25

Innovation Policy and the Press

Christina Koningisor and Jacob Noti-Victor

In colonial America, a small network of local newspapers proved crucial in the lead-up to the Revolutionary War. They facilitated the exchange of information between the colonies, fostering a collective sense of identity among politically distinct entities.[1] They also spread news of British injustices, creating a shared set of grievances that ultimately coalesced into more united opposition to foreign rule.[2] This circulation of news throughout the colonies "made the American Revolution possible."[3]

Yet these crucial information exchanges did not occur on their own. Rather, they were the product of deliberate government intervention. In 1754, Benjamin Franklin served as the postmaster general in the colonies under the British Crown.[4] He decided to exempt newspaper-to-newspaper exchanges from postage and delivery fees. Under this policy, printers could send their editions to one another through the mail at no cost.[5] Congress later codified this rule with the enactment of the Postal Act of 1792. The statute also permitted newspapers to send issues to their subscribers at a lower rate.[6] Collectively, these interventions facilitated the free exchange of

[1] Jeffrey L. Pasley, The Tyranny of Printers: Newspaper Politics in the Early American Republic 33 (2001) ("It was a matter of consensus, then as now, that Patriot newspapers were one of the most important factors in turning American public opinion against Great Britain.").

[2] Timothy E. Cook, *Public Policy Toward the Press: What the Government Does for the News Media*, in The Press 252 (Geneva Overholser & Kathleen Hall Jamieson 2005) ("Newspapers carried word of local problems and built consensus on collective grievances against the British.").

[3] *Id.*

[4] U.S. Postal Service, *About Us, Benjamin Franklin: Postmaster General*, https://about.usps.com/who-we-are/postal-history/pmg-franklin.pdf.

[5] Cook, *supra* note 2, at 252.

[6] Postal Act of 1792, Act of Feb. 20, 1792, ch. 7, 1 Stat. 232. The impact of this subsidy was significant. *See* Cook, *supra* note 2, at 38 ("By 1832 the circulation of newspapers constituted 95 percent of the weight of the mail but provided only 15 percent of total postal revenue.").

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ideas and created a vibrant public sphere for intellectual discussion and debate.[7] The number of newspapers proliferated.[8]

Since then, the government has intervened in countless ways to support the press. It has offered various forms of financial support, such as tax subsidies and grants.[9] It has also recognized new property-like interests, such as "hot news," in order to allow media organizations to seek a return on their investments in newsgathering.[10] It has invested substantial resources in critical information infrastructure, such as telegraph and radio cables, satellites, broadband internet cable, and more.[11] And it has engaged in myriad forms of regulation that have facilitated growth in media, such as creating rules to manage and allocate broadcast spectrum.[12]

Yet this effort takes on new urgency today. The American press is in a period of decline. Since 2005, the nation has lost roughly a third of its newspapers and nearly two-thirds of its newspaper journalists.[13] Local newspapers have been especially hard hit, leaving large swaths of America without any local news coverage at all.[14] Members of the press have described it as an "extinction-level event."[15]

This has prompted a wave of new efforts to save the local press. Many of these have been undertaken voluntarily by the media. Press institutions have tried innovating to attract back advertisers and subscribers. These efforts have included increased investments in video and data-driven journalism,[16] new financial structures like journalism cooperatives or direct public offerings to subscribers,[17] and an

[7] *See* Robert C. Post, *Data Privacy and Dignitary Privacy: Google Spain, the Right to Be Forgotten, and the Construction of the Public Sphere*, 67 DUKE L.J. 981, 1072 (2018).

[8] Michael T. Gibson, *The Supreme Court and Freedom of Expression from 1791 to 1917*, 55 FORDHAM L. REV. 263, 293 (1986) (describing how the number of newspapers in the United States rose "from less than one hundred in 1825 to more than six hundred in 1850").

[9] *See infra* Sections 25.2.2 and 25.2.4.

[10] *See infra* Section 25.2.1.2.

[11] *See* MARTHA MINOW, SAVING THE NEWS 52–54 (2021) (describing these investments).

[12] *See* THE PUBLIC AND BROADCASTING 4–6, FEDERAL COMMUNICATIONS COMM. (2021), https://www.fcc.gov/sites/default/files/public_and_broadcasting_0.pdf.

[13] Penelope Muse Abernathy, *The State of Local News: 2023 Report* (2023), https://localnewsinitiative.northwestern.edu/projects/state-of-local-news/2023/report/#:~:text=Since%202005%2C%20the%20country%20has,small%20and%20mid%2Dsized%20communities.

[14] *Id.* Advertising revenue at local television stations has remained more consistent over time. *See Local TV News Fact Sheet*, PEW RES. CTR. (Sept. 14, 2023), https://www.pewresearch.org/journalism/fact-sheet/local-tv-news/.

[15] *See* Paul Farhi, *Is American Journalism Headed Toward an 'Extinction-Level Event'?*, THE ATLANTIC (Jan. 30, 2024), https://www.theatlantic.com/ideas/archive/2024/01/media-layoffs-la-times/677285/.

[16] *See, e.g.*, Lauren Easton, *The Future of Data Journalism in Local News*, ASSOCIATED PRESS (Feb. 4, 2019), https://blog.ap.org/industry-insights/the-future-of-data-journalism-in-local-news (describing how the AP is assisting local news outlets with expanding data-driven journalism efforts).

[17] *See, e.g.*, Berkeleyside Staff, *First in the Nation: Berkeleyside Raises $1M from Readers in Direct Public Offering*, BERKELEYSIDE (Apr. 12, 2018), https://www.berkeleyside.org/2018/04/12/first-in-the-nation-berkeleyside-raises-1m-from-its-readers-in-a-direct-public-offering (example of direct

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expansion of nonprofit, digital-only outlets.[18] They have also included the sale of struggling media institutions to wealthy individuals.[19] But these private-sector and internal reforms have had only limited success and have not yet stemmed the decline of the local press.[20]

In response, scholars, policymakers, and journalists have called for the government to take more aggressive steps to bolster the press, especially the local press. Many interventions have been proposed or adopted in recent years. They include intellectual property rights, tax credits, subsidies, prizes, and grants.[21] These reforms have also been proposed by a wide range of government actors, including international organizations; foreign countries; and federal, state, and local legislators.[22]

Yet there has been little effort to develop an overarching framework to compare and evaluate these many different policy interventions.[23] This chapter begins this work. It argues that the local news crisis should be understood as a kind of innovation failure, one that calls for solutions drawn from areas of the law that have long grappled with similar problems. In markets like pharmaceuticals and technology, policymakers often employ "innovation policy pluralism," or combinations of intellectual property protections and other government tools, such as prizes and

public offering); Banyan Project, *We Are Pioneering a New Model for Community-Energizing Journalism*, https://banyanproject.coop/ (example of news cooperative).

[18] *See, e.g.*, Sarah Scire, *Now Nonprofit, the Salt Lake Tribune Has Achieved Something Rare for a Local Newspaper: Financial Sustainability*, Nieman Lab (Nov. 29, 2021), https://www.niemanlab.org/2021/11/now-nonprofit-the-salt-lake-tribune-has-achieved-something-rare-for-a-local-newspaper-financial-sustainability/ (describing a newspaper's conversion from for-profit to nonprofit status).

[19] *See, e.g.*, Benjamin Mullin & Katie Robertson, *A Decade Ago, Jeff Bezos Bought a Newspaper. Now He's Paying Attention to It Again*, Wash. Post (July 22, 2023), https://www.nytimes.com/2023/07/22/business/media/jeff-bezos-washington-post.html.

[20] *See* Abernathy, *supra* note 13. *See also* Ryan Mac, Benjamin Mullin & Katie Robertson, *Los Angeles Times Owner Clashed with Top Editor over Unpublished Article*, N.Y. Times (Jan. 26, 2024), https://www.nytimes.com/2024/01/26/business/media/los-angeles-times-owner-editor-clash.html (describing conflicts of interest that can arise when a wealthy owner purchases a media outlet).

[21] *See* discussion *infra* Section 25.2.

[22] *Id.*

[23] Some have addressed the pros and cons of various government interventions through other policy lenses. *See, e.g.*, Leonard Downie, Jr & Michael Schudson, *The Reconstruction of American Journalism*, in Will the Last Reporter Please Turn Out the Lights: The Collapse of Journalism and What Can Be Done to Fix It (Robert W. McChesney & Victor Pickard eds., 2009) (describing the pros and cons of various interventions, and endorsing certain options like increased tax incentives for press institutions); Kyle Langvardt, *Structuring a Subsidy for Local Journalism*, 3 J. Free Speech L. 297, 316–18 (2023) (examining possible public news subsidy design in light of potential constitutional limitations); Minow, *supra* note 11, at 104–44 (proposing various government interventions to support the press); Neil Weinstock Netanel, *Mandating Digital Platform Support for Quality Journalism*, 34 Harv. J. L. & Tech. 473, 499 (2021) (critiquing three types of government initiatives to bolster journalism); David M. Schizer, *Subsidizing the Press*, 3 J. Legal Analysis 1, 2–3 (2011) (proposing a framework for analyzing press subsidies that focuses on how well editorial independence is preserved, how effectively a subsidy channels resources to "externality-generating activities," and political feasibility).

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grants.[24] Such combinations harness both free-market forces and government regulation to foster socially valuable services in productive and efficient ways.[25]

Drawing on the work of scholars who have examined various combinations of innovation policy levers in other contexts, we map these existing and proposed press interventions onto this innovation policy rubric. Specifically, we rely on an innovation policy framework developed by scholars Daniel Hemel and Lisa Larrimore Ouellette. We adopt this framework to plot various press policy proposals across two indices: whether the interventions are government-sponsored or market-driven; and whether the innovation reward is allocated ex ante or ex post.[26]

Consider an example. The Postal Act of 1792[27] represents a government intervention designed to bolster innovation and, specifically, press innovation.[28] Congress set the price of the subsidy and determined who would shoulder the costs – in this case, private letter-senders who paid higher postage fees.[29] Further, the incentive was imposed ex ante: The government offered the subsidy in advance to any qualifying newspaper, regardless of their business model, focus, or level of success.[30] We argue that each press policy intervention can be plotted along these two dimensions. Further, we suggest that categorizing the various press policy interventions in this way permits a comparison among the different policy levers and an analysis of how these levers can be combined and layered to meet different innovation goals.[31]

After mapping out these various proposed press policy interventions, we conclude by suggesting that intellectual property and other market-driven mechanisms alone are insufficient to ensure continued local news creation in today's media landscape. Yet a pure government-funding model is also inadequate. Instead, intellectual property solutions should be combined with other government incentives like grants, subsidies, tax benefits, and prizes.[32] In future work, we intend to evaluate the benefits and drawbacks of combining them in different ways at various levels of the local news supply chain by drawing on interventions in other industries, such as

[24] *See* Daniel J. Hemel & Lisa Larrimore Ouellette, *Innovation Policy Pluralism*, 128 Yale L.J. 544, 549 (2019); Daniel J. Hemel & Lisa Larrimore Ouellette, *Beyond the Patents-Prizes Debate*, 92 Tex. L. Rev. 303, 316 (2013).

