

31 Nonprofit Media

THOUGH PUBLIC RADIO AND TV—NPR and PBS member stations—are perhaps the most recognized noncommercial outlets, the nonprofit media sector is far larger and more varied. It includes nonprofit websites, PEG channels, lower power FM stations, state public affairs networks, journalism schools, public radio networks unaffiliated with NPR, foundations, mobile news apps, and others. The public policy issues affecting nonprofit media organizations vary as well.

PUBLIC BROADCASTING

FCC Rules Governing Public TV and Radio

Since the 1930s, Congressional and FCC policies have mandated that spectrum be set aside for noncommercial use. The FCC first began reserving spectrum for noncommercial educational (NCE) radio broadcast use in 1938, selecting channels in the 41–42 MHz band¹ before moving the reserved band to 88–92 MHz in 1945.² In radio, the FCC continues to reserve the lowest 20 channels on the FM broadcast band for NCE use, as well as channel 200 (87.9 MHz) for class-D NCE stations.³ The FCC has never reserved any AM channels for noncommercial use. In 1952, the FCC ruled that when more than three VHF channels were assigned to a city, one would be reserved for educational institutions. A total of 242 channels were reserved. By 2001, these had grown to more than 370 public TV stations.⁴ The current estimated value of NCE television spectrum ranges from \$1.96 billion to \$26.8 billion.⁵ There are currently 3,311 NCE FM stations in the U.S., approximately 23 percent of the total number of radio stations.⁶ The FCC Media Bureau estimates that about 500 more NCE stations will be created over the next three years as a result of applications granted during the 2007 and 2010 filing windows. There are 391 noncommercial TV licensees.⁷

Noncommercial stations are generally subject to ordinary FCC broadcasting rules, with some exceptions.⁸ The FCC requires certain governance structures of some noncommercial broadcasters. Noncommercial TV stations *not* affiliated with universities or governments are required to submit “evidence that officers, directors and members of the governing board are broadly representative of the educational, cultural, and civic groups in the community.”⁹ To meet this standard, a noncommercial TV station or applicant must show that a majority (over 50 percent) of its governing board is broadly representative of the community.¹⁰

Although this does not apply to stations run by universities or governments, some have suggested that it should.

Noncommercial television stations are issued licenses for an eight-year period. Eleven noncommercial TV renewal applications filed during the last renewal cycle remain pending due to the filing of an objection or because of indecency or EEO holds. In the FCC’s history, we could find only two instances in which the Commission has denied the license renewal applications of public broadcasting licensees.¹¹

Noncommercial television stations have the same FCC disclosure requirements as commercial. They compile issues/programs lists that ostensibly show how they have served the community.

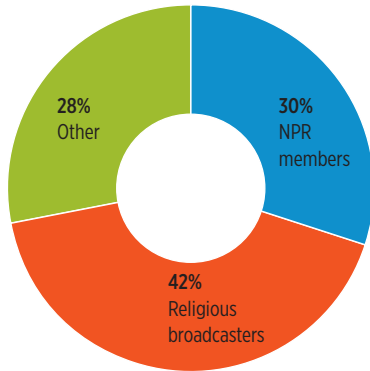
FCC Programming Requirements

Noncommercial licenses are available only for “educational” purposes. TV stations must show that the licenses will be used “primarily to serve the educational needs of the community; for the advancement of educational programs; and to furnish a nonprofit and noncommercial television broadcast service.”¹² This includes transmitting “educational, cultural, and entertainment programs.”¹³ FM radio licensees must be nonprofit educational organizations that advance “an educational program.”¹⁴

In practice, though, the FCC has allowed the stations to determine for themselves whether they have produced programming of this sort. The Commission has intentionally left “educational programming” undefined, describing public broadcasting instead in terms of what it is not: Public stations “are not operated by profit-seeking organizations nor supported by on-the-air advertising,” with their “positive dimensions” determined by “social, political, and economic forces outside the Commission.”¹⁵

Because noncommercial stations have an educational mission, whose contours have been left unspecified, the FCC has never adopted public interest programming rules for noncommercial stations, such as requiring that a certain amount of airtime be dedicated to local news.

NONCOMMERCIAL FM RADIO LICENSES (2010)



Source: BIA and NI

Religious Broadcasters

Forty-two percent of noncommercial educational radio stations broadcast in a primarily religious format. According to FCC regulations, stations may broadcast in this format, and a noncommercial license may be held by a religious entity, so long as the station is to “be used primarily to serve the educational needs of the community.”¹⁶ Here, too, section 326 of the Communications Act of 1934, as amended, precludes the Commission from favoring, censoring, or determining program choices, except for some narrow exceptions. The FCC has traditionally let the licensee determine whether it is serving educational purposes.¹⁷

FCC Rules and Public Broadcasting Business Models

Various rules and laws (including several by the FCC and CPB) restrict the ability of noncommercial broadcasters to generate revenue. In general, public broadcasters have accepted the restrictions, fearing that using commercial revenue-generation techniques would alienate donors and undercut the arguments for government or foundation funding.

Underwriting

There has always been tension between giving noncommercial TV and radio stations flexibility to raise revenue and preserving their character as “noncommercial” entities (i.e., operating on a not-for-profit basis and without commercials). Section 399(b) of the Communications Act prohibits the *broadcast* of advertisements on noncommercial stations.¹⁸

In 1984, the FCC granted stations more flexibility by adopting a policy of “enhanced underwriting,”¹⁹ which permitted noncommercial stations to broadcast donor and underwriter acknowledgements from for-profit entities. These acknowledgements can include logograms and slogans that identify, but do not promote, sponsoring businesses. They may include business location information, value-neutral descriptions of a product line or service, and brand and trade names along with product or service listings.²⁰ That is why some underwriting messages resemble ads. Subjects that cannot be mentioned in underwriting announcements include price information, such as discounts, rebates, and interest rates; calls to action; inducements to buy, sell, rent, or lease; and any language that states or implies favorable comparisons to other like businesses or competitors.²¹

The underwriting policy has some gray areas. Sometimes it is difficult to distinguish between language and images that are descriptive and those that are promotional. Having too many shots of a product, or flashing or blinking features, has been considered promotional, although there are no quantitative boundaries defining what constitutes one image too many.²² Describing a phone company’s “quick connection and clear sound” has been prohibited on the grounds that it implies a comparative advantage over the company’s competitors.²³ The FCC usually defers to broadcasters,²⁴ but in worrying about stepping over the line, licensees struggle to determine whether donor acknowledgements are descriptive, but not “comparative or qualitative,”²⁵ and whether slogans identify, but do not promote.²⁶ The FCC has said that “lengthy” or “verbose” announcements are more likely to be deemed promotional, but it has not said how many words or seconds constitute verbosity.²⁷

In written comments filed with the FCC, most public broadcasters did not advocate for a significant loosening of the standards. Although they would welcome the ability to raise more revenue, public broadcasters fear that if their programming ends up seeming too commercial, they will lose their rationale for public and member funding. This concern, however, is not necessarily shared by the entire noncommercial broadcasting community. National Religious Broadcasters (NRB) has a different view: “NRB urges the FCC to both clarify, and to relax, the current rules that permit noncommercial broadcasters to give very short sponsorship mentions on the air as long as they ‘identify’ the sponsor but do not ‘promote’ the sponsor. The line-drawing here is confusing and inconsistent.”²⁸ NRB argues that even if secular public broadcasters do not want this flexibility, religious broadcasters should have extra leeway, since they do not get federal money through CPB.²⁹

Though the FCC publishes on its website enforcement actions related to underwriting, several parties have asked for clarifications on what is or is not allowed.³⁰ For instance, NPR wrote in 2010: “NPR and its public broadcasting colleagues work hard and carefully to comply with the FCC’s rules, but uncertainties about particular language issues have made the task substantially more difficult, especially given the changing nature and expectations of underwriters.”³¹ National public radio identifies the following as “issues that arise routinely and that are not addressed by the FCC’s formal guidance”:

“1. Aspirational language, such as language describing an automobile tire as ‘designed to extend mileage’ or ‘helping reduce energy loss.’

“2. References to technical specifications, such as language describing an air filter as ‘99.9 percent efficient and 100 percent covered in textured grip control.’

“3. References to third party standards, such as ‘ENERGY STAR rated’ appliances.

“4. Language referring to a funder’s website for product specific information, such as ‘where visitors can learn more about the importance of inspecting shocks and struts at fifty thousand miles.’

“5. Language describing an episode of a television program as ‘all-new’ or ‘a sneak preview.’

