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“From Town Crier to Bloggers: How Will Journalism Survive the Internet Age?”
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Summary

The Internet is neither the problem nor the solution, but it is a central part of the future of journalism. Cutbacks in journalism predate the Internet, and have been driven by the incessant demands of Wall Street for short-term results and ever-greater rates of return.

I support experimentation with most of the proposed new mechanisms for supporting journalism, including content-neutral, platform-neutral subsidies and funds for public media, but I am against changes in antitrust and copyright laws to prop up incumbents. The future is in competition and experimentation.

The First Amendment not only authorizes, but encourages, aggressive government action to promote robust debate and civic discourse. Quality journalism is a public good, and government can and should intervene to promote it. Far from contravening the First Amendment, postal subsidies, free broadcast licenses and other benefits are wholly consistent with the First Amendment goal of a robust exchange of artistic, social and political expression.

Since *U.S. v. Associated Press*, antitrust jurisprudence has been informed by First Amendment values. The FTC’s enforcement of Section 5 also promotes First Amendment goals by increasing public confidence in the mass media. Thus, I not only support the recently clarified guidelines for endorsements by new media participants, but also call for extending it to address otherwise undisclosed payments to journalists made to influence content.

I also encourage experimentation with the Low-Profit Limited Liability Company (“L3C”) mechanism as a means of facilitating broader investment in journalistic endeavors. The L3C model is a newly-developed business structure which may be particularly well-suited to facilitate philanthropic and altruistic investment in new ventures and struggling media companies.

Media Access Project is a 37 year-old non-profit telecommunications law firm which represents members of the public seeking access to participate in the debate over issues and ideas in the electronic mass media.

In this testimony, I call for Congress, federal agencies and the courts to embrace an aggressive approach towards creating and supporting new mechanisms for funding journalism, especially local journalism. I suggest one area in which the FTC can make a significant contribution to evolving journalistic enterprises by exercise of its Section 5 jurisdiction. Finally, I recommend that steps be taken to facilitate the development of the so-called L3C corporate or partnership structure as a means of creating new models for financing journalism.

I start with a few words about my perspective. I have spent more than 35 years participating in policymaking pertaining to the electronic mass media. It is my opinion that this country developed the best electronic media in the world because of - not in spite of - the rules and policies of the Federal Communications Commission, the Federal Trade Commission and the Department of Justice which promoted competition and diversity in the mass media. While the evolution of digital technologies has enabled the public to have access to much more artistic, social and political speech, I believe that the less aggressive enforcement policies of the last 25 years have been counterproductive, and have prevented the electronic mass media from fully realizing their potential.

The Internet Is Not the Primary Cause of Deteriorating Journalism, and We Cannot Rely on the Internet Alone to Solve This Problem

The Internet is not the source of all the problems we now face, nor is it the solution for all of them. It is, inevitably, a central part of the future of journalism, and how the Internet evolves will have a powerful influence on the future of our civic discourse. But the trends which have threatened the delivery of high quality journalism to the American people predate the inception of the Internet. Unless these structural and behavioral flaws are addressed through antitrust enforcement and other policies, the Internet will fall far short of remediating these problems.

Experience shows that the marketplace does not function perfectly with respect to providing news and public affairs coverage. For a long time, the extraordinary profitability of print and broadcast journalism masked this phenomenon. We have recently ended a long era - nearly a century - during which newspaper publishers were willing and able to subsidize intense local, national and international coverage. For nearly 50 years, television broadcasting has also achieved spectacular rates of return, but the economics of over-the-air television are changing as well.

The degradation of American commercial journalism has been underway for a long time. Newspapers began to reduce local, national and international coverage as early as the 1980's. Staff cutting began in earnest in the 1990's. Long before the Internet's ascendance, expensive enterprises such intensive coverage of business, labor, and state capitals were increasingly seen as unnecessary frills. Washington and foreign bureaus were cutback or eliminated. Broadcast network coverage of national and, especially, international events has also been curtailed. Since the FCC eliminated guidelines as to minimum amounts of news programming, many stations eliminated all news and public affairs programming. While local TV news has been a profit center for other stations, its quality has deteriorated rapidly.

