Editorial Advertising: A Means of Free Expression?

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EDITORIAL ADVERTISING: A MEANS OF FREE EXPRESSION?

BY

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Introduction

With the ratification of the Bill of Rights in 1791, the framers of the Constitution guaranteed every citizen the unbridgeable right to express his or her opinion freely and without fear of government reprisal. This guarantee was simultaneously reinforced by granting the same freedom to the press, thus providing a vehicle for such expression.

Today, the Constitution has been subjected to a vast number of interpretations. Generation after generation has styled these interpretations to fit their needs, but what about the needs of citizens, as individuals, to express themselves? The geometric progression of modern technological development has and is constantly increasing the speed of the communication process. This rapid increase in technology has forced the tools for expression into the hands of a minority of highly skilled communicators and has made it difficult, if not impossible, for an individual to express his opinion to the rest of

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1 U.S. Const. Amend. I.

his community. Yet, the Constitution still gives him the right to do so.

It would therefore seem logical that today's citizen use all those media and vehicles, provided him by today's technology in order to express an opinion. However, everyday realities make it impractical for every citizen to print an article; write a column; or be heard over the airwaves. These impracticalities narrow the citizen's alternatives for expression. One alternative which is both practical from the citizen's point of view and profitable for the community as a whole is the institution most commonly used in the everyday business world—advertising.

The idea to use this commercial institution as a way to express opinions openly and with a minimal amount of editing is not a novel one. As stated by Mr. C. H. Sandage, "the institution of advertising has many facets, one of which is to serve as an instrument of communication. This facet could be used by anyone who has sentiments to express, as a method to have his voice heard."

Advertising for the purpose of expressing opinions is

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not, however, quite the same as commercial advertising. This differentiation will be pointed out later in the text. This type of advertising, also, must be identified. The label for advertising of this nature has been and henceforth shall be referred to as editorial advertising. Editorial advertising is defined as a spot of time or space paid for by individuals or groups for the purpose of expressing opinions on issues of public importance.

Advertising for this purpose has been used in print media, but recent court rulings have seriously questioned its use in broadcast media. It has also been used in other media.

STATEMENT OF PURPOSE

The purpose of this study is to analyze various aspects of editorial advertising in an effort to determine if its continued and expanded use can serve as a modern means of

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free expression. It is intended that this analysis might also serve as a compendium to facilitate decision making for any and all persons who consider the use of paid space or time to express an opinion.

STATEMENT OF PROBLEM

In order to determine whether editorial advertising can be used further as a means of free expression, the following questions must be answered:

1. How does editorial advertising differ from other forms of advertising and from other forms of editorializing?

2. What is the existing legal and practical status of editorial advertising?

METHODOLOGY

The research questions posed and the uniqueness of the phenomenon under investigation suggested that a library survey be conducted. In addition, an analysis is being conducted. It focuses on the technical differences and the constitutional background, as well as the legal status and the practical uses of editorial advertising.

The library survey is divided into three major areas. The first area is a review of the relevant literature on

free speech and First Amendment interpretations. The second major area focuses on the institution of advertising as a general means of communication and, more specifically, on editorial advertising as a means of free expression. This area also looks at other forms of editorializing and different types of advertising. The third major area reviews both the legal and practical status of editorial advertising. This area also involves the key issue of access to the media.

Sections reviewing the legal status are limited to those agency, appellate court, and supreme court decisions which directly involve the use of editorial advertising.
Chapter 1

FREE EXPRESSION IN PERSPECTIVE

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.10

ORIGIN AND PURPOSE

Consideration of any method for implementing free expression must rest upon a basic understanding of the First Amendment and its interpretations. Essential to such an understanding, is the viewing of this amendment within the contextual framework of its origin, purpose and meaning.

The origin of the amendment dates to the late 1780’s at which time there was concern for revising the newly adopted Constitution to include safeguards for individual freedoms. During this same period, there surfaced a unique attitude. It regarded free expression as a function of an individual’s speech and writing, as well as the tradi-

10 U.S. Const. Amend. I.

tional use of the press. To put it more bluntly, "free speech" was attitudinally elevated to a position which had previously been held only by the "free press" concept. This attitude appears to have been another manifestation of the democratic zeitgeist.

Further evidence of this attitude pervades the research of George Anastaplo who states, "Until the establishment of the American Republic, 'liberty of the press' had been emphasized when freedom of expression for the public at large was provided. 'Freedom of speech'... can be said to have been expanded by the First Amendment to include the entire population..."

This same attitude, as to the meaning of the First Amendment, was most clearly stated by the major author of the Bill of Rights, James Madison. Madison justified amending the Constitution with a lengthy speech in 1789 wherein he referred to the proposed First Amendment. It was worded thus, "...The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable..." It should also be pointed out that Madison's wording of the amendment

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had been suggested to him by various State conventions and individual representatives.

The First Amendment, at the time of its origin, can be said to have reflected the attitude that free speech and free press be conscribed into a basic right of free communicative expression. This attitude must not, however, be construed as the purpose or meaning of the amendment, but rather the philosophy held by its originators.

The purpose of the amendment was to lay the groundwork for the maintenance of the values and philosophies expounded in the late Eighteenth Century Republic. This maintenance could be realized with a general and flexible groundrule which established an absolute right. The First Amendment was and is one of the few laws set down in the Constitution which projects the foresight of its authors. Their foresight was seasoned with a tradition of press freedom found in their Anglo-Saxon culture. Because of this tradition, tempered with their new attitude, the originators of the First Amendment purposefully sought to guaranty an entire system of free expression.

A "systematic" view of the First Amendment's purpose also supports the unique attitude of individual free speech and a free press as being complementary. Indeed, a free press could be the vehicle for an individual's exercise of

free speech. A "systematic" view also ensures a "method of securing participation by the members of the society in social, including political, decision making." Thus a system of free expression, by guaranteeing an absolute right, can adapt to societal changes over periods of time. This, then, was the purpose of the First Amendment.

CHANGING INTERPRETATION

The First Amendment, like the entire Constitution, has been interpreted by each generation of Americans to meet their needs for expression, as perceived at the time. Interpretations, while changing and differing to meet these needs, have not necessarily detracted from the amendment's primary purpose...the institutionalizing of a durable system for free expression.

Interpretations of the First Amendment are also changing, like Toffler's "Discovery, Application, Impact" continuum, at an increased rate. For example, when a new interpretation is accepted and applied, its impact sets precedents or creates problems that, in turn, demand newer interpretations. Thus, there is a need for new interpretations to meet accelerating technical and social changes and the constant need of free expression maintenance.

The job of interpreting the First Amendment has, since the ratification of the Constitution, been assigned to the

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15 Ibid., p. 9.

Supreme Court of the United States. The justices who comprise this body have, for the past couple of decades, become increasingly aware of the need to formulate their interpretations with respect to the rapidly increasing technological and social changes. William Hachten succinctly illustrates the Court's awareness of rapid change and free expression needs when he states:

The Supreme Court has had to cope with the technological revolution that has shaped mass communications in this century. In the days of small, hand-printed news sheets, James Madison and the architects of the First Amendment could not foresee giant high-speed rotary presses, network television, communication satellites, motion pictures, radio, or world-wide news agencies strung together by teletype and telephone. But had they had such foresight, it is unlikely that they would have rewritten the First Amendment. It is part of the genius of our Constitution that each generation can adapt the document's broad enduring principles to the changing needs of time.17

Modern interpretation of the First Amendment not only reflects an awareness of increasing technology and increasing free expression needs, but also suggests the testing of a new means to maintain the free expression system. Speaking on this point Supreme Court Justice Brennan has stated, "Thus, although 'full and free discussion' of ideas may have been a reality in the heyday of political pamphleteering, modern technological developments in the field of communications have made the soapbox

orator and the leafleteer virtually obsolete." This obsolescence of the soapbox in the square and the handbill type of pamphlet, as vehicles within the free expression system, suggests that other vehicles for carrying out the same function be devised. The present technology can dictate the device and the modern interpretations of the First Amendment can maintain the free expression system.

MAINTAINING THE FREE EXPRESSION SYSTEM TODAY

Technology has forced upon interpreters of the First Amendment, as well as today's society in general, the need for new methods to maintain free speech and free press concepts. This same technology can also satisfy these needs, but technology alone may not be enough. Likewise, the institutionalizing of free expression by the First Amendment may not, by itself, maintain free expression.

Maintenance of a system of free expression also depends on practical, day-by-day methods for individuals and groups to lay their ideas and opinions before the public. Furthermore, in the words of Thomas Emerson:

"...an effective system of freedom of expression requires a realistic administrative structure. It is not enough to merely formulate the broad principles or simply to incorporate them in general rules of law. It is necessary to develop a framework of doctrines, practices, and institutions which will take into account the actual forces at work and make possible the realistic achievement of the objectives of the First Amendment."

18 Justice Brennan, 47 LW 4719.
sought.19

The objective sought in this case is the self-fulfillment of individual and group needs for expression. And, as Emerson pointed out, the day-by-day methods for achieving this objective lies in formulating new doctrines and institutions.

The purposes of this chapter and this study are not to develop a doctrine for free expression. Instead, they are to give the reader a perspective of the First Amendment and then to consider a new method for maintaining the free expression system. Therefore, the last part of Emerson's framework—the (modern) institution, emerges as a method to implement free expression.

Any institution, by its nature, cannot radically change the present system for communicating information, ideas, and opinions into some Orwellian nightmare. Any method chosen, therefore, must work within the present communication systems.

This is not to say, however, that a new method cannot eliminate errors or improve upon the performance of the present system. Thomas Emerson, calling for an "affirmative promotion of freedom of expression" says, "There are numerous reasons for the failures now threatening the existence of the system (of free expression). Probably the most significant is the overpowering monopoly over the

means of communication acquired by the mass media." This same point of view is supported by Zechariah Chafee Jr. who views the concentrated power of today's mass media as an antithesis to the essential conditions for a healthy public opinion, the essential conditions being a diversity of expressed views.

A new method for maintaining the purpose of the First Amendment in today's society should be an institution which can work within the present communications media, while also eliminating some of the failures which the media have had due to their monopolistic position.

An institution for the maintenance of free expression does exist in the form of modern advertising. Within this institution, a method also exists by which individuals and groups can still achieve free speech without radically disrupting the present communications media. This institution and this method will be thoroughly examined in the next chapter.

SUMMARY

Much of this chapter has focused on the background of free expression as embodied in the First Amendment of the Constitution. Specific attention was focused on the attitudes held by James Madison and other originators of the

\[20\] Ibid., p. 627.

Bill of Rights to show that the dual concepts of free speech and free press were, in fact, at least complementary if not synonymous when the amendment was created.

This chapter also pointed out that the basic purpose of the amendment was to establish an entire system of free expression which could adapt to changing times. With a systematic view in mind, the complementary role of free speech and free press assumed greater meaning. The press, in accordance with the attitude surrounding First Amendment composition, could be seen as a vehicle for free speech.