[25] Hemel & Ouellette, *Innovation Policy Pluralism*, *supra* note 24, at 549 (arguing that this lens allows policymakers to "identify a wide range of circumstances in which IP/non-IP combinations can advance the goals of innovation law").

[26] *Id.* at 547–51 (mapping out this framework).

[27] *See* Postal Act of 1792, Act of Feb. 20, 1792, ch. 7, 1 Stat. 232.

[28] We explain why the media should be considered a form of innovation below. *See infra* Section 25.1.

[29] Richard R. John, Spreading the News: The American Postal System from Franklin to Morse 39 (2009).

[30] *See* Postal Act of 1792, Act of Feb. 20, 1792, ch. 7, 1 Stat. 232. This is in contrast to an ex post intervention, which might have provided the subsidy as a reward for the creation of a specific kind of new story or based on the ultimate popularity of the news product.

[31] *See* discussion *infra* Section 25.3. *See also* Hemel & Ouellette, *Innovation Policy Pluralism*, *supra* note 24, at 549 (mapping out the innovation policy pluralism framework).

[32] *See* discussion *infra* Section 25.2.

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pharmaceuticals, that have also suffered from innovation failures.[33] This chapter lays the descriptive groundwork that will allow us to advance these normative claims.

It does so in three sections. Section 25.1 describes the innovation policy framework. It then argues that this rubric can be a useful lens for evaluating press policy proposals. Section 25.2 applies this framework to various existing or proposed press policy interventions. It outlines five categories of regulatory interventions when it comes to the press: market-set, ex post rewards; market-set, ex ante rewards; government-set, ex post rewards; government-set, ex ante rewards; and hybrid approaches. It then concludes by briefly examining the implications of the press policy pluralism framework. It outlines our plans for future research by offering early lessons learned by mapping press policy innovations onto the policy pluralism rubric.

25.1 INNOVATION POLICY LEVERS

"Innovation" is a nebulous concept. Among policymakers and in popular discourse, it usually refers to the fostering of technological or scientific breakthroughs. But, as scholars of intellectual property contend, innovation can and should be a broad umbrella, referring to the production of all "knowledge goods." It encompasses anything that contains ideas and/or information, including but not limited to, "[b]ooks, blueprints, films, and pharmaceutical formulas."[34]

By adopting this approach, we treat journalism as a form of innovation.[35] As discussed further below, the market failures that have plagued the news industry correspond closely to the market failures known to occur in other innovation-focused industries, such as technology, pharmaceuticals, and entertainment.[36]

[33] *See* Christina Koningisor & Jacob Noti-Victor, *Press Policy Pluralism* (draft on file with authors).

[34] Daniel J. Hemel & Lisa Larrimore Ouellette, *Knowledge Goods and Nation-States*, 101 MINN. L. REV. 167, 168 n.1 (2016). *See also* Hemel & Ouellette, *Innovation Policy Pluralism*, *supra* note 24, at 549 (An innovation incentive "establishes the payoff structure for producers of knowledge goods."); Brett M. Frischmann & Mark A. Lemley, *Spillovers*, 107 COLUM. L. REV. 257, 301 n.4 (2007) (defining innovation "to refer to the process of research, invention, and development and refinement of new ideas").

[35] *See* Hemel & Ouellette, *Innovation Policy Pluralism*, *supra* note 24, at 168 n.1 (referring to a "knowledge good" as "anything that can be digitized") (quoting HAL VARIAN, MARKETS FOR INFORMATION GOODS 3 (1999)). Newspapers clearly pass the minimum threshold of this test. Moreover, the social value of press products is particularly high when assessed through some of the normative frameworks that have been applied to copyright and other innovation-encouraging interventions. *Cf.* Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 288 (1996) ("Copyright provides an incentive for creative expression on a wide array of political, social, and aesthetic issues, thus bolstering the discursive foundations for democratic culture and civic association.").

[36] *See infra* Section 25.2 (examining various government responses to market failures in the media).

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Indeed, innovation in general is often understood to require some kind of legal or regulatory intervention to occur effectively. The law involves itself in innovation not simply because many innovations are socially desirable but because the production of knowledge goods commonly poses economic difficulties. Knowledge goods generally suffer from a classic public goods problem: They can be used simultaneously by many without leading to scarcity (nonrivalrousness) and their use cannot inherently be limited to some and not others (nonexcludability).[37]

In more concrete terms, a song or a pharmaceutical formula or a piece of investigative reporting can be copied and shared indefinitely without any inherent way for the creator to police such sharing. This runs in contrast to tangible goods – from apples to airplanes – that can only be used by one person at a time (rivalrousness) and, by virtue of the good's physical nature, can be protected from use by nonowners (excludability). Many contend that, because of the problems of nonrivalrousness and nonexcludability, innovators will lack an incentive to produce socially valuable knowledge goods unless they are guaranteed some possibility of financial reward for investing the time and money that innovation generally requires.[38]

Most notably, patent and copyright law provide this financial reward by granting innovators a limited right to exclude access to their innovations and, therefore, charge a market-based price. Without this property right, the theory goes, innovators would lack the incentive to produce valuable knowledge goods. But property-based interests are not the only way this innovation incentive can occur. The government can also directly reward innovators through grants, prizes, or tax credits.

Legal scholars, in particular Lisa Larrimore Ouellette and Daniel Hemel, have categorized the variety of ways that a government can facilitate "innovation policy."[39] Specifically, they note the distinctions between when the innovation reward is set temporally (ex post vs. ex ante) and who actually sets the reward amount (market vs. government).[40] A brief discussion of the four categories follows.

Market-Set, Ex Post Rewards. This category includes any intervention that grants an innovator the right to exclude and thus charge a market price. Patent, copyright, and other forms of intellectual property are all examples of such policy levers. Patent law, for example, grants inventors twenty years of exclusivity for nonobvious, useful innovations.[41] Thanks to this exclusivity, the patent owner can earn a financial reward through licensing the invention or through producing the invention itself.[42]

[37] William M. Landes & Richard A. Posner, The Economic Structure of Intellectual Property Law 13–14 (2003).
[38] *Id*.; Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 Tex. L. Rev. 1031, 1053 (2005).
[39] Hemel & Ouellette, *Innovation Policy Pluralism*, *supra* note 24, at 547–49.
[40] *Id*. at 554.
[41] Hemel & Ouellette, *Beyond the Patents-Prizes Debate*, *supra* note 24, at 319.
[42] *Id*. at 320.

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The compensation structure of intellectual property is ex post because the innovator will only be able to demand compensation if they successfully produce a knowledge good that the public actually finds valuable. Simply *attempting* to write a novel or invent a new pharmaceutical is not sufficient; the innovator must actually produce something of value. The reward is market-set because the precise compensation will be dictated by market demand. The government itself is neutral as to the specific innovation and the kind of compensation it warrants.[43]

Market-Set, Ex Ante Rewards. This category includes tax preferences and other interventions that lower the costs of doing business for innovators. For example, the tax code explicitly allows researchers to deduct certain expenses related to research and development.[44] Through these preferences, innovators are incentivized to spend more money more quickly on research than would otherwise be financially feasible.

Tax preferences are ex ante because they are provided neutrally to anyone engaged in a specific form of innovation before the results of the innovative activity are known. But the reward is still dictated by the market because the benefits of a tax preference are meaningless if innovation does not ultimately yield a marketable product. The preference may enable a quicker route to that possibility, but it does not guarantee it.[45]

Government-Set, Ex Post Rewards. This category includes government prizes that promise compensation if a specific innovation goal is achieved. For example, if the government is concerned about a specific disease, it may set a prize for the successful development of a vaccine for that disease.[46]

A prize operates ex post because only successful achievement of the prize's criteria will yield a reward. But, unlike a patent, the reward is government-set; compensation can be received regardless of whether the innovation has market value.

Government-Set, Ex Ante Rewards. This category includes direct spending by the government on innovation. Such direct spending can be done through grants or through direct government ownership of entities engaging in research. Examples of the former include funding provided to private researchers by the National Institute of Health, and examples of the latter include direct government-funded research at the Department of Energy's National Laboratories.[47]

[43] Hemel & Ouellette, *Innovation Policy Pluralism*, *supra* note 24, at 553 (2019). The government is of course also involved in IP-based rewards because the government is responsible for creating the IP entitlement to begin with. But the market, not the government, dictates the actual *compensation amount*.

[44] I.R.C. § 174(a) (2006). *See also* Hemel & Ouellette, *Beyond the Patents-Prizes Debate*, *supra* note 24, at 321–26 (describing these tax provisions).

[45] Hemel & Ouellette, *Innovation Policy Pluralism*, *supra* note 24, at 553–54; Hemel & Ouellette, *Beyond the Patents-Prizes Debate*, *supra* note 24, at 328.

[46] Hemel & Ouellette, *Innovation Policy Pluralism*, *supra* note 24, at 553–54.

[47] *See generally* W. Nicholson Price II, *Grants*, 34 Berkeley Tech. L.J. 1, 17 (2019).

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Through such direct funding, research and development can occur without regard to market-driven returns on investment. But, in contrast to prizes, the reward is not conditioned on a specific successful outcome. Thus, the reward is government-set because the government makes the compensation decision, but it is ex ante because the reward is given before the government knows whether the innovative activity has actually proven fruitful.

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These categories provide a helpful heuristic for making sense of various innovation policy proposals in any industry focused on the production of knowledge goods, including, as the next section argues, the press. It is important to note, however, that the categories are more ideal types that can encompass a variety of policy arrangements. As Hemel and Ouellette note, many actual interventions operate on a spectrum between government-set and market-set rewards and even between ex ante and ex post reward settings.[48] Moreover, specific policy interventions can entail intricate combinations of different innovation strategies. For example, government-funded researchers may be permitted to also seek a patent – a mixing of patent and grant strategies. Or the government might license a pharmaceutical patent at a market-set price and then distribute the corresponding medicine for free – a matching of a market-set reward with government-driven allocation. In addition to discussing how the four primary innovation policy categories already operate in the press landscape, some of these combinations are also discussed in the next section.