Perhaps the most pernicious factor in the long-term deterioration of American journalism has been the demands of Wall Street. Many companies considered “troubled” on Wall Street, like McClatchy and Gannett, remain profitable. Indeed, most daily newspapers and broadcasters are profitable on an operating basis. It is debt service which creates the red ink. Over the last 25 years, many of the privately held major media companies became publicly held, and hedge funds and other aggressive institutional investors took significant interests in these and other publicly held journalistic enterprises.¹ Local and regional ownership has been supplanted by larger national group ownership. The insatiable demand for ever-greater rates of return and quarter-by-quarter judgments make it ever harder to produce high quality journalism.

The incessant demands of Wall Street have made a difficult situation much worse. The disaster which has befallen the Tribune Company is not necessarily representative of all media companies, but it nonetheless offers a startling object lesson. Shareholders demanding greater rates of return forced a sale financed by massive borrowing. In an effort to meet the onerous debt burden, Tribune has shed assets and made draconian staff cuts which have severely impaired the quality of Tribune’s product. Yet, through all of this, including the sharp drop in advertising revenue caused by the recession as well as fundamental industry changes, Tribune’s newspapers and TV stations have remained profitable on an operating basis. Its precarious financial position is largely a function of bad business decisions.

Pessimists tend to deemphasize the impact of the current recession on journalistic operations. But, as Robert Picard has shown, advertising revenues are cyclical and we are just now experiencing the first hints of recovery in advertising sales.² This is not to ignore the fundamental secular changes in journalism. The Internet has unquestionably accelerated the ongoing disintegration of quality “traditional” journalism. While I believe the Internet’s contribution to free speech and expression is - by far - a net positive force, there is also no doubt that the Internet has upended the economics of distributing information, including journalism, and no one has as yet developed a reliable model for monetizing the creation of Internet-based general news coverage. As Michael Gerson recently said,

Free markets, it turns out, often make poor fact-checkers,...Bloggers in repressive countries often show great courage, but few American bloggers have the resources or inclination to report from war zones, famines and genocides.

Gerson, “Journalism’s Slow, Sad Death,” Washington Post (November 27, 2009), p. A27.

¹Institutional investors held 93 percent of the stock in 15 publicly traded newspaper companies as of 2004. “Taking Stock Redux: Corporate Ownership and Journalism in Publicly Traded Newspaper Companies,” published in Robert G. Picard (ed.) *Corporate Governance of Media Companies* (Jonkoping) International Business School Research Reports No. 2005.

²Picard, “Tremors, Structural Damage and Some Casualties, But No Cataclysm: The News About News Provisions,” p. 5 (submitted to the FTC on November 6, 2009).

If there is consensus about anything, it is that there are no easy answers. Even if the immediate circumstances are not as dire as some claim, journalism is surely in a downward spiral. Draconian cuts in news gathering budgets may seem necessary, but they hasten the breakdown of the traditional model. Perhaps the greatest challenge is that the Internet is transforming the financial base of reporting and, in the words of Paul Starr, “it is also dismembering the public that the press has long had.” Starr, “Journalism Minus Its Old Public,” *Columbia Journalism Review* (November-December 2009), p. 59.

There have been many suggestions about new structures to support journalism, including non-profit investment and governmental support. I endorse many of the suggestions provided by my friends at Free Press in their November 6, 2009 comments to the Commission, particularly its call for content-neutral, platform-neutral systems to subsidize journalism and public media. Mark Nadel has suggested revamping Section 106 of the Copyright Act, not to provide new protections for rights holders, but to develop incentives allowing greater rights to make copies as a means of using technology to generate new revenues.³ I am in favor of experimentation with most of these models, because the ultimate answer is in innovation and adaptation to the changing circumstances.

I also know what I am against, which is changes in the antitrust and copyright laws to prop up the old ways of doing things. The future is in competition and experimentation, not in stifling new start ups and other innovators.

Government’s Mandate Under the First Amendment is to Facilitate Platforms for Free Speech and Expression

I believe that the First Amendment not only authorizes, but encourages, aggressive government action to promote the development of vibrant mechanisms for generating news and other mechanisms for creating a well-informed electorate.