Interpretations of the First Amendment, while differing over time, did not necessarily detract from the amendment's basic purpose. Furthermore, modern Supreme Court interpretations were shown to reflect an awareness of the demands of modern technology.

And finally, it was suggested that a method to maintain the free expression system would have to include not only modern interpretations of the amendment, but also an institution which could work within the present mass communications systems to eliminate past mistakes and still provide individual self-fulfillment. It was further suggested that maintenance of the free expression system could be accomplished by the modern institution of advertising.
Chapter 2

ADVERTISING, EDITORIALIZING, AND FREE EXPRESSION

ADVERTISING AS AN INSTITUTION

Advertising need not be viewed only as the business world's tool for mass selling. Such a view would be simplistic and only partially correct. Advertising, also can be thought of as an institution that assumes an important and far reaching role in modern society. Advertising, as an institution of social control, has been compared to other major institutions as the Church and the University. It is similar to these latter institutions due to its extensive influence. It is largely differentiated from Church and University because it is the offspring of modern economic abundance. 22 Whereas the Church meets society's spiritual needs and the University meets the needs for self-betterment through reason and learning, advertising satisfies people's economic desires and communicates, to them, their roles as consumers.

Advertising, in conjunction with mass media, fulfills its social role by affecting attitudes. In the words of Mr. Potter, "...the only institution which we have for

22 Potter, People of Plenty, p. 176.
instilling new needs, for training people to act as consumers, for altering men's values, and thus for hastening their adjustment to potential abundance is advertising."

Furthermore, Mr. Leo Bogart, leading advertising strategist, concurs with Mr. Potter by saying that, "advertising is more than an economic force; it is also a profound influence on our culture, on our values, and on the quality of our life."

Advertising, as an institution, does have a strong social effect. It largely reinforces existing social attitudes and has the potential for changing attitudes. An institution with such influential capabilities as modern advertising can also provide the necessary tool for maintaining free expression.

ADVERTISING AS COMMUNICATION

If advertising, as an institution, reinforces or changes social values and attitudes, then it accomplishes such effects by communicating ideas, information, and opinions. Advertising, in a more basic context, is communication, i.e., it "involves the symbolic representation

23 Ibid., p. 175.


25 Potter, People of Plenty, p. 188.
of the context of a thought." More succinctly, advertising may be defined as "any paid form of mass media presentation and promotion of ideas, goods or services by an identified sender." The relevant aspect of this definition, for purposes of free expression, deals with ideas and not goods or services.

The entire advertising process also embodies communication. Briefly, the advertiser (communicator) designs (encodes) his advertisement (message) and transmits it via media (channels) to his audience (receivers), who may or may not buy (positive response). The purpose of these coded, pre-engineered messages is to communicate as precisely and with as much impact as possible, given a strictly limited amount of space or time. Precision, competition, and complexity of process all demand that advertising be a form of communication characterized by artistry, scientific knowledge, and technical skill.

Advertising, viewed within a communication context, assumes a more basic and broader meaning than that attributed it by everyday business world connotations. It is not


27 Ibid., p. 16.

28 Ibid., pp. 13, 17, 26.

29 Toffler, p. 164.
just the clamoring of merchants for people's attention.
It is an economic and social institution based on com­mu­nication processes. Furthermore, advertising's propinquity to business practices can be seen as a practical asset for maintenance of free expression. Its daily use throughout this century has fostered a communication system which need be altered only insofar as the content of the messages be changed from selling company products to insuring that citizens' opinions be presented.

ADVERTISING AND FREE EXPRESSION

It has already been suggested that, in order to maintain a system of free expression, one would most likely have to work with the established systems of mass commun­ication whose structures are controlled by a minority of editors, station managers, and skilled technicians. It has also been suggested that, with the rapidity of technological advancement, the trend in controlling the mass communication systems will rely even more heavily on those specialists and managers mentioned above. Furthermore, it has been pointed out that, perhaps, the only active institution existing which can be used to maintain the free expression system is modern advertising.

The notion to use advertising to maintain free expression, as stated in the introduction, is not new. Mr. C. H. Sandage expounded this idea to the Association for Education in Journalism in 1958. As already cited, he too viewed advertising as an institution with its
major "facet" being communication. In the same speech, Mr. Sandage continued by expanding the idea to use advertising:

True, its communicating function has been confined largely to informing and persuading people in respect to products and services. On the other hand, it can be made equally available to those who wish to inform and persuade people in respect to a city bond issue, cleaning up community crime, the 'logic' of atheism, the needs for better educational facilities, the abusive tactics of given law enforcement officers, or any other sentiment held by any individual who wishes to present such sentiment to the public.30

This kind of concept seems readily easy to grasp, but the fact is that very few people, especially those in the various disciplines of mass communication, have done little to see that free expression keep pace with technological progress. Mr. Sandage also brought attention to this lack of action. He attacked obsolete methods for free speech implementation by saying:

Adherence to the old concepts of implementing free speech can only curtail and largely destroy the effective communication of the lay citizen with various publics. The newer concept of using advertising as a communication vehicle for the lay citizen can make each purchaser of a two-inch column of space his own editor and publisher. The freedom to speak is meaningless unless there is effective machinery for distributing speech to those ears one wishes to reach.31

Sandage's theme is similar to other sources cited. The similarity lies in the fact that many persons in the


31 Ibid., p. 223.
mass communication systems, as well as some in the legal institutions, have not yet realized or accepted the fact that old methods of free speech do not meet citizens' needs in a rapidly advancing, technological age. Modern advertising, however, does presently have the capability to accomplish the task.

EDITORIAL ADVERTISING

Advertising, on the institutional level, provides a means to work within present systems to maintain free expression. Advertising, as communication, implies that free expression is available if the opportunity is seized.

The next step would be to seek a specific tool, the exact form of advertising, with which citizens could exercise their free expression. This specific type of advertising has been labeled editorial advertising. Editorial advertising has been defined as a spot of time or space paid by individuals or groups for the purpose of expressing opinions on issues of public importance.

For the purpose of semantic clarity, it will be necessary to dwell further on the definition of editorial advertising. This is due to the legal and practical questions which will be discussed in the next chapter.

Editorial advertising is differentiated from other forms of advertising by two main factors. One difference

is the actual content of its messages. The other is the person or group who is sponsoring the message. For example, an ad, written and paid for by John Public and expressing his opinion on local air pollution standards, would qualify as an editorial advertisement. A similar ad, written and paid for by X Oil Company, would not qualify as an editorial advertisement. Because of its potentially commercial benefits to X Oil Company, the latter example would more accurately be labeled as a "public relations institutional advertisement."

Another very similar form of advertisement to editorial advertising is the "public service institutional ad." In this type of ad, ideas about an important social problem are given by an identified company, "but no effort is made to indicate where the firm stands on the problem or what the firm has done about it." This type of ad again differs from editorial advertising because of the commercial sponsor.

A third type of similar advertising not to be confused with editorial advertising is the non-commercial


34 Ibid.

35 Ibid.
institutional ad which usually promotes organizations like Red Cross, American Cancer Society, Easter Seals, etc. This type of ad is also often referred to as a public service announcement. The non-commercial institutional ad contrasts from the editorial advertisement in that it promotes "ideas which normally concern civic ventures, by soliciting contributions for charitable institutions and religious organizations, or issuing information about services available from federal, state and local government." This type of advertising also varies due to the fact that it is run free of charge by the media involved. Because it is free, it is not always guaranteed time or space and may be subject to somewhat more editing than a paid ad.

Other categories of advertising types which normally show no resemblance to editorial advertising are:

1. Commercial Advertising (Business) - this involves the selling of products or services to middlemen.

2. Commercial Advertising (Consumer) - this is the selling of products and services to the ultimate consumer. It is the most common form of advertising.

3. Demand Stimulation Advertising - this is designed to stimulate a specific type of demand response in the market.38

36 Ibid., p. 3.

37 Ibid.

38 Ibid.
These latter categories are obviously all commercially oriented and bear no resemblance to the former institutional types which might be confused with editorial advertising.

Editorial advertising is, as Sandage stated, a new concept. It may be seen as a spinoff of an old concept for free expression - the editorial. Editorial advertising, however, is not nearly the same as the editorial. As with different types of advertising, a more detailed look at the editorial will help create a better distinction between it and the new concept of editorial advertising.

Freedom of expression pertaining specifically to editorializing can be traced to 1801 when "...President Jefferson released from jail those who were still serving sentences for such crimes as printing 'peace and retirement to the President (Adams),' and the federal government abandoned the field of legislating against its critics." 39

In Jefferson's time, editorializing usually implied the printing of an opinion on a public issue, most often political. Today, however, an editorial is either a letter written to a newspaper by an individual citizen who hopes his opinion will be printed, or it is a column of opinion written by an editor or one of his staff.

Since 1949, editorializing also occurs in the broad-

cast media. This type of editorializing is usually presented by a commentator who holds definite opinions on the topics discussed. Broadcast editorials differ from those in newspapers by one very important fact. They are subject to the Fairness Doctrine which allows advocates of views opposed to those expressed by the commentator to voice their opinion on the air.

Whether print or broadcast media, the use of the editorial today as a means of free expression is severely limited. It is limited technically because not every letter to the editor can be given space, nor can every advocate of a public issue be given time to reply. The editorial is limited politically by the fact that the gatekeeper (editor or station manager) may disagree with a submitted editorial to the point that his personal prejudices motivate him to find reason for not printing or broadcasting the submission.

The new concept of editorial advertising combines the idea of the editorial with the modern institution of advertising, to give individuals a greater assurance that their opinion will be expressed to their community. The assurance mentioned here is the major difference between editorial advertising and the editorial. It is simply that the time


41 Ibid.
Finally, there is one factor which places editorial advertising in a unique category. This factor is its legal definition. The actual legal status of editorial advertising is the subject of the following chapter, but it is important to note here that editorial advertising is legally similar to the editorial while being legally dissimilar to commercial advertising. This seemingly paradoxical situation is best clarified by Justice Brennan who, in the Court's decision on *New York Times v. Sullivan*, wrote:

The publication here was not a commercial advertisement... It communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern... Any other conclusion would discourage newspapers from carrying editorial advertisements of this type, and so might shut off an important outlet for promulgation of information and ideas by persons who do not themselves have access to publishing facilities - who wish to exercise their freedom of speech even though they are not members of the press.42

**SUMMARY**

The focus of this chapter has been on advertising as a general means to maintain a free expression system.

As the previous chapter attempted to point out, the most effective way to maintain free expression is to utilize the present institutions. This chapter has attempted to

show that modern advertising is considered to be an institution holding significant economic and social influence. This influence and advertising's communicative nature were shown to provide a contemporary avenue for maintaining free expression.