25.2 INNOVATION POLICY AND THE PRESS

For much of the nation's history, the press has been governed largely by market forces.[49] Technological innovations throughout the 1800s caused publishing costs to fall, making newspapers more widely available to the masses.[50] By the end of the 1800s, media magnates like William Randolph Hearst and Joseph Pulitzer had established media empires through the sale of salacious and scandal-ridden "yellow journalism" papers.[51] The industry continued to grow from there. Newspaper advertising revenue grew from roughly $3.7 billion in 1960, to $14.8 billion in 1980, to $48.7 billion in 2000.[52]

[48] *See* Hemel & Ouellette, *Innovation Policy Pluralism*, *supra* note 24, at 554.

[49] *See*, *e.g.*, Victor Pickard, Josh Stearns & Craig Aaron, Changing Media: Public Interest Policies for the Digital Age 252 (2009) (noting that Finland and Denmark spend 75 times more on public media than the United States). Of course, there are many exceptions. *See* Minow, *supra* note 11, at 36–57 (describing US government interventions to support the press).

[50] *See* Bruce E. Boyden, *Regulating at the End of Privacy*, 2013 U. Chi. Legal F. 173, 191 (2013).

[51] Ken Gormley, *100 Years of Privacy*, 1992 Wis. L. Rev. 1335, 135–51 (1992).

[52] *Newspaper Fact Sheet*, Pew Res. Ctr. (Nov. 10, 2023), https://pewresearch.org/journalism/fact-sheet/newspapers/ ("Estimated advertising and circulation revenue of the newspaper industry" showing $3.681 billion in 1960, $14.794 billion in 1980, and $48.78 billion in 2000).

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Yet around the turn of the millennium, the press's long-standing financial model began to break down. The invention of the internet brought a series of cascading financial, technological, and cultural changes that disrupted the media's financial viability. Job and real estate listings had long subsidized news reporting.[53] But the internet allowed for the disaggregation of classified advertisements from journalism products.[54] Further, critical advertising revenue migrated online to other platforms.[55] Many newspapers and magazines also offered their publications for free online. Readers became accustomed to accessing news without paying for the content, and it became difficult to later reshape consumer expectations again.[56]

Local news outlets were hardest hit by these developments, especially local newspapers. Since 2005, 2,900 newspapers have closed.[57] Many that remain are now "ghost newspapers," with little or no staff and limited original reporting.[58] More than half of American counties now have no local newspaper or only a single paper,[59] and most of the existing local newspapers today are published only weekly.[60] The rise of digital-only outlets has not come close to making up for this loss.

Against this backdrop, governments have begun to experiment with new and expanded forms of financial support for the press. The press has always functioned with some measure of intervention and assistance from the government in the United States, although the government's support has traditionally been limited.[61] Given the depth and severity of the current local news crisis, however, many government actors, both domestically and abroad, have begun experimenting with new forms of press assistance. Many advocates have also proposed innovative new forms of support that have not yet been implemented. This section surveys these efforts, categorizing them according to the innovation policy pluralism framework developed by intellectual property and innovation law scholars.

25.2.1 *Market-Set, Ex Post Rewards*

A ubiquitous form of innovation policy consists of the various legal regimes that enable the press to successfully monetize content in the marketplace. These policy

[53] Jack Shafer, *Why Has Local News Collapsed? Blame Readers*, Politico (June 12, 2021), https://www.politico.com/news/magazine/2021/06/12/local-news-demand-493495.
[54] *See* Langvardt, *supra* note 23, at 299.
[55] Minow, *supra* note 11, at 13, 25.
[56] *Id.*
[57] *See* Abernathy, *supra* note 13.
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] Rodney Benson & Matthew Powers, Public Media and Political Independence: Lessons for the Future of Journalism around the World 8 (2011), https://www.issuelab.org/resources/13259/13259.pdf.

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tools enable media companies to enforce a right to exclude, thereby preventing freeriding by rivals or by users.[62] Thanks to these protections, media companies can assert control over the ways in which the public can access new content, which in turn allows these companies to utilize a variety of monetization strategies: for example, direct charging for content via subscriptions or hard-copy purchases, licensing of content, or seeking payment from advertisers.[63]

We include in this category conventional forms of intellectual property, especially copyright, as well as media-specific regimes, such as "hot news misappropriation" or special licensing obligations for platforms. We also include the variety of laws that enable media companies to prevent circumvention of various technical protections, such as paywalls. This section discusses each of these regimes below.

25.2.1.1 Copyright

In the United States, copyright protects any original work – including textual works, audio works, or audiovisual works – from the moment of fixation.[64] News articles, television news, podcasts, or radio news broadcasts are all protected by copyright.[65] Newspapers, magazines, and websites are also protectable as a collective work or compilation.[66] Thanks to copyright protection, media companies can seek damages or injunctive relief for any unauthorized copying, distribution, or transmission of these materials.[67]

Copyright in news, however, is more limited than copyright in areas such as music, art, or literature. Copyright law does not extend to ideas or facts about the world. The Supreme Court has explicitly stated that "all facts – scientific, historical, biographical, and news of the day . . . may not be copyrighted and are part of the public domain available to every person."[68] In practice, then, copyright in news materials is limited to the specific ways these unprotectable facts are expressed. The wholesale copying of an entire, or a large portion of, a news article would be considered infringing, but the borrowing of facts for inclusion in a new work of journalism – even if such facts were previously unreported – would not be

[62] *See* Landes & Posner, *supra* note 37, at 12–14.
[63] *See generally* Pew Research Center, *State of the Media Project*, https://www.pewresearch.org/topic/news-habits-media/news-media-trends/state-of-the-news-media-project/.
[64] 17 U.S.C. § 102.
[65] Though copyright vests in the "author" of the work, many news companies retain ownership of their reporters' works through copyright assignment agreements or the work for hire doctrine. U.S. Copyright Office, Copyright Protections for Press Publishers 29–30 (2022), https://www.copyright.gov/policy/publishersprotections/202206-Publishers-Protections-Study.pdf.
[66] 17 U.S.C. § 101 (defining compilation and collective work). *See also* U.S. Copyright Office, *supra* note 65, at 29 n.145.
[67] 17 U.S.C. § 106.
[68] Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 348 (1991) (internal quotations and citations omitted).

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considered infringing. For a finding of infringement, an entire article need not be copied verbatim, but the copy must be highly similar, including, for example, utilizing "the same structure and organization, … the same chronological and substantive grouping of facts … [and some] identical phraseology and word choice."[69]

Protection for news material is further limited by some other areas of copyright. The simple copying of short phrases or headlines is generally not actionable.[70] The fair use doctrine can also prevent news organizations from asserting copyright in certain contexts. While fair use will generally not excuse a rival news organization's copying of protected material,[71] the doctrine allows members of the public to copy materials for many educational uses.[72]

Copyright, then, is primarily useful to media organizations for preventing the unauthorized dissemination of news articles and the like (in contrast to the reuse of factual materials from those articles in other reporting).[73] Actually asserting copyright, however, can carry some challenges. Registration of a work at the Copyright Office is a precondition to filing suit, and this process can prove onerous for news organizations that are constantly producing new content.[74] Broad unauthorized dissemination online by members of the public is also generally difficult and expensive to police.[75] Around a decade ago, some media organizations attempted to deal with these costs by assigning their rights to sue for infringement to a for-profit "copyright enforcement" entity called Rightshaven. But after a series of failed

[69] Nihon Keizai Shimbun, Inc. v. Comline Bus. Data, Inc., 166 F.3d 65, 70 (2d Cir. 1999).

[70] *See* U.S. Copyright Office, *supra* note 65, at 33–37 (noting application of merger doctrine and de minimis use doctrine in this context).

[71] *See, e.g.*, Los Angeles News Serv. v. Reuters Television Int'l, Ltd., 149 F.3d 987, 993 (9th Cir. 1998), *as amended on denial of reh'g and reh'g en banc* (Aug. 25, 1998) (finding that Reuters copying of clips of Los Angeles riots was not fair use when Reuters did "not explain the footage, edit the content of the footage, or include editorial comment"); Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 540 (1985) (scooping of material from yet-to-be-published memoir was not fair use).

[72] *See generally* Cambridge Univ. Press v. Patton, 769 F.3d 1232, 1267 (11th Cir. 2014) (exploring scope of fair use for educational purposes); *see also* 17 U.S.C. § 110(1)) (outlining explicit carve out for classroom uses).

[73] Trademark law may additionally allow news organizations to assert a cause of action for the specific copying of brand-identifying information by an unauthorized competitor. *See, e.g.*, Washington Post Co. v. Total News, Inc., No. 97 Civ. 1190 (PKL) (S.D.N.Y., filed Feb. 20, 1997) (settled case in which several media companies brought trademark and copyright claims against a news aggregator website for, among other things, using "framed" in-line links in which the media companies' content and brand-identifying information appeared on the website).

[74] *See* Andrew Deck, *The Intercept Charts a New Legal Strategy for Digital Publishers Suing OpenAI*, NiemanLab (Mar. 20, 2024), https://www.niemanlab.org/2024/03/the-intercept-charts-a-new-legal-strategy-for-digital-publishers-suing-openai/ (discussing this problem).

[75] Dan Frosch, *Enforcing Copyrights Online, for a Profit*, N.Y. Times (May 2, 2011), https://www.nytimes.com/2011/05/03/business/media/03righthaven.html.

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litigations against various bloggers and news aggregators, Rightshaven ultimately closed its operations.[76]

25.2.1.2 Hot News Misappropriation

The unprotectability of facts under copyright law has, historically, raised concerns for newspapers that their investments in gathering news would go unrewarded, since rivals could immediately co-opt and rewrite any breaking news stories. In reaction to this problem, the federal courts developed a special form of unfair competition tort: hot news misappropriation. As the Supreme Court elucidated in 1918, newspapers maintain a "quasi-property" interest in their time-sensitive, factual news reporting that they can assert against competitors.[77]

The later abolition of federal common law, however, relegated the cause of action to the common law of just a handful of states.[78] And the passage of the 1976 Copyright Act raised questions about whether the cause of action was pre-empted. In its 1997 decision in *NBA v. Motorola*, the Second Circuit held that preemption concerns limit the doctrine's applicability to a very narrow set of scenarios.[79] Since then, courts that have considered hot news misappropriation claims have generally not permitted them to go forward.[80]

Some courts and commentators have speculated that hot news misappropriation can survive if recharacterized as a kind of unfair competition or unjust enrichment claim, rather than an intellectual property interest.[81] Indeed, news organizations continue to assert such protection for their works. For example, in the litigation over OpenAI's use of The New York Times' materials, the parties are currently debating the applicability of a common law hot news misappropriation claim.[82]

[76] David Kravets, *Copyright Troll Righthaven Says It's Nearing Bankruptcy*, WIRED (Sep. 12, 2011), https://www.wired.com/2011/09/righthaven-nearing-bankruptcy/.

