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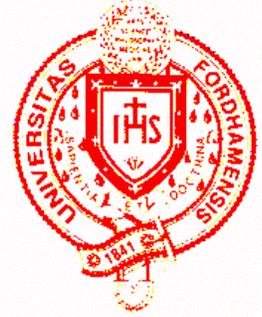
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**AUDIENCE MEASUREMENT, THE DIVERSITY
PRINCIPLE, AND THE FIRST AMENDMENT RIGHT
TO CONSTRUCT THE AUDIENCE**

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Audience Measurement, the Diversity Principle,
and the First Amendment Right to Construct the Audience

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During the months leading up to the historic election of Barack Obama as the 44th President of the United States, a tremendous amount of attention was being paid to the issue of race, to the role of the media in the depiction of race, and to various other points of intersection between race, the media, and politics.¹ During these same months, another issue with tremendous implications for the interaction between race and the media was developing; in light of the historic presidential campaign that was reaching its climax, it is perhaps not surprising that this issue received relatively little attention. This issue involved the introduction by radio audience measurement firm Arbitron of a new system for measuring radio audiences in 14 of the largest radio markets in the United States.² Dubbed the Portable People Meter (PPM), this new system of audience measurement replaced the paper diaries that radio listeners traditionally have used to record their radio listening with a small, pager-sized device that automatically captures the audio signals to which the carrier of the device is exposed, and translates that information into the ratings data that are fundamental to the buying and selling of radio audiences.³

¹ See Bonnie Erbe, *Race, Racism, and the Media in the John McCain—Barack Obama Presidential Election*, U.S. NEWS & WORLD REP. (Oct. 27, 2008), <http://www.usnews.com/blogs/erbe/2008/10/27/race-racism-and-the-media-in-the-john-mccain-barack-obama-election.html> (focusing on a roundtable discussion and the fair portrayal of race at this particular discussion of race in the 2008 elections); Julie Novkov, *Rethinking Race in American Politics*, 61 POL. RES. Q. 649, 649-50 (Dec. 2008) (analyzing the historical relationship between race and politics in the United States in light of Obama's presidential campaign).

² See Louisa Ada Seltzer, *Arbitron Plays Tough: Rolls Out PPM*, MEDIA LIFE MAG. (Oct. 6, 2008), available at http://www.medialifemagazine.com/artman2/publish/Radio_46/Arbitron_plays_tough_Rolls_out_PPM.asp (explaining the new tracking system for radio listening requires sample participants to enter their listening choices into a device they wear, and the device emits electronic signals to the Portable People Meter).

³ See Sarah McBride, *New Way to Count Listeners Shakes Up Radio*, WALL ST. J., Sept. 6, 2007, at B1, available at <http://online.wsj.com/public/article/SB118903798218018792.html> (noting that the PPM results have caused some radio stations to cut rates or request higher rates for advertisements).

The introduction of the PPM in these markets proved so controversial that it led to lawsuits seeking to prevent the launch of the system by the Attorneys General of New York⁴ and New Jersey,⁵ to an inquiry into the PPM being opened by the Federal Communications Commission (FCC),⁶ and to statements of protest against the PPM system from the New York City Council.⁷ Other protests came from members of the U.S. Senate, including then-presidential candidate Barack Obama,⁸ and from a wide range of minority media and public interest organizations, including the National Association of Black Owned Broadcasters, the Minority Media and Telecommunications Council, the NAACP, and the Media Access Project.⁹

Why did the introduction of a new radio audience measurement system provoke such a response? And why were minority groups, in particular, opposed to this new measurement system? The answer lies in the important role that audience information plays in the functioning of our media system, and the fact that a new audience measurement system can produce significantly different portraits of the media audience from the system that preceded it. In the case of Arbitron's Portable People Meter, the new methodology resulted in ratings for many radio stations targeting African-American and Hispanic audiences that were significantly lower than their ratings under the traditional diary system.¹⁰ Lower ratings tend to lead to lower advertising revenues, which of course makes survival for any media outlet more difficult. But if

⁴ Notice of Verified Petition at 1, *State v. Arbitron*, 2008 WL 4735227 (S.D.N.Y. 2008) (No. 08 Civ. 8497(DLC)).

⁵ Complaint at 1, *Milgram v. Arbitron*, (N.J. Super. Ct. Oct. 10, 2008) (No. MID-L-8428-08) [hereinafter Complaint]. The Attorney General of Maryland later filed a similar lawsuit as well.

⁶ Public Notice, Media Bureau Action, PPM Coalition Files Petition Seeking Commission Inquiry Pursuant to Section 403 of the Communications Act of 1934, No. 08-187 (Sept. 4, 2008).

⁷ New York City, N.Y., Council Resolution No. 1583-A, Committee on Consumer Affairs, (Sept. 24, 2008), available at <http://www.webdocs/nycouncil.info/attachments/851131.htm>.

⁸ See Letter from Daniel K. Inouye & Patrick J. Leahy to Stephen B. Morris, Chairman, President, CEO, Arbitron (Sept. 19, 2008) (on file with author); Letter from Robert Menendez & Ken Salazar, Senators, to Stephen B. Morris, Chairman, President, CEO, Arbitron (Oct. 2, 2008) (on file with author); John Eggerton, *Obama to Arbitron: Delay PPM Rollout*, BROAD. & CABLE, http://www.broadcastingcable.com/article/115656-Obama_to_Arbitron_Delay_PPM_Rollout.php (Sept. 29, 2008, 18:13 MT).

⁹ Letter from Benjamin Todd Jealous, President/CEO, NAACP, to Kevin Martin, Chairman, FCC (Oct. 3, 2008) (on file with author).

¹⁰ See notes xx *infra* and accompanying text.

minority-targeted media outlets are suffering disproportionately under the new measurement system, then significant diversity concerns arise, as the availability of content serving a wide range of audience interests and concerns becomes jeopardized. If minority-targeted media outlets are suffering disproportionately under the new measurement system because of flaws in the methodology, then we are faced with the question of whether this is a situation requiring some sort of legal or public policy intervention on behalf of preserving diversity in the media.

However, the question of if or how the government can intervene in such a situation rests on as-yet unclear determinations regarding the nature of audience ratings. Specifically, what level of First Amendment protection from government intervention do ratings firms have to construct the audience? What kind of speech are audience ratings? Are they commercial or non-commercial speech? Do they represent an expression of fact or an expression of opinion? These are the questions that have been debated in the PPM controversy. How they are answered ultimately will play a key role in determining whether government intervention into the audience ratings industry is permissible on behalf of diversity in the media

This article represents an initial effort to wade into these complex questions. It offers some preliminary thoughts that might guide how the courts and policymakers approach this ambiguous, complex construct known as the media audience. The first section of this article provides more detailed background on the Arbitron Portable People Meter and the controversy that its introduction has created. The second section details the arguments that have been advanced by the various stakeholders involved in this controversy regarding the appropriate speech classification for audience ratings, particularly in terms of whether ratings represent an expression of fact or opinion and whether ratings represent commercial or non-commercial speech. The third section considers the strengths and weaknesses of these arguments and offers

some additional perspectives on the speech classification of audience ratings, drawing insights from both communications and legal scholarship. The concluding section summarizes the article's main points and offers suggestions for future research.

I. THE ARBITRON PORTABLE PEOPLE METER AND THE ECONOMICS OF AUDIENCES

In 1992, Arbitron, the nation's only provider of detailed national and local radio audience estimates across all U.S. radio markets, began developing an electronic measurement system that would eventually replace the paper diaries that long have been used to measure radio audiences.¹¹ This effort reflected long-standing criticisms of diaries—criticisms that tended to focus on misrepresentations of radio audiences' listening behavior that likely arose from the diary methodology.¹² Critics noted, for instance, that it was unlikely that a diary-keeper would write down each instance in which she switched to another station, given the frequency of channel-surfing during radio listening, and the frequency with which radio listening takes place while driving a car.¹³ Paper diaries also raise the possibility of intentional distortion, as they allow listeners the opportunity to misrepresent their listening behaviors.¹⁴

These and other methodological concerns contributed to the development of the Arbitron Portable People Meter, a small, pager-like device that the listener carries, and that automatically records and identifies (via an inaudible audio code) the stations to which the carrier is being

¹¹ See Katy Bachman, *Radio: Arbitron Goes Portable*, *MEDIAWEEK*, Oct. 19, 1998 (noting that “Arbitron first touted the portable meter in 1992 as a technology that would be too expensive for radio only”).

