COMMUNICATION, SOCIETY AND POLITICS

Media, Markets, and Democracy

C. Edwin Baker

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Media, Markets, and Democracy

The mass media and free press should serve people both as consumers and as citizens. Critics claim that government interventions in media markets prevent audiences from getting the media products they want. Political theorists assert that a free press is essential for democracy. The critics' claim is incorrect and the theorists' assertion is inadequate as a policy or constitutional guide. Even if markets properly provide for people's desires or preferences for most products, Part I of this book shows that unique aspects of media products systematically cause markets to fail in respect to them. Part II shows that four prominent, but different, theories of democracy lead to different conceptions of good journalistic practice, good media policy, and proper constitutional principles. While implicitly favoring a theory of "complex democracy," Part II makes it clear that the choice among democratic theories is crucial for understanding what should be meant by a free press. Part III explores one currently controversial issue – international free trade in media products. Contrary to the American negotiating position relating to media products, both economic and democratic theory justify deviations from free trade.

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COMMUNICATION, SOCIETY AND POLITICS

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Politics and relations among individuals in societies across the world are being transformed by new technologies for targeting individuals and sophisticated methods for shaping personalized messages. The new technologies challenge boundaries of many kinds – between news, information, entertainment, and advertising; between media, with the arrival of the World Wide Web; and even between nations. *Communication, Society and Politics* probes the political and social impacts of these new communication systems in national, comparative, and global perspective.

Media, Markets, and Democracy

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For all journalists and all activists and all scholars
who work to make the mass media
better serve democracy

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Preface

Conservatives in the United States often disagree over media policy. The conflict reflects a frequently observed division between a cultural, traditionalist conservatism and a pro-property, free-market libertarian strain. Many in the first group see the mass media as a leading force in the moral decay of American society. Bad taste is rampant. Portrayals of sex and violence are seen as possibly the two most ubiquitous features of the mass media. One conservative refrain, going back long before Vice-President Spiro Agnew characterized media executives as "pointy-headed liberals" and journalists as "nattering nabobs of negativism," sees the national media as deeply elitist and unjustifiably liberal.

From this traditionalist conservative perspective, the media needs reform. Somehow society – consumers or corporate executives or government – needs to restrict bad content. Of course, the word "censorship" is hardly popular, but at least such content should not receive government support – think of Senator Jesse Helms leading the charge to withdraw support from the National Endowment for the Arts for its support of vulgar performance art and from museums that exhibit obscene or sacrilegious art or the desire to gut the "liberal" Public Broadcasting Corporation. Moreover, objectionable content should be labeled. Even better, it should be removed, at least from all spaces easily accessible to children, a strategy that has received hesitant support from the Supreme Court, although the Court still maintains the principle that any such effort is unconstitutional if it operates to "reduce the adult population to reading [or hearing or seeing] only what is fit for children," and the Court has resisted mandated cleanups of the Internet.[1] Maybe objectionable content should be subject to additional limits and maybe liability should be imposed for any harms caused.

Others on the right reject paternalism. Freedom is the key. Government should keep its hands off. Democracy and liberty both entail a free press. This pro-market, pro-property strand of conservatism arguably is central to the regime of deregulation that (with various, usually pro-industry, exceptions) has swept telecommunications and broadcasting both in the United States and globally during the past quarter century.

The left is equally conflicted – as well as in its usual state of disarray. Media are mostly owned by capitalists and the left instinctively *knows* that this creates a problem. Many on the left think it obvious that this ownership combined with other problems with markets makes a major contribution to why their message does not play more effectively in the public sphere. Moreover, unlike the libertarian right, the left is not in general burdened by any belief that freedom means uncritical support for private property and free markets. Thus, given their normative commitments and their empirical observations, many on the left conclude that intervention is needed. Nevertheless, in the media context, unlike other realms of social life – such as welfare, health care, labor policy, race policy, or the environment – the interventionist left is relatively unclear about what type of intervention is needed. This programmatic failure has a variety of causes. One problem is that many on the left have neither, for whatever reason, thought carefully enough about the nature of the problem with existing media nor related a program of reform to any carefully formulated normative ideals, such as an affirmative theory of democracy.

The interventionist left's lack of program may also reflect, in part, the influence of the other branch of the left. This other branch includes those who, in the media realm, are most offended by (and most fearful of) the censorious inclinations of cultural conservatives. These freedom-loving leftists, while unhappy with capital's ownership of the media and, in most arenas of social life, favorable toward egalitarian governmental interventions, are very hesitant to approve governmental interventions in this area. These leftists know that a free press and free speech must be part of their liberatory program – as Brandeis once put it, as both an end and a means.[2] They know that historically these freedoms have been crucial for the left in its struggle for equality and human dignity.[3] Inevitably, interventions will be censorious, controlled by those in power merely to maintain their cultural, economic, or political hegemony, or they will be ineffectual for whatever legitimate goals exist.

Although most readers will soon find it easy to see my political bias, there is something to be said for the viewpoints of each of the four groups. Both the cultural conservative and the interventionist leftist are right to see the media often doing harm or performing inadequately. Importantly, however, there is often room for disagreement about which media content is harm-causing, and certainly the reform programs of these two groups often differ. Likewise, the libertarian conservative and the freedom-loving leftist are right to want to protect press freedom. Here, however, a point of the interventionist leftist is well taken. Not only government but also capital can threaten press freedom. Or, more precisely, the market will not only fail to cure many inadequacies of the media but can also function in ways that reduce freedom. But this is getting way ahead of the story.

I do not directly enter into the debate between these four groups, although the extent of wisdom in each position should become clearer as the discussion proceeds. For me, and I expect for many readers, paternalism (sometimes) seems fine for children but very questionable for adults. Moreover, democracy is a basic norm that merits respect, and a *free press*, whatever that means, is surely a key element of democracy. The question of this book is, for one who accepts those premises, what does lack of paternalism and a commitment to democracy mean for media policy. Would a rejection of paternalism require the government to keep its hands off the media? Does a commitment to democracy require the same?

