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Philip M. Napoli

Fordham University, pnapoli@fordham.edu

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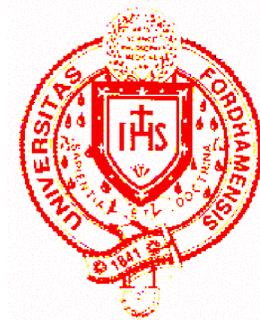
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COMMUNICATION RESEARCH CENTER



WORKING PAPER

**THE LOCAL PEOPLE METER, THE PORTABLE
PEOPLE METER AND THE UNSETTLED LAW AND
POLICY OF AUDIENCE MEASUREMENT IN THE
U.S.**

Philip M. Napoli

Director

Donald McGannon Communication Research Center

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The Donald McGannon Communication Research Center
Faculty Memorial Hall, 4th fl.

Fordham University

Bronx, NY 10458

718.817.4195

www.fordham.edu/mcgannon

mcgctr@fordham.edu

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Unsettled Law and Policy of Audience Measurement in the U.S.

Philip M. Napoli

Fordham University, New York, NY

Introduction

This chapter examines the controversial launches in the U.S. over the past decade of the Nielsen Local People Meter (which measures local television audiences in the U.S.) and the Arbitron Portable People Meter (which currently measures only radio audiences in the U.S., but also is capable of measuring television audiences). Each of these new audience measurement systems prompted substantial levels of resistance amongst a wide range of stakeholders, including television and radio broadcasters, minority groups, and local, state, and federal policymakers. This chapter provides an examination of the controversies surrounding the launch of these new technologies.

In addition, this chapter explores the range of legal and public policy issues that have been illuminated via the launches of these new measurement systems. Specifically, this chapter considers the competition and diversity policy issues that have become quite prominent in the U.S. in relation to these new audience measurement systems. These competition and diversity concerns drew the attention of city- and state-level government officials, as well as the attention of the U.S. Congress and the Federal Communications Commission.

This chapter also considers the central unresolved legal debate that has developed around these audience measurement controversies. Specifically, this chapter examines the issue of the appropriate First Amendment status of audience ratings data. The issue of if ó or

to what extent ó government policymakers can impose regulations upon the audience measurement industry depends in large part on the level of speech protection that should be afforded to the producers of audience ratings. This chapter concludes with a proposed legal and regulatory approach to the audience measurement industry

The Introduction of the Nielsen Local People Meter

The introduction of the Nielsen Company's Local People Meter system of measuring local television audiences encountered resistance and outright hostility that was (until the introduction of the Arbitron Portable People Meter) unprecedented in the history of audience measurement. The Local People Meter initiative is an effort by Nielsen to convert the 210 local television markets (in the U.S., each local market has its own measurement sample) that it measures from paper diaries and (in some markets) audimeters to set-top meters that are essentially identical to those Nielsen has used since the late 1980s to measure its *national* television audience sample that is used to produce national television ratings (Nielsen Media Research 2006a, 2006b).

Resistance to the Local People Meters (LPM) began immediately upon the introduction of the first test system in Boston in the late 1990s. This resistance emanated primarily from local broadcast television stations (as opposed to other major stakeholders such as advertisers or cable companies). The focal points of resistance at this early stage in the LPM's introduction were: (a) the sudden dramatic shift in methodology that was taking place (and the disruption it would cause to established practices); (b) the costs associated with this shift (since subscribers would have to bear the increased costs associated with the more expensive measurement system); (c) local station research directors' and media buyers' inability to cope with the enormous information flow provided by the LPM service (see Napoli, 2005); and (d) Nielsen

was instituting the shift before receiving full accreditation from the Media Rating Council ó although accreditation ultimately came six months after the launch (óFor Nielsen, Fear and Loathing in LA,ö 2004).

The Media Rating Council (MRC) is a nonprofit organization created by the media and advertising industries to oversee and accredit audience measurement services. It originated (as the Broadcasting Rating Council) in the aftermath of a series of hearings held by Congress in the 1960s in response to the well-known quiz show scandals investigating television ratings and audience research (see Goldberg 1989). The MRC engages in detailed assessments of the methodological rigor and soundness of new audience measurement systems, accrediting those that attain minimum standards of rigor, accuracy, and reliability. Services meeting these qualifications 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, it is in no way required to postpone the launching of the service until accreditation is received.

