A Round "PEG" for a Round Hole: Advocating for the Town of Oyster Bay's Public Access Channel Restrictions

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I. INTRODUCTION

A new version of an old trend is rising in the advertising world. Often called "alternative" or "guerilla" marketing, the trend finds marketers giving expensive items from expensive product lines to trendsetting college students, potentially hot showbiz players, and young nightclub-goers with the understanding that each will use and talk up the products.[1] Further, drug companies frequently pay celebrities to tout pharmaceuticals during their public appearances.[2] Other examples include extensive product placements in movies and on television programs, and sponsorship of events and concerts.[3] Such alternative marketing only represents a tiny fraction of the $236 billion spent on advertising in America, but strong evidence shows that the money spent on these alternative marketing strategies is growing rapidly.[4]

The recent spike in the marriage of content and advertisements is a response to machines like TiVo,[5] which allow users to record many hours of television programming while skipping commercials.[6] Network

1. Daniel Eisenberg, *It's an Ad, Ad, Ad, Ad World*, TIME, Sept. 2, 2002, at 38.

2. *Id.* For example, "Lauren Bacall praised Visudyne as a treatment for macular degeneration, Rob Lowe plugged Neulasta to combat a side effect of chemotherapy, and Kathleen Turner directed viewers to a website for a drug for rheumatoid arthritis." *Id* at 39. Bacall failed to mention that she was being paid for the promotion, as do many other such celebrities. In response, CNN adopted a policy of announcing any financial ties between its interview subjects and corporations, a stance which ABC, CBS, and NBC have suggested they will follow. *Id.*

3. *Id.*

4. *Id.*

5. Katie Dean, *Is That a TiVo Under the Tree?*, WIRED NEWS, *at* www.wired.com/news/holidays/0,1882,56828,00.html (Dec. 20, 2002). TiVo is one example of a new fad in television viewing, digital video recording. TiVo is a subscription-based service which allows "viewers to record, rewind and pause live television, as well as fast-forward past commercials." *Id*. The TiVo system consists of a "small black box . . . [which is] . . . hooked up to the telephone and cable/satellite lines in a home. It can store up to 80 hours of programs." Kendis Gibson, *Will TiVo Revolutionize Television Viewing?* (Dec. 5, 2002), *at* http://www.cnn.com/2002/SHOWBIZ/12/04/hln.connect.tivo/.

6. *See* Associated Press, *Stealth Advertising to Foil Ad Zappers* (Jan. 10, 2003), *available at* http://www.cbsnews.com/stories/2003/01/10/entertainment/main536018.shtml [hereinafter *Ad Zappers*]; Carrie MacMillan, *Plot Twists*, PROMO, (Aug. 1, 2002), *available at* www.promomagazine.com/ar/marketing_plot_twists; Eisenberg, *supra* note 1, at 39. Due to fears about TiVo, AOL-Time Warner has begun work on a new rival system, called Mystro TV. *See* David D. Kirkpatrick, *AOL is Planning a Fast-Forward Answer to TiVo*, N.Y. TIMES, Mar. 10, 2003, at C2. "Mystro TV is a technology that uses a cable system itself to provide viewers capabilities similar to computerized personal video recorders like TiVo: watching programs on their own schedules, with fast-forward and rewind." *Id.*

executives fear that the use of such devices bodes very ill for future advertising revenues, from which networks draw a bulk of their profits.[7] Jamie Kellner, CEO of Turner Broadcasting System, spoke of his concerns at the Association of National Advertisers' 2002 national conference, stating that "the [television] business cannot exist as its current model is today unless consumers are willing to give time for [advertisements]."[8] Kellner further asserted his belief that "advertising has driven this country. Without advertising, we will damage this country."[9]

These fears, echoed by other network executives, are powerful, but may be either premature[10] or altogether unwarranted.[11] Regardless, these same executives have time and time again adopted the alternative or guerilla marketing strategies outlined above. These activities have possible implications far beyond the executives' individual networks. The more advertisers fear that their messages will not reach the intended audience of television viewers, the more that advertisers will likely seek other outlets for these messages.

These other outlets could include forums with obvious dangers attached, such as a larger proliferation of overly distracting advertisements on highways, including on vehicles. Advertising on some alternative outlets could pose more subtle dangers. One of these possible dangerous alternative outlets is public access television, which receives little

However, Mystro TV further "lets networks set the parameters, dictating which shows users can reschedule, and *it also creates ways for networks to insert commercials*." *Id.* (emphasis added).

7. *See* Kate McArthur, *Turner CEO Lambasts Ad-Avoiding Technologies* (Oct. 11, 2002), *at* http://www.adage.com/news.cms?newsId=36283.

8. *Id.*

9. *Id.*

10. As of November 12, 2002, just over 500,000 American homes subscribed to TiVo, less than the total number of American homes with outhouses (671,000). Bradley Johnson, *More U.S. Homes Have Outhouses Than TiVos* (Nov. 4, 2002), *at* http://www.adage.com/news.cms?newsId=36471. In addition, TiVo forecasts showed a drop in new subscribers in the final quarter of 2002, the first such drop since TiVo hit the market in 1999. *Id.*

11. "Most forecasters . . . are predicting an increase in ad spending for 2003 of 3 percent to 7 percent . . . . [In 2002] ad spending showed a modest uptick of 2.6 percent compared with 2001, when spending fell 6.5 percent, the largest decline since 1938." Stuart Elliott, *Threat of War Already Curbs the Budgets of Marketers,* N.Y. TIMES, Mar. 10, 2003, at C1. Furthermore, "[t]here are even predictions that the coming market for commercial time on broadcast TV networks sold ahead of the 2003-2004 season could increase 10 percent atop the robust gains registered [in the spring of 2002]." *Id.* However, executives' fears may be validated by the fact that those with digital video recorders skip 72.3% of commercials, while those who record with VCRs only skip 15.6%, and those who ignore ads while watching television only ignore 44.6% of the commercials aired. Wayne Friedman, *72.3% of PVR Viewers Skip Commercials* (July 2, 2002), *at* http://www.adage.com/news.cms?newsId=35293.

protection from corporate advertisers under the Cable Communications Policy Act of 1984 ("CCPA").[12] Under the CCPA, municipalities are free to adopt their own protective contractual measures with cable operators in their cable franchise agreements. Many municipalities, including New York City, deny the right to place advertisements on airwaves reserved for public access.[13] However, these contractual terms are not mandated by the CCPA. This lack of protection is striking since, as argued, *infra*, corporate advertising often negatively distorts media content. Corporate advertising on public access channels could have alarming implications for those wishing to utilize their only meaningful access to public airwaves.

This Note urges municipalities, cable franchisees, and courts to adopt the same protections afforded to the public by the Oyster Bay, New York, cable franchise agreement. Section II outlines the relevant provisions of the CCPA, the New York state regulations regarding cable franchise agreements, the Cable Franchise Agreement between the Oyster Bay, New York, and Cablevision Systems Corporation, and the recent Second Circuit Court of Appeals decision in *Goldberg v. Cablevision Systems Corporation.* Section III of this Note argues that corporate advertising has historically had several adverse effects on the content of television programming. Section IV further describes the recent upswing in guerilla marketing tactics. This Note concludes in Section V with an argument for municipalities, cable franchisees, and courts to structure and interpret statutes and cable franchise agreements so as to prohibit advertising on public access channels.

II. THE STATUTORY AND COMMON LAW FRAMEWORK OF CABLE FRANCHISE AGREEMENTS AND PEG CHANNELS

A. The Cable Communications Policy Act of 1984

The CCPA authorizes municipalities to enter into agreements with cable providers to set the ground rules for providing cable service for citizens of the municipality.[14] In these agreements, municipalities often impose conditions on cable operators wishing to utilize public rights-of-

12. *See* 47 U.S.C. § 521 (2000). The CCPA provides the framework under which municipalities are free to negotiate with franchise cable providers to provide cable service for their citizens. *Id*. §§ 521-73.

