ALL THE NEWS THAT'S FIT TO FUND: THE LOW-PROFIT LIMITED LIABILITY NEWSPAPER

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By Christopher Hickman

INTRODUCTION

The newspaper is an exceptional commodity in the American community. When investigative news reporting is vibrant and disinterested, citizens receive a compelling view of their community and the social, economic, and political forces that shape the world around them. At the local and national level, the newspaper provides information, investigation, and community knowledge that citizens might not otherwise have. It reveals government activity and the impulses behind such activity. The press, at its best, serves an invaluable watchdog function, holding business and government actors accountable for their actions. The citizen also turns to newspapers for marketplace analysis, consumer information, and diversion. The journalism business addressed all these needs with remarkable success over the last sixty years. In 1950, total newspaper advertising nationwide was $2 billion, enough to provide a living for most owners (and for other owners to nonetheless do quite well).\(^1\) By 2000, advertising was responsible for $49 billion in income to newspapers; ad growth and the disappearance of competing paid circulation papers made newspapers quite profitable, led to an influx of publicly traded newspaper companies owning large numbers of newspapers nationwide, and occasioned a spike in profitability.\(^2\)

Increasingly, however, the newspaper has ceded ground to other platforms, particularly the Internet, for marketplace analysis, consumer information, and diversion.

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\(^2\) Picard, * supra* note 1.
Advertisers, naturally, have followed news audiences to these newer platforms. News organizations are severely thinning out their bureaus and areas of coverage. The number of full-time journalists is in a notable decline. This has contributed, in part, to a dearth of resources for watchdog reporting. And, though Internet advocates feel certain that the Web can fulfill the need for in-depth investigative reporting, chiefly through its battalions of citizen journalists, there is no current substitute for publications that can "marshal years of well-developed sourcing and reporting experience" to address news of the moment.

Thus, journalism is in a period of significant upheaval. The traditional media, chiefly ink-and-paper media, has been beset by economic hardship and the ascension of new modes of newsgathering and distribution. In the face of these challenges, many scholars, journalists, and policymakers have considered possible new models for the old media; the focus, in particular, has been on developing new systems to support thoroughgoing, credible accountability journalism. An intriguing possibility is to abandon the standard business model for newspapers, which relies on circulation and ad revenue to generate profits and fund investigative reporting, in favor of a hybrid social enterprise approach, which blends non-profit and for-profit modes in an effort to achieve social benefits while still maintaining some bottom-line profitmaking.

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3 Picard, supra note 1.
5 For the purposes of this article, the terms "hybrid social enterprise" and "blended enterprise" are effectively interchangeable. A blended enterprise refers to that entity which seeks to pursue both profits and social good, both in tandem and by making careful choices to pursue one over the other. There will be times when the pursuit of profit trumps social good, and vice versa. If the two were perfectly aligned, and more profits always took a back seat to increased social good, or if the opposite were true, then a single mission charity or an appointed business form would be sufficient. A hybrid social enterprise is the model through which the various investors conduct this pursuit. Dana Brakman Reiser, Professor Law, Brooklyn Law School, Keynote Address at the
article is about the future of the newspaper in the context of hybrid social enterprise, specifically the low-profit limited liability company (hereinafter, the “L3C”), both as a possible engine for a moderate profit source for its backers and a platform for socially conscious values in the news reporting context.

Part I of this article discusses the landscape of the newspaper business currently, including the decline in print circulation, the migration of classified ads to the Internet, the impact of the economy on retail ads, and the relative inability of the newspaper business to embrace the possibility of new solutions in the non-profit realm. Part II discusses the low-profit limited liability company, its guidelines and organization, and argues that as a hybrid form it is best equipped to solve the problems facing newspapers today. Part III details the manner in which the L3C can be applied to a struggling newspaper, detailing the practical and legal complications faced in the process, as well as pointing out possible solutions to allow its application to be effective. Part IV briefly recounts the policy considerations for saving the newspaper, and argues that a social enterprise approach will provide the cleanest transition for the newspaper from purely for-profit uncertainty to firmer ground in a hybrid format, where profits share space with social concerns. Also, this part makes recommendations to Congress and the I.R.S. to hasten the ability of L3Cs to do the necessary work of preserving the watchdog function of the American media. The article briefly concludes with a summation of the problems facing the newspaper industry today, and the effectiveness of the L3C in providing a solution.

PART I. AMERICAN NEWSPAPERS IN DECLINE

The First Amendment “rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society.”6 The American press did not always actively explore the contours of this assumption.7 “Watchdog journalism,” or, journalism that challenges those with power and influence as a civic duty, generally found its voice in the sixties and seventies.8 From the Watergate reporting of Bernstein and Woodward to the New York Times’ report on the Pentagon’s use of military analysts on television to generate favorable accounts of the Bush administration’s wartime performance, the general assessment is that such independent reporting is vital to the interests of the American people.9

The relationship of reporter and reader is a key component of this dissemination of information. As the influential reporter Richard Harding Davis said, “Now, you cannot pay a good reporter for what he does, because he does not work for pay. He works for his paper. He gives his time, his health, his brains, his sleeping hours, and his eating hours, and sometimes his life, to get news for it. He thinks the sun rises only that men may have light by which to read it.”10 The reader, in turn, has responded favorably to vigorous reporting, for “in any mentally alert society, there is a fairly universal desire for access to

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8 Downie & Schudson, supra note 7.
9 Downie & Schudson, supra note 7; in a piece on the collection of “military analysts” who hit the airwaves to give apparently neutral and favorable judgment of the Bush Administration’s prosecution of the War on Terror, the New York Times uncovered evidence that these seemingly impartial accounts were actually part of a propaganda campaign orchestrated by the Pentagon. David Barstow, Behind TV Analysts, Pentagon’s Hidden Hand, N.Y. Times, April 20, 2008, at A1.
a world of experience, thought, and feeling beyond the range of private observation. And also beyond the range of private concern, for it is the genius of the human animal to “take an interest” in what does not immediately concern him.”¹¹ The contours of this relationship between reporter and reader were sketched out decades ago, but they are no less valid today. The public has repeatedly demonstrated an interest in thorough and intensive investigative reporting; this interest is keenly felt when such reporting is conspicuously absent.¹²

Today the media is in the midst of an all-encompassing transformation, and, by all accounts, newspapers are an endangered format.¹³ However, this is not the result of an express abandonment of the relationship between reporter and reader. Rather, undue commercial constraints have consistently resulted in lesser-quality news output,

¹² The quality of reporting in the run-up to the Iraq War has been singled out for particular criticism. John Nichols & Robert W. McChesney, The Death and Life of Great American Newspapers, March 18, 2009, available at http://www.thenation.com/doc/20090406/nichols_mcchesney/2; see generally the Bill Moyers Journal: Buying the War, http://www.pbs.org/moyers/journal/btw/watch.html (last visited Mar. 27, 2010) (the landing web page of which contains the following representative quote: “‘From August 2002 until the war was launched in March of 2003 there were about 140 front page pieces in the Washington Post making the administration’s case for war,’ says Howard Kurtz, the Post’s media critic. ‘But there was only a handful of stories that ran on the front page that made the opposite case. Or, if not making the opposite case, raised questions.’”) Additionally, the recent coverage of the housing bubble crisis has come in for similar criticism. See Nichols & McChesney, supra note 11; see generally John Hanrahan, What the press can learn from its failure to report the housing bubble before it burst, Nieman Watchdog, October 19, 2009, available at http://www.niemanwatchdog.org/index.cfm?fuseaction=background.view&backgroundid=00405.
¹³ See Downie & Schudson, supra note 7; Breaux Symposium, supra note 1; the Editors, Battle Plan for Newspapers, N.Y. Times, February 10, 2009, available at http://roomfordebate.blogs.nytimes.com/2009/02/10/battle-plans-for-newspapers/; Newspaper Death Watch, http://www.newspaperdeathwatch.com (last visited June 18, 2010). Similarly, one Web site provides not only updated information on papers that have closed, moved exclusively to the web, or scaled back, but also a running tabulation of all the layoffs and buyouts in U.S. newspapers, along with a map that provides locations of papers which have suffered timely setbacks. See Paper Cuts, http://graphicdesignr.net/papercuts/ (last visited June 25, 2010).
and even reporters who give their life and health to reporting are frequently unable to
follow a story for lack of resources. Moreover, reader interests are no less keen, and
readers will seek out information other formats if the newspaper cannot deliver. The
journalism crisis is three-fold: first, a decreased quality in the news and significant job
losses in newsrooms have resulted from a commercial media model that has favored
profit imperatives over costly investigative reporting and time-consuming beat
reporting; second, the decline in print circulation, migration of classified ads to the
Internet, and dearth of retail ads in a time of economic depression have caused a
steep drop in revenues; and third, the media industry is suffering self-inflicted wounds
from bad business decisions and failed strategies. While the market does not respond

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14 Victor Pickard, Josh Stearns, & Craig Aaron, Saving the News: Toward a National Journalism
15 See 2014: How We Got Here: Voices From an Imagined Future, Columbia Journalism Review,
March 1, 2009, p. 26-42. In this article, which features eight industry figures speculating on the
future of the newspaper and U.S. media in general, Adam Davidson, the editorial director for
NPR’s Planet Money project, discusses the launch of Planet Money, a team of multimedia and
radio journalists producing economic and business news in podcast, blog, Web site, and radio
formats. Davidson describes his model as a response to the migration of the “old stuff” – good
stories told by professional reporters – into the new: user-generated content, Twitter feeds, and
the like, as a response to the challenge of replicating serious reporting in a digital age. id.
16 Pickard, Stearns, & Aaron, supra note 14, at 13.
18 Pickard, Stearns, & Aaron, supra note 14, at 7. At a recent conference on new economic
models for the news, Steve Yelvington, a media strategist for Morris DigitalWorks, a new-media
unit of the Georgia-based Morris Communications Company, put it rather succinctly: “The
economy is not the only reason that revenue is down. Debt is killing companies.” Conference
Summary: New Economic Models for the News, McNamara Alumni Center, University of
Minnesota-Minneapolis, June 16, 2009, at 9, available at
http://www.mjc.umn.edu/assets/pdf/summary.pdf. Witness the recent bankruptcy filing of
MediaNews Group, which privately owns 54 newspapers in 11 states, including the Denver Post
and the San Jose Mercury News. Staff, Execs cash in on Post parent bankruptcy, the Denver
http://www.medianewsgroup.com/advertisers/media_markets/Pages/default.aspx. Through a
“pre-packaged” bankruptcy, the company will agree to a restructuring, whereby its investors will
pocket 19 cents on the dollar in order to achieve a $752 million dollar debt reduction. Staff,
enthusiastically to accountability journalism, it has positive externalities, whereby societal benefits arise from changes in public policy that result from its impact. The benefit of an informed populace, the ability of citizens to “monitor those in power,” should be of paramount concern, for, as James Madison once warned, “A people who mean to be their own governors, must arm themselves with the power which knowledge gives.” This “call to arms” cannot be reflected in the bottom line; perhaps it is too late in the day for the traditional media model to make room for thoroughgoing investigative journalism in its budget. However, this creates new room in the media marketplace for a variety of “independent, non-commercial initiatives specifically designed to produce high quality, public service journalism.” Thus, a news organization is a good candidate for operation as a hybrid social enterprise concern.

1. The commercial media model and its shortcomings

Newspaper readership began its decline well before the Internet, in an era when television lured away significant amounts of national and retail advertising. The audience for news became even more fragmented and dispersed with the introduction of multichannel cable television and increased non-English-speaking immigration to the United States. As a result, newspaper ownership became increasingly concentrated in publicly traded corporations with an eye toward large

supra note 17. This will not, however, prevent two top executives of the company from seeking $3.74 million dollars in combined salary and bonuses for fiscal year 2010. Staff, supra note 17.

19 Charles Lewis, The Growing Importance of Nonprofit Journalism, Joan Shorenstein Center on the Press, Politics, and Public Policy, April 2007, p. 3-4 (citation omitted).

20 See Lewis, supra note 19, at 6.

21 See Downie & Schudson, supra note 7.

22 See Downie & Schudson, supra note 7.
profit margins and muscular stock prices. Quarterly earnings became the driving principle of the large newspaper chain owners, who often governed at a far remove from the companies’ newsrooms and the communities they served. David Simon, a former beat reporter for the Baltimore Sun and creator of the HBO series The Wire, has chronicled this development on numerous occasions. He wrote that, prior to the Internet’s encroachment, most big-city newspapers were merely “assets to their newspaper chains (where p)rofits were taken, and coverage did not expand in scope and complexity.” The prevalent view of the corporate news administrator is characterized by a lack of vision, and the news executive role has been reduced to the tag “passive administrator.” In a climate that requires strong leadership to respond to the economic and social changes affecting the markets, too many news organizations are headed by administrators, relatively powerless front men whose focus is on the pragmatics of day-to-day survival rather than creating a vision for the future. The top executives, meanwhile, are often isolated, far removed from the news operations that

23. See Downie & Schudson, supra note 7.
24. See Downie & Schudson, supra note 7.
26. Robert G. Picard, Journalism, Value Creation, and the Future of News Organizations, Joan Shorenstein Center on the Press, Politics and Public Policy, Spring 2006, available at http://www.robertpicard.net/PDFFiles/ValueCreationandNewsOrgs.pdf. Prior to Samuel Zell’s assumption of control of the Tribune Co., a magazine article speculated on his intent for the media company. Zell, who made billions in real estate, among other ventures, but who had no experience in the media industry, revealed a plan that had less to do with reinvigorating the newspaper model and more to do with hiding the problems in diversification. The growth will “come in other areas,” he told the reporter, citing broadcasting and digital media. He had no illusions about regaining any newspaper readership. As for his role at the top of the company, he intended to be, as with many of his ventures, “chairman of everything, C.E.O. of nothing.” As for the ability of newspapers to serve an important public service role, he offered that he had no room for sentiment, only room for profit maximization. Connie Bruck, Rough Rider, the New Yorker, November 12, 2007, available at http://www.newyorker.com/reporting/2007/11/12/071112fa_fact_bruck.
are part of their media conglomeration, and they often do not share the journalistic values or culture of the newspapers they control.27

As of May 2009, there are nine currently actively traded public newspaper companies, and public data is available for two, the Tribune Company and NewsMedia Group.28 The combined circulation of these companies amounts to over forty percent of the total U.S. circulation and is said to generate about 35 percent of U.S. ad revenues.29 These conglomerate companies, despite their deep cost cutting, have been waylaid by the deteriorating economic landscape of the past few years.30 For example, the Tribune Company, which includes a number of prominent newspapers, has gone into bankruptcy.31 Within its ranks, the newsroom at the Sun shrank in a few years’ time to around 150 journalists from around 400; the Los Angeles Times, from 1100 to less than 600 journalists.32

Large companies have not suffered the brunt of the industry’s woes exclusively: in the last year, the Minneapolis Star-Tribune, the Rocky Mountain News, and other papers have folded.33 The Christian Science Monitor and the Detroit Free Press have reduced their deliveries and shuttled much of their content online.34 The San Francisco

29 Rich Fine, supra note 28 at 1. The figures are based on data compiled by the Newspaper Association of America (NAA).
30 Rich Fine, supra note 28 at 1; Downie & Schudson, supra note 7.
31 Phil Rosenthal & Michael Oneal, Tribune Co. files for bankruptcy protection, the Chicago Tribune, December 9, 2008, available at http://archives.chicagotribune.com/2008/dec/09/business/chi-081208tribune-bankruptcy. Among its newspapers are the Chicago Tribune, the Los Angeles Times, the Baltimore Sun, the Sun Sentinel, the Hartford Courant, the Orlando Sentinel, and the Morning Call.
32 Downie & Schudson, supra note 7.
33 Rich Fine, supra note 28 at 1.
34 Rich Fine, supra note 28 at 1.
Examiner is now a free, news-lite model daily deposited on people’s doorsteps.\textsuperscript{35} Industry-wide, the economic hit has resulted in fewer newspaper journalists reporting on schools, social welfare, city hall, culture, the arts, and science. Investigative reporting has taken a major hit.\textsuperscript{36} So has civic reporting: the number of newspapers covering state capitals full-time, for example, fell by nearly 200 in the space of six years.\textsuperscript{37}

The larger companies, however, are primarily responsible for the repercussions of their debt, by abandoning investigative reporting in favor of a more sensational, tabloid news approach to compete with first television and now the Internet, and reducing public interest information as a result of cost-cutting.\textsuperscript{38} Sixty years ago, the Commission


\textsuperscript{36} Downie & Schudson, supra note 7. David Simon described the devolution of the Sun in this regard as thus: “Amid buyout after buyout, the Baltimore Sun conceded much of its institutional memory, its beat structure, its ability to penetrate municipal institutions and report qualitatively on substantive issues in a way that explains not just the symptomatic problems of the city, but the root causes of those problems. The Sun began doing so in the 1990s... when beat reporting and any serious, systemic examination of issues was eschewed in favor of ‘impact’ journalism, special projects and Pulitzer sniffing. It continued doing so into the present decade as the Tribune Company followed the Times-Mirror buyouts with even more ruthless abandon. And now, with the economic vise that is the internet (sic) tight around her, The Sun - like so many once-worthy regional newspapers -- is fighting for relevance and readers.” David Simon, \textit{The Wire’s Final Season and the Story Everyone Missed}, The Huffington Post, March 17, 2008, available at http://www.huffingtonpost.com/david-simon/the-wires-final-season-an_b_91926.html.