Under the LPM system, broadcast stations experienced significant ratings declines, while many cable channels experienced significant increases (óFor Nielsen, Fear and Loathing in LA,ö 2004; see also Napoli 2005). Broadcasters were resistant to a measurement system that was likely going to alter the competitive dynamics of their market in a manner that would enhance local cableø ability to compete with local broadcasting for advertising dollars. Resistance to the LPM mirrored what took place at the national level in the 1980s, when the switch to the People Meter also resulted in sudden ratings increases for cable at the expense of broadcast ratings (Adams 1994; Barnes and Thomson 1994).

The most widely accepted explanation for this alteration in ratings patterns is that the participant recall component of the diary system creates a bias in favor of broadcast programs. For a variety of reasons, participants are more likely to recall viewing or even exaggerate viewing broadcast than cable programs; that is, diary keepers are more likely to recall and record broadcast television viewing than they are to recall and record cable television viewing. Unhappy with the results of the new system, as well as the increased costs associated with subscribing to it, many broadcasters went for months without subscribing to Nielsen data (Bachman 2002a, 2002b).

As the LPM rollout continued, however, the expressed rationales for broadcaster resistance to the new system changed dramatically, with the resistance focusing on the possibility that the LPM system was under-representing minority television viewers in relation to non-minority viewers, as well as the contention that Nielsen was abusing its position as a monopolist in the provision of television audience ratings (see Hernandez and Elliott 2004a). At the time of the controversies peak, LPM data from these more ethnically diverse markets indicated significant declines in minority broadcast television viewing (compared to viewing levels under the audimeter/diary system) and increases in cable viewing; however, cable viewing was more widely dispersed across available channels than was indicated by the audimeter/diary system (Napoli 2005).

The new system also suggested that a larger proportion of the audience for "minority targeted" television programs was, in fact, white. Thus, for instance, diary-derived assumptions that audiences for certain African American-targeted programs were roughly 75% African American were countered by LPM data at the time, which indicated that the audiences were closer to one-half to one-third African American (Napoli 2005). The result of these patterns is

that the audiences for certain minority-targeted broadcast network programs appear to decrease dramatically under the LPM system. Some African-American targeted programs experienced declines in viewers 18 and older of between 29% and 63% (Napoli 2005). However, it is important to recognize that these large audience declines are not isolated to minority-targeted programs. Nonminority-targeted programs also experienced significant declines, ranging from 30% to 55% (Napoli 2005). Nonetheless, it is from these ratings patterns that the concerns about the impact of the LPM system on diversity in television arose.

These claims of anti-competitive behavior and minority under-representation quickly attracted attention in political and policymaking circles (see Bachman 2004; Hernandez and Elliott 2004b), leading to the formation of an advocacy organization called the Don't Count Us Out Coalition (2004), which comprised a collection of minority advocacy groups and which received its primary financing from NewsCorp, owner of the FOX broadcast station group (Hoheb 2004; NewsCorp 2004).

Broadcaster resistance to the LPM went further still, resulting in a failed lawsuit seeking an injunction against the rollout of the Los Angeles LPM system (*Univision Communications, Inc. v. Nielsen Media Research, Inc.* 2004), as well as congressional hearings (U.S. Senate 2004), requests by members of Congress for a U.S. Federal Trade Commission (FTC) investigation (Burns 2004), and proposed congressional legislation seeking to establish more direct government oversight over media audience measurement (Fairness and Accuracy in Ratings Act 2005). This legislation was introduced in response to the specific concerns about the accurate measurement of minority audiences, as well as in response to the more general concerns about the dangers of monopolies in audience measurement (Advertising Research Foundation 2005).

