

DEVELOPMENT OF THE PAID SUBSCRIBER RULE
IN SECOND-CLASS MAIL

by

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INTRODUCTION

The basic requirement that general publications admitted to the second-class mail have a legitimate list of paid subscribers traces its roots to 1879, when Congress created the four categories of mail still used today.¹ Postal officials fleshed out the rather meager and vague statement, "a legitimate list of subscribers," during the late 1800s and early 1900s as they confronted a bewildering array of publications that endeavored to qualify for second-class rates. Their efforts culminated in the Act of August 24, 1912, popularly known as the Newspaper Publicity Law, which among other requirements stipulated that publishers of daily papers attest to the extent of their circulation, thereby strengthening

¹ The 1879 law established the following conditions for admission to the second class:

"First. It must regularly be issued at stated intervals, as frequently as four times a year, and bear a date of issue, and be numbered consecutively.

"Second. It must be issued from a known office of publication.

"Third. It must be formed of printed paper sheets, without board, cloth, leather, or other substantial binding, such as distinguish printed books for preservation from periodical publications.

"Fourth. It must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry, and having a legitimate list of subscribers; Provided, however, That nothing herein contained shall be so construed as to admit to the second class rate regular publications designed primarily for advertising purposes, or for free circulation, or for circulation at nominal rates." Act of March 3, 1879, 20 U.S. Statutes at Large 359, sec. 14.

the department's ability to enforce the paid subscriber rule.²

The essential specifications of "a legitimate list of subscribers" have changed little since then, as can be seen by comparing the appropriate provisions of the 1913 Postal Law and Regulations with those of the current Domestic Mail Manual:

1913

Sec. 419. A "legitimate list of subscribers" to a newspaper or periodical is a list of:

(a) Such persons as have subscribed for the publication for a definite time, either by themselves or by another on their behalf, and have paid, or promised to pay, for it a substantial sum as compared with the advertised subscription price. . . . [The rule goes on to specifically include news agents, those who purchase copies over the publishers' counter, recipients of bona fide gift copies, and a few others.]

3. The methods of a publisher in fixing the price of his publication or in inducing subscriptions by giving of premiums, prizes, or other considerations, . . . will be carefully scrutinized in respect of their effect upon the legitimacy of the subscription list as a whole. . . .³

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422.221 List of Subscribers. General publications must have a legitimate list of subscribers who have paid or promised to pay, at a rate above a nominal rate, for copies to be received during a stated time. Persons whose subscriptions are obtained at a nominal rate (see 422.222) shall not be included as a part of the legitimate list of subscribers. . . .⁴

By reviewing these extracts, it is clear that most of the major elements of the current rule governing a "legitimate list of subscribers" were in place more than seventy years ago: a substantial portion of those

² Act of August 24, 1912, 37 Stat. 554, sec. 2

³ 1913 Postal Laws and Regulations 220, sec. 419.

⁴ Domestic Mail Manual, sec. 422.221 (issue 13, 12-29-83)

receiving a periodical had to pay a sizable price for it beyond any special inducements.

This study examines the conditions that led Congress to make "a legitimate list of subscribers" a prerequisite for admission to the second-class mails; the legislative history of the phrase itself; the problems of interpretation and the resulting administrative amplification; and efforts to apply the rule in the face of an ever-changing publishing industry. The relation of the rule to the general policies of the second-class mail will also be evaluated. This paper focuses on the formative years of the rule, 1879 to 1912, but some attention will be paid to subsequent congressional reviews of its efficacy.

**PERIODICAL SUBSCRIBERS AND THE POST OFFICE
BEFORE THE 1879 SECOND-CLASS CATEGORY**

Before 1874, publishers, subscribers, and the post office were linked in a tenuous triangular relationship. Publishers entered their newspapers and magazines at the office of mailing; the department delivered the periodicals and then tried to collect the postage from the subscribers. The post office thus had a vital interest in whether those receiving periodicals were bona fide subscribers: those who weren't (and even many who were) refused to pay postage after the department had gone to the expense of carrying the publication.⁵ To curb the practice of

⁵ For the development of postal policies governing periodicals before 1863, see Richard B. Kielbowicz, "News in the Mails, 1690-1863: The Technology, Policy, and Politics of a Communication Channel," Ph.D. dissertation, University of Minnesota, 1984.

sending publications to persons who did not solicit them, Congress added the language "actual and bona fide subscribers" to the 1851 post office law.⁶ An 1852 law changing periodical rates referred to "actual subscribers."⁷

The distinction between actual subscribers and mere recipients of printed matter became more important in 1857 when Congress enacted the first law mandating prepayment at the office of mailing for some forms of printed matter. Not surprisingly, the requirement was imposed only on transient publications, those mailed by other than a publisher or a news agent. Addressees, of course, were not regular subscribers since transient publications were issued sporadically. David Yulee, a senator from Florida, explained that the law was needed to correct an increasingly common abuse. Great numbers of circulars, many promoting lotteries, were being entered in the mails without prepayment. Some post offices, he said, had received forty bags of such matter. Because the addressees did not solicit the circulars, "very few of them are taken out at the offices, but they are transported at great expense to the Government." The proposal passed without debate. Transient newspapers and circulars henceforth prepaid postage at the office where mailed.⁸

A primitive second-class category created by the Act of March 3, 1863, referred to "regular subscribers" in more than one section.

⁶ Act of March 3, 1851, 9 Stat. 588, sec. 2.

⁷ Act of August 30, 1852, 10 Stat. 39, sec. 2.

⁸ Congressional Globe, 34th Cong., 1st sess., July 18 and 25, 1856, pp. 1658, 1778-79; 34th Cong., 2d sess., December 26, 1856, p. 203; Act of January 2, 1857, 11 Stat. 153; New York Times, January 7, 1857.

Moreover, the law empowered the Postmaster General to require affidavits from publishers to affirm that no publications enjoying the lowest rates were sent to other than "bona fide and regular subscribers."⁹ The legislative history of the bill, and this provision in particular, is sparse. The principal architect of the 1863 law was Senator Jacob Collamer, a Whig from Vermont who had served as postmaster general from 1849 to 1850. The postmaster general at the time, Montgomery Blair, also helped shape the bill. With their combined expertise in postal matters, they devised three classifications to accommodate allailable matter. The first class embraced correspondence; the second, regular periodical publications; and the third, all otherailable matter, ranging from occasional publications and books to seeds, cuttings, and engravings.¹⁰ Both the and the House dealt with the legislation expeditiously.¹¹ That this legislation was drafted during the Civil War may explain in part the lack of debate on normally controverted postal issues.

ADVENT OF THE SECOND-CLASS CATEGORY AND THE PAID SUBSCRIBER REQUIREMENT

Administrative rulings under this primitive second-class category laid the foundation for the modern classification law passed in

⁹ 12 Stat. 701, 704-05, 707, quote at 708, secs. 18, 20, 24, 35, 37, 41.

¹⁰ U.S. Mail and Post Office Assistant, March 1863, p. 2; New York Times, February 2, 1863; New York Herald, March 5, 1863.

¹¹ Congressional Globe, 37th Cong., 3rd sess., February 10, 1863, pp. 839-40; February 20-March 2, 1863, pp. 1149-51, 1170, 1181, 1225, 1343, 1371, 1454, 1494.

1879. Several rulings provided the impetus for the requirement that eligible publications have a "legitimate list of subscribers." Moreover, the problems postal authorities encountered in dealing with periodicals in the 1870s suggest why they considered a "legitimate list of subscribers" tantamount to paid subscribers. Because the 1879 law formed the original statutory foundation for the second-class category, the evolution of its general principles is worth tracing in some detail.¹²

Advertising Circulars Discover the Mails

Key ideas for an improved classification scheme originated with Arthur H. Bissell of the post office. Bissell rendered legal decisions for the department, and in this capacity he had many occasions to rule on the nature of publications and the postage they paid. In June 1877, filling in for the assistant attorney general for the Post Office Department, Bissell ruled that "[p]eriodicals intended primarily for advertising purposes should not be mailed at [second-class] pound rates."¹³ His decision was "based upon the theory that the government should not carry at a loss to itself publications which are simply private advertising schemes."¹⁴ Bissell's ruling forced such

¹² For a fuller exposition of the forces that led to the 1879 law, see Richard B. Kielbowicz, "Origins of the Second-Class Mail Category and the Business of Policymaking," Journalism Monographs, forthcoming late 1985 or early 1986.

¹³ 1 Opinions of the Assistant Attorney General for the Post Office Department 313-15 (June 7, 1877) [hereinafter cited as Op. Asst. Att'y Gen'l]; 1877 Annual Report of the Postmaster General 242-45 [hereinafter cited as Annual Report].

¹⁴ Argument of William E. Sheldon of Boston, before the Committee on Post Office and Post Roads, U.S. Senate. . . . (Washington, D.C.: Government Printing Office, 1878), p. 8.

publications to pay third-class rates, 1 cent for each 2 ounces, instead of 2 or 3 cents per pound at the second-class rates. (Publications issued weekly or more often, mainly newspapers, paid 2 cents, those issued less often but at least four times a year, mainly magazines, paid 3 cents.)