\textsuperscript{37} Downie & Schudson, supra note 7.

\textsuperscript{38} In March 2009, the \textit{New York Times} and the \textit{Washington Post} both announced that they were cutting jobs in order to combat declining revenue. The Times, which lost $30.3 million in 2008, eliminated 100 positions and cut non-union salaries companywide by as much as 5 percent. The Post, meanwhile, sought an unspecified number of buyouts after losing $192.7 million in 2008. Greg Bensinger, \textit{New York Times, Washington Post Cut Jobs as Ads Fall (Update 1)}, Bloomberg.com, March 26, 2009, available at http://www.bloomberg.com/apps/news?pid=20601103&sid=aTyDUNJ6MuVY&refer=us. After this cost-cutting, the Post demonstrated on at least one occasion that the battle between hard investigative reporting and political navel-gazing were still the order of the day. The “traditional” journalists at the Post have taken umbrage at the Internet-driven interest in tabloid news material; this conflict was felt keenly in the aftermath of the recent State dinner, which was crashed by a couple with designs on reality-TV stardom. “Some in the newsroom felt the frenzied coverage of the White House party-crasher scandal was driven in part by the millions of hits the story generated. A week after the story broke, Style editor Ned Martel convened a meeting attended by 25 reporters and editors to coordinate coverage of the scandal. ‘If I were to call a similar meeting on Al Qaeda’s recruitment in the U.S., you know what I would get? I
on the Freedom of the Press, a commission formed to study freedom and accountability of the press and funded by *Time Magazine* founder Henry Luce, noted the deleterious effect on journalism due to the rise of newspaper publishers who made their money in some other field, and who considered the paper a way to achieve power and prestige. Less concerned with the actual character of the publication than the spotlight it cast on him, the newspaper inevitably veered from "their traditional position as leaders of public opinion to mere peddlers and purveyors of news."  

2. The revenue problem

The journalism industry has operated without a solid business model since its inception. It has always been subsidized by something or someone. The industry has for some time now operated with the assumption that advertising revenues would be the primary source of news revenue well into the current century. However, this assumption has come undone. Ad revenue fell twenty-three percent across the industry between 2007 and 2009, and there are dire predictions about 2010. Newspapers rely on print advertising for up to 90 percent of their revenue, but advertisers pay much less for online ads, and classified ads have nearly vanished from

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39 William Allen White, the Pulitzer-prize winning journalist for whom the journalism school at the University of Kansas is named, referred to this predilection of the monied man seeking a plaything in the media industry as a "country club complex," which inevitably colored the content of the paper or papers he owned. *A Free and Responsible Press*, supra note 11 at 60.

40 *A Free and Responsible Press*, supra note 10 at 60.


42 Pickard, Stearns, & Aaron, supra note 14, at 7.

ink-and-paper media.\textsuperscript{44} Furthermore, the other major revenue stream, circulation, is not an effective avenue for revenue enhancement in the digital age.\textsuperscript{45}

Ad revenue generally falls under three headings: classified, retail, and national. Classified ads have largely migrated to the Internet. A single website like Craigslist, which serves as a Web clearing house for classified ads, sales, and similar features, and provides its services in a less costly and more immediate format than a newspaper, can attract fifteen million visitors a month, a terrifying figure for the newspaper industry.\textsuperscript{46} Classified ads, which once accounted for nearly fifty percent of newspaper ad revenue, contributed only around thirty percent in 2008.\textsuperscript{47} In 2009, the decline in total classified ad revenue hit thirty-eight percent.\textsuperscript{48} Newspapers have lost pricing power in the face of Internet competition to such an extent that some feel the future of the newspaper industry will preclude classified ad revenues.\textsuperscript{49} Retail advertising, meanwhile, has largely tailed off due to the current economic downturn and the consolidation of department stores.\textsuperscript{50} The decline has been precipitous; in 2006, retail ad expenditures were down a mere three-tenths of a percent, but since then, the decline has gone from bad (five percent in 2007) to worse (nearly eleven percent in

\begin{itemize}
\item Pickard, Stearns, & Aaron, \textit{supra} note 14, at 7.
\item Rich Fine, \textit{supra} note 28 at 2-3 ("Readers only contribute 20\% of the revenues .... Circulation has proven to be highly elastic, i.e. the cover price is raised, circulation volume goes down.")
\item Rich Fine, \textit{supra} note 28 at 7.
\item Newspaper Association of America, http://www.naa.org/TrendsandNumbers/Advertising-Expenditures.aspx (last visited March 27, 2010) (the figures are represented in a chart entitled “Advertising Expenditures”).
\item Rich Fine, \textit{supra} note 28 at 7.
\item "A reduction in competition (between retail stores) hurts both in terms of losing an advertiser as well as a softening in advertising by the remaining department store as they no longer have to spend against the competition.” Rich Fine, \textit{supra} note 28 at 7.
\end{itemize}
National advertising has historically been a problem for newspapers; it is difficult to place a national buy, and while there are facilitator companies that can ease the process, it is under-utilized in the current climate.\footnote{Newspaper Association of America, http://www.naa.org/TrendsandNumbers/Advertising-Expenditures.aspx (last visited March 27, 2010).}

The Internet has had a decisive impact on the direction of advertising; it has given advertisers a variety of options in spending ad dollars and better tools to gauge the effectiveness of various campaigns.\footnote{Rich Fine, supra note 28 at 7.} As a result, three problems have yet to be adequately addressed by the ink-and-paper media: first, the increasing dependence of advertisers on vehicles that have little to do with content creation, like Craigslist and Google Search; second, the ability of advertisers to bypass traditional advertising models altogether and target customers through emails that drive them directly to the

\footnote{An Internet user will encounter all manner of advertising forms while surfing the Internet on any given day: pop-ups (which appear in a separate window on top of content already on the computer screen); pop-unders (which appear in a separate window beneath the open window and appear only when the top window is moved); interstitial ads (which appear between two content pages); and floating ads (which appear within the main browser window on top of a Web page’s normal content, and appear to “float” over the top of the page. Interactive Advertising Bureau, Glossary of Interactive Advertising Terms v. 2.0, available at www.iab.net/media/file/GlossaryofInteractiveAdvertisingTerms.pdf. Web users are targeted by advertisers through a variety of methods; a recent report by the trade body the Network Advertising Initiative found that behavioral advertising, which draws on information collected on an individual’s web browsing behavior such as the pages they have frequented or searches they have made to determine which ads to be displayed to that individual, has proven to be more effective than non-behavioral, “run of network” advertising. 6.8% of viewers of behavioral advertising became customers of the company which placed the ad, as opposed to 2.8% of run of network ad viewers. Additionally, behavioral ads were clicked on 670% more often than run of network ads. Staff, Targeted advertising brings 670% more clicks and more money, Ecommerce Journal, Mar. 29, 2010. available at http://ecommerce-journal.com/node/27565 (last visited June 25, 2010). Media professionals have cast doubt on the ability of content creators to find support in Internet advertising. Behavioral targeting has its virtues – efficiency, cost-effectiveness – but news centers have to compete to deliver such ads through an external network, and that requires tailoring the ads to the specific information needs of each browser, arguably a more difficult task than selling them a tooth whitener based on the nature of the user’s visits to WebMd.com. See generally Conference Summary: New Economic Models for News, supra note 18 at 9.}
destination site; and third, the rapid growth of online publishers, which increase is largely due to the Internet’s low barrier to entry.\textsuperscript{54} To date, publishers have not been able to make up for these losses with online advertising on their sites.\textsuperscript{55}

Furthermore, circulation figures have been trending downward since the late 1990s.\textsuperscript{56} Total circulation peaked at 62,635,000 in 1990; however, circulation has decreased steadily since 1993, and in 2008 total circulation dipped below fifty million for the first time since 1971.\textsuperscript{57} Though a total readership of nearly fifty million suggests a financial robustness, circulation is responsible for only twenty percent of newspaper revenue.\textsuperscript{58} Additionally, because promotion efforts are too costly, and total revenue too slim in comparison with other revenue streams, circulation will likely be an economic nullity when it comes to rebuilding newspapers’ financial health.\textsuperscript{59}

3. Bad business decisions and failed strategy

Many of the problems in the newspaper industry today are self-created. Instead of investing the hefty profits from years ago in forward-thinking news models, publicly traded conglomerate media companies like McClatchy, Gannett, and the Tribune Company went on ill-considered buying sprees, vacuuming up tangential properties and additional media outlets and sacrificing the attention to their journalistic output in an attempt to inflate their bottom lines.\textsuperscript{60} Now, these companies are burdened with debt sufficient to shut them down or, perhaps, to lead to a downgraded sale to a

\textsuperscript{55} Kramer & Sawyer, supra note 54, at 2.
\textsuperscript{56} Newspaper Association of America, http://www.naa.org/TrendsandNumbers/Total-Paid-Circulation.aspx (last visited March 27, 2010).
\textsuperscript{57} Id.
\textsuperscript{58} Rich Fine, supra note 28 at 3.
\textsuperscript{59} Rich Fine, supra note 28 at 3
\textsuperscript{60} Pickard, Stearns, & Aaron, supra note 14, at 7.
private equity firm, who will likely bust the companies up and sell the parts for pennies on the dollar.\textsuperscript{61}

Other companies, such as the New York Times, are fighting to remain solvent. The Times’ debt as of May 2009 was estimated at $1 billion,\textsuperscript{62} and its debt rating has been downgraded to “junk” status by Standard & Poor’s and Moody’s.\textsuperscript{63} The Times mortgaged its new headquarters in Midtown Manhattan and refinanced a quarter of a million dollars in debt with Mexican telecommunications billionaire Carlos Slim Helu at 14% interest.\textsuperscript{64} Also, the Times was not immune to the acquisition bug; it acquired a stake in a baseball team, gathered up a number of newspapers (including the faltering Boston Globe),\textsuperscript{65} a radio station, the web destination About.com, and a number of other businesses.\textsuperscript{66}

The rush to acquire is only part of a larger problem: lack of vision. Until recently, newspaper companies have been able to conduct business as “high-margin monopolies.”\textsuperscript{67} If you operated a major newspaper, or the only newspaper in a mid-market city, you essentially had a license to mint money.\textsuperscript{68} However, the increased interest in financial considerations led to a “narrowing of the purpose of the newspaper

\begin{footnotes}
\item[61] Pickard, Stearns, & Aaron, supra note 14, at 7.
\item[63] Muse Abernathy, supra note 62, at 6.
\item[64] Muse Abernathy, supra note 62, at 6.
\item[65] In 2009, the New York Times considered shuttering the Boston Globe if it did not agree to a $20 million concession that included salary and benefit cuts. The Globe’s largest union recently asked its members to sign a letter protesting the compensation packages of the Times’ chairman and C.E.O., characterizing such largesse as a slap in the face to its employees, coming as it did on the heels of the concession request. Globe Staff, Globe union moves to protest executives’ pay, the Boston Globe, March 27, 2010, available at http://www.boston.com/business/articles/2010/03/27/globe_union_moves_to_protest_executives_pay/.
\item[66] Muse Abernathy, supra note 62, at 6; Hirschorn, supra note 4.
\item[68] Alterman, supra note 67.
\end{footnotes}
in the eyes of its owner.”⁶⁹ A newspaper’s capacity to make a profit, once simply one among many concerns, became the predominate concern.⁷⁰ Perhaps the problem was (and is) that profits were easy to target, but commodifying the news was not.⁷¹ That is, there are only so many stories for competing journalists to deliver to the public, and the demand for news is not strong enough to fuel a robust competition.⁷² News organizations, aware that there is only so much money to be made from their trade in the future, have increasingly commercialized their content, which has resulted in an emphasis on content designed to attract a broad demographic that is attractive to advertisers.⁷³ This strategy focuses on the production of average quality content and promotion of short-term profit maximization; obviously, attending to the public interest component of the news in this atmosphere has become increasingly difficult.⁷⁴ The strategy has been widely deployed, but there is as yet no evidence that it has attracted new readers or reversed the decline in news consumption.⁷⁵

Even if news organizations rededicated themselves to providing hard-driving investigative journalism above all else, their profitability would likely suffer. Building a successful business model, among other things, requires finding information that others

⁷⁰ Charles Lewis noted that the public ownership of newspapers was intended to preserve the social good that is greater than making money. He referred to the two-tier stock structure that supposedly allowed media families to elect a majority of the public company’s board of directors and continued to provide a community service through the paper. However, he compromised his premise by pointing out that Dow Jones & Co., which had a two-tier stock structure, was nonetheless unable to prevent the Bancroft family from resisting Rupert Murdoch’s $5 billion, $60-a-share offer. Lewis, supra note 69, at 90.
⁷¹ See generally Picard, supra note 1, at 115.
⁷² Picard, supra note 1, at 115; Alterman, supra note 64 (noting that only 19 percent of Americans age 18 to 34 read a daily newspaper, and that respondents to a Carnegie Corporation survey, all age 35 and younger, planned to use the Internet to get the news by a ratio of 35 to eight).
⁷³ Picard, supra note 1, at 115 (citation omitted).
⁷⁴ Picard, supra note 1, at 115 (citation omitted).
⁷⁵ Picard, supra note 1, at 115.
can’t easily replicate.\textsuperscript{76} If news organizations are competing for a limited pool of stories, the result is inefficiency.\textsuperscript{77} Additionally, these same stories, once published, can often be found on an aggregated Web site. As a result, the newspaper must acquire these stories for more money than it costs to sell it, and it is doubtful whether the online reader will be sufficiently intrigued by the story they found on the aggregated Web site to seek out the print edition of the paper the next morning.\textsuperscript{78} So, while strangers may find out about your product, the essential second step, making them customers, is not easily achieved.\textsuperscript{79}

As a result of the current financial climate, and the newspaper industry’s inability to address their predicament by addressing the failings of their business model, investigative journalism has suffered. Such journalism is expensive, and in a world where an article’s value lays in the number of readers it attracts (and hence acquaints the reader with advertising or encourages subscription), its future vitality is at risk.\textsuperscript{80}

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\textsuperscript{76} Conference Summary: New Economic Models for News, supra note 18, at 10.
\textsuperscript{77} Conference Summary: New Economic Models for News, supra note 18, at 10.
\textsuperscript{78} Conference Summary: New Economic Models for News, supra note 18, at 9.
\textsuperscript{79} Conference Summary: New Economic Models for News, supra note 18, at 9. Notably, the Associated Press announced in the summer of 2009 a six-month pilot project to run content from four leading non-profit news outlets: ProPublica, Center for Public Integrity, Center for Investigative Reporting, and the Investigative Reporting Workshop. Though the project was meant to provide a wider platform for independent public interest journalism, and a means for newspapers to run in-depth content from respected outlets, the partnership yielded a meager return in the first six months. AP members used little, if any, of the content provided by the non-profit news outlets. The negligible interest, however, may be due to the difficulty in finding the stories in the AP’s online database (to locate them, an editor cannot merely consult the AP’s main wire services, but has to search through a web delivery platform called “AP Exchange” or consult a section of the AP Web site called “Marketplace), particularly when AP members are used to pulling stories off the satellite wire. On the other hand, non-profit stories may be a tough sell in a passive form on a Web platform populated with “massive amounts of material,” which again typifies the problems with getting a stranger to find your content, and then return to it. In this case, the stranger is the editor of the newspaper looking for AP stories to augment his daily paper. See Laura McGann, Six months in to AP’s nonprofit distribution project, not a lot of picked-up stories to show for it, February 19, 2010, available at http://www.niemanlab.org/2010/02/six-months-in-to-aps-nonprofit-distribution-project-not-a-lot-of-picked-up-stories-to-show-for-it/.
\textsuperscript{80} Hamilton, supra note 17 at 2.
newspaper market typically revolves around three types of demands: producer, consumer, and entertainment. The consumer looks for information that helps her in the workplace, weighs the value of products, and entertains. Accountability journalism, unlike these three demands, has a market that cannot be adequately captured or monetized. Though the market does not respond to accountability journalism, it has positive externalities whereby societal benefits arising from changes in public policy as its result. Thus, news organizations are prime candidates for operation as media hybrids in the world of social enterprise.

PART II. THE L3C IS A MODEL FOR THE NEWSPAPER OF THE FUTURE.