Part I of this book answers no to the first question, but in doing so it requires a close look at the economics of the media. Part II answers no to the second question, but the answer depends on the conception of democracy that a person accepts. If, however, I am right that both answers are no, what type of interventions are appropriate? Both Parts I and II offer some suggestions based on the economic and democratic theories described. Finally, Part III illustrates these themes by applying the earlier analyses to one issue, policies concerning international free trade in media products. I conclude with a claim about digital technologies and the Internet – that however much they transform the world, the issues and analyses of this book remain crucial for thinking about media policy.

This book is a revised, edited, and updated version of three articles published between 1997 and 2000: "Giving the Audience What It Wants," *Ohio State Law Journal* 58 (1997): 311; "The Media That Citizens Need,"

University of Pennsylvania Law Review 147 (1998): 317; and "An Economic Critique of Free Trade in Media Products," *North Carolina Law Review* 78 (2000): 1358. I received help and inspiration from a host of people, only some of whom I am now able to list, while writing the articles and then transforming them into this book. I especially want to thank Yochai Benkler, Jamie Boyle, Mike Fitts, Oscar Gandy, Lani Guinier, Fritz Kubler, Jason Johnston, Carlin Meyer, Gerry Neuman, Jim Pope, Margaret Jane Radin, and Carol Sanger. In addition, Michael Madow has been invaluable as a sounding board and reader of drafts, saving me from many factual and conceptual errors and trying to save me from others. Patisserie Claude and Les Deux Gamins have provided coffee and a welcome place in which much of this has been written. I have gained from the opportunity to present portions of the book in various venues, including workshops at either the law school or communications department of University of Chicago (2000), New York University (2000), Yale University (1999), Stanford University (1997), University of Pennsylvania (1995), and University of Oregon (1995). I have also benefited from being permitted to present portions of the argument at the Mass Communications Section of the Association of American Law Schools Annual Convention (1999, 2000); Conference: Prospects for Culture in a World of Trade (Canadian Consulate & NYU, 2000); Convention of the Union for Democratic Communications (1999); Commodification of Information Conference (Haifa, Israel, 1999); Cultural Environment Movement National Convention (Athens, Ohio, 1999); Symposium on American Values, Angelo State University (1998); Law and Society Annual Conference (Glasgow, 1996); luncheon seminar at the office of FCC Chairman Reed Hunt (1996); and Critical Legal Studies Conference (Washington, D.C., 1995).

PART I

Serving Audiences

Economics-minded critics of government intervention in the media realm raise a constant refrain: interventions are paternalistic and treat viewers as "helpless or obstinate."[1] Interventions assume that viewers are "incapable of wise choice."[2] A free society must treat audiences as perfectly able to know and choose what they want to read, watch, and listen to. Market incentives lead media producers to provide audiences with what they want.

In his classic article arguing for deregulation of broadcasting, former FCC chairman Mark Fowler explained that the government "should rely on the broadcasters' ability to determine the wants of their audiences through the normal mechanisms of the marketplace."[3] As with any other product, "[i]n the fully deregulated marketplace, the highest bidder would make the best and highest use of the resource."[4] Fowler summed up this view of the media with his famous remark that "television is just another appliance . . . a toaster withpictures."[5] Fowler's deregulatory perspective swept through policy-making circles in the United States. It became received wisdom in executive, legislative, and judicial branch thinking about media policy.[6] In the last decades of the twentieth century, deregulation of the media (and much else) became a global phenomenon. I argue here that this approach is fundamentally wrong.

My primary concern is with the creation and provision of media content. The pervasive antiregulatory refrain, however, has recently been equally loud in the related context of the infrastructure for delivering communication content.[7] It was overwhelmingly evident in the passage of the Telecommunications Act of 1996, adopted as an act "to promote competition and reduce regulation."[8] A virtually unquestioned market orientation was conspicuous. For example, the initial Senate

report described the bill's purpose as "to provide a pro-competitive, deregulatory national policy framework."[9] Senator Hollings' additional views emphasized that "competition is the best regulator of the marketplace." The only two dissenting senators did not disagree on this point. They observed that "[d]eregulation has a clear and consistent track record" but complained that, as reported out of committee, the deregulatory bill did "not go far enough" and did "not guarantee free and open markets."[10]

The chorus favoring deregulation within the media realm often repeats standard conservative defenses of free markets. Yet, in the context of the media, this view has added rhetorical appeal. First Amendment values lead even some interventionist liberals to reject government paternalism in respect to speech. Nevertheless, despite the lure of equating freedom of the press with free markets, constitutional law does not mandate such an equation.[11] Although the First Amendment ought to restrict purposeful suppression of speech, it should not and has not restricted structural interventions designed to improve the quality of the press.

Still, maybe critics of intervention are right to emphasize the strong antipaternalism aspect of the First Amendment. If interventions are paternalistic, if they attempt to displace readers', listeners', and viewers' own choices, then maybe interventions are contrary to basic First Amendment values. The critics argue that, in respect to media content, surely the government ought to let the public get what it wants – and this, the critics assert, means leaving the issue to the market.[12] An advocate of intervention might plausibly argue that people often do not know what they want or that they should receive what (someone else thinks) they need – government does this for children in the schools. Both positions have nuanced versions, but I put this debate aside. Rather, in Part I of this book I assume that people's choices ought to prevail but argue that this will not occur in an unregulated market. Thus, Part I critiques the underlying assumption of the market advocates' argument, namely, their claim that the market gives people the media they want.

