and ensures that individuals and communities encounter a diverse set of ideas (not simply a variety of perspectives that give the illusion of choice) (Glasser, 1999, p. 14).

Public journalism recasts the press from a supplier of information to a convener of conversations (Carey, 1987, p. 14) so that journalists can discover and report the community's agenda (Glasser & Lee, 2002, p. 209). This is achieved through public journalism's ideal strategies, mechanisms for community engagement, and the changes it brings to newsroom cultures. As Charity (1995, p. 5-12) details, public journalism works to realize "full-time citizens" through journalistic activities that help the public set an agenda, reduce complex social issues to clear choices, bridge gaps between the public and experts, facilitate deliberation, and encourage the public to take action on their choices. In practice, newspapers and television stations have translated these ideals into a variety of mechanisms for community engagement such as sponsoring open public forums for semi-structured debate on community issues, conducting focus groups, and forming citizen panels to discover community issues that may not be present in press coverage (Glasser & Lee, 2002, p. 216). Finally, to ensure that these community engagements impact the ethos and content of journalism requires an additional set of purposeful changes in the newsroom. Glasser & Lee (2002, p. 211) describe a set of guidelines for newsrooms practicing public journalism, including having reporters look for sources with moderate views (not just extreme opinions), valuing a citizen's knowledge alongside the expert's, and moving beyond a reliance on a limited number of bureaucratically reliable official sources (Fishman, 1980). This also entails organizational changes. For example, moving to a "reporting circle" model in which reporters from different beats collaborate on a variety of broad themes (*e.g.*, quality of life, city life and governance, leisure) that correspond to community priorities instead of newspaper sections (Johnson, 1998).

While we find the general principles of public journalism valuable for considering the role the state can and should play in promoting self-government, the literature on public

journalism tends to focus narrowly on professional organizations and the procedural aspects of journalism. Contemporary news, meanwhile, is as likely to be produced by professionals who adhere to the rituals of objectivity (Schudson, 1978, 2003; Tuchman, 1978) as non-professional sources with explicitly partisan and mobilization goals. Shifts in the production of information have also challenged the very definition of ‘community’ at a time when geographically-dispersed individuals come together in collaborative networks that are not easily represented by any single organization practicing public journalism. In sum, the ideals of public journalism and a body of positive First Amendment theory would benefit from being updated and reworked to reflect the new ways citizens and institutions interact in the public sphere.

To develop a contemporary public journalism movement the state should provide incentives that broaden our understanding of journalism beyond formal news organization and professional cultures. To this end, our second tier of subsidy details five criteria for journalistic production: transparency, accountability, dialogue, reliability, and collaboration. As in the first tier, a baseline requirement is that the process and products of journalistic activity be in the public domain to ensure a collective, public right of expression in the raw materials of the commons. Going beyond this, however, we argue that additional state subsidy for content produced through these journalistic practices will foster the conditions necessary for constructing quality arguments in the public sphere, a key concern for positive interpretations of the First Amendment.

By transparency we mean that journalistic processes, ideals, and principles are open to public scrutiny before, during, and after news content is created. As such we mean that individuals and organizations commit not to producing a particular kind of content, but 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. As we detail below in our institutional model, a community of peers in each media sector will consider what constitutes ‘transparent’ journalistic practice, a task made all the more difficult by questions surrounding issues like the use of anonymous sources. While challenging, the focus on transparency also creates novel opportunities to achieve it, 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 (McQuail, 2000; see also Bardoel & D’Haenens, 2004). At the same time, it is insufficient simply to make visible the processes and principles that guide journalism; publicly-subsidized journalists must subject themselves to consequences if they fail in their broader mission to serve the public. The idea of accountability goes beyond the notion of responsibility – asking not just what we should expect from journalism but how we might ensure that journalists provide it (Hodges, 1986). While defining exactly how this practice may be achieved will be the responsibility of representatives of each media sector, the principal point to make here is that the individuals, networks, and organizations that accept public subsidies must be accountable to the publics 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 sources, advertisers, shareholders, or other actors.

The third criterion of this model is that the actions of subsidized journalists must 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 go beyond transmitting materials to passive citizens. State-secured subsidies are intended to foster and support institutions that are responsive and accountable to public dialogue given that we cannot expect face-to-face conversation alone (Schudson, 1997) – or the analogous interpersonal interactions afforded by new information technologies – to somehow aggregate into collective deliberation and shared understandings.