But this scarcely resolved the problem. In a five-month period, Bissell had to pass on the postal status of 300 to 400 publications. Advertisers began issuing publications just frequently enough to qualify as periodicals, he complained. The intent of postal legislation was clear, he wrote, but the intent of many publications was not. Some of these publications had no regular list of subscribers, and subsisted entirely on advertising revenue.¹⁵

Bissell was confronting a relatively new species of mail, the advertising circular. Manufacturers striving to penetrate national markets were turning to advertising. The traditional vehicles for ads were newspapers and increasingly magazines. But some merchants discovered that they could reach potential customers directly through the mails, and the liberal second-class rates enticed many to style their publications as newspapers or magazines. Crude advertising circulars

¹⁵ Arthur E. Bissell, Classification of Mail Matter. Letter to the Postmaster General (Washington, D.C.: Government Printing Office, 1878).

quickly evolved into more sophisticated mail-order catalogues.¹⁶

E. C. Allen pioneered mail-order advertising. Allen, operating a mail-order business from Augusta, Maine, bought liberal amounts of advertising in newspapers and magazines until he developed his own publication, the People's Literary Companion, a monthly first issued in 1869. Nominally sold for 50 cents a year, it could be obtained for less when purchased by clubs, and in fact much of its circulation was simply given away. It contained a few stories and household hints, but was mainly a device to generate mail-order sales of goods. Companion attained a circulation of half a million in its second year. Success spawned imitators, and many did well enough to become weeklies in the mid-1870s.¹⁷

A series of postal rulings in the mid-1870s tried to divert the flood of newer publications to the more costly third class. The department repeatedly reminded postmasters that to qualify for second-class rates a publication had to meet several criteria, one of which was the bona fide subscriber rule.¹⁸ Some of the other requirements are worth noting briefly because they developed in tandem with the subscriber

¹⁶ Frank Presbrey, The History and Development of Advertising (Garden City, N.Y.: Doubleday, Doran & Co., 1929), pp. 284-86; George P. Rowell, Forty Years an Advertising Agent (New York: Franklin Publishing Co., 1926), pp. 201-02, 211; Printer's Ink: Fifty Years, 1888-1938 (issue for July 28, 1938), pp. 41-45; Daniel J. Boorstin, The Americans: The Democratic Experience (New York: Vintage Books, 1973), pp. 121-29.

¹⁷ Frank Luther Mott, A History of American Magazines, Vol. 1 (Cambridge: Harvard University Press, 1930), pp. 37-40.

¹⁸ See, e.g., 1873 Postal Laws and Regulations 70; U.S. Official Postal Guide, October 1874, p. xix; January 1877, p. 56. Virtually every issue of the Postal Guide carried a ruling trying to define what constituted a "regular subscriber."

rule and seemed to reflect a single purpose. A related criterion was the purpose of a publication. In 1876, rulings emphasized that pound rates were to be accorded only to publications whose "prevailing characteristic and purpose" was the dissemination of intelligence of passing events.¹⁹ Apparently, some publishers collaborated with those who would otherwise issue separate advertising circulars. In 1878 the Post Office Department prohibited advertisers from buying up the entire issue of a publication and then using the low second-class rates to reach subscribers, who received the publication for free.²⁰

The earliest legal construction of the term, "regular and bona fide subscriber," came in an 1872 circuit court case, U.S. v. Leckey Harper. During the 1871 political campaign, Harper sent copies of his paper to a list of recipients provided by financial backers without prepaying postage. Under the 1863 law, postage had to be prepaid on all publications mailed to other than "regular and bona fide subscribers." Some of the recipients refused to take the paper from the postmaster. The defense argued that it was customary to mail specimen or sample copies without prepaying postage. In finding against Harper, the court defined a subscriber as one who "has subscribed himself or by some authorized agent, or has subsequently in some sufficient way ratified the subscription which may have been volunteered for him."²¹

¹⁹ See, e.g., U.S. Official Postal Guide, April 1876, p. 54.

²⁰ See, e.g., ibid., April 1878, pp. 60-61.

²¹ U.S. Circuit Court, January 8, 1872, opinion reprinted in American Newspaper Reporter, March 4, 1872, p. 251; see also 10 Op. Asst. Att'y Gen'l 22 (August 5, 1873).

Bissell and his predecessors in the office of the assistant attorney general for the Post Office Department amplified this judicial construction of "bona fide subscribers" in a number of rulings in the mid-1870s. An 1873 opinion closely adhered to the definition given in Harper: "bona fide and regular subscribers" were considered to be those who subscribed themselves or through an authorized agent as well as "those who have in some sufficient way ratified the subscription or those who have explicitly signified in some unequivocal manner that they are willing to occupy the position of and be considered regular and bona fide subscribers."²²

Through the 1870s, post office rulings added minor refinements to the definition, but always the goal seemed to be to reduce the number of sample copies and advertising circulars entered as second-class mail. Some of the refinements included the stipulation that where someone other than the recipient purchased the subscription, the recipient had to consent or request it;²³ that subscriptions arranged by someone other than the recipient had to be for specific a period of time (not indefinite);²⁴ that "a person who orders one copy of one issue of a newspaper or magazine cannot be considered as a regular subscriber thereto";²⁵ that publications had to disclose the "terms of subscription

²² 1 Op. Asst. Att'y Gen'l 22, quote at 25-6 (August 5, 1873).

²³ U.S. Official Postal Guide, October 1874, p. xix.

²⁴ Ibid., July 1875, p. 43 (emphasis in original).

²⁵ Ibid., January 1876, p. 55.

to regular subscribers";²⁶ that advertisers did not qualify as regular subscribers simply by inserting ads in publications;²⁷ and that persons requesting free copies did not qualify as regular subscribers.²⁸

This proliferation of administrative rulings on a single and seemingly narrow point reflected the ingenuity of publishers and advertisers in their efforts to qualify for the lowest postage rates. In an 1877 ruling, Bissell tried to reduce the thicket of considerations in defining regular subscribers to two elements: there had to be an express or implied contract between publisher and recipient, and a subscription price had to be paid.²⁹

Publishers Help Rewrite the Law

At about the same time that he was struggling with the definition of "regular and bona fide subscribers," Bissell began work on a sweeping reform of postal laws. To remedy what he considered to be abuses of the second-class privileged rates, Bissell proposed grouping publications in two general categories, "registered" and "ordinary." While some features of his plan eventually failed to win congressional approval, most of the basic elements of the current second-class category trace their lineage to Bissell's proposal. Bissell's proposed registered publications became the second class; ordinary publications became the third class.

²⁶ Ibid., October 1877, p. 56.

²⁷ Ibid., July 1878, p. 58.

²⁸ USOPG, October 1878, p. 57.

²⁹ 1 Op. Asst. Att'y Gen'l 329-32 (December 31, 1877).

In 1877 Bissell communicated his plan to Postmaster General David M. Key in 1877. Congress began considering a bill drafted by Bissell and invited New York City publishers to register their opinions about the proposal to differentiate between regular publications (newspapers and magazines) and irregular ones (advertising sheets).³⁰

Bissell also held meetings with publishers in a few of the largest cities. New York publishers representing different segments of the industry unanimously endorsed a modified version of the bill then before Congress.³¹ Even at this relatively early step in the legislative process, the conditions for admission to the "privilege of registration" — what became the second class — had nearly assumed their final form:

First, it must be regularly issued at stated intervals, and bear a date of issue, or be numbered consecutively.

Second, it must be issued from a known office of publication.

Third, it must be formed of printed paper sheets without board, cloth, leather, or other substantial binding such as distinguish printed books, for preservation, from periodical publications.

Fourth, it must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry, and having a legitimate list of subscribers. . .

³⁰ Bissell, Classification of Mail Matter; New York Times, October 10, 1877, p. 1; Printer's Circular, February 1878, p. 273; American Newspaper Reporter, January 21, 1878, p. 56.

³¹ The committee of New York publishers meeting with Bissell had representatives from Scribner's Monthly, the Christian Union, The Grocer, the American News Company, the New York Times, and Harper's publishing house. Bissell, Classification of Mail Matter; New York Times, January 27, 1878, p. 7; January 29, 1878, p. 3; Classification of Mail Matter. Action of the Publishers of New York and Philadelphia, on the Bill Now Pending Before Congress (Washington, D.C.: Judd & Detweiler, 1878).

Bissell then met with Philadelphia publishers. Like their counterparts in New York, they too acceded to the proposal, objecting only to the registration feature of the bill as creating the potential for censorship.³³

As modified by the New York and Philadelphia publishers, the bill retained the three classes of mail then in use. Within the second-class some distinction would be made among publications based on their purposes. Second-class matter could either be "registered," enjoying the lowest rates, or "ordinary," subject to a higher charge.

Under this plan, "ordinary" printed matter in the second-class would pay 1 cent for each 2 ounces, then the rate for third-class printed matter. The advertising circulars without regular subscribers that so troubled Bissell would pay this higher rate. Bissell claimed that the department carried 10 million pounds of these circulars a year at a loss of \$250,000.³⁴

A spokesman for New England publishers testified before the Senate post office committee and echoed the remarks of his counterparts in New York and Philadelphia. The comments of William E. Sheldon revealed why many publishers joined with administrators of the post office department in pushing for registration of printed matter.

³² *Ibid.*, pp. 6-7; emphasis added.

³³ Quoted in 1878 Annual Report 51. The text of the bill adopted by the Philadelphia publishers and Bissell is reproduced in Printer's Circular, February 1878, pp. 274-76.

³⁴ New York Times, January 27, 1878, p. 7.

Sheldon's testimony was peppered with such phrases as "legitimate publishers," "the honorable publishers," and the "legitimate press." He asserted that the registration scheme was "without opposition from the entire legitimate press of the country," but predicted that the measure would probably be opposed by "a species of publications that are designed to sell medicines, or are designed to influence the public to buy special goods; that is, one class of trade journals that are not designed to convey intelligence to the people."³⁵

In questioning Bissell, one senator implied that there was no valid reason to discriminate against advertising circulars when such magazines as Scribner's, Harper's, and the Atlantic carried several pages of advertising. Bissell admitted that, at the insistence of the publishers, a provision had been added to the bill permitting regular periodicals to carry advertisements printed on separate pieces of paper. But he maintained that the contents of these publications entitled them to the lower pound rates. Bissell reminded the senator that Congress had already made such a discrimination in the Act of July 12, 1876, which subjected "publications designed primarily for advertising purposes, or for free circulation or for circulation at nominal rates" to the higher postage of transient printed matter.³⁶

The 1879 Law in Congress

To this point, most of the work on the pending postal reform

³⁵ Argument of William E. Sheldon, p. 2.