The market is failing. Stripped of subsidization by highly profitable newspapers and broadcasters, journalism remains a public good, and the free market is unlikely to supply it, at least for the foreseeable future. Sound public policy dictates that government should take steps to protect the public welfare. As Professor Sunstein has written,

[I]nformation about public affairs has many of the characteristics of a public good, like national defense or clean air. It is well-known that if we rely entirely on markets, we will have insufficient national defense and excessively dirty air. The reason is that both defense and clean air cannot be feasibly provided to one person without simultaneously being provided to many or all. In these circumstances, each person has inadequate incentives to seek, or to pay for, the right level of national defense or clean air. Acting individually, each person will “free ride” on the efforts of others. No

³See Nadel, “Current Copyright Law Discourages Creative Content,” 19 *Berkeley Berkeley Tech. L.J.* 786, 822-847 (2004).

producer will have the appropriate incentive for production. The result will be unacceptably low levels of the relevant goods.

Much the same is true of information, especially with respect to public affairs. The benefits of a broad public debate, yielding large quantities of information - through coverage of public issues, disclosure of new facts and perspectives, and diversity of view - accrue simultaneously to many or all people. Once information is provided to one person, or to some of them, it is also provided to many others too, or it can be so provided at minimal cost. The production of information for any person thus yields large external benefits for other people as well. But - and this is the key point - the market provides no mechanism to ensure that these benefits will be adequately taken into account by those who produce the information, in this case the newspaper and broadcasting industries.

At the same time, the benefits of informing one person - making him an effective citizen - are likely to accrue to many other people as well, through that person's contribution to multiple practices and conversations, and to political processes in general. But the external benefits, for each person, will not be taken into account in individual consumption choices.

Because of the "public good" features of information, no single person has sufficient incentive to "pay" for the benefits that he receives. The result will be that the market will produce too little information. Reliance on media markets will therefore have some of the same difficulties as reliance on markets for national defense or environmental protection. For this reason, a regulatory change, solving the collective action problem, is justified, at least in principle.

Sunstein, "Free Speech Now," 59 U. Chi. L. Rev. 255, 285-66 (1992).

There is a widespread misconception that government is somehow foreclosed from facilitating the production of quality journalism, that this somehow transgresses the First Amendment. The First Amendment precludes action which *abridges* speech. But the Founding Fathers never contemplated that the First Amendment would bar government action which *promotes* civic discourse. According to Professor Alexander Meiklejohn, one of the greatest First Amendment scholars,

[C]ongress is not debarred from all action upon freedom of speech. Legislation which abridges that freedom is forbidden, but not legislation to enlarge and enrich it. The freedom of mind which befits the members of a self-governing society is not a given and fixed part of human nature. It can be increased and established by learning, by teaching, by the unhindered flow of accurate information, by giving men health and vigor and security, by bringing them together in activities of communication and mutual understanding. And the federal legislature is not forbidden to engage in that positive enterprise of cultivating the general intelligence upon which the success of self-government so obviously depends. On the contrary, in that

positive field the Congress of the United States has a heavy and basic responsibility to promote the freedom of speech.

Alexander Meiklejohn, *Free Speech and Its Relation to Self-Governance* at 16-17 (1948).

Indeed, from the earliest days of our nation, we have provided numerous benefits and subsidies to encourage journalism. The Post Office Act of 1792 provided reduced mailing rates and franking privileges to newspapers. The Constitution affords copyright protection as an incentive. During World War II, journalists were exempt from gas rationing. In 1970, in a well-meaning but misguided initiative, Congress provided newspapers with an anti-trust exemption. Today, media companies receive free broadcast licenses, capped rates for cable franchise fees, special postal rates, Small Business Administration loan guarantees⁴ and numerous other benefits.

Far from contravening it, these policies are wholly consistent with the goals of the First Amendment. The central objective of the First Amendment is to insure that there is a robust exchange of artistic, social and political expression. The Founding Fathers, as best embodied in the writings of James Madison, thought that democratic self-governance requires a well-informed and participatory electorate which expresses its will at the ballot box. This is something the market does not always supply. In the words of Professor Sunstein,

On the Madisonian view, sovereignty entails respect not for private consumption choices, but for the considered judgments of the citizens. In a well-functioning polity, laws frequently reflect those judgments-what might be described as the aspirations of the public as a whole. Those aspirations can and often do call for markets themselves. But they might also diverge from consumption choices - a familiar phenomenon in such areas as environmental law, protection of endangered species, social security, and antidiscrimination law. Democratic aspirations should not be disparaged. Democratic liberty should not be identified with "consumer sovereignty." And in the context at hand, the people, acting through their elected representatives, might well decide that democratic liberty, calling for quality and diversity of view in the mass media, is more valuable than consumer sovereignty.