13. *See* N.Y. COMP. CODES R. & REGS. tit. 9, § 595.4(a)(1) (2001) (restricting public access channels to noncommercial uses).

14. 47 U.S.C. § 521-73 (2000).

way.[15] One such condition allowed for by the CCPA is that municipalities may establish certain channels to be set aside for public access, educational access, or governmental access.[16] Such public, educational, and governmental access channels are generally referred to as "PEG" channels.[17] The CCPA requires that if PEG channels are not being used by members of the community or the government, the cable franchise agreement shall set forth how those channels will be used by the cable provider, as well as any and all "rules and procedures under which such permitted use shall cease."[18] The most significant CCPA limitation on the establishment of PEG channels in cable franchise agreements is that "a cable operator shall not exercise any editorial control over any public, educational, or governmental use of channel capacity provided pursuant to this section."[19]

The CCPA sets forth one exception to this broad rule against cable operators' exercise of editorial control over the content of PEG channels, namely that "a cable operator may refuse to transmit any public access program or portion of a public access program which contains obscenity, indecency, or nudity."[20] In implementing the CCPA, the Federal Communications Commission ("FCC") requires public, educational, and governmental access programming mandated by the cable franchise agreement to be carried on the basic tier of cable, meaning that subscribers must receive PEG channels when they order the lowest-priced service available from the cable operator.[21]

In passing the CCPA, Congress recognized that "[o]ne of the greatest challenges over the years in establishing communications policy has been

15. William E. Lee, *Cable Franchising and the First Amendment*, 36 VAND. L. REV. 867, 867 (1983).

16. *See* 47 U.S.C. § 531(b) (2000). The rights-of-way consist of the cables, above- and underground, that are to be used to carry the transmission of the cable provider's signals. *See generally* Lee, *supra* note 15.

17. *See* H.R. REP. NO. 98-934, at 30 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4667. *See also* Horton v. City of Houston, 179 F.3d 188, 189 n.1 (5th Cir. 1999).

18. 47 U.S.C. § 531(d)(2) (2000). It is a popular conception that channels designated for use by the public are not fully utilized for this purpose. *See* Ed Foley, Comment, *The First Amendment as Shield and Sword: Content Control of PEG Access Cable Television*, 27 CAP. U. L. REV. 961 (1999). Initially, this conception appears to be true, as "only about five percent of [public access] programming was scheduled, and these programs were viewed primarily by their participants." *Id.* at 965 (footnote omitted). Some stark exceptions to this general rule do exist, however, including "[a] PEG channel in Bloomington, Indiana [which] is watched by fifty percent of the adult population, and in Kalamazoo, Michigan, [where] eighty-six percent reported watching public access programming." *Id.*

19. 47 U.S.C. § 531(e) (2000).

20. *Id.*

21. 47 C.F.R. § 76.901(a) (2002).

assuring access to the electronic media by people other than the licensees or owners of those media."[22] Congress further recognized the utility of cable in providing access to the airwaves to those who, up to that point, had not had the resources to obtain meaningful access to the airwaves.[23] To remedy this situation, the CCPA established public access channels as "the video equivalent of the speaker's soap box or the electronic parallel to the printed leaflet."[24] Public access channels were designed to provide access to electronic media to those groups who previously had little to no such access.[25] PEG channels were also to inform citizens of the actions of their local government.[26] The CCPA specifically encourages municipalities to guarantee in their cable franchise agreements that PEG channels would continue to serve these ends.[27]

In establishing the framework for carriage of PEG channels, Congress recognized previous First Amendment challenges brought by cable operators against access provisions.[28] Nonetheless, Congress believed that the CCPA's particular access provisions furthered the goals of the First Amendment by "establish[ing] a form of content-neutral structural regulation which will foster the availability of a 'diversity of viewpoints' to the listening audience."[29] Since the First Amendment is designed to ensure such diverse viewpoints, PEG channel requirements fit well within the

22. H.R. REP. NO. 98-934, at 30. The CCPA itself contains six declared purposes of the Act:

> (1) establish a national policy concerning cable communications;
>
> (2) establish franchise procedures and standards which encourage the growth and development of cable systems and which assure that cable systems are responsive to the needs and interests of the local community;
>
> (3) establish guidelines for the exercise of Federal, State and local authority with respect to the regulation of cable systems;
>
> (4) *assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public*;
>
> (5) establish an orderly process for franchise renewal which protects cable operators against unfair denials of renewals where the operator's past performance and proposal for future performance meet the standards established by this subchapter; and
>
> (6) promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems.

47 U.S.C. § 521 (2000) (emphasis added).

23. H.R. REP. NO. 98-934, at 30.

24. *Id*.

25. *See id*.

26. *See id*.

27. *See id*.

28. *Id.* at 31.

29. *Id.*

Supreme Court's constitutional framework.[30] Congress concluded that "there can be no doubt that the purposes of access regulations serve a most significant and compelling governmental interest—promotion of the basic underlying values of the First Amendment itself."[31]

Under the CCPA, several hundreds of municipalities have implemented original cable franchise agreements and renewed existing cable franchise agreements.[32] In forming such an agreement, municipalities generally follow four steps:

> First, the authority assesses community needs and policy options through means such as consultant studies and special citizen task forces that hold extensive public hearings. Second, the franchising authority adopts a request for proposals (RFP) . . . [which] describes the cable system and services that the community desires . . . [and] outlines the information that the franchising authority seeks from applicants concerning their background, financial qualifications, proposed system design, construction plan, rates, and services. Third, after firms bid for the franchise, the franchising authority evaluates the bids. . . . Last, the authority selects an applicant and executes a franchise agreement incorporating the proposals submitted in the bid. Once the franchising authority and the chosen applicant negotiate this agreement, the franchising authority adopts an ordinance or resolution authorizing the agreement. Construction of the cable system then may begin.[33]

Throughout this process, as well as throughout the similar process for renewing existing franchise agreements, municipalities are free to place

30. *Id.* (quoting Assoc. Press v. United States, 326 U.S. 1, 20 (1945)). *See also* Red Lion Brdcst. v. FCC, 395 U.S. 367, 390 (1969) ("It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which the truth will ultimately prevail, rather than to countenance monopolization of that market . . .").

31. H.R. REP. NO. 98-934, at 34. However, Congress noted that required carriage of PEG channels may cause First Amendment difficulties if the rights of access were contingent upon specific speech. *Id.* at 34-35. For instance, Congress noted that in *Miami Herald v. Tornillo*, 418 U.S. 241 (1974), "the Court overturned a contingent access scheme because the means chosen impinged on the journalistic discretion of the newspaper." H.R. REP. NO. 98-934, at 34 (citation omitted). In *Tornillo*, the right of access to the newspaper "was triggered by the statements the newspaper made. Thus not only would the newspaper have to print what reason told them not to print, but the right of reply would chill the editors' own expression." *Id.* (citations omitted). PEG channel requirements differ from the regulations at issue in *Tornillo* as

> requir[ing] cable operators to set aside channel capacity does not chill cable operators' speech. . . . [C]able operators act as [conduits]. They do not exercise their editorial discretion over the programming; nor are they prevented or chilled in any way from presenting their own views and programming on the vast majority of channels otherwise available to them.

Id. at 34-35.

