II. Radio

A. The Media Buying Process

The purchase of commercial time on radio involves several steps that begin with developing marketing and media objectives. In the course of establishing these objectives, advertisers identify consumers who are to be targeted in the advertising campaign (see, Overview of Media Planning, Diagram A, Appendix A). The consumer target may be identified in terms of demographic variables (*e.g.* males, ages 25 to 54, with household incomes of $50,000). Focusing the advertising campaign on a targeted segment of the market enables advertisers to make efficient use of their resources. Money is concentrated on buying advertising time on media patronized by people likely to consume the companies' products.

In 1997, for example, the New York Volvo dealers association adopted the following demographic profile for a media buy campaign:

Education level: college graduate plus;
Household income - $75,000;
Age - 25 to 54.

Without stipulating race, the income and educational variables of this profile automatically disqualify radio stations that program to Black and Hispanic consumers.[59] In an attempt to win the account, Emmis Broadcasting, which programs to the Black community on WRKS-FM, conducted further research.

Emmis found that there is very little relationship between the profile adopted by Volvo and the profile of the vast majority of Volvo owners. Scarborough[60] qualitative data[61] indicated that 80 percent of Volvo owners in New York City *do not* fit the profile of the Volvo dealer. Nearly 29% of New York Volvo owners were found *not* to be age 25 to 54; over 60% had household incomes *less* than $75,000; and nearly 65% did not graduate from college. The station provided evidence that the amount of money paid for a new car by people who listen to black/urban radio is similar to the amount paid by general market station listeners. Research showed that 12.5% of urban and general market listeners pay

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[59] The average household income of Blacks and Hispanics is less than Whites and Asians (see Chart B).

[60] Scarborough Reports is a division of The Arbitron Company.

[61] Data for this example was supplied by Judith Ellis, Senior Vice President of Emmis Radio and General Manager of WRKS-FM. Scarborough Qualitap Target Profiles in support of the position taken by Emmis Radio are on file with CFR.

$20,000 to $30,000 for new cars; while 6.1% of the urban radio listeners and 7.6% of general market listeners pay $25,000 to $30,000 for new cars.[62]

Emmis presented data to the advertiser's buying service that they believed showed that urban listeners fit the demographic profile of Volvo consumers. The research findings were not contested, yet they did not persuade the advertiser's buying service. After prolonged discussions, the dealer's association decided not to buy WRKS on grounds independent from the market research. The station manager reported:

> *We went to the buying service. They gave us a lot of time. We got to see people right up the line; the account people. They couldn't say no. It was right there in black & white; we were showing them. And then it got down to—what we were told by the buying service—was the head of the dealership who said,* ***"I just don't want to. We just don't want it on that radio station****."*
>
> *...I don't believe that the criteria ever really mattered to begin with. I think to a great degree the criteria exist so that they can eliminate whoever they want to eliminate, i.e. the Black stations. And they buy whoever they want.*[63]

As an example of "no Urban dictates," Ms. Ellis also reported that the luxury car manufacturer BMW refused to buy advertising time on urban radio stations in New York, including WRKS-FM and WBLS-FM. [64] The company chose not to advertise on these stations despite qualitative research that showing that Black adults, aged 25 to 54, account for 46 percent of the people who own or lease BMWs in New York.[65]

While it is normal business practice for advertisers to identify a target market, factors other than market research frequently influence the selection of radio stations that will be part of the media mix. This study has identified seven reasons related to ethnic identity and economic status that may account, at least in part, for "no Urban/Spanish dicates" and "minority discounts:

- racial/ethnic minority consumers are incorrectly stereotyped as inappropriate for certain luxury products or services;
- stations that program to minority listeners are excluded based on average listener income, regardless of data about consumption patterns
- the desire to disassociate a company's image from minority consumers;
- language barriers, in the case of Hispanic radio;

[62] Scarborough Qualitap Reports on file with CFR.

[63] Interview with Judith Ellis, Emmis Broadcasting, pages 14 - 15. (emphasis added).

[64] Telephone interview with Judith Ellis, Emmis Broadcasting, August 10, 1998.

[65] Scarborough Qualitap Report, New York, March 1997- February 1998 on file with CFR.

- unfounded fears that minority consumers pilfer;
- media buyers' unfamiliarity with the consumer habits of minorities;
- efforts by broadcasters and / or their national sales representatives to discourage advertisements on minority-formatted stations; and
- the belief that minorities can be reached through the general media.