Sunstein, *supra* at 287-88.

Perhaps the best statement of government's role in promoting speech and debate is found in *Red Lion Broadcasting v. FCC*, where the Supreme Court unanimously embraced a robust view of the affirmative duty of government to facilitate speech, pointing to the public's "collective right to have the medium function consistently with the ends and purposes of the First Amendment." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969). Elaborating on that, Justice White said that "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in

⁴See *Media Policy Rule*, 59 FR 36042 (July 15, 1994) (rejecting arguments that loan guarantees to media companies violate the First Amendment).

which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee.” *Id.* He added that “It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here.” *Id.*

The FTC Should Seek to Promote Free Expression in Exercising Its Antitrust Jurisdiction

Unlike the Federal Communications Commission, the Federal Trade Commission has not traditionally seen itself as having a role in promoting civic discourse. But by insuring greater competition in media and content creation industries, antitrust jurisprudence has, indeed, increased the availability of diverse political, social and artistic expression.

It has been clear for some 60 years that antitrust principles are informed by the First Amendment. The seminal case in this regard is, of course, *United States v. Associated Press*, 326 US 1 (1945), where the Supreme Court applied the Sherman Act to newspapers. Writing for the majority, Justice Black held that the First Amendment provided powerful support for applying the Sherman Act because it “rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public....” *Id.*, 326 U.S. at 20. Justice Frankfurter emphasized in his concurring opinion that the case was about a commodity more important than peanuts or potatoes, that it was about who we are as a nation. “A free press,” he said, “is indispensable to the workings of our democratic society.” *Id.*, 326 U.S. at 28. For that reason, he wrote, “the incidence of restraints upon the promotion of truth through denial of access to the basis for understanding calls into play considerations very different from comparable restraints in a cooperative enterprise having merely a commercial aspect.” *Id.*

A notable example of how this concept has been applied in practice can be found in Judge Greene’s treatment of the AT&T consent decree. In imposing restrictions on what was then described as “electronic publishing,” he held that both First Amendment considerations bolstered his competitive analysis. “Certainly,” he said,

the Court does not here sit to decide on the allocation of broadcast licenses. Yet, like the FCC, it is called upon to make a judgment with respect to the public interest and, like the FCC, it must make that decision with respect to a regulated industry and a regulated company.”

U.S. v. AT&T, 551 F.Supp. 131, 184 (D.D.C. 1982). Thus, he said, it was necessary for him to

take into account the decree’s effect on other public policies, such as the First Amendment principle of diversity in dissemination of information to the American public. Consideration of this policy is especially appropriate because, as the Supreme Court has recognized, in promoting diversity in sources of information, the values

underlying the First Amendment coincide with the policy of the antitrust laws.”

Id.

The FTC Should Apply Section 5 To Require Disclosure of Payments to Journalists

The Commission’s consumer protection policies also have great bearing on maintaining public confidence in the integrity of the mass media by helping consumers differentiate between commercial speech and “pure” journalism. Thus, I strongly agree with the Commission’s recent action interpreting its endorsement guidelines as they apply to new media. As the Commission quite properly said in rejecting arguments that strong disclosure requirements would impair growth of new outlets,

to the extent that consumers’ willingness to trust social media depends on the ability of those media to retain their credibility as reliable sources of information, application of the general principles embodied in the Guides presumably would have a beneficial, not detrimental, effect.

Guides Concerning the Use of Endorsements and Testimonials in Advertising, 74 FR 53124, 53126 (October 15, 2009). The Commission’s focus on insuring that consumers receive truthful information and are protected from misleading and other unfair business practices is entirely consistent with First Amendment doctrine that emphasizes that it is the right of the public to receive information which is “paramount.” *Red Lion Broadcasting Co.v. FCC*, 395 U.S. at 390.

The revised guidelines are a good beginning, but the Commission should go further. In particular, I think that more attention should be devoted to insuring that new and evolving platforms for journalism are not corrupted by undisclosed commercial relationships.

As the Internet platform evolves, the Commission should proactively promote artistic, social and political speech by developing guidelines for newly evolving journalistic enterprises. By establishing principles early in the life of the Internet, the Commission can help insure that non-commercial speech is not tainted with unfair and/or misleading practices that undermine public confidence in the sources of information. Full and fair disclosure of payments and other consideration which influences or underwrites journalism enables consumers to know by whom they are being persuaded and enables them to make better and more intelligent decisions in the marketplace of ideas as well as in the marketplace for goods and services.