Before beginning, however, I must make a confession. The first three chapters apply the most conventional of economic analyses. This is problematic on a number of grounds. For example, the key concept of the conventional analysis, "efficiency," is *inherently* indeterminate in the policy context of choosing legal rules.[13] In a conventional analysis, determining the efficient rule or policy depends on assuming some

distribution of wealth and some set of preferences. The economist's normal approach of assuming the existing distribution of wealth is conceptually unavailable when the content of the existing distribution is precisely what the choice of a legal rule or policy places at issue. The choice of a rule (or a disposition of a legal dispute) affects the parties' wealth and, often, influences people's preferences toward favored or approved options. Thus, as a positivist analysis, typical versions of law and economic methodologies are systematically incomplete; the efficiency criterion is often indeterminate. In contrast to the overt inadequacy of this law and economics analysis as positivist theory, a positivist class-based theoretical addition makes for potential descriptive completeness. When alternative results would both be "efficient," the class-based theory could predict that the law will choose the solution that adds to the ruling economic class's wealth or power. Likewise, a normative egalitarian theory would also be determinant, but would recommend the opposite. Analytically, however, law and economic analysts effectively adopt the ruling-class orientation when they assume, as a starting point of analysis, that value is determined by a person's "willingness to pay" with the wealth she has available absent the contested rule. In contrast, the poor would be comparatively favored if the analysis adopted as its criterion of value the amount a person would require before selling a benefit if it were supposed that she initially held it. This second starting point would proportionately increase the wealth of the poor more than the rich, making it possible for her to value the item more. For example, a poor person might be able to pay only $500 for a potentially life-saving operation for which a rich person would, if necessary, pay a million dollars. If, however, both had an initial right to these medical services, the amount they would require before giving up the right might be virtually the same. That is, given an efficiency goal of trying to locate a right or benefit in the hands of the person who values it the most, the first criterion favors the rich by making it seem that she values the matter at issue the most while the second comparatively favors the poor (but not as much as would an egalitarian standard).

None of the foregoing denies, and this book implicitly assumes, that welfare economics can be extraordinarily useful in examining relevant aspects of the legal order. On the other hand, this economic analysis can be equally dangerous to the extent it dominates consideration of legal issues. The analysis's linguistic commodification of all valued elements of human existence may contribute to making such commodification

intellectually and socially acceptable. As Chapter 4 observes, human flourishing requires many elements of life to remain uncommodified.[14] The analysis's reductionist orientation regularly treats as assumptions particular answers to precisely the issues most in dispute.

Different methodologies are essentially different languages. Although the same question can be approached and the same "best" answer can often be reached using different languages, the different languages vary in their ability to shed light. No single language can do all that others do even if a given insight is seldom (if ever) available in only one language. A particular language may be out of place in a particular context. Each is a tool and should be used to the extent it is useful; while it makes some things clearer, it is likely to obscure other important matters. The danger of hegemony arises when a particular language either implicitly or explicitly claims to be the only way to reach insight.

Probably the most important issues the legal order faces today are normative; they relate to proper distributions of wealth and power and to what preferences or values should prevail in various contexts. These issues are inevitably seriously contested and the perspectives that different groups bring to bear on them differ, often profoundly. The methodologies that are often most important for responding to these contested issues – and hence methodologies that should be at the core of any policy-oriented education – are ones that aid in seeing different perspectives and that aid in the self-reflective development of these perspectives. If the reductive allure of economic problem solving causes neglect of these more difficult methodologies, we are all losers.

Despite these reservations, Part I is relentlessly economic in analyzing the capacity of markets to give people the media they want. In part, this emphasis is valuable because of the clarity it casts on numerous important issues of media policy. Because my conclusions diverge from those that many free-market advocates believe economics recommends, I hope this approach is also useful in speaking directly to defenders of the market on their own turf.

CHAPTER 1

Not Toasters: The Special Nature of Media Products

Economics-oriented critics of government intervention in the media realm typically rely on oversimplified economics. Under certain purportedly normal circumstances, the market provides firms with an incentive to produce and sell the product as long as the product's cost (e.g., its cost of production and distribution) is less than the purchaser will pay, that is, as long as marginal costs are less than marginal price. The market thereby leads to a preference-maximizing production and distribution. This I call the "standard model."

The standard model is subject to a host of general critiques mostly related to why the market will fail or will be dysfunctional.[1] As one example of the latter, note that market competition creates an incentive for a market enterprise (e.g., capital holders) *to gain power* in relation to other resource owners (e.g., labor or other competitors) as much as it creates an incentive *to produce goods efficiently*. The power struggles between stakeholders, however, are primarily over distribution and do not produce any goods. As such, they waste resources as well as often generating unjust distributions.[2]

Of course, no one ever claims that the market works perfectly. Still, despite its problems, many find the standard model relatively adequate, at least enough so that it provides a presumptive reason to rely on "free" markets. For present purposes, I assume that the market *generally* works relatively well – for example, it effectively and efficiently leads to roughly the right production and distribution of cars or can openers. My claim is that, whatever the validity of general critiques of the market, the standard model applies especially badly to media products.

The standard model's persuasiveness depends on the following assumptions. (1) Products are sold in competitive markets and are sold

at their marginal cost. (This will mean that their market price will equal their marginal cost, which will equal their average cost, which implicitly requires that at this point their marginal cost is rising.) (2) Product's production and normal use create relatively few serious externalities (i.e., relatively few major benefits not captured by or costs not imposed on the seller-producer). (3) The most significant policy concern is satisfying market-expressed preferences.

Even if these assumptions are true enough in general, my claim is that they do not apply so well to certain categories of products of which the media are an example. Media products are unlike the hypothesized "typical" product, such as a car or can opener, in four ways that are relevant here. Each difference complicates any economic claim concerning the wisdom of reliance on markets.

FOUR FEATURES OF COMMUNICATION PRODUCTS

First, media products have significant "public good" aspects. A public good is an item for which one person's use of or benefit from the product does not affect its use by or benefit to another person. National defense or public parks are goods that, once provided, many can use without interfering with others' use.[3] Similarly, many can watch the same broadcast or read the same poem once it is created. Economic definitions of "public good" usually emphasize two aspects: "nonrivalrous use," which is the aspect that I am primarily concerned with here, and "nonexcludability."[4] Typically, utilities or other "natural" monopolies exhibit this "nonrivalrous use" public-good quality in their infrastructure, for example, in the gas lines, water mains, or telephone lines (other than the final connection to the house). Multiple consumers can use this infrastructure with no or very modest extra expense. To the extent that adding an additional customer does not increase the cost of this infrastructure, which is usually true until crowding requires larger lines or mains, the infrastructure exists as a public good. If this infrastructure is a major part of the delivered product's cost, the marginal cost of serving that additional consumer will predictably be substantially less than the average cost. That is, the marginal cost of supplying the new user could approach zero while the average cost of the infrastructure to each user, that is, its total cost divided by the number of users, stays much higher.