“6. A reference to an award, such as an ‘Academy Award’ winning movie or actor.

“7. References to product ingredients, such as ‘130 calories or less per serving.’

“8. References to a funder’s charitable endeavors, such as ‘investing \$100 million towards education each year.’

“9. Quantitative references to a funder’s specific experience, such as ‘thirty-five years of clinical experience.’

“10. References to arguably promotional website addresses, such as ‘Trust the Check dot com.’”³²

There has been some confusion as to whether underwriting rules apply to the websites created by public TV or radio stations. To be clear: the FCC rules do *not* restrict advertising or sponsorships on the websites in any way.³³ Guidelines on types of permissible sponsorship apply only on air. Of course, stations may decide to avoid ads on their websites, and the CPB is creating incentives for stations to apply broadcast underwriting standards to online advertising.³⁴

Merchandising

Public broadcasters are allowed to generate ancillary revenue by selling merchandise related to their shows. The licensing of children’s characters has been the most lucrative. But there are restrictions. Though the stations can allow for the creation of program-related merchandise, they cannot market any of it on air. And many broadcasters choose not to explore these options for fear of a backlash along the lines of what happened in the early 1990s when PBS forfeited the license fees from Barney, because it was under political pressure to remain noncommercial.³⁵

Again, under FCC rules, while stations might be prohibited from marketing merchandise on air, they are allowed to do so on their websites.

There has been some confusion as to whether the FCC’s underwriting restrictions apply to the websites created by public TV or radio stations. To be clear: they do not.

Public TV stations have must-carry rights on cable TV, but, unlike commercial broadcasters, they are unable to get paid for their signals through “retransmission consent” fees.

Retransmission Fees

Public TV stations have must-carry rights on cable TV, but, unlike commercial broadcasters, they are unable to get paid for their signals through “retransmission consent” fees.³⁶ Public TV leaders have been reluctant to ask for this authority, lest it undercut their status as noncommercial broadcast entities. It is not known how much additional revenue this could generate for local public TV stations.

Fundraising for Third Parties

Noncommercial broadcasters are generally prohibited from engaging in fundraising activities for other nonprofits.³⁷ This rule is intended to prevent the reserved noncommercial spectrum from being used as a barker platform for fundraising, taking time away from the provision of noncommercial service. The FCC has granted waivers in special circumstances, such as to permit on-air fundraising for Haiti relief and, to help restore a Washington, D.C. arts facility destroyed by fire.³⁸ NRB noted that WMIT-FM, in Asheville, North Carolina, used such a waiver to raise \$272,250 in an on-air fundraiser in February 2010 for the Haiti relief project of nonprofit Samaritan’s Purse—an amount projected to help “1,815 Haitian families with shelter, clean water, and medical supplies.”³⁹

The National Religious Broadcasters has proposed that noncommercial stations should be permitted to use up to one percent of their airtime to raise money for nonprofits. NRB’s executive director suggests that among those that might benefit are “local rescue missions in their listening areas” and international relief organizations.⁴⁰ NRB argues that these fundraising-based shows would help raise awareness about important local and international issues such as hunger and global poverty. It also appears that the current waiver-based system puts the FCC in the position of deciding which human tragedy is most worthy of fundraising. It is not clear, for instance, why restoring an arts facility would be permissible but addressing persistent homelessness in a community would not be.

Many secular public broadcasting officials do not want to have this flexibility because it would put them in the awkward position of deciding which worthy cause to support and which to reject. But at least one secular noncommercial broadcaster also endorses relaxation of the third-party fundraising rule. Joseph Bruns, a longtime public TV executive and currently COO of WETA in Washington, argues (in comments reflecting his personal views, not necessarily those of WETA) that relaxation would allow for more creative partnerships and enable broadcasters to highlight worthy charities in the community, thereby deepening the station’s connection to the community.⁴¹ Bruns notes that since they rely on donors, many public TV stations have the necessary infrastructure, including a “television production facility, and a backroom fundraising operation that can handle a large volume of call-in donations.” The ability to participate in third-party fundraising, he argues, would allow noncommercial stations to expand their “community service mission” by “allowing us to work with social service nonprofit organizations and to lend to them our capability to allow them to extend their own community awareness and fundraising appeal.” What Bruns imagines is “a kind of telethon in which we would bring in local celebrities, politicians, sports figures, music groups, and the like. We would allow the organizations an opportunity to do a presentation of what they do and why they are worthy of support.”⁴² A local public broadcasting station could partner with a nonprofit news web start-up in developing and distributing content. The station would gain access to additional local content, and the nonprofit might in turn benefit from increased distribution as well as further fundraising opportunities.

The National Religious Broadcasters has asked for the ability to do fundraising for “local rescue missions in their listening areas” and international relief organizations.

Digital Stations

Noncommercial television stations are entitled to carriage, through must-carry regulations, on local cable systems. Although public television stations are not legally entitled to carriage of their digital multicast signals, a private agree-

ment between the National Cable Television Association and the Association of Public Television Stations in 2005 provides for cable carriage of up to four multicast programming streams from each public television station for a 10-year period.⁴³ All noncommercial television stations are required to use their digital capacity “primarily for a non-commercial, nonprofit, educational broadcast service,”⁴⁴ but they may also use some of it for commercial purposes, to generate income for the overall enterprise. In a controversial 2001 *Report and Order*, the Commission stated that noncommercial stations could accept traditional advertising on capacity that they are not using for broadcasting, even though they cannot do it on their primary channel.⁴⁵ If they do so, the noncommercial stations, like commercial licensees, must also pay the FCC a fee amounting to 5 percent of gross revenues generated.⁴⁶ In 2010, 88 full-power public TV stations reported revenues of \$435,916.50 from ancillary and supplementary services and paid the FCC \$21,795.83 in fees.⁴⁷

The Corporation for Public Broadcasting

Although most public TV and radio funding comes from private sources, the money from the federal government is often quite important. It can provide seed funding for projects, which then get additional support from other sources such as universities, foundations, local governments, and viewers.⁴⁸ It also covers the mundane overhead (“keeping the lights on”) that donors rarely want to support and that make station operations sustainable. This is particularly true in smaller markets where it is often difficult to attract sufficient membership dollars and other private donations.

The Corporation for Public Broadcasting (CPB) is the largest source of federal funding for public broadcasting. Its federal appropriations for 2009 were approximately \$400 million and \$420 million for 2010.⁴⁹ Public media advocates argue that the federal financial commitment to public broadcasting is insufficient. It is certainly far lower per-capita than that of many other western countries. U.S. taxpayers give about \$1.35 each to public broadcasting per year, compared with \$24.88 in Canada, \$58.86 in Japan, \$80.36 in the United Kingdom, and \$101 in Denmark, based on appropriations (for the U.S.) and license fees (for the other countries) for 2007.⁵⁰

Various rules and laws restrict the ability of noncommercial broadcasters to generate income. In general, public broadcasters have accepted the restrictions, fearing that using commercial revenue-generation techniques would alienate donors and undercut the arguments for government or foundation funding.

Perhaps even more important in the continually changing media environment, CPB is limited in how it can distribute funds allocated to it. By law, it must direct most of its annual budget (89 percent) to TV and radio stations, as well as to programming for those stations.⁵¹ Seventy-five percent of its funds must go to television,⁵² 25 percent to radio.⁵³ Most of those funds go to station support,⁵⁴ with only 25 percent of TV funding and 23 percent of radio funding going to programming.⁵⁵ In recent years, CPB has been receiving an additional appropriation earmarked for assisting TV (and to a lesser extent radio) stations with their digital transitions.⁵⁶ The mechanism CPB uses to direct funds to public television and radio stations is the Community Service Grant (CSG).⁵⁷ From 2009 to 2010, over 550 public TV and public radio stations received CSG disbursements, with approximately \$212.2 million going to TV, and approximately \$83.1 million to radio.⁵⁸ Stations must qualify for CSGs by meeting a set of eligibility requirements. For one thing, a substantial majority of the station’s daily total programming hours must be devoted to “CPB-qualified programming, which is defined as general audience programming that serves demonstrated community needs of an educational, informational,

and cultural nature.”⁵⁹ This excludes programs that further political or religious philosophies, as well as those that are designed mainly for in-school audiences.⁶⁰