³⁶ Testimony of Bissell in ibid 17, quoting Act of July 12, 1876, 19 Stat. 82, sec. 15.

had been carried out by a postal administrator in conjunction with some of those who would be affected by the legislation. This solicitude shown for the opinions and cooperation of leading publishers was practical policymaking. Postal officials, after all, knew that a major share of the periodicals entered in the mails issued from a handful of the largest cities.³⁷ The ultimate power, of course, resided with Congress. And the political climate in which the classification act passed was unusual if not unique. Through an unusual set of circumstances, Democrat David M. Key became postmaster general in a Republican administration.³⁸ Bills endorsed by his office carried the imprimatur of both a Democratic department head and, at least implicitly, a Republican president. This was not insignificant in the sharply-divided Forty-Fifth Congress.³⁹

After 18 months of consideration, the House post office committee reported a bill on January 23, 1879, that ultimately became law, establishing the modern second-class category. Alfred M. Waddell, a Democrat from North Carolina, explained that the bill reclassified mail matter, but left rates basically unchanged. The only rate change favored monthly and quarterly magazines.⁴⁰ The registration of "legitimate"

³⁷ By 1878, the six principal post offices accounted for over 60 percent of the total second-class postage paid in the United States. 1878 Annual Report 250.

³⁸ David M. Abshire, The South Rejects a Prophet: The Life of Senator D.M. Key, 1824-1900 (New York: Praeger, 1967), pp. 145-57.

³⁹ Edward McPherson, A Hand-Book of Politics for 1880 (Washington, D.C.: James J. Chapman, 1880), pp. 1-2; George B. Galloway, History of the House of Representatives (New York: Thomas Y. Crowell Co., 1961), pp. 249-50.

⁴⁰ Cong. Rec., 45th Cong., 3rd sess., January 23, 1879, p. 690.

publications was the only other noteworthy change in existing law proposed by the House committee. Like Bissell, Waddell, in explaining the bill to his colleagues, frequently resorted to the terms "legitimate" and "illegitimate" to denote different publications. Where earlier versions of the bill had only three classes of mail, the committee's report suggested four. The second class would encompass regular publications, which would be registered in order to receive the 2-cent a pound rate. The third class covered books, transient newspapers, and the so-called "illegitimate" publications — the advertising circulars that were specifically excluded from the second-class. Third-class material would be admitted to the mails without registration at 1 cent for each 2 ounces — eight times the second-class rate.⁴¹

The House failed to act expeditiously on the bill, so the classification scheme was revived in the Senate as an amendment to a post office appropriations bill. The substance of the classification scheme and the rates excited little interest in the Senate; the half-hearted debate centered on whether such legislation should be considered late at night near the end of the session, and whether it belonged as an attachment to an appropriations bill. It passed.⁴²

When the classification scheme returned to the House, opponents objected to the proposed registration of periodicals using the second class mails.⁴³ Some argued that registration of second-class periodicals

⁴¹ *Ibid.*, pp. 691-98.

⁴² *Ibid.*, February 20, 1879, pp. 1662-65.

⁴³ *Ibid.*, February 28, 1879, p. 2136.

amounted to censorship. Further, Joseph Cannon, later a powerful speaker of the House, claimed that the provision benefited the city press. "I would ask now if any of your publishers in Minnesota, Illinois, Ohio, Alabama, and South Carolina have ever besieged you with letters — I mean your country publishers — to enact this registration system?" he asked. "I guess not. Mine never did me."⁴⁴ About a month before, a letter in the New York Times charged that the only opposition to the bill came from representatives of country districts.⁴⁵ The registration provision, Cannon added, was the product of a "mutual-admiration society" — city publishers whose magazines would pay less and the Post Office Department, which would add to its personnel.⁴⁶ Despite some strong counter-arguments, Cannon prevailed; the House voted 60 to 25 to delete registration from the classification act.⁴⁷

A conference committee then considered the post office appropriation bill and retained the mail classification features and postage as they had emerged from the House. On the last day of Congress, March 3, 1879, the House and Senate passed the bill without further debate, thereby creating the modern second-class mail category.⁴⁸

There was nothing in the law that major publishers had

⁴⁴ Ibid.; William R. Gwin, Uncle Joe Cannon, Archfoe of Insurgency (N.p.: Bookman Associates, n.d.), p. 18.

⁴⁵ New York Times, January 29, 1879, p. 3.

⁴⁶ Cong. Rec., 45th Cong., 3rd sess., February 28, 1879, p. 2136.

⁴⁷ Ibid., pp. 2134-37.

⁴⁸ Ibid., March 3, 1879, pp. 2372-73; 20 Stat. 358-61.

stridently opposed and much that they had approved. Postal administrators failed to get the registration system they had sought, but prevailed in other respects. Printed matter now fell into either the second or third class. Qualifications for admission to the second class were those suggested by the department and approved by publishers in a few large cities. A publication had to appear at regular intervals at least four times a year; be issued from a known office of publication; formed of printed sheets without substantial binding; and disseminate "information of a public character, or [be] devoted to literature, the sciences, arts, or some special industry, and having a legitimate list of subscribers." In addition, the definition specifically proscribed "publications designed primarily for advertising purposes, or for free circulation, or for circulation at nominal rates."⁴⁹

Very little of the congressional debate, or even that among publishers, dealt with the conditions for admission to the second class. Most of those speaking about the bill dwelled on the registration plan and the proposed reduction in magazine postage.⁵⁰ The House post office added the language excluding "publications designed primarily for advertising purposes."⁵¹ From scattered remarks during deliberations, it appears that the requirement of having "a legitimate list of subscribers" was intended to accomplish much the same objective as the proscription on

⁴⁹ 20 Stat.. 359.

⁵⁰ See generally Cong. Rec. at the ten preceding citations.

⁵¹ Cong. Rec., 45th Cong., 3rd sess., January 23, 1879, p. 696.

advertising publications.⁵² The Senate added a few words that underscore this interpretation. The Senate language, which eventually became law, excludes publications designed "for free circulation, or for circulation at nominal rates" in the same sentence that denies advertising publications admission to the second class.⁵³

The postal regulations issued to interpret the law for thousands of postmasters give further weight to the view that all parts of the fourth condition, including the list of subscribers, were intended to aid in determining the true nature of publications, and to exclude those whose raison d'etre was advertising. The 1879 regulations were largely crafted by Bissell, architect of the law on which they were based. The regulations defined advertising sheets partly in terms of their subscribers:

Second. Those which, having no genuine or paid-up subscriptions, insert advertisements free, on the condition that the advertiser will pay for any number of papers which are sent to persons whose names are given to the publisher.

Third. Those which do advertising only, and whose columns are filled with long editorial puffs of firms or individuals who buy a certain number of copies for distribution.⁵⁴

Subscribers were defined largely in terms of their willingness to pay for the publications they received:

A regular subscriber is a person who has actually paid, or undertaken to pay, a subscription price for a newspaper, magazine, or other periodical, or for whom such payment has been made, or undertaken to be made, by some other person.

⁵² Ibid., pp. 696-97.

⁵³ Ibid., February 20, 1879, p. 1664.

⁵⁴ 1879 Postal Laws and Regulations 73, sec. 186 (Arthur H. Bissell and Thomas B. King, compilers).

But, in the latter case, such payment must have been made or undertaken with the consent or at the request of the person to whom such newspaper, magazine, or periodical is sent. Consent is to be implied in the absence of objection by the party to whom the publication is sent.⁵⁵

Thus, by 1879 if not before, "having a legitimate list of subscribers" meant having a substantial portion of paid subscribers.

EVASIONS OF THE RULE IN THE 1880s

The 1879 law and the regulations implementing it left one gaping loophole regarding subscribers that plagued the department. The law permitted an unlimited number of sample copies to be sent by publications admitted to the second-class, and, by definition, they went to other than regular subscribers.⁵⁶ Earlier administrative rulings had kept sample copies from enjoying the lowest rates because they did not satisfy the subscriber test.

The 1879 law relegated advertising circulars to the third-class, along with books, transient newspapers and other printed matter, and charged eight times the 2 cents a pound second-class rate. In 1884 Congress moved transient publications into the second-class, but improved their rates only slightly.⁵⁷ And less than a year later, Congress halved the pound rate for regular periodicals to 1 cent.⁵⁸ Such a rate schedule

⁵⁵ *Ibid.*, p. 74, sec. 193.

⁵⁶ *Ibid.*, p. 76, sec. 203.

⁵⁷ Act of June 9, 1884, 23 *Stat.* 40; *Cong. Rec.* 48th Cong., 1st sess., February 18, 1884, pp. 1206-08.

⁵⁸ Act of March 3, 1885, 23 *Stat.* 387, sec. 1.

favoring regular periodicals over transient publications naturally enticed publishers to seek the lower rates wherever possible.

Stretching the Subscriber List

A number of rulings flowing from the department in the early and mid-1880s illustrate the various means that some advertisers and publishers used to stretch the second-class category to cover their circumstances. Significantly, too, these rulings usually applied the legitimate list of subscribers rule to determine the proper classification of periodicals under scrutiny. Most of the cases involved alleged abuses of the provision for publishers admitted to send out an unlimited number of sample copies.