32. Lee, *supra* note 15, at 869.

33. *Id.* at 871-72.

restrictions on the franchisors as outlined in the CCPA in exchange for permission to install above- and underground cable networks and to use public rights-of-way.[34] This system of cable franchising has been recognized and held valid by the United States Supreme Court,[35] as well as by several circuit courts of appeal.[36]

B. New York's Official Compilation of Codes, Rules and Regulations

A typical example of the restrictions placed into cable franchise agreements may be found in the Official Compilation of Codes, Rules and Regulations of the State of New York ("NYCRR"). The NYCRR states that certain conditions shall be imposed on proposed cable franchisors.[37] A cable franchise agreement would only meet the approval of the Commission on Cable Television if it contained, among other provisions, limitations on the term of the agreement, guarantees that the franchisor will not practice employment discrimination, and minimum channel capacity for the cable system.[38] The NYCRR further allows agreements to contain additional terms and conditions that are not inconsistent with all applicable laws.[39]

The NYCRR also sets forth the minimum PEG channel access standards that must be met in order to form a valid cable franchise agreement. Under the NYCRR, if the cable system contains at least twenty-one channels, that system must contain a minimum of one public access station and one station designated for educational and governmental use.[40] If the cable system carries less than twenty-one channels, the NYCRR requires it to carry only one PEG channel.[41] Finally, neither the cable television franchisee nor the municipality are to exercise any editorial control over the content of any PEG channel designated under this section.[42] The NYCRR defines a public access channel as "a channel designated for [noncommercial] use by the public on a first-come, first-

34. *See id.* at 872.
35. *See* Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727 (1996).
36. *See*, *e.g.,* Horton v. City of Houston, 179 F.3d 188 (5th Cir. 1999); Time Warner Cable of New York City v. Bloomberg, L.P., 118 F.3d 917 (2nd Cir. 1997).
37. N.Y. COMP. CODES R. & REGS. tit. 9, § 595.1 (2001).
38. *Id*.
39. *Id*. § 595.2.
40. *Id.* § 595.4(b).
41. *Id.* § 595.4(b)(2).
42. *Id.* § 595.4(c)(8)-(9).

served, nondiscriminatory basis."[43]

C. Goldberg v. Cablevision Systems Corporation

Consistent with the NYCRR, the Town of Oyster Bay, New York, entered into a cable franchise agreement with Cablevision Systems Corporation ("CSC"), whereby CSC agreed to provide a minimum of thirty-six channels of service to citizens of the town.[44] Two of the channels were set aside exclusively for PEG access programming.[45] Under the agreement, CSC was to develop and enforce rules for access to PEG channels that were consistent with the applicable federal and state laws.[46]

In accordance with these guidelines, CSC instituted a series of access rules, which each person or organization submitting access programming[47] was to follow.[48] Among these provisions, Access Rule 3(d) prohibited all material that "promotes or is designed to promote the sale of commercial products or services . . . in connection with any Access Programming."[49]

Robert M. Goldberg is a coordinator of the Public Access Movement of Long Island ("PAM").[50] PAM "is an association of video producers and supporters that work to ensure that community communications channels are available, convenient, and inexpensive."[51] In 1999, Goldberg submitted a program entitled *America's Defense Monitor,* which was distributed by the Center for Defense Information ("CDI").[52] CSC cablecasted many installments of the program on its public access channel but refused to air one segment that violated Access Rule 3(d) by running a twenty-five-second advertisement offering copies of the tape from CDI for $19.95.[53]

43. *Id.* § 595.4(a) (emphasis added).

44. Goldberg v. Cablevision Sys. Corp., 261 F.3d 318, 322 (2nd Cir. 2001).

45. *Id.*

46. *Id.*

47. *Id.* at 322 n.8 (CSC defines "Access Programming" as "[v]ideo and audio material provided by Access Channel Users on the [PEG] Access Channel(s), which programming concerns matters of interest to and/or is about Cablevision's service area.").

48. *Id.* at 322.

49. *Id.* (footnote omitted). However, Access Rule 3(d) did allow for the presentation of "'billboard' type notices announcing the source of funding (if any) for the production of the program." *Id.*

50. Memorandum from Robert M. Goldberg, A Coordinator of the Public Access Movement of Long Island, to Public Access producers and supporters (Feb. 27, 2002) (on file with the Journal).

51. *Id.*

52. *Goldberg*, 261 F.3d at 322. *America's Defense Monitor* was originally produced by CDI to "[further] its primary objective of sharing its views on military issues." *Id.*

53. *Id.* The price of the videotape was later increased to $39 per copy. *Id.*

Although the tapes were sold for little or no profit to either CDI or Goldberg,[54] CSC indicated that it would show the segment in question only if all references to sale of the videotape and transcript were removed.[55] Goldberg removed the advertisement from the offending segment of the program and from all those succeeding it before submitting them to CSC for airing, a process that took him about an hour for each submission.[56]

Goldberg filed suit on March 25, 1999, in the United States District Court for the Eastern District of New York, alleging that CSC's refusal to cablecast *America's Defense Monitor* intact with the advertisement violated both the federal CCPA and the state NYCRR regarding control of PEG programming by municipalities and cable franchisees.[57] Specifically, Goldberg alleged a violation of the CCPA provision that "a cable operator shall not exercise any editorial control over any [PEG programming],"[58] and a separate violation of the New York statutory and regulatory provisions against such editorial control.[59] The district court granted summary judgment for CSC, concluding that the program had, indeed, contained an offer by Goldberg "to enter into a commercial transaction with his viewers," thereby constituting commercial programming, and that CSC was within its rights to refuse to air the segment.[60] Goldberg appealed both of these rulings.[61]

On appeal, the Second Circuit Court of Appeals first reaffirmed its previous holding in *Time Warner Cable v. Bloomberg, L.P.*[62] that cable operators retain the right to refuse any submitted programming that does not meet the legal standard for dissemination on a public access channel.[63] Next, the court analyzed whether or not the segment of *America's Defense*

54. *Id.* at 322-23. CSC conceded that $19.95 "cover[ed] the cost of a blank videotape and the cost of having the program dubbed onto the blank videotape and provid[ed] CDI with a little money left over . . . and is a very small income stream for CDI." *Id.* Additionally, Goldberg was not the "seller" of the videotapes, and did not receive any profits from the sale. *Id*. at 323.

55. *Id.*

56. *Id.*

57. *Id.* at 320.

58. 47 U.S.C. § 531(e) (2000).

59. *See* N.Y. COMP. CODES R. & REGS. tit. 9, § 595.4(c) (2001); N.Y. PUB. SERV. LAW § 229(3) (McKinney 2000) ("No cable television company may prohibit or limit any program or class or type of program presented over a leased channel or any channel made available for public access or educational purposes.").

60. *Goldberg*, 261 F.3d at 323.

61. *Id.*

62. 118 F.3d 917 (2d Cir. 1997).

63. *Goldberg*, 261 F.3d at 323.

Monitor that CSC had refused qualified as public access programming.[64] The court noted that since the CCPA does not adequately define "PEG programming," it was proper to turn to applicable New York State laws and regulations to determine the proper boundaries of public access programming.[65] The court concluded that the New York State regulations and the Oyster Bay franchise agreement require PEG programming to be noncommercial, and that "*CSC was authorized to reject the CDI segment submitted by Goldberg only if it constituted commercial . . . programming.*"[66]

The court then considered the proper definition of the term "noncommercial."[67] It found that speech is not necessarily "commercial" under the standard set forth in the NYCRR for determining whether or not a program qualifies for public access airing merely because it qualifies as "commercial speech" under First Amendment analysis.[68] Instead, in order to determine the meaning of "noncommercial" in the context of the NYCRR, the court assessed the public policy behind affording preferential PEG channel access to "noncommercial" programming.[69]

In performing this analysis, the court first noted that advertisements for the sale of a video or transcript of educational and ideological programs are a common way for such programs to conclude.[70] The court recognized that these types of offers help organizations spread their message to a much larger audience, and hence that such offers were not "clearly inconsistent" with allowable public access programming.[71] Additionally, the court noted that such offers actually further the First Amendment's goals of providing a diversity of viewpoints and stimulating wider public debate "by allowing the viewer to further disseminate, study, remember, criticize, discuss, or

64. *Id.*

65. *Id.*

66. *Id.* at 325-26 (emphasis added) (citations omitted).