It is noteworthy that in the interviews conducted for this survey, lack of responsiveness to ads on urban and Spanish stations was not raised as a reason for not placing ads there. The factors listed above were predominant in the experience of the broadcast and advertising professionals interviewed. Further research should investigate response rates to ads in minority and general format stations, and their impact on "no Urban / Spanish dictates," "minority discounts," and ad placements.

In the following section, explanations for imposing "dictates" and "discounts" are further explored.

B. "No Urban / Spanish Dictates" and "Minority Discounts"— *What* Are They & *Why* are They?

In order to gain a better understanding of industry practices, CRF conducted twenty-one in-depth interviews[66] and surveyed General Managers at minority-owned broadcast stations with a written questionnaire.[67] The next two subsections present findings based upon these research efforts.

1. No Urban/Spanish Dictates Examined

The term "no Urban / Spanish dictates" is industry jargon for the practice of prohibiting the placement of ads on stations that have an urban or Spanish[68] format. In this study the terms "dictates" and "no Urban / Spanish dictate" are used interchangeably. "Minority discounts" refers to the practice

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[66] A list of the individuals interviewed is provided in Appendix C.

[67] The questionnaire was completed by 64 of 284 (or 22.5%) of the minority-owned radio stations. The survey instrument and the consolidated results are provided in Appendix J.

[68] Data collected by this study indicate that "dictates" are frequently imposed upon stations that air programming targeted to either Blacks or Hispanics. Interviews with the following media executives provided evidence of dictates imposed upon Spanish-formatted stations: Tom Castro, Chairman & President of El Dorado Communications; Luis Alvarez, Local Sales Manager, WSKQ, Spanish Broadcasting Systems; Carey Davis, General Manager, WSKQ, Spanish Broadcasting Systems; Roman Pineda, President of Caballero Media; and David Lykes, President of Heftel Broadcasting. The U.S. Department of Commerce has identified only four Native-American radio licensees. Only one, KTNN-AM, responded to the survey questionnaire circulated by this study stating that it had *not* encountered a "dictate," but that "some advertisers in minority [Navajo nation] border towns have been telling us they aren't interested in Navajo business," Survey of Tazbah McCullah, General Manager, KTNN-AM.

of buying time on a minority-formatted station at a rate that would be less than what is paid to a general market-formatted station with comparable audience size.

Occasionally an advertising agency will expressly indicate that its client has a "dictate" or policy not to buy advertisements on urban or other minority-formatted stations. Sherman Kizart, Director of Urban Marketing at Interep in Chicago which represents radio stations soliciting ads from national advertisers and their ad agencies, recounted that he "routinely" runs into these exclusionary practices.[69] The Dallas Morning News quoted Kizart regarding the distribution of ad dollars in the radio industry:

> *When mapping out marketing plans, major advertisers and ad agencies sometimes specify what are called "no-Urban" dictates, Mr. Kizart says. That means no black-oriented stations are to be included when ads are purchased.*
>
> *'I just got off the phone with an advertising agency where I had to deal with it, where there was a no-Urban dictate for a specific car brand' that is beginning a national radio campaign, Mr. Kizart says. He wouldn't name the agency or the automobile company.*[70]

Kizart observed that "there is often 'no rhyme or reason' for the exclusion of black-oriented stations in marketing plans."[71]

Kernie Anderson, General Manager at WBLS-FM in New York, an African-American owned station offering urban-formatted programming, reported that "the reality is that there are still a significant number of accounts that regularly tell our salespeople 'no urban dictates,' which translates into saying that clients refuse to buy time on minority-oriented stations."[72]

Judith Ellis, Senior Vice President of Emmis Broadcasting, a majority broadcasters with an urban formatted station in New York, echoed the sentiments of Mr. Anderson, "There is one ad agency that told our account executive that Black people do not buy linens when there was a Wamsutta linens buy. I could go on and on about this."[73]

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[69] John Kirkpatrick, *Making Waves: Concern over Distribution of Ad Dollars Stirs Up Radio Industry*, ("Making Waves"), The Dallas Morning News, June 28, 1998, 1H; 1998 WL 13084258.

[70] *Id.*

[71] *Id.*

[72] Kendall Wilson, *Many Outraged by Agency's Snub of Minority Radio*,, The Philadelphia Tribune, May 19, 1988 1A; 1998 WL 11493873.

[73] Interview with Judith Ellis, Emmis Broadcasting, page 13.