An 1881 administrative ruling shows how tempting it was for publishers and advertisers to issue sample copies of a regular publication containing matter that would otherwise subject the paper to third-class rates. The publisher of the weekly Appleton (Wis.) Post informed his advertisers that he planned to issue an extraordinary number of one issue. One advertiser furnished a list of names of persons who did not subscribe to the paper, and the publisher sent them copies marked "sample." The assistant attorney general considered this issue of the Post to fall within the 1879 regulations, that proscribed "mailing as sample copies extra numbers of their publications ordered by advertisers, or by campaign committees . . . to serve the business, political, or personal interests of the person or persons ordering the same."⁵⁹ The

⁵⁹ 1 Op. Asst. Att'y Gen'l 564-66 (February 10, 1881) quoting 1879 Postal Laws and Regulations 76.

assistant attorney general ruled that the Post did not satisfy the test that sample copies be designed "to increase the subscription list and advertising patronage of his publication."⁶⁰ Counting such recipients as legitimate subscribers would be fraudulent, he advised.⁶¹

Although statutory law fixed no ceiling on the number of copies that could be sent to non-subscribers as samples, the department ruled "that the regular circulation of a number of sample copies largely disproportionate to the number of copies sent to actual subscribers necessarily raises the inference that the paper is designed for free circulation, or circulation at the nominal rates."⁶² Thus a magazine, the National Normal, that issued 20,000 sample copies but had only 1,500 subscribers was not entitled to pass at second-class rates.⁶³ Another magazine, the Querist, published by the owner of a "bureau of information," also failed to meet the subscriber test. It had fewer than a dozen subscribers but circulated over 5,000 copies of each issue. The department found that the dozen subscribers were "obtained not for the purpose of deriving revenue from subscriptions, but for the purpose of enabling him [the publisher] to say that he had a list of subscribers."⁶⁴ The department concluded, in part by the absence of a substantial share of paid subscribers, that such sample issues were designed largely for

⁶⁰ 1 Op. Asst. Att'y Gen'l 564.

⁶¹ Ibid. 566.

⁶² 1 Op. Asst. Att'y Gen'l 858-59 (August 20, 1883).

⁶³ 1 Op. Asst. Att'y Gen'l 859-60, (August 20, 1883).

⁶⁴ 2 Op. Asst. Att'y Gen'l 28 (June 17, 1885).

advertising purposes and thus denied the pound rates.⁶⁵

Determining the legitimacy of a subscriber list logically entailed obtaining information from the publisher. The 1879 law provided a penalty for giving "any false evidence to the postmaster relative to the character of his publication,"⁶⁶ but did not specify what information had to be submitted upon request. The department began developing guidelines in the mid-1880s. The assistant attorney general for the post office suggested that in ascertaining the legitimacy of a list, a postmaster inquire into "[t]he income the paper receives from subscribers, whether the list is made up merely for the purpose of bringing the publication under the law or with a bona fide intent of deriving an income from that source."⁶⁷

The 1887 postal laws and regulations pulled together and expanded on these rulings to help postmasters cope with the countless varieties of periodicals. These comprehensive instructions suggested how the presence or absence of a legitimate list of subscribers helped in determining the character of a publication and its proper classification. In gauging whether a publication was "designed primarily for advertising purposes, postmasters were instructed to check "the price of and amount derived from subscription, [and] the number of subscribers in proportion to the issue. . . ."⁶⁸ The regulations for the first time defined nominal

⁶⁵ See also 2 Op. Asst. Att'y Gen'l 364-65 (August 3, 1886).

⁶⁶ Act of March 3, 1879, 20 Stat. 359, sec. 13.

⁶⁷ 2 Op. Asst. Att'y Gen'l 8-9 (May 25, 1885); see also ibid., 373-74 (September 28, 1886).

⁶⁸ 1887 Postal Laws and Regulations 139, sec. 331.

subscription rates:

1. The publication asserts or advertises that it is furnished to subscribers at no profit.
2. When it appears from the contents that subscriptions are not made because of the value of the publication as a news or literary journal, but because of its offers of merchandise, or other consideration substantially equal in value to the subscription price, as an inducement to subscription.
3. When the publication is issued for and distributed among the members of a society, association, or club, upon payment of regular dues, with no distinct and sufficient charge for the publication.⁶⁹

Furthermore, mailing a number of sample copies exceeding those sent to regular subscribers was "deemed evidence that the publication is primarily designed for advertising or free circulation. . . ."70

The 1887 regulations also spelled out the process by which a publication gained admission to the second class. Interestingly, the procedures outlined by the department resembled the registration plan that the House had specifically removed from the 1879 classification law.⁷¹ In other words, the department accomplished by administrative rule what Congress had declined to do in its law-making capacity. Publishers seeking admission for their publications now had to provide sworn written answers to a number of questions, including several that elicited information about the extent and nature of their subscription

⁶⁹ Ibid., p. 140, sec. 332. For an application of the test, see 2 Op. Asst. Att'y Gen'l 452-53 (June 10, 1887).

⁷⁰ 1887 Postal Laws and Regulations 144-45, sec. 340; but see 2 Op. Asst. Att'y Gen'l 725-27 (August 29, 1889), which held that a paper with 30,000 subscribers issuing 100,000 copies did not mean that it was primarily for advertising purposes where facts indicated otherwise.

⁷¹ See above, pp. 11-17.

list:

12th. What is the greatest number of copies furnished to any person or firm who advertise in your publication? 13th. On what terms are these papers furnished? 14th. What number of papers do you print of each issue? 15th. About what number of bona fide subscribers (that is, subscribers who pay their own money for the publication and receive it regularly) have you to the next issue of your paper? 15th. What is the subscription price of your publication per annum? 16th. What is the subscription price of your publication per annum? 17th. How many pounds weight will cover the papers furnished to regular subscribers? 18th. What average number of sample copies with each issue do you desire to send through the mails at pound rates? 19th. How are the names of the persons to whom you wish to send sample copies obtained by you?⁷²

Upon receiving satisfactory answers to these and other questions, and after examining the publication, a postmaster issued a temporary second-class permit giving it pound rates. Reviewing the same evidence, the third assistant postmaster general then decided whether to issue a certificate that entitled a publication to print "Entered at the post-office at _____, as second-class matter."⁷³

In applying the tests, ambitious postmasters could contact some of a publication's subscribers to discover the terms under which they received it. For example, Cupid's Quiver was refused the pound rates of the second class when the Chicago postmaster drew a sample of seventeen of the supposed actual subscribers and only two satisfied the legal definition of the term.⁷⁴ Subscription data furnished with the application for admission to the pound rates could also prove revealing

⁷² 1887 Postal Laws and Regulations, 141, sec. 333; for an application, see 2 Op. Asst. Att'y Gen'l 479-81 (October 4, 1887).

⁷³ 1887 Postal Laws and Regulations 140-42, sec. 333-34.

⁷⁴ 2 Op. Asst. Att'y Gen'l 443 (April 25, 1887).

and decisive. For example, Sanger Brothers' Monthly Magazine, published by a clothing firm, carried several pages discussing fashion in addition to advertising matter. Its application revealed that 3,000 to 4,000 copies were intended for bona fide subscribers, 1,500 for samples, with 50 to 100 to be furnished to advertisers. But an ad in the magazine revealed that many of the subscriptions were obtained through offers of a premium; for 65 cents, subscribers could get the forty-page monthly magazine for a year as well as a book retailing for 75 cents or \$1. The assistant attorney general concluded that twenty percent of the subscriptions were samples or free, and the balance were "at nominal rates, as a book is given to the subscriber of greater value than the cost of the year's subscription."⁷⁵

Subscribers to Fraternal Publications

In the early 1890s the post office ruled that the publications of fraternal organizations provided to members as part of their dues usually failed to qualify for the pound rates.⁷⁶ These rulings turned on the actual subscriber rule, with the assistant attorney general finding that "[c]ollecting the subscription in the nature of an assessment is a compulsory collection and can not be considered as constituting 'a legitimate list of subscribers' within the meaning of the law."⁷⁷ However, members of an order who were assessed an annual subscription fee

⁷⁵ 2 Op. Asst. Att'y Gen'l 749-51 (November 8, 1889).

⁷⁶ See, e.g., ibid. 960-61 (October 15, 1891).

⁷⁷ Ibid. 961.

comprised a legitimate list.⁷⁸

Congress, apparently at the behest of some of the affected organizations, amended the postal laws in 1894 to bring publications of fraternal and related societies into the second class. A number of congressmen complained that the post office's adverse rulings misread congressional intent behind the 1879 classification law, that lawmakers planned to confer the lowest rates on such publications.⁷⁹ Much of the debate focused on the nature of subscriptions to the societies' publications. Those favoring the legislation argued that members were indeed subscribers and their dues counted as more than a nominal charge.⁸⁰ In cases where the society did not publish its own paper, one representative explained, it acted as a middleman, collecting the subscriptions from members and forwarding them to the publisher.⁸¹ Congress intended the requirement that publications have "a legitimate list of subscribers" who paid more than a nominal fee to "shut out advertising sheets," not publications of fraternal societies, one explained.⁸²

Those opposed to the legislation, notably the postmaster general, claimed that the legitimate subscriber rule was one of the "safeguards provided by law against an inundation of the mails by

⁷⁸ 2 Op. Asst. Att'y Gen'l 806-07 (February 25, 1890).

⁷⁹ See, e.g., Cong. Rec., 53rd Cong., 2d sess., April 6, 1894, pp. 3510, 3512.

⁸⁰ See, e.g., ibid., April 5, 1894, p. 3488.