In 2008, CSG funding constituted about 15.7 percent of the average public television station’s budget and 10.1 percent of the average public radio station’s budget.⁶¹ Small and rural stations rely on CSG funding much more heavily than large urban stations do.⁶² The amounts granted are based mainly on the size of the service area, but CPB also factors in considerations such as the amount of non-federal support the station receives, whether the station

is the sole broadcaster in its area, whether it is the first CPB-funded licensee in its area, whether the station serves minority communities, and whether it is in a rural area. Because so much CPB funding is tied to statutory and CPB-created formulae, it is difficult for CPB to reward excellence or adapt to changing circumstances. Stations almost never lose CSG funding.⁶³

In 2010, CPB conducted a review of CSG eligibility criteria. A panel of public media leaders recommended creating more financial incentives for stations to merge or collaborate and requiring stations to disclose information about local programming. But they declined to recommend that CPB require the production of local programming or other community service performance metrics as a condition of funding.⁶⁴

Some want CPB to go farther. Bill Kling, president and CEO of American Public Media (APM), has long been an advocate for stricter CSG requirements that, for instance, mandate much more local content, larger full-time station staffs, and a governance structure for stations that makes them accountable to the community rather than to a university or other entity with diffuse interests.⁶⁵ Free Press has similarly argued that CSG funds should be tied to tougher performance standards for local stations.⁶⁶ The advocacy group Association of Independents in Radio (AIR) has urged the FCC to adopt local content rules for noncommercial stations that would prod stations to seek new voices, including independent producers.⁶⁷ CPB funding for independent programming now comes mostly through small programs, such as the Radio Program Fund, which has been responsible for funding Radio Bilingüe’s national program service, public radio’s principal source of Latino programming; Koahnik Public Media’s Native Voice 1, public radio’s principal source of Native American programming; and independent productions such as *StoryCorps* and *This I Believe*.⁶⁸

As noted in chapters 6–12, the nonprofit media sector includes many players other than noncommercial TV and radio stations. In theory, CPB is permitted to fund these independent nonprofits;⁶⁹ however, due to statutory funding directives and the paucity of funds to disperse, CPB provides very little funding to them. In the past, adjustments to federal legislation have served to broaden CPB’s pool of grantees. For example, in response to TV and film producers’ complaints that they were being excluded from the public television schedule, in 1988 Congress made the Independent Television Service (ITVS) a mandatory CPB grantee in order to promote innovative content for underserved audiences.⁷⁰ AIR has argued that there should be a similar intervention on behalf of independent radio producers, who are generally not funded by CPB.⁷¹

A Public Media Platform is currently under development. Public broadcasting stations and other media entities would contribute content, which could then be sliced, sorted, and redistributed to other public media entities.

Technology and Infrastructure Funding

There is a long tradition of federal funding (from various sources) going to public broadcasting infrastructure, as opposed to programming. For instance, CPB funds infrastructure through the satellite interconnection system, which made early use of satellites to network together programming among public television and radio stations nationwide.⁷²

What will “infrastructure” mean in the future? Basic infrastructure will no longer be limited to radio towers and satellite dishes, but will involve software, digital platforms, digital delivery systems, and applications. For example, a Public Media Platform is currently under development by NPR, PBS, the Public Radio Exchange (PRX), APM, and Public Radio International, with funding from CPB.⁷³ The plan is for public broadcasting stations and other media entities to contribute content, which could then be sliced, sorted, and redistributed to other public media entities. The prototype for this platform is the NPR API, which has fostered the sharing of radio and web-based content among public radio stations.

Another example of public media infrastructure not currently or systematically funded by the federal government is the “middle mile” infrastructure that connects public broadcasting entities to anchor institutions and other strategic points of access in local communities.⁷⁴ Initiatives such as National Public Lightpath,⁷⁵ which brings together members of the education, media, public broadcasting, and government sectors to build broadband networks, have called for increased federal funding to support universal access to broadband content that is in the public interest. The 2010 *National Broadband Plan* recommended that schools, hospitals, and other community institutions, including

public broadcasting stations, function as anchor institutions for community access to broadband, especially in Tribal lands and rural areas.⁷⁶

Government has also funded public broadcasting “software,” as opposed to physical infrastructure. Between 1994 and 2004, the Technology Opportunities Program (TOP), run by the National Telecommunications and Information Administration (NTIA) within the Commerce Department, gave grants to support new telecommunications and information technologies aimed at providing education, health care, and public information. In the course of those ten years, TOP awarded 610 grants totaling \$233.5 million and leveraging \$313.7 million in local matching funds.⁷⁷ Only a small portion of TOP funds went to public media entities; among the public media grantees was PRX,⁷⁸ which curates over 20,000 independently produced noncommercial radio programs, making them available to all stations on an open online platform.⁷⁹ Also a CPB grantee, PRX developed what is currently one of public media’s top innovations: the app that allows streaming of local radio stations on the iPhone.⁸⁰ One of the benefits of CPB, NTIA, and other operations existing within a broader public service media framework is that small investments can be leveraged in ways that connect innovators to each other and to the larger system.

Since the TOP program ended in 2005, and given the constraints on CPB funding, there is currently little federal support for technical innovation either in the existing public broadcasting community or among new entrants to the public service media world. Thus, entities and individuals that, for instance, want to develop noncommercial mobile apps for educational use have no obvious place to go for start-up grants. Foundations have provided some support,⁸¹ but it remains to be seen whether their investments can be leveraged strategically to support widespread and follow-on innovation across communities and across the layers of public media activity, including distribution, applications, and content development.

Fundraising via New Technologies

Smartphone applications have been an area of extraordinary growth for public radio. But there is some controversy over whether all technology companies are doing enough to facilitate charitable transactions.⁸²

The Problem of Rising Broadband Costs

As noted in Chapter 6, public broadcasters face a serious new challenge, which threatens to interfere with future innovation. As more people access their video and audio content online, the costs of streaming the material could skyrocket. Commercial broadcasters can often offset those costs through ad deals that pay them more as video plays increase, but given the commitment of public broadcasters to remaining noncommercial, they are left in a peculiar position: the more popular their video and audio streams, the deeper into the cost hole they go.

No current public policy attempts to address this issue.

Structural and Governance Issues

Station Ownership and Governance

In both radio and television, private nonprofit organizations own the bulk of NCE licenses. For television, the proportion is nearly half (approximately 46 percent) of total licenses; in radio, private nonprofits own roughly 62 percent of NCE licenses. A significant minority, however, are owned by governments or universities—a fact that may become more relevant if stations dive more deeply into the creation of local journalism. In TV, about 31 percent of licenses are owned by government (via boards, commissions, and authorities that are either directly or indirectly affiliated with city or states.) Colleges and universities own the remaining 23 percent. The numbers are slightly reversed in radio, with only 7 percent of NCE FM stations owned by entities affiliated with state and local governments and 31 percent owned by colleges and universities.

The composition of licensee types varies by state. For example, in states such as Georgia, Maryland, Alabama, Iowa, Arkansas, and South Dakota, all or nearly all of the NCE TV licenses are owned by state legislatures or government-affiliated entities. Private nonprofit organizations own all NCE TV licenses in Colorado, Connecticut, Hawaii, Massachusetts, Maine, Minnesota, New York, and North Dakota. Universities own nearly all television NCE licenses in Michigan and Utah.⁸⁴

DISTRIBUTION OF TV AND RADIO NONCOMMERCIAL EDUCATIONAL LICENSES (2010)

	NCE TV Licenses	NCE Radio Licenses
Private nonprofit	46%	62%
State/local government	31%	7%
Colleges and universities	23%	31%

Source: FCC data⁸⁵

There seems to be widespread agreement that good governance, including a professional, involved, and accountable board, is important to the productivity of NCE stations.⁸⁵ “Good governance is a combination of leadership structures, strong leadership at the top, vision, mission, strategy, a financial model that supports that core mission, and a sense of responsibility, accountability, and transparency to the community of service,” says Terry Clifford, president of the Station Resources Group, a nonprofit public media consultancy.⁸⁶

Community advisory boards, which are required for stations licensed to nonprofits, can provide some of this good governance.⁸⁷ However, they are in some cases merely ceremonial. APM president and CEO, Bill Kling, says, “In my experience, advisory boards are treated sort of like the old FCC-required ascertainment process. They come together and talk about things they care about relative to programming content and then they leave.”⁸⁸ He contrasts this to “governing boards” which have the power to hire and fire, “decide how much financial risk they can take, open doors, raise money, approve and contribute to strategy and in even more ways, help move the vision of public media forward.”⁸⁹