This chapter also considered a specific tool by which free expression can be maintained. This tool was labeled editorial advertising. An attempt was also made to show how the new concept of editorial advertising differed from other forms of advertising which appear to be quite similar, except that they are either commercially sponsored or not paid for at all.

This chapter also focused on the difference between editorial advertising and present day editorial. The major difference being that the former is paid for while the latter is not. One last characteristic difference was also shown to be a legal definition. Editorial advertising, was shown to have the same Constitutional rights as other forms of editorializing.
Chapter 3

EDITORIAL ADVERTISING: PRACTICAL AND LEGAL STATUS

The first chapter reported on the background of the First Amendment, giving specific attention to the origin and meaning. The second chapter sheds light on a contemporary method for maintaining the free expression system through the modern institution of advertising and the specific tool, editorial advertising.

This chapter examines the basic philosophy upon which editorial advertising, as a means of free expression, rests. This philosophy involves the right of access to the media, both print and broadcast.

This chapter also looks at examples of editorial advertising in various media to show its everyday manifestations. Some of the examples have not, as of this investigation, been published or broadcast, but plans to do so have been reported by reliable sources. Other examples of editorial advertising stem from the legal cases reviewed.

This chapter finally focuses on those legal cases directly involving editorial advertising and those cases which serve as primary precedents. Detailed attention is given to all judicial decisions regarding editorial advertising and the First Amendment.
ACCESS TO THE MEDIA

Maintenance of free expression depends on the cooperation of the modern mass communication systems including newspapers, radio and television networks, and other media such as magazines, outdoor advertising companies, and transportation companies which sell space for advertising purposes. The general public would find it extremely difficult to communicate with one another if were not for the cooperation of these media.

Most of these systems are regulated either governmentally or internally. But the agencies and associations that have been responsible for such regulation cannot guarantee that free expression be a reality for all citizens.

Because of this practical deficiency there has been a recent trend among constitutional experts and communication specialists for a right of access to the media by individuals or groups seeking to express their opinions on issues of public importance.

This right of access philosophy can be seen to have stemmed from the fact that many of the mass media have not cooperated, for various reasons, with those who want to voice an opinion. The lack of cooperation by the media, in turn, has emanated from its current business nature.

Unlike the 1700's, free speech and free press have not recently been regarded as synonymous among a number of media managers. Instead, many media people now equate
the free press concept with laissez-faire economics; i.e., some people of the print and broadcast press have styled First Amendment interpretations to fit their business needs. Their claim of "free press" really means "do not interfere with our business" and serves to stifle others whose "free speech" relies on media access.

A leading proponent of a right of access to the media, Jerome Barron, discussed today's First Amendment paradox implied by the conflict between individual free speech and freedom of the press. He stated:

To them (those whose ideas are unacceptable to editors) the mass communication industry replies: The First Amendment guarantees our freedom to do as we choose with our media. Thus the constitutional imperative of free expression becomes a rationale for repressing competing ideas.44

In addition, further inconsistencies in the practical application of the First Amendment have pointed to the need for a modern interpretation that considers the question of media access. Barron commented:

While we have taken measures to ensure the sanctity of that which is said, we have not inquired whether, as a practical matter, the difficulty of access to the media of communication has made the right of expression somewhat mythical.45


44 Ibid., p. 1642.

Arguments opposing a right of access have relied on the logic that other media exist which might offer outlets for expression. Arguments proposing further access, however, have countered by saying that access relies "not so much in an abundance of alternative media, but in an abundance of opportunities to secure expression in media with the largest impact." This same reasoning was found in a pair of legal decisions concerning the extent of free expression. "Restraints on freedom of speech are not justified simply because alternative forms of expression are available." "As long as the medium sought is an appropriate one, the availability of other media is irrelevant."

Another reason favoring the need for a right of access is the abridgement of expression by private enterprise, an area traditionally not covered by the First Amendment. Proponents have stated that a new interpretation is needed "which focuses on the idea that restraining the hand of government is quite useless...if a restraint on free speech is effectively secured by private groups." Indeed,

46 Ibid., p. 1653.


48 Schneider v. New Jersey, 308 U.S. 147, 163 (1939).

49 Barron, p. 1656.
because mass media systems are basically profit oriented and because they are trying to reach and please as large an audience as possible, presentation of controversial opinions have become impractical. Therefore, proponents have maintained that the old constitutional interpretation "is unrealistic if it prevents courts or legislatures from requiring the media to do that which, for commercial reasons, they would be otherwise unlikely to do."  

Opponents to further access include Mr. C. Daniel who has purported the traditional argument that problems of free expression should be kept within the media themselves. He stated:

I am perfectly prepared to concede that there is a problem of access to the press in this country. My contention is that the remedies should be left largely to the press itself and the reading public.  

Although Daniel disagrees with Barron as to the means by which access should be obtained, he nevertheless admits that there is a problem and the immediate future will warrant solutions. The major disparity in viewpoints is that Daniel thinks that "legislators and judges should not be the ones to decide how much access there should be."

50  
Ibid., p. 1662.

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Barron essentially has proposed that there should be a new First Amendment interpretation that would include access to the media as a basic right of free expression. This extended right could not be abridged by government and should not be allowed to be abridged by private enterprise.

Daniel, on the other hand, has proposed that the question of access should be considered by the media and that judicial and legislative institutions should only suggest and not force access rights.

**Print Media Access**

Access to the print media has been thoroughly discussed by William Douberley who generally agrees with Barron's proposal and who offers editorial advertising as an alternative vehicle.

Doublerley contends that changes in mass communication over the past two centuries have created a situation, regarding the press as a vehicle for free expression, which has largely contradicted the First Amendment. He has stated that:

> speech is not necessarily 'free' in the press. Since it forms the center of the process of dissemination of ideas, the press is the force that can most effectively abridge expression by nulli-

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fying the opportunity for an idea to obtain public exposure.54

He went further into this dichotomy by writing:

the first amendment's frustration by a system that was thought to embody its goals is paradoxical. The press was given constitutional protection because it was thought to be the key to free expression. The Courts have embraced this concept in upholding editorial freedom and taking care to prevent the press from falling under state control by means of a public utility classification...under present interpretations, free press inhibits free speech.55

Doublerley continued by stating, much like Barron, that the reasons for this existing dichotomy were the centralization and monopolizing of modern newspapers. Such a situation has demanded that business considerations take precedence over expression considerations and thus has given rise to non-controversial advertising and editorials that only support popular attitudes.

This investigator has also found evidence that the trend toward monopoly stifling competition in the mass media, not to mention free expression, has been an ever-present problem. The most recent example was reported in the Orlando Sentinel Star. The article described action by the Justice Department stating:

(It was) opposing continued operation by newspaper owners of television and radio stations in St. Louis, Missouri and DesMoines, Iowa...The department said renewal of broadcasting licenses...would not be in the public interest because the publishers were effectively hindering competition in the dissemina-

55 Ibid., p. 304.
The growing trend toward news monopoly lends some support to earlier evidence that those who control mass media are few and that their control has increased. For these reasons access to the press has assumed greater relevance, especially when considering the maintenance of a free expression system.

The trend toward press monopoly, along with other reasons, has fostered a parallel trend toward press access, particularly involving the use of advertising. In Zucker v. Panitz, a case involving the use of advertising as an access vehicle in a school newspaper, it was found that the advertiser had a right to publish an antiwar advertisement in the paper. The advertisement had been refused by the school principal on the ground that it was not related to school activities, but the court stated that "the principal could not preclude the students from expressing their views."

Writing on the judicial enforcement of a right of access by means of advertising, Barron stated:

In Uhlman v. Sherman (22 Ohio N.P. 225) an Ohio lower court held that the dependence and interest of the public in the community newspaper, particularly when it is the only one, imposes the reasonable demand that the purchase of advertising should be

56 Sentinel Star (Orlando, Florida), January 3, 1974, p. 6-B, Col. 1.

Editorial advertising, as already suggested, has been a primary contender for supplying access to the press. Researching its possible use in print media, Douberley has written:

An application of the first amendment to free speech type advertisements could provide an equally effective means of access to the press. Advertorials have been found to be an effective and relatively inexpensive way to express ideas not recognized as worthy of comment by editors. McLuhan has observed that editorials are ignored unless put in the form of news or advertising. This indicates that the advertorial may be even more desirable as a means of expression than the publisher's own format, the editorial, since readers give at least equal attention to news copy and to advertisements.

One final advantage for using editorial advertising as an access vehicle to the printed press, has been found to be that its sale not only provides the advertiser with a forum for expressing himself, but it also provides a "proportional amount of editorial space." Profit would be realized by monetary gain as well as the opportunity for the editor, or anyone opposed to the advertisement, to print countervailing arguments enhancing free expression dialogue.

Broadcast Media Access

The general trend for media access is somewhat more

58 Barron, p. 1667.
59 Douberley, p. 306.
60 Ibid., p. 299.
complicated in the broadcast industry than in the printed press. Such complications have arisen over conflicts between the Communication Act, the Fairness Doctrine and the First Amendment.

Section 315 of the Communication Act specifically provides access for political candidates, giving equal opportunities to all public office seekers. What has been commonly referred to as the "equal time" clause is applicable only if a licensee provides time to any one candidate. Only then has the licensee been required to offer the same opportunities to opposing hopefuls. Furthermore, Section 315 excludes newscasts, news interviews, news documentaries, and on-the-spot news coverage from the realm which "equal time" can apply. Section 315 also does not include advertising for political candidates as that which requires equal opportunities.

The Fairness Doctrine stemmed from the Federal Communication Commission's investigation of editorializing by broadcast licensees. It states that persons or groups holding views on issues of public importance that conflict with those espoused by a licensee's commentary shall have reasonable opportunity to reply.

A major criticism of the Fairness Doctrine, in

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terms of free expression and access, has been that many licensees simply avoid broadcasting commentaries on controversial issues. Rather than comply with the fairness provisions and seek viewpoints opposing their commentaries, broadcasters do not comment at all or comment on noncontroversial matters.

Opponents of further broadcast access through First Amendment interpretations have suggested that Section 315 and the Fairness Doctrine are sufficient to satisfy the constitutional requirements. Proponents, on the other hand, have suggested that neither the "equal time" clause nor the Fairness Doctrine supply individuals with an opportunity to initiate expression; i.e., individuals or groups must wait until a licensee has commented on a controversial issue, or given time to a candidate, before they even attempt to rebut.

The specific purpose of Section 315 has not comparatively elicited much argument by access advocates or opponents. The Fairness Doctrine, however, has been cited by both camps in support of their arguments.