⁸¹ Ibid., April 6, 1894, p. 3508.

⁸² Ibid., April 6, 1894, p. 3509.

publications claiming second-class privileges" that has "been found by experience to be in the interest of the Government as well as of legitimate publications."⁸³ After the publications of other kinds of societies and bureaus were given second-class privileges, the provision was accepted as part of a post office appropriations bill.⁸⁴

ABORTED CONGRESSIONAL REFORMS, 1889-1901

In his annual report for 1889, Postmaster General John Wanamaker identified several abuses of the second-class privilege that hurt postal interests (meaning revenues) as well as "legitimate" journalism.⁸⁵ His report signaled the beginning of a push for reforms that lasted at least eighteen years. Some of the abuses — and proposed remedies — revolved around the construction of the phrase "a legitimate list of subscribers." In the end, the statutory language of the legitimate subscriber rule remained unchanged. But the lengthy hearings and discussions were not without consequences. The concern exhibited by Congress and some segments of the publishing industry during these years encouraged the post office to tighten the sample-copy rule.

Postmaster General Wanamaker, more than many of his

⁸³ Letter of Postmaster General W.S. Bissell, October 31, 1893, to House Committee on Post Offices and Post Roads, reprinted in Cong. Rec., April 5, 1894, p. 3489.

⁸⁴ Cong. Rec., April 6, 1893, pp. 3513-14; Act of July 16, 1894, 28 Stat. 105.

⁸⁵ 1889 Annual Report 43-44.

predecessors, wanted to put the department on a firmer fiscal footing. Wanamaker, not coincidentally, was founder of the chain store bearing his name.⁸⁶ He focused on three abuses of the second-class mail: books masquerading as periodicals, excessive numbers of sample copies that were really advertising sheets, and the news agents' privilege of returning unwanted publications.⁸⁷ Wanamaker's 1891 report made a tempting offer: if books passing in the second class and sample copies were limited, "the increased revenue would more than equal the total amount now collected from publishers for postage of newspapers. In other words, the Department would suffer no loss by carrying newspapers to actual subscribers free if it received just pay for the serials and sample copies."⁸⁸

There had long been attempts to pass book material at rates reserved for newspapers and later magazines.⁸⁹ The practice mushroomed in the 1880s with the advent of mechanical typesetting, a precipitous drop in paper costs, and reduced postage, notably the 1 cent a pound second-class rate adopted in 1885.⁹⁰ Book publishers recognized a huge untapped market for inexpensive books, and, to maximize their profits

⁸⁶ See Dorothy G. Fowler, The Cabinet Politician: The Postmasters General, 1829-1909 (New York: Columbia University Press, 1943), pp. 207-23.

⁸⁷ This last issue will not be discussed here.

⁸⁸ 1891 Annual Report 106.

⁸⁹ See Kielbowicz, "News in the Mails," pp. 299-307.

⁹⁰ Cong. Rec., 53rd Cong., 2d sess., April 24, 1884, p. 4050; see also John Tebbel, A History of Book Publishing in the United States, (New York: R. R. Bowker, 1975), vol. 2, pp. 481-511.

from sizable capital investments, they aimed for massive sales. Some reprinted European novels; others carried original fiction, much of it labeled "trashy" by the reading elite — and established publishing houses.

These paper-covered books were designed to pass at second-class pound rates. Wanamaker described how they qualified. The publisher, he said, applied for a permit to send his library or series through the mails. It was easy to show that the publication was devoted to literature, and that it was issued from a known office of publication. Even though each copy was self-contained — that is, it carried one story — the publishers issued at least four a year in a numbered series or library to meet the periodicity test.⁹¹

The book publishers also satisfied the subscriber requirement. This could be accomplished in more than one way. News agents, who sold much of this literature over the counter, qualified by law as subscribers. Newspapers also used these inexpensive books as premiums to induce subscriptions to their own papers. The papers then reported the names of their subscribers to the book publishers, who in turn used these names to constitute their own list.⁹² One Chicago paper planned to

⁹¹ 1889 Annual Report 44-45.

⁹² Cong. Rec., 53rd Cong., 2d sess., April 24, 1884, p. 4051.

distribute 1.6 million volumes to its readers.⁹³

One of the other abuses decried by Wanamaker was hardly new -- the excessive use of sample copies sent at the pound rate. This problem, discussed above, hardly disappeared with the department's rulings that attempted to limit the privilege even where the statute imposed no ceiling.

The Loud Bill

After complaining about these practices for a number of years, some in Congress and the post office department launched a concerted drive to revise the statutes. These efforts, from 1896 to 1901, involved repeated consideration of the Loud bill, named after its sponsor, Representative Eugene F. Loud. Loud, a Republican from California, shepherded his proposals through Congress and wrote for the popular press to advocate his ideas. Some of his work sheds light on the reasons for the paid subscriber rule.

Loud introduced a bill in 1896 that would have retained the 1879 language regarding legitimate subscribers, but added further qualifications. A subscriber was defined as one who "voluntarily orders and pays for the" publication. And he clarified the intent of the law regarding sample copies, prescribing that those "sent by the publishers thereof, acting as the agent of an advertiser or purchaser, to addresses

⁹³ See letter from Postmaster General W.S. Bissell, January 31, 1894, to House Committee on Post Offices and Post Roads, in *ibid.*, April 10, 1894, p. 3643; see also letter from Washington Hering, Chicago postmaster, February 12, 1894, reprinted in House Report 260, 54th Cong., 1st sess., pp. 197-98 for details about the cooperation between newspapers and book publishers in issuing cheap serials.

furnished by the latter," would go at transient rates.⁹⁴

Loud prepared the ground for his legislation by cultivating the support of major press associations. He met, for example, with the American Newspaper Publishers Association at its 1896 annual convention. He told the daily newspaper publishers that the first step in curbing abuses of the second class was to "amend the law so that a bona fide subscriber will be clearly defined."⁹⁵ After hearing how Loud's proposals would benefit the "legitimate press" by denying postal privileges to the "illegitimate" publications, the ANPA unanimously endorsed the bill. Members decided to support the legislation through their papers and agreed it would be good strategy to point out to the public that they were surrendering their sample copy privilege.⁹⁶

Loud carefully showed that the bill enjoyed the support of more than the proprietors of the major metropolitan dailies represented by ANPA. The American Trade Press Association endorsed the bill, too, specifically because it would exclude "from the mails a class of printed matter not in any sense publications based upon a list of bona fide subscribers. . . . As publishers of established newspapers, whose business is based upon a legitimate constituency of paying subscribers, they are entirely willing to forego the advantage of mailing sample

⁹⁴ Cong. Rec., 54th Cong., 2d sess., December 15, 1896, p. 184.

⁹⁵ Report of the Proceedings of the Tenth Annual Convention of the American Newspapers Publishers Association, 1896, p. 59.

⁹⁶ Ibid., p. 66; see also Cong. Rec., 54th Cong., 2d sess., December 15, 1896, p. 186.

copies at pound rates. . . ."97 And to make it clear that this did not unduly hamper the rural press, Loud introduced a letter from the Agricultural Press League.⁹⁸

Perhaps Loud's stoutest allies were the postmasters general who had served since the late 1880s. He marshaled all the evidence possible from the department's annual reports for consideration by Congress.⁹⁹ Postmaster General Wilson S. Bissell's 1894 report proved especially useful to Loud's cause. Bissell noted that the weight of second class mail doubled in six years until it amounted to over 299 million pounds in 1894. The average cost of transportation alone was 8 cents a pound for all matter; most of that in the second class paid 1 cent a pound. The postmaster general believed that a too liberal sample copy privilege was largely to blame for the department's financial problems. Bissell noted that in a six-year period, the department admitted 24,304 new publications to the second class, but during the same time a newspaper and magazine directory recorded only a net increase of 3,747 or 15 percent of those granted permits. He concluded that 85 percent of the publications were ephemeral, that "after serving the temporary purposes of their proprietors" they folded, perhaps to be revived later. The circulation of most such publications, the postmaster general presumed,

⁹⁷ Letter from association in Cong. Rec., 54th Cong., 2d sess., December 15, 1896, p. 187.

⁹⁸ Ibid.

⁹⁹ See House Report 260, 54th Cong., 1st sess., for a review of the Post Office Department's comments on the problem.

"consisted mainly of sample copies."¹⁰⁰

The House passed the Loud bill after extensive debate¹⁰¹ and a Senate committee reported the bill favorably.¹⁰² The Senate committee suggested two changes relating to the subscriber rule. First, it would have limited the number of sample copies sent at the pound rate to 10 percent of a publication's "aggregate legitimate circulation," or, if in its first year of publication and still striving for readers, up to 100 percent. Second, it would have added language to the Loud bill counting as legitimate subscribers those who assume the obligation of paying for a periodical even if they did not initiate the order themselves.¹⁰³

The Senate post office committee's hearings elicited a number of opinions in favor of the bill. The president of the Agricultural Press League testified on behalf of limiting sample copies. He said the League was formed in part to fight unfair competition, "a class of papers going through the mails that have no definite legitimate subscription list. They send not one-tenth, but ten times as many papers through the mails as they have legitimate subscribers for." He identified the principal culprits as commercial house organs, one-time legitimate agricultural papers that were purchased by firms simply to obtain a list

¹⁰⁰ 1894 Annual Report quoted in ibid., pp. 192-95.

¹⁰¹ See, e.g., Cong. Rec., 54th Cong., 2d sess., December 19, 1896, pp. 306-308; January 5-6, 1897, pp. 462-519.

¹⁰² Ibid., February 22, 1896, pp. 2095-97; February 24, 1896, pp. 2169-72.