This situation creates a problem. If the product is priced at its average cost (or priced higher if a seller exercises monopoly power), some con-

sumers will be unwilling (or unable) to pay that price, even though they want the products and would be willing to pay the added cost created by their usage. Charging the average cost results in underproduction. On the other hand, charging the marginal cost, as efficiency considerations normally recommend, fails to produce enough revenue (selling price times the number of purchasers) to cover the product's cost. The market will not support production if the seller must provide the product or service to all customers at the marginal cost of supplying the last customer. At that price, the seller would not recover the cost of the required infrastructure.

To gather, write, and edit news or to create and produce video entertainment, the media incur huge "first-copy costs." This economically significant element of media products' cost is like the utility's infrastructure or, better, is like national defense. There is no limit to how many can benefit from the producer's expenditure on first-copy costs or analogous costs, such as the expense of broadcasting.* Writing the story or sending out the broadcast signal costs the same no matter how many people "tune in." Adding a marginal consumer does not affect these costs. As long as these public-good costs are a large enough part of the media's total cost,[5] charging potential audience members the average cost leads to inefficient exclusions. Charging the average cost excludes people who would pay more for the story or broadcast than it actually costs to include them among the recipients. Alternatively, setting the price at the marginal cost, that is, the cost of supplying it to

* Economists often identify this factor as the cause of the current dominance of one-newspaper towns. A monopoly newspaper pays only one set of first-copy costs (and requires a single infrastructure) in serving the whole city. By adding customers, it constantly reduces its average cost. See James N. Rosse & James N. Dertouzos, *Economic Issues in Mass Communication Industries* (Stanford: Department of Economics, Stanford U., 1978), 55–78. Any competitive equilibrium would be unstable, usually requiring two papers roughly equal in circulation. See Randolph E. Bucklin et al., "Games of Survival in the US Newspaper Industry," *Applied Economics* 21 (1989): 631, 636. Despite this theoretical account, until a long-term decline began just before the end of the nineteenth century, competition generally prevailed among local daily newspapers. Thus, Rosse more precisely suggests that the "fundamental long-run cause of newspaper failure is loss of effective market segmentation." James E. Rosse, "The Decline of Direct Newspaper Competition," *Journal of Communications* 30 (1980): 65, 67. Although Rosse does not explain this loss, the decline in effective segmentation could result from the changed incentives that occur when advertisers become the primary purchaser of newspapers' efforts – that is, as they become the paper's primary source of revenue and profit. To the extent that daily newspapers' primary product becomes readers sold to advertisers rather than product sold to readers, the main product differentiation for daily newspapers selling to mostly local advertisers will be geographically rather than content based. See C. Edwin Baker, *Advertising and a Democratic Press* (Princeton: Princeton U. Press, 1994), ch. 1.

the last purchaser, creates insufficient incentives to produce the media product.

Firms sometimes avoid these consequences by engaging in "price discrimination" – charging different purchasers different prices and thereby tapping the "consumer surplus" that some consumers would receive if they were charged only the marginal costs. Whether there are sufficient opportunities for price discrimination to lead to a value-maximizing level of production (hopefully without producing monopoly profits) is an empirical matter that will vary with the product and market in question. I assume in much of the discussion that follows that providers of media products cannot uniformly engage in sufficient price discrimination to eliminate this problem. Moreover, even when reasonably adequate levels of production could be achieved because of the availability of relatively costless price discrimination, price discrimination introduces an additional policy-based fairness issue. When and why should some consumers have to pay more than others for the same good, thereby reducing or eliminating their potential "consumer surplus," in order to achieve distribution to others who willingly pay the marginal cost but would not pay the higher price necessary to cover infrastructure or first-copy costs? This is a central issue in many rate-setting disputes. It can obviously also raise controversial issues in the media context – for example, was it fair for an early Congress to charge some mail users a price higher than the cost of serving them in order to subsidize the cost of communication for other users, namely newspapers?

Second, media products often produce extraordinarily significant positive and negative externalities. Externalities typically refer to the value some item has to someone who does not participate in the transaction. If one or more persons, often numerous unorganized people, would potentially pay to have the transaction occur, then the externality is positive; it is negative if they would potentially pay to have it not occur. For example, people care whether their reputation is ruined or advanced, whether people they meet are boring or cultured, and whether they are murdered or aided by the person they pass on the street – and these are among the phenomena whose occurrence can be significantly influenced by *other people's* media consumption. Likewise, many people value a well-functioning democracy. They are affected by whether the country goes to war, establishes parks, or provides for retirement and medical care – and hence can be greatly benefited by other people's con-

sumption of quality media or harmed by others' ignorance or apathy produced by inadequate consumption or consumption of misleading, distortive, and demobilizing media. Furthermore, the political or corporate corruption that the threat of media exposure deters is a benefit that the press cannot effectively capture – there is no story – to sell to consumers. In each case, people other than the direct media consumers would pay if necessary to have the beneficial effect occur or to avoid the harmful effects. Later I suggest that many media policies, ranging from libel laws to reporters' privileges or postal subsidies given to newspapers or direct grants for public broadcasting – and much, much more – can be understood as in part designed to increase positive or to reduce negative externalities.