No legislation was passed, nor was any FTC oversight imposed, and the Nielsen LPM

system, though delayed somewhat from its original timetable, has continued its roll-out across the nation's major television markets, with most broadcasters essentially begrudgingly subscribing to the new service. Today, the LPM service is operating in 25 television markets in the United States. Nielsen did, however, make some concessions, adopting a number of methodological alterations, and doing more to engage with minority communities (see Napoli 2005).

The Introduction of the Arbitron Portable People Meter

This pattern demonstrated with the Local People Meter in the U.S. has recently repeated itself with Arbitron's introduction of its Portable People Meter (PPM) radio audience measurement service. The PPM is a portable electronic device intended to gradually replace Arbitron's paper listening diaries. The PPM carrier need only carry the device all day (attached to a belt or a purse, etc.). All of the relevant listening data are uploaded, aggregated, and linked with the subject's demographic data, so that detailed radio listening reports can be produced much more quickly, and presumably much more accurately, than can be accomplished via paper diaries, which need to be filled out by each participant and mailed back to Arbitron for tabulation at the end of each week (Arbitron 2007a).

It is important to note that, in the developmental stages of the PPM, Arbitron approached Nielsen about a possible joint venture with the new system. Because the PPM relies upon an embedded audio signal, it is capable of measuring television usage as well as radio usage (and could even measure online audio/video consumption). Arbitron was in need of a funding partner in order to develop and roll out the PPM on a reasonably rapid timetable. Nielsen, however, after some consideration, opted not to enter into a joint venture with Arbitron, committing itself instead to its LPM technology.

Arbitron began rolling out its new system via trials in test markets such as Wilmington, Delaware, and Philadelphia, Pennsylvania (McBride 2007). The PPM went live in Philadelphia in March 2007 and in Houston in June of the same year (Arbitron 2008). 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. PPM data have since become the currency in almost 50 of the 290 radio markets in the United States (as of December 2010; see Arbitron 2010).

However, 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 (2008), and the Association of Hispanic Advertising Agencies (2008) asked that Arbitron delay the roll-out of the PPM service (McBride 2007). Public interest and advocacy organizations such as the NAACP (Jealous 2008) and the Minority Media and Telecommunications Council soon began expressing concerns about the PPM roll-out as well. Some Spanish-language broadcasters refused to encode their broadcasts with the PPM signal in a number of markets in which Hispanic audiences comprised a significant portion of the overall radio audiences (Bachman 2009). In some instances, Arbitron sought court orders requiring these broadcasters to encode their broadcasts with the signals necessary for the PPM to be able to measure their stations (Arbitron v. Spanish Broadcasting System 2010).

Once again, the key criticism being leveled at the new system was that the new ratings estimates showed substantially lower listening levels for programmers targeting minority audiences. It should be noted that PPM data from this time period indicated overall declines in the average quarter-hour ratings of radio stations of between 15 and 30 percent. However,

these declines were generally steeper for ethnic stations, some of which exhibited declines of 50 percent or more (Downey 2008).

As was the case with the LPM, the specific criticisms of the PPM system arose not from the PPM *technology* per se, but rather from the *sampling process* via which PPM audience panels are constructed. Critics of the PPM roll-out contend that Arbitron's samples are substandard in ways that lead to significant underrepresentation of minority radio audiences. A number of arguments have been put forth in this regard, such as: Arbitron's use of telephone-based, rather than address-based sampling diminishes the ability to recruit an adequate Hispanic sample; the company under-samples cell-phone-only households, thereby under-representing minorities and youth; and response rates and compliance rates for PPM participants are unacceptably low (see Napoli 2009).

It was on the basis of many of these sampling issues that the Media Rating Council has also been critical of the PPM system. When Arbitron launched its PPM service in Houston, that service did receive accreditation from the MRC prior to "going live" (Arbitron 2007b). However, Arbitron subsequently went live with the PPM in nine other markets without the services successfully achieving MRC accreditation (Downey 2008). Arbitron continued to go live with the PPM service in dozens of individual radio markets, despite the fact that only the Houston and Riverside, California, PPM systems were operating with MRC accreditation. Critics of Arbitron's willingness to roll out the PPM service without MRC accreditation pointed to the fact that Arbitron executives' performance bonuses were heavily tied to the commercialization of the PPM service (Radio Business Report 2008). Within this context, it should be noted that the PPM service generally carries a subscription price tag that is 60 to 65 percent higher than a subscription to diary data (Napoli 2011).