The newspaper has only recently been considered a candidate for social enterprise treatment. When charitable and educational donations are made, the normal beneficiaries are to religious, health, and social organizations. A number of recommendations to the industry to forestall or reverse the current decline have little to do with social enterprise. Additionally, the fate of newspapers has received variable

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81 Hamilton, supra note 17 at 2.
82 Hamilton, supra note 17 at 2.
83 Hamilton, supra note 17 at 3.
84 Hamilton, supra note 17 at 4.
85 These recommendations include: creating a local online business listings service, akin to an Internet local yellow pages; upgrading the sales department to better promote the paper’s viability; entering the local ad network business; petitioning local subscribers to give more; charging for online content; and ceasing the urge to attract every demographic – in particular, the youth demographic – and focusing more on providing focused local content. See Rich Fine, supra note 28 at 14-15. The Washington Post seems to be increasingly focusing its efforts on local content; in November 2009, it shuttered its remaining domestic bureaus to concentrate on its resources in D.C. Sherman, supra note 38.
treatment in various commentaries. However, the troubles in the newspaper industry have had a greater impact on the culture than the troubles in other waylaid media industries, such as the recording industry. Generally, newspapers, unlike other media, have a central role in the marketplace of ideas. Furthermore, readers who seek their news on the Internet still largely rely on print newspapers to supply the stories. Thus, the rally to correct newspapers’ woes has led to a raft of possible solutions, both practical and innovative.

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86 For a representative withering view of the necessity of newspapers, see Daniel Lyons, Don’t Bail Out Newspapers – Let Them Die and Get Out of the Way, Newsweek, September 27, 2009, available at http://blog.newsweek.com/blogs/techtonicshifts/archive/2009/09/27/don-t-bail-out-newspapers-let-them-die-and-get-out-of-the-way.aspx (last visited July 21, 2010). The writer, himself a professional journalist for twenty-seven years, argued that saving newspapers would be less about preserving their role as a beacon of democracy and more about bailing out a handful of once-powerful newspaper companies who were too lethargic in the face of changing times to help themselves. He noted that the newspaper industry saw the Internet “charging toward them like a freight train, and they just stood there on the tracks” instead of adapting to the new reality. Id. Another commentator has counseled the newspaper industry to accept the death of the ink-and-paper media, because “if they keep wearing their paper albatrosses,” they will be unable to amass the revenue to make the inevitable online transition. Michael S. Malone, Silicon Insider: Newspapers Nearing Death?, ABCNews.com, March 24, 2005, available at http://abcnews.go.com/Business/SiliconInsider/story?id=629221&page=1 (last visited July 21, 2010).

87 Malcolm McLaren, the former manager of the short-lived but revolutionary punk band the Sex Pistols, had this to say when the music industry was suffering due to developments that closely mirror those currently besieging the newspaper industry: “The amazing thing about the death of the record industry is that no one cares. If the movie industry died, you’d probably have a few people saying, ‘Oh, this is too bad – after all, they gave us Garbo and Marilyn Monroe.’ But now the record industry is dying, and no one gives a damn.” John Seabrook, The Money Note: Can the Record Business Survive?, the New Yorker, July 7, 2003.

88 As with other essays and publications, David Swensen and Michael Schmidt invoked a famous quote from one of the nation’s founders to drive the point home: “’The basis of our governments being the opinion of the people, the very first object should be to keep that right,’ Thomas Jefferson wrote in January 1787. ‘And were it left to me to decide whether we should have a government without newspapers or newspapers without a government, I should not hesitate to prefer the latter.’” See David Swensen and Michael Schmidt, News You Can Endow, the New York Times, January 28, 2009, available at http://www.nytimes.com/2009/01/28/opinion/28swensen.html (last visited July 21, 2010).

Some publications have sought a new business model by stripping down the old business model. A number of papers and news publications have experimented with a balance between the Internet and ink-and-paper distribution. For example, the Detroit Free Press reduced its delivery cycle and now provides a greater amount of original content on its website. Some publications have scrapped their daily delivery entirely and publish only on the Internet. For example, The Christian Science Monitor ended its print publication, and now relies on pure content distribution through its website. Additionally, the Arkansas Democrat-Gazette has a modified pay wall option by which the reader only receives free access to the Web site if she is a print subscriber. Some publications will pool resources to bring down costs. Eight newspapers in Ohio created an alliance which allows them to share particular content through story pooling. Though this idea has been floated by other publications, a significant drawback in sharing information is the reduced diversity of views shared with the public.

However, the emerging “fourth sector” is receiving increased attention as the leading model for the future newspaper. A growing number of foundations and

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94 Gerald Magpily, A Band of N.Y.-N.J. Newspapers Join Forces, The Deal Magazine, February 19, 2009, available at http://www.thedeal.com/dealscape/2009/02/a_band_of_ny-nj_newspapers_joi.php (last visited May 23, 2010). Magpily reported that a group of papers including the New York Daily News, the Newark Star-Ledger, and the Albany Times-Union were considering a content-sharing plan similar to that of the Ohio papers. Id. 95 The “fourth sector,” which is sometimes referred to as the “emerging fourth sector,” refers to the social sector that, for lack of a firmer definition, gives meaning and structure to social
philanthropic efforts are lending support to the news business, backing news-and-information non-profits, and the trend appears to be fairly robust. In fact, the traditional model of foundation-funded journalism – where a foundation sends a check to a non-profit journalistic organization to support reporting and news dissemination – is only one of many options in the current landscape. One NGO, Human Rights Watch, is experimenting with turning academic-type research into consumer-friendly news items. Endowments from angel investors and conglomerates have been floated as cure-alls for large publishing concerns and news organizations. Alternatively, a newspaper could be purchased by a university or educational institution; in a positive test-case for this approach, the St. Petersburg Times was purchased by the Poynter Institute for Media Studies, a journalism school. The Times is allowed to operate as a for-profit, and the profits have been funneled into the media studies institute to fund its journalism training endeavors. Additionally, for every non-profit news organization

entrepreneurs and their various hybrid social enterprises. “Hybrid social enterprises,” a term which is interchangeable with “social enterprise,” can also refer to those entities through which social entrepreneurs can conduct their business affairs. See Thomas Kelley, Law and Choice of Entity on the Social Enterprise Frontier, 2009, available at works.bepress.com/context/thomas_kelley/article/1001/.../viewcontent/ (last visited July 21, 2010). See also Brakman Reiser, supra note 5.

96 David Westphal, a senior fellow at Annenberg’s Center on Communication Leadership & Policy, and a veteran of four decades in the newspaper business, has cited a recent study by American University’s J-Lab that foundations had contributed $128 million to investigative and community reporting non-profits between 2005 and 2009 David Westphal, Philanthropic Foundations: Growing Funders of the News, USC Annenberg School for Communication Center on Communication Leadership & Policy, July 2009, at 2. See also supra note 96, at 4.

97 Westphal, supra note 96, at 4.

98 Westphal, supra note 96, at 4.

99 Westphal, supra note 96, at 4; Hirschorn, supra note 4.


101 Starr, supra note 100.
that functions through the traditional model of contributions from foundations, there are those non-profits who used initial investments as seed money, but whose aspirations involve breaking free of foundational support and existing as a profitable news unit in their own right. Joel Kramer, CEO of MinnPost.com, sees the eventual transition to break-even journalism as necessary not merely because, with the right model, it is achievable, but also because he doubts the ability of foundations to provide the necessary funds to support journalism indefinitely.

Non-profits have often been constrained by a dearth of capital; this is particularly true in lean economic times. And for-profit enterprises are often the servants to legal duties to maximize profits, not socially beneficial aims. A hybrid organization best achieves self-sustainability because it provides capital for social missions and envisions a for-profit commitment to achieving social goals. Specifically, the low-profit limited liability company, or L3C, a hybrid social enterprise form, may be tailor-made for the newspaper industry.

102 ProPublica, an “independent, non-profit newsroom that produces investigative journalism in the public interest,” announces at its website that it operates through a generous multi-year commitment from a major investor and augments this investment through individual contributions. See ProPublica: About Us, http://www.propublica.org/about/ (last visited June 25, 2010).
104 MinnPost draws its members from among its web visitors; thus, page views are critical to the news organization’s success. Kramer noted that page views had doubled between 2008 and 2009. Advertisers, of course, have taken note of the growth in consumer interest. Kramer hopes to phase out foundation support by increasing page views, and thus advertising dollars; this is only possible if the quality of the reporting at the site remains high. Kramer feels it is desirable to phase out foundation support because he believes it is questionable whether they have the means to support journalism on the scale necessary to replace what is being lost. Kramer, supra note 103.
106 Gottesman, supra note 105 at 346.
1. THE L3C: A FOR-PROFIT WITH A NON-PROFIT SOUL

The L3C is a for-profit model whose primary goal under state charter is to perform a socially beneficial purpose which does not maximize income.\(^\text{107}\) This new hybrid form, extensively promoted by Robert Lang, the chief executive of the Mary Elizabeth & Gordon B. Mannweiler Foundation, was first recognized via legislation in Vermont in April 2008.\(^\text{108}\) Since then, L3Cs have been approved through the legislative efforts of Michigan, Illinois, Utah, Wyoming, the Ogala Sioux Tribe, and the Crow Indian Nation, and efforts to pass similar legislation are ongoing in twelve other states.\(^\text{109}\)

At heart, an L3C combines the social benefits of a non-profit entity with the financial upside of a traditional limited liability company ("LLC").\(^\text{110}\) The LLC is a hybrid of a corporation and partnership, as it has the attributes of both a partnership and a corporation but is not characterized formally as either one.\(^\text{111}\) Basically, a LLC offers its members, including any member-manager, the limited liability of a corporation, as if they were shareholders, but regards the entity and its members as a partnership for tax purposes.\(^\text{112}\) LLCs resemble partnerships in that they offer near limitless organizational flexibility.\(^\text{113}\) A number of LLC statutes direct that an LLC can be organized for any

\(^{110}\) Marc Lane, The Illinois Low-profit Limited Liability Company (L3C), 2010.
\(^{112}\) Id. at 292-93.
\(^{113}\) Thomas Kelley, Law and the Choice of Entity on the Social Enterprise Frontier, 84 Tul. L. Rev. 337, 370 (December 2009).
lawful purpose, rather than specifically for a business.\textsuperscript{114} Because they are organized for a lawful “purpose” rather than as a business, LLCs do not have to be organized for profit as partnerships are. Thus, LLCs are free to engage in public benefit or charitable enterprises rather than those that solely benefit their owners.\textsuperscript{115} However, a company does not have license to conduct non-profit activity absent express provisions in the statute.\textsuperscript{116} LLC statutes are generally modeled on partnership statutes, which apply only when the company is a “business;” this suggests an uneasy fit between non-“business” entities and the default provisions of LLC statutes.\textsuperscript{117}

The Internal Revenue Service (“I.R.S.”) has offered guidance in past rulings regarding the tax implications when a private foundation invests in a LLC that is organized for a primarily charitable purpose.\textsuperscript{118} For example, the I.R.S. has approved an arrangement between a § 501(c)(3)\textsuperscript{119} tax-exempt university and a for-profit company specializing in conducting interactive video training programs to form an LLC whose sole purpose was to offer teacher training seminars at off-campus sites utilizing


\textsuperscript{115} Ribstein & Keatinge, supra note 114.

\textsuperscript{116} Ribstein & Keatinge, supra note 114.

\textsuperscript{117} Ribstein & Keatinge, supra note 114 (references omitted).


\textsuperscript{119} Under § 501(c)(3), the organizations that are tax exempt include: “corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes,” so long as “no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation … and which does not participate in, or intervene in … any political campaign on behalf of (or in opposition to) any candidate for public office.” 26 U.S.C. § 501(c)(3).
interactive video technology.¹²⁰ The governing documents granted the university the exclusive right to sign off on the curriculum, instructors, and training materials, and to set the standards for successful completion of the seminars in order to maintain exempt status under § 501(c)(3) of the IRS.¹²¹ Thus, even though the university and the for-profit company shared in the distributions and allocations of the LLC, the I.R.S. approved the arrangement, first because:

* the manner in which (the LLC) conducts the teacher training seminars contributes importantly to the accomplishment of (the university’s) educational purposes, and the activities of (the LLC) are substantially related to (the university’s) educational purposes…. Accordingly, based on all the facts and circumstances, (the university) is not subject to unrelated business income tax under § 511 on its distributive share of (the LLC’s) income."¹²²

Second, the activities the university conducted through the LLC were not seen as a substantial part of the university’s activities within the meaning of § 501(c)(3). Therefore, the university continued to qualify for exemption as an organization described in § 501(c)(3).¹²³

This joint venture, an LLC with a primarily charitable purpose and a secondary profit motive, is “a paradigmatic (L3C).”¹²⁴ In effect, it is a venture built on the LLC foundation to provide the flexibility of organization and membership needed to cover

¹²¹ Id.
¹²² Id.
¹²³ Id.
¹²⁴ Letter from Marcus Owens, member in Caplin & Drysdale law firm, to Ronald J. Schultz, Senior Technical Advisor in the Tax Exempt and Government Entities Division of the I.R.S., supra note 102. It is worth noting that, in addition to joint ventures with for-profit companies, the I.R.S. has allowed some §501(c)(3)s to be organized as LLCs. In fact, the §501(c)(3) application asks specifically if the organization in question is an LLC. See Form 1023 (Rev. June 2006), available at http://www.irs.gov/pub/irs-pdf/f1023.pdf (last visited July 21, 2010). Though uncommon, LLCs can be tax-exempt organizations. For the purposes of this Article, I am focusing on the joint venture example simply because it harmonizes with the structure and purpose of the L3C.
the vast array of social enterprise situations. The L3C essentially utilizes the membership agreement to award the for-profit investors with the lion’s share of any profits, while the social-minded non-profit participants are allowed to retain ultimate decision-making power and thereby ensure that the company hews to the course of its social purpose. Additionally, while the I.R.S. acknowledges that LLCs are utilized by foundations to accomplish charitable objectives, the LLC is generally not required under state law to articulate a commitment to pursue charitable objectives in its governing documents. By enacting legislation that recognizes the L3C, Vermont created a form of business that has an identifiable designation and signals to investors and regulators that the organization’s goal is to accomplish charitable objectives. Thus, as its advocates have advertised, the L3C acquires a brand name status and becomes a recognizable construct in the social enterprise sphere to the extent that investors are willing to utilize it. Its chief attributes, minimal overall financial risk for investors and participation in an organization designed to foster social change, are critical “selling points.”


84 Tul. L. Rev. at 370. Ideally, empowering the social enterprise actors in the L3C with decision-making powers will prevent a common problem in mixing social enterprise and revenue streams: “mission creep,” wherein the organization becomes so focused on the business that it loses sight of the mission it was formed to follow. Mark Hrywna, The L3C Status: Groups Explore Structure That Limits Liability for Program-Related Investing: Low-Profit, Limited Liability Corporations, The Non-profit Times, Sep. 1, 2009.


a. The L3C, its requirements, and its organizational flexibility

An L3C is organized much the same way as an LLC. There are, however, three central requirements that must be fulfilled. First, an L3C must first signify that it not only “significantly further[s] the accomplishment of one or more charitable or educational purposes” under the federal tax code, but also demonstrates that the L3C “would not have been formed but for the relationship to the accomplishment of such charitable or educational purposes.” Second, an L3C must represent that “no significant purpose of the company is the production of income or the appreciation of property.” An L3C can see its property appreciate and earn income, but this cannot be the organization’s primary purpose. Third, the L3C cannot engage in political or legislative purposes within the meaning of Section 170(c)(2)(D) of the Internal Revenue Code (“I.R.C.”). Section 170(c)(2)(D) references the tax exemption requirements of § 501(c)(3), which provides that attempting to influence legislation, or participation in political campaigns on behalf of or in opposition to any candidate for public office, is grounds for disqualification from tax-exempt status.

130 Somewhat less “central,” but still important, is the naming directive. The “L3C” designation must be indicated when articles of incorporation are submitted to the Secretary of State and the name must include the phrase “L3C.” Betty Poulin, Low-Profit Limited Liability Company, Vermont Secretary of State, Corporations Division (July 2008), available at http://www.sec.state vt.us/corps/dobiz/llic/llic_l3c.htm (last visited June 26, 2010).
133 Lane, supra note 110.
The key advantage of the L3C is that it is designed specifically to facilitate program-related investments (“PRIs”) for private foundations. A PRI is a hybrid of a grant and an investment, made with the chief motive of accomplishing a charitable purpose. For example, a PRI might take the form of a no-interest or low-interest loan to an economically disadvantaged business that cannot obtain conventional funding. PRIs can qualify toward the required distribution of a foundation’s assets that must be allotted for charitable purposes. Additionally, if a PRI accords with the three central requirements detailed in the L3C statute, it will not be subject to designation as a “jeopardizing investment,” which under § 4944 of the I.R.C. penalizes and essentially prohibits investments that would jeopardize the laying out of a foundation’s tax exempt purpose. Thus, when properly structured, a PRI can obtain or avoid advantages under the other private foundation excise tax rules.