Cheryl Womack, Local Sales Manager for KJLH-FM in Los Angeles, a minority-owned, urban formatted station, heard an airline's ads on other radio stations in the Los Angeles market.[74] She approached the airline's advertising agency about buying ad time on KJLH. The ad agency told her the client was "not buying urban stations." [75] Later, KJLH secured an ad for that airline through a national buying service, which seeks bulk national ad placements for clients. Ms. Womack did not know whether the ad placement resulted from a change in strategy by the client, or the difference in advertising agencies. She suspected that the ad agency's perspectives had a great influence on the original refusal to consider their urban station.[76]

Katz Media, a firm that represents broadcasters selling air time to advertisers, was lambasted on ABC Radio's "Tom Joyner Morning Show"[77] for a memo the firm authored coaching sales people on ways to pitch time on general market stations against minority-formatted stations.[78] The memo said that urban stations fared poorly in delivering "prospects, not suspects."[79] Stu Olds, President of Katz Media, appeared on the May 15 show to discuss the memo.[80]

MediaWeek reported that a week later, Olds met privately with Joyner and co-host Tavis Smiley to discuss what Katz should do in the wake of the memo. Olds promised to hire more minorities at Katz. He also pledged to "personally call on 20 companies both parties agreed had a 'no urban dictate'—meaning they have a policy against advertising on black stations— and pitch his black station clients to them himself."[81] Though Olds and Joyner would not specify which companies were identified,[82] their agreement confirms that media executives such as Olds recognize that "no Urban dictates" are a current marketplace reality.

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[74] Telephone interview with Cheryl Womack, Local Sales Manager, KJLH-FM, November 13, 1998.

[75] *Id.*

[76] *Id.*

[77] "The Tom Joyner Morning Show" is the most highly rated urban-formatted morning show in the country. *See*, *Ratings Racism: When No. 1 is Not*, ("Ratings Racism") MediaWeek, June 22, 1998, 1998 WL 10320344.

[78] *Id.*

[79] *See* Katz memo, page 12, (on file with CFR).

[80] *See also*, Letter from Stu Olds, May 26, 1998, apologizing for the language and tone of the Katz memo and referring to the discussion of it on the "Tom Joyner Morning Show," (on file with CFR).

[81] *Ratings Racism*, MediaWeek, June 22, 1998.

[82] *Id.*

Dictates against advertising on minority targeted radio have deep roots. The FCC released a report in 1978 on its minority broadcast ownership conference. The report discussed advertising practices as a barrier to minority ownership:

> *It appears, however, that black stations are often told that time will not be bought in advance of the "buy," notwithstanding their numbers. [Advertising] (a)gencies claim that their clients impose a "no ethnic" restriction on the advertising medium used due to the nature of the product. Yet, a double standard may exist even at this level, for white-owned stations with formats aimed at the Black community may not be barred from securing these ads.*[83]

These dictates appear to be based on the station's minority format, rather than individual assessments of the station's ratings, audience or technical characteristics.[84]

Minority broadcasters surveyed for this study reported that they also encounter "dictates" disguised in a variety of ways. When asked if they had encountered discriminatory advertising practices that go by a name **different** from "no Urban/Spanish dictates," the survey respondents provided the following examples: *"We're out of budget;" "We used the medium, but it didn't work;" "We are not buying radio;" "We can't get financing for [minority customers];"*[85] *"There is no money for your market;"*[86] *"We are not looking for that kind of audience."*[87] While these may constitute legitimate reasons for not advertising on a station, the broadcasters responding to the survey indicated that the reasons provided were often a ruse.

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[83] *Report on Minority Ownership in Broadcasting*, Federal Communications Commission, 1978, at 26. W. Cody Anderson, General Manager of WHAT-AM, reported: "In my earlier years in radio, agencies used to say 'no ethnic' advertising. Because of laws, they were prevented from doing that, but they continued to practice it. They just didn't say it." Kendall Wilson, *Many Outraged by Agency's Snub of Minority Radio,* The Philadelphia Tribune, May 19, 1998 1A, 1998 WL 11493873.

[84] The National Telecommunications and Information Administration found that in 1996, AM stations represented 50% of non-minority owned stations, but 69% of African-American owned and 80% of Hispanic-owned stations. Non-minority owners also had higher average signal power than minority owners. NTIA Minority Broadcast Ownership Report, 1996, pages 4-7. Anecdotal evidence collected indicates that FM stations with high signal power are subjected to "no Urban/Spanish dictates," see page 26 and to minority discounts, see page 34 Technical characteristics of the station are unlikely to be the selective factor for imposing dictates, particularly since they are applied across the format. Further research should examine the impact of a station's technical characteristics on advertising performance and the imposition of dictates or discounts.