Third, media products are unusual in that often two very different purchasers pay for the transfer of media content to its audience. The media enterprise commonly sells media products to audiences and sells audiences to advertisers. Of course, multiple parties being "affected" by a transaction, each thus being a potential but often not an actual payee or purchaser, is not an unusual phenomenon – that basically defines an "externality." However, in the media context this multiple set of purchasers represents not merely potential purchasers; and the payment from advertisers in return for what is sold or delivered to audiences plays an unusually large and relatively routinized role. Selling to both audiences and advertisers has especially significant consequences and adds special complexities. For example, what is the right level of production of television programming? The "value" of a television broadcast is its combined value for the audience and the advertiser – in economic terms, the amount they would be willing to pay. To the extent that the broadcaster only collects from the advertiser, the broadcaster apparently receives an inadequate incentive to spend money on programming. From this observation, some economists conclude that our society drastically underinvests in television broadcasting.[6]

Having multiple purchasers creates other issues. For example, advertisers in effect pay the media firm to gain an audience by providing the audience with something the audience wants, although not necessarily what the audience most wants. A portion of the advertisers' payment often goes to having the editorial content better reflect the advertisers' interests. There is a potential conflict between advertisers' and audiences' interests in the media content.[7] A century ago many papers routinely accepted "reading matter," material prepared by advertisers that

promoted their products (or sometimes their political goals) but that was not identified as advertising. Advertisers wanted this material presented as if it were editorial content, not advertising, while (presumably) the public would have preferred identification of the source. Typically the public wants and expects the news and editorial content in the news media to embody the journalists' and editors' independent professional judgment. The market brings this audience interest to bear on the journalistic enterprise to the extent that the enterprise can better sell its publication if it gains a reputation for independence. However, in the case of "reading matter," the market did not suffice to induce source identification or to create journalistic independence. In 1912 Congress responded by prohibiting the practice for any paper receiving second-class mail privileges.[8]

A fourth aspect of the media relevant to media economics involves why or how audiences value media products. In the standard economic model just presented, people seek products that satisfy various existing preferences. When people purchase media products – as when they seek education or advice from psychological, legal, or spiritual advisors – they are often seeking information or guidance for the very purpose of forming preferences. People often want a media product for what I call "edification," which includes education, exposure to wisely selected information, or wise opinion and good argument. This feature of media is difficult to embody fully within the terms of standard economic analysis. Even if a market can properly allocate resources to fulfill preferences for preference formation activities, a market for this type of product will have unusual features. When a person wants to develop "better" preferences, values, or outlooks, she puts her present outlook or preferences into question without a clearly formulated alternative to put in their place. Thus, her own preferences do not give her a complete standard by which to measure whether her purchases provide the right thing. Her preference might well be to choose a context in which she expects to get the best guidance – a context that may or may not be consistent with market purchases.

This dilemma is not entirely resolvable. How does a person know whether the person she became after seeing the psychologist is who she wants to be or whether her changes would have been better with a different psychologist? Furthermore, from what perspective does she evaluate – from the views she now has, those she had earlier when she

chose the psychologist, or the views she would have had if she had chosen a different psychologist? The answers may very well not be the same, so which perspective should she privilege? Of course, even when people do not know precisely what they want, they can still have rules of thumb for guessing whether they are likely to get it. They may know the seller's or producer's general reputation for expertise. In addition, they may have reasons to presume the seller or producer exercises independent judgment and to believe that this supplier uses this independence to try to serve the purchaser's interests – reasons purportedly underwritten by professionalism in education, law, psychology, or the priesthood. These concerns provide a catalyst for the press to portray itself as independent and an explanation for most people's outrage at any evidence that advertisers influence media's editorial content. In addition, some people may also use as a rule of thumb indications that the seller shares or, at least, has familiarity with and responsiveness to the purchaser's basic values or perspectives. This sharing supports the hope that she will receive desirable guidance in formulating new preferences and values. In the media context, this might lead to preference for media with a particular partisanship. Moreover, one response that a person could rationally choose is to have society (government) create nonmarket methods of providing these edifying products.

Finally, people value media products for various reasons. Audiences want media products (sometimes the same media product) for entertainment or for specific information, as well as for "edification." Attributes that make a media product good for one purpose may not be those that make it good for another. This diversity in functions introduces complications for the notion of the audience getting what it wants, complications that are often exacerbated due to the multiple purchasers – audiences and advertisers. Audience members' knowledge about how well a media product serves differing purposes often varies. Advertisers, on the other hand, may wish to control – or have a veto over – particular attributes. For example, an advertiser may be interested in a movie's or story's transformative and informative roles, especially the product's slant and its capacity to persuade on issues related to the advertiser's corporate interests. In contrast, the audience may evaluate the media content mostly in terms of its potential to entertain. This focus might make some sense if the audience is best situated to evaluate this characteristic. In consequence, the advertiser may pay for, say, a pro-Pepsi informational slant, about which the audience is unaware

or unconcerned as long as the slant does not affect the movie's entertainment value. Thus, predictably, advertisers pay for "product placements" where their products are presented within the apparently nonadvertising content.

More generally, when content serves multiple functions to different degrees but where the audience members' ability to assess its contribution varies from one function to another, a person is likely to choose on the basis of functions about which her ability to assess its contribution is better. In this circumstance, the market creates increased opportunities for manipulative or ideologically distorted content. If the audience values both the media's entertainment and edification roles strongly, but if information in respect to a program's contribution to edification is harder to obtain or evaluate, the audience may choose a media product on the basis of its entertainment value in the hope that the different dimensions correlate. This audience strategy reduces the cost to the advertiser in having its editorial choices prevail. For example, tobacco companies might "pay" (i.e., threaten to withdraw advertising) for the editorial slant they wanted in popular women's magazines – no negative stories about smoking. Their capacity to pursue this strategy increases if the slant did not overly influence the magazine's fulfilling the role most easily and actively evaluated by the audience. However, such payment is, in effect, censorship.

The point is merely that the combination of multiple purchasers (audience plus advertiser) creates multiple allegiances. Influence tends to flow in particular directions – toward the larger purchaser, the purchaser with greater knowledge of how well the media are serving its interests, and the purchaser whose purchase is most sensitive to how well the media serve its interest in relation to the specific issue in question. Having an audience that values the product in multiple ways but with different degrees of knowledge about how well it performs each is a context that enhances the opportunity for the other purchaser, the advertiser, to influence content away from what the audience wants in the dimensions about which the audience finds knowledge most difficult to obtain.

In sum, each of these four special features of media products can lead to results contrary to what the audience wants – what it would pay for. The next three chapters more carefully examine these features in terms of how they often lead the market to deny the audience what it wants or, in economic terms, lead to inefficient use of resources.

COPYRIGHT: AN ILLUSTRATION

Drawing out policy implications of these four attributes of communicative products could explain much of copyright law. I do not attempt that here, but some examination of how copyright responds to these attributes is useful later on and serves as an illustration of some of their implication.