[77] Int'l News Serv. v. Associated Press, 248 U.S. 215, 242 (1918).

[78] Netanel, *supra* note 23, at 499.

[79] *See* Nat'l Basketball Ass'n v. Motorola, Inc., 105 F.3d 841, 845 (2d Cir. 1997) (describing these exceptional circumstances).

[80] *See, e.g.*, Fox News Network, LLC v. TVEyes, Inc., 43 F. Supp. 3d 379, 399 (S.D.N.Y. 2014); *see also* U.S. COPYRIGHT OFFICE, *supra* note 65, at 47 n.266 (surveying cases).

[81] *See* Barclays Cap. Inc. v. Theflyonthewall.com, Inc., 650 F.3d 876, 902 (2d Cir. 2011) (noting the requirement of direct competition between the plaintiff and defendant). *See also* Shyamkrishna Balganesh, *The Uncertain Future of "Hot News" Misappropriation After Barclays Capital v. Theflyonthewall.com*, 112 COLUM. L. REV. SIDEBAR 134, 135 (2012); Shyamkrishna Balganesh, *"Hot News": The Enduring Myth of Property in News*, 111 COLUM. L. REV. 419, 475–76 (2011).

[82] *See* Complaint at 1–4, The New York Times Co. v. Microsoft Corporation, Open AI Inc. (Dec. 27, 2023) (No. 23 Civ. 11195), https://nytco-assets.nytimes.com/2023/12/NYT_Complaint_Dec2023.pdf (asserting cause of action for "common law misappropriation"). *Cf.* Open AI Memorandum of Law in Support of Motion to Dismiss (Feb. 26, 2024) (No. 23 Civ. 11195), https://static01.nyt.com/newsgraphics/documenttools/82a013b9ba852548/9d4b1790-full.pdf (arguing that claim is preempted in light of *Barclays*) *with* New York Times Memorandum of

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25.2.1.3 Press Publishers' Rights Against Platforms

The rise of online platforms and news aggregators has posed significant challenges for media organizations. In particular, platforms' role as both a gateway and (algorithmic) curator of consumers' access to news has led to significant decreases in news media revenue.[83] Rather than accessing news directly on a media organization's website, most consumers now encounter news articles via platforms, while accompanied by the highly precise targeted advertisements that these platforms enable through data accumulation and sophisticated algorithms. This has meant that news organizations' advertising revenue has decreased significantly, as advertisers have instead flocked to platforms.[84] Notably, from 2014 to 2018, Google and Facebook advertising revenue increased by 150 percent while newspapers experienced a 35-percent advertising revenue decline.[85] Moreover, platform-based news access has also eroded consumers' familiarity with distinct media brand identities, as consumers now access content through algorithmically driven curation that is mostly independent of specific media brands.[86]

Platforms' role in reducing media revenue has led to several interventions ostensibly designed to restore the status quo by requiring platforms to compensate news organizations for reproducing their content. Some of these interventions can be categorized as intellectual property-like ex post, market-based rewards. In particular, Article 15 of the 2019 European Union Copyright Directive provides that EU member states must grant press publishers an exclusive right to prevent platforms (including news aggregators, social media companies, and search engines) from reproducing excerpts of press publications without permission.[87]

This press publishers' right is independent of the copyright in the news story.[88] Thus, for example, a national law implementing Article 15 would require Facebook to obtain permission from a publisher before providing a headline and short snippet of a news story (even though such permission would not always be required under copyright law). Notably, the Copyright Directive explicitly justifies the creation of this new press publishers' right using the language of innovation incentives. It explains that the "organisational and financial contribution of publishers in producing press publications needs to be recognised and further encouraged to ensure the sustainability of the publishing industry." The Copyright Directive aims

Law in Opposition to OpenAI's Motion to Dismiss, https://ipwatchdog.com/wp-content/uploads/2024/03/NYT-v-OpenAI-Opp-Motion-to-Dismiss-3-11-2024.pdf (arguing that claim falls under narrow hot news exception and is not preempted).

[83] Netanel, *supra* note 23, at 479.

[84] *Id.* (describing rise in platform advertising revenue); Abernathy, *supra* note 13 (describing decline in newspapers' advertising revenue).

[85] Netanel, *supra* note 23, at 480–81.

[86] *Id.* at 482–83.

[87] Council Directive 2019/790, 2019 O.J. (L 130) 35, 57–59, 92, 118.

[88] Netanel, *supra* note 23, at 501.

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to do so by providing "harmonised legal protection for press publications in respect of online uses by information society service providers."[89]

While the Article 15 press publisher right does not cover simply linking to press material (without the inclusion of any excerpt), some countries have implemented their own press publisher rights that also include linking. For example, Australia and Canada require payment for such uses. And in order to address perceived imbalances in bargaining positions,[90] Australian and Canadian laws require platforms to negotiate royalties with news organizations before the platforms can make their news content available. They also enable the government to step in to set rates if negotiations do not succeed.[91]

The United States has not enacted a press publishers' right, but California has proposed legislation modeled after some of the examples described above. Like the Canadian and Australian approaches, the proposed California Journalism Prevention Act would require that platforms engage in a negotiation, with the possibility of arbitration, to determine an amount the platforms must pay for a license to make available news content.[92]

Scholars have criticized press publishers' rights on a variety of grounds. The lack of government-mandated negotiation and rate-setting in the EU Directive raises concerns that large platforms will take advantage of their market power to demand the use of content for a low or no fee.[93] Approaches with mandatory arbitration or rate-setting attempt to resolve this competition problem but still raise concerns that platforms will deprioritize news content, or even pull it altogether, to lower or avoid royalty payments. For example, the Canadian government is still in negotiations with Facebook, which has threatened to pull all news content from its platform in Canada.[94]

[89] Council Directive, *supra* note 87, at 104.

[90] *See generally* U.S. Copyright Office, *supra* note 65, at 52–54 (discussing competition problems).

[91] Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2021 (Cth) (Austl.), Div. 6–7, 9–10, https://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/r6652_aspassed/toc_pdf/20177b01.pdf; Bill C-18, Online News Act, 1st Sess., Secs. 4, 18–22, 44th Parl., 2022 (first reading, Apr. 5, 2022) (Can.), https://www.parl.ca/DocumentViewer/en/44-1/bill/C-18/first-reading. *See also* Matthew Ingram, *Canada Imitates Australia's News-Bargaining Law, But to What End?*, Colum. Journalism Rev. (Marc. 16, 2023), https://www.cjr.org/the_media_today/canada_australia_platforms_news_law.php; U.S. Copyright Office, *supra* note 65, at 24–26.

[92] Cameron Joseph, *Can Legislation Save Journalism in California?*, Colum. Journalism Rev. (Feb. 16. 2024), https://www.cjr.org/the_media_today/california_news_bill_buffy_wicks.php.

[93] Netanel, *supra* note 23, at 504.

[94] Vjosa Isai, *Google Agrees to Pay Canadian Media for Using Their Content*, N.Y. Times (Nov. 29, 2023), https://www.nytimes.com/2023/11/29/world/americas/google-canada-news-media-deal.html; Ashley Belanger, *Meta Won't Negotiate with Publishers, Will End Facebook News in Canada*, Ars Technica (June 23, 2023), https://arstechnica.com/tech-policy/2023/06/facebook-cutting-off-news-in-canada-to-avoid-paying-publishers-for-content/.

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The California proposal has also received more specific criticism. Some media stakeholders have raised concerns that the royalty payouts would predominantly benefit large media organizations (or, even more troublingly, clickbait-focused entities), at the expense of small, local media outlets.[95] Finally, some commentators believe the California proposal could not survive a court challenge on First Amendment and/or copyright preemption grounds.[96]

Notwithstanding these criticisms, the direct payments from platforms to media organizations have begun to prove helpful to at least some in the news industry. In particular, in 2023, 33 percent of media leaders described payments from platforms as an "important revenue stream."[97]

25.2.1.4 Paywall Anti-circumvention

Many media organizations now use online paywalls, requiring a reader to create an online account and (usually) pay a fee in order to access content. Paywalls provide a source of direct revenue to media companies, while also attempting to ensure that users access content predominantly on the media company's website, which can bolster advertising revenue.[98]

Paywalls, however, are easily circumvented by specialized software, URL manipulation, or password sharing.[99] Several areas of law may provide protections for media companies that seek to prevent circumvention. Access to paywalled media content is

[95] *See* Chris Jennewein, *Opinion: A Bill to Prop Up Legacy Media in California Is Bad News for Journalism*, Times of San Diego (Apr. 18, 2023), https://timesofsandiego.com/opinion/2023/04/18/a-bill-to-prop-up-legacy-media-in-california-is-bad-news-for-journalism/; Mike Rispoli, *Lawmakers Must Ensure That Preserving California Journalism Doesn't Enable Clickbait*, Cal Matters (Jan. 22, 2024), https://calmatters.org/commentary/2024/01/preserving-california-journalism-bill-clickbait/. *See also* Paul Matzko, *From Hot News to Link Tax: The Dangers of a Quasi-Property Right in Information*, 3 J. Free Speech L. 269, 286–93 (2023) (arguing that such informational closure will lead to industry consolidation, diminished competition, and censorship).

[96] *See, e.g.*, Eric Goldman, *California's Proposed Fix to the Journalism Crisis Is Unconstitutional and Worse Than Socialism (Comments on the California Journalism Protection Act, CJPA)*, Tech. & Marketing L. Blog (June 22, 2023), https://blog.ericgoldman.org/archives/2023/06/californias-proposed-fix-to-the-journalism-crisis-is-unconstitutional-and-worse-than-socialism-comments-on-the-california-journalism-protection-act-cjpa.htm (explaining these arguments).