[85] Survey response of Andrew Langston, CEO, and Owner of WDKX-FM.

[86] Survey response of Preston Brown, General Manager of WCLM - FM.

[87] Survey of Manuel Davila Jr., Owner, and General Manager of KBSO-FM, KCCT-AM, and KFLZ-FM.

Migdalia Colon, Vice President of the Spanish-formatted station WCUM-AM said she was once told, "*We are not doing ethnic stations.*"[88] On another occasion she was told that her market was not included in a promotion, "*but then we would hear their product on all the Anglo Stations in our market.*"[89]

Of those minority broadcasters responding to the survey, ninety-one percent indicated that they had encountered a "no Urban / Spanish dictate" at least once from the advertising agencies or advertisers from which they solicit business. An average of 26 "dictates" were reported to be encountered annually.

Urban stations that are clients of The Interep Store regularly report to the company incidents that they believe constitute "no Urban dictates."[90] Interep routinely investigates such reports and contacts advertisers in order to verify them.[91] If Interep encounters reluctance or a refusal on the part of an advertiser to place ads on urban-formatted stations, the national rep firm will attempt to "turn around" the "dictate" with market research that justifies such a buy. In rare instances, according to Interep executive Stewart Yaguda,[92] do advertisers maintain a dictate after being presented with such research. Interep's Sherman Kizart reported to The Dallas Morning News:

> *'The excuse I hear is that the clients are looking for 'upscale,' and implying that African-Americans aren't upscale...My job is to turn around these no-urban dictates. There are a lot of negative perceptions that unfortunately exist about the black consumer market and their viability'... including 'lack of money, lack of education, lack of professional jobs.'*
>
> *The only way to change that... is 'by giving people the right information' - a tactic that often works, he says.* [93]

Contrary to this view, the minority broadcasters responding to CRF's survey indicated that in most instances there is either no response or a continued refusal to buy after market research is presented to advertisers or ad agencies (see page 38).

The study was not able to investigate advertisers' reasons for "no Urban / Spanish dictates" because of funding limitations. The anecdotal evidence collected suggests minority broadcasters and professionals working in the format believe they may be based, at least in part, on stereotypes based

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[88] Survey response of Migdalia Colon, Vice President of WCUM-AM.

[89] *Id.*

[90] Stewart Yaguda, President of Radio 2000, a division of The Interep Store.

[91] *Id.*

[92] *Id.*

[93] *Making Waves*, The Dallas Morning News, June 28, 1998.

on the race or ethnicity of the station's audience.[94] Dictates could also be a short-hand way of excluding unlikely customers, based on perceptions of their purchasing power, consumption patterns or other factors.

Blanket dictates based on a station's format preclude a broadcaster from competing for the advertisement of the goods or service. While it may save resources for an advertiser or its ad agency to exclude an entire class of stations from consideration so they can focus on others, this practice has profound implications. Rather than evaluating a station based on its individual merits— its rating, its particular audience characteristics, the price of ads—the station is excluded based on its minority format.

To the extent that dictates are based on the race, ethnicity or national origin of the broadcaster's audience, one could argue that such practices amount to an attempt to avoid having minorities as customers. In certain areas, such as housing and public accommodations, Congress has enacted legislation stating that businesses cannot limit their customers based upon race, color, or national origin.[95] Indeed, in the housing area Congress has recognized that advertisements which convey a message that certain groups are not welcome are detrimental to our society and contrary to public policy. Thus, the Fair Housing Act explicitly prohibits the publication of any "advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin . . ." 42 U.S.C. § 3604(c).[96] While there are no similar statutes prohibiting advertisers from selecting stations on the basis of race, the public policy concerns here are similar to those motivating various anti-discrimination statutes. Specifically, these policies would suggest that stations should be evaluated on the basis of their

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[94] *See,* Section II-B-3.