Once produced, media content is a public good. No one's consumption (e.g., reading, viewing, discussing) prevents anyone else from consuming the same content. Maximum value results from allowing consumption without charge for the content, although a consumer should pay for any marginal cost involved in access. The problem is that if content were *freely* appropriatable by any consumer, although this pricing (i.e., a zero price) would not exclude any audience members who value the content, this regime would provide no economic incentive for creation and would fail to encourage production.

Enter the regime of intellectual property, probably the most overt legal response to the public-good aspect of media content. Copyright law creates private property rights in content so that authors and creators will receive a reward adequate to induce production. Complexities of copyright law are (or, at least, are supposed to be) a response to its utilitarian aim of influencing both production and distribution in a manner that maximizes the availability and valued use of intellectual content. The Constitution gives Congress the power to grant rights in intellectual creations not in order to recognize some asserted natural right of authorship but in order "to promote the Progress of Science and useful Arts."[9] Copyright properly aims to recognize private property rights only to the extent that they "contribute" more to production of valuable content than they "cost" in terms of restricting access to and use of that content. This goal explains, at least in part, copyright doctrines such as "fair use." Ideally, fair use benefits audiences by allowing free use whenever free use adds more value than it "costs" in terms of reduced incentives to create and distribute. Similar economic balancing of gains and losses due to propertizing intellectual content can explain why copyright only attempts to protect the "unique expression" of the idea and not the idea (or fact) itself.

Thus, arguably, copyright's maximizing policy is relatively nonideological in merely aiming to efficiently promote "science and the useful arts," that is, to make more content more widely available. On closer examination, however, it turns out to be significantly more complicated.

Specifics of copyright law favor the production of some types and some ways of producing content over others and affect who has access to it. Whether copyright favors creating and distributing the content that society most values – whether it maximizes value – is often unclear. The question involves all the problems discussed in this and the next two chapters. Despite the standard economic argument for intellectual property rights, economic arguments opposed to all restrictive rights and in favor of zero pricing are imaginable and, depending on circumstantially variable empirical factors and people's values, could be persuasive. Much commercial production of content would continue without legal protection of intellectual property rights. Moreover, the commercial production for which copyright provides an incentive, that is, production for profit, competes to a degree with noncommercially produced content (e.g., ideological speech that people spread for political reasons or amateur productions where the joy or pride of expression provides a primary motive for production). Possibly, the absence of copyright, by dispensing with the advantage it gives commercial production, would encourage a culture in which noncommercial communications were more dominant. The policy issue is whether this culture would by any relevant measures be richer than the existing commercial culture created by the mass media. The problem is how to compare and evaluate the worlds that would be produced by the alternative legal regimes.[10] That problem, in fact, is the general issue of the next three chapters.

Different content creators line up on both sides of a debate about extending or limiting copyright protection. All creative works borrow from potentially copyrighted past creations. Often noncommercial creative "borrowers" favor less restrictions on their partial appropriations, whereas most commercial producers favor greater protection in order to maximize their return on content they own.[11] Still, because a prime role of copyright is to create effective distribution channels, sometimes even audience-oriented, non-profit-seeking creators have an interest in a commercially effective copyright. A writer or advocate may be personally unconcerned with economic rewards, wanting to make her creation maximally available out of a desire for influence or fame, but still want an effective copyright in order to induce a publisher or distributor to make her work available.

Copyright not only favors commercialization but also tilts production toward particular types of content. First Amendment lawyers will recognize this as troublesome. Copyright is a speech-related law that

involves content discrimination.[†] Here, however, I want to examine the bias in terms of the policy issues that copyright's lack of neutrality raises. Existing copyright law allows privatization of only some aspects of content. It covers, for example, only the "unique expression," not facts or ideas. If privatization serves its intended purpose of creating production incentives, this coverage means that copyright directly encourages investment in creating and distributing "unique expressions" while only incidentally and presumably less effectively encouraging investment in uncovering, developing, or communicating "facts or ideas" (although, admittedly, patent and trade-secret law encourage investment in developing some commercially relevant categories of new information). This bias is potentially dramatic. For example, the distinction could encourage greater investment in unique entertainment content (expression) and less investment in news content (facts). Of course, other factors may be more central, but this bias is illustrated by media expenditures. In 1995, the annual newsroom budget of the *Washington Post*, the paper that brought us Watergate, was reportedly about $70 million, while the quite forgettable 1995 movie, *Waterworld*, reportedly cost about $175 million, although this figure includes more than just content creation (e.g., an approximately $30 million marketing budget).[12]

Even within news production, copyright rules influence expenditures. They favor unique or flashy presentation as opposed to expenditures on gathering hard news, especially news that is expensive to obtain. It should not be surprising that market competition leads television stations to advertise the images of, and pay high salaries to, appealing "anchorpersons." These personalities, like the copyrightable words, are a "unique" element that an owner can exploit commercially.

[†] The Supreme Court claims to invalidate most content discriminations involving protected speech content. But see C. Edwin Baker, "Turner Broadcasting: Content Regulation of Persons and Presses," *Supreme Court Review* (1994): 54. Whether copyright is a content-based regulation is an issue that has troubled some commentators. The best formulation is Brennan's. He claims that the traditional approach is: "any restriction on speech, the application of which turns on the content of the speech, is a content-based restriction." *Boos v. Barry*, 485 U.S. 312, 335–36 (Brennan and Marshall, concurring in part and concurring in the judgment). Obviously, one cannot know whether a writing violates another's copyright without looking at its content. Thus, copyright rules are content-discriminatory on their face. Even if that were not recognized, clearly copyright's purpose is to protect the copyrighted content and thereby to favor creation of such content over any content whose value copyright does not protect (or content whose creation copyright prohibits absent permission by some copyright holder). And the Supreme Court treats facially content-neutral laws as content-based if the law has any purpose to affect content. See *Turner Broadcasting System v. FCC*, 512 U.S. 622, 642–43 (1994).