¹² See PHILIP M. NAPOLI, *AUDIENCE ECONOMICS: MEDIA INSTITUTIONS AND THE MARKETPLACE* 73-5 (2003) [hereinafter *AUDIENCE ECONOMICS*] (providing an overview of the critiques of the diary method of gathering audience data).

¹³ See *id.* at 78-9 (noting that diaries require “diligence” and that many participants fill out their entire diary, which records a week's worth of audio or television consumption, in the evening prior to its due date).

¹⁴ See *id.* at 74 (noting that diaries provide “ample opportunity” for “both recall error and intentional misrepresentation”).

exposed.¹⁵ The PPM carrier need only carry the device all day (attached to a belt or a purse, etc.) and then dock it at night in an Arbitron-provided docking station. All of the relevant listening data are uploaded, aggregated, and linked with the carrier's demographic data, so that detailed radio listening reports can be produced much more quickly than via paper diaries, which need to be mailed back to Arbitron for tabulation at the end of each week.¹⁶

Arbitron began rolling out its new system via trials in test markets such as Wilmington, Delaware and Philadelphia, Pennsylvania.¹⁷ The PPM went "live" in Philadelphia in March 2007 and in Houston in June of that same year.¹⁸ This meant that, as of those dates, the PPM data officially replaced the diary data as the "currency" to be used in setting the rates for the buying and selling of radio audiences. The next steps for the PPM roll-out were introductions in eight additional large markets, including New York, Los Angeles, Chicago, and San Francisco.¹⁹

There is relatively little dispute over whether the PPM technology is superior to the paper diary. Diaries require more work and recall from participants than the PPM. The PPM is much closer to the kind of true "passive" audience measurement system that long has been seen as the holy grail in the world of audience measurement.²⁰ A passive audience measurement system is one in which the participant has to do little, if anything, in order for the data to be gathered.

¹⁵ See Arbitron, *The Portable People Meter, New Age for Radio—Electronic Audience Measurement with the Portable People Meter System*, http://www.arbitron.com/portable_people_meters/ppm_service.htm (last visited March 24, 2009).

¹⁶ See *id.*

¹⁷ See Sarah McBride, *New Way to Count Listeners Shakes Up Radio*, WALL ST. J., Sept. 6, 2007, at B1 (noting that PPM has already been tested in Philadelphia).

¹⁸ See ARBITRON PPM COMMERCIALIZATION SCHEDULE (Nov. 2008), http://www.arbitron.com/downloads/ppm_rollout.pdf (indicating that PPM was launched in Philadelphia and Houston in March 2008 and June 2008, respectively).

¹⁹ See *id.* (listing New York, Los Angeles, Chicago, San Francisco, Dallas/Fort Worth, Atlanta, Washington and Detroit as launch sites for PPM in September 2008).

²⁰ See AUDIENCE ECONOMICS, *supra* note 12, at 154. "Historically, measurement firms have explored a variety of (sometimes outlandish) alternative systems of audience measurement. Typically, these efforts have focused on developing passive measurement systems that eliminate any need for audience input, thereby minimizing the recall error that is exacerbated by increased media fragmentation." (citation omitted) *Id.*

This, of course, reduces the likelihood for error. In this case, carrying the meter is much less burdensome on the participant than carrying and maintaining a listening diary.

Nonetheless, the introduction of the PPM was quickly met with resistance by many within the radio industry and within the public interest and advocacy communities. Industry associations such as the National Association of Black Owned Broadcasters, the Spanish Radio Association, and the Association of Hispanic Advertising Agencies asked that Arbitron delay the roll-out of the PPM service.²¹ Public interest and advocacy organizations such as the NAACP and the Minority Media and Telecommunications Council soon began expressing concerns about the PPM roll-out as well.²²

This resistance stemmed from the fact that the PPM data indicated that the switch from paper diaries to PPMs has resulted in significant declines in ratings for many stations that target minority listeners. While most stations experience ratings declines under the PPM methodology, “the declines are generally steeper for ethnic stations, some of which have seen declines of 50 percent or more.”²³ This situation has led some policymakers to speculate that the introduction of the PPM could cause “the greatest loss of asset value by minority broadcasters in history, leading

²¹ See Press Release, Association of Hispanic Advertising Agencies, Association of Hispanic Advertising Agencies Rallies Industry Leaders to Tackle Portable People Meter Challenges (May 19, 2008), *available at* <http://www.ahaa.org/media/PPM%20Advisory%20Council%20Members.htm> (emphasizing the serious adverse effects of PPM implementation on Hispanic advertising); Press Release, PR Newswire, Leading Spanish-Language Radio Broadcasters Join Forces to Express Concerns About Arbitron’s Flawed Portable People Meter (June 11, 2008), *available at* <http://www.hispanictips.com/2008/06/12/leading-spanish-language-radio-broadcasters-join-forces-to-express-concerns-about-arbitrons-flawed-portable-people-meter-ppm/> (indicating that several major Spanish-language broadcasters were uniting against PPM implementation); McBride, *supra* note 17 (“The National Association of Black Owned Broadcasters is putting pressure on Arbitron to improve the measurement of young urban listeners.”).

²² Letter from Benjamin Todd Jealous to Kevin Martin, *supra* note 9, at 1-3 (“The NAACP . . . requests that Arbitron delay its planned roll-out until the FCC has been able to complete a 403 investigation of this new PPM methodology. . . .”); Testimony of Joseph S. Miller Before The New York City Council, MINORITY MEDIA & TELECOMMS. COUNCIL (Sept. 10, 2008), *available at* <http://www.mmtconline.org/filemanager/fileview/173> (“The implementation of a flawed PPM methodology would be akin to dropping a financial nuclear bomb—what MMTC estimates to be around \$500 million in annual lost revenues—on America’s minority radio stations.”).

²³ Kevin Downey, *Arbitron: The PPM Rollout Will Proceed*, MEDIA LIFE MAG., Oct. 3, 2008, at 1, *available at* http://www.medialifemagazine.com/artman2/publish/Radio_46/Arbitron_The_PPM_rollout_will_proceed.asp.

ultimately to the demise of approximately half of these stations.”²⁴ If minority-owned and minority-targeted broadcasting were to be so affected, then certainly the long-central communications policy goal of diversity would take a devastating hit.²⁵

Arbitron has contested that its new ratings estimates represent such a dire future for minority-targeted radio stations.²⁶ Specifically, Arbitron has contended that many minority-targeted stations that initially experienced ratings declines have subsequently rebounded after making changes to their programming and promotion practices, and that further, there have been no systematic declines in the revenues for minority-targeted stations in those markets (Houston and Philadelphia) where PPM data have served as the currency for over a year.²⁷ Arbitron also has contended that there have been no examples of minority-owned or minority-targeted stations going out of business, or switching away from minority-targeted programming formats, in either of these markets.²⁸

Of course, if it were clear that the declines in minority audience sizes were purely a function of the greater accuracy of the PPM methodology, then this controversy likely would not have developed in this manner. When a new audience measurement system is introduced, the

²⁴ See Letter from Robert Menendez & Ken Salazar to Stephen B. Morris, *supra* note 8, at 2. This statement reflects the fact that minority-owned broadcasters are significantly more likely to provide programming that targets minority interests and concerns. *Id.* See generally Peter Siegelman & Joel Waldfoegel, *Race and Radio: Preference Externalities, Minority Ownership, and the Provision of Programming to Minorities*, 10 ADVANCES IN APPLIED MICROECON. 73 (2001) (explaining that smaller markets present problems of sustaining broadcast options for minority populations).

²⁵ See Philip M. Napoli, *Deconstructing the Diversity Principle*, 49 J. COMM. 7, 7 (1999) (utilizing the discussion of diversity as a communications policy goal.); see also Philip M. Napoli, *Audience Measurement and Media Policy: Audience Economics, the Diversity Principle, and the Local People Meter*, 10 COMM. L. & POL’Y 349, 351 (2005) (referring to a discussion of the diversity issues raised specifically by the process of audience measurement).

²⁶ See Defendant’s Proposed Findings of Fact and Conclusions of Law at 32, *Arbitron v. Andrew Cuomo*, 2008 U.S. Dist. Lexis 86573 (S.D.N.Y. 2008) (on file with author) [hereinafter Defendant’s Proposed Findings] (highlighting the findings of fact and conclusion to explain the impact of ratings on minority-focused radio channels)

²⁷ See Defendant’s Memorandum of Law in Reply to Plaintiff’s Opposition to Motion to Dismiss the Complaint at 31, *Arbitron v. Andrew Cuomo*, 2008 U.S. Dist. Lexis 86573 (S.D.N.Y. 2008) (on file with author) [hereinafter Defendant’s Memorandum of Law] (discussing the rating increase after new programming and practices were implemented at minority targeted radio stations).