63 Barron, p. 1664.


The right of access to broadcast media was strongly supported in *Red Lion Broadcasting Co. v. F.C.C.*. The case involved a perceived conflict between the First Amendment and the Fairness Doctrine. Specifically, broadcasters argued that the Fairness Doctrine abridged their constitutional rights. The Court, however, stated:

> It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not be constitutionally abridged either by Congress or by the F.C.C. 68

Not only did the Court define the public's right of access, but also the obligations of broadcast licensees:

> There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves. 69

Jaffe reviewed the Red Lion decision regarding the dual issues of access and fairness and wrote:

> The Court held that the fairness doctrine, and even a right to command time, is not only tolerated by the first amendment but is required by it. 'It is the right of the viewers and listeners, not the right of the broadcasters which is paramount....' We must therefore conclude on the basis of the pronouncements in Red Lion that the fairness doctrine is in a somewhat loose sense a first


69 *Ibid.*.
amendment requirement.70

Access to broadcast media via advertising has generally been regarded similar to other attempts of securing access. Advertising, however, adds a dimension which has made it somewhat more practical. It produces revenue for the licensee. Editorial advertising specifically has been offered as a means by which individuals could gain access and broadcasters could gain money.

Broadcasters, however, have opposed this specific use of editorial advertising for fear that groups or individuals opposed to a particular advertisement may demand free time to reply on the basis of the Fairness Doctrine as defined in Red Lion.71

Jaffe commented on that argument by writing, "If editorials engender fairness obligations, the number the broadcaster is required to take must be limited by some quota, perhaps graded to his profit level." Furthermore, as will be seen in the legal review, there have been decisions which do not regard editorial advertising as "engendering" Fairness Doctrine obligations.73

Finally, nothing has been stated in the Fairness

70 Jaffe, p. 774.

71 Ibid., p. 780.

72 Ibid., p. 787.

73 41 LW 4688 (1973).
Doctrine which specifically pertains to editorial advertising. The closest statement to required access has been found in Section 315, but as stated that applies only to political candidates. And even if broadcasters had attempted to apply that Section to editorial advertisements, the only thing they would be required to do is to give opponents to a particular advertisement an equal opportunity to buy time for their own advertisement.

**Access To Other Media**

Access to media other than newspapers, radio, and television and for the expression of opinion has been found to be less controversial. The other media include community antenna television (CATV) and public transportation facilities; e.g., buslines, subways, taxicab companies, etc.

Access to CATV has been spelled out by specific regulation under authority of the Federal Communication Commission. In this regulation the Commission has stated:

> cable systems in major television markets shall maintain at least one specially designated, non-commercial public access channel available on a first-come, nondiscriminatory basis. The system shall maintain and have available for public use at least the minimal equipment and facilities necessary for the production and programming for such channel.74

Access to public transportation facilities has been exclusively through the purchasing of advertising space on such facilities. Access to these facilities, as out-
lined in the legal review, has been recognized due to their common carrier status.

The philosophy of a right of access to mass media, as an extension of the First Amendment, has achieved some recognition as a valid interpretation for contemporary free expression. This philosophy has also been opposed, particularly by those in the broadcast media, on grounds that its manifestations would impinge upon the parallel rights of the press, both print and broadcast.

This philosophy, while being controversial, has, nevertheless, helped establish precedent for more practical means of gaining access while maintaining both individual rights of expression and press freedoms. Specifically, editorial advertising has been suggested as a vehicle which could eliminate the present paradox of conflicting First Amendment rights.

MANIFESTATIONS OF EDITORIAL ADVERTISING

Print Media

One of the primary examples of editorial advertising found in print media and one of the most notorious was printed in the New York Times on March 29, 1960. The advertisement was headlined "Heed Their Rising Voices" and accused Alabama officials of mistreating Negroes. It listed, by lengthy copy, a number of grievances and urged

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75 See Appendix for complete ad.
readers to support its cause.

This example was an expression of opinion by a group known as "Committee To Defend Martin Luther King And The Struggle For Freedom In The South." It also involved a controversial issue, racial discrimination. It was accepted by the Times and paid by the Committee which was the identified sponsor.

A second example was reported to have been printed in the December 15, 1963 New York Times. This advertisement was entitled "The Time Has Come" and was sponsored by the John Birch Society. It was a full page, paid espousal of that organization's beliefs.

The most recent example of editorial advertising in newspapers was published in the Times on October 14, 1973. The headline read, "Why it is necessary to impeach President Nixon. And how it can be done." The copy, like that of the first example, was a long dissertation listing specific grievances as reasons for the action suggested by the headline. This advertisement also urged readers to support the opinion of the sponsors and the sponsors themselves. The American Civil Liberties Union was responsible for the creation and funding.


Broadcast Media

Examples of editorial advertising in broadcast media have been difficult to locate. There has, however, been one distinct case of national notoriety. The advertisement in this example was never broadcast, but it was prepared for broadcasting by a responsible organization that was willing to pay for all time required.

The organization was known as Business Executives Move for Vietnam Peace and had prepared a series of sixty second spot announcements "urging immediate withdrawal of American forces from Vietnam and from other overseas military installations." 78

In addition to the sixty second spots, there were also ten, twenty, and thirty second announcements. The contents of these "commercials" varied. The opinion that the relative loss of life due to immediate withdrawal would be far less than that incurred by continuous policies expressed a criticism of specific administrative action. Also expressed within the advertisements, were the opinions that the War was "morally corrupt, politically inept, and militarily stupid;" that the War was causing domestic upheaval; that our "allies" were not representative of their population; Vietnamization would only "prolong" the conflict; that saving lives was more important than 'saving face;' that our presence in the conflict was humiliating; "withdrawal must be total;" that some arguments for con-

continued conflict were steeped in "pseudo-patriotism"; and that the entire foreign policy should be reformed.

Another example found in broadcast media was reported by Advertising Age. At the time of the report the advertisement had not been aired, but plans for an entire campaign had already been completed. These ads were to be broadcast in Canada urging the support of a particular religious belief. The article stated:

Pope Paul VI will be heard on 18 French-language radio stations throughout the Quebec province on October 18, 19 and 20 in 60 second (paid) spots for the local office of the Church's Propagation of the Faith. The Pope is being used 'in order to put the weight of the Papacy behind renewed efforts by the office' to promote Catholicism and ask people to work actively for the betterment of human conditions in general.

Other Media

Other media in which editorial advertisements have been manifested were outdoor or public transportation vehicles which provide advertising space. Two specific examples were found. Legal cases resulted in both instances, but after decisions were rendered, the advertisements were placed.

The first example was found in September of 1964. An organization known as Women for Peace created and

79 Ibid., p. 243.

sponsored an advertisement urging an end to the Vietnam War. The message read as follows:

'Mankind must put an end to war or war will put an end to mankind.'
President John F. Kennedy

Write to President Johnson: Negotiate Vietnam.

Women for Peace 81
P. O. Box 944, Berkeley.

This advertisement had been planned for placement on the buses operated by the Alameda-Contra Costa Transit District.

The second example was of a similar nature. It was sponsored by Students for a Democratic Society. It was created by an advertising agency and scheduled to show on New York subways. The message read:

WHY ARE WE BURNING, TORTURING, KILLING THE PEOPLE OF VIETNAM? TO PREVENT FREE ELECTIONS.
PROTEST this anti-democratic war.
WRITE President Lyndon Johnson, The White House, Washington D.C.
GET THE STRAIGHT FACTS, WRITE Students for a Democratic Society 119 Fifth Avenue, New York, N.Y. 10003
This 10-year old girl was burned by napalm bombs.

LEGAL STATUS OF EDITORIAL ADVERTISING:
REVIEW OF CASES

The use of editorial advertising has been sparse in comparison with commercial advertising. Reasons for

81 Wirta v. Alameda-Contra Costa Transit District, 64 Cal Rptr. 432 (1967).

its lack of use include unawareness of its potential by the general public and opposition from those who control various media.

Some of the examples in the previous section were opposed by the media for business reasons. That opposition lead to legal battles which have formed the basic precedents for editorial advertising in general.

If editorial advertising is to be used further in order to maintain free expression, then a review of all relevant legal decisions is imperative.

Print Media

The main precedent for editorial advertising in print was established in New York Times Co. v. Sullivan. The facts of the case were as follows.

A New York advertising agency was paid by the "Committee to Defend Martin Luther King and the Struggle for Freedom in the South" to create an advertisement (see previous section) which listed actions by the Montgomery, Alabama Police Department as grievances. The ad went into great detail to explain why readers should support the Committee, Dr. King, and the civil rights movement in general. As a result of the advertisement, Montgomery City Commissioner L. B. Sullivan brought suit for libel against those persons listed in the message and against

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the New York Times. An Alabama Court awarded Sullivan $500,000.00 in damages. The case was appealed and the Alabama Supreme Court upheld the decision. The advertisers and the Times then appealed to the United States Supreme Court. The Court, in a unanimous decision, reversed the Alabama Courts and held that the Alabama law was "constitutionally deficient" regarding First Amendment protections and "evidence presented was constitutionally insufficient..."

The majority of arguments presented to the Court centered on the issue of libel and free expression. One section of the decision did focus on editorial advertising within this context of protected speech. The Court stated:

Where an allegedly libelous statement appeared in a newspaper advertisement which communicated information, expressed opinion, recited grievances, protested claimed abuses of Negro students protesting against segregation, and sought financial support on behalf of the movement against racial discrimination, the allegedly libelous statement did not forfeit its protection under the constitutional guaranty of freedom of speech and press merely because the newspaper was paid for publishing the advertisement...any other conclusion...would thus have the effect of shackling the First Amendment in its attempt to secure the widest possible dissemination of information from diverse and antagonistic sources.85

This statement by the Supreme Court, in conjunction with the statement on page 25 of this report, clearly

84 Ibid.
85 11 L ed 2d 698 (1964).
86 Cf. supra, p.25, emphasis added.
defined the legal status of editorial advertising as another form for free expression within the print media.

**Broadcast Media**

Legal opinions on the status of editorial advertising in broadcast media have been diverse and contrary. It was necessary, for this reason, to review each case more closely and to consider all opinions, concurring and dissenting.

**Initial Cases.** The specific issue of using editorial advertisements in these media first arose when Business Executives' Move for Vietnam Peace (BEM) filed a complaint, with the Federal Communications Commission, against radio station WTOP AM (Post-Newsweek Stations, Capital Area, Inc.) The complaint was the result of repeated refusals by WTOP to accept the editorial advertisements of BEM.

BEM, on three separate occasions: June 1969, July 1969, and January 1970, attempted to purchase advertising time from WTOP in order to persuade public opinion against Vietnam policy. WTOP refused all attempts and on January 22, 1970, BEM filed its complaint alleging that the station's actions violated the Fairness Doctrine; infringed on the public's right to hear contrasting views; and violated the First Amendment by suppressing free

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88 Cf. supra, p. 43.
speech. BEM further asked the Commission to force WTOP to accept their advertisements.