Kling points to the example of KPCC in Los Angeles, which was licensed to Pasadena City College, and as such was not required to have a community advisory board, nor did it have a governing board that was focused uniquely on station operations. Instead, KPCC was governed by the elected board of trustees of the college, which managed the station along with all other college departments. The station had a budget of about \$1 million, an annual deficit of \$135,000, and an audience so small that it did not meet CPB audience minimums. The KPCC license was then leased to Southern California Public Radio, a nonprofit with a direct governing board (as well as a community advisory board, but that was not the game changer). It hired a new CEO, revised the program line-up, built a professional news department, added bureaus and offices in downtown L.A. and in Orange County, added a transmitter in the Inland Empire and Palm Springs, and brought in professionals for fundraising, marketing, and underwriting. Today, the station has the largest news audience of any public media company in L.A. (600,000), an aggressive digital media initiative, a balanced budget of \$16 million, a new \$27 million production center that has already been paid for, and a powerful, diverse board of directors, and it has become a “centering institution” for the diverse communities of Southern California.⁹⁰

If CPB were to require all licensees to have a direct governing board as a condition of funding, public media could in many cases be strengthened.⁹¹ In practice, this would mean that university and state licensees would appoint boards to run their stations. A direct governance requirement could help strengthen the already-strong university-run stations and nudge those university and state licensees that have little interest in managing a public media company to transfer control or operation of those facilities to other entities. Alternatively, they could appoint boards to oversee station performance. Bill Kling has urged that the FCC make the existence of a direct governing board a requirement of license renewal.⁹²

Consolidation

As detailed in Chapter 6, there is some duplication of services among public TV stations in certain markets. For many years, CPB has tried to get multi-provider markets (also known as “overlap markets”) to consolidate by offering financial incentives, but so far it has not achieved much change. A report on public media by the Aspen Institute recommended that the FCC take action to encourage consolidation: “The FCC should adopt policies that ease station acquisition, mergers and operating agreements.”⁹³ The FCC permits stations to enter into shared services agreements, as long as control of the stations rests with the licensees, as required by the Communications Act.⁹⁴ One obstacle

to consolidation may be the Commission's localism rules, which require stations to be controlled by a board that is broadly representative of the educational, cultural, and civic groups within the community.⁹⁵

Consolidation could be spurred by the FCC's drive to reclaim unneeded broadcast spectrum for use in advancing wireless broadband connectivity. The FCC has proposed a voluntary incentive auction system in which broadcasters (commercial and noncommercial) could voluntarily put some of their spectrum up for auction and keep some of the proceeds from the sale. There may be some public TV stations that will go for the offer, leading to some elimination of duplication in the public media space.

Diversity

Reaching diverse audiences with diverse content is a core mission of public media. CPB and other public broadcasting organizations have invested in national public radio programs for ethnic media; CPB currently supports at least 75 stations governed by boards that are at least half minority.⁹⁶ CPB also supports the National Minority Consortia, which consist of the Center for Asian American Media, National Black Programming Consortium, Native American Public Telecommunications, Native Public Media, Pacific Islanders in Communications, and Latino Public Broadcasting.⁹⁷ The Consortia select, fund, develop, produce, and distribute radio and television programming about their ethnic communities, and also award grants for program production, training, exhibition, and outreach activities.⁹⁸

Nevertheless, both public television and public radio have faced sharp criticism for failing to hire staff, and offer programming, reflecting the populations of the communities their stations serve.⁹⁹ There have been many calls to broaden their audience, improve programming and diversify management.¹⁰⁰

The Latino Public Radio Consortium and the Native Public Media have worked to increase the number of noncommercial radio stations for Latino, tribal, and native entities.¹⁰¹ CPB and PBS are making efforts to prioritize diversity. For instance, PBS recently established a Diversity and Innovation Fund to support programming that is of interest to diverse audiences.¹⁰² CPB is also changing the TV Community Service Grant criteria to require that grantees formally adopt a goal having a diverse management staff and governing board reflective of their service area. They will also need to provide an annual report on hiring goals, guidelines, and employment statistics.¹⁰³ It has also proposed instituting diversity hiring training programs, better resourcing for minority stations, and establishing a new incentive for increased diversity in station leadership.

Public media leaders emphasize the need to incentivize stations to produce local content as a way of promoting diversity. The thinking is that if stations are compelled to produce local content, they will inevitably interact more with populations in their communities, and in turn will be more likely to produce programming that is reflective of it.¹⁰⁴ As one report put it: "If you seek to diversify the public media audience, understand that you must leave your office and go outside; you must find them and invite them to participate in telling the story of their lives and their community."¹⁰⁵

Collaboration

Local commercial TV stations struggle to fill their airtime, while local websites struggle to get exposure for the content they produce. Public radio stations want to do more local reporting but have smaller staffs than local newspapers. Stations are free to collaborate, but neither CPB funding criteria, FCC licensing criteria, nor other national institutional strictures have incentivized them to do so. Indeed, some station managers seem to believe that collaboration will hurt their ability to distinguish themselves in the community and attract funding. In addition, there are often long-standing tensions and rivalries between leaders of nonprofit news and information providers within a community that deter them from collaboration.

The Political Firewall

CPB was intentionally established as a semi-private organization, rather than a government agency, to insulate it from political interference. Decisions about funding are made by a board of directors, composed of nine U.S. citizens "who are eminent in such fields as education, cultural and civic affairs, or the arts, including radio and television" and broadly represent "various regions of the Nation, various professions and occupations, and various kinds of talent and experience appropriate to" CPB's "functions and responsibilities."¹⁰⁶ The directors are appointed by the president with the consent of the Senate for six-year terms, with the proviso that a maximum of five directors may be "of the same

political party.”¹⁰⁷ There have been several instances in which the heat shield did not work optimally (See Chapter 6, Public Broadcasting), but by and large it has been effective at protecting editors from political pressure.

Free Press, a media advocacy group that believes public media funding should be significantly increased, also argues that the CPB governing structure needs reform. It suggests, for instance, that the chair and vice chair should be of different parties, and the board should be expanded to include leaders from major cultural institutions such as the Smithsonian and Library of Congress.¹⁰⁸

Although even CPB has an effective firewall at the national level, it is unclear whether a local political firewall would work, particularly if public TV and radio begin to do more local investigative journalism. In one sense, the main form of protection against political interference on a local level is the fact that government funds come from the national government. If a public radio station owned by a community licensee were to criticize the mayor, His Honor would have a hard time finding a way to punish that station financially, since what government funding there is comes from the federal government by formula. Of course, ownership by local or state governmental entities makes it more likely that a local official would have the means to exercise disciplinary power.

For most public broadcasters, problems associated with their local watchdog role are not all that different from those faced by local commercial broadcasters: pressures from advertisers or sponsors. In that sense, the main issue may not be the fact that they receive government dollars, but rather the percentage of their budget that those dollars comprise. Just as a commercial station is better able to withstand pressure from, say, a car dealer that is providing 15 percent of the station’s revenue than one who is providing 40 percent, noncommercial stations will be better positioned to preserve their independence if they have diverse revenue sources. Steve Coll, president of the New America Foundation and a Pulitzer Prize-winning journalist for the *Washington Post*, endorsed the idea of limiting the percentage of public media revenue that might come from the government, offering this general observation about how undue influence has been curbed in various institutions over the years:

“Firewalls are a daunting challenge, but they can be managed. Newspaper publishers, in their day, insulated their newsrooms from pressure from advertisers, for the most part; university presidents insulate their faculty from pressure from donors, for the most part. When they fail they are often exposed (typically by journalists) and held accountable. Conflicts of interest and the appearance of conflicts are inherent to professional activity in a free-market economy; law, medicine, accounting, and science all struggle with the problem. There is, in any event, no inherent moral difference between corporate advertising dollars and government dollars; both flow from institutions whose power over citizens journalists should be seeking to describe and challenge.”¹⁰⁹

Currently, CPB has political independence rules for its national governance, but at this time, there is no stipulation attached to CPB funding requiring that station personnel must have the leeway to make independent content decisions that are not subject to influence by local sponsors.

New Funding Sources and Strategies

Just how public broadcasting should be funded (e.g., where funds should come from, how funding should be structured, how much should be provided) has been a matter of continual debate. Over the decades, many have argued that alternatives to annual government appropriations would guarantee more sustainable, predictable, and politically insulated funding.

