

The Free State Foundation

A Free Market Think Tank For Maryland...Because Ideas Matter

Perspectives from FSF Scholars

April 16, 2010

Vol. 5, No. 11

The Key To Media's Digital Future: First Amendment Freedom, Not Desperate Measures

by

Donna Coleman Gregg*

In an ambitious and wide-reaching January 21, 2010, Public Notice, the Federal Communications Commission seeks comment on a range of issues “regarding whether Americans have access to vibrant, diverse sources of news and information that enable them to enrich their lives, their communities and the democracy.”¹ The Commission’s “Future of Media” project joins a variety of similar activity now underway in the nation’s journalism schools, public policy institutes, and private foundations, as well in media company boardrooms and government circles.²

The recent torrent of studies, conferences, reports, proposals, and blogosphere debate reflects growing concern over fallout from media’s ongoing transition to the digital age. Despite continuing technological advances and the promise of “new” media, each closure of another financially troubled newspaper and every cutback in a broadcast station’s local news operation cast a shadow over how the “future of media” really will unfold. Will new business models and revenue sources emerge in time to ensure that Americans’ access to vibrant and diverse sources of news and information continues? If community newspapers and local broadcast stations fail, will local news become a thing of the past? Will independent professional journalists no longer be available to hold those in positions of power and influence accountable to the public?

The Free State Foundation
P.O. Box 60680, Potomac, MD 20859
info@freestatefoundation.org
www.freestatefoundation.org

Thoughtful contemplation of these important questions and exploration of creative approaches for preserving local news reporting and accountability journalism in the new era of media certainly are welcome. At the same time, in embarking on such a project, the Commission should be alert to hazards in the road ahead and take care to avoid them.

First, while pursuing lofty objectives, the Commission should resist the temptation to venture into uncharted and possibly treacherous territory. The Public Notice promises to produce “a report providing a clear, precise assessment of the current media landscape, analyze policy options and, as appropriate, make policy recommendations to the FCC, other government entities, and other parties.” In pursuit of that goal, the Commission presents 42 separate inquiry items, most of which pose an additional series of questions. Given the many other important responsibilities entrusted to the Commission and the extent of its available resources, accomplishing a mission of such sweeping magnitude becomes a tall order. Moreover, areas such as newspaper and magazine publishing, gaming systems, social media, financial trends, for-profit and non-profit business models, and the role of schools and libraries in supporting community information go well beyond the Commission’s current regulatory purview and traditional expertise. The Commission should consider to which of the lines of inquiry it can add the most value and which areas are best left to other institutions with more expertise.

The project also seems likely to put the Commission on a collision course with the First Amendment. To its credit, the Commission’s Public Notice claims the First Amendment as the “starting point” for its journey down the long list of issues and acknowledges an obligation to proceed with “great sensitivity to the paramount need to protect free speech and an independent press.” Nevertheless, conflict with the First Amendment will be difficult to avoid given the project’s contemplated governmental inquiry into such subjective and content-related matters as the “quality,” “vibrancy,” and “amount” of the news that various media provide and the particular topics that news should cover. While merely assessing these matters may do no harm, if the Commission ventures beyond assessment it almost inevitably will run up against First Amendment constraints.

At the Commission’s initial Future of Media Workshop on March 4, 2010, speakers raised an idea which presents an additional set of First Amendment issues. As embodied in recent federal legislative proposals and advocated by a number of media scholars, foundations, and even a prominent former newspaper editor, this idea relies upon funding or other financial relief for media from the federal government. Further discussion of this public option may occur at a second FCC Future of Media Workshop on Public and Other Noncommercial Media in the Digital Era later this month.³

A congressional attempt to create a public option to ward off the demise of the struggling newspaper industry took form in March 2009, with introduction of “The Newspaper Revitalization Act.”⁴ Rather than offering direct subsidies, the legislation proposed an indirect form of financial relief for the newspaper industry. Specifically,

the legislation would amend the Internal Revenue Code to grant certain qualified newspaper corporations the option of becoming non-profit educational entities,⁵ enabling them to augment dwindling revenues by attracting tax-deductible charitable contributions. While the drafters took great pains to distinguish their proposed legislation from unpopular federal bailouts of the financial and automotive industries, the need to avoid certain constitutional and administrative difficulties inherent in direct federal funding of the press may have influenced the choice of indirect support.

Lately the focus seems to have shifted from shoring up the newspaper industry to ensuring that reliable news reporting and independent professional journalism survive the transition from “old” to “new” media. Such is the focus of a recent report by former *Washington Post* executive editor Leonard Downie, Jr. and Columbia Graduate School of Journalism Professor Michael Schudson.⁶ Journalism also is central to research and news media partnerships sponsored by major philanthropic organizations including the Kaiser Family Foundation, The Pew Charitable Trusts, and the Pew Research Center’s Project for Excellence in Journalism.