[95] *See,* Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a; Fair Housing Act, 42 U.S.C. §§ 3604 *et seq.* Title II prohibits discrimination on the basis of race, color, religion, or national origin in the provision of public accommodations such as hotels, restaurants, and places of entertainment. The Fair Housing Act prohibits, among other practices, discrimination in the sale or rental of housing, on the basis of race, color, religion, sex, familial status, handicap, or national origin. Moreover, judicial cases interpreting the Fair Housing Act's prohibitions have recognized that discriminatory intent need only be one motivating factor for the conduct. *See, Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977); *United States v. City of Parma*, 661 F.2d 562, 575 (6th Cir. 1981), *cert. denied*, 456 U.S. 926 (1982) ("There is no requirement that such intent be the sole basis of official action"). *See also*, *United States v. Scott*, 788 F. Supp. 1555, 1562 (D. Kan. 1992) ("[w]hether motivated by animus, paternalism, or economic considerations, intentional . . . discrimination is prohibited by the [Fair Housing] Act.").

[96] See also, *Ragin v. Harry Macklowe Real Estate Co.*, 6 F.3d 898 (2d Cir. 1993). Congress decided that the prohibition on discriminatory advertisements was so important that small housing providers who are otherwise exempt from the Fair Housing Act's prohibitions, (the so-called "Mrs. Murphy exemption"), are still subject to the provision prohibiting discriminatory advertisements (*see*, 42 U.S.C. § 3603(b)).

individual merit—ratings, particular audience characteristics, prices —rather than being excluded on the basis of the race of their listeners. "No Urban/Spanish dictates" appear to prevent broadcasters serving the minority community from obtaining ads in the same way that exclusionary policies by hotels or real estate agents prevent minorities from obtaining services. This has implications for competition, fundamental fairness and service to the public.

2. Minority Discounts Examined

"Minority discounts" are based upon discrepancies in the rates paid to comparable minority-formatted and general market-formatted stations. The difference may be based upon the amount of "cost per point" paid to such stations. The general market cost per point is the rate that advertisers pay to reach one percent of the entire population in an Arbitron metro market (see Glossary and Overview of Media Planning in Appendix A). When a minority discount is used, a minority-formatted station is compensated at a lower rate than the general market cost per point, even though it may have more or the same number of listeners than a general market station.

For example, a well-known bedding and mattress retailer reportedly offered to buy time on on WRKS-FM and WQCD-FM in New York. Both stations are owned by Emmis Radio. The urban-formatted station, WRKS, was offered a general market cost per point of $330 while the general market station, WQCD, was offered a general market cost per point of $365. The urban station had a larger market share than general market station. Moreover, data on consumer buying habits indicated that urban listeners were more inclined to purchase bedding products (*see,* page 86 regarding telephone interview with Judith Ellis).

Advertisers interested in targeting their products to minority consumers often pay minority-formatted stations on the basis of the Hispanic cost per point or the Black cost per point. These rates are based upon the cost of reaching one percent of the Hispanic population within the metro market (*i.e.* the Hispanic cost per point) or the cost of reaching one percent of the Black population within the metro market (*i.e.* the Black cost per point). A comparison of the Black cost per point and the general market cost per point indicates that in some markets the Black cost per point is higher, reflecting the more targeted nature of the audience. (see, Table 5). However, advertisements purchased on the basis of the Black cost per point are estimated to comprise only a small fraction of the buys on urban radio stations[97] (*see*, Section II-C-2-d).

Minority discounts also occur when advertisers insist on paying less than the minority-formatted station's rating or audience demographics would indicate. For example, according to a Spanish Broadcasting System sales executive:

> *[Media buyers] don't ask for your rate card....They tell you what the Hispanic cost per point is. When comparing certain Hispanic costs per points to [what] the general market cost per point are, the cost per point that they are quoting you is much lower....[J]ust this morning a sales person was in here talking to me about a*

[97] Interview with Sherman Kizart, Director of Urban Marketing, The Interep Store, October 1, 1998.

$45 cost per point which is ridiculously low. But it's not the first time I've heard that... A general market cost per point is around $280, which translates basically to they are trying to have us come in at a $45 cost per point when the average [Hispanic] cost per point is $75.[98]

Minority broadcasters interviewed for this study reported that "minority discounts" account for a substantial amount of lost advertising revenues. Carey Davis, General Manager of two Spanish formatted stations in New York, estimates that "minority discounts" account for 25% of the lower amount of revenues earned by his stations.[99] Spanish-formatted WSKQ-FM, which Davis manages, was ranked number two in the New York market in 1997. Its 6.1 local commercial share (audience size), represented a much larger audience than the two general market stations, WCBS-FM and WXRK-FM, with local commercial shares of 4.6 and 5.5, respectively. Despite their smaller listening audience, the two general market stations earned $34.8 million and $37.3 million, compared to $21.5 million for WSKQ.[100] The power ratios reflected these differences: 0.72 for WSKQ, 1.14 for WCBS, and 1.61 for WXRK.[101]

Minority broadcasters responding to CRF's survey estimated that 61% of their sales transactions were reduced by "discounts." The amount of the "minority discount" was estimated to average 59%.