In 1967, the first Carnegie Commission advocated, unsuccessfully, for a permanent endowment, with the interest providing the annual funds for public broadcasting.¹¹⁰ In early 1971, Congress considered a bill to establish a “public broadcasting trust fund” and to authorize a federal match of two dollars for every dollar of non-federal support over \$50 million.¹¹¹ But the legislation did not pass. The Ford Foundation, in a report authored by former CBS News President Fred Friendly in 1966, proposed that a nonprofit corporation operate a new satellite system, lease capacity to commercial broadcast networks, and use the proceeds in part to fund educational television. In addition, the satellite would provide free interconnection to noncommercial stations. McGeorge Bundy, who publicly presented the report, characterized the financial support for noncommercial television as “a people’s dividend, earned by the American nation from its enormous investment in space.”¹¹²

In 1996, Republican Congressional leaders offered a plan to end all Congressional appropriations to CPB by 2000; it would endow a \$1 billion trust fund, using proceeds from the auction of vacant noncommercial TV channels and

setting aside \$250 million annually from 1998 to 2000 to ensure there would be cash flow until the auction proceeds were available.¹¹³ The bill stalled, however, when broadcasters concluded that Congress would not provide enough money.

The trust fund idea resurfaced as a recommendation in the 2010 *National Broadband Plan*—this time endowed by revenues from a voluntary auction of spectrum licensed to public television.¹¹⁴ The *Broadband Plan* did not specify how this system would work or where precisely in “public media” the proceeds would go.

The 1998 Advisory Committee on Public Interest Obligations of Digital Television Broadcasters, also known as the “Gore Commission,” considered a different approach to using spectrum to fund public media. Instead of imposing spectrum fees on commercial broadcasters or garnering funds from spectrum sales, the Gore Commission considered a “pay-or-play” proposal that would allow commercial broadcasters to buy their way out of public interest programming requirements on the digital channels, with the proceeds going to support public broadcasting in their markets.¹¹⁵ The proposal was met with strong opposition by individual members of the Committee, however, who argued that it would damage the public trusteeship ethos of broadcasting and be administratively difficult to establish.¹¹⁶

In an October 2010 cover story for the *Columbia Journalism Review*, Steve Coll recommended that the FCC raise funds from a combination of spectrum auction proceeds and ongoing fees from holders of public spectrum.¹¹⁷ In a more recent piece, Coll wrote, “Our public media system has achieved this extraordinary result despite being starved

for public funds, in comparison to other industrialized countries.”¹¹⁸ He recommended a variety of reforms to make CPB more accountable, open to new media, and balanced, adding, “Any new funding regime should be measured by whether or not it will produce more serious, independent, diverse, public-minded reporting.”¹¹⁹

The Writers Guild of America East in 2010 proposed raising funds for public media by requiring a fee from commercial media companies that merge.¹²⁰

Some have argued that the best way to fund public media is by taxing media services or devices. Again, the *Carnegie Commission Report* advocated for this early on, suggesting that the government tax new TV sets, as it had between 1950 and 1965, to finance public media.¹²¹ This is a version of the license fee that television owners pay in Britain to fund the BBC.¹²² Several other European nations have passed, or are considering,

proposals to migrate the television device tax to a more general individual media tax or electronic device tax to support public service media (with the recipients generally being limited to the legacy broadcasters). In the U.S., contemporary device tax proposals focus on electronic devices, such as high-definition TVs, smartphones, and laptops.¹²³ Some have suggested levying a tax on commercial stations to have them share in the funding of public television.¹²⁴

Another recent proposal involves taxing advertising expenditures or advertising revenue, or reducing the deductions businesses can take for advertising expenses and funneling the proceeds into a trust fund for public media.¹²⁵ With total U.S. spending on advertising expected to approach \$310 billion this year, proponents estimate that taxing even 2 percent of advertising for 10 years could raise more than \$45 billion total, amounting to a \$2.25 billion annual budget by the end of the 10 years—which would exceed annual public broadcasting funding by governments, nonprofits, and corporate institutions combined.¹²⁶ An indirect tax, based on reducing or eliminating allowable deductions for advertising expenses, could feasibly fund a \$61 billion trust in 10 years that would be self-sufficient by its 11th year.¹²⁷

Of course, others argue that not only should we not be seeking new sources of funding for public media, but the time has come to eliminate taxpayers subsidies altogether. Randolph May, president of the Free State Foundation, has argued (not in connection with any specific de-funding proposal), “[T]oday’s marketplace ought to provide as much ‘quality’ as the American public demands. Absent coercion, it is difficult to justify expenditure of taxpayer dollars trying to force-feed programming that the public does not want.”¹²⁸

Adam Thierer of the Progress and Freedom Foundation has argued that the revenue-raising ideas tend to be unfair. For instance, he says, extracting funds from broadcasters through spectrum fees is unfair, since they are generally not the ones that got the spectrum for free:

What will “infrastructure” mean in the future? Basic infrastructure will no longer be limited to radio towers and satellite dishes, but will involve software, digital platforms, digital delivery systems, and applications.

“Using spectrum fees as a reparations policy today fails to punish those who originally got their spectrum free-of-charge. The vast majority of broadcast spectrum licenses have traded hands in the secondary market for lucrative sums. In many cases, those television and radio properties have traded hands numerous times.

“Thus, the current spectrum-holders who would be taxed are generally not the beneficiaries of any “windfall,” but have instead paid competitive market prices for the spectrum they use that should be roughly commensurate with the economic value of that spectrum (at least for the limited range of uses allowed by the FCC).”¹²⁹

Taxing advertising, Thierer argues, is no better. “Advertising benefits society by subsidizing the creation of news, information, and entertainment,” he says.¹³⁰ Efforts to fund public media by somehow taxing commercial media are, he says, strategically akin to “burn[ing] the village in order to save it.”¹³¹ Such proposals would channel taxpayer support to media entities the *proponents* favor, essentially destroying “the private provision of media in America” and the possibility of a truly free press.¹³²

On a broader level, opponents argue that the government should not force taxpayers to subsidize media they may not want or find offensive, and assert that in an age of information abundance, consumers cannot be forced to watch, listen, finance, or read the “right” types of media.¹³³

Over the years, there have been proposals to allow public broadcasting stations to enlarge their own revenue base, and new versions of those are now on the table. One such proposal would allow public television stations greater flexibility to lease excess digital capacity to commercial wireless service providers.¹³⁴ Though these proposals are designed to provide public broadcasting more security, there is often reluctance within the public broadcasting community to aggressively pursue revenue opportunities for fear that Congress will respond by cutting appropriations.

Until recently, it has been assumed that the incumbent noncommercial broadcasting stations would be the beneficiaries of any new fund or funding. But newer proponents of the trust fund model have suggested that proceeds could be used to assist new noncommercial media entities, such as nonprofit websites providing local news. And Eric Newton of the Knight Foundation has proposed creating a fund for technology innovation.¹³⁵ (See Chapter 12, Nonprofit News Websites.)

“Advertising benefits society by subsidizing the creation of news, information, and entertainment,” writes Adam Thierer.

LOW POWER FM

The low power FM (LPFM) 100-watt radio service was created by the Commission in January 2000¹³⁶ to “create opportunities for new voices on the airwaves and to allow local groups, including schools, churches, and other community-based organizations, to provide programming responsive to local community needs and interests.”¹³⁷ In order to be eligible for an LPFM license, an applicant must demonstrate that it is locally based, has no attributable interests in other media (broadcast or newspapers), and has no other LPFM stations.¹³⁸

Like NCE stations, LPFMs cannot sell advertising, but can make underwriting announcements.¹³⁹

Currently, there are about 860 LPFM stations. Further growth in the number of LPFM stations is likely as a result of two recent developments. First, the Local Community Radio Act (LCRA), signed into law on January 11, 2011,¹⁴⁰ removed the requirement, previously imposed by Congress in December 2000,¹⁴¹ that LPFM stations protect nearby full power stations operating on third adjacent channels. LPFM advocates estimate it could double the number of LPFM stations,¹⁴² including more in urban areas.¹⁴³

Second, the FCC has taken steps to resolve the conflict between license applicants for LPFM and translator services (which take a radio station that operates on one frequency and rebroadcast it on another to expand the broadcaster’s reach).¹⁴⁴ As secondary services, LPFMs and translators operate on an essentially co-equal basis, meaning that a first-filed LPFM or FM translator application is given priority over all subsequently filed LPFM and FM translator applications.¹⁴⁵ In 2003, the Commission witnessed what became known as the “Great Translator Invasion,” in which

861 filers submitted 13,377 applications to operate translator stations.¹⁴⁶ Commission staff granted approximately 3,500 new station construction permit applications and then froze further processing in response to requests from the LPFM community, which feared that translators would use up all the frequencies, leaving little or no spectrum for future LPFM station licensing, particularly in larger markets.¹⁴⁷ The Commission agreed that processing the approximately 7,000 remaining translator applications would interfere with development of LPFM service and its efforts to promote localism. It instituted a cap of 10 applications per entity with regard to the remaining applications from the 2003 Auction No. 83 filing window.¹⁴⁸

Although LPFM and translators are subject to similar prohibitions on interfering with other FM services, these stations could not be more different in terms of the service they provide. LPFMs not only are required to be locally based, but they are given points (under the LPFM comparative standard) if they produce local content.¹⁴⁹ Translators, on the other hand, are not legally authorized to originate local content (with a narrow exception for fundraising),¹⁵⁰ and they often rebroadcast satellite-distributed national programming.¹⁵¹

The Commission plans in the near future to initiate a rulemaking procedure to implement the LCRA. It is possible that the Commission will open the second LPFM window as early as 2012.