67. The court noted that the advertisement in the CDI program did meet several dictionary definitions of the terms "commercial" and "commerce." *Id.* at 326 n.10. The court further noted, however, that "[t]o the extent that CDI's advertisements were part of its effort to disseminate its message, they did in a sense do '*more* than propose a commercial transaction,'" and therefore did not meet the technical definition of "commercial speech" as it was set forth in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 762 (1976). *Goldberg*, 261 F.3d at 327 n.12. Nevertheless, since the district court had so ruled, the court "assume[d] that CDI's advertisements did 'no more than propose a commercial transaction,' and were therefore 'commercial speech' for purposes of First Amendment analysis." *Id.* (quoting Goldberg v. Cablevision Sys. Corp., 69 F. Supp. 2d 398, 402 (E.D.N.Y. 1999)).

68. *Goldberg*, 261 F.3d at 327.

69. *Id.* at 327-28.

70. *Id.* at 328.

71. *Id.*72.*Id.*

rebut the message conveyed in the program."[72] The court finally noted its concern that a broad reading of the limits of PEG programming would permit cable operators "to bar disfavored programming under the guise of enforcing such limits."[73]

Due to these concerns, the court concluded that whether such offers constituted commercial programming depended on the function of the advertisement.[74] If the advertisement for tapes of the program was designed solely to disseminate the program's message to a wider audience, then the advertisement furthered the goals of PEG channel requirements and, thus, should be permissible.[75] However, if the advertisement was designed for the financial gain of the program's producers, then the advertisement would be far more problematic. Requiring cable operators to carry this type of advertisement on public access channels "may threaten the diversity of those channels by opening them to an onslaught of material properly carried in paid media, thereby crowding out legitimate PEG programming that has no other effective avenue of dissemination."[76]

The court noted that distinguishing between these two categories of advertising would likely be a difficult task, and therefore proposed several factors to aid in making such a determination.[77] First, the burden to show entitlement to PEG access must be placed on the applicant for those airwaves, as that person is in a better position to prove the function of the advertising in question.[78] Second, if the tapes advertised on the program were only being sold for cost and not for profit, the advertising would likely be "noncommercial."[79] Finally, in cases where this question of "cost" or "profit" is unclear, the determination should be informed by the nature of the person or organization submitting the program and the nature of the program itself.[80] If the entity submitting the program is a nonprofit organization, it would be much less likely that the offer of the video and/or transcript would have a purely financial motivation.[81] If, however, the

73. *Id.* (quoting Time Warner Cable of New York City v. Bloomberg, L.P., 118 F.3d 917, 928 (2nd Cir. 1997)). This warning is especially prevalent due to the considerable incentives granted by the NYCRR to exclude as much public access programming as possible, which include provisions allowing cable operators to use vacant PEG channels for commercial programming. *Goldberg*, 261 F.3d at 328.

74. *Goldberg*, 261 F.3d at 329.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at 330.

80. *Id.*

81. *Id.*

submitting entity is a profit-making organization, then the offer for sale of the tapes would likely be part of a larger financial scheme.[82] Likewise, an advertisement selling tapes of a program discussing "ideas at the core of the seller's educational or ideological goal" is much more likely to be "noncommercial" than would be an advertisement selling tapes of a program that is "devoid of ideas or information."[83]

In applying these factors to Goldberg's submission of CDI's *America's Defense Monitor*, the court found that the evidence was inconclusive.[84] CDI's director of television had stated that the purpose of the advertisement was to "further disseminate our point of view."[85] However, the purchase price of the tapes exceeded CDI's production costs.[86] Therefore, it was unclear if CDI's offer was solely intended to further disseminate its own views, or if CDI intended to generate any stream of income through the sales of the tape. [87] Due to this lack of evidence, the court remanded the case to the district court for determinations not inconsistent with its opinion.[88]

III. THE HISTORICAL DANGER OF ADVERTISING: CONTROLLING CONTENT

Leonard Matthews, a former president of the American Association of Advertising Agencies, said, "business and the entire free enterprise system need to be supported by the media."[89] Matthews further noted, however, that the "mutually healthy relationship" that existed between business and the free enterprise system had been "impaired in recent years by the overzealous actions of a small but very visible group of investigative reporters who have made a practice of slugging advertisers while their associates in the sales department were accepting an order from the same company."[90]

Matthews's statement illustrates a serious problem inherent in the interplay of the media and the advertisers that support them, especially in light of the incredibly large role advertisers play in funding the media.

82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. BEN H. BAGDIKIAN, THE MEDIA MONOPOLY 55 (6th ed., 2000) (citation omitted).
90. *Id.* at 56 (citation omitted).

Virtually all television broadcasting revenue flows from advertisers.[91] This massive amount of money[92] represents a massive amount of power. Corporate advertisers often use the power of their advertising dollars either to distort or censor content produced by others or to purchase time for content that favors their own interests.[93] These two powers, the power to "censor" content and the power to "purchase" content, allow advertisers to force media to do three things. First, the media must provide favorable treatment to advertisers' products and broader corporate interests.[94] Second, the media's content must encourage the audience to spend money.[95] Third, the media's content must garner an affluent and free-spending audience.[96]

Unfortunately, advertisers do not merely have the potential to use their powers to achieve these three goals. Advertisers regularly employ various tactics to meet each of these ends, thereby greatly distorting the content of the media.

A. Garnering Favorable Treatment of Advertisers' Products and Goals

Perhaps the largest goal of advertisers is to see that their products and other interests are portrayed in the most positive light possible. "Advertisers would prefer that the media avoid, bury, or downplay media content that casts their products, firm, or industry in a negative light; better would be media that present content supportive of their interests and their products."[97] Advertisers have many techniques to achieve these goals, including placing institutional ads within the content of the media and threatening to withhold advertising revenue from the media.

1. Placing Institutional Ads: The Mobil Oil Story

One of the most prevalent techniques used by advertisers to ensure that their products and other interests are positively portrayed in the media

91. *See* C. EDWIN BAKER, ADVERTISING AND A DEMOCRATIC PRESS (1994).

92. The sheer amount of money spent on advertising is staggering. In 1981, the combination of "[n]ewspapers, magazines, and broadcasters . . . collected $33 billion a year from advertisers." BAGDIKIAN, *supra* note 89, at 121 (citation omitted). Today's advertising revenues dwarf those of twenty years ago; television ads alone in 1999 brought in almost $37 billion. *Id.* at xxxiii.

93. BAKER, *supra* note 91, at 44.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* at 50.

is to pepper institutional advertisements throughout the media.[98] Corporations have spent upwards of $3 billion to promote "the corporation as hero," and to explain capitalist theory.[99] One company in particular, Mobil Oil, has perfected this strategy.

During the 1970s, Mobil Oil bought ads next to editorials in several newspapers, securing a spot that was eventually known by editors as "the Mobil position."[100] Mobil also had its own Sunday supplement column in thousands of community newspapers and disseminated its antimedia commercials through an informal network of television stations.[101] Furthermore, Mobil funded the publication of many books.[102] During its advertising blitz, Mobil placed ads in, among other sources, *The New York Times, Wall Street Journal*, and *The Washington Post* that expressed Mobil's own anger and weariness with what it contended was the media's "lack of devotion to the true principles of the First Amendment."[103] In addition to attacking unfriendly media, Mobil also ran self-laudatory ads detailing the company's own struggle against pollution.[104]

One particular use by Mobil of its advertising power came in 1981, when the company attacked a reporter for United Press International ("UPI"). While working in the Washington, D.C., bureau of UPI, reporter Edward F. Roby was to write a piece on a report prepared by the Financial Reporting System of the U.S. Department of Energy that detailed the revenues and taxes of oil companies.[105] While analyzing the report, Roby noticed that while the average U.S. corporation paid 23.7% of its revenues in taxes, Mobil and the other twenty-five largest oil companies paid only

98. Harry Keyishian, *"We Bring Good Things to Life"/ "We're Always There": The AdWorld of GE*, *in* ADVERTISING AND CULTURE: THEORETICAL PERSPECTIVES 49 (Mary Cross ed., 1996) ("Institutional advertising is designed to articulate corporate values—or what the corporation wishes the public to believe are its values.").

99. BAGDIKIAN, *supra* note 89, at 58 (citation omitted).

100. *Id.* at 59.