136 Lane, supra note 110.
137 Cassady V. Brewer, The L3C: A For-Profit with a Non-Profit Soul, the Foundation Center, September 16, 2009, available at http://clevelandblog.foundationcenter.org/.../low-profit_limited_liability_companies_l3c_10.06.09.pdf (last visited March 21, 2010).
138 Brewer, supra note 137. Other examples of PRI instruments and their uses include: the debt instrument (i.e. a ten year, $600,000 loan with an interest rate of two percent to help capitalize a microfinance loan fund); the equity instrument (such as a purchase of $4 million in common stock in a community development bank holding company, which may allow a subsidiary to expand financial services to low-income customers); and the loan guarantee instrument (a $300,000 loan by a commercial lender to a group of organic milk producers to support independent business development, with a guarantee of repayment by a foundation). Neil Carlson, Program-Related Investing Skills & Strategies For New PRI Funders, GrantCraft, available at http://www.grantcraft.org/index.cfm?pageId=821 (last visited June 5, 2010).
139 I.R.C. § 4944(c)2009; Lane, supra note 110; Americans for Community Development: Supporting Information of the L3Cs, Presentation Workshop C-3, UBS Philanthropy Forum – July 5-7 2007, Lisbon, Portugal, available at http://www.americansforcommunitydevelopment.org/supportingdownloads/L3CUBSPresentation.pdf (last visited May 15, 2010). Generally, the required distribution amounts to five percent of a foundation’s assets each year. I.R.C. § 4942(d) (2009); Americans for Community Development: Supporting Information of the L3Cs, supra note 139.
140 I.R.C. § 4944(a) 2009; I.R.C. § 4944(c)2009.
141 Brewer, supra note 137. An excise tax, established each year until the end of the taxable period, is imposed on a private foundation if the foundation invests in a manner that jeopardizes its exempt purpose. Donald P. DiCarlo, Jr., The Section 4944 Tax on Jeopardizing Investments: “Double Jeopardy” for Foundation Managers?, Summer 2002, available at http://files.ali-
Currently, foundations are resisting making PRIs, due partly to a lack of public awareness about the L3C, which manifests in uncertainty at the foundation level.

More importantly, foundations have expressed uncertainty about whether L3Cs comply with I.R.S. regulations. Though L3C advocates argue that the I.R.C. clearly sets out what comprises a PRI investment for a foundation, many in the private sector are reluctant to move forward in the absence of a private letter ruling. The procedure for

aba.org/thumbs/datastorage/lacidoirep/articles/PTL_DiCARLO-PTXL0208_thumb.pdf (citing I.R.C. § 4944(e)(1), (2)). An additional tax is levied on the foundation equal to twenty-five percent of that section not disposed of within the taxable period. DiCarlo, supra note 141 (citing I.R.C. § 4944(b)(1); Treas. Reg. § 53.4944-2(a). A jeopardizing investment occurs when the foundation managers, in making the investment, “have failed to exercise ordinary business care and prudence, under the facts and circumstances prevailing at the time of making the investment, in providing for the long- and short-term financial needs of the foundation to carry out its exempt purposes.” I.R.C. § 4944(a)(2).

Brewer, supra note 137. It has been pointed out that it is acceptable for a PRI to generate income and appreciate in value, as long as this isn’t the primary reason for making it. The tax rules require that any gains should be given away or reinvested in another PRI within a year of receipt. Additionally, PRIs are excluded from a foundation’s asset base used to calculate a minimum payout amount. Also, for purposes of the Section 4940 tax, dividend and interest income from PRIs count as investment income, but capital gains and losses from PRIs are excluded. Moreover, PRIs do not run afoul of the 20% limit on excess on business holdings under Section 4943.

A hypothetical scenario is in order: since foundations have a duty to re-invest PRI returns in grants or more PRIs, PRIs can allow foundations a broader reach by increasing the available dollars for philanthropy. For example, if a hypothetical foundation with a $200 million endowment conducts their affairs according to form, they distribute $10 million dollar a year in the form of grants. If, at the end of ten years, the foundation’s endowment remains constant, it will have spent $100 million on social causes via grants. If, however, that same foundation spends 100% of their grant money in the form of PRIs, and the annual return on the PRIs is 2%, and we continue to suppose that the endowment remains constant, the first year the foundation will spend $10 million; the next year, $10,200,000 – and so on. At the end of ten years, the foundation will have spent $109,497,210, an increase of over nine percent. Americans for Community Development: Supporting Information of the L3Cs, supra note 122.

Robert Lang recently estimated that 95 percent of United States foundations never utilize PRIs. Americans for Community Development: Supporting Information of the L3Cs, supra note 139.

Grant Williams, Dozens of Companies Are Sprouting With the Same Goal: Doing Good, The Chronicle of Philanthropy, November 12, 2009. Sources in the Williams article, including Robert Lang, concede that the L3C will probably need several years before they begin to take off. The foundation mindset, expressed in the article by foundation observers, is that no group wants to be “the first to jump in.” Id.

American for Community Development: Supporting Information of the L3Cs, supra note 139.

receiving a letter ruling is itself a deterrent: they cost around $50,000 in legal fees, $8700 in fees to the I.R.S., and they take 12 to 18 months to be completed.\textsuperscript{147} Furthermore, because most PRI deals are one-time-only-deals, attorneys are likely to recommend a private letter ruling to be certain that any deal with unique characteristics still accords with federal guidelines.\textsuperscript{148} Moreover, each deal is unique, so the I.R.S. does not allow private letter rulings to serve as precedent.\textsuperscript{149} Still, there is no requirement in either federal law or I.R.S. regulation that expressly requires a foundation to receive I.R.S. approval before making a PRI.\textsuperscript{150}

The organizational flexibility of the L3C could mute uncertainties about PRIs and resolve problems with capital formation.\textsuperscript{151,152} The L3C, like the LLC, allows for multiple classes of members, with the characteristics of each class tailored to the varying needs of investors.\textsuperscript{153} Accordingly, an L3C membership agreement can create different classes of membership assigned to different tiered investment tranches.\textsuperscript{154} For example,

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\textsuperscript{147} Lang, supra note 146.
\textsuperscript{148} Lang, supra note 146.
\textsuperscript{149} “Unless the Secretary otherwise establishes by regulations, a written determination may not be used or cited as precedent.” I.R.C. §6110(k)(3). See also Lang, supra note 146.
\textsuperscript{150} Lang, supra note 146.
\textsuperscript{151} Robert Lang, Jr., \textit{The L3C: The New Way to Organize Socially Responsible and Mission Driven Organizations}, SN036 ALI-ABA 251, 253 (November 29-30, 2007).
\textsuperscript{152} Before leaving uncertainty about PRIs behind, it should be noted that detractors question any particularized ability of an L3C to receive PRIs. The argument is that L3Cs are no better situated than LLCs to receive PRIs because Congress has not passed any tax regulation that signifies the unique standing of the L3C. Thus, because LLCs are already flexible organizations, nothing prevents them from receiving a PRI when they satisfy the same requirements listed in L3C statutes (i.e. the LLC furthers a significant educational or charitable purpose, etc.). Additionally, several private letter rulings have stated that LLCs may receive PRIs. J. William Callison, \textit{Nonbinding Opinion: L3Cs: Useless Gadgets?}, 19-DEC Bus. L. Today 55, 56 (November/December 2009).
\textsuperscript{153} SN036 ALI-ABA at 256.
\textsuperscript{154} 84 Tul. L. Rev. at 373.
a layered investment might be comprised of three tiers: an equity tranche, a mezzanine tranche, and a senior tranche.\textsuperscript{155} Foundations might make a 25% investment, buying the “equity” tranche, with a 1% rate of return.\textsuperscript{156} Corporations, trusts, and other socially motivated investors whose interests allow them to take a below-market rate of return, could buy a total of 25% of middle-level ownership, the “mezzanine” tranche, with a market rate of -3%.\textsuperscript{157} Finally, the 50% investment in the “senior” tranche could be comprised of market driven investors, who require a safe investment with a 6% return.\textsuperscript{158} This would result in a blended rate of return of 4%, which allows the L3C to produce the necessary income.\textsuperscript{159} A foundation invests at less than the market rate of return and at a higher risk, which lowers the risk to other investors and increases their potential return rate.\textsuperscript{160} It leverages its investment to attract additional capital to the project, and retains its investment to further its mission and potentially enjoy some capital gain.\textsuperscript{161} The socially motivated investor will ostensibly find the investment attractive because she has evinced a willingness to forego some income and security for the satisfaction of doing social good.\textsuperscript{162} The market driven investor has not only an increased menu of potential investments to choose from, but invests in a social enterprise that offers a market based return.\textsuperscript{163}

\textsuperscript{155} Americans for Community Development: Supporting Information of the L3Cs, supra note 139.  
\textsuperscript{156} Americans for Community Development: Supporting Information of the L3Cs, supra note 139.  
\textsuperscript{157} Americans for Community Development: Supporting Information of the L3Cs, supra note 139.  
\textsuperscript{158} Americans for Community Development: Supporting Information of the L3Cs, supra note 139.  
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\textsuperscript{161} Americans for Community Development: Supporting Information of the L3Cs, supra note 139.  
\textsuperscript{162} Americans for Community Development: Supporting Information of the L3Cs, supra note 139.  
\textsuperscript{163} Americans for Community Development: Supporting Information of the L3Cs, supra note 139.
The flexible approach to layered investment provides a better utilization of assets and gives foundations reasonable control over how the L3c uses their money. The operating agreement of the L3C, if carefully drafted, gives social entrepreneurs broad latitude over governance issues. Each membership class can select different privileges and responsibilities, and, like an LLC, the L3C provides a vehicle for mixing different types of financing by different investors. Thus, an investor in a mezzanine tranche who receives a below market rate of return can still play a significant role in governance in order to assure that the L3C complies with the goals set out by its founders. Also, an L3C, like an LLC, is a “pass-through” entity for tax purposes, meaning that there is no double taxation of net revenues, and profits are taxed for each investor according to the taxpayer’s particular status.

Because it is specifically formed to share risk and leverage co-investment, attracting market-driven investors to a socially-minded enterprise which would otherwise be of scant interest to them, the L3C has the potential to allay previously noted concerns regarding foundation support of newspapers. Because of the blended investment component, the L3C need not rely wholesale on foundation support. Additionally, it offers investors an opportunity for capital gains and the eventual generation of substantial profit. Thus, an L3C newspaper, after the initial period of development and expansion through the seed money provided by L3C investors, could eventually become self-sufficient.

164 SN036 ALI-ABA at 257.
165 Lane, supra note 110.
166 SN036 ALI-ABA at 256.
167 Id.
168 Id.
169 Lane, supra note 110.
170 SN036 ALI-ABA at 257.
b. The positive trend of “creative capitalism” can help the L3C make gains in the social enterprise world

Many people have given considerable thought to ways to support newspapers in the current climate. As we have learned, the common thread in this ongoing discussion is the need to refine the newspaper industry’s business model, mainly to preserve original, credible reporting, regardless of profitability. The L3C is a new kid on the block; as such, its usefulness has been criticized. However, there are three arguments that favor adapting the model to (in this case) the newspaper: first, the L3C has already been used to get a number of businesses off the ground; second, the ascension of “creative capitalism,” and its endorsement by some key American businessmen, has set the table for new hybrid enterprise forms; and third, the L3C can serve as a signal to investors that the newspaper should be considered an indispensible component of civic engagement.

First, there are already L3C companies in existence. For example, in Maine, a group of ten organic milk farmers, all of whom were pink-slipped from their previous production contracts due to the economy, banded together to form MOOMilk, a collective agreement L3C which allows them to produce organic milk and distribute it locally. Also, CoolPass, a carbon offset company whose mission is to reduce greenhouse gas emissions and stimulate education on green energy and climate change, is an L3C which takes as its business model the turning of credits into carbon

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171 A Google search for “journalism business models” can return a result of up to 1.7 million hits. Picard, supra note 1.
173 Pickard, Stearns, & Aaron, supra note 14, at 6.
Additionally, Faithful Travelers is a recently organized L3C that promotes international and national socially beneficial projects through international outbound travel and education focused on bridging the gap between different people by assisting them through social, educational, and charitable outreach. Each of these organizations benefits from foundation and charity investments, not merely grants, because they have a distinct social role. Thus, with the formation of these companies, the L3C model now enjoys real-world application, and is not solely a theoretical construct confined to investor speculation.

Second, the goals of the L3C harmonize with the notion of “creative capitalism,” a term coined by Microsoft co-founder Bill Gates, and used to refer to the use of market forces to address the problems in underdeveloped countries. In October 2009, the Bill & Melinda Gates Foundation announced a pilot program with an envelope of $400 million to be used as PRIs to provide investment capital directly to reduce risk to investors of revenue-generating enterprises that are in line with the foundation’s charitable strategies, to “help our partners access the capital they need to grow and demonstrate to the market that financially viable opportunities exist that

178 Robert A. Guth, Bill Gates Issues Call For Kinder Capitalism, the Wall Street Journal, Jan. 24, 2008; William Shutkin, The New, Evolved Capitalism, the Boston Globe, Jul. 27, 2007. This notion of reconstituting capitalism so that it better achieves the dual mission of making profits and improving the lives of those who do not benefit from market forces is variously referred to as “creative capitalism,” “philanthrocapitalism,” and the “philanthropy-as-offset” approach, and is consonant with the views of the emerging “fourth sector,” in which social enterprises work to transcend the boundaries separating government, business, and non-profits in an attempt to make capitalism a principal agent of social change. While the blended enterprise L3C contemplates a reduced profit zone relative to Bill Gates’ aspirations, comparisons are unavoidable and appropriate.
serve the needs of poor or otherwise disadvantaged persons.”

Such investments are hardly new; a handful of foundations have used PRIs for “venture philanthropy” purposes for over 30 years. However, a sizable commitment from a foundation supported by two of the wealthiest men in the world – Bill Gates and Warren Buffett – sends a strong message to the mainstream about the viability of PRIs in foundation philanthropy. Thus, while there is concern about the viability of PRIs in the L3C model, and the uncertainties that are inevitably attendant on a new organizational form, such endorsements can positively impact the investment strategies of foundations and market-driven investors.

Third, the L3C model can serve as a prompt for foundations, philanthropists, and the like, to consider public affairs journalism “a continuous public good rather than a series of specific projects under their control or a way of generating interest and action around causes and issues of special interest to them.” If a foundation supports an L3C newspaper, it lends credence to the notion that there is a compelling connection

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180 David T. Leibell, Gates Embraces Philanthro-Capitalism, Trusts & Estates Magazine, Dec. 30, 2009, available at http://trustsandestates.com/wealth_watch/gates-foundation-venture-philanthropy1230/ (last visited July 23, 2010). “A tiny percentage of large foundations, such as The Ford Foundation and The John D. and Catherine T. MacArthur Foundation, have engaged extensively in venture philanthropy through the use of program-related investments for more than 30 years. For example, The Ford Foundation, through loans, gave Grameen Bank the necessary funding to demonstrate the viability of microcredit. It was not long before the bank showed a profit and for-profit investors jumped in with support. The incipient microfinance industry was helped along dramatically by The Ford Foundation’s willingness to loan Grameen Bank money when no one else would.” Id.
181 Id.
182 L3C proponents have featured Gates’ commitment to creative capitalism in various newsletters as evidence of the developing institutional perspective on PRIs. The Family Foundation and the L3C, Family Office Ass’n (Family Office Ass’n, Greenwich, Ct.), 2009, at 2, 3.
183 Downie & Schudson, supra note 7.
between the foundation’s interests and the news reporting it supports.\textsuperscript{184} If this model is effective, social enterprise investors may be more willing to place a higher priority on accountability journalism, and they may be inclined to substantially increase their support for news organizations that demonstrate a commitment to accountability reporting.\textsuperscript{185} Additionally, in order for the movement toward social enterprise to impact the current situation facing newspapers, it is necessary to align the goals of the particular social enterprise model with the newspaper model and create a new financial model in the newspaper industry. The current financial model for newspapers, as has been noted, is not sustainable. So, in order to contemplate new models for newspapers, a few things must be recognized about the industry generally. Newspapers are still revenue-generating entities, even if profitability is increasingly uncertain.\textsuperscript{186} Newspapers seem able to cover operating costs, but it is unclear whether they can attract capital in the future.\textsuperscript{187} The market-driven investor generally wants a future return on investment, but some capitalists – the Bill Gates’ of the world – have a social consciousness sufficient to allow them to waive some or all of the financial returns that an optimal deployment of their capital might otherwise offer.\textsuperscript{188} Since the primary goal of the L3C is to increase the flow of philanthropic and private capital to enterprises that further a charitable or economic purpose, this model has great potential in extending the life span of the newspaper.

