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ABSTRACT

The fast-growing practice of buying paid "editorial advertisements" in the mass media by individuals and citizens groups wishing to express opinions oncontroversial issues, and the media by individuals and citizens groups wishing to express opinions on controversial issues, and the reluctance and refusal of some licensees and publishers to comply with these requests presents the courts with a dilemma. Is such "commercial advertising" protected by the provisions of the First Amendment? Actual case histories show that such commercial advertising is not protected by the Constitution and is regulated by broad government regulations. Rights that are well-defined demonstrate that allegedly libelous statements do not forfeit constitutional protection because they appear in the form of paid advertising; broadcasters are not required to sell time for editorial ads as long as they treat issues fairly; and the individual is restricted in his ability to express views directly to an audience, but he can advertise on municipal facilities such as buses and subways since the courts have forbidden public agencies to prohibit such advertising. (DS)

Editorial Advertising and the First Amendment

a

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by

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Nor is it enough that he should hear the arguments of adversaries from his own teachers, presented as they state them, and accompanied by what they offer as refutations. That is not the way to do justice to the arguments, or bring them in real contact with his own mind. He must be able to hear them from persons who actually believe them; who defend them in earnest, and to their very utmost for them.

John Stuart Mill

In recent years, however, a new function of advertising has emerged. It is the use of paid "editorial advertisements" by individuals and citizens groups to express opinions on controversial public issues. Many who support editorial ads believe that the present structure of the mass media, especially broadcasting, does not give the individual the opportunity to speak his own views directly to the audience. Instead, the licensee or publisher retains control over format, the order of presentation, the speakers chosen, and the ideas considered presentable. As a result, advocates have turned to paid editorial ads to gain a chance to speak. In turn, the courts have been faced with a novel question: Is advertising protected by the freedom of speech and press provisions of the First Amendment? The purpose of this paper is to trace the case law on the subject to illustrate the answer the courts have provided.

Commercial Advertising Restrictions

Court cases concerning commercial advertising have been of one opinion: that commercial advertising is not protected by the First Amendment and is subject to broad governmental regulation. Moreover, the courts have been careful to distinguish between commercial and noncommercial advertising.[1]

The first Supreme Court case approving governmental regulation of commercial

advertising occurred in the 1911 case of Fifth Avenue Coach Company v. New York City.[2] The Court ruled that the city could prevent advertising on the outside of double-decker buses since advertising was not essential to the transportation of the people. In 1942, the Supreme Court directly addressed the question of First Amendment applicability to advertising. The case, Valentine v. Christensen, involved a constitutional challenge to a New York City ordinance prohibiting the distribution of "commercial and business advertising matter" in public places.[3] In dismissing the constitutional challenge to the ordinance, the Court established the precedent that "purely commercial" speech is not protected under the First Amendment. After noting the distinction between the freedom to express political views and the freedom to advertise a commercial product, the Court wrote:

> We are equally clear that the Constitution imposes no such (First Amendment) restraint on government as respects purely commercial advertising. Whether, and to what extent, one may promote or pursue a gainful occupation in the streets, to what extent such activity shall be adjudged a derogation of the public right of the user, are matters for legislative judgement.[4]

The decision did not, however, explain how purely commercial speech differed from other forms of expression. Seventeen years later, Justice Douglas, a member of the unanimous Valentine Court, commented on the lack of analytical explanation. In a concurring opinion in Cammarano v. United States,[5] Justice Douglas challenged the idea that commercial advertising enjoys less First Amendment protection than noncommercial advertising. Calling the Valentine ruling "casual,

almost offhand," he wrote:

> The profit motive should make no difference in First Amendment protection, for that is an element inherent in the very conception of a press under our system of free enterprize. Those who make their living through exercise of First Amendment rights are no less entitled to its protection than those whose advocacy or promotion is not hitched to a profit motive.[6]

Constitutional Protection for Editorial Ads

The Supreme Court in 1964 established a significant precedent by granting constitutional protection to paid "editorial ads." The conclusion was reached in the famous New York Times v. Sullivan case in which the Court overturned a $500,000 libel suit brought against the Times for alleged errors in a paid ad supporting integration.[7] But, despite the constitutional protection the commercial/noncommercial distinction remained. The Court wrote:

> The publication here was not a "commercial" advertisement in the sense in which the word was used in Christensen. 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....That the Times was paid for the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold.[8]

The Court stated that discouragement of "editorial ads" would eliminate a vital form of expression for citizens who are not members of the press. The First Amendment, said the Court, is based on a "profound national commitment that debate on public issues should be uninhibited, robust, and wide open."[9] Allegedly libelous statements, the Court concluded, do not forfeit constitutional protection because they were published in the form of a paid advertisement.