²⁸ See *id.* at 33 (noting that minority targeted or minority owned stations remained in operation without changing their programming format or targeted audience) on file with author.

portrait of the media audience produced by the new system virtually always differs significantly from the portrait of the media audience produced by the old system.²⁹ To the extent that new audience measurement systems typically are designed and implemented to improve upon perceived flaws in the old system, stakeholders typically assume that these discrepancies reflect a move toward a more accurate representation of the audience.³⁰

It would be difficult for any stakeholders to argue convincingly against an unassailably more accurate measurement system, even if that system produced the unfortunate byproduct of lower audience estimates for minority-targeted stations. Moreover, it is particularly challenging to determine the extent to which an audience measurement service is accurate, given that there are no sources of objective data against which to compare the results. That is, illustrations of dramatic differences between the paper diary data and the PPM data really do not tell us anything about the accuracy or inaccuracy of the PPM data because the diary data do not represent an indisputably accurate basis for comparison.³¹ It is possible that the diary data were wildly inaccurate to begin with and that the PPM data provide the more accurate representation of radio listening. This debate captures the uniquely ambiguous and unstable nature of the “audience commodity.”³²

²⁹ See AUDIENCE ECONOMICS, *supra* note 12, at 17–18 (discussing the different data that can result from differing measurement tools and methodology).

³⁰ See generally, IEN ANG, *DESPERATELY SEEKING THE AUDIENCE* 8 (1991) (looking at the discrepant measurement system as indication of more precise audience measurements).

³¹ See Erwin Ephron, *Recounting Radio: What do the New PPM Numbers Mean*, EPHRON ON MEDIA, Oct. 2008, http://www.ephrononmedia.com/article_archive/articleViewerPublic.asp?articleID=172 (finding that “[s]ince the two CPMs are based on different measures of audience they cannot be compared”).

³² See, e.g., Dallas Smythe, *Communications: Blindspot of Western Marxism*, 1 CANADIAN J. OF POL. & SOC. THEORY 1, 5 (1977) (noting the term “audience commodity” is used to reference the notion that audiences are essentially a product manufactured and sold by ad-supported media industries, emphasizing the role of ratings data in the commodification of the media audience); Eileen Meehan, *Ratings and the Institutional Approach: A Third Answer to the Commodity Question*, 1 CRITICAL STUDIES IN MASS COMM. 216, 216 (1984) (recognizing that the broadcasting industry focuses its energies on capturing high audience ratings); AUDIENCE ECONOMICS, *supra* note 12, at 18 (identifying the media audience as a major component within the marketplace and economy).

However, critics of the PPM system have asserted that it has a number of specific methodological shortcomings that they contend are leading to systematic misrepresentation of minority audiences. These concerns generally do not arise from the PPM *technology* per se, but rather from the *sampling process* via which PPM audience panels are constructed.³³ The sampling process is another aspect of the production of audience ratings that is vulnerable to error. Samples that are too small, or that do not accurately reflect the demographic characteristics of the larger listening population, can provide inaccurate data.³⁴

Critics of the PPM roll-out contend that the samples that Arbitron constructed are substandard in ways that lead to significant under-representation of minority radio audiences. A number of arguments have been put forth in this regard including: that Arbitron's use of telephone-based, rather than address-based sampling diminishes the ability to recruit an adequate Hispanic sample; that the company under-samples cell-phone-only households, thereby under-representing minorities and youth;³⁵ and that response rates and compliance rates for PPM participants are unacceptably low.³⁶

³³ See, e.g., Kevin Downey, *Arbitron Halts Rollout of People Meters*, MEDIA LIFE MAG., Nov. 27, 2007, at 1, available at http://www.medialifemagazine.com/artman2/publish/Research_25/Arbitron_halts_rollout_of_people_meters.asp (“But critics say the real issue is that the size of the panel wearing the pager-sized PPMs is simply too small. There are simply too few people in the sample group to result in data reflecting the listening patterns of the general radio audience.”); see also Press Release, AHAA PPM and Arbitron Meet in New York to Discuss Industry Concerns About PPM Implementation (Aug. 21, 2008) (on file with author) (“The Hispanic marketing industry acknowledges that the transition from diary to electronic audience measurement is the right thing to do. ‘We know that electronic measurement should yield higher quality data than the diary method; however, historically the sampling methodology that Arbitron has deployed has been flawed,’ says Isabella Sanchez, AHAA PPM Council chairwoman.”).

³⁴ See JAMES G. WEBSTER, PATRICIA F. PHALEN, & LAWRENCE W. LICHTY, RATINGS ANALYSIS: THE THEORY AND PRACTICE OF AUDIENCE RESEARCH 108 (2006) (explaining the benefits of using larger sample sizes).

³⁵ See Verified Petition at 9, *State v. Arbitron*, (N.Y. Sup. Ct. Oct. 10, 2008) (on file with author) [hereinafter Verified Petition] (explaining that the purpose here is not to make a determination as to the accuracy or inaccuracy of the PPM system, because that is beyond the article's focus and requires a privileged access to data and methodological details).

³⁶ See Letter from Margaret E. Lancaster, Counsel for the PPM Coalition, to Marlene Dortch, Secretary, FCC 22-30 (Sept. 2, 2008), available at <http://www.fcc.gov/mb/da082048att.pdf> (outlining perceived methodological flaws with the PPM system).

Of course, one could question the credibility of PPM critics who also happen to be amongst those most significantly harmed by the new audience estimates. However, in this case, a presumably neutral third party, the Media Rating Council, also has been critical of the PPM system. The Media Rating Council is a non-profit organization created by the media and advertising industries to oversee and accredit audience measurement services.³⁷ The MRC engages in detailed assessments of the methodological rigor and soundness of new audience measurement systems, accrediting those that meet minimum standards of rigor, accuracy, and reliability. Those services that meet these standards receive a formal accreditation from the MRC. However, the MRC does not have any binding regulatory authority over the firms that produce audience data. Measurement firms are not required to subject their methodology to the MRC accreditation process and, more importantly, if a measurement service is denied accreditation by the MRC, the measurement firm is in no way required to postpone the launching of the service until accreditation is received.³⁸

When Arbitron launched its PPM service in Houston, that service did receive accreditation from the MRC prior to “going live.”³⁹ However, the PPM services in Philadelphia and New York have been denied MRC accreditation to this point.⁴⁰ Arbitron has gone live with these measurement services despite these rebukes from the MRC.⁴¹ Of the 14 U.S. radio markets

³⁷ See Media Rating Council, History and Mission of the MRC, *available at* <http://www.mediaratingcouncil.org/History/htm> (last visited Feb. 11, 2009) (listing the crediting and auditing functions of the MRC).

³⁸ *Id.* (stating that MRC membership is voluntary and its reports are confidential).

³⁹ See Press Release, Arbitron Receives Media Rating Council Accreditation for the Portable People Meter Radio Ratings Data in Houston (Jan. 29, 2007), <http://www.onlinepressroom.net/arbitron> (explaining the significance of achieving MRC accreditation).

⁴⁰ See Media Rating Council, MRC Statement on Philadelphia and New York PPM 1 (Feb. 28, 2008), *available at* <http://www.mediaratingcouncil.org/0208MRC%20PPM%20Statement.pdf> (stating that the MRC voted not to grant accreditation to Philadelphia and New York PPM Services).

⁴¹ See Downey, *supra* note 23, at 1-2 (noting that despite continued resistance, Arbitron plans on launching its PPM).

in which PPM data currently are serving as the currency, only the Houston and Riverside PPM systems have received MRC accreditation.

These concerns about the accuracy of these unaccredited iterations of the PPM service, and their potential impact on minority-targeted radio, have spilled beyond the confines of the radio and advertising industries. At the local level, in September of 2008, the New York City Council issued a resolution calling upon the Federal Communications Commission to open an investigation into the PPM service.⁴² At the state level, in October of 2008, the Attorneys General of both New York and New Jersey filed lawsuits against Arbitron, seeking damages and the cessation of the unaccredited PPM services.⁴³ Additionally, at the federal level, in September of 2008, the Federal Communications Commission opened an inquiry into the PPM service aimed at the question of whether a formal FCC investigation into the PPM was appropriate.⁴⁴

II. DISCRIMINATION, FRAUD, AND THE FIRST AMENDMENT STATUS OF AUDIENCE RATINGS

There are a number of legal claims that have been made against Arbitron and its decision to issue what many stakeholders consider flawed ratings data. The New Jersey lawsuit alleged that Arbitron violated the Consumer Fraud Act by: a) replacing an accredited ratings product with an unaccredited product; b) issuing deceptive and misleading statements regarding its new service (and the service's failure to receive accreditation); and c) advertising the product without designating limitations on its quality.⁴⁵ The New Jersey lawsuit also contended that Arbitron

⁴² See Resolution Calling on the FCC to Investigate Arbitron's Portable People Meter System and its Potential Effect on Diversity of Radio, N.Y.C. Res. No.1583-A (Sept. 24, 2008).