PART III. WHAT THE L3C NEWSPAPER LOOKS LIKE, AND WHY

\textsuperscript{184} Downie & Schudson, supra note 7.
\textsuperscript{185} Downie & Schudson, supra note 7.
\textsuperscript{187} Schmalbeck, supra note 186, at 2.
\textsuperscript{188} Schmalbeck, supra note 186, at 2.
Though a newspaper constructed with charitable and economic purposes in mind requires a fundamental reconsideration of what “news” constitutes, a model L3C newspaper will in some ways resemble the traditional newspaper. For example, an “Economy” section, on a given day, might be devoted to news on the local economy, and include stories on, for example, a local scientist who founded a non-profit to fight pediatric cancers; a local accountant who was the victim of fraud and what he did to combat it; and a report on the community’s attempts to combat trash scavengers and the need to deter the homeless from scavenging through local enforcement coupled with incentives to get necessaries through community outreach. Other sections will also mirror those of the regular local newspaper and might even incorporate the elements of a community blog.

The front page may feature a multi-part series on a national story with local implications; because the L3C prizes accountability journalism, this front page feature is more heavily funded than other articles and sections in the paper, and more than one reporter will be involved in its development. This hypothetical feature comprises the bulk

An L3C paper will likely be composed of the familiar ink-on-cellulose. Its broadsheet size, in a nod to cost-cutting and environmentally conscious use of less material to deliver the news, might be roughly twenty-five percent smaller than the New York Times. Sections of the newspaper should sound familiar: “Government,” “Education,” “Housing,” “Neighborhoods,” and “Science,” among others. See generally VoiceofSanDiego.org and Minnpost.com for examples of the form, from which this proposed view of the L3C newspaper draws generously.

The stories will have local impact: for example, one reporter might uncover evidence that, even in the unsteady economy, people who have opened coffee shops and restaurants have made a profit. The article will answer many of the whys, whats, wheres and hows about starting a restaurant. It will probably not feature a breathless paragraph on celebrities who have stopped by for the proprietor’s famous cinnamon latte.

A “Community Voices” section, given over to the residents of the community, can provide an opportunity to feature original local writing with appeal to the immediate population. Locals, recast as “citizen journalists,” will contribute columns on matters of community interest: what was discussed at a recent school board meeting, notice of a fund drive for the local library, or an account of how recent efforts by the federal government to strengthen Title IX impacts the local female youth sports leagues.
of the column inches, but the front page may be comprised of other stories with a specifically local reach: for example, an entry in the continuing “Guide to the City Hall Beat,” which chronicles legislation on the table, election information, and other city hall business; and information about the upcoming school board election, with profiles of each of the four candidates and their views.

Local advertising will be predominant; in fact, national advertising has little or no place in the newspaper. For example, a business leadership forum might choose to run an ad in the newspaper featuring a partnership with the local college to sponsor the visit of a prominent scholar in the field of global migration and its impact on the GDP and the job market. A number of similar forums – business, spiritual, artistic – can be advertised in the paper. Additionally, smaller “sidebar” ads for local businesses and restaurants opening in the area can be publicized.

The masthead of the newspaper should be comprehensive and visible; names and contact information of the editor-in-chief, the managing editor, the director of advertising, and the board of directors will all be available. The masthead will share space with what is loosely referred to as the “Commentary” page. It will be printed directly above an “About Us” column, which details the paper as an L3C newspaper, its social mission, its funding and where it comes from, and its policy on advertising and “community voice” pieces. The publication will celebrate its readership as news-minded, information-seeking members of the immediate community.

Political vitriol and partisan warfare, a staple of many an editorial page, will be notably absent on the Commentary page. Instead, editorials will eschew fire-breathing rants for measured analysis. The newspaper will report on myriad issues of local concern, and highlight local business in its ad space, while making room for issues of
national concern, particularly when the reporting links national issues to the local community.

The goal of the L3C newspaper is to provide a locally-based, independent news gathering entity. Alternatively, existing newspapers could be acquired with the same purposes in mind, with the goal of repurposing them to meet the requirements of the L3C model. Ideally, an L3C newspaper focuses its attention on community service and, in keeping with the expectations of its patrons, preserves and strengthens a commitment to accountability journalism. The short-term prospects allow for the reconstitution of the paper, buttressed by advertising revenue that is locally-oriented and whose impact is less likely to be dimmed by advertising challenges posed by the Internet. In the long term, if the newspaper is sustainable and achieves a measure of success in providing professional and thoroughgoing local and regional reporting, then it can either maintain its mission or adopt a profitmaking model. In the latter case, this newspaper will be able to contemplate investment in news of a global scale, which requires more resources, and perhaps an abandonment of the L3C model.

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195 To frame this newspaper in the best possible light, one might refer to it as an “indispensable civic asset.” The success of the effort can pay dividends: for example, the Knight Foundation formed a five-year program whereby it put up $5 million of seed money to bankroll 21 news sites and foundations agreed to contribute another $12 million. The program, which was designed to spend $24 million in total, was designed in no small part to alert community foundations to the investment possibilities of news organizations, and to make the argument that such organizations served a core community need by providing newsworthy information to the citizenry. David Westphal, Philanthropic Foundations: Growing Funders of the News, the USC Annenberg School for Communication Center on Communication Leadership and Policy, at 7 (July 2009).
The promise of a newly-formed newspaper industry model is met with equal parts hope and skepticism.\textsuperscript{196} Accordingly, in describing the content, look, and organization of the new industrial model, it is also necessary to confront the limitations of the model, in funding, organizational and operational concerns, and branding.

1. **Funding**

The Articles of Organization and the various statutes under which an L3C is established meet the PRI requirements established by the Tax Reform Act of 1969.\textsuperscript{197} Thus, the L3C form itself should be sufficient to overcome any problems with obtaining PRIs.\textsuperscript{198} However, there are reasonable concerns about whether the purpose of the L3C is “charitable or educational.”\textsuperscript{199} Additionally, a foundation wishing to make a PRI must thoroughly vet the transaction; I.R.S. regulations require that, prior to making the PRI, the private foundation must make a “limited inquiry” that gives “a reasonable man assurance” that the PRI will be used as intended.\textsuperscript{200} There are a number of factors to be considered in this inquiry, and failure to comply with this “expenditure responsibility”\textsuperscript{201} will subject the foundation and its management to an unpleasant tax penalty.

a. **The L3C as a “charitable” organization**

The L3C is meant to comply with the requirements for PRIs. Treasury regulations set out ten examples of investments that may or may not qualify for PRIs.\textsuperscript{202} The first set

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\textsuperscript{196} Apart from questions of funding, some media watchers question whether the community-based news organizations of the Minnpost.com variety are capable of providing the sort of in-depth local coverage required to satisfy the demands of citizenry to be informed. Notably, these voices of doubt focus specifically on the Internet model of community newsgathering. Pickard, Stearns, & Aaron, supra note 14, at 20-21.

\textsuperscript{197} See PRI Makers: PRI Primer, available at http://primakers.net/resources/faq (last visited June 27, 2010).

\textsuperscript{198} Brakman Reiser, supra note 131, at 4.

\textsuperscript{199} See generally Schmalbeck, supra note 186.

\textsuperscript{200} 26 C.F.R. § 53.4945-5(b)(2).

\textsuperscript{201} 26 C.F.R. § 53.4945-5(b).

\textsuperscript{202} 26 C.F.R. § 53.4944-3.
of examples deal primarily with businesses that are set in a “deteriorating urban area,” or a “depressed rural area,” and which can involve ownership by “members of an economically disadvantaged minority group.” The language of the statute suggests that a PRI is subject to a traditional view of charitable giving; that is, the PRI, like a grant, will be used to purchase property for nonprofit organizations, or as a loan to a start-up company in the developing world. However, under the regulations, the possibility persists that an organization which has stock listed on the exchange and enjoys a measure of financial security might still qualify for a PRI. The guiding principle appears to be that PRIs are not solely designed to help distressed, small, or minority businesses, but to help any business make a charitable investment, if the business could not economically justify the investment without capital from a proponent of creative capitalism.

The Treasury and Congress set out a test in § 4944(c) – essentially the same set of conditions that is included in the L3C statute – that is designed to assure that this condition is met. So, while the L3C would appear to have met the conditions for receiving PRIs, § 4944(c) requires that “the primary purpose of the investment is to accomplish one or more of the purposes described in section 170(c)(2)(b).” Thus, the investment must accord with the I.R.C. definition for “charitable contribution,” which

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203 26 C.F.R. § 53.4944-3.
204 See Shelley Banjo, Consider It an Investment, the Wall Street Journal (Nov. 9, 2009) (in which the author sketches out the parameters of PRI giving and, in doing so, narrows the scope of its applications to models that meet with the examples articulated in § 4944), available at http://online.wsj.com/article/SB10001424052748704500604574481541506618608.html?mod=googlenews-wsj.
205 26 C.F.R. § 53.4944-3 (which in Example 5 describes the investing business as “financially secure” and whose stock is “listed and traded on a national exchange). Schmalbeck, supra note 186, at 17.
206 26 C.F.R. § 53.4944-3(a)(1).
207 4944-3(a)(1).
208 4944-3(a)(1).
states that the organization must be “organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes.”\textsuperscript{209}

Thus, the initial inquiry is whether publishing a newspaper serves a charitable purpose under sections 170(c)(2)(b) and 501(c)(3) of the Code.\textsuperscript{210} The L3C is not exempt from this inquiry, because it cannot be formed to run a newspaper unless its efforts qualify as a “charitable or educational” purpose.\textsuperscript{211} Further, the L3C must satisfy the § 4944(c) guidelines, based on the proffered examples, on what qualifies as a PRl.

Because of the dearth of I.R.S. rulings that specifically address whether L3Cs are eligible vehicles for newspapers, past rulings on whether certain newspaper organizations qualified for tax exemption provide the best window into the I.R.S.’s thinking. In 1967, the I.R.S. issued a ruling that outlined the factors a publishing organization must satisfy to qualify for exemption:

1. The content of the publication is educational;
2. The preparation of the material follows methods generally accepted as educational in character;
3. The distribution of the materials is necessary or valuable in achieving the organization’s exempt purpose; and
4. The manner in which the distribution is accomplished is distinguishable from ordinary commercial publishing practices.\textsuperscript{212}

This ruling itself might be narrowed by its facts; the decision only extended to organizations engaged in the publication of scientific or medical literature.\textsuperscript{213}

However, this ruling has been used as a basis for subsequent rulings in the publication

\textsuperscript{209} I.R.C. § 170(c)(2)(b).
\textsuperscript{210} Schmalbeck, supra note 186, at 19.
\textsuperscript{211} Schmalbeck, supra note 186, at 19; Betty Poulin, Low-Profit Limited Liability Company, Vermont Secretary of State, Corporations Division (July 2008), available at http://www.sec.state.vt.us/corps/dobiz/linc/linc_l3c.htm (last visited June 26, 2010).
field that expended the types of literature covered.\textsuperscript{214} The I.R.S. General Counsel clarified the fourth factor in a 1982 Memorandum, listing five factors that guided the I.R.S.’ analysis.\textsuperscript{215} The Memorandum found that practices which reflected a commercial purpose to publish included:

1. conducting as its sole activity publishing activities using standard commercial techniques which generate ongoing profits;
2. pricing its materials ‘competitively’ with other commercial publications or to return a profit;
3. conducting an enterprise in a manner in which all participants expect to receive a monetary return;
4. publishing its materials almost exclusively for sale, with only a de minimis amount of material donated to charity;
5. existing or accumulating large profits; and accumulating profits from sales activities which are greatly in excess of the amounts expended for educational programs.\textsuperscript{216}

The 1967 ruling and the 1982 Memorandum provide the standard by which any publishing organization assesses whether or not it can receive an exemption (and, for L3C purposes, until such time as legislation addresses the model, whether a newspaper reinvented as an L3C can qualify as a charitable or economic entity).\textsuperscript{217} This fourth factor, and its five-prong analysis, is generally the most difficult to overcome.\textsuperscript{218} For example, in a 1965 Tax Court memorandum decision, a religious organization, whose primary purpose was an educational appraisal of daily religious living, and whose efforts included publication of religious materials, was denied an exemption.\textsuperscript{219} Though its

\textsuperscript{214} A 1982 General Counsel Memorandum declined to distinguish between science and medical publications and other publications, addressing the ruling as it applied to educational publications generally. GCM 38845, 1982 WL 204252 (I.R.S. GCM).
\textsuperscript{215} GCM 38845, 1982 WL 204252 (I.R.S. GCM).
\textsuperscript{216} GCM 38845, 1982 WL 204252 (I.R.S. GCM).
\textsuperscript{218} Fremont-Smith, \textit{supra} note 217, at 23-24.
nonexempt purpose was clear, the organization was found to have operated predominantly as a commercial enterprise.\textsuperscript{220} Furthermore, a federal district court distinguished organizations whose commercial activities were only a part of its overall purpose and held that an independent religious publishing house was organized solely to “carry on a trade or business.”\textsuperscript{221} The court found that the primary purpose of the religious enterprise was to publish and sell religious literature at a profit.\textsuperscript{222} Thus, the organization’s sole activity defined its purpose, and allowing it an exemption would be tantamount to exempting every publishing house on the grounds that they educate the public.\textsuperscript{223} By contrast, a private letter ruling found that an organization that published a journal to further its charitable purposes of combating prejudice and discrimination was entitled to an exemption.\textsuperscript{224} The ruling rested on a reading of the fourth factor – that “the manner in which the distribution is accomplished is distinguishable from ordinary commercial publishing practices that emphasized ‘commercial’ over ‘distribution’” – and relevant to the decision were the facts that the journal never made a profit, contained advertising that was merely incidental to the primary purpose, and was offered for free or for a reduced price.\textsuperscript{225} Additionally, another private letter ruling found that a magazine that included articles on health, even though it could properly be deemed a mix of general and health-related material, clearly assisted in

\begin{itemize}
\item \textsuperscript{220} The organization received substantial funds through donations and offered many items for sale that were not of a nonreligious nature, including member donations, which were seen to be payment for materials offered, and offers which promised that financial benefits would accrue to the donors if donations were made. \textit{id.}
\item \textsuperscript{221} \textit{Fides Publishers Ass’n v. U.S.}, 263 F.Supp. 924, 934 (N.D.Ind. 1967).
\item \textsuperscript{222} \textit{id.} at 935.
\item \textsuperscript{223} \textit{id.}
\item \textsuperscript{224} TAM 8351008, 1983 WL 205121 (I.R.S. TAM)(1983).
\item \textsuperscript{225} TAM 8351008, 1983 WL 205121 (I.R.S. TAM)(1983).
\end{itemize}
implementing educational and scientific purposes.\textsuperscript{226} Central to the ruling were facts that the magazine was not operated to make a profit, and that the publisher determined through years of trial and error that the split-focus of the magazine was the best way to achieve the purpose of disseminating vital health information to readers.\textsuperscript{227}

Though newspapers are having a hard time in the current commercial market, some would argue that this is not a sufficient reason to overcome this fourth factor. Some have pointed out that though there are around 375,000 newspaper employees today, there were about 280,000 in 1950.\textsuperscript{228} The reason for the turmoil over employment is largely because the employment level enjoyed a high of 440,000 around 1990, and that the reduction should be properly measured from that watershed mark.\textsuperscript{229}

Additionally, the number of employees in newsrooms has, accounting for industry declines, increased from 1970 by approximately 25 percent.\textsuperscript{230} However, this data admits to the overall industry decline of the last ten years; notably, these same voices concur that news organizations will of necessity become less profitable and therefore smaller.\textsuperscript{231}

Moreover, the L3C model can overcome this factor by design. The model exists to attract those investors who are willing to forego substantial profits in an effort to achieve a social good.\textsuperscript{232} Even though some investors expect a marginal return, like the magazine that published health-related articles, this return would be incidental to the

\textsuperscript{228} Picard, \textit{supra} note 1, at 115.
\textsuperscript{229} Picard, \textit{supra} note 1, at 115.
\textsuperscript{230} Picard, \textit{supra} note 1, at 115.
\textsuperscript{231} Picard, \textit{supra} note 1, at 115.
\textsuperscript{232} SN036 ALI-ABA at 253.
overall purpose of the venture. Newspapers that are to be converted by or created in accordance with the L3C model are by definition those that can no longer survive on revenues from subscriptions and advertising. Thus, a blended enterprise organization can substantiate that its methods are not designed to earn significant profits. Rather, the organization is trying to reverse a negative trend. Though the goal is not to maximize profits, there is an expectation of profitability, at a minimum to meet operational expenses. For example, ad revenue can be local and cover information that is relevant to the immediate area. The I.R.S. has considered commercial advertising acceptable when it does not conflict with the primary purpose of the group. Since “no purpose of the company is to accomplish one or more political or legislative purposes,” an L3C newspaper would likely be unable to feature, say, a full-length advertisement in which a group offers a politically partisan criticism of the policies of one political party. However, this does not deny the newspaper the right to offer space to advertisers, particularly if the advertising in question benefits the