As was the case with Nielsen's Local People Meter, concerns about the accuracy of these unaccredited iterations of the PPM service, and their potential impact on minority-targeted radio, have spilled into the governmental arena, again with the underlying concerns involving potential abuses of monopoly power and the diversity implications of the new measurement system. At the local level, in September 2008 the New York City Council issued a resolution calling upon the Federal Communications Commission to open an investigation into the PPM service. At the state level, the attorneys general of New York, New Jersey, Florida, and Maryland filed lawsuits against Arbitron, asserting both fraud and civil rights violations, and seeking damages and the cessation of the unaccredited PPM services (see Napoli 2009). Arbitron tried to preempt the action by the New York attorney general by filing its own lawsuit in federal court (*Arbitron v. Andrew Cuomo* 2008a). At the federal level, in September 2008 the Federal Communications Commission (2008) opened an inquiry into the PPM service aimed at the question of whether a formal FCC investigation into the PPM was appropriate; and in June 2009, the Oversight and Government Reform Committee of the U.S. House of Representatives initiated an investigation into Arbitron's use of the PPM ("Towns opens investigation," 2009; "Towns subpoenas Media Ratings Council," 2009; see also Towns 2009).

The FCC has yet to initiate a formal investigation into the PPM at the time of this writing (December, 2010). The lawsuits filed by the states of New York, New Jersey, and Maryland have all been settled, with Arbitron agreeing to make a number of methodological alterations to its PPM service, most of which focus on the process of sampling individuals to participate in the measurement process—so once again the representation of the audience provided by the new audience information system has been affected. The settlements also

include agreements by Arbitron to include more pronounced disclaimers about the limitations of the PPM data in its ratings reports and to provide a small amount of monetary relief to the states and minority broadcaster associations (see, e.g., *Anne Milgram v. Arbitron* 2009; *New York v. Arbitron* 2009). The Florida lawsuit is ongoing.

The Unsettled Law and Policy of Audience Measurement

The contentious introduction of these two audience measurement systems in the United States highlight a number of interesting law and policy issues that are intertwined with the business of audience measurement.

Monopoly in Audience Measurement

First, in both the Nielsen and Arbitron cases, a key point of concern that was raised in the various lawsuits, as well as in the inquiries initiated by Congress and the Federal Communications Commission, was the extent to which these measurement services operated as unregulated monopolies. Historically, there has been a pronounced tendency toward monopoly in audience measurement, given the efficiencies that arise when a marketplace is served by a single currency that all participants in the marketplace treat as definitive. Direct competition in audience measurement means that marketplace participants may need to subscribe to multiple, possibly contradictory, ratings services; and that the discrepancies across these services then become a source of uncertainty and contention in the negotiations surrounding the buying and selling of audiences. On the other hand, a monopolistic situation can create conditions, such as those asserted by opponents of Nielsen and Arbitron, in which innovation is slow to materialize, in which prices are inflated, and in which measurement services are not responsive to the needs and interests of their client base.

And so, one of the key unresolved policy issues that has arisen as a result of the

contentious introductions of the Nielsen LPM and Arbitron PPM is whether the television and radio audience measurement industries in the United States, as currently structured, represent the kind of monopolies that traditionally have warranted some form of direct government oversight or intervention, given the long-standing centrality of competition as a U.S. communications policy principle (Napoli, 2001). As was noted above, these measurement firms currently are only subject to a largely ineffectual form of industry self-regulation via the oversight of the MRC.

Audience Measurement and Diversity Policy

Second, both the LPM and PPM controversies became very tightly intertwined with the principle of diversity. Diversity has long been one of the fundamental principles guiding communications regulation and policy in the United States. Diversity is a complex concept with many elements (see Napoli 1999); however one element that has always been at the core of U.S. diversity policy is the focus on assuring that the media system supports content from a diverse array of sources that addresses a diverse array of audience interests.