Thus, a legal paradox existed. The Supreme Court extended First Amendment protection to ads promoting ideas, but it did not extend constitutional protection to ads promoting products. Other decisions had held that ads for religious meetings,[10] labor union activities,[11] and political debates[12] were protected speech. These ads too, seem to fall in the category of speech promoting opinions.

The Established Forum Doctrine: The BEM Case

How has this paradox been justified? The method has been the development of an "established forum doctrine."[13] The doctrine works as follows: If a forum is available for commercial ads it must also be available for noncommercial editorial ads. To ban editorial ads would violate the constitution as a discrimination between classes of ideas, which is prohibited by the First Amendment.

The doctrine was developed in a series of lower court cases. For example, the California supreme court ruled that a public transit district, which sold advertising space on municipal busses, had to make the same forum available to a group called "Women for Peace" to display anti-war posters.[14] Refusal had been based on a policy accepting only commercial advertising and the fact that the copy was too controversial. A similar ruling concerning advertising space on subway platforms was reached in a New York case where the Students for a Democratic Society had been denied advertising space.[15] It is noteworthy that

the cases utilizing the "established forum doctrine," all involved some form of public utility engaged in commercial advertising.[16] This doctrine was applied to broadcasting by the U. S. Court of Appeals in Washington, in Business Executives' Move for Vietnam Peace v. Federal Communications Commission.[17] The Business Executives' Move (BEM) attempted to purchase advertising time on WTOP (AM), Washington, D. C., to advocate an end to the Vietnam War. The station refused, citing a long established policy of refusing to sell spot announcements conveying controversial issues. The FCC upheld such a policy,[18] but, in overruling the Commission's decision, the court of appeals held that a flat ban on editorial ads violated the First Amendment. The appeals court concluded that a broadcast station which sold time for commercials must sell it for political and editorial ads.

Citing Times v. Sullivan, the court noted that:

> [a]ny other conclusion ... might shut off an important outlet for the 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. ... The effect would be to shackle the First Amendment in its attempt to secure 'the widest possible dissemination of information from diverse and antagonistic sources.[19]

"Both free speech and equal protection principles," said the court, "condemn any discrimination among speakers which is based on what they intend to say. If the First Amendment prohibits anything at all, it must be censorial discrimination

among ideas."[20]

The appeals court also commented on the commercial/noncommercial distinction. Editorial ads, the court noted, are of First Amendment concern since they deal with political questions.[21] Commercial advertising, on the other hand, was observed to be less fully protected than other speech, because it generally "does not communicate ideas and is not directly related to the central purpose of the First Amendment."[22]

The appeals court concluded that the public has a limited First Amendment right of access to radio and television and directed the FCC to establish immediate procedures to determine which and how many editorial advertisements would be put on the air.[23]

The Supreme Court and Editorial Advertising

The U. S. Supreme Court reversed the appeals court opinion. In a 7-2 decision the Court held that neither the First Amendment nor the Communications Act requires broadcasters to sell time for editorial ads.[24] Chief Justice Warren E. Burger, who wrote the majority opinion said it is the fairness doctrine, which requires broadcasters to air all sides of controversial issues of public importance, that is the mechanism for informing the public on matters of public importance.[25] Moreover, he said, the lower court's decision would unduly restrict day-to-day editorial decisions of broadcast stations by removing "journalistic discretion."

Burger stressed the need to maintain a balance between holding broadcasters to a public accountability while allowing them private control of their stations. He warned that unfettered access to broadcast time might allow "the views of the affluent (to) prevail over those of others, since they would have it within their power to purchase time more frequently."[26] Then, to comply with the fairness

doctrine, the Court said:

> "...a broadcaster might well be forced to make regular programming time available to those holding a view different than that expressed in an editorial advertisement...The result would be a further erosion of the journalistic discretion of broadcasters in the coverage of public issues, and a transfer of control over the treatment of public issues from the licensees who are accountable to private individuals who are not.[27]

Repeatedly, Burger likened broadcasters to journalists and equated their responsibilities. He rejected the appeals court's contention that every potential speaker is the "best judge" of his views, and cited his major defense for "journalistic discretion'":

> For better or for worse, editing is what editors are for, and editing is selection of choice and material. That editors--newspaper or broadcast--can and do abuse this power is beyond doubt, but that is no reason to deny the discretion Congress has provided.[28]

For broadcasters, then, the key seems to be that they need not accept editorial ads as long as they treat controversial issues in a fair manner.