⁴³ These lawsuits recently have been settled. Also, Arbitron filed a pre-emptive lawsuit in federal court seeking to prevent the New York Attorney General from proceeding with the state-level lawsuit. Arbitron's lawsuit was dismissed on grounds that did not address the First Amendment status of audience ratings; however, many of the arguments about the nature of audience ratings provided by both parties within the context of this federal lawsuit will be discussed here. See *Arbitron Inc. v. Cuomo*, 2008 WL 4735227, at *5 (S.D.N.Y Oct. 27, 2008) (No. 08 Civ. 8497(DLC)).

⁴⁴ Public Notice, PPM Coalition Files Petition Seeking Commission Inquiry Pursuant to Section 403 of the Communications Act of 1934, Media Bureau Action, MB Docket No. 08-187 (Sept. 4, 2008).

⁴⁵ See Complaint, *supra* note 5, at 3.

violated the New Jersey Law Against Racial Discrimination by offering a ratings service that “disparately impacts radio stations serving racial and ethnic minorities.”⁴⁶

The New York lawsuit alleged that Arbitron engaged in fraudulent and deceptive business practices for “repeatedly placing in the marketplace a commercial product that is unreliable and unrepresentative of the diversity of New York radio markets, while making public statements that the PPM methodology for New York is reliable and fully representative of the diversity of New York radio markets.”⁴⁷ Also, the New York lawsuit accused Arbitron of false advertising and of violating New York Civil Rights Law S40-c and Executive Law S296, which prohibits patterns of conduct that discriminate against persons based on race or national origin.

According to the New York Attorney General:

By imposing the flawed PPM methodology . . . Arbitron has deprived minority businesses of the equal opportunity to engage in contractual relationships and commercial activity free from discrimination, in violation of civil rights laws. It has also knowingly deprived minority communities of the right to diversity of programming and services on the airwaves.⁴⁸

Both lawsuits sought to enjoin Arbitron from issuing PPM data, as well as restitution to those broadcasters harmed by the PPM service. These lawsuits were settled, with Arbitron continuing the transition to its PPM system, but agreeing to make some methodological changes to the PPM sampling process.⁴⁹ Given these settlements, the legal arguments about the speech status of audience ratings that are the focus of this article, were not addressed or resolved by the courts.

It is important to recognize that the nature of the Attorney General’s claims extend not only to the PPM ratings service, but also to statements Arbitron has made about its ratings

⁴⁶ *See id.*

⁴⁷ Verified Petition, *supra* note 35, at 10.

⁴⁸ *Id.* at 11.

⁴⁹ *See* Anne Milgram v. Arbitron, Final Consent Judgment, Superior Court of New Jersey (January 7, 2009). Retrieved March 22, 2009, from: <http://www.nj.gov/oag/newsreleases08/pr20090107c-Arbitron-ConsentJudgment.pdf>; New York v. Arbitron, Stipulated Order on Consent, Supreme Court of the State of New York, County of New York (January 7, 2009). Retrieved March 22, 2009, from: http://www.oag.state.ny.us/bureaus/civil_rights/pdfs/Arbitron%20Consent%20Order%2001-07-08.pdf.

service in advertisements, press releases, and on its Web site. This analysis focuses on the ratings themselves as a form of speech. This focus seems particularly appropriate in light of Arbitron's contention that the Attorney General's ability to enjoin the company from issuing PPM-based ratings runs aground against the ratings' status as non-commercial speech.

According to Arbitron, any efforts to enjoin distribution of the PPM data represent a prior restraint on protected, non-commercial speech, and are thus a violation of the company's First Amendment rights.⁵⁰

Generally, non-commercial speech receives stronger First Amendment protection than commercial speech.⁵¹ As the New York Attorney General noted, "False or deceptive commercial speech is wholly unprotected by the First Amendment."⁵² Non-commercial speech, on the other hand, is not "subject to prior restraint by the AG under statutes such as New York General Business Law Sections 349, 350 and 352, nor under Section 40-c of the New York Civil Rights Law."⁵³ From this standpoint, any effort to prevent Arbitron from moving forward with its PPM roll-out would represent an unlawful infringement on the company's First Amendment rights. Arbitron has gone so far as to argue that because the Attorney General's concerns are directed at the representations of African-American and Hispanic audiences within Arbitron's ratings data, the AG's efforts "constitute a content-based regulation of speech."⁵⁴

A. *The Speech Status of Audience Ratings*

⁵⁰ Verified Complaint, *supra* note 5, at 18 (arguing that any restraint on Arbitron's publication of its PPM audience estimates "would constitute an unlawful prior restraint of Arbitron's right to publish under the First and Fourteenth Amendments").

⁵¹ See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 562-63 (1980) (explaining that the Constitution "accords a lesser protection to commercial speech than to other constitutionally guaranteed expression").

⁵² See Defendant's Proposed Findings, *supra* note 26, at 4 (citing *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 563 (1980)).

⁵³ Verified Complaint, *supra* note 5, at 18.

⁵⁴ Plaintiff's Corrected Memorandum of Law in Opposition to Defendant's Motion to Dismiss and in Further Support of its Motion for a Preliminary Injunction at 16, *Arbitron v. Cuomo*, 2008 WL 4735227 (S.D.N.Y. 2008) (No. 08 Civ. 8497(DLC)) [hereinafter Plaintiff's Corrected Memorandum].

Here then, within this context of a dispute over whether government intervention into the constructions of the audience provided by an audience measurement firm is permissible on behalf of preserving and promoting diversity in the media, we are confronted with the difficult question of what kind of speech are audience ratings? The question at the center of this dispute involves whether ratings are best characterized as commercial or non-commercial speech; but making such a determination involves addressing underlying questions such as whether audience ratings represent facts or opinions, and the extent to which audience ratings are a matter of broader public interest and concern.

Unfortunately, the Supreme Court has never offered a clear and definitive set of criteria as to what constitutes commercial speech.⁵⁵ The unsettled nature of the Supreme Court's position on the definition of commercial speech has inspired a wide range of interpretive approaches, ranging from those that advocate classifying all speech that emerges from a corporation as commercial⁵⁶ to those that advocate abandoning a commercial speech classification, and the second-tier First Amendment status that accompanies it, in its entirety.⁵⁷

The Court has articulated different criteria in different decisions.⁵⁸ At the general level, the Court has defined commercial speech as speech that does no more than propose a

⁵⁵ See J. Wesley Earnhardt, *Nike, Inc. v. Kasky: A Golden Opportunity to Define Commercial Speech – Why Wouldn't the Supreme Court Finally "Just Do It"?*, 82 N.C.L. REV. 797, 798-99 (2004) (highlighting the fact that the Court has never fashioned an all-purpose test for defining commercial speech); Karl A. Boedecker, Fred W. Morgan & Linda Berns Wright, *The Evolution of the First Amendment Protection for Commercial Speech*, 59 J. MARKETING 38, 42 (1995) (noting that the distinction between commercial and noncommercial speech has been criticized and that the problem with the distinction is that the criteria for identifying commercial speech are not precise).

⁵⁶ See, e.g., Tom Bennigson, *Nike Revisited: Can Commercial Corporations Engage in Non-Commercial Speech?*, 39 CONN. L. REV. 379, 383 (2006) (arguing that "all speech by publicly traded for-profit business corporations is commercial" and that "No corporate speech is entitled to more than second-tier First Amendment protection accorded to commercial speech").

⁵⁷ See generally Daniel A. Farber, *Commercial Speech and First Amendment Theory*, 74 NW. U. L. REV. 372 (1979-80) (explaining that the informative function of commercial speech is protected by the first amendment but that commercial speech also serves a contractual function which does not directly implicate first amendment interests and arguing that the regulations aimed at the contractual function of commercial speech should not be tested under the stricter scrutiny reserved for content related regulation).