WTOP responded to the complaint by first stating that it had refused the advertisements because they antagonized its policy of not accepting controversial matter. They further stated that they had acted within all rules, regulations, and guidelines established by the Commission and the National Association of Broadcasters.

The Commission, after hearing both arguments, categorized its decision according to the allegations made in the complaint. The first category in its decision regarded the Fairness Doctrine violations. The Commission agreed with BEM that the Vietnam War was, indeed, a controversial issue. In their opinion, however, they found WTOP's news coverage and programming to be sufficient to satisfy Fairness Doctrine requirements. The Commission, thus, dismissed the complaint on that particular allegation.

The second category of the complaint, regarding the public's right to hear controversial issues was attended to more quickly than the first. BEM's argument in support of this allegation rested on an earlier Supreme Court decision in the case of Red Lion Broadcasting Co. v. F.C.C. which stated the "right of the public to receive suitable access


90 Ibid.
to social, political, esthetic, moral, and other ideas." The Commission dismissed this allegation by stating, "Inasmuch as WTOP appears to have presented 'representative community views' on the issues here in question, we find that it has not acted contrary to the principles laid down in Red Lion."

The third category of the complaint, alleging suppression of free expression, was also based on the Red Lion decision and it too was subsequently dismissed by the Commission. With all three categories of BEM's complaint dismissed as being either too general or "misinterpretive" of earlier decisions, the Commission denied BEM's request to have its advertisements broadcast.

There was, however, one dissenting opinion, that of Commissioner Nicholas Johnson who wrote an extensive, detailed criticism of the Commission's decision. Mr. Johnson held the opinion that the main issue of the hearing had been overlooked.

The issue, therefore, is not what policy the Commission might wish to adopt concerning the 'advertisements' before us, but what the Constitution requires the Commission to adopt. He continued his reasoning by stating that the Commission had ignored "a long line of judicial precedent which guarantees...a right of access to forums generally open

91 Cf., supra, p. 38.


93 Ibid., p. 250.
to the public for expression of views." Mr. Johnson then stated what he believed to be the four main issues of the case. The first one, considering the protection of advertising as free speech, was relevant to this review.

Mr. Johnson listed some of the forementioned precedents regarding advertising and free speech and then stated:

Although the distinction drawn is an elusive one, it divides, perhaps, speech which seeks to influence political and social decisions in the marketplace of ideas from speech which seeks to influence private economic decisions in the marketplace of goods and services.95

He concluded his comments on this issue by suggesting that WTOP and the Commission had "relegated political and social speech to an inferior role" by preferring commercial advertising to editorial advertising. He contradicted the Commission's decision by stating, "BEM's anti-war advertisements are 'speech' deserving of First Amendment protection."97

A related case, also involving the purchase of time for expression of opinion, was organized by the Democratic National Committee (DNC). The DNC had attempted to purchase network television time in order to present an issue-oriented

94 Ibid., p. 251.
95 Ibid., p. 252.
96 Ibid.
97 Ibid., p. 253.
program designed to comment on controversial issues and also designed to solicit funds.

The Columbia Broadcasting System (CBS) rejected the request for time on the grounds that no elections were in progress. The National Broadcasting Company (NBC), however did grant DNC's request for time. The American Broadcasting Company (ABC) refused to sell their time on the grounds of its general policy prohibiting monetary appeal for purposes other than charitable.

On May 19, 1970, the DNC filed a request with the Federal Communications Commission that general policies of the television networks, regarding the sale of time for expression of opinion, be made nationally uniform in order to facilitate campaign and media planning. The DNC specifically sought a declaration that "A broadcaster may not, as a general policy, refuse to sell time to responsible entities, such as DNC, for the solicitation of funds and for comment on public issues."

The DNC, like BEM, based its arguments on the Red Lion decision which, according to the DNC, "reaffirmed the public's First Amendment right to hear contrasting views


99 Ibid., p. 217.

100 Ibid., p. 216.
on issues of public importance and "employed language that would extend to members of the public the right of access to broadcast facilities."

The DNC qualified their argument by suggesting that such access be regulated by the Commission and be given to responsible groups. The DNC also pointed out that it was not seeking to require acceptance of any particular program, but only that arbitrary barriers to access are contrary to the public interest.

ABC, in response to the DNC's request before the Commission, altered its position. It stated that, in the final analysis, the DNC was attempting to fortify a two party system and therefore its request fit into ABC's category of "special public interest consideration."

CBS, however, maintained its refusal and counter-argued by stating that its policies:

-insure full and fair presentation of such issues;
-a regulatory policy which imposes common carrier obligations would be contrary to the public interest;
-there was no constitutional or statutory right to compel broadcasters to carry the DNC programs and;
-such obligation would be contrary to the Communications Act and Commission precedent.

CBS proceeded to justify its claims by suggesting that

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101 Ibid., p. 217.
102 Ibid.
103 Ibid., p. 218.
104 Ibid., p. 219.
implementation of such requests would "radically alter the nature of broadcasting and be a detriment to fair, objective and balanced information to the listening public." CBS also suggested that selling time for public issues would preempt the "limited broadcast frequencies and allow those rich groups to distort issues." They finally stated "The First Amendment is primarily concerned with the right of the public to be informed - as opposed to the right of the public to speak or to be heard."  

The Commission, in the course of its decision, analyzed both the DNC and CBS arguments. The Commission concluded that CBS' argument rested on the "assertion that no particular group or person has the right to speak over broadcast facilities." They continued their analysis of charges and countercharges and separated their final decision into two parts. Part one regarded the right of political parties to purchase time for solicitation. Part two regarded the right of responsible entities to buy time for opinion expression. The Commission passed judgment on part two first. 

The Commission's decision on part two of the DNC request began by emphasizing that such a request:

goesth e heart of the system of broadcasting which has developed in this country; i.e., the licensing of private entities under the public interest standard. While the issues raised by the DNC are fundamental, they are not open. They

105
Ibid.

106
Ibid., p. 221.
have long been settled adversely to the DNC position... 107

The Commission also stated that due to the unique nature of broadcast frequencies, "some who wish to use it must be denied." They continued in that vein by citing the Red Lion decision as supporting the view that nobody has the right to access. They also were finally careful to point out that there was no specific policy which actually prohibited the sale of time on public issues. "Licensees are free to do so, with the caveat that the fairness doctrine... must be observed."

The Commission's decision in part one, regarding fund raising, basically concurred with the new position taken by ABC; i.e., they found purchasing time for solicitation to be acceptable because it was ultimately in the public interest.

The Commission, in conclusion, stated, "In view of the foregoing, the request of the DNC and ABC for a declaratory ruling IS GRANTED, to the extent reflected in part II and all other respects, IS DENIED." What was concluded,

107 Ibid.

108 Ibid.

109 Ibid., p. 226.

110 Ibid., p. 230.
essence, was that certain paid announcements asking for money were acceptable, but those commenting on controversial issues were not.

The major implications, derived from the BEM and the DNC hearings before the Federal Communications Commission, were that editorial advertisements cannot be forced upon broadcasters; advertising time and program time were considered synonymous; advertisements for political financial solicitation were acceptable provided that there were no controversial issues contained within them; licensees may accept editorial advertisements if they choose, being cognizant that fairness implications might arise; and it is the judgment of the licensee that is paramount in defining "controversial issues of public importance."

Appellate Cases. On March 9, 1971, both BEM and the DNC appealed the decision of the Communications Commission to the United States Court of Appeals, District of Columbia Circuit, which generally hears appeals of this nature.

The petitioners (BEM and the DNC) argued that the Commission's decision in the previous hearings tacitly permitted a general broadcaster policy of banning all controversial editorial advertising from the air.

The Circuit Court reversed the Commission's decision and remanded the cases for further study. The reasons for the reversal applied specifically to editorial advertising as being protected by the First Amendment. They also differentiated between advertising time and general program-
miring time. The Commission's decisions were largely based on Fairness Doctrine interpretations as applied to general programming.

The Court's reasoning began by referring to that differentiation.

The principle at stake here...concerns the people's right to engage in and to hear vigorous public debate on broadcast media. More specifically, it concerns the application of that right to the substantial portion of the broadcast day which is sold for advertising... For too long advertising has been considered a virtual free fire zone, largely ungoverned by regulatory guidelines...112

The Court continued its disagreement, referring to the Commission's argument that acceptance of editorial advertising would strike at the "heart" of the broadcasting system and cause chaos. The Court pointed out that the issue was specific and not one of radical change. The Court reassured the Commission and broadcasters by stating:

...we leave undisturbed the licensee's basic right to exercise judgment and control in public issue programming and the sale of advertising time. All we do forbid is an extreme form of control which totally excludes public debate from broadcast advertising time.113

In essence, the Court was directing its decision against a flat ban on editorial advertising. It further suggested that the Commission develop "reasonable regulations," as quickly as possible, that would determine which

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112 Ibid., p. 646.

113 Ibid.
and how many editorial advertisements would be broadcast.

The Court, in support of its reasoning, stressed First Amendment interpretations more and Fairness Doctrine applications less. The Court, like BEM, the DNC, and the Commission, cited the Red Lion case, adding its interpretation. They quoted the Supreme Court's decision by saying, "the people as a whole retain their collective right to have the medium function consistently with the ends and purpose of the First Amendment."

The Circuit Court also held a technical view of the broadcast media but added that the media was "our foremost forum for public speech" and by its very nature "plays an absolutely crucial role in the process of self-government and free expression."

The Court continued its categorical disagreement with related aspects of the Commission's standpoint. The Commission purported that the Fairness Doctrine was sufficient to observe First Amendment rights, but the Court stated that, due to the special nature of advertising, the Commission should reconsider. The essence of that remanding was twofold. First,

when an individual or group buys time to say

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114 Ibid.
115 Ibid., p. 650.
116 Ibid., pp. 653-54.
its piece, the crucial controls are in its own hands. Editorial advertising is thus a special and separate mode of expression, not simply a duplication of other expression on the same medium.\textsuperscript{117}

Second, the Court stated that the use of editorial advertising allowed groups and individuals to actively express themselves; i.e., "to take the initiative." This reasoning was furthered by invoking the First Amendment idea of free and vigorous debate coupled with the traditional idea that the best judge of expressing an opinion is the person or group who holds that opinion.

The Court criticized the Commission on this point by saying:

\begin{quote}
The present system, allowing a flat ban on editorial advertising, conforms instead to a paternalistic structure in which licensees and bureaucrats decide what issues are 'important' how 'fully' to cover them and the format, time and style of coverage.\textsuperscript{119}
\end{quote}

The Court then concluded its discussion on Fairness Doctrine sufficiency by stating that it did not "eliminate the public's interest in a further, complementary airing of controversial views during advertising time."