¹⁰³ Senate Report 1517, 54th Cong., 2d sess., p. ii.

of readers.¹⁰⁴ Testifying for the bill, the secretary of the International Committee of the YMCA described an abuse of the sample-copy provision. He told of a letter he received from a weekly with a paid circulation of 5,000 subscribers "asking for names to which sample copies may be sent. The publisher guarantees an issue early in February of not less than 40,000 copies. . . ."¹⁰⁵

The Senate failed to act on the Loud bill. Similar bills introduced in the next two years also fell short of passage.¹⁰⁶ Loud continued agitating for his reforms both in Congress and before the public.¹⁰⁷ His magazine articles emphasized the savings that would be realized by his plans.¹⁰⁸

Loud's involvement with the issue reached its denouement in 1901 when he served as chairman of the joint congressional commission investigating the post office.¹⁰⁹ Although the commission was formed primarily to study the rates of payment to railroads, Loud used the hearings to develop his ideas about the second-class mail. After several years of inquiry, Loud concluded that it was not possible to distinguish

¹⁰⁴ Testimony of T.E. Orr, *ibid.*, pp. 25-6.

¹⁰⁵ Testimony of Thomas K. Cree, *ibid.*, pp. 121-22.

¹⁰⁶ House Report 73, 55th Cong., 2d sess.; House Report 1715, 55th Cong., 3rd sess.

¹⁰⁷ See House Report 376, 56th Cong., 1st sess.

¹⁰⁸ E. F. Loud, "A Step Toward Economy in the Postal Service," *Forum*, December 1897, pp. 471-75; "The Need of Postal Reform," *North American Review*, March 1898, pp. 342-49.

¹⁰⁹ See William H. Moody, "The Work of the Postal Commission," *Independent* (January 24, 1901) pp. 195-98.

between legitimate and illegitimate second-class matter based on a publication's content. "You can only draw a line between the subscriber and the nonsubscriber," he asserted. The upshot of this realization was that the lowest rate should "continue on such matter . . . that the people want to pay for."¹¹⁰

Although Loud failed to win the statutory reform he sought, the momentum he generated, aided by Postmaster General Charles E. Smith, prompted the department to apply administrative remedies under existing laws. The post office scored at least one noteworthy success — eliminating books masquerading as periodicals from the second class.¹¹¹ In Houghton v. Payne, the U.S. Supreme Court sustained the department's administrative action even though it reversed sixteen years of earlier policy.¹¹² Less successful in securing its aims was a departmental order issued July 17, 1901, that limited publishers to sending a maximum of one sample copy for every subscriber. If the number of sample copies exceeded the number of subscribers, the publication was deemed designed for free circulation and thus ineligible for the pound rates under the law.¹¹³ When this administrative initiative was challenged, the assistant attorney general for the department advised that the law

¹¹⁰ Senate Document 89, 56th Cong., 2d sess., 1901, pt. 3, pp. 56-7, 67.

¹¹¹ House Document 608, 59th Cong., 2d sess., p. 16.

¹¹² 24 S.Ct. 590 (1904).

¹¹³ 1901 Annual Report 782; House Document 608, 59th Cong., 2d sess., pp. 17-18.

permitted such a limitation.¹¹⁴

**FURTHER HEARINGS
AND AN ADMINISTRATIVE CRACKDOWN ON SUBSCRIBER LISTS**

Chronic post office deficits, which many attributed to the below-cost second-class rates, brought forth another congressional joint commission in 1906. Although it covered a wide range of topics, a considerable part of the inquiry dealt with continuing abuses of subscriber lists. Indeed, something of a consensus emerged among many of the industry representatives and department officials that careful scrutiny of a publication's list of subscribers was the best test of its eligibility for the preferred rates. As before, the deliberations produced no statutory changes, but they emboldened the post office to apply the subscriber test more stringently than ever before .

The Penrose-Overstreet Commission, 1906

Virtually all segments of the periodical publishing industry sent representatives to take part in the commission's hearings, which convened October 1, 1906. Many commented on the subscriber list as a valid measure of a publication's character and entitlement to use the second-class mails:

— The National Editorial Association recommended that great weight be placed on the subscription list in determining admissibility. The NEA spokesman deemed legitimate all subscriptions paid for by the recipient

¹¹⁴ 4 Op. Asst. Att'y Gen'l 200-02 (July 25, 1906).

or another for a definite period.¹¹⁵

— Spokesmen connected with religious publishing interests told the commission that Sunday schools and churches subscribed for multiple copies in one person's name and the institution should be considered a legitimate subscriber.¹¹⁶ The Religious Weekly Publishers' Association conceded that subscribers habitually in arrears should be stricken from a publisher's list, but urged that some latitude be granted past-due accounts. The association recommended that the nature of a subscriber list be gauged by asking the publisher to submit a sworn statement about the list and the methods of securing subscribers.¹¹⁷

— The rural press was especially interested in protecting subscriptions based on credit. Surveying 4,101 of its members, the American Weekly Publishers' Association found that 87 opposed any postal law that required subscribers to pay in advance. Questions of credit should be decided by publishers.¹¹⁸ The Inland Daily Press Association agreed. A promise to pay the subscription should be a crucial factor in determining a publication's admission to the preferred mails. Its spokesman noted that "[t]he average country weekly newspaper sometimes carries its subscribers a year and a half to two. There may be a condition of bad crops or something of that kind." Thus the association

¹¹⁵ House Document 608, 59th Cong., 2d sess., p. 147.

¹¹⁶ Testimony of R. H. Boyd, *ibid.*, p. 236; Erastus Blakeslee, pp 247-48.

¹¹⁷ Testimony of Everett Sisson, *ibid.*, p. 605.

¹¹⁸ Testimony of W. D. boyce, *ibid.*, p. 312.

opposed prepayment as a test of a subscriber's legitimacy.¹¹⁹ Another IDPA representative suggested that the post office enforce the rule by requiring sworn circulation statements from publishers.¹²⁰

— The Periodical Publishers' Association applauded the vague statutory language, suggesting that its framers intended it to be elastic and construed to fit circumstances they could not anticipate in 1879. "Who can write a definition of 'a legitimate list of subscribers?'" the association's spokesman asked. "No man can do it. . . . [It's] beyond the power of the mind to ever write a definition which is comprehensive and satisfactory."¹²¹ He reported on a visit to the Post Office Department to ask for a compilation of decisions that interpreted the austere language of the law. "They told me they were embraced in circulars and letters scattered all over the Department . . . and the conclusion I reached was that they did not know any more about the real construction that had been put upon that than I did. . . ."¹²²

Representing the department, Third Assistant Postmaster General E. C. Madden complained that the current law was unenforceable in part because no one could determine what constituted a "legitimate list of subscribers." Madden offered an extensive list of subscription arrangements considered by his office to violate the statutory meaning of

¹¹⁹ Testimony of A. W. Glessner, *ibid.*, p. 371-77, quote at 374; see also the remarks of Wilmer Atkinson, publisher of the Farm Journal, pp. 671-72; and J. H. Neff, president of the National Association of Daily Livestock and Farm Papers, p. 681.

¹²⁰ Testimony of A. K. Lowry, *ibid.*, p. 390.

¹²¹ Testimony of William A. Glasgow, *ibid.*, p. 555.

¹²² *Ibid.*, pp. 392-93.

a legitimate list. Virtually all of the various schemes proscribed by his list turned on the question of whether the ultimate recipient of the publication paid, promised to pay, or accepted the periodical as a gift for a definite period.¹²³ Madden conceded that the "act of 1879 is a Pandora's box of possibilities of executive construction" whose terms were enforced with varying degrees of rigor depending on the administering officer.¹²⁴

The Commission's report underscored the futility of scrutinizing the purpose of a publication as a means of evaluating its

¹²³ Ibid., pp. 30-31. The lists includes: "alleged subscriptions which had been secured through the means of premiums, or gifts, to the subscriber, the effect of which is to return the entire subscription price, and sometimes more; alleged subscriptions secured through clubbing arrangements, through which one or more publications are given away, thus defeating the law prohibiting free circulation, or circulation at nominal rates; alleged subscriptions actually given free upon the recipients signing an order to the publisher alleging payment or making a promise of payment upon which there was no collection and no intention to collect; alleged subscriptions in connection with the sale of goods the bill for which contains an item for subscription to the publication, which item was only a part of the price of the goods, there being no actual charge for subscription; alleged subscriptions which were themselves gifts or premiums given by the publisher in consideration of the purchase of merchandise which he had for sale in his other business; alleged subscriptions of persons whose names had been secured by the publisher from the lists of defunct publications which defaulted on their subscription contracts; alleged subscriptions based, without any order, contract, or other action on the part of the addressees, upon the sending of copies of publications with a notification that failure to direct discontinuance by a fixed date would constitute such persons subscribers; alleged perpetual subscriptions; alleged subscriptions for numbers of copies for their patrons or prospective patrons, or other boards of trade, campaign committees, candidates for office, clubs, organizations, or individuals interested in the circulation of the publication for advertising or other purposes; alleged subscriptions carried indefinitely on a pretended credit. The devices by which this requirement of the law was and is circumvented are too numerous to mention. The law does not define a subscriber."