LOW POWER TV

The Commission created the low power television service—consisting of low power television (LPTV), TV translator, and Class-A television stations—in 1982.¹⁵² Low power TV stations can be used to provide locally oriented service to small communities, both in rural areas and within large urban settings.¹⁵³ Class-A stations are former LPTV stations that have certain interference protection rights that are not available to LPTV stations; they operate at least 18 hours a day and air at least three hours a week of locally produced programming.¹⁵⁴ TV translator stations rebroadcast the programming of full-power broadcast stations to communities that are unable to receive their free over-the-air signals due to distance or interference from mountains and other geographic obstacles.¹⁵⁵ LPTV and TV translator stations have “secondary” frequency use status, which means they may not cause interference to, and must accept interference from, full-power TV stations, certain land mobile radio operations, and other primary services.¹⁵⁶

Class-A stations must broadcast an average of at least three hours each week of programming produced within the media market area served by the station.¹⁵⁷

As part of the FCC’s efforts to assist stations making the transition to digital TV, the Commission in 2009 began issuing new digital low power television licenses in rural areas.¹⁵⁸

NONPROFIT PROGRAMMING ON SATELLITE CABLE

State Public Affairs Networks (SPANs)

In most states, it is up to local cable providers to decide whether or not they want to carry state public affairs networks (SPANs). The Commission’s FOM team counts 24 SPANs (in 23 states and the District of Columbia) that broadcast/multicast or cablecast varying amounts of live coverage of state government proceedings (with a primary focus on the legislative branch).¹⁵⁹ The National Association of Public Affairs Networks (NAPAN) has identified 16 of these states as having an “independent” SPAN—a network managed by a distinct operating unit and recognized by the national association of state SPANs.¹⁶⁰ In only four states do local cable operators follow the model set by national cable operators when C-SPAN was created, by passing along a portion of subscriber fees to state SPAN operations.¹⁶¹ (As noted in Chapter 3, Television, some cable operators have been more cooperative than others.) In 12 states, SPANs receive funding from the state government,¹⁶² but with budgets tightening, there has been little interest from lawmakers in other states to add a new budget line to accommodate SPANs. Furthermore, some SPAN advocates are averse to state funding because of its potential to undercut broadcast independence.¹⁶³ Although a

few public TV stations have made deals with state SPANs, CPB does not currently provide direct funding to state SPANs.

There is typically no statewide entity with whom a network can contract for statewide carriage. Therefore, since SPAN channels are not must-carry channels, they must forge carriage agreements with each and every local cable operator in the state to get statewide coverage.¹⁶⁴ As we noted in Chapter 27, Cable Television, our reading of Section 611 of the Communications Act is that states or local franchising authorities can deem SPANs as eligible for inclusion in the PEG system. If they get carriage as part of a PEG arrangement, they could also potentially receive franchise fees.¹⁶⁵

Satellite providers have offered virtually no assistance to state SPANs. The Alaska public affairs network is the only one currently carried on satellite.¹⁶⁶ Paul Giguere, president of NAPAN, has described the difficulties of obtaining carriage via satellite:

“The direct broadcast satellite providers would not even return our phone calls for many years and were not willing to negotiate carriage whatsoever until the Connecticut General Assembly began exerting pressure about the carriage of CT-N three years ago.... We have participated in that application process with no success to date, but the expense involved and the likelihood that a network designed to serve a single state would be selected for nationwide channel capacity makes this an untenable solution for one public affairs network, let alone 50 of them.”¹⁶⁷

Paying for carriage on satellite can cost as much as \$10,000 per month or \$120,000 per year, a figure that SPANs find prohibitive given their small budgets.¹⁶⁸ Most SPANs believe that some form of carriage assistance from satellite and telephone companies is needed if the system is to flourish.¹⁶⁹

On May 12, 2010, Congress amended section 335 in the Satellite Television Extension and Localism Act of 2010 to reduce the set-aside requirement for satellite providers from 4 percent down to 3.5 percent if they carried state SPANs.¹⁷⁰ However, members of NAPAN argue that the amendment will not have the intended effect, because DBS operators that are already fulfilling their 4 percent obligation are unlikely to willingly replace channels they already carry with SPANs because of the disruption it would cause.¹⁷¹

NONPROFIT WEBSITES

By and large, nonprofit local news websites that have launched in the past few years operate without help or interference from government. Because of the openness of the Internet, and the low-cost of publishing online, hundreds of experiments have been launched.

However, relatively few have so far developed sustainable business models. It is certainly possible that revenue growth will come but the history of noncommercial broadcasting offers a cautionary lesson: public broadcasting (TV and radio) was created in the 1930s, but did not take off until 1967, when the Public Broadcasting Act was passed. Why was that such a stimulus? It provided a consistent, steady influx of federal funding with which broadcasters could build sustainable operations. The government funding started out as a higher percentage of public broadcasters' revenue and declined over time. Now the government essentially serves as a junior partner, providing a minority share of cash at all levels of public broadcasting.

There is no such base line of operating funds from the federal government to nonprofit websites. Budgetary constraints make the idea impossible. Even if money were available, many journalists wouldn't want it. They bristle at the idea of government funding when a big part of their job is investigating government.

But three ideas have surfaced that might help nonprofit websites without involving the government writing checks to news media.

First, foundations may be able to play an even bigger role than they already have (See Chapter 13, Foundations.)

Second, tax law changes may help nonprofits draw more private donations (See Chapter 30, Non Profit Media.)

Third, the government could invest in information technology in ways that would be content-neutral and pay significant dividends both for nonprofit and potentially commercial media. Eric Newton, senior advisor to the President of the Knight Foundation, has proposed that the government create a technology fund that would be available to nonprofit websites. Government can fund technology or software development that can help media in general and

accountability reporting in particular. For instance, a new technology that makes it easier to scan handwritten public records will improve accountability journalism by websites covering the entire political spectrum. What is more, a technology fund could require that new innovations be made open to the public—meaning that they can be used by commercial ventures as well as nonprofits.

“If a tech fund systematically unleashes open source software applications and the technology needed to operate them, and grants money for code, coders and computers to news organizations across the country, it could spread public media innovation faster into new groups and deeper into existing ones, and create nothing less than a news renaissance in America.

“Everyone can win here. A local newspaper, a commercial or public broadcaster, ethnic and alternative media, citizen media, new web-based startups, all of them can use open source news technology. The technology does not care whether they are liberal or conservative, old or young, city dwellers or rural Americans, black or white or any color of the rainbow. People will still be free to choose what news they would like to consume; they will, in fact, have greater choice in a media ecosystem richer in local media.”¹⁷²

Technology development could help to lower the cost of reporting and enhance quality. But, to be clear, it would not directly address a website’s short term revenue problems.

NONPROFIT TAX RULES

“Regardless of whether a paper is owned by a nonprofit organization or an unreconstructed capitalist, it has to take in more money than it spends—or it will perish,” writes Alan Mutter, a media executive and investor. “The form of ownership doesn’t change this fundamental truth.”¹⁷³ And in today’s shrinking publishing economy, both nonprofit and for-profit news organizations are searching for new sources of income.