Conclusion

What, now is the Constitutional status of advertising? In reality, there are few solid answers for the flurry of court cases on the issue have produced varied and sometimes conflicting rulings. It must be remembered that the question

of advertising's First Amendment status came about because of growing pressure to create a "right of access" to news and advertising time. As Professor Jerome A. Barron put it:

> The free marketplace of ideas is not working at all well during the latter third of the 20th Century. Competition among newspapers, magazines, and the electronic media is so diminished that only ideas acceptable to the nation's establishment can gain a hearing...Government has an affirmative obligation to stop the discriminatory refusal of advertisements and notices.[29]

As a result, the notion that an individual could purchase time to speak his own views directly to an audience, and not through a third party trustee, has been almost eliminated. Although it is the foundation of a democratic society that the individual should openly advocate his own ideas, the Court has chosen instead to recognize the right of a station, under the FCC's fairness doctrine, to determine who shall speak on the airwaves. It is difficult to imagine that very many stations will be willing to open their advertising time to controversial ideas when they are not required to do so. If a station did choose to air such a commercial it would have to broadcast all sides of the issue. It is not likely that very many stations will choose to open their facilities to such a possibility.

It is also interesting to note the variation between the BEM decision and the earlier Supreme Court ruling in the Red Lion case. In that decision, the Court recognized the right of the public to be served by a broadcast media which operates to provide listeners with suitable access to ideas. The Red Lion Court noted that "the Government is permitted to put restraints on licensees in favor

of others whose views should be expressed on this unique medium."[30] It stated further that "It is the right of the viewers and the listeners, not the right of the broadcasters, which is paramount..."[31] Clearly, the Court has taken the opposite approach in BEM, for stations have been given the power to decide who can broadcast. Several factors may explain the change in the thinking of the Court. One factor is that BEM deals with advertising and the fairness doctrine while Red Lion was concerned with the constitutionality of the fairness doctrine. Thus, the Court seems to have developed a double standard concerning public access to the airwaves. The Court seems to want broadcasting, through the fairness doctrine, to promote an informed citizenry. But the Court is not willing to establish strict guidelines when questions of fairness involve paid opinion. The FCC and the stations themselves are charged with the responsibility of determining when editorial ads are "fair." A major concern of the Court was that widespread use of editorial ads could undercut the financial base of broadcasting since stations might find themselves in a morass of conflicting fairness claims which would not necessarily bring in revenue. Apparently, the BEM Court felt that the fairness doctrine was sufficient to safeguard individual expression, and that editorial ads were not required.

Another factor that may have influenced the High Court to change its position on access is the complexity of the BEM case. Although the justices voted 7 to 2 to reverse the lower court, the decision was so complex that it produced six separate opinions. The Court divided on the application of the First Amendment and the Communications Act to the sale of broadcast time. Specifically, the Court ruled 4 to 2 that the First Amendment doesn't require broadcasters to accept editorial ads. Justice Burger, who wrote the majority opinion, was joined by Justices Potter Stewart and William Rehnquist on this point, while Justice William O. Douglas,

who did not participate in the 7 to 0 Red Lion case, filed a separate opinion in which he argued that radio and television enjoy the same First Amendment protection as the printed press. Justices Blackmun and Powell did not express an opinion on the First Amendment issue.

By a 6 to 2 vote the Court held that the Communications Act doesn't require stations to sell editorial ads. Burger, White, Blackmun, Powell and Rehnquist formed the majority. Douglas concurred but wrote his own opinion. Brennan and Marshall dissented, while Stewart did not vote on the Communications Act question.

Legal scholars will no doubt evaluate the sharp division of opinion on the case. The applicability of either the First Amendment or the Communications Act to the issue clearly led to much difference of opinion. It may also be that the changed composition of the Court since Red Lion led to new insights into the issue of fairness.

While the decision seems to be a strong victory for the broadcast industry the decision did little to resolve the underlying legal issues. As Justice Burger noted, the basic Constitutional issue is "not whether there is to be discussion of controversial issues of public importance...but rather who shall determine what issues are to be discussed by whom, and where."[32] The ruling seems to place that decision in the hands of the licensee, but in recent years, an increasing number of cases relating to fairness have found their way to the FCC. If stations carry editorial ads, which seems unlikely, it is probable that the FCC will be asked to decide cases bearing on the fairness of the editorial decisions. In short, the Supreme Court has given broadcasters no guidelines to determine which speakers and which issues are acceptable.