The success of “traditional” journalism has been built upon a large reservoir of public confidence in the journalistic process. Journalists for serious newsgathering organizations have, for the very most part, maintained a separation between opinion and fact, and conducted themselves with professionalism and high ethical standards with respect to conflicts of interest, protection of sources, and so on.

New digital and hybrid platforms, especially those for community journalism, do not

necessarily adhere to these standards. There is reason to fear that undisclosed payments or sponsorship of materials which are presented as objective journalism are increasingly influenced by corporate or other commercial interests. It is well within the FTC's jurisdiction to help insure public confidence in new journalistic endeavors by issuing guidelines on when and how payments to promote products and services are disclosed.

I would note that there is useful precedent in the Federal Communications Commission's administration of the "sponsorship identification" provisions of the Communications Act, which states that

[a]ll matter broadcast by any radio [or television] station for which any money, service or other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting, from any person, shall, at the time the same is so broadcast, be announced as paid for or furnished, as the case may be, by such person....

47 U.S.C. §317(a)(1). The FCC has said that the Section 317 "embraced the principle that listeners are entitled to know by whom they are being persuaded" *Public Notice*, 40 FR 41936 (September 9, 1975). Thus, in its rules implementing this provision, the FCC requires broadcasters to use "reasonable diligence" to obtain disclosure from staff and contributors and to insure that

in addition to stating the fact that the broadcast matter was sponsored, paid or furnished, fully and fairly disclose the true identity of the person or persons...by whom or on whose behalf such payment is made or promised.

47 C.F.R., §73.1212.

I do not say here that the Commission could or should adopt identical rules for new journalistic endeavors; rather I cite these rules to show that such a regime does exist and that it has proven administratively feasible. Obviously, there are much more complicated and difficult questions raised by payments which promote purveying opinions rather than products and services that are at the periphery of direct governmental regulation. These opinions are nonetheless an important component of building a new journalistic ecology.

The L3C Model is a Promising Device for Facilitating New Financial Structures to Support Journalism.

The Low-Profit Limited Liability Company ("L3C") model is a newly-developed business - structure which may be particularly well-suited to facilitate philanthropic and altruistic investment in struggling newspapers and other media companies. L3C's are designed to be a hybrid between a charity and a for-profit business.

Although the L3C model was not conceived with media properties expressly in mind, it

nonetheless confers a number of advantages for media investment. At least four states (Vermont, Michigan, Wyoming and North Dakota) have already adopted legislation authorizing L3C formations, and several others are considering doing so. The purpose of the L3C laws is to create a vehicle which is able to accept investment from both foundations seeking little or no income (as “program-related investments” or “PRI’s”) and ordinary investors who may seek market rates of return.

L3Cs are set up to allow for a tiered investment structure in which different types of investment carry different levels of risk and potential return. Thus, the L3C can be organized to allow for a higher return to profit-seeking investors (*e.g.*, institutional investors), and for lower returns to socially motivated investors or “venture philanthropists,” whose concept of “return on investment” might include the accomplishment of socially worthwhile ends. Because investors in the L3C need not invest identically, the model is well-suited for corporate reorganizations of struggling or bankrupt media properties, in which existing debt holders can maintain ownership while allowing new investment from foundations and other altruistic investors.

Another advantage of the L3C model is that it is potentially attractive to “private foundations” which are required to pay out at least 5 percent of their wealth annually for charitable purposes. While foundations typically structure these payments as grants, they also may structure them as PRI’s. Such interests would presumably be a “junior tier” of investment – the capital at most risk in the venture – providing the L3C with the financial wherewithal to attract substantial additional capital from other investors.

The biggest obstacle to widespread use of the L3C mechanism is the uncertainty of how the Internal Revenue Service will treat PRI’s. The “Program-Related Investment Promotion Act of 2009” has been drafted to address this problem. I encourage the Commission and other agencies to help facilitate this interesting experiment by reviewing the proposed legislation and otherwise seeking to create opportunities for it to be tested.

CONCLUSION

While there are no easy answers, there is much that can be tried. To give life to the goals of the First Amendment, the Commission and other instrumentalities of government can and should seek every possible means of creating platforms for journalism to evolve.