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233 SN036 ALI-ABA at 257.
234 Fremont-Smith, supra note 217, at 24.
235 In their discussion of the L3C as the basis of a newsgathering operation, Americans for Community Development cited a 2008 study in Western Michigan concluding that when dollars are spent at locally owned businesses, 68% of the dollars remain in the community. By contrast, dollars spent at non-locally-owned businesses retain only 43% for the community. Thus, locally owned commerce can benefit from advertising placed in a newsgathering organization with a locally-oriented model, including a local journalism staff and a local advertising staff. Americans for Community Development: News 3.0 & Advertising 3.0, available at http://www.americansforcommunitydevelopment.org/supportingdownloads/News3.0.pdf (Last visited June 6, 2010).
236 One ruling counseled that an organization spreading a message on health and medicine accepted advertisements, but “(did) not accept the advertisements of products that it consider(ed) to be medically harmful. Consequently, (the organization) receive(d) no revenue from the two most lucrative sources of advertising income - tobacco and alcohol advertising.” TAM 8751007, 1987 WL 428434 (I.R.S. TAM)(1987).
237 See 11 V.S.A. § 3001.
community for whom the paper is produced.\textsuperscript{238} The overriding concern is not ad
revenue \textit{per se}, but that advertising does not consume column inches to the
detriment of space for material that reflects the primary purpose of the organization.\textsuperscript{239}

Additionally, since PRIs are a part of the L3C model, there is generally an understanding that investments will achieve a below market return, with adjustments for mission and risk.\textsuperscript{240} Participants can accrue upside gains, since the idea driving the foundation investment is to allow otherwise low-end or marginal enterprises to improve their balance sheets to a degree necessary to attract additional capital investment.\textsuperscript{241} The pertinent question in the “litmus test” for lawyers regarding these investments is, “Would an investor solely engaged in investing for profit make the investment on the same terms?”\textsuperscript{242} If the answer is “no,” then the foundation is willing to accept a higher risk and a lower return.\textsuperscript{243} Thus, the PRI investment, if subject to a private letter ruling, would appear to steer clear of the problems identified in the 1982 Memorandum.\textsuperscript{244}

Arguably, the proposed L3C newspaper’s greatest challenge is to fulfill the first three factors articulated in Revenue Ruling 67-4 (for present purposes, this will serve as a

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\item[\textsuperscript{239}] The 1987 private letter ruling suggests that advertising, and column inches devoted to material other than that identified as fulfilling the organization’s primary purpose, is not problematic when the publication “has included as much medical and nutritional information ‘as the market would bear’ without jeopardizing its target readership.” TAM 8751007, 1987 WL 428434 (I.R.S. TAM)(1987).
\item[\textsuperscript{241}] Schmalbeck, \textit{supra} note 186, at 19.
\item[\textsuperscript{242}] Schmalbeck, \textit{supra} note 186, at 19.
\item[\textsuperscript{243}] Schmalbeck, \textit{supra} note 186, at 19.
\item[\textsuperscript{244}] This assumes that the institutional uncertainty of PRIs has been overcome. This Article presumes that, in due course, foundation executives will appreciate the extent to which a well-constructed PRI can directly leverage private capital for social good, and that the necessary skills required for such drafting will be better understood. See Schmalbeck, \textit{supra} note 186, at 2.
\end{itemize}
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means of fulfilling sections 170(c)(2)(b) and 501(c)(3) of the Code); that is, the newspaper will have to show that its content, preparation of material, and distribution of material, is educational or charitable in nature and purpose. In absence of an I.R.S. ruling or legislation, this is not an easy task.

First, the meaning of “charitable” is difficult to square with the publication of a newspaper. In the legal sense, “charitable” is defined in the following ways: “relief of the poor and distressed or of the underprivileged;” “advancement of religion;” “advancement of education or science;” “lessening of the burdens of Government;” and “promotion of social welfare” through such functions as lessening neighborhood tensions, eliminating prejudice, or defending civil rights. The listed examples might be appropriate for a single-issue publication, such as one that reports on wage inequities and job discrimination and their effects on lower-middle class minorities. Such reporting might, in fact, be a part of a news publication organized as an L3C, but an L3C newspaper that addresses a community should ideally encompass all manner of issues that impact its citizens. There is no language in the regulation contemplating the fit between a news organization and the designation “charitable.” That an L3C has stepped in to relieve the economic burdens of a faltering newspaper is a charitable

245 The ruling makes mention only of “educational” in its four-factor test due to the scientific nature of the publication at issue. “Educational” and “charitable” are on equal ground in the test, as evidenced by the ruling’s reference to Section 501(c)(3) of the code, wherein the ruling notes that the definition of “charitable” in that section includes the advancement of science and education, and further notes that the distribution factor is deemed “charitable” because a public benefit accrues through the method of distribution. Rev. Rul. 67-4, 1967-1 C.B. 121, 1967 WL 15588 (I.R.S. RRU).

246 Schmalbeck, supra note 1986, at 20. However, other voices disavow the difficulty inherent in the calculus. Robert Lang, creator of the L3C, has maintained that lawyers and laymen can easily understand the structure of the L3C, and finds private letter rulings and Congressional action only useful to “enhance the value, ease of use, and flexibility of the L3C.” Robert Lang, “What is the L3C?,” available at http://americansforcommunitydevelopment.org/downloads/WhatIsTheL3C.pdf (last visited Jul. 24, 2010).

247 26 C.F.R. § 1.501(c)(3)-1(d)(2).
act, but that does not in itself establish a newspaper as a charitable entity under the terms of the regulation.

A newspaper could be said to address a raft of charitable purposes. A newspaper can offer content that is educational, address social ills such as discrimination and civil rights violations, offer news reporting that provides insight into the advancements of science and medicine, and lessen the burdens of government by performing the civic duty of informing the body politic about impending government matters, their impact on the community, and how citizens can get involved. Advocates of the L3C envision their model newspaper supplying its readership with content along these lines, though they emphasize a duty toward helping small, local businesses to flourish. Under this logic, the front page of an L3C newspaper might resemble the front page of an existing for-profit newspaper. The stories cover a range of local issues, including details on a recent state senate proposal that affects local businesses, an expose on current social conditions in the municipality that lead to juvenile delinquency and efforts of charitable organizations to course-correct, and even a story with national implications on the latest breakthrough in medicine.

It may be too difficult and time-consuming for a newspaper editor to continually frame the paper’s contents to substantially reflect a charitable purpose. However, the major impetus for using social enterprise to save newspapers is to preserve the investigative, disinterested journalism that keeps the citizenry informed and empowered. The information that results from such reporting is the key asset to be

248 Schmalbeck, supra note 186, at 20.
249 Americans for Community Development speak generally of the newspaper as an engine of local economy, with the ability to provide information that will significantly help local business, as well as a one-stop outpost for information on services offered by cultural and non-profit venues. News 3.0 & Advertising 3.0, supra note 192.
preserved by the L3C newspaper. Furthermore, the question remains whether such a newspaper would be viewed favorably as a collective of charitable concerns, or whether investors are merely intervening to save a newspaper from its debt, its excesses, and its inability to compete with the Internet. In order to achieve the former result, it may be necessary to revisit the idea of what “charitable” means.250

b. The L3C as an “educational” organization

The same Treasury regulation that supplies guidance for the term “charitable” also provides guidelines for an “educational” purpose. The regulation defines “educational” as relating to either “the instruction or training of the individual for the purpose of improving or developing his capabilities” or “the instruction of the public on subjects useful to the individual and beneficial to the community.”251 The former would seem to refer chiefly to manuals, guidebooks, and the like.252 As an example of the latter, the regulations cite, “An organization whose activities consist of presenting public discussion groups, forums, panels, lectures, or other similar programs.”253 Broadly read, this sort of activity is not the province of groups involved in newsgathering, but rather those groups that congregate after news has been gathered in order to assess its impact, or those groups that congregate to propose systematic changes which, if enacted, could result in news. However, there have been rulings that the publication of investigations and analyses qualify as activities for educational organizations.254

250 Schmalbeck, supra note 186, at 20.
251 26 C.F.R. § 1.501(c)(3)-1(d)(3).
252 One such organization cited “presents a course of instruction by means of correspondence or through the utilization of television or radio.” 26 C.F.R. § 1.501(c)(3)-1(d)(3), Example 3.
Perhaps the selfsame reporting that debatably qualifies as "charitable" could meet the requirements for material provided for educational impact.

In 1986 the I.R.S. issued a Revenue Procedure which laid out a test to determine "whether advocacy by an organization is educational." The Service recognized that some advocacy was educational even if the views expressed were unpopular, and that it would render no judgment on the merit of the viewpoint expressed. Rather, the Service rested its analysis on the methodology the organization employed to express its views, and stated that the organization would not be considered educational absent a factual foundation for the viewpoint expressed or the provision of a development from the pertinent facts that would aid a reader in her learning process.

A publication which adheres to these guidelines can promote the usefulness of advocacy journalism by informing citizens of social conditions and government activity. The publisher cannot merely depend on the A.P. wire or inadequate sourcing to justify a story that advocates a position; she must engage in information-gathering, verify the information, and make qualified and thoroughgoing judgments about the content she intends to publish. An L3C newspaper will have little space for those Op-Ed columns

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257 Rev. Proc. 86-43, 1986-2 C.B. 729, 1986 WL 297205 (I.R.S. RPR) (1986). The Procedure also included the following factors as indicative that the methodology was not educational: "1) The presentation of viewpoints or positions unsupported by facts is a significant portion of the organization’s communications; 2) The facts that purport to support the viewpoints or positions are distorted; 3) The organization’s presentations make substantial use of inflammatory and disparaging terms and express conclusions more on the basis of strong emotional feelings than of objective evaluations; 4) The approach used in the organization’s presentations is not aimed at developing an understanding on the part of the intended audience or readership because it does not consider their background or training in the subject matter." Rev. Proc. 86-43, 1986-2 C.B. 729, 1986 WL 297205 (I.R.S. RPR) (1986).
that seek to persuade a class of people to adopt a position for partisan gain; however, an opinion column that marshals facts and evidence to inform the readers of the pitfalls of a government program may be allowed to advocate a solution if the position employs reasoned and dispassionate analysis, factual support, and is aimed at a readership who already possesses some background in the topic.\(^{259}\)

Additionally, if a newspaper is to qualify as an educational organization, it is necessary to determine what material must be left out. Not all the information in, for example, a publication like the *New York Times*, will conform to the regulation. Journalism concerned with celebrity gossip, humorous essays, or a litany of crime-related stories stripped of any socio-cultural context might be better left to celebrity newsweeklies, online “zines,” and the six o’clock news. The opinion page will likely come under fire if it is found to present partisan viewpoints to the exclusion of reasoned analysis. However, this same Treasury Regulation states that an organization, in carrying out its primary purpose, may advocate for change or present opinion on controversial issues with the intent of shaping public opinion without losing its educational status.\(^{260}\) This advocacy is subject to parameters set out in paragraph (c)(3) of the regulation; chiefly, the advocacy cannot be an “insubstantial” portion of

\(^{259}\) An Op-Ed column that takes a candidate for political office to task for a perceived elitism would likely fail under the Procedure’s test; in place of facts, the author characterizes the candidate as “unable to feign even Main Street cred” based on personal opinion; the facts in the story, which include the candidate “examining the cheese and salami at the Italian Market (as) intriguing ethnic artifacts, are distorted to support the author’s opinion; the tone is disparaging; and the author is less interested in educating the intended audience than in offering criticism of a candidate for reasons unstated. Maureen Dowd, *Eggheads and Cheese Balls*, the *New York Times*, April 16, 2008, available at http://www.nytimes.com/2008/04/16/opinion/16dowd.html (last visited July 5, 2010).

\(^{260}\) 26 C.F.R. § 1.501(c)(3)-1(d)(3).
its activities, and it should be characterized by nonpartisan analysis, study, or research, which results are offered to the public.\textsuperscript{261}

Some generally accepted reporting techniques may receive scrutiny under the I.R.S.'s Revenue Procedure test. For example, the use of anonymous sources might be questioned. Many reporters view unnamed sourcing as a necessary evil in journalism, because without them much useful information might not otherwise be communicated to an interested readership.\textsuperscript{262} However, such information gathering is also criticized as a crutch for lazy reporting, a quick means of beating rival publications to a story, and, most critically, an opportunity for a source to shape the news cycle and influence public thought.\textsuperscript{263} To counterbalance the uncertain authority of an anonymous source, the newspaper can adopt a rigid policy about their use. For example, the \textit{New York Times}’ policy is to use anonymous sources only as "a last resort when the story is of compelling public interest and the information is not available any other way."\textsuperscript{264} However, the Public Editor noted that the \textit{Times} often relaxes its own policy for questionable reasons.\textsuperscript{265} In order to conform to the test, anonymous sources should become not only rare, but also subject to corroboration from other sources before they are considered verifiable information.\textsuperscript{266} Therefore, a critical component of

\begin{footnotesize}
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\item\textsuperscript{261} 26 C.F.R. § 1.501(c)(1), (3).
\item\textsuperscript{263} Id.
\item\textsuperscript{265} Id.
\item\textsuperscript{266} "From the legal point of view, the use of appropriate verification procedures is ‘(t)he most often discussed procedural hallmark of a protected editorial judgment.’ So, for example, in libel cases, the courts look at the verification measures used by the publisher to determine whether the defendant acted with reckless disregard for the truth… the courts could (also) look for whether the publisher has mechanisms in place to systematically exercise judgment over the
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“educational” journalism is a publisher who has a verification procedure in place to investigate all sources of information and confirm their accuracy.267

Thus, a newspaper may, in a number of ways, be considered “educational.” Moreover, one might argue that an L3C newspaper is “educational” because it provides a public service through its investigative work, its notice of public events and gatherings, and its publication of matters of local concern that might not otherwise be obtainable by the citizens of an area.268 Furthermore, since profits are a negligible expectation in today’s economic climate, the salient reason for formation as an L3C newspaper is to provide the sort of educational information that was once published by papers that could generate significant revenue, but no longer can.269

c. The requirement of “expenditure responsibility”

In order to square a PRI with a charitable or organizational purpose, foundations have a responsibility to adhere to the standards set out by the regulation. They must consider the designation of an entity as “charitable” or “educational” as seriously as the Treasury and the I.R.S. If the recipient of the PRI is not a public charity, the foundation is required by I.R.S. regulations to exercise “expenditure responsibility.”270 The regulations explain that the foundation must conduct a vetting process of the potential PRI recipient. The I.R.S. will consider identity, experience, and history of the organization and its managers, and any knowledge the foundation has on the

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267 39 Hous. L. Rev. at 1414.
268 Schmalbeck, supra note 186, at 24.
269 Schmalbeck, supra note 186, at 24.
270 While public foundations have somewhat more latitude, many will opt for the sake of fiscal prudence to follow the I.R.S. guidelines. 26 C.F.R. § 53.4945-5(a); Carlson, supra note 138.
potential recipient and its business practices in its assessment.\textsuperscript{271} Furthermore, the regulations require that the foundation use “reasonable efforts” and “adequate procedures”\textsuperscript{272} to insure that the PRI is used solely for the educational and charitable purpose for which the organization is dedicated, that the organization “submit full and complete financial reports of the type ordinarily required by commercial investors under similar circumstances and a statement that it has complied with the terms of the investment,”\textsuperscript{273} and to make books and records available to the private foundation at reasonable intervals.\textsuperscript{274} Thus, even if an organization believes its newspaper fits the definition of “charitable” or “educational,” the potential foundation investor must conduct its own serious inquiry on the same question.

2. Governance

The L3C effectively adopts wholesale the tremendous flexibility of LLC governance framework.\textsuperscript{275} The L3C model may be either member-managed model or manager-managed.\textsuperscript{276} The “operating agreement” allows the L3C to vary the model it chooses; for example, the operating agreement can establish internal governance procedures, set up a unique executive structure, or even set up a managing committee of members.\textsuperscript{277} An L3C can presumably oblige its managers to pursue a both profit and social good. However, as Brooklyn Law School Professor Dana Brakman Reiser has noted, this flexible governance confronts three major issues: first, because

\textsuperscript{271} 26 C.F.R. § 53.4945-5(b)(2).
\textsuperscript{272} 26 C.F.R. § 53.4945-5(b)(1).
\textsuperscript{273} 26 C.F.R. § 53.4945-5(b)(2).
\textsuperscript{274} 26 C.F.R. § 53.4945-5(b)(2).
\textsuperscript{275} Brakman Reiser, \textit{supra} note 5.
The L3C is a flexible model, there is no mandate to pursue a common social goal; second, “there is no clear regulatory backstop for the governance regime,” and fiduciary duty may only go so far in internal governance; and third, there is lingering skepticism that a form that offers complete or dominant control to foundations (as with the tranched investment hypothetical structure) will attract market-driven investors if there is no significant security offered to those investors. These issues must be addressed in turn if the L3C is to effectively enforce its blended mission.

a. The operating agreement and the mandate necessity

There is no mandate for the L3C to pursue a common goal. The L3C is governed by an “operating agreement” which closely follows the format for an LLC agreement. Like the LLC, the L3C agrees to regulate the company’s affairs and business conduct, and to govern relations among its managers (if there are managers), members, and the company. The operating agreement sets forth its members’ respective rights and obligations, contributions to the company, distributions members are to receive, voting rights, manager or managers’ duties, and other provisions. As has been stated, the operating agreement is flexibly construed, and members are given ample latitude to determine governance through the operating agreement. If there is no operating agreement, or if the operating agreement is in some way deficient, the company will be bound by the default minimum requirements set forth by state laws.