After the October 2009 congressional hearing at which Princeton Professor Paul Starr, a media historian, raised the idea of expanding the scope of the Corporation for Public Broadcasting’s funding mandate to cover struggling newspapers, additional support for federal subsidy of journalism began to emerge.⁷ CPB has already put the concept into practice by launching a news-focused funding initiative to support regional collaborations among public media (*i.e.* public radio and television stations). The initiative strives to counter “the decline of local journalism by creating seven Local Journalism Centers” in different regions of the country, with a combined CPB and station investment of approximately \$10.5 million over two years.”⁸

In more recent testimony at the FCC’s March Future of Media Workshop, Professor Starr again endorsed direct government funding as a partial remedy for the financial problems confronting the media and journalism. This time, however, he qualified his endorsement of government financial support for the press with an important caveat: “. . . what our history shows is that it is possible to have government subsidy and support of the press without government control *as long as those subsidies are view-point neutral and provided in a way that leaves little discretion to public officials.*”⁹

Unfortunately, our history also shows how difficult it can be to keep such subsidies viewpoint neutral and to provide them without public officials’ interference in content. Federal support for public broadcasting began with the importance of freedom from governmental or political interference well in mind. The landmark Report of the Carnegie Commission on Educational Television, which served as the blueprint for a federally supported public television system, and the Public Broadcasting Act of 1967, which established the Corporation for Public Broadcasting to administer the funding, reflected this concern.¹⁰ First, to create some separation

between the government funders and public broadcasters, the Act made CPB a private, non-profit corporation, not a government agency. Further, Congress prohibited CPB from owning or operating broadcast stations or producing programming, limiting CPB's functions to administering the distribution of federal funds to eligible stations and, through grants and contracts, to independent producers of programming. Finally, the Act specified the size and composition of CPB's governing board of directors and provided for directors' appointment by the President with advice and consent of the Senate.

Notwithstanding these measures, the inability of members of Congress and Presidents to refrain from using the appropriations and budget process to wield influence inevitably prevailed, resulting in ongoing instances of subtle and not-so-subtle pressure on public broadcast programming decisions.¹¹ Congress responded by amending the Act several times over the years to provide even stronger safeguards against inappropriate external influence on public broadcast programming. For example, statutory provisions for "forward funding" of CPB were added in part to eliminate the annual threat of funding cutbacks to influence programming content. In addition, Congress amended provisions governing the make-up of the board of directors and reduced CPB management's discretion by adopting rigid statutory formulas for distribution of station and programming grants.¹² Another amendment contained an explicit mandate to "facilitate the full development of public telecommunications in which programs of high quality, diversity, creativity, excellence, and innovation, which are obtained from diverse sources, will be made available to public telecommunications entities with strict adherence to objectivity and balance in all programs or series of programs of a controversial nature."¹³

Perhaps not surprisingly, the added safeguards did not succeed in fending off program-related pressure from both Congress and the administration. From the 1970's on, Congress has continued to convey members' preferences as to viewpoints and coverage in public broadcasting's programming by wielding the power of the public purse.¹⁴ Although deficit reduction and federal belt-tightening are often cited as justifications for the funding cuts, the content and tone of questioning at appropriations hearings suggests a content-related motivation.

Funding for CPB often has appeared on the list of programs targeted for major cutbacks in the President's budget. Each year, the public broadcasting establishment awaits the release of the administration's federal budget proposal with trepidation, recalling substantial cuts in CPB's funding by almost every administration since 1970. Presidents also have attempted to curtail expenditure of appropriated funds already appropriated to CPB by using the rescission process.¹⁵

Political pressure also creeps into public broadcasting through the nomination and confirmation process for board members who play an important role in CPB governance.¹⁶ In a recent paper, University of Oregon Journalism Professor Alan Stavitsky and Ryerson University Journalism Professor and former National Public Radio Ombudsman Professor Jeffrey Dvorkin noted that the CPB board had often been dominated by Democratic or Republican campaign donors and

activists. The paper urges reforms to bolster public confidence and improve the image of public broadcasting by eliminating the presence of partisans on the board.¹⁷

While the transition now occurring in the media creates tremendous opportunities, there can be no doubt that it also presents significant challenges. Finding the transition's potential impact on journalism especially (and perhaps unnecessarily) frightening, some believe that these are desperate times for independent journalism. And that desperate times call for desperate measures. Since the 1960's, federal support of public broadcasting has been the principal vehicle and model for federal subsidy of the media.