⁵⁸ For a detailed overview of the state of commercial speech law, see Boedecker, *supra* note 54.

commercial transaction.⁵⁹ In some decisions, however, additional characteristics have been identified, including a) whether the communication is an advertisement; b) whether the communication refers to a specific product or service; c) whether the speaker has an economic motivation for the speech;⁶⁰ d) whether the speech involves a matter of public rather than private concern; and e) whether the speech conveys information of interest to audiences beyond potential customers.⁶¹ Some commercial speech decisions also have suggested that expressions of opinion are less able to meet the threshold of classification as commercial speech than are expressions of fact.⁶²

The fact that the application of these different criteria has varied across different commercial speech cases helps explain why the arguments put forth by Arbitron and by the New York and New Jersey Attorneys General seek to address virtually all of them. In support of its argument that its audience ratings are non-commercial speech, Arbitron first emphasized that its ratings “do not propose any offer of sale or other commercial transaction by Arbitron to its subscribers.”⁶³ Arbitron noted that in a similar lawsuit where Nielsen Media Research was sued by Spanish-language broadcaster Univision over representations of the Spanish-language audience provided by Nielsen’s Local People Meter, the court concluded that “[t]hough advertising sellers and buyers rely on the ratings system, the ratings system itself does not

⁵⁹ See *Va. State Bd. of Pharmacy v. Va. Citizen’s Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) (defining commercial speech).

⁶⁰ *Gorran v. Atkins Nutritionals, Inc.*, 464 F. Supp. 2d 315, 326 (S.D.N.Y. 2006), *aff’d* 279 Fed. Appx. 40 (2d Cir. 2008) (noting that “the mere fact that there is an underlying economic motivation in one’s activity does not turn that activity into commercial speech”).

⁶¹ For a useful overview of the tests that have been employed in the analysis of commercial speech, see Boedecker, *supra* note 54, at 39.

⁶² See *Kasky v. Nike*, 27 Cal. 4th 939, 961 (2002) (“In the context of regulation of false or misleading advertising, this typically means that the speech consists of representations of fact about the business operations, products, or services of the speaker . . . This is consistent with, and implicit in, the United States Supreme Court’s commercial speech decisions”); see also *Earnhardt*, *supra* note 54, at 802 (“The court concluded that because Nike was involved in commerce; because the intended audience was partially made up of potential or past customers of Nike; and because the statements were *factual representations* about its business operations and thus commercial in nature, the statements constituted commercial speech.”) (emphasis added).

⁶³ Plaintiff’s Corrected Memorandum, *supra* note 53, at 20.

propose a commercial transaction. Therefore, the speech can be afforded full First Amendment protection.”⁶⁴

Arbitron also contended that its ratings did not qualify as commercial speech because the ratings are “a matter of public interest and concern.”⁶⁵ In support of this point, Arbitron noted how its radio ratings are published in a wide variety of mainstream media outlets and trade publications.⁶⁶ From this standpoint, Arbitron’s construction of the radio audience has a public relevance that extends well beyond those who subscribe to its ratings service, and this broader public relevance is indicative of speech with implications that extend beyond narrow commercial transactions.⁶⁷

Arbitron also contended that its ratings represent “its *opinions* as to the size of radio audiences and station rankings” (emphasis added).⁶⁸ According to Arbitron, “[s]imply because the final audience measurement estimates are arrived at through statistical analysis and the results are expressed in numerical form does not make them objective facts, nor does it make them unworthy of First Amendment protection.”⁶⁹

⁶⁴ *Univision Commc’n, Inc. v. Nielsen Media Research, Inc.*, 2004 WL 3050799, at *3 (Cal. Sup. Ct. 2004) (No. BC316833).

⁶⁵ Verified Complaint, *supra* note 5, at 5.

⁶⁶ See Verified Complaint, *supra* note 5, at 4 (noting that some estimates from the Arbitron Reports are provided to both mainstream media outlets and trade publications); Plaintiff’s Corrected Memorandum, *supra* note 53, at 21 (“The Arbitron Reports are original works of opinion that express the views of Arbitron based on its more than 40 years in the audience measurement field. Members of the radio industry, journalists, advertisers, academics and others seek out Arbitron’s opinions and follow them regularly. It is clear that the Arbitron Reports are a matter of public interest and concern worthy of full First Amendment protection. Arbitron’s ratings information is regularly and widely distributed to media outlets and others, and is often the subject of news items and commentary in newspapers and other periodicals.” (citations omitted)).

⁶⁷ See Plaintiff’s Proposed Findings of Fact and Conclusions of Law at 44, *Arbitron Inc. v. Cuomo*, 2008 WL 4735227 (S.D.N.Y. 2008) (No. 08 Civ. 8497(DLC)) [hereinafter Plaintiff’s Proposed Findings] (“Arbitron’s works provide a form of news of significant concern to a great number of people far beyond Arbitron’s subscribers, providing information about radio listening habits to various segments of the population as well as the performance of radio stations relative to one another in a given market. They do not provide information about Arbitron’s own products or services – the classic definition of commercial speech.”).

⁶⁸ Verified Complaint, *supra* note 5, at 3 (emphasis added).

⁶⁹ Plaintiff’s Proposed Findings, *supra* note 66, at 61.

Arbitron's emphasis that its ratings data are opinions extends beyond the issue of the commercial versus non-commercial classification for audience ratings. Other concerns are involved as well. The first is the well-established principle of copyright law that facts are not copyrightable.⁷⁰ If ratings data were treated as facts in the traditional sense then Arbitron might not have any enforceable copyright over its ratings, potentially destroying its current business model.⁷¹ More relevant to this analysis is the extent to which characterizing audience ratings as opinions makes it more difficult to characterize Arbitron's PPM ratings as fraudulent commercial speech, unprotected by the First Amendment, than if the ratings are considered facts. A false opinion is generally seen as an oxymoron in First Amendment jurisprudence, whereas the expression of a false fact can much more easily be characterized as fraudulent and has less First Amendment protection.⁷²

The New York Attorney General⁷³ contended that Arbitron's ratings data are a "statistical service," sold commercially, and thus regulatable "pursuant to state consumer protection and civil rights laws without running afoul of the First Amendment."⁷⁴ The Attorney General argued that the extent to which Arbitron emphasizes the "objectivity" of the PPM service contradicts the company's efforts to characterize its ratings as "opinions," and thus they are more appropriately classified as facts.⁷⁵ The New York Attorney General also countered

⁷⁰ See, e.g., *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 344 (1991) (stating "[t]hat there can be no valid copyright in facts is universally understood").

⁷¹ From this standpoint, should the courts decide that audience ratings are facts rather than opinions, the ramifications of their decision could extend well beyond the PPM issue.

⁷² See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974) ("Under the *First Amendment* there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact.").

⁷³ The New York lawsuit has advanced further at this point than the New Jersey lawsuit; therefore, the documents and associated arguments produced in the New York lawsuit will be the focus of the remainder of this analysis.

⁷⁴ Defendant's Memorandum of Law, *supra* note 27, at 10 (explaining the New York Attorney General's argument that Arbitron's ratings data can be regulated).

⁷⁵ *Id.* (demonstrating the New York Attorney General's feeling that Arbitron is contradicting itself regarding the status of its ratings as opinions or facts).

Arbitron's characterization of its ratings data as information of "public interest and concern" by noting that Arbitron's full data do not circulate very widely, as they are fully available only to "subscribers who purchase the data for a fee."⁷⁶ The New York Attorney General also contended that the Supreme Court has established that commercial speech is not limited to advertisements and that commercial speech need not reference a particular product or service."⁷⁷

III. ASSESSING THE SPEECH STATUS OF AUDIENCE RATINGS

It is beyond the scope of this article to assess all of the points of contention that have arisen about the appropriate speech status of audience ratings, though such a thorough examination of not only the First Amendment claims, but also the civil rights and fraud claims that have arisen in this dispute, is much needed. This section will, however, inject some additional perspectives on the main points of contention, drawing in particular on the distinctive characteristics of audience ratings and the audience marketplace that have been examined in significant detail in the communications and media studies literature, and on alternative analytical approaches to distinguishing fact from opinion and commercial from non-commercial speech that have been developed within legal scholarship.

A. *Fact v. Opinion*

We begin with the question of whether audience ratings are best characterized as fact or opinion. This issue relates not only to the larger issue of whether ratings are appropriately characterized as commercial or non-commercial speech, but also to the extent that inaccurate audience ratings can be considered fraudulent.⁷⁸ From a legal standpoint, answering this question

⁷⁶ Verified Complaint, *supra* note 5, at 4-5; Defendant's Memorandum of Law, *supra* note 27, at 9 (noting the New York AG's belief that Arbitron's ratings data is not as wide a public concern as portrayed by Arbitron).

⁷⁷ Defendant's Memorandum of Law, *supra* note 27, at 9 (explaining why the New York Attorney General claims that Arbitron's data are commercial speech).