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278 Brakman Reiser, supra note 5.
279 Brakman Reiser, supra note 5.
While the fundamental characteristic of L3C governance, like the LLC, is flexibility, it ought to include specific provisions in the operating agreement in order to adhere to the limitations of its socially beneficial purpose. The effect of the investment on the private foundation is based on the “purpose” the foundation has for making the investment. And, since a foundation’s expenditure responsibility requires that it inhere in the L3C manager or managers’ particular obligations, they, as well as the uses to which the investment is to be put, should be set forth in the operating agreement.

The advocates of the L3C envision its operations along the lines of a private business, with an eye toward self-regulation. The L3C allows for different classes of members with different powers and privileges. The membership parameters seek to provide assurance that the L3C will comply with its founding goals: it will have owners, officers, and boards elected by its members, except that membership is comprised of the trusts and foundations that hold the membership units. The L3C advocates anticipate that this will eliminate the risk of a self-perpetuating board overcome with “mission creep.” Further, the advocates maintain that if a foundation or trust desires a greater say in L3C governance, it merely has to hold on to its securities and take a

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284 Keatinge, supra note 283.
287 Robert M. Lang, Jr., The L3C: The New Way to Organize Socially Responsible and Mission Driven Organizations, SN036 ALI-ABA 251, 256 (November 29-30, 2007).
288 SN036 ALI-ABA at 257.
289 SN036 ALI-ABA at 257.
more active role. However, what sounds good in theory may not be easy in practice. The L3C can improve its claim as a workable social enterprise model, whose very structure combats the notion of “mission creep,” if it establishes a method for enforcing the founding goals. This can be achieved “by fiat through imposition of specialized fiduciary obligations” or structurally by giving governance rights to an appropriately incentivized group. These requirements may undercut the L3C’s ability to increase capital available for its blended mission, but in the short term, they provide stronger boundaries for the governance structure.

b. Self-governance in the absence of regulation

There is no I.R.S. regulation of blended enterprise. Though the I.R.S. might be able to act as a “shadow regulator,” it may not be equipped to regulate a blended enterprise. In absence of this regulation, there are rulings that provide guidance for an L3C’s fiduciary obligations. For example, Revenue Ruling 98-15 provides some important considerations regarding the presence of an exempt organization in an LLC. The ruling considered whether an organization that operated an acute care hospital could qualify as an organization whose principal purpose was providing hospital care when it formed an LLC with a for-profit corporation and subsequently contributed the hospital and its assets to the LLC (which then oversaw the hospital’s

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290 The particular essay is unclear as to the steps the foundation would take to achieve a greater say. Presumably, part and parcel of the organizational flexibility is the opportunity to amend portions of the operating agreement, if need be, to effect various changes in governance. SN036 ALI-ABA at 257.

291 Brakman Reiser, supra note 5.

292 Brakman Reiser, supra note 5.

293 Brakman Reiser, supra note 5.

294 Brakman Reiser, supra note 5.

affairs). The I.R.S. found that an exempt organization may form and participate in an LLC, but only “if participation in the partnership furthers a charitable purpose, and the partnership arrangement permits the exempt organization to act exclusively in furtherance of its exempt purpose and only incidentally for the benefit of the for-profit partners.” Moreover, an organization is allowed to enter into a management contract with a private party, and to give that party authority to conduct activities on the organization’s behalf, as long as the organization has ultimate authority over the assets and activities being managed and the terms and conditions of the contract are reasonable. By contrast, if a private party controls or utilizes the non-profit organization’s activities or assets for its own benefit, and the benefit is not incidental to the accomplishment of exempt purposes, the organization will fail to be organized and operated exclusively for exempt purposes.

This ruling invests the fiduciary with a duty to maintain and enforce a social mission, and the “blended” element of the LLC in question tracks the substance of the L3C. However, the question remains whether a provision in the operating agreement will be respected when it invests the L3C with the authority to conduct business in furtherance of a charitable or educational purpose, or whether a preference to the fiduciary duty to accrue profit for L3C members will hold sway. Fiduciaries can act in their own self interest, provided they do not compete with the L3C or breach obligations of good faith and fair dealing. The management arm of an L3C may be permitted to act in its own interests in pursuing a profitmaking model; for example, the

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300 See generally 42 Suffolk L. Rev. at 568.
301 Brakman Reiser, supra note 5.
Uniform Limited Liability Company Act has approved of an LLC member who voted against a proposal that the LLC open a shopping mall that competed with the member’s own shopping mall.\textsuperscript{302} Presumably, this member was acting contrary to the wishes of the LLC and the contours of its mission. It may be a breach of the duty of good faith for the management team or manager of an L3C to behave in likewise fashion. If the operating agreement required adherence to the L3C’s blended mission, and an event like the aforementioned LLC member’s vote occurred, this may be a problem, but there is no enforcement mechanism to insure against potential breaches such as these.\textsuperscript{303}

Also, there is the problem of mission drift. The L3C is premised on a degree of social altruism on the part of its investors, and assumes that they will forego a measure of operational control and financial benefit in order to be allied with a social concern. Still, imprecise drafting can lead to the unintended consequence of a for-profit entity that receives resources to achieve its social aim might, in its future, experience mission drift, and become a pure profit-making enterprise.\textsuperscript{304} The question the potential L3C organization will face is how to get its market rate investors and its social investors on the same page, their purposes aligned. The flexibility of the operating agreement in this way is the L3C’s greatest blessing and, potentially, its greatest curse.\textsuperscript{305} Investors who have expressed interest in the L3C model are confronted with a statute that is relatively content-free; their goal is to realize a plan that can be articulated with care and precision.

c. The problem of attracting the market rate investor

\textsuperscript{302} Brakman Reiser, \textit{supra} note 5.
\textsuperscript{303} Brakman Reiser, \textit{supra} note 5.
\textsuperscript{304} Dana Brakman Reiser, \textit{For-Profit Philanthropy}, 77 Fordham L. Rev. 2437, 2466 (April 2009).
\textsuperscript{305} 42 Suffolk L. Rev. at 568.
The L3C brand can function as a signal to potential investors about the nature of their investment and the expectation of return. If provisions are clearly and carefully written into the operating agreement, they will be acknowledged.\textsuperscript{306} A number of scholars, lawyers, and businesspeople have stressed the importance of carefully considering the operating agreement and drafting it with a lawyer’s assistance.\textsuperscript{307} The two governance patterns of the L3C – member-managed and manager-managed\textsuperscript{308} – yield a number of unique possibilities in drafting an operating agreement, and negotiating for a harmonious arrangement can avoid tax issues, role uncertainty, and costly litigation.\textsuperscript{309}

However, if the operating agreement provides the bulk of governing authority to a foundation or to socially-minded investors, it is uncertain whether the L3C will be able to market memberships to market-driven investors who seek a return on their investment without offering them significant security.\textsuperscript{310} Arguably, if there is significant security offered to these investors, then it might be easier to simply form a charity and sell them true debt.\textsuperscript{311} Additionally, it is important to find a way to manage possible conflicts without undermining the capital investment. For example, if the market rate investors take a debt position, rather than an equity position, then isn’t that tantamount to giving up the store? Does this not make the L3C subject to takeover when it achieves a measure of success? The operating agreement should be the embodiment of a deal

\textsuperscript{306} 42 Suffolk L. Rev. at 568.
\textsuperscript{307} Lane, supra note 110, at 6; Americans for Community Development, Legal: Operating Agreements, available at http://americansforcommunitydevelopment.org/legal.php (last visited Aug. 2, 2010); Brakman Reiser, supra note 131; 42 Suffolk L. Rev at 568.
\textsuperscript{309} Lane, supra note 110; 42 Suffolk L. Rev at 582-86.
\textsuperscript{310} Brakman Reiser, supra note 5.
\textsuperscript{311} Brakman Reiser, supra note 5.
reached between the market rate interest and the social interest, but the struggle could be in making the deal.

d. Governance and the L3C newspaper

L3C advocates generally believe that a newspaper’s stability is best served by an equity transaction. They contemplate a tiered investment whereby, for example, local members of the Newspaper Guild would have a small financial stake, but significant control of the product. Local businesses would contribute more money but have less control. Other investors, like pension funds, would be considered passive participants. The operating agreement would presumably be drafted with these considerations in mind. However, the L3C newspaper will still have to address the absence of a mandate to pursue a common social goal, as well as the limits of internal governance in the absence of I.R.S. regulation.

First, if the mandate of an L3C is unclear at present, then the L3C newspaper’s mandate is less so. The roles of the traditional newspaper can be lifted out of the for-profit model and set into the L3C model; then, the governance model can provide a measure of oversight to enforce the blended mission. The organizational structure of the newspaper under L3C provisions, in the traditional view, will consist of a staff of journalists managed by a professional news management staff. This staff, under the proposed L3C model, reports to the management board, which may be comprised of “members of the present management structure and community leaders.”

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312 Brakman Reiser, supra note 5.
313 Brakman Reiser, supra note 5.
The L3C form articulated here anticipates a manager-managed governance structure. The default provisions for a manager-managed L3C (per the default rules of the LLC) confer on the manager the power of agency of the company for business purposes. Member-managed companies, by contrast, lack the power of agency, and the members do not have the apparent authority necessary to bind the company. However, though the Uniform Limited Liability Company Act vests much authority in the manager of a manager-managed company, members do retain some significant power. If there is more than one manager, the Act makes it clear that each has an equal share of management and conduct of company business. Also, managers are designated and removed by the members. Furthermore, the manager of any L3C, like the manager of the LLC, is subject to the fiduciary duties of care and loyalty; members are not, so long as they do not “exercise some of the rights of a manager.”

In the case of the L3C newspaper, the most sensible course for day-to-day operations would be to appoint or maintain an editor-in-chief. The current newspaper model has flaws, but the presence of an editor-in-chief remains necessary. If the editor-in-chief is responsible for revenue shortcomings or bad business decisions, the reconfiguration of the newspaper’s business model, not the elimination of the editor’s primacy in the day-to-day operations of the newspaper, is a sufficient way to correct

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the problem. Furthermore, there is no necessity currently for a team of executive editors in the newspaper hierarchy. The importance of a single editor-in-chief has historical and practical support. The editor-in-chief is the face of the newspaper, communicating its vision and mission to its readers. In the L3C context, this includes the ability to articulate the blended mission of the newspaper and its educational purpose. Additionally, the editor-in-chief should be responsible for a two-pronged approach to content, mining the paper’s stories to justify not only the strength of the reporting but also the extent to which the newspaper fulfills its social enterprise requirements.

The L3C newspaper can operate under a tranched investment structure. The Newspaper Guild or a similar organization is better equipped to oversee the social mission of the newspaper because of their expertise in the field; thus, it makes sense to give them greater control of the overall content of the product (subject to their working arrangement with the editor-in-chief), and less control over the fiscal aspect of the venture. The business investors will commit more capital, and though their control of editorial content is slight, they will receive the ancillary benefits that come from advertising in the newspaper. Placing dominant control of the social mission in the 

323 The Washington Post was famously run by Ben Bradlee during its Watergate heyday, but it was Len Downie who, in his tenure at the helm, built the paper into a model of professionalism. The effect of his skilled judgment and love of news had a considerable effect on the rest of the paper’s employees. “The reason (certain questionably newsworthy items, such as the couple who crashed President Obama’s first State dinner) never would have happened with Len,’ a former senior editor (said), ‘is that Len would have … said ‘it’s a stupid idea, don’t come to me with this shit. We’re doing journalism here.’” Gabriel Sherman, Post Apocalypse, the New Republic, January 19, 2010.
324 See generally Howell Raines, My Times, the Atlantic, May 2004, available at http://www.theatlantic.com/past/docs/issues/2004/05/raines.htm (last visited Aug. 11, 2010) (in which the author describes the totality of circumstances that occasioned his rise to executive editor of the New York Times, and his controversial fall; the article in sum presents a view of the newspaper editor’s responsibilities that is a public concern, and details the editor-in-chief’s role in shaping the direction of a publication and focusing its mission).
hands of an entity investing for no return will reinforce the social, but not the blended, mission of the newspaper, because the entity is presumably investing for no return.\textsuperscript{325}

Here, however, the Newspaper Guild, or whatever foundation invests in the newspaper for social mission purposes, must provide the sort of reporting that is valued by the community; otherwise, the newspaper will end up crippled by lack of business investment.

Additionally, the potential of mission drift in the absence of a “regulatory backstop” must be addressed.\textsuperscript{326} A number of commentators in recent months have noted that, given the current economic climate in the newspaper industry, commercial owners are interested in selling and communities are interested in buying.\textsuperscript{327} Therefore, one way to explore the ability of the for-profit to coexist with the philanthropic elements is to test the model.\textsuperscript{328}

L3C advocates have argued that the model can withstand mission drift under some general guidelines. They argue that a well-drafted operating agreement will assure stakeholders that mission will be adhered to, and that those managers who run the day-to-day business will not be constrained to vet all decisions by other members or the board in order to deliver the publication.\textsuperscript{329} In a fundamental sense, this directive asks members to allow the managers to manage. Take, for example, the possible conflict of political endorsements. In order to qualify as an L3C, a newspaper will have to forego the usual election-year round of endorsements that often appears in its Op-Ed

\textsuperscript{325} Brakman Reiser, supra note 5.
\textsuperscript{326} See generally 77 Fordham L. Rev. 2437 (April 2009).
\textsuperscript{327} Pickard, Stearns, & Aaron, supra note 14, at 17.
\textsuperscript{328} Pickard, Stearns, & Aaron, supra note 14, at 17.
section. Though this is a necessary cost of funding and operating the L3C newspaper, it may not be a welcome option for a newspaper that has been in circulation for some years, has fallen on hard times, and is considering the L3C model as a possible solution. Many newspapers have long viewed the editorial page as an essential piece of media real estate through which its holders hope to shape and influence political discourse. Absent a strong operating agreement, and clear delineation of duties in the newspaper model, the corporate element may feel obligated to energize the paper in the area of political opinion in order to compete with the confluence of Internet opinion, the wealth of opinion on cable news programs, and the relative political freedom exercised by papers who maintain their existence as for-profit entities. The flexibility of the model may cut both ways, allowing careful crafting of an agreement that provides numerous safeguards to protect the social mission, or, alternatively, enabling indeterminate power-sharing agreements and unclear roles to overtake the paper’s social mission in an effort to “compete.” The drafters of the operating agreement must formalize the governance structure clearly in the operating agreement, drawing from the existing governance structure of the traditional newspaper, in order to avoid this problem.

The potential difficulty of attracting the market rate investor in the absence of security offered to these investors does not uniquely concern the L3C newspaper. However, there are recent developments in the I.R.S.’s view of a tax-exempt organization’s ability to earn profits in general that might enhance an investor’s view of the L3C model. The I.R.S. used to revoke tax-exemption for charities that earned

330 Swensen and Schmidt, supra note 88.
331 Muse Abernathy, supra note 62, at 9.
substantial profits; they would investigate the nature of the activities that charities engaged in that resulted in profits with an eye toward whether the activities were “substantial.”\textsuperscript{333} Then, they would investigate the actual amount of profit the activities generated under the same “substantial” test.\textsuperscript{334} The I.R.S. did not formulate a bright-line rule, so attorneys would generally advise tax-exempt organizations that, as long as their unrelated revenue-generating activities constituted less than twenty percent of the organization’s activities and the unrelated profits constituted less than twenty percent of the organization’s total revenues, the unrelated profit-making activity should be acceptable.\textsuperscript{335}

However, recently the I.R.S. has allowed several organizations to earn revenues that comprise a much greater portion of their budgets. In February 2010, the I.R.S. issued Technical Advice Memorandum 20100506\textsuperscript{336}, which allowed a tax-exempt organization to maintain its exempt status despite the fact that over fifty percent of its revenues were derived from unrelated profit-generating activities.\textsuperscript{337} Other rulings and court decisions have followed suit. Thus, the I.R.S. now appears to allow charities to earn a higher percentage of their revenues from unrelated business activities.