Although being a nonprofit has many disadvantages for media—most important, the restrictions on raising capital—it also offers several advantages that are particularly relevant, considering the challenges media companies currently face. The nonprofit structure frees news outfits from the constant pressure to increase short-term profits that has sometimes distracted for-profit news organizations from their journalistic mission. The fact that donations to nonprofit media are tax deductible serves as an incentive for citizens to lend financial support to organizations

whose missions they value. Unlike postal subsidies, which are only useful to newspapers, the nonprofit tax deduction “subsidy” is platform-neutral. For this and other reasons, tax attorney and Columbia Law School dean David M. Schizer has recommended that news organizations take better advantage of the opportunity to apply for nonprofit status, modeling themselves on universities and museums that rely largely on private philanthropy.¹⁷⁴ Schizer points out that unlike direct government subsidies, which empower the government to determine funding levels, “the charitable deduction allows the government to piggyback on the judgments of private donors about which charities to support.” When it comes to charities, the IRS does not tell a citizen whether it is better to donate to the soup kitchen or the environmental group; it provides a deduction in either case. The donor makes the decision; the tax code gives them a reward for their efforts. The same is true for nonprofit media. The government doesn’t choose what to subsidize, but makes it easier for private citizens who want to support nonprofit media.

**Joel Kramer of MinnPost:
“We ran an op-ed type
piece.... And we got
somebody who complained
to us that running an
article like this from a
person in the community,
was a violation of our
501(c)3 status.”**

Like museums and universities, most news organizations would fit into the 501(c)(3) “charitable organization” category if they advance “educational purposes,” such as “the instruction of the public on subjects useful to individuals and beneficial to the community.”¹⁷⁵ A wide range of media organizations that found ways to fit in the 501(c)(3) cat-

egory, including the Associated Press, Mother Jones, The National Review Foundation, Wikipedia, The Washington Monthly, James O’Keefe’s Project Veritas, NPR, and American Spectator. Their tax exempt status has enabled them to remain mission focused and attract tax deductible donations from individuals and foundations.

But there are regulatory complications that some experts fear may limit the ability of local news entities to thrive as nonprofit. For instance, some of the basic rules for 501(c)(3) entities seem an imperfect fit for some of the nonprofit websites that have arisen. A 1967 IRS ruling spelled out the four criteria an organization engaged in publishing must meet to qualify for section 501(c)(3) exemption:

- “1. the content of the publication must be educational;
- “2. the preparation of the material must follow methods generally accepted as educational in character;
- “3. the distribution of the materials must be necessary or valuable in achieving the organization’s exempt purpose; and
- “4. the manner in which the distribution is accomplished must be distinguishable from ordinary commercial publishing practices.”¹⁷⁶

In 1977, the IRS denied tax-exempt status to a nonprofit newspaper on the grounds that its operations were “indistinguishable from ordinary commercial publishing practices. Accordingly, it is not operated exclusively for charitable and educational purposes.”¹⁷⁷ While news content is clearly educational, and its distribution is clearly necessary or valuable in achieving the educational purpose, professional news organizations do not generally carry out their reporting duties following methods that are “generally accepted as educational in character.”¹⁷⁸

In May 2009, a dozen media lawyers, scholars, and editors wrote to the IRS with ideas for reforming the tax code to help newspapers.¹⁷⁹ First, they argued that even traditional newspapers satisfy the key mission criteria for nonprofit status: “By providing information to the general public about local, national, and international events, newspapers serve a critical educational function.” Further, they are:

“‘charitable’ [because] maintaining the integrity of public institutions is an important obligation of government, and a vigilant press is the institution best positioned to assist in achieving tolerable levels of public integrity. In providing that assistance, the publication of a daily newspaper lessens the burdens of government. Further, by providing a convenient and comprehensive means for governments, businesses, and nonprofit organizations to convey information to each other and the general public regarding elections, public health services, and the availability of commercial goods and services, newspapers contribute importantly to the economic health and general welfare of the geographic areas they serve. Newspapers’ coverage of public affairs issues particularly generates positive externalities through better informed voters.”¹⁸⁰

They cited various previous IRS rulings that they found discouraging, including conflicting rulings regarding the tax-exempt eligibility of various forms of news providers. Another area for re-thinking, they said, was the IRS’s position regarding volunteer labor—namely that to avoid resembling commercial entities, nonprofit media should make heavy use of volunteer labor—noting, “in several important subsectors of the nonprofit world, hardly any volunteer labor is or can be used. Research hospitals and universities, for example, employ professional staff to execute their exempt functions. . . .”¹⁸¹

Restrictions on political endorsements make some news executives reluctant to consider seeking nonprofit status. Some newspaper executives view the ability to endorse candidates as a central element of an independent press. “[P]olitical endorsements” are “an absolute no-no. . . . It’s not even a gray area,” says attorney Allen R. Bromberger,¹⁸² whose practice focuses on nonprofits and social enterprise corporate philanthropy.

But the law doesn’t merely restrict outright endorsements. It prohibits 501(c)(3) organizations from “publishing or distributing statements” of candidates.¹⁸³ In the case of all candidates, but particularly for incumbents, this prohibition clearly restrains the dissemination of information that a news organization would typically do. Ohio State University law professor and tax attorney Stephanie Hoffer points out that the restriction on political campaign involvement is absolute,¹⁸⁴ meaning that even a small amount can jeopardize the tax-exempt status of a 501(c)(3) organization.

More important, editors who have no interest in doing candidate endorsements nonetheless do want and need the freedom to publish commentaries on important issues or legislation. At a June 2010 hearing held by the Federal Trade Commission, Joel Kramer of MinnPost, a 501(c)(3) news organization, said:

“I don’t think it’s critical that we be able to do editorial endorsements, but I do think it’s critical that it be clarified that when individuals write for us and take advocacy or political positions, that it doesn’t endanger our status. We ran an op-ed type piece by somebody explaining why...after John Edwards dropped out of the race...she switched to Barack Obama instead of to Hillary Clinton. And we got somebody who complained to us that running an article like this from a person in the community, it was a violation of our 501(c)(3) status.”¹⁸⁵

Although section 501(c)(3) restrictions on seeking to influence legislation are less strict than campaign involvement restrictions, they present similar problems. Educational organizations are permitted to engage in some activity that seeks to influence legislation; however, determining which activities qualify and in what quantity they are permitted can be challenging under existing law. Section 501(h) of the Internal Revenue Code describes the permissible kind and scope of these activities by referring to section 4911 of the Code, which says that activities affected by the limitation include not only traditional lobbying activities, but also attempts to influence legislation through grass roots efforts. For instance, a news organization that attempts to influence public opinion on legislation and also provides the names of relevant legislators is deemed to have engaged in lobbying activity under the law. A special rule applies to news organizations that qualify as mass media outlets; for them, simply taking a position on publicized legislation is considered lobbying. Again, although this categorization seems fairly clear-cut on paper, it could prove difficult to monitor in practice. For instance, would speculating about potential benefits or detriments of pending legislation amount to stating a view on that legislation? Since news organizations regularly report on passed, pending, or needed legislation, as well as the legislators who draft it, the existing 501(c)(3) restriction would force editors and reporters to develop legal expertise on covered versus non-covered speech and to curtail their reports accordingly.

The ban on seeking to influence legislation is not absolute— meaning organizations have leeway to engage in some of the prohibited activities without losing their tax exempt status. Hoffer says that organizations do not jeopardize their tax exempt status if their expenses for these activities typically remain below 150 percent of a “non-taxable amount,” as described in Internal Revenue Code section 4911. The non-taxable amount is calculated on a sliding scale. For instance, organizations can spend up to 20 percent of their first \$500,000 of revenue on lobbying activities, and the non-taxable amount can never exceed \$1 million. Many smaller organizations could stay below this limit but larger organizations would have to carefully monitor expenses associated with any speech that might qualify as an attempt to influence legislation (which, as described above, may be difficult, owing to the lack of easily applicable standards). Since the dollar amount of the applicable limitation must be calculated yearly under section 4911, the task would be continuous, requiring additional bookkeeping and accounting.¹⁸⁶ It is not unreasonable to think that some organizations will simply self-censor this speech in order to avoid the attendant costs, decreasing the range of political opinion and information available for inclusion in our vaunted marketplace of ideas. IRS investigations are lengthy, expensive, and worrisome to any organization’s leadership. Experienced legal counsel would likely discourage nonprofit news organizations from publishing any sort of material that could raise a red flag to the IRS.¹⁸⁷

In 1977, the IRS denied tax exempt status to a nonprofit newspaper on the grounds that its operations were “indistinguishable from ordinary publishing practices.”

Miles Maguire ran the Oshkosh Community News Network for five years before deciding to shut it down. “It was just going to be too hard to go to the next level in terms of revenue development, and my concerns were record-keeping and... that the IRS would decide to disallow our nonprofit status.”