Our fourth practice is reliability. In her examination of the ethics of public communication practices, Bok (1999, p. 26-27) argues that societies depend upon a certain amount of communicative trust: "Trust is a social good to be protected just as much as the air we breathe or the water we drink. When it is damaged, the community as a whole suffers; and when it is destroyed, societies falter and collapse." The essential idea is that if publicly-subsidized journalism is to be transparent, accountable, and dialogic it must also be reliable. Without this quality it becomes impossible for citizens to trust that journalists are creating informational and deliberative spaces that they can use to form opinions, sustain relationships, make decisions, and manage public goods. A number of mechanisms to support this might be implemented, especially given the affordances of digital, networked media. For example, journalists can provide direct links to evidentiary material, detailed biographical information on sources, and access to archives that help put an issue or public debate in historical context.

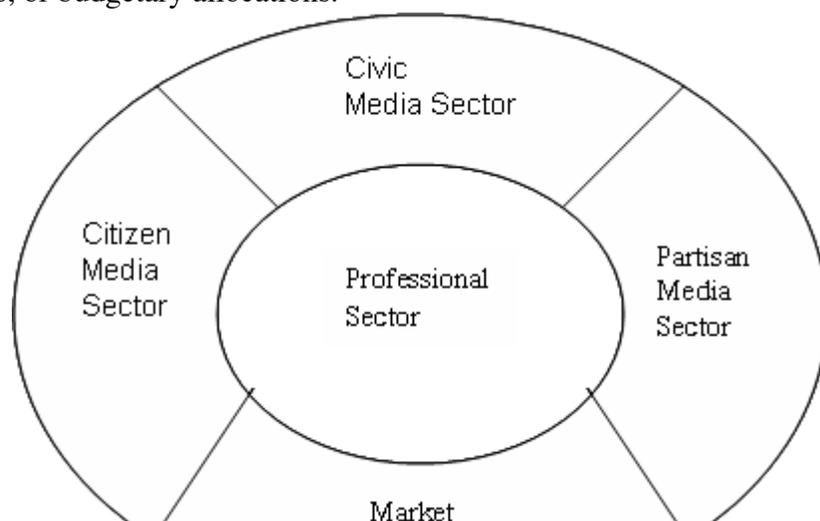
The fifth criterion of our publicly-subsidized journalism is that it be collaborative. In a sense the press has always relied on the participation of audiences (e.g., letters to editors, call-in shows and, more recently, online comments on mainstream news stories) but rarely have journalistic outlets engaged in collaborative production. Collaboration may take on different forms that can be described on a continuum. For example, readers may suggest topics to be reported, times at which they would like content to appear, sources that might be cited, reporters that could be assigned, or relationships among stories. Or, going further, audiences might work with journalists by doing research and even co-authoring stories. 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 and replicating function, helping citizens acquire the skills, attitudes, and relationships necessary to become more active participants in – and teachers of – public life. Thus, these state-secured incentives may connect journalists interested in working with their different publics with active citizens eager to participate in and foster practices of public engagement and communication.

INSTITUTIONAL DESIGN

Given that these practices will be subject to competing interpretations, we recognize the potential difficulty of administering subsidies in accord with these standards. Fortunately, there already exist a number of institutional models that can be applied to creating incentives for the practices of public journalism. In light of Balkin's (2004) call for consideration of the legislative,

administrative, and technological influences on the social conditions that produce free speech but drawing in particular from James Curran’s (1996) work on democracy and media systems, we sketch the broad contours of a model to govern the support and evaluation of publicly subsidized journalism. While Curran (1996, p. 106) proceeds from the European context and was writing prior to the widespread development of the networked public sphere, his work accords with ours in proposing a media model that values diversity, public accountability, social representation, and “spaces for the communication of opposed viewpoints, and a common space for their mediation.”

Adapting Curran’s model we outline the different sectors that broadly constitute the contemporary U.S. media system and represent different genres of public communication governed through distinct cognitive-cultural, normative, and regulative institutions (Scott, 1995). Outlets seeking public subsidies will determine which sector they, or particular segments of their content, are a part of and apply to that sector’s elected body of representatives tasked with evaluating proposals and administering funds. Importantly, as detailed below, these bodies will be housed within extant institutions and representatives will be elected by their peers. Finally, as in our proposed first tier of funding, expanded subsidies can come from a broad range of sources including, but not limited to, taxes on online advertising or digital software or hardware, monies from FCC auctions, or budgetary allocations.



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. The implication here is that these journalists will interpret public journalism practices and evaluate applications in accordance with professional norms. These norms include a commitment to objectivity and an often adversarial or ‘watchdog’ relationship to the state. The point here is not to defend, critique, or point to the divergence of these norms from practice (the press often breaks its own norms of objectivity or fails in its watchdog responsibilities), but to suggest that professional journalists play a vital role in democratic life and are necessary “to maintain a critical surveillance of all power centers in society, and expose them to the play of public opinion” (Curran, 1996, p. 110). This body of elected professionals tasked with the administration of subsidies can be housed within the Society for Professional Journalists, the largest journalistic association in the United States that is instrumental in articulating professional norms, standards, and ethics.