⁷⁸ And, of course, as the previous discussion illustrated, the lack of an objective, indisputably accurate basis for comparison makes it difficult to determine if, or to what extent, any audience ratings system is inaccurate.

begins with establishing the appropriate definitions for each of these terms. The Supreme Court has been reasonably precise in articulating its definition of a fact. Facts, according to the Court, are not original; they are discovered rather than created.⁷⁹ Historical accounts of the meaning of a fact have emphasized the centrality of numbers – a perspective that strengthens a possible association between facts and quantitative audience ratings such as those produced by Arbitron.⁸⁰ An opinion, in contrast is best thought of as something that can not be proven right or wrong. Key defining elements of an opinion that have been used to distinguish opinion from fact include: a) whether a statement has a precise core of meaning for which a consensus of understanding exists; b) the verifiability of the statement; c) the broader context or setting in which a statement appears.⁸¹

The problem is that neither categorization seems ideal for constructions of the media audience. There is, no doubt a certain amount of cognitive dissonance that emerges from the contention that ratings data on the one hand represent the *opinions* of the measurement firm, but on the other hand serve as what is described by Arbitron as an *accurate* and *objective* currency in the audience marketplace. Arbitron seems to work itself into a bit of a rhetorical corner when the company first argues in its filing with the U.S. District Court that, due in part to the fact that the ratings represent the Arbitron’s opinions, they should be classified as non-commercial rather than commercial speech.⁸² Yet in this same document Arbitron argues that, should their ratings

⁷⁹ See *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 347 (1991) (“[F]acts do not owe their origin to an act of authorship. The distinction is one between creation and discovery: The first person to find and report a particular fact has not created the fact; he or she has merely discovered its existence.”).

⁸⁰ See MARY POOVEY, *A HISTORY OF THE MODERN FACT: PROBLEMS OF KNOWLEDGE IN THE SCIENCES OF WEALTH AND SOCIETY* xii (1998) (“[N]umbers have come to epitomize the modern fact, because they have come to seem preinterpretive or even somehow noninterpretive at the same time that they have become the bedrock of systematic knowledge.”).

⁸¹ See Marshall S. Shapo, *Fact/Opinion = Evidence/Argument*, 91 NW. U.L. REV. 1108, 1109-10 (1997) (discussing the fact versus opinion dichotomy).

⁸² See Plaintiff’s Corrected Memorandum, *supra* note 53, at 21 (“Simply because Arbitron’s Reports do not fit the AG’s idea of traditional political or social commentary does not mean that they are commercial speech. The

data be found to be commercial speech, the ratings are “accurate and reliable,” and are therefore “not false.”⁸³ The term “accurate” suggests some sort of relationship to factuality; but one probably cannot go so far as to say that the notion of an “accurate opinion” is inherently contradictory.

It is, however, also the case that the audience as represented by a ratings firm such as Arbitron is the outgrowth of a number of subjective decisions and opinions about how best to go about constructing the audience. Decisions about technology design, sample generation and recruitment, and data processing all affect the construction of the audience that ultimately serves as the currency in the audience marketplace.⁸⁴ And, as the transition from diaries to PPMs illustrates, changes in the process lead to very different audiences. It is hard to accept a construct that is this malleable as a fact.

Indeed, communications scholars have frequently emphasized the extent to which audience ratings should not be considered as objective facts about the media audience. These scholars have emphasized the extent to which the audience, as represented in ratings data, is a socially constructed phenomenon; that it is the outgrowth of a number of highly subjective interpretations as to what aspect of the audience is of greatest importance, how the relevant information can best be gathered, and even the extent to which competitive conditions and market forces impact the processes via which ratings data are produced.⁸⁵ The extent to which the portrait of the media audiences that emerges from a ratings service is affected by these internal and external forces undermines any notion of audience ratings representing some sort of

Arbitron Reports are original works of opinion that express the views of Arbitron based on its more than 40 years in the audience measurement field.”).

⁸³ See *id.* at 24 (explaining that “Arbitron intends to demonstrate that its PPM results are the product of scientific analysis and opinion and that Arbitron adhered to the highest standards to ensure that its results are accurate and reliable”).

⁸⁴ See generally, WEBSTER, PHALEN, & LICHTY, *supra* note 34.

⁸⁵ See generally ANG, *supra* note 30; KAREN BUZZARD, CHAINS OF GOLD (1990); Meehan, *supra* note 32; AUDIENCE ECONOMICS, *supra* note 12.

objective and verifiable facts about the audience's media consumption behaviors. From this standpoint, the media audience, as represented in audience ratings, would seem to be more appropriately characterized as created rather than discovered.

In making this fact versus opinion determination, perhaps it is also appropriate to consider how subscribers to the data use the ratings. Research on media organizations and their use of ratings data suggests that, even if ratings do not clearly meet the threshold associated with the traditional definition of facts, they nonetheless seem to operate as facts in the functioning of the marketplace for media audiences. Audience ratings typically are accorded a level of precision and accuracy attributable only to facts in terms of how they are interpreted and utilized in the audience marketplace. Media sociologist Todd Gitlin, for instance, in a classic analysis of the television industry, noted that:

In the tumult of everyday figuring and judging, network executives, even research specialists, often commit the standard occupational error of unwarranted precision. . . . Once managers agree to accept a measure, they act as if it is precise. They "know" there are standard errors—but what a nuisance it would be to act on that knowledge. And so the number system has an impetus of its own.⁸⁶

The key point here is that, to the extent that subscribers treat audience ratings as perfectly accurate rather than as estimates, they essentially *function* more as facts than as opinions for those who utilize them.⁸⁷

Clearly then, audience ratings seem frustratingly resistant to categorization as either fact or opinion. Perhaps it is most appropriate to consider audience ratings as a mix of fact and opinion. On one level, for instance, the Arbitron PPM data represent basic facts. If the data uploaded from a PPM indicate three hours of listening for a particular day, spread out across eight different radio stations, it is a fact that that PPM device was exposed to those particular

⁸⁶ TODD GITLIN, *INSIDE PRIMETIME* 46 (2000).

⁸⁷ See generally ANG, *supra* note 30; AUDIENCE ECONOMICS, *supra* note 12.

radio signals for those particular periods of time. It is more a matter of opinion when we get to the issue of whether this aggregation of factual data can be projected to the listening behaviors of the population as a whole. When Arbitron characterizes its ratings reports as opinions, this is really a reflection of the extent to which it is the company's opinion that the data it gathers are representative of the larger listening population. The dispute over the "accuracy" of the Arbitron data emerges from differences of opinion over whether the data can be confidently projected to the population as a whole.

Is there, then, some tenable intermediate position that can be ascribed to constructions of the audience that serve as currency in the audience marketplace? Some legal scholars have asserted the need for the courts to acknowledge a category of "created facts," . . . in which the expressive work brings the very facts themselves into existence."⁸⁸ John Searle offers a potentially valuable middle ground acknowledging that "there are portions of the real world, objective facts in the world, that are only facts by human agreement."⁸⁹ Such instances have been termed "social facts." According to Searle, a social fact arises when: a) someone declares or states that something is the case; and b) when it becomes widely accepted something is the case.⁹⁰ This notion of facts by human agreement seems particularly applicable to the nature of audience constructions such as ratings, in which their functioning as a "currency" essentially involves the unanimous acceptance, and utilization, of a particular set of social constructions as facts. Searle even uses currency as a prime example of a social fact.⁹¹

⁸⁸ Justin Hughes, *Created Facts and the Flawed Ontology of Copyright Law*, 83 NOTRE DAME L. REV. 43, 45 (2007); see Wendy J. Gordon, *Reality as Artifact: From Feist to Fair Use*, 55 LAW & CONTEMP. PROBS. 93, 94 (1992) ("We academics may or may not applaud the denial of copyright, but most of us united in seeing the Court's insistence that facts are never 'created' as a conceptual error.").

⁸⁹ JOHN R. SEARLE, *THE CONSTRUCTION OF SOCIAL REALITY* 1 (1995).

⁹⁰ See *id.* at 45-6 (noting that in addition to the assignment of a new status to some phenomenon, there must also be "continued collective acceptance or recognition of the validity of the assigned function").

⁹¹ See *id.* at 55 ("When the Treasury says [this piece of paper] is legal tender, they are *declaring* it to be legal tender, not announcing an empirical fact that it already is legal tender.").