Advertising

A nonprofit publication is allowed to run advertising as long as the amount is considered insubstantial, but any profits that accrue as a result are subject to the unrelated business income tax (UBIT).¹⁸⁸ Smaller nonprofit organizations may struggle to understand what counts as unrelated income and what counts as “insubstantial.” The *Raleigh Public Record* (www.RaleighPublicRecord.org) was set up as a nonprofit to fill a vacuum in local accountability journalism. “A lot of important decisions are made by the Planning Commission, and no reporter was covering them,” explains Charles Duncan Pardo, the site’s young reporter-founder. But as he struggles to bring in revenue, he says, he “could use some guidance” on how to acknowledge sponsors. “If a restaurant were to give a few thousand to post their company name, I don’t know what we could do with it,” he says. “I don’t object to unrelated business income tax. I just need to know how to handle it with the IRS.” Additional sponsor money would go a long way toward increasing the amount of news coverage the site can offer: “You sell a small ad for \$100, it pays for one freelance story, and when we are publishing five to ten stories by paid freelancers each month that adds up. Right now, a lot of our content is volunteer-based.”¹⁸⁹

Miles Maguire, a University of Wisconsin professor, ran the Oshkosh Community News Network for five years before deciding to shut it down, in part because of concerns about tax law. “One of the reasons that we folded is that it was just going to be too hard to go to the next level in terms of revenue development, and my concerns were first of all record-keeping (for UBIT) and second of all that the IRS would decide to disallow our nonprofit status. (I could imagine complaints coming from the commercial media if we got to be successful in attracting ads/sponsorships of significant size).”¹⁹⁰

One problem with the current IRS interpretation is that it ignores the centrality of advertising to media business models. Limiting the ability of nonprofits to take advertising could prove to be a significant impediment to the organizations fulfilling their basic missions. Some tax experts have pleaded for flexibility on the grounds that the advertisements themselves offer valuable information to consumers. In their letter to the IRS, the group of media lawyers, scholars, and editors wrote:

“It would also be useful to have guidance on whether income from advertising—the primary source of income of most newspapers—is unrelated business income. We believe that it is not; a significant part of the function of newspapers in facilitating the operations of a local economy consists in the informational content provided by advertising.”¹⁹¹

Legislation proposed by Senator Benjamin Cardin of Maryland would have allowed newspapers to become nonprofits, and made advertising revenue non-taxable.¹⁹²

Although advertising income is taxable, organizations are allowed to deduct the cost of generating that ostensibly unrelated income. While that has traditionally covered expenses such as the ad sales team, in a web world many other costs are essential to the task of selling advertising: the technology that serves the site and the advertising, the personnel to sell the ads, and even the content around which the ads are placed. If the definition were more flexible and in tune with the realities of the Internet, it could reduce the odds that advertising revenue would become taxable for nonprofit media.

Facilitating Donations and Assistance to Nonprofit Entities

Nonprofit organizations could also benefit from the donation of certain kinds of services or goods from commercial enterprises. For instance, it could be hugely beneficial if an Internet service provider (ISP) could donate free Internet service to a nonprofit website or public radio station. But under current law, companies donating such services would likely not be able to take a charitable deduction for doing so, according to attorney Bruce Hopkins, who specializes in tax law concerning nonprofits.¹⁹³

There may also be limits on the extent to which foundations can make “program-related investments” in news-oriented nonprofit media organizations. As the public tax lawyers wrote in their letter to the IRS:

“Because the aims of the philanthropists who would provide support for these ventures are entirely altruistic, it would be appropriate to accord their support the usual tax advantages associated with charitable giving. It is far from clear under existing law, however, that charitable contributions made for these purposes would be deductible, or that grants or program-related investments made to advance such purposes would be ‘qualifying distributions’ under existing law.”¹⁹⁴

Other questions abound: If a TV station pays a nonprofit news website, under what circumstances would that revenue be taxable for the nonprofit media? And under what circumstances could the TV station take a tax deduction for making that donation? Ideally, a structure would be set up that would allow commercial entities that offer significant aid to nonprofit media in their communities a tax advantage for doing so.

A New 501(c) Classification?

Some have suggested that the difficulty nonprofit media companies have fitting in to the 501(c) educational category could be resolved if Congress were to create a separate 501(c) category for nonprofit media. There is much precedent for this. When presented with demonstrable needs, Congress has previously created new 501(c) categories for such diverse purposes as railroad retirees, black lung disease benefit trusts, and cemetery companies. Most recently, Congress enacted section 501(c)(29), which governs federal tax exemption of co-op health insurers.

Since section 501(c)(3) is intended to govern organizations whose mission and nature are much different from those of news organizations, Ohio State University's Stephanie Hoffer believes that, rather than adding to the complexity of section 501(c)(3), a new category of exemption would be a cleaner solution, allowing Congress to tailor benefits and costs specifically to news organizations while retaining the spirit of nonprofit law.¹⁹⁵ She is particularly concerned about the constraints in the 501(c)(3) section related to political expression:

"Unlike universities and other traditional educational organizations, news organizations have consistently had a political voice in our country's civic discourse. This role meaningfully distinguishes them from educational organizations, and has significant implications for their nonprofit classification. The benefits of federal tax exemption are unimportant to news organizations unable to make a profit."

On the other hand, David Schizer, dean of the Columbia Law School, argues that by issuing clarifying policy statements, the IRS could help nonprofit media tremendously without changing the law.¹⁹⁶

Hybrids

Hybrids are for-profit companies that incorporate elements traditionally associated with nonprofits. The concept emerged out of a movement to bring greater social accountability to corporations, allowing their leadership to place "doing good" on an equal footing with "doing well." In a traditional for-profit organization, any decisions on the part of a company's board and management that would run contrary to the profit-making imperative, no matter how noble the aim, will be considered an abrogation of the duty to act in the owners'/stockholders' best interests. Thus, if the board of a thriving newspaper in a mid-size town were to turn down a purchase offer from an out-of-town corporation offering an above-market price, and shareholders wanted the sale to take place, board members would risk losing their positions and possibly even be subject to personal lawsuits for breach of their fiduciary duties. The fact that out-of-town ownership of a local newspaper might not be in the best interest of area residents would be beside the point. In contrast, the nonprofit form allows an organization to act in the best interest of its community. But nonprofit status has many limitations that most news organizations would wish to avoid, if at all possible.

Right now, most hybrids are still in their incubation period and have yet to prove themselves. Maryland has passed a law recognizing a new corporate entity called a "benefit corporation," a legal designation that allows corporations to pursue socially responsible purposes in addition to profits.¹⁹⁷ California is considering a similar bill that would create "flexible-purpose corporations," allowing businesses to codify their intent to pursue social or environmental good while also turning a profit.¹⁹⁸, according to the following three-"tranche" formula:

"Equity tranche: highest risk, lowest return. Unlike most for-profit structures in which the first tranche investors with the highest risk want the highest return, foundations through the use of the PRI structure, can take this tranche. Since a PRI [Program Related Investment from a Foundation] is in lieu of a grant, no matter how risky the PRI, the potential return and income is still better than that from a grant.

"Mezzanine tranche: Because the high-risk portion has been taken care of, the mezzanine investor will ask for a lower rate of return since the risk is much lower. Individuals, banks under CRA [Community Reinvestment Act], corporations with dual objectives of investment return and corporate image are the types of investors who could occupy this tranche.

“Senior tranche: Whether there is real estate, equipment or whatever involved, most L3C transactions will have some hard assets which have value if the transaction fails. This makes the senior tranche very stable and hence investors in this tranche will ask for a lower return because of the low risk and could more likely be long-term-income directed investors. Pension funds and other large institutional investors are very possibly in this tranche.”¹⁹⁹

In theory, the L3C is an ideal way to combine business and philanthropic goals in one business structure. In practice, however, federal and state regulators are so accustomed to the established, binary system of handling for-profits and nonprofits that they are likely to have trouble determining appropriate ways to scrutinize the new entities.²⁰⁰

To help lead the way in minimizing such uncertainty, in March 2010 the Council of Foundations issued a position paper supporting the L3C structure. The Council contends that new business entities like the L3C will help loosen up new sources of funding, because at present IRS guidance “is either nonexistent or lags behind the pace of innovation,” so that “definitely determining whether a project is charitable can be difficult.”²⁰¹ The American Bar Association Section of Taxation has also made an effort to promote the use of program related investments (PRIs) by foundations to assist struggling newspapers.²⁰² In addition, Robert Lang has drafted a Congressional bill, the Philanthropic Facilitation Act of 2010, to make it easier for foundations to make PRI investments in L3Cs.²⁰³