Civic and Partisan Media Sectors

We define the ‘civic media’ sector as encompassing journalism produced by nongovernmental and nonpartisan organizations that are governed by 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, and many social service and policy organizations, universities, and religious institutions fall into this category. While they cannot engage in direct campaign activities, these organizations play an important role in the public sphere. They communicate both to their members and the wider public, helping to raise awareness of particular issues and define perspectives on public affairs. In addition, their leaders often serve as highly visible sources for the professional press. As such, they are an important influence on public debate and 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. Given that the Internal Revenue Service (IRS) is already actively engaged in issuing rulings and guidelines relating to the conduct of these organizations in light of their special tax-exempt status, an elected body of representatives from this sector could potentially be housed within this agency.

Where 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. 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 like The Village Voice, Pacifica, and FOX News. Similar to civic media organizations, they pursue a range of communicative practices, including speaking to their members and the public, but they have broad 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 the public sphere, and many have a long tradition of printing newspapers and producing media that speak to their own members and the general public. Many, in turn, have 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. As with the civic media sector, an elected body of representatives could potentially be housed within the IRS.

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 broadcast and print outlets 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 professional journalism and may even serve as vehicles for political information (Baum, 2003, 2005). At the same time, with hybrid programs including The Daily Show and The View, the ways that the 2007-2008 presidential election was regularly covered in lifestyle magazines, and the more general recognition that popular culture is an important realm for the crafting of political values, we hope to reflect the diversity of outlets that help constitute discourse in the public sphere. As such, if the content of these organizations is produced in accordance with public journalism practices and widely 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 the new forms of peer production that, as discussed in detail above, theorists argue is an increasingly emergent practice on the Internet. This includes political blogging, distributed reporting organizations like Talking Points Memo, professional-amateur collaborations like Off the Bus, and online aggregators of content. At the same time, 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 included. Given that there are many competing definitions of what exactly constitutes ‘citizen media,’ and indeed professional journalists often collaborate with citizens just as some amateurs have parlayed their writing into paid journalistic and political positions, we aim to suggest the broad contours of a genre of communication that can be contrasted with the professional norms cited above and that will form the basis for evaluating subsidy applications.

For example, many of these citizen media efforts express a political and partisan viewpoint and communication is often driven by moral judgments and salience in particular communities rather than professional news values, while also being intended to mobilize rather than simply inform. These characteristics do not apply to every network or organization in this sector, nor are they exhaustive, but they do suggest a general characteristic of these forms of journalistic production. 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. That said, as the New Assignment and Peer to Patent projects demonstrate, in offering a host of concentrated intellectual and material resources universities are uniquely suited to contribute to this sector, which also reflects the historic role of the university in the development of the Internet and the extent to which college students are significant participants in many peer production projects. To this end, an elected body of citizen media practitioners can be housed within a university as the site for the administration of state funding for public journalism practices.

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 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 kind of quality information required for informed self-governance. Debates regarding the over-extension of copyright center on individuals’ rights to express themselves using the raw materials of the public domain, but largely fail to engage with broader questions about the journalism necessary for democracy. This reflects a limited and largely negative interpretation of the First Amendment, a perspective that tends to cast the state as oppositional 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 in the face of widespread market failure. And yet, in the face of anxiety over the seeming death of an institution, few scholars or practitioners have questioned why we would entrust such a fundamental pillar of democracy to the market in the first place. Those looking to new production models of networked collaboration have a sublime faith in voluntarism but fail to appreciate its limitations, especially with respect to providing the resource base for routine and quality journalism. While we share with these scholars the belief that contemporary media tools and the networked practices that have developed alongside of them certainly offer new potentials for citizens to engage and participate, there is as of yet little evidence that such collaboration alone is creating a robust public sphere that fosters and sustains

the production of diverse viewpoints, democratic dialogue, quality information, and perspectives on what is happening around the corner as much as across the globe.

While there is much to be gained by securing a rich information commons, we must offer incentives and support for the communication a democratic public needs. At the same time, we cannot ignore the deep threat that over-extended property rights holds for our ability to participate in democratic life as citizens. By retuning 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 21st century networked public sphere. Our proposal for a two-tiered system of state subsidy for journalistic production will not only create a rich and public system that secures the 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. We are confident that our proposal simultaneously addresses these two fundamental issues in contemporary journalism. As free culture scholars have argued, individuals have a broad right to use the elements of a shared, common culture for their expression. At the same time, positive readings of the First Amendment stipulate that the state must both safeguard and promote the quality of these raw materials of democratic self-governance. Given the ease with which digital media can be used to replicate, transform, and disseminate these materials, we seek to ensure that the public has access to a robust, shared public sphere.

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