Drilling deeper down into this notion of social facts, we find sub-categories that seem particularly attributable to audience ratings. Specifically, Hughes identifies what he terms “evaluative facts,” which involve quantitative or qualitative evaluations made by private parties that “can become so widely accepted and so relied upon for substantial non-expressive activities that they become social facts.”⁹² Hughes’ examples of evaluative facts include a publisher’s estimates of the resale value for used automobiles, price estimates for collectible coins, and settlement prices established by a commodities exchange committee.⁹³ All of these examples involve the setting of values for products, not unlike the way Arbitron’s assessment of the audience size and composition of individual radio programs sets the value to advertisers of commercial spots within these programs.

What does this mean for the issue at hand? To this point, efforts to develop some sort of intermediate construct between fact and opinion/expression have been focused primarily on the copyright implications of such a shift. Hughes, for instance, has advocated on behalf of the notion of “created facts,” but has done so while also maintaining copyright protection for such facts when judged appropriate.⁹⁴ This is relevant to this situation to the extent that it is important to recognize that a legal path could potentially be traveled in which audience ratings are classified as facts of a sort for the purposes of fraud assessments and commercial versus non-commercial speech determinations, but that such a classification would not necessarily deny measurement firms such as Arbitron the copyright protection needed to sufficiently incentivize them to produce their product.

⁹² Hughes, *supra* note 87, at 68.

⁹³ *See id.* at 68-77 (examining the ways in which the courts approached specific cases dealing with these types of evaluative facts).

⁹⁴ *See id.* at 93-107 (suggesting that it is necessary to find ways to “curb and/or probably recalibrate” the limiting doctrines of copyright to provide protection for the subset of “created fact works” that need the incentive of copyright).

B. *Commercial v. Non-Commercial Speech*

As the previous section illustrates, the construct of audience ratings in many ways confounds the traditional fact-opinion dichotomy that has been a key component of First Amendment jurisprudence. Given the ambiguous state of the definition of commercial speech, it seems unlikely that this analytical frame can provide clear-cut guidance on how to approach a form of communication that is as uniquely ambiguous as audience ratings.

The first fundamental question that arises in making a commercial speech determination is whether audience ratings meet the criterion of proposing a commercial transaction. An Arbitron ratings report certainly is not an advertisement for an Arbitron product. In that regard, the ratings are fundamentally different from any advertising or public relations communication that Arbitron engages in on behalf of its PPM service, or from any traditional advertisement seeking to sell a particular good or service.

Another prominent element of definitional approaches to commercial speech involves whether the speech involves an issue of public concern that extends beyond the interests of the buyers and sellers of the product. This is another area in which appropriately characterizing ratings is quite tricky. To what extent do individuals outside of the radio and advertising industries really care about the ratings performance of individual radio stations? Do enough other people actually care enough for radio ratings – or audience ratings more broadly, for that matter – to be considered a matter of sufficient public interest and concern to trigger their categorization as non-commercial rather than commercial speech? Here again, it may make sense to parse audience ratings out into some discrete subcomponents, as was done in the fact versus opinion analysis. Specifically, a subscriber to Arbitron's audience data receives a tremendous volume of data. The data cover a wide range of demographic categories and are

presented across multiple time periods, and the audience exposure expressed via a variety of measures.⁹⁵ It is only a very basic, superficial component of all of these data, representing a miniscule proportion of the entirety of a typical Arbitron ratings report that is reported in the more mainstream media outlets targeting audiences outside of the radio and advertising industries. Perhaps this dynamic should be taken into consideration in determining whether it is appropriate to consider audience ratings as a matter of broader public interest and concern because it suggests that whatever broader public interest exists for audience ratings extends only to a very small component of these ratings.

This question of the broader public interest in ratings data also seems reflective of legal analyses of commercial versus non-commercial speech that have emphasized that the distinction should hinge on the extent to which the speech is “essential to public discourse.”⁹⁶ Robert Post, for instance, proposes defining commercial speech as “the set of communicative acts about commercial subjects that within a public communicative sphere convey information of relevance to democratic decision making but that do not themselves form part of public discourse.”⁹⁷ From this standpoint, for instance, books receive full First Amendment protection, while a form of speech such as medicine labels does not.⁹⁸

Do audience ratings meet these somewhat stringent speech criteria of “public discourse”? It seems difficult to place audience ratings in this category, particularly when audience ratings reports are considered in their entirety. This perspective has been convincingly articulated

⁹⁵ For example, Arbitron provides data not only on the average number of listeners to each station during a particular quarter hour, but also on the total number of discrete listeners that stations accumulate over time and the number of these listeners that are unique to the particular station.

⁹⁶ See James Weinstein, *Database Protection and the First Amendment*, 28 DAYTON L. REV. 305, 320 (2002) (indicating that speech occurring in a setting that is essential to public discourse tends to be considered highly protected).

⁹⁷ Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 25 (2000).

⁹⁸ See Weinstein, *supra* note 95, at 321 (suggesting that unlike books, medicine labels are not a medium essential to public discourse, and that is why medicine labels do not receive First Amendment protection).

within the context of commercial databases (a category in which audience ratings reports can be easily included). In his analysis of the speech status of commercial databases, Weinstein concludes that “although such speech is indeed protected, it does not enjoy nearly the same rigorous protection as speech that is part of democratic self-governance. . . . scientific and mathematical speech is protected primarily for instrumental reasons rather than as speech constitutive of democracy.”⁹⁹

These obvious difficulties in easily assigning audience ratings to either the commercial or non-commercial speech category suggest that perhaps we should dare to ask the question, are ratings data speech at all? The New York and New Jersey Attorneys General did not put forth such a contention, but such a possibility seems worthy of consideration. Certainly, the extent to which so many scholars of media industries and media audiences have often critically described the media audience as represented in ratings as a “discursive construct”¹⁰⁰ suggests that audience ratings should very much be considered a form of speech. How do we reconcile the fact that something can be simultaneously described as a *discursive construct*, the *currency* used in economic exchange, and an *opinion*, yet marketed and purchased on the basis of its claimed *objectivity* and *accuracy*? The apparent contradictions in this set of descriptors are almost head-spinning. Perhaps with audience ratings we are not really talking about something that fits within the parameters of speech established in First Amendment jurisprudence.

A number of scholars have emphasized the wide range of forms of communication that take place in the commercial sector that have very little, if any, First Amendment protection.¹⁰¹

⁹⁹ *Id.* at 327.

¹⁰⁰ For a discussion of the many academic analyses that have emphasized the discursive dimension of audience ratings, *see generally* PHILIP M. NAPOLI, AUDIENCE EVOLUTION: NEW TECHNOLOGIES AND THE TRANSFORMATION OF MEDIA AUDIENCES (forthcoming) (manuscript on file with author).

¹⁰¹ *See, e.g.*, Weinstein, *supra* note 95, at 319 (“The government thus routinely regulates without First Amendment hindrance the content of commercial and financial speech through laws against false or misleading advertising and

Frederick Schauer, for instance, notes that there is “a universe of communication relating only to business activity, having no explicit political, artistic or ideological content, and yet differing substantially from the kind of widespread hawking of wares” traditionally associated with commercial speech.¹⁰² Examples range from:

[C]ommunications to offerees, stockholders, and investors now regulated by various state and federal securities laws, including the Securities Act of 1933 and the Securities Exchange Act of 1934; numerous communications among business executives about prices and business practices now regulated by the Sherman Antitrust Act; communications about working conditions and the like now regulated by the National Labor Relations Act; representations about products and services now regulated by the Federal Trade Commission and the Food and Drug Administration; representations about products now regulated by various consumer protection laws, by the Uniform Commercial Code, and by the common law of warranty and contract; statements about willingness to enter into a contract now regulated by the common law of contract; and so on and on.¹⁰³

From this perspective, “Commercial speech doctrine is thus not merely about the boundary that separates commercial speech from public discourse, but also about the boundary that separates the category of ‘commercial speech’ from the surrounding sea of commercial communications that do not benefit from the protections of the doctrine.”¹⁰⁴ The point here, is that there are essentially some forms of communication that take place in the commercial sector that do not even trigger the need for a First Amendment analysis.

From this perspective, Cohen questions whether “we need not to apply First Amendment standards of review at all.”¹⁰⁵ This perspective of course raises the question of what exactly does trigger a First Amendment analysis? As Post illustrates, the answer comes largely from *Spence*

other deceptive business practices; controls what may be said about the value of a stock; prohibits competitors sharing price information; and through copyright law restrains the publication of infringing material.”).

¹⁰² Frederick Schauer, *Commercial Speech and the Architecture of the First Amendment*, 56 U. CIN. L. REV. 1181, 1183 (1988).

¹⁰³ *Id.* at 1183-84.

¹⁰⁴ Post, *supra* note 96, at 21.