In these audience measurement cases, the primary concern amongst policymakers has been whether the new systems are being implemented in ways that disproportionately under-represent the media consumption of minority audiences (primarily African-American and Hispanic viewers/listeners). If so, then these audience segments become more difficult to monetize in the audience marketplace; which of course creates disincentives for television and radio programmers to provide content that addresses the needs and interests of these audience segments ó or at the very least lead to reduced investment in such content and thus reduced quality. And finally, when we consider the fact that research has demonstrated that minority owners of media outlets are much more likely to provide content addressing the needs and

interests of minority communities (Siegelman and Waldfogel 2001), these possible patterns of under-representation of minority audiences have the potential to reduce minority ownership of media outlets. If the provision of minority content becomes a significantly less viable business model, then there is a danger that the owners of outlets that provide such content will be forced not just to alter their programming strategy (a diminishment of content diversity), but possibly also to either shut down their station/network or to sell to a non-minority programmer (a diminishment of source diversity).

Reaching a clear and objective conclusion, however, regarding whether these new measurement services are genuinely undermining diversity is a difficult task. This is largely because of the challenges associated with determining whether the revised audience estimates provided by these new measurement services represent a more or less accurate representation of audience behavior. Simply because the revised audience figures indicate lower levels of minority media usage does not necessarily mean that the new systems are less accurate than the old systems. The old systems might have been over-representing minority radio and television usage.

Perhaps not surprisingly, opponents of the LPM and PPM produced research indicating that the new systems were under-representing minority media usage, while the measurement firms have produced research indicating that the new systems were in fact more accurate than their predecessors (see Napoli, 2005, 2009). Thus, while the question of whether these particular new audience measurement systems helped or hindered media diversity has yet to be satisfactorily resolved, these debates have raised the larger question of whether diversity concerns represent a compelling rationale for a more active governmental role in the oversight of the audience measurement industries in the United States.

Questioning the Speech Status of Audience Ratings

Underlying these unresolved policy issues, and the legal battles that have accompanied them, is the fascinating question of the appropriate speech status of audience ratings. That is, should audience ratings data be afforded full free speech protection under the First Amendment, and therefore be free from any potential government intrusions? The answer to this question has a direct impact on whether policymakers and the courts have the right influence the operation of audience ratings services. This section examines the specifics of the dispute over the speech status of radio audience ratings that took place between Arbitron and the New York Attorney General (of the three states that have concluded lawsuits against Arbitron, it was the New York lawsuit that proceeded the furthest before being settled).

Looking first at Arbitron's arguments, the firm contended that the states' ability to enjoin the company from issuing PPM-based ratings ran aground against the ratings' status as noncommercial speech. According to Arbitron, any efforts to enjoin distribution of the PPM data represented a prior restraint on protected, noncommercial speech, and were thus a violation of the company's First Amendment rights (*Arbitron v. Andrew Cuomo* 2008a). In the U.S., noncommercial speech generally receives stronger First Amendment protection than commercial speech (see, e.g., *Central Hudson v. Public Service Commission of New York* 1980). False or deceptive commercial speech is wholly unprotected by the First Amendment. Noncommercial speech, on the other hand, is immune to the forms of prior restraint that were being sought by the attorneys general in their efforts to prevent Arbitron from switching over from the diary to the PPM ratings. 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 went so far as to argue that because the concerns

of the attorneys general were directed at the representations of African-American and Hispanic audiences within Arbitron's ratings data, their efforts to prevent the dissemination of the LPM data "constitute a content-based regulation of speech" (*Arbitron v. Andrew Cuomo* 2008b:16).

Unfortunately, the U.S. Supreme Court has never offered clear and definitive criteria as to what constitutes commercial speech (see, e.g., Boedecker, Morgan, and Wright 1995; Earnhardt 2004). The court has articulated different criteria in different decisions (Boedecker, Morgan, and Wright 1995). At the general level, the Court has defined commercial speech as speech that does no more than propose a commercial transaction (*Virginia State Board of Pharmacy v. Virginia Citizen's Consumer Council* 1976). 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 (see, e.g., *Goran v. Atkins* 2006/2008); (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. 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 (*Kasky v. Nike* 2002).