¹²⁴ Ibid., p. 31.

eligibility for second-class rates. Applying the statutory language proscribing publications designed primarily for advertising purposes was pointless, the Commission concluded, because "every periodical is designed for advertising purposes or no periodical is so designed."¹²⁵ Representatives of the various press associations concurred.¹²⁶ The Commission offered a bill that, it felt, emphasized technical tests rather than ones of content or purpose. Significantly, much weight was attached to delineating what constituted a legitimate subscriber. Specifically, the draft legislation would have (1) limited sample copies to 10 percent of the regular subscription list; (2) abolished all premiums; (3) prohibited combination offers or required a price be fixed to each item in the combination; (4) required that publications print their regular subscription price as well as reduced rates offered for quantity sales; and (5) imposed third-class postage on copies sent "otherwise than in response to an actual demand."¹²⁷

The Department's Crackdown and Its Consequence

The Commission retreated from most of its proposals because of mounting opposition from daily and weekly newspapers,¹²⁸ but the evidence it gathered pointed to a consensus on at least one matter — tightening the sample copy rule. Postmaster General George von Lengerke Meyer received advice from the assistant attorney general that the limit on

¹²⁵ *Ibid.*, pp. xxxvii-xliii.

¹²⁶ *Ibid.*, pp. xxxvii-xxxviii.

¹²⁷ *Ibid.*, pp. xlii-xliii.

¹²⁸ *Publisher's Weekly*, February 9, 1907, p. 679.

sample copies could be modified so long as it advanced the goals intended by Congress.¹²⁹ Meyer thereupon adopted the limit proposed in the Commission report — 10 percent sample copies. In another order affecting subscription lists, the department announced that it would discount as legitimate subscribers those who were in arrears for varying periods of time.¹³⁰ Together, the orders threatened the subscription lists of some periodicals.

These administrative actions, especially requiring reasonably prompt payment from subscribers, shook sectors of the magazine industry, according to the preeminent historian of American magazines. "This effectively ended the great period of mail-order journals," Frank Luther Mott wrote. "Those that did not quit outright lowered the price to ten cents a year and made bona fide collections of that amount, and then on the basis of swollen circulations, attempted 'the big time.' A few of the better ones succeeded for shorter or longer periods. . . ."¹³¹ These publications, which the post office had complained about for years, had started with the People's Literary Companion in 1869.¹³² E. C. Allen, the pioneer publisher of mail-order journals, eventually put together a stable of several issued from Augusta, Maine.¹³³ Much of the circulation was obtained through premiums and other schemes that extended the

¹²⁹ 4 Op. Asst. Att'y Gen'l 445-48 (May 9, 1907).

¹³⁰ New York Times, December 7, 1907, p. 8.

¹³¹ Mott, A History of American Magazines, vol. 4, p. 368.

¹³² See discussion above, p. 8.

¹³³ Ibid., p. 365.

subscription list. Not surprisingly, three-fourths of Allen's subscribers were far behind in their payments.¹³⁴ A large share of these journals died in 1907 and 1908.¹³⁵

The department's action brought a number of calls for an explanation. Under the new rule, publishers could send as samples up to 10 percent of the weight of their mailings to subscribers. Samples sent in excess of this limit had to pay transient second-class rates, 1 cent per 4 ounces. The third assistant postmaster general boasted that this "regulation has taken out of the mails since January 1 [1908] millions of copies of publications whose 'circulation,' for advertising purposes, was swelled to the limit."¹³⁶ Ten years later, Congress recognized this administrative rule -- the ten percent limit on samples -- in a statute.¹³⁷ For the first time, the department refused to count subscribers in arrears. Specifically, the rule fixed a grace period during which subscribers had to renew: for dailies, within three months; tri-weeklies, six months; semi-weeklies, nine months; weeklies, one year;

¹³⁴ Ibid. See also the 1908 Annual Report 281 where the postmaster general noted "that the abuses of the second-class mailing privilege can not be reduced to a minimum until the practice of offering premiums and other extraneous inducements for subscription is effectively stopped. . . . A 'legitimate list of subscribers' as required by the law, should consist of the names of persons who subscribed for the paper because they wanted it not because they . . . wanted a premium offered or desired to win a prize."

¹³⁵ The impact of the 1907 Post Office Department rulings is confirmed by examining Mott, History of American Magazines, vol. 4, pp. 364-68, which shows each publication's first and last date of issue. See especially p. 365, note 54.

¹³⁶ Senate Document 270, 60th Cong., 1st sess., pp. 9-10.

¹³⁷ Act of October 3, 1917, 40 Stat. 327, sec. 1101.

semi-monthlies, three months; monthlies, four months; bi-monthlies, six months; quarterlies, six months.¹³⁸ The liberal grace period for weeklies probably reflected the concerns of country editors expressed during the 1906 hearings that their subscribers often failed to pay on time because of the vicissitudes of the rural economy.

The post office braced itself against criticism. The department argued, first, that it had not arrogated excessive power to itself. The regulations "do nothing more than define, as the law makes necessary, some of the conditions under which a list of subscribers will be considered 'legitimate' and under which the primary design of the publication may be more easily determined."¹³⁹ The department's letter to Congress, second, explained that the regulations would benefit the "legitimate" press by curbing the "class of publications, which expend little or no money for editorial matter, which circulate at rates hardly more than nominal, if not in fact nominal."¹⁴⁰ To show the support the regulations enjoyed, the third assistant postmaster general forwarded to Congress hundreds of favorable articles, letters, and resolutions from those connected with the press.¹⁴¹

The operation of these rules was tested in two 1911

¹³⁸ Senate Document 270, 60th Cong., 1st sess., p. 10.

¹³⁹ *Ibid.*, p. 14.

¹⁴⁰ *Ibid.*, p. 8.

¹⁴¹ *Ibid.*, pp. 21-43; With only slight variation, the same information was communicated to Congress in two other documents. See Senate Document 204, 60th Cong., 1st sess.; and House Document 686, 60th Cong., 1st sess.

administrative decisions. The Orange Judd Northwest Farmstead was denied second-class mailing privileges after the department scrutinized its subscription list. Subscriptions were found to have expired, to have been purchased by banks for the readers at nominal rates, or to have been claimed by the publishers without any supporting evidence. Furthermore, the department surveyed a sample of the addressees and only 52 percent considered themselves subscribers. A U.S. Circuit Court of Appeals eventually endorsed the department's reading of the paid subscriber rule in this case, but reversed and remanded it to reconsider a question of evidence.¹⁴² In another case, the Woman's National Weekly's use of its second-class permit was curtailed. The post office decided that it did not satisfy the paid subscriber test because many copies were undeliverable, 24 percent of a sample of 3,000 readers did not consider themselves subscribers, and many subscriptions were given as gifts. The department ruled that, until the Weekly purged its subscription list, 24 percent of its circulation would have to go at the transient rates.¹⁴³

REQUIRING SWORN CIRCULATION STATEMENTS

In the years immediately following the 1907 administrative initiative, few changes were wrought in the substance of the paid subscriber rule. The Act of August 24, 1912, however, altered two parts of federal law that touched on the subscriber provision.

¹⁴² Myrick v. United States; Cunningham v. Same, (1st Circuit Court 1915).

¹⁴³ Senate Document 26, 62nd Cong., 1st sess.; see also 5 Op. Asst. Att'y Gen'l 493-502 (November 8, 1911).

After many years of sporadic agitation, Congress broadened the privilege enjoyed by fraternal, professional and similar societies to send their periodicals at the lowest rates. The law stipulated that members who paid at least half of the subscription price through dues or assessments should be counted as legitimate subscribers.¹⁴⁴

The 1912 act, sometimes known as the Newspaper Publicity Law, also enhanced the department's ability to scrutinize the purpose of publications and the nature of their subscriptions, at least those of daily newspapers. The law began as a rider attached to the 1912 post office appropriation act. It mandated that all publishers using the second-class mails had to file twice a year a sworn statement giving the names of owners and others with sizable financial interests in the publications. Periodicals also had to mark as "advertisement" any editorial matter for which they received consideration. Daily newspapers had the additional obligation of attesting to their average paid circulation for the previous six months.¹⁴⁵ New York newspapers, with the backing of the American Newspaper Publishers Association, tested the constitutionality of the law. In their brief to the U.S. Supreme Court, the newspapers focused their attention on the financial disclosure

¹⁴⁴ Act of August 24, 1912, 37 Stat. 551. The law also increased such publications' rights to carry advertising. For background on the part of the 1912 law affecting publications of fraternal societies, see Senate Document 648, 61st Cong., 2d sess.; and Senate Document 815, 61st Cong., 3rd sess.).

¹⁴⁵ 37 Stat. 553-54; Edwin Emery, History of the American Newspaper Publishers Association (Minneapolis: University of Minnesota Press, 1950), pp. 114-15; Alfred M. Lee, The Daily Newspaper in America (New York: Macmillan, 1937), pp. 238-9.

and identification of advertising matter, claiming that they violated the First Amendment. The Court upheld the constitutionality of the law in a unanimous decision.¹⁴⁶

The requirement imposed only on daily newspapers — attesting to circulation — appeared in a conference committee report with no explanation as to why one class of periodicals was singled out.¹⁴⁷ Even before the Supreme Court rendered its decision, the attorney general advised that publishers had to attest to the size of their entire circulation, not just the portion sent through the mails. This aided the department in enforcing its rule that a legitimate list of subscribers had to have 50 percent or more of the copies sent to persons "who voluntarily seek it and pay for it with their own money."¹⁴⁸

After the 1912 law created a mechanism to monitor a publisher's circulation, the paid subscriber rule underwent only minor refinements. In 1915, the postmaster general complained that the practice of offering premiums to induce subscriptions flouted the law. He argued that the second-class privilege should be reserved for those publications that "circulated in response to a genuine public demand based on their

¹⁴⁶ 229 U.S. 288 (1913); Emery, History of the American Newspaper Publishers Association, pp. 115-117.

¹⁴⁷ Cong. Rec. 62nd Cong., 2d sess., August 22, 1912, p. 11, 554.