¹⁰⁵ Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373, 1417 (2000).

v. Washington,¹⁰⁶ in which the Court acknowledged that not all forms of conduct can be labeled as speech, even if the individual engaging in the conduct intends to express an idea. Instead, the Court determined that First Amendment scrutiny would only be triggered when “[a]n intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it.”¹⁰⁷ According to Post, “[t]hese criteria (known as the Spence test) have been used ever since by lower courts to guide their decisions about whether to apply First Amendment protection.”¹⁰⁸

Post, however, asserts that the Spence test provides an inaccurate set of criteria regarding when the First Amendment has been brought to bear, arguing that the determination as to whether a First Amendment analysis is appropriate has also considered the social context.¹⁰⁹ He illustrates this point with the example of flight navigation charts, which, while certainly a medium of communication for particular messages, have, when accused of being inaccurate, been treated in the courts as products under product liability law rather than as speech receiving First Amendment protection. This is the case because, according to Post, “First Amendment analysis is relevant only when the values served by the First Amendment are implicated. These values do not attach to abstract acts of communication as such, but rather to the social contexts that envelop and give constitutional significance to acts of communication.”¹¹⁰

¹⁰⁶ 418 U.S. 405, 409 (1974).

¹⁰⁷ *Id.* at 410-11.

¹⁰⁸ Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1251 (1995).

¹⁰⁹ *Id.* at 1252. Post states:

The fundamental difficulty with the Spence test is that it locates the essence of constitutionally protected speech exclusively in an abstract triadic relationship among a speaker's intent, a specific message, and an audience's potential reception of that message. The examples we have been considering, however, suggest that the constitutional recognition of communication as possibly protected speech also depends heavily on the social context within which this triadic relationship is situated. The threshold conditions for applying the First Amendment must thus attend to this social context.

Id.

¹¹⁰ *Id.* at 1255.

The question then, is does the production and dissemination of databases such as Arbitron’s radio audience ratings necessarily meet these criteria for consideration as the type of expressive activity that falls within the purview of the First Amendment? A number of analyses that have focused on the appropriate analytical lens to apply to commercial databases have concluded that the answer may be no, that the information contained within commercial databases does not meet the criteria necessary to trigger a First Amendment analytical framework.¹¹¹ One could certainly see how the same logic employed by Post and Schauer would seem equally applicable to a context such as audience ratings. Essentially, audience ratings may be closer to a navigation chart or medicine label than they are to a book or a newspaper. Commercial databases such as audience ratings may perhaps best be considered within the demonstrably large collection of forms of commercial communication (see above) that have long resided largely outside of the parameters of First Amendment protection. As one analysis of the privacy issues surrounding consumer databases noted, databases are “a tool for processing people, not a vehicle for injecting communication into the ‘marketplace of ideas.’”¹¹² From this perspective, Cohen questions whether “we need to apply First Amendment standards of review at all.”¹¹³

This line of reasoning is particularly compelling in terms of the extent it intersects with academic analyses of audience ratings that have emphasized the extent to which it is the ratings themselves that are the product that is produced and sold by advertising-supported media.¹¹⁴

¹¹¹ See, e.g., Neil M. Richards, *Reconciling Data Protection and the First Amendment*, 52 UCLA L. REV. 1149, 1151 (2004) (“This Article takes issue with the conventional wisdom that regulating databases regulates speech . . . The First Amendment critics overstate the First Amendment issues at stake in the context of most database regulation proposals, because such proposals are not regulating anything within the ‘freedom of speech’ protected by the First Amendment.”).

¹¹² See Cohen, *supra* note 104, at 1414.

¹¹³ *Id.* at 1417.

¹¹⁴ Meehan, *supra* note 32, at 216 (“the commodity produced, bought, and sold is constituted solely by the ratings”); see ANG, *supra* note 30, at 3 (discussing the necessity for institutions to have audiences in television programming);

According to Eileen Meehan, this perspective can be taken so far that “ratings per se must not be considered as reports of human behavior, but rather as products—as commodities shaped by business exigencies and corporate strategies.”¹¹⁵

This notion of audience ratings as non-speech also seems to gain support when we consider the unique role that audience ratings serve in the audience marketplace. As was noted previously, ratings such as Arbitron’s serve as “currency” in the marketplace for media audience. “Currency” audience measurement products (referred to as Currency AMPs) are treated as a distinct category of audience measurement product from the standpoint of the Media Ratings Council, and are defined as “Those AMPs that are widely used and form the basis for setting the financial value of advertising.”¹¹⁶

One important aspect of this idea of ratings data as currency is that the history of audience measurement tells us that there are very powerful incentives pushing towards the use of a single currency in any audience market. Thus, competition in the audience ratings business is quite rare—and, most important, most participants in the audience market (i.e., purchasers of ratings data) seem to prefer it that way.¹¹⁷ The existence of multiple currencies amplifies uncertainty about what is already a highly nebulous product; it means purchasing what can easily be perceived as redundant information sources (imagine, for instance, a media organization having to subscribe to two or three or four sets of audience ratings from different, competing providers); and it introduces points of contention and inefficiency into the negotiations between

see generally AUDIENCE ECONOMICS, *supra* note 12 (citing the intricacies of advertising supported media in connection with audience lists).

¹¹⁵ Meehan, *supra* note 32, at 221.

¹¹⁶ Letter from Thomas O. Barnett, Assistant Attorney General, Department of Justice, to Jonathan R. Yarowsky, Patton Boggs L.L.P. 1 (Apr. 11, 2008) (on file with author) (describing the Justice Department’s decision not to pursue anti-trust action against the MRC for altering its auditing policies in regard to Currency AMPs, in which the MRC adopted language more forcefully encouraging audience measurement firms to obtain MRC accreditation before replacing an existing Currency AMP with a new Currency AMP).

¹¹⁷ *See generally* AUDIENCE ECONOMICS, *supra* note 12 (discussing the industry of audience marketing).

buyers and sellers of audiences. For these reasons, advertisers and media buyers seldom have demonstrated the necessary support for competitive ratings services for such services to take hold and serve as meaningful competitors to the incumbent firms. In sum, most marketplaces for ratings “currencies” are monopolies – perhaps even natural monopolies.¹¹⁸

This description would suggest that the dynamics of the marketplace for audience ratings do not at all conform to the kind of traditional “marketplace of ideas” dynamics that are protected and promoted by the First Amendment. The audience ratings marketplace tends to have one “speaker,” and unlike in traditional idea marketplaces, the audience tends to prefer it that way, as it allows them to go about their work and make their relevant decisions more efficiently. This kind of deviation from the established marketplace of ideas model raises serious questions about the appropriateness of categorizing audience ratings as speech. And if we do, then doing so simultaneously raises a red flag on a state of monopoly in an idea marketplace that is utterly contradictory to the fundamental First Amendment principle that the public is best served by the availability of “the widest possible dissemination of information from diverse and antagonistic sources.”¹¹⁹ There are seldom any diverse and antagonistic sources in the marketplace for ratings data—and, more important, nobody seems to want them. The marketplace would likely not operate efficiently if there were—leading to the inevitable contraction back to a single currency provider. If this is how the marketplace for audience ratings operates, then can we really be talking about a traditional, legitimate idea marketplace warranting a First Amendment analysis?

CONCLUSION

¹¹⁸ See Joe Mandese, *Nielsen Media Chief: We Now Control Three-Quarters of World's TV Currency Data*, <http://www.tvrd.org/showthread.php?t=932> (Nov. 13, 2008, 08:31 EST) (announcing that Nielsen Media Research controls three quarters of the world's television currency data).

¹¹⁹ *Associated Press v. U.S.*, 326 U.S. 1, 20 (1945).

Clearly, the Arbitron PPM controversy raises complicated questions about the nature of commercial speech, the nature of the media audience, and even the distinction between fact and opinion. This article provides only a preliminary inquiry into these questions at this early, unresolved stage in this controversy. Nonetheless, this analysis suggests that audience ratings require looking beyond the traditional fact versus opinion dichotomy, and that the question of the commercial/non-commercial speech categorization be expanded to address the question of whether a First Amendment analysis is even appropriate for considering audience ratings and the permissibility of greater legal/regulatory oversight of the audience ratings industry.

Future research not only needs to delve more deeply into the questions addressed here, but also into related questions involving, for instance, whether the Federal Communications Commission has the regulatory authority to engage in more active oversight of the audience ratings industry, and whether some more authoritative form of industry self-regulation might be appropriate/permissible. Or, should the construction of the media audience be left to the dynamics of the market? Clearly, in this case the multi-faceted issue of race and the media has led to the opening of a Pandora's Box of difficult questions related to diversity, the media, and the process of constructing the media audience.