Kearnie Anderson, General Manager of minority-owned, urban-formatted WBLS-FM in New York City, said that minority-owned stations have to work harder for the dollars they earn. He said his station does more promotions of events in its local market than its competitors do. He believes they have to offer the advertiser more "value-added" benefits through promotions, such as events outside of air time, to get a sales dollar.[102]

3. Rationales for "Dictates" and "Discounts"

Advertiser avoidance of media outlets based on the ethnic identity of the audience would appear to contradict the natural inclination to increase customer patronage and sales. However, product image control, lack of knowledge, and stereotypical views about minority consumer habits may be a few factors that explain the reason for "dictates" and "minority discounts."

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[98] Interview with Luis Alvarez, Local Sales Manager, WSKQ and WPAT pages 5 - 6.

[99] Interview with Carey Davis, General Manager, WSKQ-FM and WPAT-FM, (Spanish Broadcasting System), page 8.

[100] 1998 BIA MasterAccess database.

[101] 1988 BIA MasterAccess database.

[102] Kearnie Anderson, WBLS General Manager, telephone interview, November 12, 1998.

As part of the survey analysis, minority broadcasters were asked to rate several explanations for "dictates." Most broadcasters responding indicated that they believed "dictates" were based upon "faulty evidence that there is no ethnic market demand for the goods or services." The "desire to avoid minority patronage" and "legitimate rationale based upon market research" were rated five and six, respectively, on a scale of one to ten, with one being the highest level of importance and 10 being the lowest. In the following table the responses in column two represent the average rating provided by the survey respondents.

***Question*: To what extent are "no Urban dictates" based upon the reasons listed below?**	**Average Response on a scale of 1 to 10 *(1 denotes the highest level of importance)***
Faulty evidence that there is no ethnic market demand for the goods/services in question	3
The desire not to have ethnic minorities patronize the goods/services	5
Legitimate reasons based upon evidence that the ethnic minority market does not purchase the goods and services	6

In the interviews conducted by CRF, explanations for "minority discounts" and "dictates" included perceptions of insufficient income, image control, fear of pilferage, unfamiliarity with the market, and stereotypical views about minority buying habits. Byron Lewis, Chairman and CEO of UniWorld Group, America's largest independently-owned ethnic advertising agency, characterized advertisers as having the following misperceptions about the African-American market:

Lewis: *[H]istorically, the advertisers have assumed that based upon census data, African-Americans earn less money, have less median income than their mainstream customers. So, therefore, they believe that certain types of purchases — particularly upscale — they really do not consider African-Americans as customer targets for many product categories. So, for example, very few insurance companies advertise to Blacks. Banks, financial services, luxury items like credit cards, tourism destinations—the whole area of product advertising feel that Black people are not, because of income and professional background and education, suitable targets to advertise to. That is a general attitude toward the African-American consumer market.*

Ofori: Do you believe that's an accurate perception?

Lewis: No, I don't believe its an accurate perception. But it's an historic perception.[103]

The view that minority household income is strongly associated with reluctance on the part of advertisers to target advertising to Blacks and Hispanics is consistent with the quantitative findings presented in Section II-C. A comparison of general market and minority-formatted stations indicates strong linkages between low household income, high levels of minority listenership, and minority targeted programming. (*See*, Charts H-I, page 69).

As explained earlier, the media buying process seeks to use advertising dollars in the most efficient manner possible. Based upon market research, the audience demographic most likely to buy the product or service is identified and targeted for a media ad campaign. Or, the marketing objective may be to expand the company's consumer base, in which case the advertiser will target ads to consumers who haven't purchased its products in the past. However, even where market research identifies minoritied as heavy or moderate consumers and the advertiser's marketing objective is not focused upon expanding the consumer base, survey respondents reported that advertisers were often reluctant to include minority-formatted stations in their advertising campaigns.[104]

Consistent with the example of the New York Volvo dealers association, media buyers with a "no Urban/Spanish dictate" were reported to have either "no response" or a "negative response" to market research that demonstrates minority patronage of the brand. Rated closely behind these choices was the response that there is a "long lapse of time between when the research is acknowledged and when the account is granted." The table below summarizes the experiences of minority broadcasters responding to the survey when they presented market research to media buyers in an effort to overcome a "no Urban / Spanish dictate."