101. *Id.*

102. *Id.* "[Mobil's] book, *The Genius of Arab Civilization*, published by New York University Press, is one of a series promoting countries where it has oil interests. Other books and reports it has sponsored have been published by MIT Press and Hudson Institute." *Id.*

103. *Id.* at 59-60. One of Mobil's ads proclaimed, "Any restraint on free discussion is dangerous. Any policy that restricts flow of information or ideas is potentially harmful." *Id.* at 60. Interestingly, "Mobil . . . , a major sponsor of public broadcasting, urged the Public Broadcasting System to suppress the showing of a film that would upset its oil partner, Saudi Arabia." *Id.* (citation omitted).

104. *Id.* at 60. However, "[w]hen a national business group of which [Mobil was] a member, the Council of Economic Priorities, issued a pollution report that mentioned Mobil's poor record on pollution, Mobil withdrew its support from the council." *Id.*

105. *Id.* at 62.

12.4% of their own revenues in taxes.[106] Roby wrote a story containing this information for the UPI newswires in June of 1981.[107]

Mobil's response to Roby's story was swift and strong. The company started with an ad headlined "WON'T THEY EVER LEARN?" for "the Mobil position" of eleven of America's largest newspapers.[108] The ad read, "Once again . . . newspaper readers across the country were recently presented with a massive dose of misinformation on oil industry taxes."[109] The ad denounced Roby's article as "misleading" and "blatantly incorrect," and concluded by stating, "This is not the first time the oil industry has been falsely accused of underpaying its taxes . . . we hope that UPI will set the record straight so the American public can make judgments based on accurate and reliable data."[110] Mobil accused Roby of misunderstanding the tax structure under which oil companies operated, stating that the income of oil companies is taxed by the country where the oil was drilled, and that U.S. law then credits the amounts paid by oil companies for foreign *income taxes* to avoid double taxation by the IRS.[111]

Despite Mobil's claims of fair dealing, secret documents of the Internal Revenue Service going back to 1950 backed up Roby's allegations of wrongdoing. The documents indicated that the tax laws of Saudi Arabia, where Mobil often drilled for oil, were partially drafted by Mobil Oil and other oil companies.[112] When drilling in Saudi Arabia, oil companies were required to pay a royalty rate for each gallon withdrawn.[113] Saudi tax laws were structured to report these royalty rates not as regular costs of doing business, but as income tax.[114] Reporting these fees as income tax allowed Mobil to take advantage of the clause outlined in their attack on Roby's article, allowing Mobil to deduct these fees from what they would have paid in United States taxes.[115] In a 1977 study, the House Ways and Means Committee determined that oil companies claimed an income tax credit for 75% of the royalties they paid to Saudi Arabia.[116] The tax money lost by

106. *Id.* This 12.4% tax rate was at the time "the same rate that would be paid by a private citizen who made less than $20,000 a year." *Id.*

107. *Id.*

108. *Id.* (citation omitted).

109. *Id.*

110. *Id.*

111. *Id.* at 62-63.

112. *Id.* at 63.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

the United States was recouped from other taxpayers to the tune of more than $2 billion every year.[117]

Unfortunately, Mobil's attack on Roby's accurate article was successful. UPI forbade Roby from writing further pieces on Mobil, or the taxation of oil companies in general, despite the fact that Roby specialized in reporting on energy issues for the UPI Washington, D.C., bureau.[118] Shortly thereafter, Roby left UPI.[119]

Mobil's actions are not uncommon within the corporate world; many corporations have developed institutional advertising campaigns both to offset any tarnishing of their image by truthful media reports, and to attempt to squeeze out opposition to their products and goals. Corporations' widespread purchase of institutional advertising solely to attack and weed out such accurate media content because it undermines their corporate image limits the diversity of viewpoints within the marketplace of ideas, thereby stifling a primary goal of the First Amendment. If cable franchise agreements could not block such advertising schemes from PEG channels, then the ability of public access channels to act as "the video equivalent of the speaker's soap box," as Congress envisioned, would be severely restricted.

2. The Blackmail Power: When Advertisers Threaten to Withhold Revenue

C. Edwin Baker, Nicholas F. Gallicchio Professor of Law at the University of Pennsylvania, states, "Advertisers' power lies largely in their willingness and ability to withdraw ads."[120] The media draw a tremendous percentage of their revenue from advertisements.[121] Threats to withdraw this tremendous percentage of revenue certainly frighten those controlling the content of the media. Such threats constitute advertisers' blackmail power.[122]

117. *Id.*

118. *Id.* at 65.

119. *Id.*

120. BAKER, *supra* note 91, at 54.

121. *See* BAGDIKIAN, *supra* note 89, at 121. In 1981, almost five out of every six dollars collected by newspapers, magazines, and television came from advertising revenue, a statistic that remains true today. *Id*.

122. Some might argue that this "blackmail power" is not blackmail at all, but rather a conscious, legal choice that advertisers may make as to where and how to spend their advertising dollars; in other words, advertisers are exercising a lawful market power. While this argument may be true in the abstract, its flaw is that it assumes that there are no special considerations to be given to transactions taking place within the marketplace of ideas. When advertisers combine what would ordinarily be a normal market power (i.e., a choice to spend advertising dollars where they so desire) with threats designed to warp the

In 1990, William Winter, head of the American Press Institute, said, "There is not as much really tough, aggressive, hard-hitting, expensive-to-do, investigative reporting right now as there was maybe half a dozen years ago."[123] Winter attributed this change to the "bottom-line mentality" of the media.[124] Norman Pearlstine, managing editor of the *Wall Street Journal*, has questioned the media's will to "take on major institutions, major organizations, important people in our society . . . and to expose them as thieves when it is appropriate."[125] These statements are directly attributable to pressures exerted by advertisers using their blackmail power.

Much blackmail power is exercised at the local level by automobile dealers, a major source of local media revenue.[126] Local media sensitivity to the whims of auto dealers often leads to stories being retracted, heavily edited, or quashed altogether. One reporter noted, "We don't even bother with auto-related stories anymore. . . . These days, even a simple consumer education story on how to buy a new car can draw the wrath of local car dealers."[127] In St. George, Utah, in 1990, car dealers boycotted the local newspaper when it published an article urging consumers to bargain car dealers down to close to dealer cost for new cars.[128] Due to the boycott, the paper not only retracted the article, but it also issued a public apology, claiming that the article was the result of an editor "exercising 'poor judgment.'"[129]

Real estate dealers are also heavy users of their blackmail power at the local level. In a national survey of real estate editors, 44% reported that balanced coverage of real estate issues was prohibited out of "fear of offending advertisers," while 80% reported instances of advertiser threats

marketplace into a forum most favorable to them (i.e., by threatening to withhold ad revenue until media content meets their specific demands), it becomes less like a normal market power and more like traditional definitions of blackmail. *See* BLACK'S LAW DICTIONARY 163 (7th ed. 1999) (defining "blackmail" as "A threatening demand made without justification," and likening "blackmail" to "extortion."). When this "blackmail power" is used within the special realm of the marketplace of ideas, it imposes severe limitations on the goal of the First Amendment to foster a diversity of viewpoints.

123. RONALD K.L. COLLINS, DICTATING CONTENT: HOW ADVERTISING PRESSURE CAN CORRUPT A FREE PRESS 11 (1992) (quoting Jonathan Kwitny, *The High Cost of High Profits*, WASH. JOURNALISM REV., June 1990, at 19, 28).

124. *Id.* at 20.

125. *Id.* (citation omitted).

126. *Id.* at 19.

127. *Id.* (quoting Herb Weisbaum, *Advertisers Fight Back*, IRE JOURNAL, Fall 1990 at 18).

128. *Id*. at 20.