The Circuit Court also touched on the issue of access citing five cases as precedent. These included \textit{Wirta v.}

\begin{itemize}
\item \textsuperscript{117} Ibid., p. 656.
\item \textsuperscript{118} Ibid.
\item \textsuperscript{119} Ibid., p. 658.
\item \textsuperscript{120} Ibid.
\end{itemize}
Alameda-Contra Costa Transit District and Kissinger v. New York City Transit Authority. The main argument taken from both of those cases was that of previously opened forum. The Court, while recognizing no common carrier obligations for broadcasters, nevertheless suggested that by opening their forum to some paid advertisements, the broadcasters could not discriminate against other types just because they were of controversial tone. They concluded:

...the editorial advertising ban, particularly when licensees accept advertising generally, establishes an unmistakable infringing of First Amendment liberties.123

The Court finally reiterated the Commission and licensee arguments. It countered each with its own, taking a constitutional view and then concluded by stating:

In the end, it may unsettle some of us to see an anti-war message or a political party message in the accustomed place of a soap or beer commercial. But we must not equate what is habitual with what is right — or what is constitutional. A society already so saturated with commercialism can well afford another outlet for speech on public issues. All that we may lose is some of our apathy...124

There was a dissenting opinion in this appellate case. Circuit Judge McGowan disagreed with the majority opinion

121 Cf. infra, p. 68.
122 Cf. infra, p. 70.
123 450 F. 2d 662.
on the practicality of the remanding. He suggested that
the task of formulating "reasonable regulations" for edi-
torial advertising was more difficult than the majority
realized. He also stated that he "was not convinced that
the Constitution required the Commission to perform such
a task." He suggested finally that the Commission review
editorial advertising when it reviewed the operation of the
Fairness Doctrine, and added, "I would not order the
Commission to undertake that review in a constitutional
strait jacket which dictates the results in advance." 126

The major implications for editorial advertising that
came from the appellate cases were that advertising time
is differentiated from general programming; the Fairness
Doctrine does not eliminate complementary public debate
in advertising time; a flat ban on editorial advertising
is unconstitutional when other advertising is allowed;
and a system of regulating the use of editorial advertising
should be established with the licensees still controlling
the time, manner, and place of such advertising.

**Supreme Court Decision.** On May 29, 1973, the United
States Supreme Court rendered its decision on the contro-
versial BEM case and the status of editorial advertising in

125
Ibid., p. 666.

126
Ibid., p. 667.
broadcast media. In a seven to two decision, the Supreme Court held that "neither the Communications Act nor the First Amendment required broadcasters to accept paid editorial advertisements." This decision reversed the one of the Circuit Court and somewhat reinstated the decision of the Federal Communications Commission.

The Court based part of its reasoning on legislative intent stating, "Congress has consistently rejected efforts to impose on broadcasters a 'common carrier' right of access for all persons wishing to speak on public issues." The Court was, of course, referring to the Communications Act and continued its reasoning by saying, "The 'public interest' standard of the Communications Act, which incorporates the First Amendment, does not require broadcasters to accept editorial advertisements."

The Court also believed that to implement the system suggested by the appellate court would risk that system to monopoly by those who would pay the cost. They further stated that such a system would be too impractical for the Commission to handle effectively.

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127 CBS v. DNC; F.C.C. v. BEM; Post-Newsweek Stations, Capital Area, Inc. v. BEM; ABC v. DNC, 41 LW 4688 (1973).
128 Ibid.
129 Ibid.
130 Ibid.
131 Ibid.
All of the previous reasoning, however, was based on the Supreme Court's interpretation that each licensee maintains "journalistic discretion" to meet its statutory and public obligations. The Court throughout its decision referred to this concept. It stated:

The licensee policy challenged in this case is ultimately related to the journalistic role of a licensee for which it has been given initial and primary responsibility by Congress. The licensee's policy against accepting editorial advertising cannot be examined as an abstract proposition, but must be viewed in the context of this journalistic role... Moreover, the Commission has not fostered the licensee policy challenged here; it has simply declined to command particular action because it fell within the area of journalistic discretion.132

The Court continued in this vein when reasoning against the argument that broadcaster policy and Commission approval constituted "state action" thus allowing First Amendment application via the Fourteenth Amendment. The Court said:

...it would be anomalous for us to hold, in the name of promoting the constitutional guarantees of free expression, that the day-to-day editorial decisions of broadcast licensees are subject to the kind of restraints urged by respondents. To do so in the name of the First Amendment would be a contradiction. Journalistic discretion would in many ways be lost to the rigid limitations that the First Amendment imposes on government... We therefore conclude that the policies complained of

132 Ibid., p. 4695.
do not constitute governmental action violative of the First Amendment.133

The Supreme Court, agreeing with the McGowan dissent, criticized the appellate court for being unrealistic in remanding the case to the Communication Commission. This criticism was centered on the fact that such a remanding would have the effect of increasing "governmental control over the content of broadcast discussion of public issues." 134

The Court also rebuked appellate court statements that licensee policy was discriminatory in favor of commercial advertising. It did so by discounting the cases cited by the appellate court that called for open public forum. It differentiated those cases from the present one by citing the differences between public property, public transportation facilities, and broadcast facilities. It concluded, "...there is no 'discrimination' against controversial speech present in this case." 135

There were two dissenting opinions in this decision. Justices Brennan and Marshall generally opposed the decision of the majority to uphold the denial of editorial advertising. This, they said, inhibited robust

133 Ibid., p. 4696.
134 Ibid., p. 4697.
135 Ibid., p. 4698.
and wideopen debate thus violating the First Amendment.

Justice Brennan wrote for both Justices and divided the opinion into four areas, addressing the main points of the majority opinion. The four areas pertained to government involvement, Fairness Doctrine and journalistic discretion, balancing First Amendment interests, and criticism of majority's fears elicited by the implementation of a regulatory scheme for editorial advertising.

The First Amendment can only apply to situations where the government or its agencies have abridged free expression. This test has also been extended to state and local governments by means of the Fourteenth Amendment. A critical segment of this case was whether or not the licensees, supported by the Communications Commission, were government agencies or fiduciaries. Justice Brennan reminded the majority of five indicia which linked licensees with the government. Briefly, these indicia included: public "ownership" of the airwaves as established by the Communications Act; dependence of broadcasters on the governmental control over the broadcast industry; specific governmental involvement in this case by means of Commission's ruling and Fairness Doctrine interpretations; and specific precedent in the case of Public Utilities Commission v. Pollak.

136 Ibid., pp. 4712-14.
Justice Brennan, in the second area of his dissent, pointed out the inadequacies of the Fairness Doctrine in relation to editorial advertising and concluded that it could not, in this case, provide wide-open debate. He stated:

As a practical matter, the Court's reliance on the Fairness Doctrine as an 'adequate' alternative to editorial advertising seriously overestimates the ability - or willingness - of broadcasters to expose the public to the 'widest possible dissemination of information from diverse and antagonistic sources'. In the commercial world of mass communications, it is simply bad business to espouse - or even to allow others to espouse - the heterodox or the controversial. As a result, even under the Fairness Doctrine, broadcasters generally tend to permit only established - or at least moderated - views to enter broadcast world's 'marketplace of ideas.'

He concluded by stating that the Fairness Doctrine was necessary to broadcast regulation, but that its mere existence "cannot eliminate the need for a further, complementary airing of controversial views through the limited availability of editorial advertising."

The third area of the dissent dealt with balancing the First Amendment rights of the broadcasters, listeners and viewers, and access seekers. Justice Brennan suggested that the First Amendment safeguarded those who wanted to "participate" in debate as well as "hear" it. He stated that this was particularly true nowadays because

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137 Ibid., p. 4716.

138 Ibid., p. 4718.
of increased "anonymity." He further suggested that this case dealt with advertising time, an area in which broadcasters do not normally have great editorial control. He supported the ideas of "open forum" and held that there was indeed, discrimination in this case. He also pointed out the irony of this case; i.e., traditionally, controversial speech had been protected by the Constitution, whereas commercial speech had not. He then concluded:

Balancing those interests against the limited interest of broadcasters in exercising 'journalistic supervision' over the mere allocation of advertising time that is already made available to some members of the public, I simply cannot conclude that the interest of the broadcasters must prevail.140

Justice Brennan finally addressed the major fears held by the Court. Those fears were: an editorial advertising system might favor the wealthy; application of the Fairness Doctrine might adversely affect itself; regulation of editorial advertising might increase government control of broadcasting. His reply to these fears was short. He suggested that, in light of his previous arguments, editorial advertising should be given an op-

139 Ibid.
140 Ibid., p. 4720.
141 Ibid., p. 4721.
portunity. He wrote, "We simply have no sure way of knowing whether, and to what extent if any, these potential difficulties will actually materialize." 142

The major implications for editorial advertising in the broadcast media derived from this Supreme Court decision were that neither the Communications Act nor the First Amendment requires broadcasters to accept such advertising. Licensees are not common carriers, therefore advertisers have no right of access.

An extensive dissenting opinion attempted to show that editorial advertising was protected by the First Amendment and would not disrupt licensee's journalistic discretion when being used to complement "robust" and "wideopen" debate.

Other Media

Legal opinions on editorial advertising in other media have been largely confined to that space sold for advertising purposes by public transportation companies. Like print media, definite precedents have been established and little controversy has risen.

Two decisions, noted earlier, helped establish this precedent. One of these was Wirta v. Alameda-Contra Costa

142
Ibid.
Transit District. This decision involved an organization known as Women For Peace who attempted to place antiwar advertisements on local bus card space.

The advertising agency, representing the transit company, refused to sell the space to the organization because of its policy rejecting advertising of a controversial nature.

The Supreme Court of California held that the "content of the advertisement in question is undeniably protected by the First Amendment." They continued to state that just because the message was paid for did not mean that it was not in the realm of protected speech. The Court also dismissed the busline's arguments stating that the company had already allowed advertising and it was a public utility. It therefore could not deny that its buses were a forum for free speech.

The Court conceded that the company could regulate the time, place, and manner, but also said:

Transit advertising is an acceptable and effective means of communication. A regulation which permits those who offer goods and services for sale and those who wish to express ideas relating to elections access to such forum while denying it to those who

143 Wirta v. Alameda-Contra Costa Transit District 64 Cal. Rptr. 430 (1967).

144 Ibid., p. 432.

145 Ibid., p. 433.
desire to express other ideas and beliefs, protected by the First Amendment, cannot be upheld.\textsuperscript{146}

Based on this decision, the Court affirmed an injunction which permitted Women For Peace to place their message.

The other precedent for editorial advertising came in \textsuperscript{147}Kissinger v. New York City Transit Authority, a case which considered the sale of advertising space in local subway systems.