The impact of these developments on the L3C is unclear. However, if the L3C is given the similar ability to achieve increased revenue from unrelated profit-generating activities, the market-driven investor might have greater interest in the L3C model. This investor is still incentivized by contributing to a new investment model and receiving the

\textsuperscript{333} See Pepper Hamilton LLP, \textit{Tax Update: Recent TAM on a Sport Association’s UBTI Finds Acceptable Split of Income and Employee Activity, May 2010}, at p. 4-5 (hereinafter “Pepper Hamilton”).

\textsuperscript{334} Pepper Hamilton, \textit{supra} note 333.

\textsuperscript{335} Pepper Hamilton, \textit{supra} note 333.


psychic benefit of contributing to a socially beneficial organization. However, because the I.R.S. appears to be more generous with respect to business revenues generated by L3Cs, the market-driven investor might be more assured of a solid return on the initial investment, and the L3C may not suffer a corresponding dilution of its social mission.

3. Branding

Social entrepreneurs generally feel that if hybrid organizations have a recognizable brand, then institutional and financial support will follow. They feel that if a consistent impression of the organization is presented to the public and investors, such that it differentiates itself from other organizations and gives people an unmistakable and unique idea of what it means to be a hybrid organization, then the organization will not only be more memorable but able to compete in the marketplace. In order for the L3C to gain traction in the growing world of social enterprise, it must achieve recognition and trust in the marketplace. Also, the notion that an L3C is a fit model for a newspaper must also be branded effectively, since the most-cited uses of L3C occur outside of the newspaper industry. One media professional noted that, generally, people feel that if there is important news out there, someone will report it to

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338 B4 Tul. L. Rev. at 361.
341 Examples of possible L3Cs usually encompass the following areas: "Pharmaceutical Venture to Develop Inexpensive Drugs for So-Called ‘Neglected Diseases’; “High-Tech Furniture Factory Established to Restore Lost Jobs in Rural North Carolina Town’; “Green Restaurants Exclusively Serving Locally Grown Organic Food and Employing Underprivileged Youth’; “Blended Charitable/Commercial Purpose Organizations Like Hospitals, Museums, and Arts Centers’; “Low-Income Housing Projects.” Newspapers, when included in the conversation, are considered with reservations, as thus: “Newspapers?” Brewer, supra note 137, at 14.
them; thus, any successful model will leverage that belief.\textsuperscript{342} Thus, in order to establish a fit brand for the marketplace, an L3C must clearly signal its unique mission to the public and instill confidence in potential investors. Government ratification of the form, still pending, would bolster the argument that the L3C is a suitable option for investors and foundations.

Robert Lang has written that the L3C’s strengths are a sufficient signal to investors that the L3C’s mission is unique, and he believes that this will pave the way for the L3C to become a recognized and trusted brand.\textsuperscript{343} The profit motive is designed to make the business essentially a self-regulating entity.\textsuperscript{344} Also, because investors are signaled about the predominance of mission over market, they cannot claim that they would not have funded the enterprise if they had known the direction it would take.\textsuperscript{345}

Organizationaly, the L3C should make available a market for organizational control that has a notable impact on the metric of effectiveness for social hybrid organizations.\textsuperscript{346} Moreover, a social entrepreneur’s desire for an effective asset lock depends on the manner in which the operating agreement is drafted.\textsuperscript{347} That is, the drafting ought to give the charity ultimate control of the mission.\textsuperscript{348} In this way, the social investor and the consumer will both have confidence that the assets will remain dedicated to a socially useful end.\textsuperscript{349}

\textsuperscript{343} SN036 ALI-ABA at 257.
\textsuperscript{344} Id.
\textsuperscript{345} Id.
\textsuperscript{346} Id.
\textsuperscript{347} 84 Tul. L. Rev. at 375.
\textsuperscript{348} Id.
\textsuperscript{349} Id.
L3C advocates feel a newspaper can instill confidence in investors and the public through branding by separating itself from sales and marketing concerns.\textsuperscript{350} They propose a repositioning of the publication’s old name or, alternatively, creating a new name.\textsuperscript{351} This brand name, they contend, will mark the beginning of a “conversation” with the readers, as well as an opportunity to signify the publication’s new purpose: as representative of the critical information for a local area.\textsuperscript{352} The newspaper will have strong local advertising of all stripes; information on community organizations and non-profits; and a conduit of information about local government activity.\textsuperscript{353} Additionally, the paper will function as a check on governmental power, and a watchdog of government activity, in keeping with its educational mission.

L3C advocates utilized I.R.S. private letter rulings as a guide to create the L3C form.\textsuperscript{354} Their logic was to use the rulings to structure the L3C as a brand which signifies easily made, replicable PRIs, so that the concept of PRIs would be easy to understand and more confidently used.\textsuperscript{355} Therefore, they reason, the legislative efforts of states like Vermont coupled with the care taken to comply with the I.R.S. regulations should be

\textsuperscript{355} Lang, supra note 351.
sufficient to provide confidence to investors that the L3C brand is solid.\textsuperscript{356} Further, the L3C proponent might point to the established L3Cs – MOOMilk, CoolPass, and Faithful Travelers – as proof that there is growing confidence in the L3C format. However, these organizations are new, and demonstrable proof that the L3C is a sustainable model can only be achieved over time.

The L3C would thus benefit immeasurably by the ratification of a prominent institutional voice. Ideally, the imprimatur of the government would solve this problem. One oft-cited way to allay institutional fears is to obtain a private letter ruling that essentially gives L3Cs the Service’s blessing.\textsuperscript{357} Though time-consuming and costly, such a ruling would bless the L3C with a measure of certainty regarding the use of PRIs.\textsuperscript{358} Without such reassurance, L3C champions are left to defend the model against the concerns that various government officials have expressed.\textsuperscript{359} An effort to legislate a simplified qualification process for L3Cs with the I.R.S., the Program-Related Investment Promotion Act of 2008, would have amended § 4944(c) to facilitate a process whereby an organization seeking a PRI could receive a determination that below-market

\textsuperscript{356} Lang, supra note 351.


\textsuperscript{359} For example, at a conference in 2009, a senior technical advisor in the I.R.S.’ Tax Exempt and Government Entities Division advised private foundations to approach L3C opportunities with caution. He said that “(a)t the federal level, no one has really signed off on L3C’s yet,” and that PRI investments in L3Cs are “premature” and “the jeopardy investment issue is (not) a slam dunk.” \textit{Id.}
investments from foundations in the organization are acceptable.\textsuperscript{360} It gained no traction in Congress.\textsuperscript{361}

Alternatively, Congress might be enlisted to tailor the laws currently on the books to make room for the L3C form (among other emerging social enterprise models). In March 2009, Maryland Senator Benjamin Cardin introduced the so-called “Newspaper Revitalization Act,” which would allow certain newspapers to qualify for tax exemption under statutes 501(a) and 501(c)(3) of the Code.\textsuperscript{362} Senator Cardin, who noted in an editorial in the \textit{Washington Post} that any infusion of federal taxpayer money was off the table,\textsuperscript{363} envisioned instead a bill that would allow newspapers to operate under 501(c)(3) statuses for educational purposes.\textsuperscript{364} The newspaper would be designated to provide local, national, and international news as way to satisfy an educational purpose; additionally, advertising would be allowed in Cardin’s newspaper, so long as the space allotted for advertising did not exceed the space allotted for newspaper items that fulfill the paper’s educational purpose.\textsuperscript{365} Cardin identified several aspects of the newspaper he envisioned that harmonize with the L3C newspaper model: newspapers would be allowed to report on political issues, but not make political endorsements; the measure itself would be targeted to local newspapers serving their particular communities; and watchdog journalism would be preserved.\textsuperscript{366}

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\textsuperscript{361} 19-DEC Bus. L. Today at 56.
\textsuperscript{362} Http://cardin.senate.gov/pdfs/newspaperbill.pdf (last viewed 3/8/10).
\textsuperscript{364} \textit{Id}. The amendment calls for insertion of the phrase “(including a qualified newspaper corporation)” after the language “educational purposes” in § 501(3)(c).
\textsuperscript{365} http://cardin.senate.gov/pdfs/newspaperbill.pdf (last viewed 3/8/10).
\textsuperscript{366} Cardin, \textit{supra} note 363.
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However, Cardin’s proposed bill did not take into account the possibilities of a blended enterprise model; the Senator was concerned with locating an alternative business model for newspapers with non-profit status only, as a marked contrast with the commercial model. In order to utilize government legislation to maximum branding effect, a bill that promotes the idea of blended social enterprise should be considered. In the same way that a bill conferring tax-exempt status on newspapers should encourage charitable donations to papers, a bill that essentially blesses the L3C, or more widely, the concept of for-profit philanthropy, by the necessary amendments to the Code, would help to send a signal to potential investors that the model is not merely a theoretical construct but offers a real alternative to the market investor who seeks to make a charitable contribution and receive some level of return for the effort.

Notably, a recent Comment from the American Bar Association’s Section of Taxation proposed to I.R.S. Commissioner Douglas Shulman that the I.R.S. expand its roster of investments that, under facts and circumstances detailed in the comment, qualify under current law as PRIs. The newly proposed investment examples sought to apply existing law to the realities inherent in today’s economic and social climate. The Comment’s intent was to provide further guidance to grant-makers and their advisors interested in making PRIs.

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367 Cardin, supra note 363.
370 ABA Section of Taxation, Comments on Proposed Additional Examples on Program-Related Investments, Mar. 3, 2010, available at
Notably, the Comment took the following position on L3Cs:

“We have not included any examples that focus on the legal status of the PRI borrower or investee being a limited liability company ("LLC"), as opposed to a corporation or partnership. LLCs have been more commonly used for PRIs in recent years. Low-profit LLCs, also known as L3Cs, have received significant recent attention but are merely a subset of regular LLCs …. We believe that, if a particular loan to, or investment in, an ordinary LLC would qualify as a PRI, then, a fortiori, a loan to, or investment in, an L3C should also so qualify. We also believe that LLCs do not warrant specific guidance.”

The ABA comment gave the L3C the blessing that the proposed Cardin bill lacked.

Government legislation that follows the model of the ABA’s comment would provide a significant boost to the L3C’s efforts to establish a strong, recognizable brand.

CONCLUSION

If the operating agreement is sound, and governance achieves sufficient clarity, a newspaper should qualify as an educational or charitable objective, and thus fit for L3C status. At its best, newsgathering and reporting has significant positive externalities, that lack the financial strength of partisan or celebrity-based journalism, but which are nonetheless “essential to the political, economic, and social health of the community served by the particular newspaper.” Newsgathering and reporting should be recognized as a valuable asset at the federal level; new social enterprise forms should therefore be ratified through Congress or the I.R.S. Government generally does, and should, have an interest in what these new forms will contribute to
the art of accountability journalism. As Richard Schmalbeck has noted, the IRS is essentially the only government body with the standing to challenge a newspaper claiming that it is published for a charitable or organizational purpose. If the IRS announces that it has no intention to make such a challenge, the controversy is essentially ended. Absent the IRS’ opinion, Congress may be enlisted to ratify the L3C. And, as the Cardin bill demonstrated, there is interest at the federal level in addressing the open issues and crafting legislation that makes the road for the L3C an easier one to travel.

Apart from government participation, a continuing effort to present the L3C as a trusted and viable brand will send a signal to investors that it can be applied to all manner of businesses, including newspapers. Recently, the not-for-profit

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375 Cardin, supra note 363.
376 Schmalbeck, supra note 186, at 21.
377 Foundations can take the lead in this effort. Social enterprise models for newspapers compliment the transformation of the newsgathering form. They highlight the social benefits of a newspaper that are required to preserve accountability journalism and help it accrue sufficient capital to adhere to its social mission. The overriding goal of interaction of the new social enterprise regime with foundations is to challenge them to create value through achieving sufficient social impact through their investment targets. Mark R. Kramer, Philanthropy’s New Agenda: Creating Value, Harvard Business Review (Nov. 1999/Dec. 1999). Foundations should drive social programs, since they have the power to make more lasting use of scarce resources than either the government or individual donors. Id. (This article also lays out the tax implications of a foundation investment as opposed to an individual donation that goes directly to charity: “We rarely stop to think about the differences between direct giving to operating charities and donations through foundations, but they are striking. When an individual contributes $100 to a charity, the nation loses about $40 in tax revenue, but the charity gets $100, which it uses to provide services to society. The immediate social benefit, then, is 250% of the lost tax revenue. When $100 is contributed to a foundation, the nation loses the same $40. But the immediate social benefit is only the $5.50 per year that the foundation gives away -- that is, less than 14% of the forgone tax revenue.” Add administrative costs and compliance burdens to the financial mix and it becomes quite plain that foundations are an expensive way to allocate money to social enterprise. The author posits that this is all the more reason to invest substantially in foundation philanthropy, so long as the social return is significant enough to justify the cost. Id.)

There are four ways in which foundations can create value by generating, through their work, social benefits that exceed the purchasing power of their charitable giving. Id. First, a foundation should be taxed with deploying resources to areas of the social sector that are cost-effective or that address urgent, possibly underreported concerns. Id. Second, foundations
independent news organization, ProPublica, won a Pulitzer Prize for a piece about lethal injections administered to ill patients in a New Orleans hospital cut off from outside help during Hurricane Katrina. The piece was produced in a partnership arrangement with the New York Times. Accolades of this sort can draw more attention to new business models in news and increase their attractiveness to interested social entrepreneurs.

should seek to magnify the value they create by educating donors about their mission by signaling other funders to attract donors who lack foundations’ expertise in a particular area and thus improve the return on a larger pool of resources. Id. Third, by improving the grant recipient’s performance (the newspaper) foundations increase the value of their investments. Id. This involves capacity building, wherein the foundation partners with consultants and other non-profit organizations to provide their grantees with the tools and techniques to enable them to better achieve their missions. This is possible when a foundation moves from the role of the capital provider to an engaged partner in the enterprise, to the extent that it improves the grantee’s effectiveness with respect to its mission. Id. This particular role is built directly into the L3C model, and is subject to the strength of the operating agreement and the clear delineation of roles within the newspaper’s organization. Finally, the ability of the foundation to advance the state of knowledge and practice depends on its willingness to fund journalism, particularly multipart journalism that uncovers areas of immediate social or political concern. So, a newspaper providing content for a local readership on a regular basis should seek to educate through consistently thorough, useful, and verifiable content on events, issues, and information of immediate and long-ranging concern. This is likely a key challenge, because a major hurdle in conferring L3C status on a paper is its ability to achieve status as an “educational” or “charitable” enterprise that harmonizes with the applicable provisions of the Code.


ProPublica Pulitzer, supra note 378.

Tina Susman, Nonprofit newsroom wins Pulitzer Prize, Los Angeles Times, April 13, 2010, available at http://articles.latimes.com/2010/apr/13/nation/la-na-pulitzer-prizes13-2010apr13 (last visited August 21, 2010). ProPublica gained additional interest from readers, and was able to increase their staff, in the wake of the accolade. Zeke Turner, Journalism’s Not-For-Profit Arm Is Growing! ProPublica hires, NPR Has Record Ratings, The New York Observer, June 7, 2010, available at http://www.observer.com/2010/media/journalisms-not-profit-arm-growing (last visited August 21, 2010). However, there are still concerns for the potential investor, even in a moment of great success for independent, disinterested journalism. For example, it was estimated that the piece cost around $400,000 to produce. Zachary M. Seward, An extremely expensive cover story –with a new way of footing the bill, Nieman Journalism Lab, August 28, 2009, available at http://www.niemanlab.org/2009/08/an-extremely-expensive-cover-story-with-a-new-way-of-footing-the-bill/ (last visited August 21, 2010). Gerald Mazorati, the editor of the Times magazine, where the article appeared, delivered this estimate: Mazorati conceded that the cost may be a deterrent to future long-form pieces, noting that the devotees of long-form
Thus, the obstacles the L3C faces in establishing a foothold in the newspaper industry should be overcome through the efforts of foundations, L3C advocates, journalists, investors, and, potentially, the government. If the fourth sector continues to grow, the L3C is arguably the model best suited to give a troubled newspaper the seed money necessary to resume its publishing efforts and deliver journalism that is necessary to maintain a socially and politically informed and involved community.

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journalism don’t make a lot of money, and Web outlets don’t want to pay for it. Talk to the Times: Assistant Managing Editor Gerald Mazorati, the New York Times, August 24, 2009, available at http://www.nytimes.com/2009/08/24/business/media/24askthetimes.html?_r=2&pagewanted=all (last visited August 21, 2010) (however, Mazorati did reprint a statement he made that “Readers still want long-form journalism — despite information overload and hectic schedules and so on — and the numbers prove it. It’s the magazine’s longest pieces that get the most page views each week, often more than a million.”) Mazorati did not venture a comparison between the revenue-generating page views of the story against its cost, a decidedly complex procedure, and important analysis in this situation.