Then, as newscasters' salaries increase, the networks fire senior professionals and generally engage in cutting the costs of news production.[13] And this bias favoring anchor personalities has additional consequences. James Fallows has forcefully attacked the deleterious effect on democracy of the media's constant cynical emphasis on the competitive, horse-race aspects of politics rather than on its substantive aspects. He concludes that having a star personality "report" on the top current story twists the content of news in a way that contributes to this misdirected media focus because, usually, this star figure does not have expertise or reportorial knowledge of the specific issue but has general expertise on issues such as how the issue will play politically.[14]

Although 40 percent of viewers report that the anchorperson is their reason for viewing a particular network news program,[15] that does not necessarily mean that the bias toward expenditures on anchorpersons rather than news represents audience preferences, much less that a democratic society would self-consciously choose to promote this tilt. Rather their report may result from competitive factors created by the existing legal and market structure. First, the anchorperson may be their reason for choosing among programs, not their reason for watching the news. As for it being a determinative factor in that choice, this may reflect the extent of broadcaster expenditures both on making this element appealing and on advertising to promote viewer interest in this element. These broadcaster efforts may, in turn, make "economic" sense. Anchorperson personalities and their expressive delivery, not facts and ideas that other stations can freely appropriate, are the station's unique goods. The station or network's exclusive position in respect to a given anchorperson gives it a reason to promote the merits or appeal of its anchor as a reason to "tune in." This incentive replicates the peculiarities of the legal order's privatization rules. Unsurprisingly, systems operating under different copyright rules, as well as systems where broadcasters are less driven by market pursuit of profit, are likely to make very different choices of what type of content – anchor personality or informative factual material – to emphasize and to spend money on creating.

Privatizing facts or ideas in order to encourage their discovery or development is hardly an appropriate corrective. Although in special circumstances this is arguably acceptable (e.g., with patents, although here only certain commercial uses are privatized), generally most people rightly see ownership of ideas and facts as offensive. Because a person comes up with an idea or uncovers facts hardly suggests that she should

be able to stop another from independently doing the same and then telling others about it. Even when the second person learns something from the originator, the notion that she cannot then repeat it, or reformulate it and then include it in her own messages, is contrary to how thinking and discussion occur and contrary to how cultures develop. Granting the originator control over "copying" and repetition gives her a virtual property right in the recipient's mind and speech. Of course, a person may agree or contract to keep a confidence. The default rule, however, is and should be that repetition is limited only by discretion, not by law.[16] Economic arguments, ranging from avoiding enforcement costs to reducing transaction costs in making efficient use of information, also argue against routine privatization of facts and ideas.

Various responses by media entities or government can reduce the negative consequences and underproduction related to lack of copyright protection for facts and ideas. The media may successfully nurture desires for speedy news and, more important, for reliable news. They may be able to teach audiences to correlate these attributes with news organizations that themselves engage in (some) investigations. This process of individualization of media entities would give these entities some incentive to spend money on finding facts and developing ideas. Or the government (and others) could heavily subsidize development of desired information and ideas, which then could be communicated by the media. Government-supported research universities, prestige-based reward systems within those universities, direct government sponsorship of research, and noncopyrightability of governmentally produced intellectual works serve as examples. Public officials' news conferences and press releases, and similar techniques used by various private sources, create and make available considerable information without concern for the lack of copyright protection – although with obvious, questionable content tilts.[17]

Still, the basic points remain. Communications can often be cheaply provided for everyone after being originally produced, but this provides insufficient incentives for production. The intellectual property regime responds to this problem but inefficiently restricts access. It also encourages production of some content more than other. Responses to differential underproduction provide only partial cures, and the cures contain their own tilts. Inevitably, the audience gets what the law encourages, not some "uncontaminated" version of what it wants. No "free market" could provide otherwise.

CHAPTER 2

Public Goods and Monopolistic Competition

PRODUCTION OF A PUBLIC GOOD

As discussed in Chapter 1, copyright is a form of propertization in the economically peculiar realm of communications. Propertization of traditional commons, for example, where sheep or cattle grazed, supposedly solved problems of overuse leading to subsequent underproduction. Owners have an incentive to husband their property to create maximum value. Copyright, however, cannot be expected to be such a perfect solution precisely because of the public-goods aspect of media content. At least without adequate price discrimination, market-based firms predictably provide inadequate amounts of those goods whose use is nonrivalrous. Private firms will not provide some media content that an audience wants – content whose value as measured by willingness to pay is greater than its cost. In these cases, no price exists at which the media product can be profitably sold even though its value to potential consumers is greater than the cost of supplying them. Another routine feature of such goods is underproduction. In order to cover the cost of a media product, it must be sold at a price that prevents some people from purchasing, even though they would be willing to pay at least the marginal cost necessary to provide them with the media content.

A simple example based on three hypothetical media products in a two-person society, summarized in Table 2.1, can illustrate these problems. For each product, the cost of producing the first copy is assumed to be 10, while reproducing and distributing a copy to person B has a minimal cost, here assumed to be 1. Then I assume three different demand functions. With the first, the product could be produced and sold to each person for 6. Even here, if a third person was added who

Table 2.1

	Cost	Demand[a] Product 1	Product 2	Product 3
Copy 1/person A	10	9[b]	12[b]	9
Copy 2/person B	1	6[b]	5	5
Profitable selling price		$5\frac{1}{2}$ to 6	10 to 12	—
Surplus (value-cost)		15 – 11 = 4	12 – 10 = 2	—
Potential surplus		15 – 11 = 4	17 – 11 = 6	14 – 11 = 3

[a] Hypothetical product 1 shows a *successfully marketed* declining marginal cost product; 2 shows that markets may *underproduce or distribute* this type of product; and 3 shows that markets may *fail to produce* a valued product.
[b] Purchasers at the profit maximizing selling price; hypothetical assumes seller's inability (or inadequate ability) to price discriminate.

valued the good at 2, the producer seller could not afford to sell to each person for 2. That is, in a free market, the producer would not supply the third person even though she values the product at more than the cost of supplying her.

In the second hypothetical, the good could be sold to person A at a price between 10 and 12. Production at this level produces a societal gain, a surplus of 2, which, depending on the selling price, goes either to the seller or buyer or is divided between them. This surplus represents the amount that the good is valued by the buyer over the cost to the seller. However, the good cannot be sold to both persons at a price of 5 each because then the seller's total revenue, 10, does not cover the cost of two copies (10 + 1 = 11). Since the value, 5, of the good to the unserved person B is much greater than the cost of producing it for her, 1, the result is underproduction – a failure to distribute the product to this second person.