The subway system refused to place the posters of Students For a Democratic Society because they violated their acceptance policies, being controversial and "offensive to good taste."\textsuperscript{148}

Although not ruling on the case, Judge Bonsal of District Court of New York stated:

\par Plaintiff's posters are an expression of political views. They are not obscene or profane. Consequently, the Authority and the Advertising Company cannot refuse to accept the posters for display unless the posters present a serious and immediate threat to the safe and efficient operation of the subways... (furthermore) they cannot refuse to accept the posters for display because they are 'entirely too controversial...'\textsuperscript{149}

The Court concluded by saying that the "Authority and the

\textsuperscript{146} Ibid., p. 438.


\textsuperscript{148} Ibid.

\textsuperscript{149} Ibid., p. 440.
Advertising Company cannot accept some posters and refuse plaintiff's for reasons that conflict with the First Amendment."

These two cases clearly define the use of editorial advertising in media supported by public utilities. All First Amendment rights pertained to opinion advertisements in these media. Furthermore, the precedent of open public forum was developed to entail this type of advertising.

SUMMARY

The use of editorial advertising to maintain free expression has relied heavily on the philosophy that the First Amendment provides access to the media. Proponents of this philosophy have suggested that the First Amendment be interpreted to include a right of access because contemporary applications of it have been paradoxical; i.e., media have used their right of free press to pursue business and suppress individual free speech. Opponents to a right of access believed that the media and not the government, or people, should promote access.

Editorial advertising has been used in the print media to express opinions. This use was supported by the United States Supreme Court. Examples appeared in large daily newspapers and school newspapers.

150
Ibid.
The use of editorial advertising in broadcast media has been debated extensively. Some licensees have refused it and stated that its acceptance would hurt their business because opponents would demand free reply time. This refusal policy was declared unconstitutional by an appellate court, but generally upheld by the United States Supreme Court.

Opinion advertisements have been used in other media such as bus company card space and subway station posters. These uses have been declared constitutional by state courts due to the concepts of "open public forum" and "governmental fiduciaries."
Chapter 4

ANALYSIS, DISCUSSION, AND CONCLUSIONS

The constitutional background of a free expression system has been examined and the modern institution of advertising has been suggested as an aid in maintaining that system in a rapidly advancing, technological society. Editorial advertising has been suggested as the specific tool to accomplish free expression. Its uniqueness has been discussed in relation to other forms of advertising and editorializing. Its uses have been seen and its legal status reviewed.

There are, however, a few questions remaining concerning the future use of editorial advertising. First, what are the paramount issues surrounding the continued and expanded use of editorial advertising? If its use is to be expanded, then how might it be implemented to fit into existing mass media? Finally, what aspects of editorial advertising and its use for free expression need further research?

PARAMOUNT ISSUES

There is very little doubt that editorial advertising can be used to communicate opinions. The crucial issue, however, is whether or not the "gatekeepers" will sell
their space or time so that the advertisements may be exposed to the public. The question of media access was discussed initially in Chapter 3, but at this point those arguments must be reconsidered within the context of the first two chapters.

Print Media

Access to newspapers via editorial advertising, as shown in Chapter 3, has generally been accepted as a result of *Times v. Sullivan* and *Zucker v. Panitz*. This acceptability must not, however, be construed as a right of access. Editors still retain the right to refuse advertising of any nature.  

The right to refuse advertising has usually been expressed in newspapers' business policies, and varies from paper to paper. Specific reaction to the acceptance of various editorial advertisements was the subject of a recent survey. The results showed that while some of the papers would accept some of the editorial ads, all papers emphasized their ultimate right to refuse.

These general policies are best expressed by an

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151 Douberley, pp. 301, 303.

152 Ibid., pp. 318-320.

153 Ibid.
excerpt from the "Advertising Acceptability Guide" of the Chicago Tribune. It states, "Advertising of a controversial nature is acceptable only if approved by a Tribune divisional advertising manager."

Other newspapers, like the New York Times, have expressed their general right to refuse, but have also specifically stated the need to apply the First Amendment to advertising. The Times has stated:

...The Times believes that, in furtherance of the objectives of the First Amendment of the Constitution, it should keep its advertising columns open to all points of view, no matter how strongly it disapproves of them.

Subject of course to the laws of libel and the bounds of decency and good taste and the requirements of factual accuracy, we think the principle of freedom of the press not only requires us to report events and occurrences of which we disapprove... but also imposes on us the obligation to accept advertising of books whose contents we reject and of political parties and movements whose goals we despise.

The guarantees of the First Amendment are not mere guarantees of the publishers' right to publish. They are, more importantly, guarantees of the public's right to know. We consider that that is what a free press truly means: the maintenance of open communication in the realm of ideas.

Since this editorial was printed, advertising of controversial opinions was directly supported by the Times v. Sullivan decision. In that decision, even

154 Ibid., p. 301.

advertisements containing libelous statements did not detract from the main issue of free expression. Furthermore, there is some evidence that only the advertiser may be held libel and not the vehicle of communication. 

Access to the newspapers will probably continue to be the crucial hurdle for opinion advertisers. However, due to the reduced risk of libel suits against publishers; the publishers' knowledge that they ultimately retain the right to refuse; and the increased incidence of court decisions recognizing editorial advertisements as free speech, it appears that opinion advertisements will, for all practical purposes, increasingly continue to be accepted thus lowering the hurdle.

**Broadcast Media**

The main issues that have emerged from attempts to buy air time for opinion advertising have been, like print media, access and competing constitutional rights.

Broadcasters, as seen in Chapter 3, have considered themselves to be part of the "press" and thus entitled to First Amendment protections from government interference. They are, unlike printed media, regulated by a federal agency. This dual nature has created a complex problem for the licensee and anyone who wishes access for free

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156 Barron, p. 1672.
speech purposes. Results of this complex problem were seen in the extended review of those cases involving access for editorial advertising.

The result of the court cases was the opinion of a majority of the Supreme Court that the First Amendment did not compel licensees to accept editorial advertisements, despite their status of protected speech, and broadcasters had "journalistic discretion" to choose the manner by which they would meet public interest obligations. The Court, in essence, treated the broadcasters like the printed press, but the printed press has generally accepted editorial advertisements. This general acceptance was pointed out in Mr. Douberley's survey of major daily newspapers.

Confusion over access rights, and more basically competing constitutional rights, begins when recalling the arguments of licensees en route to the final Supreme Court decision. Licensees claimed that the Fairness Doctrine and the Communications Act sufficiently satisfied the public's First Amendment rights. The Supreme Court, reviewing legislative action (Communications Act) and federal agency precedent (Fairness Doctrine), agreed that the best manner to meet public interest obligations was to allow licensees journalistic discretion over their air time. Yet, it was also stated that licensees may, if they choose, accept editorial advertisements. To do this, broadcasters maintained, would subject them to
Fairness Doctrine obligations and potentially destroy their business and integrity by giving free time to opponents of particular opinion ads. How can the Fairness Doctrine, in relation to editorial advertising, satisfy individual free speech, if its mere existence frightens broadcasters into refusing such advertisements? The existence of this paradox does not seem consistent with the maintenance of a free expression system.

Broadcasters have also argued that they have temporary property rights because they "lease" electromagnetic frequencies from the government. This argument, however is limited. It involves conflicting constitutional rights (licensees property v. citizens' free expression). Balancing these rights has been settled in *Marsh v. Alabama*. That case involved a woman arrested for trespassing while distributing religious literature in a company-owned town. Justice Black, delivering the Court's opinion, stated:

> When we balance constitutional rights of owners of property against those of the people to enjoy freedom of the press and religion; we remain mindful of the fact that the latter occupy a preferred position.157

Also seen in these recent editorial advertising cases were competing First Amendment rights. The Supreme Court clearly stated in their *Red Lion* decision that the public's rights of speech were "paramount." The existence of this type of competition does not seem consistent with the complementary relationship of speech and press

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necessary for the maintenance of a free expression system.

Editorial advertising could not only provide free expression, but also reinstate the complementary relationship if the Fairness Doctrine was not compelled upon broadcasters, who would otherwise be willing to accept such advertising. "The ability to rent or use mass media...is a clear alternative to a 'fairness doctrine.'" 158

Other issues, repeatedly raised concerning attempts to buy broadcast advertising time for opinions, were inappropriateness of format and dominance by the wealthy. The latter issue would be a problem of implementation and regulation. The inappropriateness of format has been shown to be a minor and moot argument; e.g., Jaffe has stated:

"...such reasoning may be thought an expression of intellectual snobbery. The uncomplicated truths and falsehoods most apt for mass media may be better and more succinctly said in one than five minutes. The message at least alerts the listener to the issue and, if it comes from a source which he trusts or distrusts, helps him to find his way to taking sides..."

Furthermore, the oversimplification of issues, programs, and other forms of communication already exists in the

158 Douberley, p. 307.

159 Jaffe, p. 780.
broadcast media due to time limits. Editorial advertising, therefore, would be just as appropriate as the standard two-minute editorial and might enhance free expression by offering divergent viewpoints.

Until evidence is obtained indicating the willingness of broadcasters to accept editorial advertising, with and without Fairness Doctrine obligations, the data suggests that use of opinion ads on radio or television will meet heavy opposition. It must be reiterated, however, that there is no law or governmental policy which specifically prohibits editorial advertisements from being broadcast.

It appears that, in spite of the recent Supreme Court decision, similar attempts at gaining access to paid air time will continue in an effort to realize free expression. These attempts will probably result in legal action if the advocates construct arguments based on their First Amendment rights of free speech.

Eventually, broadcasters, like publishers, will probably accept editorial advertising in light of public opinion secure in the knowledge that they still retain

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their journalistic discretion.

Other Media

The main issues concerning the use of editorial advertising in media other than print or broadcast have generally centered on the concept of "open public forum." If the particular medium or vehicle in question already accepts advertising, then editorial ads will probably also be accepted, provided that they are not obscene and do not present a clear and present danger to the public.

Should attempts to place editorial advertising in media such as busline card space, trains, subways, taxis, or other public facilities, be rejected due to a particular company's policy then advertisers would probably have a good legal case based on free speech arguments.

There is not sufficient evidence to predict the possible results of attempts to secure advertising space in exclusively private media such as outdoor advertising boards.

IMPLEMENTATION

The future use of editorial advertising depends on the development of a uniform system whereby opinion advertisements, which meet general standards of obscenity, libel, and clear and present danger, can be recognized as free expression. Such a system must contain practical regulations for purchasing of media space or time. This
latter prerequisite is especially necessary for broadcast media. Also, some provisions must be made for individuals or groups who have neither the talent nor the immediate purchasing power to create and finance their own opinion ads.

The problem of identifying editorial advertisements as such might be solved by assuming the definition presented in this text. They must clearly express opinions on public issues and must not be sponsored by profit-making entities who may eventually profit by such advertisements. Standards of obscenity, libel, and clear and present danger would be the same as other advertisements, programs, or editorial material; i.e., the messages would have to meet those standards of the media sought.

The area of "which messages" and "how many" proves to be the most taxing problem. The problem, however, would not be too difficult to overcome in print media which already accepts advertising of this nature. Broadcast media pose quite a different problem.