129. *Id.* at 20-21 (footnote omitted).

to withdraw ads due to negative coverage.[130] One article, appearing in the *Times Union* in Albany, New York, and subsequently in the *Washington Monthly* and the *Wall Street Journal* under the headline, "How Your Realtor Rips You Off," prompted an angry letter from The National Association of Realtors and similar letters from individual Albany realtors.[131] Although the editor of the *Times Union* stood behind the article, the realtor response was not unnoticed. The paper created a "new, upbeat real-estate section," and the writer of the article resigned.[132]

The cigarette industry is perhaps America's most prolific user of its blackmail power.[133] In 1983, *Newsweek* faced retribution for an article on the rights of nonsmokers.[134] After tobacco companies learned of the article, they withdrew their advertising from that issue.[135] *Newsweek* reacted to this and other similar actions of big tobacco by censoring three advertising sections submitted to the magazine by the American Medical Association between 1983 and 1985.[136] Despite their health-oriented themes, the ads contained little to no information on the effects of smoking on life expectancy.[137] *Newsweek* editors cut references to smoking from the supplements in deference to the big tobacco ad dollars.[138] In 1985, the owner of *The New Republic*, Martin Peretz, pulled an article about smoking hazards.[139] An editor with the magazine, Leon Wieseltier, stated, "[I]n this case I think it's true that we buckled before an advertiser. . . . The reason the cigarette companies have such a grip on us is because of the relative size of the account."[140]

Many other magazines have followed these examples. *Cosmopolitan* and *Psychology Today* refused advertisements for a stop-smoking clinic,

130. BAKER, *supra* note 91, at 54 (quoting Wendy Swallow Williams, *Two New Surveys Show the Industry's Reach*, WASH. JOURNALISM REV., Nov. 1991, at 24, 24).

131. COLLINS, *supra* note 123, at 26.

132. *Id.* at 26.

133. Admittedly, cigarette companies cannot heavily influence the content of television programming because it is illegal for them to advertise on television. Still, the big tobacco examples do help illustrate the disturbing trend of the use of the blackmail power.

134. COLLINS, *supra* note 123, at 38.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id. Newsweek's* actions were reportedly repeated by *Time* magazine. *Id.* A *Time* spokesman defended the two magazines, stating, "*Time*, as does *Newsweek*, has a lot of cigarette advertising. *Do you carry material that's insulting to your advertiser?*" *Id.* (emphasis added) (citing James Warren, *Is Media a Smokescreen for Tobacco Industry Ills?*, CHI. TRIB., March 20, 1985, at C4.).

139. *Id.* at 39.

140. *Id.* at 40 (citation omitted).

stating that the advertisements would "offend their tobacco advertisers." [141] The advertising agency for *Reader's Digest* deserted the magazine when it published an article on smoking risks.[142] When *Mother Jones* published an article linking smoking with health risks, the tobacco companies canceled their advertisements.[143]

Some advertisers even admit to using their blackmail power to control media content. Frank Anderson, president of the National Automobile Dealers Association, told an audience of classified ad managers that "a perception of anti-dealer bias could lead to lost ad revenue."[144] The message conveyed to reporters was that they had to be more biased in favor of car dealers or risk losing their advertising accounts.[145] Proctor & Gamble publicly threatened to withdraw all ad revenue from TV stations that broadcast a "highly offensive" Folgers ad.[146] After the company's warning, most television stations refused to carry the commercial.[147]

Proctor & Gamble's use of their blackmail power far exceeds mere protection of its own products. In 1965, the company issued a memorandum demanding a certain quality of programming for broadcasters carrying its advertising.[148] The memorandum stated that "[t]here will be no material that may give offense, either directly or by inference, to any commercial organization of any sort."[149] The memorandum further required that "[c]haracters . . . should reflect recognition and acceptance of the world situation. . . . [W]riters should

141. BAKER, *supra* note 91, at 52-53.

142. *Id.* at 52 (footnote omitted). The desertion may have been rational. "When Saatchi and Saatchi, a major advertising firm, prepared ads touting Northwest Airlines' no-smoking policy, RJR/Nabisco, a food and cigarette conglomerate, canceled its $80 million contract for advertising food products." *Id*. at 52-53 (footnote omitted).

143. *Id.*

144. COLLINS, *supra* note 123, at 25.

145. *Id.*

146. BAKER, *supra* note 91, at 54 (citing *Brewing Trouble*, THE ECONOMIST, May 26, 1990, at 70). The ad in question was sponsored by Neighbor-to-Neighbor, a political advocacy group, and was supported by the National Council of Churches. *Id.* The ad stated: "The murderous civil war in El Salvador has been supported by billions of American tax dollars and by the sale of Salvadoran coffee. . . . Boycott Folgers. What it brews is misery and death." *Id*. (quoting Thomas Palmer, *P&G will resume ads on Channel 7 in '91*, BOSTON GLOBE, Dec. 12, 1990, at 73-74).

147. *Id.* When one station, WHDH in Boston, broadcast the ad despite the Proctor & Gamble warning, the company "withdrew all its advertising from the station, which had been running about $1 million a year." *Id.* (footnote omitted).

148. *Id.* at 55.

149. *Id.* at 55 (quoted in ERIK BARNOUW, THE SPONSOR (1978) 112 (citation omitted)).

minimize the 'horror' aspects [of war]. . . . Men in uniform shall not be cast as heavy villains or portrayed as engaging in any criminal activity."[150]

Proctor & Gamble's policy also specified the treatment that was to be given to businessmen, clergy, and "similar representatives of positive social forces."[151] The company required broadcasters to counter any program's attacks on any "basic conception of the American way of life."[152] Finally, the memorandum demanded that "no material on any of *our programs* . . . [should] in any way further the concept of business as cold, ruthless, and lacking all sentiment or spiritual motivation."[153] The company's advertising manager specified that these policies are to apply to entertainment and news programs alike.[154]

Despite advertisers' overt and covert demands, few editors and journalists are willing to admit to censoring content at the whim of an advertiser due to fear of advertiser and media owner retribution.[155] One freelance writer's story idea was denied by a prominent woman's magazine on the grounds that it would offend an important advertiser.[156] The freelance writer refused to identify herself or the name of the magazine so as not to alienate its editors.[157] A television station asked its consumer reporter to censor coverage of certain restaurant practices, because the story would offend restaurants advertising on the station.[158] Again, the reporter refused to give his name or the name of the television station for fear of retribution.[159]

Unfortunately, fears of retribution may be well founded. In 1991, a newspaper reporter was fired due to statements in the *Washington Journalism Review* regarding his paper's favorable treatment of automobile advertisers.[160] The editor of a magazine on the east coast was fired for sparring with his publisher regarding the interference of advertisers with the content of the magazine.[161] In giving his story, the editor refused to

150. *Id.* (quoted in BAGDIKIAN, *supra* note 89, at 156-57 (citation omitted)).
151. *Id*. (quoted in BAGDIKIAN, *supra* note 89, at 157).
152. *Id*. (quoted in BAGDIKIAN, *supra* note 89, at 157).
153. *Id*. (quoted in BAGDIKIAN, *supra* note 89, at 157) (emphasis added). Proctor & Gamble's reference to the content of the media as "*our programs*" very much reveals the company's attitude towards broadcasters.
154. *Id.* (footnote omitted).
155. COLLINS, *supra* note 123, at 18.
156. *Id.* at 15.
157. *Id.*
158. *Id.*
159. *Id.* at 16.
160. *Id.* at 15.
161. *Id.* (footnote omitted).

give his name or the name of the magazine for fear of jeopardizing possible future employment.[162]

The examples described above represent only a small sample of a much larger problem. Advertisers continually use their blackmail power, the use of which often leads to any of three actions: (1) withdrawal of, retraction of, or punishment for an already published story; (2) quashing of an as yet unpublished story; or (3) affirmative steps on the part of the media to ensure future compliance with the wishes of advertisers.