In the third hypothetical, the media product cannot be sold at all without a loss. Person A would only pay 9 for a good that cost 10. Selling to both parties at a price of 5 would generate revenue of 10, which would not cover the cost, 11, of supplying the two persons. However, production for and distribution to both persons could produce a social gain. It would produce what people want – a value of 14 at a cost of 11 – but the market is unable to arrive at this result. In the real world,

instances taking the form of each of the three hypotheticals can be expected to be common. Thus, both inefficient underproduction and inefficient nonproduction of media content are inevitable.

Nonproduction, underproduction, and inadequate distribution of media content might be avoided if owners could perfectly price discriminate. Price discrimination is where the seller sells to different purchasers at different prices reflecting the amount that the specific purchaser is willing to pay. For example, in the third hypothetical, if the seller could sell copy 1 to person 1 for 9 and copy 2 to person 2 for 5, the seller would have an incentive to produce the good – it would be able to generate a profit of 3. This solution is sometimes available. Some degree of price discrimination is common in the media realm. Consider, for example, media firms' ability to sell both hard and paperback books, often made available at different times; to distribute video content through different "windows," first in theaters, then pay television, then video cassette rental, then free television; or to divide the audience into groups who will pay different subscription rates for the same magazine. Still, often *inability* to price discriminate is desirable. In the standard model of market competition discussed earlier, price discrimination is not necessary to achieve efficient results. Rather, it merely involves a seller's exploitation of its monopolistic position to transfer wealth from purchasers to itself. More relevant here, price discrimination inevitably is only partially effective. In the media context, the problems of underproduction and inadequate distribution will inevitably continue even if some degree of price discrimination reduces the problem. Thus, intellectual property as a form of ownership combined with reliance on markets, given the public-good quality of media content, cannot be expected to stimulate adequate production.

MONOPOLISTIC COMPETITION[1]

The preceding section described how media firms are sometimes unable to profitably market a media product even though the product's value to consumers is greater than its cost to the firm. There is a crucially important wrinkle. The introduction of a competitively successful product can exacerbate the problem, leading consumers (the audience) to get even less of what they want. Sometimes the new product that prevails competitively can reduce social value as compared with the product(s) that it replaces. When this happens, market competition itself increases inefficiency.

Table 2.2

	Product A			Product B	
	Cost	Demand at Time 1	Demand at Time 2	Cost	Demand at Time 2
Copy 1/person 1	10	9[a]	9	11	8[a]
Copy 2/person 2	1	6[a]	5	2	7[a]
Profitable selling price		$5\frac{1}{2}$ to 6	—		$6\frac{1}{2}$ to 7
Surplus (value-cost)		15 − 11 = 4	—		15 − 13 = 2
Potential surplus		15 − 11 = 4	14 − 11 = 3		15 − 13 = 2

Note: Introduction of product B has the effect of slightly reducing the demand for product A, reflected in the change in demand from time 1 to time 2.
[a] Purchases under a profitable sales strategy; hypothetical assumes seller's inability (or inadequate ability) to price-discriminate.

A simple example, summarized in Table 2.2 and expanding on the illustration used earlier, illustrates this possibility. This hypothetical assumes the new product B – for example, a newspaper with additional sections desired by person 2 but without the biting or partisan content especially liked by person 1 – is somewhat bulky, explaining its somewhat higher cost for copy 2 as compared with copy 2 of the old product A. This new product more equally satisfies the preferences of the two people, being more liked by person 2 and less liked by person 1 (i.e., it has a flatter demand curve). For present purposes, the key feature of this hypothetical is that the availability of the new product B reduces slightly the demand for product A. This effect is obviously quite plausible. This change in demand could, and in the hypothetical it does, make producing and selling product A no longer profitable *even though* product A is *still* valued by its audience at an amount more than its cost. Most troubling, production and distribution of product A would still create a greater social surplus than does product B *even though* product B replaces it in a competitive market.

This is merely a hypothetical. Obviously people are not always worse off when a new media product drives out of existence another inferior or more expensive product or set of such products. The general point here is that there is no way of knowing in the abstract when relying on the market will be beneficial – when the market will enable consumers

to get closer to what they want as they see it. Specifically, market success does not show that people are better off, as they see it, with the new product. Which product is better depends on the specifics of demand curves. Still, some observations are indicative of when it is more or less likely that the product that prevails in the market actually frustrates people's desires. For example, although I do not try to offer an economic proof here, it can be shown that usually the competitively successful but economically unjustified material will have relatively uniform but broad appeal – a comparatively flat demand curve. In contrast, the economically justified, audience-satisfying material that a free market fails to produce often is material with relatively strong, unique appeal – creating a more steeply declining demand curve.

Most often the negative effects of monopolistic competition described here is embodied in the nonexistence (or reduced distribution) of some media products that the audience wants. In these circumstances, the net effects of market competition is to reduce audience satisfaction. Consequences also include reduced media pluralism and, often, reduced responsiveness to minority tastes – a reduction not justified on economic (i.e., willingness to pay) grounds. This effect is further examined in Part III in the context of international trade. Here, I examine this effect in combination with an additional feature of most media markets – advertising support of media.

ADVERTISING-SUPPORTED MEDIA[2]

Introduction of advertisers adds a second set of purchasers whose preferences for media content at least potentially diverge from that of the media's audience. Although people often want access to advertising[3] and although advertising lowers the price of media products to consumers, advertising has additional, more negative consequences. Often advertisers want different editorial content than do readers or viewers, and their impact on which media prevail can conflict with preferences of the public. Most commentators, including many economists,[4] believe that the proper role of the press is to provide editorial content that responds to the interests of the public, not the public plus advertisers. However, even if the relevant standard is maximizing value from the combined perspective of the preferences of audiences and advertisers (as pure economic theory presumably suggests), the result produced by the market may not be economically efficient. More relevant here, it may not give the audience what it wants (which is a