

## The Discourse Costs of Free: Warning Signs from the US



*Regular Internet users have become accustomed to freely circulating content, but is it really free? Rutgers University Law Professor and LSE Visiting Fellow **Ellen Goodman** urges consideration of the “discourse costs” of freely distributed content, highlighting examples from the US that she finds particularly concerning.*

The **Center to Protect Journalists** (CPJ) recently released a report by Leonard Downie Jr., former Executive Editor of *The Washington Post* (and London correspondent), entitled **The Obama Administration and the Press: Leak Investigations and Surveillance in Post-9/11 America**. The Report is a careful and scathing chronicle of Obama Administration prosecutions and surveillance of journalists in connection with reporting on national security matters. Sometimes the government’s goal was to secure the names of sources who had leaked classified information; sometimes the government went further, alleging that the journalists had themselves committed espionage by virtue of their newsgathering activities.

The CPJ Report also reveals the difficulties journalists have had in covering the White House as the Administration makes its own media, communicating directly with the public without feeling compelled to engage with independent journalists. The struggle to report on government, coupled with the need to defend itself *from* government, is a special burden for the press given the conclusions of Downie’s last major report (co-written with Michael Schudson) for the Columbia Journalism Review on the **Reconstruction of American Journalism**: journalism is woefully under-resourced and requires government aid, not hindrances.

These two reports have more links. The CPJ Report suggests that the degree of state interference – either directly through legal action or indirectly by chilling speech – is unprecedented. The government has lost its inhibitions around messing with the press. This newfound courage is undoubtedly related to the loss of press authority and capability, discussed in the Columbia Report. To the extent that the loss of traditional journalistic authority entails a price in journalistic freedom, it is just one cost of what otherwise is a blessed abundance of information flowing through digital networks. I want in the rest of this post to consider just a few of the other costs.

The digital information flow has been a boon for expressive freedom and consumer value, a shock to traditional high-cost journalism, and a sometimes ruinous challenge for the content-producing industries. As the world adjusts to the new economics of information, we may be paying a price for free information in some surprising ways. We can think of these as “discourse costs.” They probably cannot be avoided without causing harm. But for those who focus on free expression and the promotion of democratic discourse, it is worth considering the wash and backwash of the information flow.

Two examples of potential “discourse costs” are:

1. **Distributed journalism.** We know that high-cost investigative journalism has taken a huge hit as traditional media outlets have lost the capital necessary to subsidize those activities. We hope that new financial models emerge to support investigative journalism and that the job of accountability reporting is taken up by the crowd. Indeed, the WikiLeaks and Snowden releases may be examples of distributed models of investigative journalism.

What is the unsurprising reaction of those seeking to conceal information to crowd-sourced investigations? It is to crack down on information-gathering at the source. There are many

examples of this in the U.S.:

- The U.S. Justice Department's unprecedented **crackdown on whistleblowers**, chronicled in the CPJ Report. Some of the government tactics were forecast in the **Pentagon Papers case** in 1971. That case held that the government could not restrain publication once sensitive information was leaked, but that it could always go after the leakers with a vengeance. According to Justice Stewart, a great press advocate, "the responsibility must be where the power is." Unfortunately, harsh treatment of whistleblowers makes it much more difficult for journalists to get sources to speak to them, as the CPJ Report shows.
  - The adoption by a handful of States of laws that criminalize undercover reporting of farm animal abuse – what are known as **ag-gag laws**. This is another way to shut up whistleblowers before their information goes viral and the communication is uncontrollable and is a form of prior-restraint.
  - Of course, the widespread NSA surveillance of communications functions to chill speech and the circulation of information – the CJR Report addresses these implications in both the U.S. and Britain.
  - The same chilling effects result from **suspicion-less searches** of electronic devices of journalists and others at border crossings, which has become much more common at U.S. borders.
1. **Disintermediated content.** The free flow of content around the net, whether through legal or illegal sharing, means that content owners have trouble monetizing their works. The principal solution seems to be advertising. In addition to the well-documented privacy and discourse concerns related to highly targeted, behavioral marketing (see especially the work of **Joe Turow**), there are other costs to free content and services.
- In an article on **Stealth Marketing** that I wrote a while back, I noted that one of the consequences of digital distribution of copyrighted works would be an increasing reliance on advertising and marketing to compensate creators. Dr. Guy Pessach has now shown, in **Deconstructing Disintermediation: A Skeptical Copyright Perspective**, that increased advertising (to replace other revenues) results in a shift in – and newly concentrated power over – cultural production.
  - The stealth marketing that I spoke of seven years ago is nothing compared to the "native advertising" or sponsored content that is now becoming commonplace in news and entertainment (**Peter Menell** has a new paper on this). Publishers often identify the content as sponsored, but that identification falls away once the content is disaggregated through search or social networking. Interestingly, online intermediaries like Google are stepping in to police the commercial/editorial line by **refusing to rank native advertising alongside editorial content** or to include those sponsored stories in Google news. Of course Google has its own reasons for wanting to depress access to native advertising... unless it is getting a share of the advertising revenue. If the interests of commercial platforms are aligned with the interests of the public, it's all good. But the power of these intermediaries, stoked by the free information they transmit, argues for vigilance.
  - The final example here is Gmail and other free internet services run on **surveillance and targeted advertising**. We may pay for free in ways that we don't like.

Across the board, there are tradeoffs to zero-cost distribution. The challenges to journalism, both from the state and the market, are just one set of concerns nested in a larger ecosystem of information and its control.

*This article gives the views of the author, and does not represent the position of the LSE Media Policy Project blog, nor of the London School of Economics.*

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