¹⁴⁸ 29 Opinions of the Attorney General 526-32 (September 25, 1912) quoting 1902 Postal Laws and Regulations at 531; see also 30 Opinions of the Attorney General 244-45 (January 5, 1914).

merits."¹⁴⁹ He launched an inquiry that culminated two years later in a delineation of the nominal rate rule. First, rates would be deemed nominal were the subscriber obtained a reduction of 50 percent or more from the advertised price, whether through a direct discount or a premium. This simply reaffirmed a test the department had been using for many years. The second rule discounted subscriptions obtained through agents who kept most of the money, with the publisher receiving little or no payment.¹⁵⁰ In 1919, the postmaster general applauded the success of these rules, which, he claimed, were welcomed by "the vast majority of publishers who were glad to be relieved of the unfair competition which formerly existed."¹⁵¹

A BRIEF OVERVIEW OF THE RULE IN CONGRESS, 1920-1964

Congressional concern over the nature and effect of the paid subscriber rule dropped drastically after 1912. Congress's attention turned specifically to the rule on four occasions, all of them involving a refinement of the statute requiring that publishers make sworn statements about their circulation.

In 1946 Congress required that publishers of newspapers other than dailies provide sworn circulation statements.¹⁵² One reason was equity. In addition, publishers of smaller papers hoped this bill would

¹⁴⁹ 1915 Annual Report 36-7.

¹⁵⁰ 1917 Annual Report 64-5.

¹⁵¹ 1919 Annual Report 22.

¹⁵² Act of July 2, 1946, 60 Stat. 416.

make it less tempting for some in their ranks to inflate circulation figures to attract national advertising. In fact, the Senate report on the bill asserted that the "inadequate proof of circulation statements" was partly to blame for the decline of the weekly press.¹⁵³

Seemingly with their approval, magazines were next subjected to the requirement. The post office recommended the legislation as especially helpful in dealing with magazines because of the "tendency toward abuses in the practice of free circulation."¹⁵⁴ The Magazine Publishers' Association did not oppose the legislation. It passed June 11, 1960.¹⁵⁵

In 1962 Congress amended the language of the 1912 law to make it more comprehensive and precise. The 1912 law required sworn statements about a publication's paid circulation. The revision broadened the requirement to specify that data be submitted on all circulation, whether paid or not, as well as the means of distribution.¹⁵⁶ This enabled the department to obtain figures on a publication's total circulation. Representatives of the department told a House committee that such data would be useful in identifying tie-in sales, illegitimate

¹⁵³ Senate Report 724, 79th Cong., 1st sess., p. 2; see also 1947 Annual Report 32.

¹⁵⁴ Quote in House Report 573, 86th Cong., 1st sess., p. 3; see also Senate Report 1488, 86th Cong., 2d sess.

¹⁵⁵ Act of June 11, 1960, 74 Stat. 208.

¹⁵⁶ Act of October 23, 1962, 76 Stat. 1144, sec. 2.

gift subscriptions, and similar abuses of the paid subscriber rule.¹⁵⁷ A few press associations appearing before the committee asked questions, but none opposed the law.¹⁵⁸

The 1962 law, curiously, exempted trade publications serving the performing arts from having to publish their circulation statement (they still had to file it with the post office). The hearings to close this loophole elicited comments on the paid subscriber rule reminiscent of the 1901 and 1906 investigations. Arnold Olsen, a representative from Montana, suggested that the second-class mail privilege was intended for publications having a public demand. "Subscribers is the qualification because we want these publications that have the privilege of second-class mail to bear some responsibility to the subscriber-readers; is that correct?" he asked rhetorically.¹⁵⁹

In the half century after the passage of the Newspaper Publicity Law the question of what constitutes "a legitimate list of subscribers" arose in other contexts. The department, of course, continued to hear appeals from decisions denying second-class permits on those grounds.¹⁶⁰ And the proliferation of controlled circulation

¹⁵⁷ Filing Information by Publications Having Second-Class Mail Privileges, Hearings Before the House Committee on Post Office and Civil Service, 87th Cong., 2d sess., p. 7.

¹⁵⁸ See ibid.

¹⁵⁹ Filing of Information Relating to Second-Class Mail, Hearings Before the House Committee on Post Office and Civil Service, 88th Cong., 2d sess., p. 8.

¹⁶⁰ See, e.g., 1948 Annual Report 39; 1949 Annual Report 56.

publications kept alive the issue of the paid subscriber rule.¹⁶¹ But Congress did little to modify the rule for general second-class periodicals.

CONCLUSIONS

At least three considerations help explain the development of the paid subscriber rule during its formative years, that is, from 1879 to 1912. The first and most subtle was the relation of the rule to the general policy objectives of the second-class mail category. More understandable were the administrative imperatives that actuated the post office. And underlying all the policymaking and administering were developments in periodical publishing, the most important of which had to do with advertising and intra-industry competition.

The 1879 statute spawning the paid subscriber rule continued Congress's long-standing commitment to encourage the dissemination of information by underwriting part of the cost of transportation. But it also reflected the administrative necessities the department faced in a changing publishing environment. The relevant language — that dealing with a legitimate list of subscribers and free or nominally paid circulation — was adapted from earlier statutes. Previous laws had used the words "bona fide subscribers" to reduce the number of unsolicited and often undeliverable periodicals entered in the mails, which wasted the department's resources. The other pertinent clauses were borrowed

¹⁶¹ See, e.g., 1948 Annual Report 39; 1949 Annual Report 56.

verbatim from an 1876 act expressing congressional intent to treat advertising sheets and publications not actively sought by the public (often one and the same) less preferentially than second-class matter.

The advent of the paid subscriber rule in the late 1870s and its elaboration in the next decade was linked to the boom in advertising that revolutionized publishing, especially magazines dependent on the mails. Advertising increased four-fifths in the 1880s, one-third in the depression-ridden '90s, and half between 1900 and 1905.¹⁶² The balance between editorial and advertising content shifted; some publishers realized that forsaking subscription revenue made good business sense because the increased circulation warranted higher advertising charges. Hence they resorted to various schemes to maximize circulation.

The elaboration of the paid subscriber rule is in large part the story of expanding administrative latitude. While Congress exhibited interest in the subject through at least 1912, it was always more preoccupied with rates than with fine-tuning administrative tests. The delineation of the paid subscriber rule before 1912 followed a typical pattern: the department confronted a new problem, waited a while for statutory authorization to deal with it, found that none was forthcoming, tried administrative remedies, and hoped that Congress would reify it in law, as it sometimes did. More than once, the department implemented plans that Congress had specifically declined to adopt. As early as 1879 the New York Times expressed its preference for specialists making policy: "[T]he laws of Congress are the work of men who know as much

¹⁶² Mott, History of American Magazines, vol. 4, p. 20.

about the details of Post Office business as a monkey knows about trigonometry. . . . Congressional lawyers and hair-splitters are not fit for such work."¹⁶³

The Post Office Department found the paid subscriber rule serviceable in dealing with a number of problems associated with the second-class mail. Although Congress at first permitted an unlimited number of sample copies to be sent at most-favored rates, the department decided that publishers used this to circumvent the paid subscriber rule. It unilaterally cracked down, eventually limiting samples to 10 percent of the subscribers' copies. Similarly, the post office began developing rules to give meaning to the free circulation and nominal price tests. By 1917 it had decided that readers had to pay about 50 percent or more of the regular price to count as bona fide subscribers; and that credit was permissible, but subscribers habitually in arrears would be stricken from the list. Congress substantially interfered with only one of the department's rules when it expressly defined members of fraternal societies as legitimate subscribers to their associations' magazines.

Established publishers often allied themselves with the department in seeking tightened rules for admission to the second class. Those in Congress, the post office, and in the publishing industry itself resorted to the term "illegitimate" to designate the publications that the rules were meant to bar from the lowest rates. The "legitimate" and "illegitimate" publications, of course, competed for advertising, so the struggle over postal rules mirrored more general intra-industry competition. Congress and the department used this division to their

¹⁶³ New York Times, January 26, 1879, p. 6.

advantage; they claimed that the "better" segments of the industry endorsed the tests of "legitimacy," notably the paid subscriber rule. Rule-making was usually sensitive to important constituencies.

Responding to the needs of the rural press, for example, the department agreed to recognize subscriptions based on credit as long as there was a reasonable expectation that payment would be made. Ironically, the publishers' initial opposition to the sworn circulation requirement of the 1912 law melted until by the 1940s leading press associations applauded its value in providing public scrutiny of circulation claims.

To be sure, the paid subscriber rule represented some mix of public policy, administrative convenience, and private interest. Reviewing the rule's efficacy, several postmasters general and at least two congressional commissions recognized its advantages in securing some of the objectives of second-class mail policy. Congress may have intended to encourage the dissemination of information through postal privileges, but it never seriously contemplated extending the benefits to all printed matter. Below-cost rates rested on the rationale that some publications contributed to the public good beyond their value to publishers and readers. In the closing decades of the nineteenth century, it seemed increasingly clear to those in Congress and the post office that advertising sheets mainly benefited their publishers, not society.

In striving to draft laws and rules to keep such matter from enjoying the lowest rates, it proved futile to place too much emphasis on the character or purpose of a publication. The language of the 1879 law, "designed primarily for advertising purposes," provided little help once virtually all publications carried liberal amounts of advertising. But

determining public demand for a publication comported with congressional intent, regardless of how ill-defined it might have been, underlying the second-class privilege. In short, publications worth a reader's material consideration were entitled to enjoy second-class rates. Moreover, the public demand test lent itself to relatively easy and even-handed (considering the alternatives) administration. Instead of making decisions about the character of a publication, or its purpose, attention was focused on a relatively tangible and objective characteristic — the nature of the public demand for it.