An implementation system for editorial advertising on radio and television would require the cooperation of licensees and the Federal Communications Commission to establish uniform guidelines of selection. A realistic approach would not be overwhelming, as suggested by the Supreme Court's decision in the BEM case. Nor would it be as simple as the first-come-first-served suggestion of Commissioner Johnson.
A practical system could be similar to that of present time purchasing procedures with the following additions: An agreed percentage of licensees' total advertising would be made available for potential editorial advertisements. This criterion would be imposed when requests exceeded time allotted. A daily, weekly, monthly, yearly, etc., limit would be placed on the number of spots purchased by a particular sponsor. Spots could be heard in advance to avoid duplicate opinion by differing sponsors. In that case, a cooperative effort might be suggested. Priority should be given, when possible, to messages whose timelines are of essence.

For those persons who do not have the time, talent, or immediate finances to create and place editorial advertisements, agencies and credit unions might fill the void. Examples of supplemental organizations already exist.

Public interest advertising groups are proliferating on the west coast and in Washington out to serve public issues ranging from drug abuse to saving endangered whales...(One such agency)Public Interest Communications is described by its founders as the nation's first full-service, non-commercial advertising agency. Initial clients include the American Civil Liberties Union.162


Private agencies like Public Interest Communications would help assure that potential editorial advertising, especially in broadcast media, would not be dominated by the wealthy. This agency is funded by the Stern and Kaplan funds.

A similar agency known as Public Advertising Council considers itself as "a clearinghouse where organizations without the means or the creative apparatus can get their views translated into public interest communications."

These agencies have practical roles, as well as social ones. Editorial advertisements created and placed by them would probably have a greater chance of being accepted. This notion was somewhat supported by Mr. Tracy Westen, director of Stern Community Law Firm, who said, "stations have been reluctant to give time for public service messages other than those which reach them through the Advertising Council."

Another aid to fair implementation of editorial advertising would be through government loans. Emerson has suggested a positive promotion of free expression by writing,

Government funds that enable private individuals

164 Ibid.
165 Ibid.
166 Ibid.
or groups to engage in expression are being made available in many fields at the present time... There are also government subsidies for the promotion of art and entertainment projects, for legal assistance in protecting First Amendment rights, for various types of community organizations and activities under the poverty program... The most direct form of government spending in the aid of expression is the allowance of tax deductions for political contributions or the free printing of position leaflets in political campaigns.\footnote{167}

An extension of Emerson's suggestion could be made to opinion messages. Less fortunate individuals might seek government loans to finance advertisements. Others may deduct the cost of expressing their views from their taxes.

The idea that editorial advertising would be dominated by the wealthy is diminished when one considers the criteria for implementation and various methods by which non-wealthy persons or groups could achieve expression. As Justice Brennan suggested in his opinion on the BEM case, it is worthy to attempt and as Judge Wright stated in the same case before his court, "all that we may lose is some of our apathy."\footnote{168}

Implementation of a system to integrate editorial

\footnote{167}{Emerson, The System Of Freedom Of Expression, p. 650.}

\footnote{168}{Business Executives Move For Vietnam Peace v. F.C.C. 450 F. 2d. (1971), emphasis added.}
advertising into the mass media can be the practical step needed to help eliminate the competing First Amendment rights of individuals and media managers. Methods have been suggested that would maintain the independence of the publishers and licensees, as well as their revenue, and allow the public the essence of a free society - the right to express opinions from one to many.

SUGGESTIONS FOR FUTURE RESEARCH

This study, being an exploratory analysis, has raised many questions demanding empirical investigation. For example, survey research is needed to follow Mr. Douberley's study examining which and how many newspapers do accept editorial advertising. More data is needed to determine under what standards it would be acceptable. A similar survey is desperately needed to determine the attitudes of broadcast licensees toward editorial advertising. How many licensees accept it? How many even know what it is? If they do or do not accept it, then what are their reasons? Special attention should be paid to the effect of the Fairness Doctrine on acceptance of editorial advertising.

Surveys of the same basic nature are needed from media such as public television and outdoor advertising companies.

Based on the arguments from the legal cases that controversial issues would bore or infuriate readers, viewers, and listeners, experimental research might be
conducted comparing attitudinal and behavioral reactions between editorial advertisements and commercial advertisements.

SUMMARY AND CONCLUSIONS

This study was designed to examine editorial advertising within the context of the First Amendment. Such examination was intended to determine whether or not editorial advertising is a means of free expression. The determination was made on the following bases: (1) the differentiation of editorial advertising from other forms of advertising and from editorializing; (2) its legal status; (3) its practical uses.

A review of the relevant research has suggested that editorial advertising maintains a unique position compared to commercial advertising. It is protected speech as defined by the First Amendment. It has also been differentiated from other forms of editorializing due to its paid nature. This has allowed individuals to express their opinions unedited.

Legal cases involving editorial advertising have suggested that it has been accepted by major national newspapers and has been supported as free expression. Its use in broadcast media has been seriously questioned for practical reasons, but there has been no dictum prohibiting such use. The main issues resulting in attempted use of editorial advertisements have been over a right of access to the media as an extension of the First Amendment.
No such right has been granted.

Implementation of a system to regulate the use of editorial advertising has been the most difficult problem. Recent suggestions, however, seem to have mitigated some of the earlier doubts. It has also been suggested that public opinion will eventually demand, at least a trial and error period to test its use, particularly in broadcast media.

A need has also been suggested to supplement legal opinions and practical implementation plans of editorial advertising with empirical research.

As society grows more complex, the need to express one's opinion to the community becomes more and more essential if we are to maintain a semblance of freedom and democracy. Editorial advertising is one tool within a modern institution that has proven to help meet these increasing needs for free expression.
APPENDIX A

Why it is necessary
to impeach President Nixon.
And how it can be done.

Richard Nixon has not left us in doubt. He means
to function above the law. If he is allowed to con-
tinue, then the destruction of the Bill of Rights could
follow. If, after all the Watergate revelations, we allow
him to continue, we are accomplices to that
destruction.

Consider what has already happened:
• On July 23, 1970, the President personally
approved the "Huston plan," for political surveillance
by such methods as burglary, wiretapping, eaves-
dropping, mail covers and spying on students by the
CIA and other agencies. These methods were
employed against dissenters, political opponents,
newsmen, and government employees.
• In 1971, the President established within the White
House a personal secret police (the "plumbers")
operating outside the remit of law, and employ-
ing in burglary, illegal wiretaps, espionage and
perjury.
• While Daniel Ellsberg was facing trial, his psycho-
lithic records were burglarized by White House aides and, at the direction of the President, a White
House aide discussed with the director of the FBI
with the Judge exercising over Ellsberg's trial.
• Private detective firms were hired by White House aides
to spy on the sex life, drinking habits and family
problems of political opponents.
• Supporters of possible presidential opponents of
President Nixon were marked as "enemies" on a
special list, and targeted for harassment by the In-
ternal Revenue Service.
• During three days in May 1971, over 10,000
people were illegally arrested in Washington, D.C.
The dragnet arrests, unprecedented in American
history, were declared unconstitutional by the courts.
To justify the arrests, a White House spokesman,
William Pfbcckstaudt, invented the doctrine of "Qual-
ified mental incapacity.
• In 1973, the President bombed Cambodia, a neut-
ral country, without the authorization of Congress.
We learned later that he had been bombing Cam-
bodia for years and had deliberately concealed
the bombing from Congress and from the people,
thereby duping the war-making powers of Con-
gress. When the deception was revealed, the Pres-
ident said he would do the same thing under similar
circumstances.
• The President has transformed grand juries into
instruments of political surveillance and harassment,
and caused politically motivated indictments to issue.
• The President has attacked the freedoms of the
press, and subjected news reporters to illegal wire-
taps and harassing FBI investigations.

The doctrine of "inherent power"

Richard Nixon is not the first president to violate
constitutional rights, and he will not be the last.
But no president has ever before systematically
claimed that the Bill of Rights, which limits other
government officials, does not limit the President or
his agents.

When he vetoed in violation of the Constitu-
tion, he claimed an "inherent" power to do so.
When he secretly bombed Cambodia, he claimed an
"inherent" power to do so.
When he directed the dragnet arrests of thou-

sands of demonstrators in Washington, he claimed
an "inherent" power to do so.
If the President is permitted to use the doctrine of
"inherent" power to override the Bill of Rights any-
time he pleases, civil liberties can be cancelled at
will.
The President of the United States should symbol-
ize our regard for individual rights under law. He
is the precedent for future presidents. As U.S.
Supreme Court Justice Louis Brandeis said in a
1928 dissenting opinion:
"In a government of law all actions of the
government will be measured by its ability to observe
the law scrupulously. Our government is the potent,
the omnipotent teacher. For good or for ill, it
teaches the whole people by example. Crime is
punishable only because it violates laws which
teach the whole people what conduct can be
 tolerated. Law which can be broken with impunity
is law which is not law."

How to impeach President Nixon

In order to stand trial before the Senate, where a
two-thirds vote is necessary for conviction, the Presi-
dent must first be accused by a majority of the House
of Representatives. The accusation by the House is
called impeachment. Impeachment itself does not
result in the removal of the President. Like an indict-
ment, it merely begins a trial. Impeachment is what
the House of Representatives does; the actual trial
is held by the Senate. Without such a trial must
take place, however unpleasant.

The country can withstand the resignation of the
Vice President.
The country can withstand the impeachment of the
President.
The country cannot withstand a system of presi-
dential power unlimited by the Bill of Rights.
If you believe that President Nixon should
be brought to trial before the Senate for his violations
civil liberties, join the campaign for impeachment.
Make your voice count in defense of the Bill of Rights.
Write your Representative in Congress in support
of impeachment. And if you are not yet a member
of ACLU, please take this opportunity to join. We
need your help in this extraordinary campaign for im-
peachment and in the day in day out defense of the
Bill of Rights.
Heed Their Rising Voices

At the whole world known by word, voices are being raised. Southern students are urging the Federal government to take practical measures to achieve their goals for home rule and equality. Their voices have been amplified and given a new urgency in the context of recent events.

Small wonder that the Southern sections of the Constitution are now, at the point of the Federal question, as they have always been in the past, a point of major concern. Small wonder that they are being heard with ever increasing intensity. Many of the southern states have already been affected by their voices, and it is likely that many more will be, as the movement gains momentum.

In Virginia, Alabama, the students using "My Country" as their song, and the Kent State students, the students at Ole Miss, have already experienced the intensity of their voices. They have been listened to with increasing attention, and their voices have been amplified.

We believe that the students have a right to be heard, and that their voices should be given the attention they deserve. We urge that the federal government take action to address the concerns of the students and work towards a solution that is fair and just.

Your Help is Urgently Needed...NOW!!

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