Before recommending public broadcasting as a model intended to help ensure that independent professional journalism remains a strong component of the nation's media in the future, the Commission would do well to remember the lessons of public broadcasting's history. Since 1967 there have been few periods when federal support has been truly "*view-point neutral*" or has been "*provided in a way that leaves little discretion to public officials.*" Public funding for the media and journalism, in whatever form, is an ill-advised, desperate measure. Those who hope for a future in which Americans have access to vibrant, diverse sources of news and information that enable them to enrich their lives, their communities, and the democracy should look for private sector options before resorting to public funding.

* Donna Coleman Gregg is an Adjunct Senior Fellow at the Free State Foundation and is a member of the faculty of the Columbus School of Law of The Catholic University of America, where she is affiliated with the Institute for Communications Law Studies. The Free State Foundation is a nonpartisan Section 501(c)(3) free market-oriented think tank in Rockville, Maryland.

¹ "FCC Launches Examination of the Future of Media and Information Needs of Communities in a Digital Age" (GN Docket No. 10-25), Public Notice, DA 10-100 (rel. Jan. 21, 2010) ("Public Notice"). By Order of February 18, 2010 the Commission extended the original deadline for comments in this proceeding until May 7, 2010.

² See, e.g., Federal Trade Commission Workshop, "How Journalism Will Save the Internet," March 9, 2010, <http://www.ftc.gov/opp/workshops/news/index.shtml>; Twin Cities Newspaper Guild and Minnesota Journalism Center of Minnesota Conference, "New Economic Models for News," June 16, 2009; "Internet to Newspapers: Drop Dead – A Program Recap with Nicholas Lemann and Victor Pickard," blog phlantropynewyori.org, June 12, 2009; and The Miller Center of Public Affairs, University of Virginia, "Old Media, New Media and the Challenge to Democratic Governance: Findings from the Project on Media & Governance," March 2010.

³ Workshop on Public and other Noncommercial Media in the Digital Era, <http://reboot.fcc.gov/calendar>.

⁴ S. 673 was introduced on March 24, 2009, by Senator Ben Cardin (D. Md), and Rep. Carolyn Maloney (D. NY) introduced a companion bill, H.R. 3602 on September 17, 2009.

⁵ Recommendations of the Knight Commission on the Information of Communities in a Democracy include amending the tax code to provide various forms of relief and benefits to support non-profit journalism. See "Informing Communities: Sustaining Democracy in the Digital Age," April, 2010.

⁶ Leonard Downie, Jr. and Michael Schudson, *The Reconstruction of American Journalism*, October 2009

⁷ Statement of Paul Starr, Hearing before the Joint Economic Committee, “The Future of Newspapers: Impact on the Economy and Democracy,” September 24, 2009; and Leonard Downie, Jr. and Michael Schudson, *supra*.

⁸ “Corporation for Public Broadcasting Launches New Local Journalism Initiative,” press release March 25, 2010 (www.cpb.org/pressroom/release/php?prn=814).

⁹ See Transcript, Federal Communications Commission Workshop on the Future of Media & Information Needs of Communities: Serving the Public Interest in the Digital Era,” March 4, 2010, at 35.

¹⁰ See Carnegie Commission on Educational Television, “Public Television: A Plan for Action,” 1967, at 130-134 and 47 U.S.C. §396.

¹¹ See generally, John Witherspoon, Roselle Kovitz, Robert K. Avery and Alan G. Stavitsky, A History of Public Broadcasting, 2000, at 37-43.

¹² *Id.*

¹³ 47 U.S.C.396 (g)(1)(A)

¹⁴ Witherspoon, et al., *supra*; Paul Farhi, “Public Broadcasting Targeted by House,” Washington Post, June 10, 2005.

¹⁵ See generally, Chris Johnson, “Federal Support of Public Broadcasting: Not Quite What LBJ Had in Mind,” 8 CommLaw Conspectus 135 (Winter 2006); and see also Letter from Milton J. Socolar, Acting Comptroller General of the United States to The Honorable Timothy E. Wirth, Chairman, Subcommittee on Telecommunications Committee on Energy and Commerce, U.S. House of Representatives, March 25, 1981; and Elizabeth Jensen, “Public Broadcasters Prepare to Fight Federal Budget Cuts,” *The New York Times*, Feb. 6, 2008.

¹⁶ Stephen Labaton, Lorne Manly, and Elizabeth Jensen, “Republican Chairman Exerts Pressure on PBS, Alleging Bias,” www.nytimes.com/2005/05/02, May 2, 2005

¹⁷ Jeffrey A. Dvorkin and Alan Stavitsky, “The Accountable Guardian,” Concepts in Tension: The Challenge of Ensuring both Objectivity and Balance and Editorial Independence,” at 29.