B. Creating a "Buying Mood"

In addition to garnering favorable treatment of their products and goals, advertisers push for media content to create a "buying mood." Especially in broadcasting, advertisers want the content surrounding their ads to make the audience desire the product or service advertised.[163] Examples are plentiful. DuPont once told the FCC that its ads were more effective when surrounded by "lighter, happier" content.[164] In 1980, ad agencies hesitated to support *Fania Fenelon*, a CBS movie about a survivor of Auschwitz, due to the movie's "utterly depressing nature."[165] Chrysler withdrew advertising from *Amerika*, an ABC miniseries, stating, "our upbeat product commercials would be both inappropriate and of diminished effectiveness in that environment."[166] A Coca-Cola vice president once stated, "It's a Coca-Cola corporate policy not to advertise on TV news because there's going to be some bad news in there and Coke is an upbeat, fun product."[167]

This trend is certainly not a new one. Beginning in the mid-1950s, the resistance of advertisers to support several critically acclaimed shows nearly drove those shows off the air, despite their large audiences.[168] Advertisers spurned the shows due to the complexity of their messages, which "made the simplicity of product commercial solutions seem frivolous or fraudulent."[169] Advertisers also feared that the characters featured on the shows were too lower-class, stating that the "commercials

162. *Id.*
163. BAKER, *supra* note 91, at 62 (footnote omitted).
164. *Id.* (quoted in BAGIDIKIAN, *supra* note 89, at 160 (citation omitted)).
165. *Id.* at 63 (quoting Marvin E. Goldberg & Gerald J. Gorn, *Happy and Sad TV Programs: How They Affect Reactions to Commercials*, 14 J. OF CONSUMER RESEARCH 387, 401 (citation omitted)).
166. *Id*. (quoting Goldberg & Gorn, *supra* note 165, at 401 (citation omitted)).
167. *Id.* (quoting Goldberg & Gorn, *supra* note 165, at 401(citation omitted)).
168. *Id.* (footnote omitted).
169. *Id*.

looked out of place in Bronx settings."[170] Due to these perceived failings, modern television series often rely on acceptable formulas and mechanisms instead of allowing writers to take initiative to create new, bold ideas.[171]

In short, advertisers increasingly wish to surround their commercials with media content that supports the nature and messages of the ads. Euphemistically, "[a]n ad for a sable fur coat next to an article on world starvation is not the most effective association for making a sale."[172] One result of this desire to create a buying mood is a lack of serious, thought-provoking content in programming that might create any sort of negative connotation with a product or service advertised therein. One of the few remaining outlets for such thought-provoking programming, and the outlet that is most accessible to the public, is public access television, where the lack of commercials protects the content from advertisers' desire to mold programs to fit their ads. Any bending of this protection for public access content could be devastating for the medium, transforming public access channels into pseudo-commercial broadcasters that carry the same bland, thoughtless content that has overrun channels that are funded by advertising revenue. If this possibility becomes a reality, public access channels will no longer be able to effectively further the First Amendment's goal of fostering a diversity of viewpoints.

C. Favoring the Affluent

In addition to garnering favorable treatment of products and goals and creating a buying mood, advertisers further desire to shape the content of the media so that it reaches an affluent audience. According to Pulitzer Prize-winning journalist and dean emeritus of the Graduate School of Journalism at the University of California at Berkeley, Ben Bagdikian, "[A]n iron rule of advertising-supported media [is that it] is less important that people buy your publication (or listen to your program) than that they be 'the right kind' of people."[173] This "right kind" of audience is an audience that can and does spend, meaning one that is affluent.[174] Broadcasters and advertisers go to great lengths to ensure that the audience has the right characteristics, using "reams of computer printouts" showing audiences' "income, age, sex, marital status, ethnic background, social

170. *Id.* (quoting ERIK BARNOUW, THE SPONSOR 107 (1978)).
171. *Id.* (footnote omitted).
172. BAGDIKIAN, *supra* note 89, at 116.
173. *Id.* at 109.
174. *Id.*

habits, residence, family structure, occupation and buying patterns" to guarantee that programs and ads reach the perfect demographic.[175]

Examples of this mentality abound. In 1980, the president of Harte-Hanks Century Newspaper Group noted that editors of the company's twenty-eight daily newspapers were losing their "prejudices" about separating content from the desire to reach the correct demographic, stating, "The traditional view has been for editors to focus only on the total circulation figures. Today we are seeing more editor emphasis on the quality of circulation."[176] A study of the Gannett chain found that its newspapers sought to eliminate many of its lower-income subscribers.[177]Otis Chandler, then head of the company owning the *Los Angeles Times*, said, "The target audience of the *Times* is . . . in the middle class and . . . the upper class[.] . . . We are not trying to get mass circulation, but quality circulation."[178] Chandler also stated, "We arbitrarily cut back some of our low-income circulation[.] . . . The economics of American newspaper publishing is based on an advertising base, not a circulation base."[179]

If, in fact, the broadcaster is not reaching the correct demographic, the solution is simple: *change the content*.[180] The media simply fill programs with material designed to appeal to an affluent audience.[181] Otis Chandler noted that for the *Los Angeles Times*, writing more stories on minority issues "would not make sense financially . . . [because] that audience does not have the purchasing power and is not responsive to the kind of advertising we carry."[182] As stated by the general manager of *Rolling Stone*, when the magazine wished to attract a more advertiser-friendly, affluent audience, "The only way to deliver a different kind of reader is to change editorial [content]."[183] Often, if an editor refuses to change the content to satisfy the demographic demands of advertisers, the editor is fired.[184]

In summation, advertisers are very specific about whom they want to reach with their $30 billion campaigns. [185] To avoid the risk of the wrong

175. *Id.* at 109-10.
176. *Id.* at 116 (citation omitted).
177. *Id.*
178. *Id.*(citation omitted).
179. *Id.* (citation omitted).
180. *Id.* at 110.
181. *Id.*
182. BAKER, *supra* note 91, at 68 (quoting STEPHEN BATES, IF NO NEWS, SEND RUMORS 198-99 (1989)).
183. BAGDIKIAN, *supra* note 89, at 110.
184. *Id.*
185. *Id.* at 115.

kind of audience, advertisers and the media spend much time and effort on surveys and computations that indicate the composition of the audiences of particular programs. If those audiences are not of the right quality, meaning composed of affluent free-spenders, the content of the program is often changed to attract the right people. The only way for a medium to be free of this mentality is to guarantee that it is not reliant on advertising dollars. As of this moment, the content of public access channels is protected from these pressures so long as municipalities are free to require in cable franchise agreements that PEG channels remain free of advertising. If this protection fades, meaningful public access to the airwaves may suffer due to the pressure to create a certain quality of content to reach a certain quality of audience.

IV. THE RISE OF GUERILLA MARKETING

As briefly noted in Section I, *supra*, corporate advertisers continually seek new methods to market their products and services. Guerilla marketing has appeared more and more frequently throughout American society, but the effects of these strategies can most clearly be seen in the content of broadcasters.

Perhaps the largest growing alternative marketing strategy is product placement. Jay May, president of Feature This, an advertising agency based in Burbank, California, claimed that "[p]roduct placement will go bonkers in the future . . . [due to fears that] TiVo, the Internet, and digital cable will bleep out commercials [to the point] that, if you want to advertise on TV, you'll have to [place products into the content of programs]."[186] Successful product placements are well integrated into the plots of movies and television programs.[187] Felicia Minei-Behr, senior vice president of programming for ABC Daytime in New York City, recently called plot integration the "future of advertising."[188] The ultimate goal of alternative marketing strategies is to combine products and content as "organically" as possible.[189] To be completely "organic," advertisers often begin with a product and build a script to fit that product.[190] Patti Regan, president of The Regan Group in Los Angeles, stated, "If placement is executed correctly, it's beneficial to both brand and network. . . . But if any aspect is

186. MacMillan, *supra* note 6.

187. *See id.*

188. *Id.*

189. *See On the Media: Built-In Commercial Television* (WNYC radio broadcast, Aug. 2, 2002), *transcript available at* http://www.wnyc.org/onthemedia/transcripts/transcripts_072602_tv.html [hereinafter Leshem Interview].