The fact that the application of these different criteria has varied across different commercial speech cases helps explain the multifaceted arguments put forth by Arbitron and by the state attorneys general on this issue. In support of its argument that its audience ratings are noncommercial speech, Arbitron emphasized that its ratings "do not propose any offer of sale or other commercial transaction by Arbitron to its subscribers" (2008b:20).

Arbitron also referenced the earlier lawsuit in which Nielsen was sued by Spanish-

language broadcaster Univision over representations of the Spanish-language audience provided by Nielsen's Local People Meter. In this case the court denied Univision's motion to have the LPM service suspended because in the court's view, Univision failed to demonstrate that the LPM service was flawed, and therefore the motion *had* be denied on this basis (*Univision Communications, Inc. v. Nielsen Media Research* 2004).

However, the court also touched on the First Amendment issue, noting that the motion *should* be denied on the basis that "the ratings system may qualify as non-commercial speech because, though [the] defendant is a commercial speaker, the intended audience is not necessarily likely to be actual buyers of [the] defendant's services" (*Univision Communications, Inc., v. Nielsen Media Research* 2004:3, emphasis added). The use of the terms "must" and "should" suggests that the court was less willing to make a definitive statement about the speech status of audience ratings, an interpretation that is further supported by its later statement that "even if the speech is considered commercial, plaintiffs have failed to show that the speech is false" (*Univision Communications, Inc. v. Nielsen Media Research* 2004:3). Here again the court conveys a somewhat tentative perspective on the speech status of audience ratings, which perhaps explains why the attorneys general chose to pursue this line of argument in the PPM case despite this court's decision in regards to the LPM.

Arbitron also contended that its ratings do not qualify as commercial speech because the ratings are "a matter of public interest and concern" (*Arbitron v. Andrew Cuomo* 2008a:5). In support of this point Arbitron noted that its radio ratings are published in a wide variety of mainstream media outlets and trade publications. 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.

Arbitron also contended that its ratings represent its *opinions* as to the size of radio audiences and station rankings (*Arbitron v. Andrew Cuomo* 2008a:61; emphasis added). According to Arbitron, “Simply 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” (*Arbitron v. Andrew Cuomo* 2008c:60). Characterizing audience ratings as opinions makes it more difficult to categorize 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 (see *Gertz v. Welch* 1974).

The New York attorney general 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” (*Arbitron v. Andrew Cuomo* 2008d:10). 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 (*Arbitron v. Andrew Cuomo* 2008d:9). The New York attorney general countered 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” (*Arbitron v. Andrew Cuomo* 2008d:9). Finally, 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 (*Arbitron v. Andrew Cuomo* 2008d:10).

Because these lawsuits were ultimately settled out of court (or are ongoing, as is the case in Florida), these fundamental questions about the appropriate speech classification for audience ratings remain unresolved.

Toward a Definitive Speech Status for Audience Ratings

This section offers some preliminary thoughts aimed at establishing an appropriate and workable legal framework for the speech status of audience ratings. This analysis addresses both the facts vs. opinion and commercial vs. non-commercial speech dichotomies that are at the core of recent debates over the extent to which audience ratings are entitled to First Amendment protection.

Audience Data as "Social Facts"

As should be clear at this point, audience data seem frustratingly resistant to categorization as either fact or opinion. There may be a tenable intermediate position, however, that can be ascribed to audience ratings. Specifically, 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" (Hughes 2007:45; see also Gordon 1992). John Searle offers a potentially valuable middle ground that acknowledges that "there are portions of the real world, objective facts in the world, that are only facts by human agreement" (1995:1). Such instances have been termed "social facts." According to Searle (1995), a social fact arises when: (a) someone declares or states that something is the case; and (b) when it becomes widely accepted that something is the case. This notion of facts by human agreement seems particularly applicable to the nature of the audience ratings that serve as

currency in the audience marketplace. Such currencies involve 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 (1995:55).