[97] Nic Newman, *Journalism, Media, and Technology Trends and Predictions 2023*, Reuters Inst. (Jan. 10, 2023), https://reutersinstitute.politics.ox.ac.uk/journalism-media-and-technology-trends-and-predictions-2023#:~:text=Beyond%20paid%20content%2C%20the%20fastest,up%204pp%20on%20last%20year ("Google now pays more than 300 publishers for content across the European Union as well as in other parts of the world like Australia and Canada and Facebook has been paying up to $20 million to some large publishers for content it includes in its news section.").

[98] *See* Hannah Farrow, *How Newsrooms Are Building Better Paywalls*, Local News Initiative (Mar. 9, 2021), https://localnewsinitiative.northwestern.edu/posts/2021/03/09/paywalls/.

[99] *See, e.g.*, Chip Brownlee, *Google's New Chrome Makes It Easier to Bypass Newspaper Paywalls*, Slate (July 31, 2019), https://slate.com/technology/2019/07/google-chrome-update-incognito-mode-paywall-workaround.html.

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usually accompanied by terms of service that may create contract remedies for misuse of the paywall or its underlying content.[100] Additionally, the Digital Millennium Copyright Act's (DMCA) prohibition against circumventing technical measures that control access to copyrighted works[101] may be implicated by efforts to bypass a paywall.[102] Such a theory remains untested, and the courts' differing interpretations of the DMCA may pose barriers.[103] That being said, at least one recent case attempted such a strategy: The owners of the Wall Street Journal brought a series of breach-of-contract and DMCA anti-circumvention claims against the owner of a commercial password sharing service.[104] The case, however, settled before any judgment on the merits.[105]

25.2.2 *Market-Set, Ex Ante Rewards*

A variety of ex ante, market-based rewards are also used to support the press. Most take the form of tax benefits. Through these tax initiatives, the government harnesses information held by the private sector. Government actors establish "general ground rules for the reward system without making tailored, technology-specific judgments."[106] The government offers up financial incentives but leaves private actors free to decide how to respond.[107]

There is a long history in the United States of using federal, state, and local tax incentives to support the press. A common example is the use of sales tax exemptions for news publishers. As far back as the nation's founding, states have excluded newspapers and other news products from general sales and use taxes.[108] This technique is still employed today as a form of government support for news institutions.[109] Federal, state, and local governments have also long provided tax breaks for items critical to the news manufacturing processes. They have exempted ink,

[100] U.S. Copyright Office, *supra* note 65, at 46.
[101] 17 U.S.C. § 1201.
[102] Theresa M. Troupson, *Yes, It's Illegal to Cheat a Paywall: Access Rights and the DMCA's Anticircumvention Provision*, 90 N.Y.U. L. Rev. 325 (2015) (making this argument).
[103] *Id.* (noting that this theory would require adoption of the Ninth Circuit's interpretation of Section 1201 articulated in MDY Indus., LLC v. Blizzard Ent., Inc., 629 F.3d 928, 950 (9th Cir. 2010)); *see also* U.S. Copyright Office, *supra* note 65, at 46 n.259. Some have also speculated that the Computer Fraud and Abuse Act (CFAA) would provide protection for paywall circumvention, though implementing such a theory would also face barriers. *Id.*
[104] Complaint and Jury Demand, Dow Jones & Co., Insupac., Plaintiff, v. Nic.kl, Inc., Defendant., 2022 WL 836871 (E.D. Pa. Mar. 21, 2022).
[105] Settlement Agreement, Dow Jones & Co., Inc., Plaintiff, v. Nic.kl, Inc., Defendant., 2:22-CV-01070.
[106] Hemel & Ouellette, *Beyond the Patents-Prizes Debate*, *supra* note 24, at 307.
[107] *Id.* at 308.
[108] Martha Minow, *The Changing Ecosystem of News and Challenges for Freedom of the Press*, 64 Loy. L. Rev. 499, 522 (2018).
[109] Geoffrey Cowan & David Westphal, *Public Policy and Funding the News* 10–11, USC Ctr. On Comm. Leadership & Pol. (2010), https://bpb-us-w1.wpmucdn.com/sites.usc.edu/dist/5/

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newsprint, and newspaper machinery and related equipment from sales taxes.[110] They have also excluded broadcasting and other telecommunications equipment from sales taxes.[111]

Such benefits are less valuable today because news organizations print fewer hard copies or offer digital-only products. But new tax incentives could be fashioned to better address publishers' needs in the digital age. For example, President Joe Biden's 2020 Build Back Better Act proposed tax credits for the salaries of new journalism hires. The bill, if enacted, would have provided $25,000 for the salary of local journalists in their first year of employment and a $15,000 tax credit for the following four years.[112] Similarly, Washington state recently enacted a law that reduces newspaper publishers' tax rate under the state's business and occupation tax,[113] a move estimated to save the states' publishers around $1 million per year.[114]

Other tax-based proposals have focused on better utilizing existing tax advantages. For example, nonprofit press institutions already receive general tax breaks available to all nonprofit journalism entities.[115] Some scholars have argued that the government should make it easier for for-profit news organizations to convert into nonprofit ones in order to obtain the benefits of these existing tax-based incentives.[116] The downside is that nonprofit institutions are restricted from engaging in certain political activities, such as endorsing candidates.[117] But these costs might be outweighed by the financial advantages of securing nonprofit status. Similarly, scholars have suggested moving all for-profit journalism institutions into a lower tax bracket.[118]

6 ("[F]ederal and state tax laws forgive more than $900 million annually in taxes related to newspapers and magazines.").

[110] *Id.*

[111] Minow, *supra* note 108, at 522.

[112] Marc Tracy, *Local News Outlets Could Reap $1.7 Billion in Build Back Better Aid*, N.Y. Times (Nov. 28, 2021), https://www.nytimes.com/2021/11/28/business/media/build-back-better-local-news.html. *See also* Stephen Gillers, Journalism under Fire 150 (2018) (arguing that this approach won't assist media organizations that earn little money and already have low tax burdens).

[113] Wash. Rev. Code Ann. §§ 82.04.214; 82.04.759. *See also Washington State Grants Tax Exemption to Publishing Industry Leaders*, Sales Tax Inst. (Dec. 27, 2023), https://www.salestaxinstitute.com/resources/washington-state-grants-tax-exemption-to-publishing-industry-leaders#:~:text=Gross%20Receipts%20Tax-,Washington%20State%20Grants%20Tax%20Exemption%20to%20Publishing%20Industry%20Leaders,and%20occupation%20(B%26O)%20tax (describing the effects of these legislative efforts).

[114] Brier Dudley, *Legislature Votes to Support Local News, New Capital Outlet Launching*, Seattle Times (Apr. 19, 2023), https://www.seattletimes.com/opinion/legislature-votes-to-support-local-news-new-capital-outlet-launching/.

[115] *See* ProPublica, *Donate*, https://give.propublica.org/give/346423/%23!/donation/checkout#!/donation/checkout (noting that donations are tax-deductible because the institution is a 501 (c)(3)).

[116] Gillers, *supra* note 112, at 150; Minow, *supra* note 11, at 141.

[117] Gillers, *supra* note 112, at 150.

[118] *Id.* at 149 (outlining this proposal, but also noting that there is a risk that the money goes back to shareholders or to news executives rather than back into democracy-promoting journalism).

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Scholars and policymakers have proposed modifying existing tax laws to incentivize the donation of legacy news institutions as well – for example, by eliminating capital gains when newspapers are sold or by providing enhanced federal tax deductions when newspapers are donated.[119] They also have focused on redistributive efforts among media institutions. For instance, they have proposed taxing wealthier news institutions that benefit from government information infrastructure like broadcast technology to subsidize other, less-profitable forms of journalism.[120]

Some of these proposals may not pass constitutional muster. At times, governments have imposed selective taxes on press institutions to silence political critics. The Supreme Court has struck down these efforts on First Amendment grounds.[121] In doing so, it has emphasized that the government should not use its powers of taxation to single out specific press institutions or the press as a whole for either beneficial or adverse treatment.[122] Yet the Court has permitted tax burdens that fall more heavily on some news industries than others. For example, it has upheld a tax on the receipts of the sales of services for cable television but not for newspaper and magazine subscriptions.[123]

As a result, generally applicable taxes will most likely not pose a constitutional problem. But those that burden the press specifically, favor certain press outlets over others, or discriminate against particular viewpoints may be found unconstitutional. It is unclear how these precedents would apply against some of the proposals described above, such as tax treatments that favor local press institutions over national or regional outlets. That said, tax incentives that do comply with First Amendment requirements offer a clear policy benefit. Such rewards incentivize news creation while still tethering its allocation to market forces.

25.2.3 *Government-Set, Ex Post Rewards*

Governments at all levels have also established rewards for which the government both sets the price and determines ex post how it is allocated. These innovation incentives mostly operate independent of market forces.[124] In the context of the press, these usually take the form of journalism prizes.

[119] *Solutions: Our Plan*, Rebuild Local News, https://www.rebuildlocalnews.org/solutions/our-plan/.

[120] Minow, *supra* note 11, at 142–43 ("The government could set aside for public media a portion of the proceeds from frequency auctions, or a portion of the application and renewal fee for broadcast licenses.").

[121] *See* Grosjean v. Am. Press Co., 297 U.S. 233, 240 (1936) (striking down a tax that targeted only newspapers with circulations larger than 20,000).

[122] *See, e.g.*, Minneapolis Star & Trib. Co. v. Minnesota Com'r of Revenue, 460 U.S. 575, 581 (1983); Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 234 (1987). The Court has reasoned that even tax benefits selectively granted could be used to reward press allies and silence press critics. *Minneapolis Star*, 460 U.S. at 592.

[123] Leathers v. Medlock, 499 U.S. 439, 441 (1991).

[124] *See* Hemel & Ouellette, *Innovation Policy Pluralism*, *supra* note 24, at 554–55.

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Governments have long used prizes to incentivize innovation, especially in areas like engineering, science, and medicine.[125] Among the best-known examples, the British government offered a prize in 1714 to whoever solved the long-standing problem of calculating longitude while at sea.[126] Press-based government prizes are distinct from those awarded in other contexts, in part because it is more difficult to create objective metrics against which to measure success and in part because there is a greater risk of viewpoint-based decision making by the government.[127]

Yet prizes already operate as a powerful incentive for the press. Awards like the Pulitzer Prize are among the nation's most prestigious and coveted domestic honors.[128] The financial benefits from these rewards are often modest compared to other forms of both government- and market-based interventions. The Pulitzer Prize, for example, provides award winners with $15,000.[129] But the nonmonetary benefits – including recognition, prestige, and potential future employment opportunities – are often highly valued.