***<u>Question</u>*: If an advertiser or advertising agency is presented with research that contradicts their "no Urban dictates" policy which of the following best describes the response?**	**Average Response on a scale of 1 to 10 *(1 denotes the highest level of importance)***
No response	3
The research is acknowledged, but the agency or advertiser still refuses to grant the account.	3
The research is acknowledged, but there is a lapse of a long period before the account is granted.	4
A rescission of the policy and an account is acquired within a short period of time	7

[103] Interview with Byron Lewis, Chairman and CEO of The UniWorld Group, page 4.

[104] *See* page 38, *infra*.

The reluctance to rescind a "dictate" despite market research that favors minority consumers is often due to concerns about product image and positioning. According to Byron Lewis:

> *In many cases, people have statistics. For example, there are categories of advertising where Blacks are the dominant customer. For example, you take liquor, the cognac category. Blacks represent 60 - 70% of the expensive cognacs, but almost never are directly targeted. Or, if you look at a lot of tourism advertising—tourism advertising for destinations like the Caribbean or other upscale places, almost never portray Blacks as a target because they feel that, in some way, it might create the impression that they're-attempting to encourage Blacks to come to these destinations. And that this will turn off the White traveler.*[105] *There are certain products, name brands who for the longest time did not utilize Blacks in their advertising even though they knew that Blacks represented a significant part of their sale volumes.*[106]

Some luxury car manufacturers expressed concerned about ethnic stigmas:

> *Domestic, I'd use the case of Cadillac. And [internationally,] Mercedes Benz, BMW because we can show there probably is a better market among upscale and upwardly mobile African-Americans with foreign cars. But the issue is, the projection in the media is always upscale, young professional and professional, White audiences. This is the general approach. Not that there aren't exceptions. But that has been historically the case.*[107]

Ken Smickle, President and Publisher of Target Market News, also addressed the issue of image:

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[105] To the extent that "no Urban/Spanish dictates" may be based on concerns that White customers will not buy the product or service, or patronize the business or location if it is associated with minorities, case law in the housing and employment area has stated that concerns about the preferences of customers do not justify excluding others based on race, ethnicity or gender. *See, for example, Diaz v. Pan Am World Airways*, 442 F.2d 385, 389 (5th Cir.1971), *cert denied*, 404 U.S. 950 (1971) (holding that customer preference for female flight attendants does not permit airlines to refuse to hire males). *See also, United States v. Starrett City Assoc.*, 840 F.2d 1096 (2d Cir.) *cert. denied*, 488 U.S. 946 (1988) (fear of "white flight" did not justify policies limiting number of minority tenants).

[106] Interview with Byron Lewis, The UniWorld Group, page 6.

[107] *Id.*

It's all image. So, Rolls Royce or even a Japanese luxury car maker have reams and reams of research that would tell them what the American car buyer with a lot of money to spend on a car thinks about themselves, their own self image, etc. And Black folks don't factor into the equation at all. "So, what on Earth would this person think if they ever saw an ad with a Black person driving our car?" That would diminish the value of the car because they're not seeing themselves behind the wheel.[108]

Concerns about product image are reported to extend beyond luxury items to the need to assuage White perceptions about the intended market for ordinary products and services:

We're talking about an image business where everything is image; your positioning, who you are, the difference between your product benefits, in what it offers versus what your competitor offers. It's all a matter of perception. And that perception comes from tightly controlled images about that product, about the company behind that product. And, race again plays a big factor in the thinking of how the product will be perceived. JCPenney had a huge success a few years ago in establishing these Afrocentric boutiques on its selling floor at a number of its stores. These boutiques would carry things like Black greeting cards, like books, Kente clothes or items made from Kente cloths, African art and artifacts. And these shops were set up just prior to the Christmas selling season. When the Christmas season was over, every single one of those boutiques had sold out of everything they had in an unqualified success. They never repeated the program. The reason they didn't repeat the program, it's widely felt, is because they couldn't control the industry buzz, talk, news stories and perceptions that surrounded the entire thing. They had a picture in Time Magazine, a full page color picture of a woman in an African dress and the caption said "Dress came from JCPenney." And I could just hear the Penney executives now. "Every White person in America is going to think we just became a Black store." And that's the problem.[109]

EPM Communications, Inc. recently published an article that discussed reticence on the part of fragrance companies to target-market their products to minorities:

While major fragrance companies obviously want the business of minority consumers, they don't want to be perceived as making ethnically targeted scents, despite the fact that market research suggests that regional an cultural preferences exist.[110]

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108 Interview with Ken Smickle, President and Publisher of Target Market News, page 15.

