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Executive Summary

With the release of the National Broadband plan last year, policymakers in the United States made the Internet the centerpiece of America's goals for future media policy. Although the plan addressed a very broad array of objectives on issues ranging from health care delivery to national security, it also sought to promote universal broadband access in the service of civic participation. The plan raised profound questions that go to the heart of media policy.

These questions arise as the Internet has shaken the foundations of traditional media and established media policy. Paradoxically, the new medium has made more information available to more people than at any time in history, and even some traditional media have more viewers and readers than ever, yet media companies are struggling to devise a business model that can survive in the new environment. Two federal agencies, the Federal Communications Commission ("FCC") and the Federal Trade Commission ("FTC"), launched inquiries to develop recommendations for policy changes to better enable journalism to flourish in the Digital Age. To a certain extent, traditional media already were losing their audience to newer entrants, but these trends have been fueled in recent years by the economic downturn and possibly made permanent by technological changes that undermine traditional advertiser-supported media.

Policy recommendations for the future must take into account the fact that media functions have converged, while existing regulatory models in the U.S. are predicated on distinct media that serve discrete functions. The print media historically were not subject to regulation per se, but were governed by generally applicable business law, subject to First Amendment protection that guarantees freedom of the press. In the early Twentieth Century, as electronic media emerged, the federal government regulated telephones and telegraphs as common carriers. It separately regulated broadcasting as a licensed medium infused with certain "public interest" obligations. Congress added new regulatory categories with distinct rules as new technologies were introduced, such as cable television.

The emergence of the Internet raised fundamental questions about the government's continuing ability to create new regulatory classifications for new media. The previous approach of creating new sets of rules based on a medium's particular characteristics is difficult to rationalize with a converged medium, which can serve all of the functions of

legacy media combined. This also has raised the question of whether media policy might exceed the bounds of government power under the First Amendment.

These questions have arisen recently in connection with the U.S. government's efforts to adopt such policies as "network neutrality." The FCC's initial efforts to enforce such "open Internet" requirements were struck down on judicial review as being beyond the administrative agency's authority. Its adoption of new network neutrality rules in December 2010 directly raised questions regarding the proper regulatory classification for online media as well as the limits of FCC authority to regulate broadband.

At this point, U.S. policymakers have more questions than answers. New technologies may have undermined the historic justifications for regulating legacy communications media, and older regulatory classifications do not fit the new media. This was a principal theme of the FCC's June 2011 report on the future of media, entitled *THE INFORMATION NEEDS OF COMMUNITIES*. It acknowledged that, inconsistencies resulted from the fact that existing policies were created to address issues inherent to a particular medium, but that content was now available on multiple platforms. Accordingly, the report found that many existing rules intended to advance the public interest goals are ineffective, and that policies that might have once made sense have not kept up with changes in communication technology.

The FCC report concluded that government cannot "save journalism," and that constitutional constraints would limit extensive attempts to do so. But while it documented the steep economic declines suffered by traditional media companies, it acknowledged that "breathtaking media abundance lives side-by-side with serious shortages in reporting." It made a number of policy recommendations, including universal broadband service and an open Internet, greater government transparency, targeting government advertising spending on local media, and making changes in the tax code to assist non-profit media. It is uncertain the extent to which such recommendations will be implemented by policymakers.

Author

Robert Corn-Revere practices First Amendment and communications law at Davis Wright Tremaine LLP in Washington, D.C. Mr. Corn-Revere writes extensively on First Amendment and media-related issues and has provided expert testimony before various congressional committees and the Federal Communications Commission. In addition to numerous scholarly articles, he is co-author of a three-volume treatise entitled MODERN COMMUNICATIONS LAW, published by West Group, and is editor and co-author of the book, RATIONALES & RATIONALIZATIONS, published by the Media Institute. Mr. Corn-Revere previously served as Chief Counsel to former FCC Chairman James H. Quello.