Most journalism prizes are awarded by private nonprofit groups, such as the Pulitzer Prize Board[130] or the American Society of Magazine Editors, which awards the National Magazine Awards.[131] Yet some journalism prizes can be categorized as government or quasi-government initiatives. These are prizes awarded with government funds or administered through public universities. Among the best-known examples is the Peabody Award, which recognizes excellence in television, broadcast media, and radio journalism.[132] The University of Georgia and the National Association of Broadcasters jointly fund and administer this award.[133] Another example is the Livingston Award, which recognizes outstanding journalism by

[125] Hemel & Ouellette, *Beyond the Patents-Prizes Debate*, *supra* note 24, at 317–19 (describing this history).

[126] *See* M. Diane Burton & Tom Nicholas, *Prizes, Patents and the Search for Longitude*, 64 Explorations in Econ. History 21, 21–22 (2017), https://www.hbs.edu/ris/Publication%20Files/Longitude_e207c234-9b02-4be8-b5c2-252b42c04ec7.pdfhttps://www.hbs.edu/ris/Publication%20Files/Longitude_e207c234-9b02-4be8-b5c2-252b42c04ec7.pdf. *See also* Michael J. Burstein & Fiona E. Murray, *Innovation Prizes in Practice and Theory*, 29 Harv. J. L. & Tech. 401, 402–03 (2016) (examining how innovation prizes work in practice).

[127] *See* Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 580–85 (1998) (permitting content-based but not viewpoint-based choices when the government is making funding decisions to award arts grants to private recipients).

[128] The Pulitzer Prizes, https://www.pulitzer.org/.

[129] The Pulitzer Prices, *Frequently Asked Questions*, https://www.pulitzer.org/page/frequently-asked-questions#:~:text=What%20do%20Pulitzer%20Prize%20winners,cash%20award%20and%20a%20certificate.

[130] *Id.*

[131] National Magazine Awards, *ASME Awards 2024*, https://ellieawards.secure-platform.com/a/page/judges.

[132] The Peabody Awards, *83rd Peabody Winners*, https://peabodyawards.com/awards/winners/

[133] The Peabody Awards, *Our Story*, https://peabodyawards.com/our-story/; Am. Archive of Public Broadcasting, *History of the Peabody Award*, https://americanarchive.org/exhibits/peabody/history-peabody.

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reporters under the age of 35.[134] The University of Michigan administers and partially funds this prize.[135]

There are many such examples. The University of Florida administers the Collier Prize for State Government Accountability, for example, which awards $25,000 for excellence in press reporting about state governance.[136] The University of Wisconsin administers the Anthony Shadid Award for Journalism Ethics, which recognizes ethical decisions made during the newsgathering process.[137] UCLA administers the Loeb Awards, which recognizes excellence in business and financial journalism.[138] And so on.[139]

In addition to prizes that public universities administer, government agencies also directly dispense a handful of awards. For instance, the U.S. Agency for Global Media, which oversees government-funded and directed media outlets like Voice of America and Radio Free Europe,[140] offers annual prizes to government journalists employed by affiliated press institutions.[141] A handful of government actors or agencies at the state or local levels also directly award journalism prizes. For instance, the Texas Governor's Committee on People with Disabilities issues an annual award recognizing excellence in reporting about individuals with disabilities.[142]

25.2.4 *Government-Set, Ex Ante Rewards*

Finally, the government provides ex ante awards to the press, or monetary incentives that the government dispenses before a news product has been created. Examples

[134] Wallace House Ctr. for Journalism, *Investing in the Future of Journalism*, https://wallacehouse.umich.edu/livingston-awards/about/.

[135] Wallace House Ctr. for Journalism, *Staff*, https://wallacehouse.umich.edu/wallace-house/staff/.

[136] *About Us*, Collier Prize for State Gov't Accountability, Univ. of Fl. College of Journalism and Comm., https://www.jou.ufl.edu/collier-prize-for-state-government-accountability/collier-prize-about/.

[137] *Shadid Award Nomination*, Ctr. for Journalism Ethics, Wisc. School of Journalism and Mass Comm., https://ethics.journalism.wisc.edu/shadid-award/shadid-award-nomination/.

[138] Press Release, UCLA School of Management, 2023 Gerald Loeb Award Finalists, Lifetime Honorees and Awards Event in New York City Announced by UCLA Anderson (Aug. 15, 2023), https://www.prnewswire.com/news-releases/2023-gerald-loeb-award-finalists-lifetime-honorees-and-awards-event-in-new-york-city-announced-by-ucla-anderson-301901255.html.

[139] *See, e.g.*, University of Oregon School of Journalism and Comm., *Ancil Payne Award for Ethics in Journalism*, https://journalism.uoregon.edu/payne (describing journalism award administered by the University of Oregon); Ariz. St. Univ., Walter Cronkite School of J. and Mass Comm., *Cronkite Award Honors David Muir*, https://cronkite.asu.edu/community/walter-cronkite-award/ (describing journalism award administered by Arizona State University); USC Annenberg School for Communication and Journalism, *The Selden Ring Award for Investigative Reporting*, https://annenberg.usc.edu/journalism/selden-ring (describing journalism award administered by the University of Southern California).

[140] U.S. Agency for Global Media, *David Burke Awards*, https://www.usagm.gov/awards/.

[141] *Id.*

[142] Office of the Tex. Gov., *Barbara Jordan Media Awards*, https://gov.texas.gov/organization/disabilities/barbara_jordan_media_awards.

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include various types of grants and subsidies for media institutions. They also include direct funding to government-controlled media entities, such as the military publication Stars and Stripes or overseas government radio and broadcast stations like Voice of America.

25.2.4.1 Grants and Subsidies

The government has long supported the press in the form of both direct and indirect grants and subsidies. Historical examples include financial assistance with the purchase of newspaper manufacturing equipment,[143] shipping costs,[144] and more.[145]

Ex ante government rewards today come in different forms. Some are one-time or time-limited grants. They can look like prizes, but they operate as grants because the government dispenses them before press products are created. Examples include government-funded journalism fellowships like the Fulbright Program. Fulbright Germany, for instance, offers funding for early-career American journalists to conduct research and serve as interns in German media outlets.[146] Fulbright Japan offers a fellowship for early-career journalists to engage in a months-long reporting project in Japan.[147] And the Fulbright-National Geographic Award Program offers one-time grants for research and storytelling about conservation efforts in partnership with the National Geographic magazine.[148]

Some states have also begun experimenting with government-funded fellowships to compensate for the loss of local news reporting. In 2022, for instance, the California legislature allotted $25 million in state funding to a new state-sponsored reporting fellowship.[149] The program awards up to 40 two-year fellowship positions per year at news organizations throughout the state, with an emphasis on serving underrepresented communities.[150] Similar programs have been funded in New

[143] *See, e.g.*, Cowan & Westphal, *supra* note 109, at 10–11.
[144] *See, e.g.*, Postal Act of 1792, Act of Feb. 20, 1792, ch. 7, 1 Stat. 232.
[145] *See, e.g.*, Minow, *supra* note 11, at 52–54 (describing government research and development funding for communications infrastructure).
[146] Fulbright U.S. Student Program, Germany, 5 *Young Professional Journalist Program*, https://us.fulbrightonline.org/countries/europe-and-eurasia/germany/1686.
[147] Fulbright U.S. Student Program, Japan, 5 *Journalism (Research)*, https://fulbrightscholars.org/award/journalism-research.
[148] The Fulbright-National Geographic Award, *Fulbright U.S. Student Program*, https://us.fulbrightonline.org/applicants/types-of-awards/fulbright-national-geographic-award.
[149] Christa Scharfenberg, *More Public Funding for Local News*, Nieman Lab (2024), https://www.niemanlab.org/2023/12/more-public-funding-for-local-news/; *About the Fellowship*, U.C. Berkeley School of Journalism, https://fellowships.journalism.berkeley.edu/cafellows/.
[150] *About the Fellowship*, U.C. Berkeley School of Journalism, https://fellowships.journalism.berkeley.edu/cafellows/.

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Mexico and Washington state,[151] and legislatures in other states are considering additional proposals.[152]

A related set of ex ante rewards provide annual or repeated financial grants to the press. Perhaps most significant is Congress's annual budgetary allotment to the Corporation for Public Broadcasting, which oversees public-funded media institutions like NPR and PBS.[153] Each year, Congress allots funding to the independent governing board. The board then disperses these funds to public radio and television stations across the nation.[154] These funds are significant. Congress provides over $500 million per year to public media.[155] Yet they still represent only a small part of public radio and broadcasting stations' spending. Congressional allocations comprise only around 7 percent of the average public radio's budget and 13 percent of the average public television station's budget today.[156]

Some states have followed the federal government's lead by enacting similar public media governance institutions. In 2018, for example, New Jersey created the New Jersey Civic Information Consortium.[157] This structure is similar to the federal model in that the state legislature awards a grant to the consortium, which then allocates the funds to different state and local media institutions.[158] But the funds have been dispensed differently and have been used to support a wider range of media outlets, including journalism translation services and training programs.[159]

The government awards many other, smaller grants annually to media institutions. For example, the Bay Journal is a small publication that covers environmental issues in the Chesapeake Bay.[160] The Clean Water Act of 1972 requires that the government make information about its progress on the bay cleanup available to the public.[161] Since the 1980s, the Environmental Protection Agency (EPA) has fulfilled

[151] Press Release, Sen. Karen Keiser, 33 Leg. District – Des Moines, WA Legislature Establishes Fellowship for Journalism in the Public Interest, https://senatedemocrats.wa.gov/keiser/2023/04/26/wa-legislature-establishes-fellowship-for-journalism-in-the-public-interest/.

[152] Scharfenberg, *supra* note 149.

[153] Corporation for Public Broadcasting, *About CBP*, https://www.cpb.org/aboutcpb.

[154] *Id*.

[155] Press Release, Corporation for Public Broadcasting, CPB Statement on Congress' Passage of Funding for Public Media, https://www.cpb.org/pressroom/CPB-Statement-Congress-Passage-Funding-Public-Media.

[156] Corporation for Public Broadcasting, *CFB Financial Information*, https://www.cpb.org/aboutcpb/financials. The remaining costs are covered by a combination of state and local government allocations, universities and foundations, and donations from listeners. *Id*.