The decision also did nothing to clarify the commercial/noncommercial distinction. Ads promoting products seem to be given a lower order of First Amendment protection

than ads promoting ideas. The BEM decision seems to follow this notion for an individual can broadcast an editorial opinion if he can find a station to carry it. But what about product commercials? They seem to communicate beliefs and attitudes about tangible objects. Aren't these ideas? The Supreme Court gave no answers even though this is the heart of the broad issue of advertising and the First Amendment.

While it may seem that the BEM decision provided the death blow to editorial ads, it should be noted that a limited right of access seems to exist, particularly regarding advertising on municipal facilities (busses, subways, etc.). Most lower court cases involved editorial advertising on public facilities and the courts have forbidden public agencies to prohibit such advertising. Also, the Supreme Court noted in BEM that a limited right of access for broadcasting might be devised at some future date by Congress or the FCC, especially with respect to the opportunities for discussion of public issues brought by cable television.[33] The concept of a limited right of access has not been rejected. It is really a question of how and when to implement it.

Footnotes

1. Primary data concerning the cases cited herein was obtained from the decisions as cited in the federal reporter system: United States Reports, Supreme Court Reporter, Lawyers' Edition of the United States Supreme Court Reports, Federal Reporter, Federal Supplement, Federal Rules Decisions, American Law Reports. Information concerning interpretations of the decisions was derived from a thorough search of articles and listings of cases in the Freedom of Information Digest, Journalism Quarterly, and law journals. Of particular use was Harold L. Nelson and Dwight L. Teeter, Jr., Law of Mass Communication (Mineola, N. Y.: Foundation Press, 1969), which presents a thorough analysis of the law of advertising.
2. 221 U.S. 467 (1911).
3. 316 U.S. 52 (1942).
4. Ibid, at 54.
5. 358 U.S. 498 (1959).
6. Ibid, at 514.
7. 376 U.S. 254 (1964).
8. Ibid, at 266.
9. Ibid, at 270.
10. Martin v. City of Struthers, 319 U.S. 141 (1943).
11. Thornhill v. Alabama, 310 U.S. 88 (1940).
12. Schneider v. New Jersey, 308 U.S. 147 (1939).
13. See "Media and the First Amendment in a Free Society," 60, Georgetown Law Journal, 867,965 (1972).

14. Wirta v. Alameda - Costa Transit District, 68 Cal. 2d 51, 64 Cal. Rptr. 430, 434 p. 2d 982 (1967).

15. Kissinger v. New York City Transit Authority, S.D.N.Y., 274 F. Supp. 438 (1967).

16. See also Lee v. Board of Regents of State Colleges, W. D. Wis., 306 F. Supp. 1097 (1969), affirmed, 7 Cir., 441 F. 2d. 1257 (1971); Zucker v. Panitz, S.D.N.Y. 299 F. Supp 102 (1969); Hillside Community Church, Inc. v. City of Tacoma, 76 Wash. 2d 63, 455 p. 2d 350 (1969).

17. 450 F. 2d 642 (1971).

18. Business Executives' Move for Vietnam Peace, 25 F.C.C. 2d (1970).

19. 450 F 2d 642, at 658.

20. Ibid, at 660.

21. Ibid, at 658.

22. Ibid, cited in footnote 38.

23. Ibid, at 646.

24. Columbia Broadcasting System, Inc. v. Democratic National Committee. Federal Communications Commission, v. Business Executives' Move for Vietnam Peace. Post-Newsweek Stations v. Business Executives' Move for Vietnam Peace. American Broadcasting Company v. Democratic National Committee, — US —, 36 L Ed 2d 722, 93 S Ct —. The decision came in two related cases. One the BEM case, the other a request by the Democratic National Committee that broadcasters be required to sell time for comment on public issues. CBS and ABC joined the FCC and Post-Newsweek Stations, licensee of WTOP, in appealing the appeals court's decision.

25. In Red Lion Broadcasting Co. v. FCC, 395 U.S. 375 (1969), the Supreme Court upheld the Constitutionality of the Fairness Doctrine.
26. — US —, 36 L Ed 2d 772, 795, 93 S Ct—.
27. Ibid, at 796.
28. Ibid.
29. Jerome A. Barron, "Access to the Press - A New First Amendment Right," 80 Harvard Law Review, 1641 (1967).
30. 395 U.S. 375, 390 (1969).
31. Ibid.
32. — US —, 36 L Ed 2d 722, 800, 93 S Ct—.