Drilling deeper into this notion of social facts, we find subcategories that seem particularly attributable to audience data. Specifically, legal scholar Justin 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" (2007:68). 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. All of these examples involve the setting of values for products, not unlike the way audience measurement firms' assessments of media audiences set values for advertisers.

Such efforts to develop an intermediate construct between fact and opinion/expression have been focused primarily on the copyright implications of such a shift. Hughes (2007), for instance, has advocated on behalf of the notion of "created facts," but has done so while also advocating for maintaining copyright protection for such facts when judged appropriate. This is relevant here because it is important to recognize that a legal path could potentially be traveled in which audience data are classified as facts of a sort for the purposes of fraud assessments and commercial versus noncommercial speech determinations (see below), but such a classification would not necessarily deny measurement firms the copyright protection needed to sufficiently incentivize them to produce their product (given that facts typically are not copyrightable).

Audience Ratings as Non Speech

Just as the strict fact/opinion dichotomy may be an inadequate basis for legal and public policy decisions regarding audience ratings, so too may be the strict commercial/noncommercial speech dichotomy on which legal debates about audience measurement have focused. The difficulties associated with assigning audience ratings to either the commercial or the noncommercial speech category suggest that perhaps we should dare ask the question: Are audience data speech at all? Many scholars of media industries and media audiences have often critically described the media audience as represented in ratings as a "discursive construct" (for a review see Napoli, 2011) suggesting that audience ratings should very much be considered a form of speech. How, however, 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*? 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 legal 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 (see Weinstein 2002). 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 (1988:1183). Examples range from communications 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 protections, 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. (Schauer 1988:118361184)

From this perspective, the 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 (Post 2000:21). Clearly, there are many forms of communication that take place in the commercial sector that do not even trigger a First Amendment analysis.

This perspective of course raises the question of what then does trigger a First Amendment analysis. As Post (2000) illustrates, the answer comes largely from *Spence v. Washington* (1974), in which the U.S. Supreme 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 be triggered only when “an 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” (pp. 4106411). This *Spence* test has been used by lower courts to guide

their decisions about whether to apply First Amendment protection (Post 2000).

Post (1995) however, contends 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. 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, "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" (Post 1995:1255).

The question then is: Does the production and dissemination of data such as those produced by audience measurement firms 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 (see, e.g., Richards 2004).

One could certainly see that the same logic would be equally applicable to a subject such as audience ratings. Essentially, audience ratings seem much closer to a navigation chart or medicine label than they are to a book or a newspaper, and thus may perhaps best be considered within the large collection of forms of commercial communication that long have resided largely outside of the parameters of First Amendment protection.

Conclusion

This chapter has examined the wide range of unresolved legal and policy issues that have been highlighted by the introduction of the Nielsen Local People Meter and Arbitron Portable People Meter audience measurement systems in the United States. Central U.S. communications policy principles of competition and diversity are at the core of the stakeholder disputes surrounding the efforts by these measurement firms to introduce new and, presumably, improved audience measurement systems. The goal here has not been to assess exactly how these new measurement services might be affecting diversity in television or radio; nor has the goal been to assess whether or not these measurement firms indeed meet the criteria of monopolies requiring government regulation. Rather, the goal here has been simply to illustrate how these fundamental communications policy principles are ingrained in the process of audience measurement

This chapter has also sought to provide an overview of the central First Amendment disputes that remain largely unresolved in relation to the speech status of audience ratings. The determination of this speech status is central to whether any government efforts to take a more active role in the oversight of the audience measurement industry have solid legal footing. This chapter has proposed that such a legal footing can be relatively firm, when we consider the arguments developed here that: a) provide a logical pathway for treating audience ratings as a form of facts; and b) suggest that audience ratings do not belong in the category of the type of communication that triggers First Amendment scrutiny.

Controversies such as those that have erupted in the U.S. suggest that the law and policy of audience measurement is a line of inquiry meriting more attention from scholars interested in how audiences are constructed in the operation of media industries and how these

constructions are affected by legal and policymaking institutions. Future research should engage in cross-national comparisons and analyses of how the process of audience measurement is treated in the legal and public policy arenas.

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