190. *Id.*

compromised—if you do placement for placement's sake—it's less effective."[191]

Many examples of such "organic" product placement have crept into the programming lineups of the major television networks. ABC Daytime recently signed a multi-million-dollar deal which will integrate the cosmetics company Revlon into a twelve-week plotline on the soap *All My Children*.[192] A fictional Revlon executive will appear in twenty-five episodes of the soap, attempting to steal employees from the fictional cosmetics company owned by Susan Lucci's character.[193] Felicia Minei-Behr noted that "the key was that the placement was 'organic' to the show's ongoing theme, because there is a danger that audiences may view poorly developed marketing messages as an intrusion."[194] George Schweitzer, executive vice president of marketing for CBS, admitted that "[reality shows] were specifically created for integrated product placement that meshes," noting that "[t]hey're not as dramatic or scripted, so [product placement] lends itself well."[195] Ford Motor Company's Lincoln Mercury division hosted a series of concerts on NBC's *The Tonight Show with Jay Leno*.[196] The segments, called the Lincoln Garage Concert Series, aired from a stage flanked by Lincoln models, bringing approximately $9 million worth of advertising to Ford.[197] The marketing arm of the Creative Artists Agency, a large Hollywood talent agency, helped Coca-Cola obtain sponsorship of Fox Broadcasting's *American Idol*.[198] Instead of offering guests the hospitality of a "standard green room" while waiting backstage, the program featured "the Coca-Cola Red Room," which contained "curvy red couches" eerily reminiscent of the Coca-Cola logo.[199] Fox also gave strong exposure to GMC's Yukon Excel in its drama *24*.[200] GMC also placed its Yukon Denali on UPN's *The Hughleys* during a "'road trip' episode."[201] UPN both conceived of and executed the promotion.[202] The

191. MacMillian, *supra* note 6.
192. *Id.*
193. *Id.*
194. *Id.*
195. *Id.*
196. *Id.*
197. *Id.*
198. Eisenberg, *supra* note 1.
199. *Id.*
200. MacMillan, *supra* note 6.
201. *Id.*
202. *Id.*

key to the deal for the network was that the product was integrated directly into the show's plot.[203]

A brand new alternative marketing strategy contains a twist where the products themselves become content on programs.[204] The online auction house eBay is currently developing a show for users to describe their collections on air.[205] Dodge is producing the *Fast Enuff Challenge*, a one-hour documentary to air on MTV featuring a nationwide contest to see who can drive a Dodge vehicle the fastest.[206]

Perhaps the most interesting example of "marketing as content" is *Live From Tomorrow*. The series, planned for a six-week run on the Warner Brothers' network, features segments dedicated to "fashion, technology, movies, and sex."[207] *Live From Tomorrow* will air without commercial breaks, because advertisements will be built into the content of the program, where products will form the basis for many of the show's gimmicks.[208] Matti Leshem, executive vice president of Diplomatic, the production company for *Live From Tomorrow*, touted a particular hypothetical example featuring a new line of Sony Erickson cell phones featuring cameras, proposing a game where contestants are given phones and sent on a countrywide scavenger hunt.[209] The contestant who uses the phone to transmit the most interesting photographs of several American landmarks would be the winner.[210]

Leshem continued, "This is a show that says here's an interesting product. We're interested in it. We think you'll be interested in it. And here is a way for you to look at it that you might find appealing."[211] When asked what distinguished this approach from product placement, Leshem responded that product placement was much more "inorganic," and that "[w]hat we've tried to do is actually build an organic script around a product."[212] Leshem defended *Live From Tomorrow* by stating, "I think that the notion that there's something wrong with commercial products

203. *Id.*
204. Eisenberg, *supra* note 1, at 41
205. *Id.*
206. *Id.*
207. MacMillan, *supra* note 6.
208. *Ad Zappers*, *supra* note 6.
209. Leshem Interview, *supra* note 189.
210. *Id.*
211. *Id.*
212. *Id.*

being involved in our programming is a pretty old-fashioned idea. The business of television is driven by commercials and is driven by commercial money."[213]

V. CONCLUSION

Advertisers want to shape media content so that it spreads only the messages that the advertisers wish it to spread. The influence of advertisers could have devastating impacts on the rights of the public to have meaningful access to the public airwaves, especially in the wake of the Second Circuit's decision in *Goldberg v. Cablevision Systems Corporation.* Under this standard, PEG channels do not receive as much protection from commercial broadcasting as they would under a strict interpretation of New York State statutes and the New York City administrative code. The factors articulated by the *Goldberg* court as to what constitutes commercial programming, although somewhat strong, would have little impact in preventing many of the forms of "alternative" or "guerilla" marketing that are all too common today.

The thrust of this Note is not to urge commercial broadcast networks to avoid such advertising schemes. Although such ad strategies pose many difficulties that could prevent true freedom of the press in our democratic society,[214] this Note only urges states, municipalities, and cable franchisees to include provisions in their cable franchise agreements such as those found in the cable franchise agreement of the Town of Oyster Bay, New York, prohibiting any level of commercial programming on public access channels. Further, courts should take great care in interpreting these statutory and contract provisions so as to minimize the dangers that advertisers pose to the freedom of the public to have meaningful access to public airwaves.

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213. *Id.* In response, interviewer Brooke Gladstone asserted her belief that "people tend to be more relaxed when there's a clear line between advertising and content. They seem to be more comfortable when they know okay, now I'm being sold to and now I'm being entertained." *Id.* Leshem responded:

> Well I think you're making certain assumptions there that may or may not be true. I think there's a group of young people out there who are really interested and would understand that if we're showing them something, that this new product is actually part of the show that we are presenting to them. And we don't intend to hide that in any way; we want that to be unbelievably transparent to the viewer; and we actually don't think that there's a problem with it at all.

Id.

214. *See generally* BAGDIKIAN, *supra* note 89; BAKER, *supra* note 91; COLLINS, *supra* note 123.

This caution is especially prudent in light of the more covert marketing strategies utilized by advertisers today. The development of more "organic" methods of integrating products into the content of television programs makes those advertisements much more difficult to detect using the *Goldberg* factors. As it becomes more difficult to divorce the product being sold from the content of the program, it also becomes more difficult to determine whether or not an advertisement actually exists. For instance, had not the creators of *Live From Tomorrow* admitted that their program existed in part to sell products like Sony Erickson cellular phones, and had not the creators of *American Idol* blatantly referred to the backstage area as the "Coca-Cola Red Room," it would be very difficult to tell that those programs were actually funded by Sony Erickson and Coca-Cola. Without such blatant references, these programs would be likely candidates to appear on public access channels under the *Goldberg* standard.

The more that public airwaves are dominated by programs funded by subversive corporate advertising, the less that public airwaves will be accessible to the public at large. Corporate advertisers would then be free to utilize the public airwaves as yet another outlet for their own agenda by using their blackmail power to water down the content of public access programming in order to create a buying mood among viewers and target more affluent audiences.

Under this type of corporate influence, public access airwaves could not be "the video equivalent of the speaker's soap box or the electronic parallel to the printed leaflet," as Congress envisioned when passing the CCPA.[215] Those "groups and individuals who generally have not had access to the electronic media" would still not have "the opportunity to become sources of information in the electronic marketplace of ideas."[216] Corporate control of PEG channels would severely limit the ability of the public airwaves to "contribute to an informed citizenry."[217]

One of the traditional roles of the media is to ensure that citizens are fully informed of any serious social and economic issues that might shape America in the future. The promulgation of these important messages is continually threatened by corporate advertisers' domination of the content of privately owned broadcast outlets. Perhaps if the public at large continues to be provided with meaningful access to the public airwaves, more of these messages will continue to be disseminated. Meaningful

215. H.R. REP. NO. 98-934, at 30 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4667.
216. *Id.*
217. *Id.*

access will not occur, however, if the public-access airwaves are under as much advertiser pressure as are commercial broadcasters. It is time for a round, advertiser-free PEG to fit the round, public-access airwaves. Only then can public access be truly meaningful.