[157] N.J. Civic Information Consortium, *About the Consortium*, https://njcivicinfo.org/about/.

[158] *Id*.

[159] New Jersey Civic Information Consortium, *Annual Report* (2023), https://njcivicinfo.org/wp-content/uploads/2023/11/2023-Annual-Report-New-Jersey-Civic-Information-Consortium.pdf.

[160] Bay Journal, *About Us*, https://www.bayjournal.com/site/about.html.

[161] 33 U.S.C.A. § 1267(B)(ii).

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this obligation by awarding funding each year to the Bay Journal through a competitive grant.[162]

Scholars and advocates have also proposed new types of grant-funding institutions to support the press. One scholar has argued for the creation of a "National Endowment for Journalism," similar to the National Endowment for the Arts.[163] This program could be modeled after the federal government's arts program, accepting applications and dispensing funds on a project-by-project basis. Others have proposed an international journalism consortium, which would dispense journalism funds globally, allowing democratic nations to support journalism efforts in repressive or autocratic nations.[164] Still others have proposed the creation of a local news bank that would offer low-interest loans, no-interest loans, or loans-to-grant support for new or struggling local press institutions.[165]

A further set of ex ante government interventions come in the form of press subsidies used to defray press institutions' costs. Examples include the post office subsidies to newspapers. These began in colonial times, but they continue into the present. The value of these subsidies, however, has declined over time. Until the late 1960s, publishers received up to a 75-percent subsidy on mailed news products.[166] Today, the postal subsidy is around 11 percent.[167] The importance of this ex ante reward has decreased with the transition to digital publication. But the total amount of the postal subsidy was significant. At the program's height in 1967, the government was providing the equivalent of roughly $3.5 billion in today's dollars in postal subsidies to the press.[168]

Another form of government subsidy for the press comes in the form of reduced licensing fees for private media institutions that broadcast over government-owned

[162] Jacob Fenston, *The EPA Killed This Newspaper's Funding. Was It Something They Said?*, WAMU (Feb. 7, 2018), https://wamu.org/story/18/02/07/epa-killed-newspapers-funding-something-said/. The journal also illustrates the perils of government support for the press without proper safeguards in place against editorial interference. *See* Jon Allsop, *An Unusual First Amendment Fight on the Chesapeake Bay*, Colum. Journalism Rev. (Feb. 22, 2018), https://www.cjr.org/united_states_project/bay_journal_epa_funding.php (describing how the EPA threatened to cut funding in retaliation for unfavorable coverage).

[163] Gillers, *supra* note 112, at 163.

[164] Nishant Lalwani, *A Free Press Is the Lifeblood of Democracy – Journalists Must Not Be Silenced*, The Guardian (July 5, 2019), https://www.theguardian.com/global-development/2019/jul/05/a-free-press-is-the-lifeblood-of-democracy-journalists-must-not-be-silenced.

[165] Rebuild Local News, *Solutions: Policy Menu*, https://www.rebuildlocalnews.org/policy-menu/.

[166] Cowan & Westphal, *supra* note 109, at 1.

[167] *Id.*

[168] Steven Waldman, *There's Already a Solution to the Crisis of Local News. Just Ask This Founding Father*, Politico (Apr. 2, 2023), https://www.politico.com/news/magazine/2023/04/02/james-madison-subsidize-the-news-00090023. Different scholars have provided different estimates of the value of these 1960s-era subsidies. *See, e.g.*, Cowan & Westphal, *supra* note 109, at 1 (arguing that the subsidies were worth around 2 billion in today's dollars).

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radio and broadcast frequencies.[169] Historically, the government has charged these commercial media institutions only nominal amounts, allowing private media institutions to construct their business on top of the public's airwaves.[170] In exchange, the government has imposed public-interest obligations on these private institutions. For example, the government has required licensees to air both sides of an issue and cover topics of public importance.[171] The government has also offered cable companies public rights of way for the laying of cable infrastructure as long as they open up free access channels for public, government, and educational access television.[172] Individuals and community groups can then use these stations to air programming at little or no cost.[173]

25.2.4.2 Government Press

Government-run media outlets can also be characterized as an extreme form of ex ante government reward.[174] While government actors mostly or entirely fund and administer these institutions, they still play an important role in the democratic information ecosystem, reporting from regions and telling stories that commercial outlets are no longer able to cover. They also have some mechanisms in place to safeguard journalistic independence and protect against editorial interference.

One well-known example is Stars and Stripes, a military newspaper that the Union Army began during the Civil War.[175] Today, the Defense Media Activity, a subset of the Department of Defense, administers the paper.[176] Roughly half of its funding comes from the Pentagon.[177] Under federal regulations, military interference in the editorial process is prohibited,[178] and the newsgathering and publishing process must proceed "in accordance with journalistic standards governing US daily commercial newspapers of the highest quality."[179]

Another example is the set of government-run radio and television stations that broadcast overseas. These include the federal entities of Voice of America and the

[169] Minow, *supra* note 11, at 43.
[170] *Id.*
[171] *Id.*
[172] Public, Educational, and Governmental (PEG) Access Cable Television Channels: Issues for Congress, Cong. Res. Serv. Rep., R42044 (Jan. 4, 2013), https://www.everycrsreport.com/files/20130104_R42044_65f871bc221565c497baa74be4b6bb299ca5d718.pdf.
[173] *Id.*
[174] *Cf.* Rochelle Cooper Dreyfuss, *Tailoring Incentives: A Comment on Hemel and Ouellette's Beyond the Patents-Prizes Debate*, 92 Tex. L. Rev. 131, 132 (2014) ("[G]overnment-conducted research has several unique features that make the option worthy of separate consideration.").
[175] Stars and Stripes, *About Stars and Stripes*, https://ww2.stripes.com/about-us#history/.
[176] *Id.*
[177] *Id.* The other half comes from advertisements and subscriptions. *Id.*
[178] 32 C.F.R. § 246.4.
[179] *Id.*

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Office of Cuba Broadcasting.[180] They also include Radio Free Europe, Radio Free Asia, and the Middle East Broadcasting Networks, which operate as independent nonprofits but receive substantial funding from federal government grants.[181] Collectively, these radio and television stations broadcast in more than forty languages in countries around the globe.[182]

There are also some safeguards in place to protect against government interference with the editorial process. For example, by federal statute, the secretary of state must "respect the professional independence and integrity" of the stations.[183] Yet these institutions are not wholly independent. For instance, Voice of America must produce content that is "consistent with the broad foreign policy objectives of the United States."[184] Government-controlled journalism comes with risk, moreover, such as the threat that government actors will retaliate against press institutions for unfavorable coverage through funding cuts and other mechanisms.[185]

Even so, these outlets play an important role in the broader press ecosystem. Dozens of news outlets have closed their foreign bureaus since 2003, and the ones that still exist now employ fewer reporters.[186] Government press institutions cannot replace truly independent media. But in certain places overseas, such as many US military bases abroad, government journalists are the only American correspondents left reporting from the area.[187]

Together, government grants and subsidies at all levels offer substantial financial assistance to the press. Yet the amount of ex ante support the United States provides today is much lower than it has been in the past.[188] The United States also lags behind other Western democracies in the amount of press support that it provides.[189] While the United States spends around $1.40 per capita to fund public media, for example, the United Kingdom spends around $80 per capita, and Denmark spends more than $100 per capita.[190] The US government could still do more, especially when it comes to local media outlets.

[180] U.S. Agency for Global Media, *Structure*, https://www.usagm.gov/who-we-are/organizational-chart/.
[181] U.S. Agency for Global Media, *Radio Free Asia*, https://www.usagm.gov/networks/rfa/.
[182] Voice of America, *Mission and Values*, https://www.insidevoa.com/p/5831.html.
[183] 22 U.S.C.A. § 6202(c)(1), 22 U.S.C.A. § 6204(c).
[184] 22 U.S.C.A. § 6202(a)(1).
[185] *See, e.g.*, Riley Beggin, *The Fight over Defunding Stars and Stripes, Explained*, Vox (Sept. 5, 2020), https://www.vox.com/policy-and-politics/2020/9/5/21424085/trump-fight-defunding-stars-and-stripes-newspaper (describing threats to cut the funding of *Stars and Stripes*).
[186] Anup Kaphle, *The Foreign Desk in Transition*, Colum. Journalism Rev. (Mar. 2, 2015), https://www.cjr.org/analysis/the_foreign_desk_in_transition.php.
[187] *Ombudsman on the Pentagon's Order to Shut Down 'Stars and Stripes'*, On Media, NPR (Sept. 4, 2020), https://www.npr.org/2020/09/04/909793785/ombudsman-on-the-pentagons-order-to-shut-down-stars-and-stripes.
[188] Waldman, *supra* note 168.
[189] *See* Pickard, Stearns & Aaron, *supra* note 49, at 252.
[190] Timothy Karr & Craig Aaron, Beyond Fixing Facebook 20 (2019), https://www.freepress.net/sites/default/files/2019-02/Beyond-Fixing-Facebook-Final.pdf.

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25.2.5 *Hybrid Approaches*

Several existing or proposed media-related innovation policy levers incorporate aspects of the different interventions described above. Unlike grants and prizes, these interventions do not entail direct government funding of media organizations, but they also do not entail pure free market-driven rewards. Rather, the government intervenes at various stages of the press-to-consumer supply chain to promote purchasing, leading to compensation to media organizations without having to rely solely on consumer willingness or ability to pay.

One example of such an intervention is the practice of public libraries and educational institutions purchasing newspaper and magazine subscriptions.[191] These government institutions pay the media company's market price but then provide the public with access to these materials for free. This intervention is akin to what Hemel and Ouellette call a "matching" approach to innovation policy, in which an ex post market-based innovation reward is coupled with a government-controlled form of allocation.[192] Such combinations can be particularly valuable when the government wishes to rely on predominantly market-based innovation incentives but the public benefits of cheap or free dissemination are also high.[193] This is certainly true of the press, where the positive effects of citizen access to media are notably high.[194]

Another example of the government intervening in the media-to-consumer supply chain is through tax credits or subsidies to consumers. For example, a 2020 draft bill in Congress proposed giving each taxpayer a $250 credit for subscriptions to local newspapers.[195] The credit would have covered 80 percent of subscription costs in the first year and 50 percent of subscription costs in each of the next four years.[196] Similarly, the Massachusetts legislature has also proposed providing taxpayers with a credit of up to $250 to purchase subscriptions to "local community newspapers."[197]

[191] *See* Daniel A. Gross, *The Surprisingly Big Business of Library E-Books*, New Yorker (Sept. 2, 2021), https://www.newyorker.com/news/annals-of-communications/an-app-called-libby-and-the-surprisingly-big-business-of-library-e-books (describing the high costs publishers are charging libraries for access to e-books and digital magazine subscriptions).

[192] The main example of this trend is the government purchasing a patent at the market rate, and then distributing the patented intervention to the public at a free or discounted rate. But the strategy can be used in copyright markets as well. Hemel & Ouellette, *Innovation Policy Pluralism*, *supra* note 24, at 602–07 (citing public libraries' purchase of copyrighted works for free public consumption).

[193] *Id*.

[194] *See* discussion *infra* Section 25.3.

[195] Local Journalism Sustainability Act, 116th Cong., H.R.3940 (June 16, 2021), https://www.congress.gov/bill/117th-congress/house-bill/3940. *See also* Local Journalism Sustainability Act Summary, Rep. Ann Kirkpatrick & Dan Newhouse, https://www.rebuildlocalnews.org/wp-content/uploads/2023/01/kirkpatricknewhousesummary.pdf (summarizing the bill).

[196] Local Journalism Sustainability Act Summary, *supra* note 195.

[197] An Act to Establish a Local Community Newspaper Subscription Tax Credit, H.D. 1518, 193rd General Court of the Commonwealth of Massachusetts, https://malegislature.gov/Bills/193/HD1518.

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Some foreign countries have already enacted such provisions. France, for instance, provides a tax deduction of up to 50 euros to anyone who purchases a new magazine or newspaper subscription.[198] Similarly, one United States nonprofit has suggested giving citizens vouchers to purchase news products.[199] All of these proposals would lower the costs of news for consumers, allowing them to purchase media products at the market price even if their willingness or ability to pay is otherwise low.

The government has also intervened in the media advertising market by creating tax exemptions for the sale of advertising services.[200] The goal of these initiatives is to return advertising dollars back to the press, especially to local press institutions. States have long exempted news advertising from general sales tax obligations.[201] But others have experimented with more novel approaches in recent years. In 2021, for instance, Wisconsin created an income and franchise tax credit for any business that purchased advertising in a local media outlet.[202] The credit can be used for 50 percent of the advertising expenditure up to a maximum of $5,000.[203] Likewise, in 2023, Maryland enacted a law permitting small- and medium-sized businesses to claim a tax credit for advertising through a news media organization based in the state.[204] Similar bills have been proposed in other states and in Congress, although they have yet to pass.[205] As with consumer tax benefits, these interventions preserve media companies' market-based revenue structure – in this case, advertising – but encourage greater purchasing than might otherwise occur.[206]

[198] *France Gives Tax Credits to News Subscribers*, News Media Ass'n (July 2, 2020), https://newsmediauk.org/blog/2020/07/02/france-gives-tax-credits-to-news-subscribers/. *See also* Gov't of Can., *About the Digital News Subscription Tax*, https://www.canada.ca/en/revenue-agency/services/tax/individuals/topics/about-your-tax-return/tax-return/completing-a-tax-return/deductions-credits-expenses/deductions-credits-expenses/digital-news-subscription.html (describing a similar law in Canada).

[199] Mark Histead, *Local News Dollars*, Democracy Pol. Network, https://democracypolicy.network/agenda/strong-people/strong-communities/local-news-dollars. This proposal is based on Seattle's "democracy voucher" program, in which residents get $25 credits to donate to any political campaign that they would like. *See* David Hyde, *Democracy Vouchers Are Back, But Do They Neutralize Big Money in Local Politics?*, KUOW (Feb. 21, 2023), https://www.kuow.org/stories/democracy-vouchers-are-back-but-do-they-neutralize-big-money-in-local-politics.

[200] Cowan & Westphal, *supra* note 109, at 10–11 (describing state-level tax breaks for the sale of advertising services).

[201] *Id.*

[202] 2021 Assembly Bill 762, AB 762, Wisconsin State Legislature (Dec. 9, 2021), https://docs.legis.wisconsin.gov/2021/related/proposals/ab762.

[203] *Id.*

[204] Income Tax – Local Advertising Tax Credit, Maryland General Assembly, 2023 Session, https://mgaleg.maryland.gov/mgawebsite/Legislation/Details/hb0540?ys=2023RS.

[205] *See, e.g.*, .R. 4756, 118th Cong. (July 19, 2023), https://www.congress.gov/bill/118th-congress/house-bill/4756/text; HB 1121, House Committee of Reference Amendment, Colorado General Assembly 2022, https://s3-us-west-2.amazonaws.com/leg.colorado.gov/2022A/amendments/HB1121_L.003.pdf.

[206] A related strategy is the government's intervention as a participant in the advertising market itself. For example, some have argued that the government should prioritize purchasing of advertisement in media sources that need financial help, such as local news. *See Government*

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25.3 CONCLUSION: TOWARDS A PRESS POLICY FRAMEWORK

A range of innovation policy levers are already at play in the press ecosystem. From copyright and other intellectual property protections, to tax credits, to grants, to prizes, the government has frequently intervened to encourage the creation of media products. As the last section explained, categorizing these interventions as ex post or ex ante and as government-based or market-based showcases that they fall within the innovation policy pluralism framework that has been used in other industries where innovation is prioritized.

We hope this categorization is valuable in and of itself, but we also believe that innovation policy pluralism provides a necessary path to tackling some of the biggest problems facing the press today. A full discussion of these issues – including analogizing to interventions in other industries that frequently suffer from innovation failures – will be the subject of future research. But we conclude here by briefly offering some preliminary observations.

First, and perhaps most obviously, the press must be understood as a form of innovation that can benefit from numerous, and overlapping, policy interventions. The choice here should not be between market-based remuneration and full government control of the media. Rather, a range of more subtle interventions can be used in combination to solve the specific problems facing the media. For example, just as financially lucrative pharmaceuticals – like weight loss drugs – can generally be incentivized solely using market-based interventions, like patents,[207] so too large, national media organizations may be able to survive primarily by using market-based interventions, like copyright or press publishers' rights.[208] But just as other pharmaceuticals, such as "orphan drugs" for rare diseases, often require direct government funding,[209] so too media in smaller, less established markets may require more direct grants in order to successfully operate.[210]

Second, paying attention to both the timing and institutional nature of a press policy intervention may help with weighing the pros and cons of an intervention, including First Amendment implications. While many are naturally skeptical of government control of the press,[211] not all government intervention is the same. The

Advertising and Local News, Center for Community Media, https://www.rebuildlocalnews.org/designing-the-program-introduction/.

[207] Hemel & Ouellette, *Beyond the Patents-Prizes Debate*, *supra* note 24, at 376–78.

[208] *See* discussion *supra* Section 25.1.1.

[209] *See*, *e.g.*, Orphan Drug Act, Pub. L. No. 97-414, 96 Stat. 2049 (1983) (codified as amended in scattered sections of 15, 21, 42 & 46 U.S.C.).

[210] *See* discussion *supra* Sections 25.1.3 and 25.1.4.

[211] *See*, *e.g.*, George F. Will, *Local Media Is Struggling. Government Subsidies Would Make It Worse.*, Wash. Post (Feb. 21, 2024), https://www.washingtonpost.com/opinions/2024/02/21/government-subsidies-newspapers/; Jeffrey M. McCall, *Keep Government Money Out of Journalism Industry*, The Hill (Sept. 20, 2022), https://thehill.com/opinion/technology/3651235-keep-government-money-out-of-journalism-industry/. *See also* Hemel & Ouellette, *Innovation Policy Pluralism*, *supra* note 24, at 605–06 (arguing that for creative works, we may not want "the government dictating the substance of creative works, but we do want some subsidy for producers and consumers.").

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government, for example, can intervene using broadly applicable tax credits for media organizations. If structured properly, such an approach can provide a necessary financial boost, while still trusting the market to ultimately allocate rewards to media products based on public demand.[212] This might help ensure the government does not engage in content- or viewpoint-based discrimination in choosing how to allocate funding, while still recognizing that the press cannot survive if forced to shoulder all of the harsh realities of a market-focused business model.

Third, the question of innovation incentives can and should be decoupled from the question of allocation. Scholars and policymakers have criticized intellectual property and other forms of market-based pricing for failing to account for distributive justice and other values.[213] Considering the role of the press in fostering democratic engagement, this concern certainly also applies to media products.[214] But the government can step in in subtle ways to enable broader distribution of press products, even if incentives are market focused. Just as the government may purchase a vaccine patent at the market price and then distribute the vaccine for free, the government can (and has, in the case of public libraries and education institutions) purchase press products at market-based prices and then allocated those products for free.[215] Such an approach may be particularly valuable since it frees the press's decision making from government supervision but still enables broad access to media products.[216]

Fourth, and finally, new interventions may be necessary to successfully solve the many financial problems facing the press, especially in an age of platform-based intermediation and increasing public distrust of the media in general. The numerous interventions in other innovation-intensive industries like pharmaceuticals, music, or technology – such as compulsory licensing, various grant and tax credit programs, and new or adapted intellectual property rights – could be mined to discover promising solutions to the crises facing the press. These examples demonstrate that innovation in general is rarely a one-size-fits-all policy problem, and solving the problems facing the media will be no exception.

[212] Hemel & Ouellette, *Beyond the Patents-Prizes Debate*, *supra* note 24, at 376 ("Patents . . . are most effective where potential innovators have ready access to the requisite financial capital and where the negative effects of risk aversion on innovators' incentives are limited . . . and where market signals provide reliable proxies for social benefits.").

[213] *See generally* Amy Kapczynski, *The Cost of Price: Why and How to Get Beyond Intellectual Property Internalism*, 59 UCLA L. Rev. 970, 978 (2012) ("Price can be a problematic way of distributing goods that are important to justice because the existing distribution of resources may be unjust.").

[214] *See*, *e.g.*, Victor Pickard, *Journalism's Market Failure Is a Crisis for Democracy*, Harvard Bus. Rev. (Mar. 12, 2020), https://hbr.org/2020/03/journalisms-market-failure-is-a-crisis-for-democracy (arguing that the local news crisis "arose because the news media's commercial imperatives never fully aligned with democratic objectives").

[215] *See* discussion *supra* Section 25.2.5.

[216] *Cf.* Hemel & Ouellette, *Innovation Policy Pluralism*, *supra* note 24, at 602–03 (looking to libraries as an example of "a match between an IP innovation incentive and a non-IP allocation mechanism").

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