109 *Id.*, at 15.

110 *Marketing Fragrance to Minorities is Lucrative But Not Specialized*, Minority Markets Alert, EPM Communications, Inc., October 1998 (*see*, Appendix E).

In addition to product image control, media executives cited lack of familiarity with the Black and Hispanic market[111] and a reluctance to obtain reliable data,[112] as factors contributing to stereotypical views about the minority consumer. Recalling his early experiences as a radio salesperson, Luis Alvarez of WSKQ said:

> *I recall being in front of a buyer and we were discussing at the time Ivory Soap and the buyer was telling me they were not going to buy the station. And the question was,"Why not?" And they said, "Well, we have studies that show that Hispanics don't bathe as frequently as non-Hispanics." And as you could see there were no studies that I've knew of, whether it be at the time Yankelovich, Skelly & White or Scarborough or Simmons that referred to that.*[113]

On another occasion, Mr. Alvarez recalls:

> *[T]he account supervisor for a major car manufacturer says to me, "Come on guys. You know we're wasting our time here." And I said, "How's that?" He says, "You know the Hispanics don't buy or lease cars." And I looked at him and I said, "Well, that's funny because my wife drives a Lincoln Towncar. And I've got a Mark VII." And he says, "And?" And I said, "And my name isn't Luigi Baccagalupi. It's Luis Alvarez." And this guy turned all colors. All colors. We wound up walking out of there with a buy, by the way. I think out of embarrassment.*[114]

Mr. Alvarez was confronted with these stereotypes despite the fact that in 1997 WSKQ-FM was the No. 2 station in New York in terms of number of listeners. During 1997 WSKQ had a power ratio of 0.72.[115] In 1998, WSKQ was ranked number one.[116]
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A similar pattern occurred in Los Angeles. Spanish format KLVE-FM was the market leader by a wide margin, with a local commercial share of 7.2, compared to 5.4 for its nearest competitor in

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[111] Interview with Roman Pineda, President of Caballero Spanish Media, a division of Interep Media Store, page 3.

[112] Interview with Byron Lewis, The UniWorld Group, page 6; *See also*, Interview with Judith Ellis, Emmis Broadcasting, concerning misleading sales presentations, page 23.

[113] Interview with Luis Alvarez, WSKQ and WPAT, referring to incident that occurred in 1981, page 2.

[114] *Id.* at 11.

[115] July 1998 edition of BIA MasterAccess.

[116] Mira Schwirtz, *Ratings Racism: When No1. Is Not*, MediaWeek, June 22, 1998.

terms of local commercial share. Yet, KLVE's power ratio was 0.62 in 1997, and it ranked 8th in revenues.[117]

Another barrier confronting Spanish radio is language. To effectively target Hispanic consumers, the copy may need to be written and delivered in Spanish, and the creative approach must appeal to this audience.[118] These extra requirements constitute additional obstacles for Spanish radio:[119]

> *It's not just being minority that's a disadvantage when you're trying to sell to some of the "Anglo" non-Hispanics. But also, that you're a minority in a different language.*[120]

Lack of workforce diversity at ad agencies contributes not only to a resistance to accommodating the minority market, but to misperceptions about the minority consumer market in general.[121] Pierre Troupe, an Account Executive with a Jacor Communications radio station in St. Louis said:

> *[Part of the problem is] the fact that the agencies, or a good deal of the agencies here in the St. Louis market, are lily White in terms of front door to back wall, or agencies that only have a couple of Black people involved in them. So the whole idea of understanding what Black people are all about is difficult....[For example] if you're talking to a White buyer, they try to equate it to situations in their own particular culture by which young Blacks have less money and their parents do less well. When in actuality, in reality, in the Black community, wealth is held at a younger age than is held in the White population....[T]here's the underlying aspect of the stigma of young Blacks being not into serious things even to the point of being gang members and that sort of thing.*[122]

Lack of diverse personnel in advertising agencies and companies which place ads may affect relationships with minority salespeople, minority broadcasters, and perceptions of minority consumers. Minority broadcasters tend to employ more minorities than non-minority-owned broadcasters, so they

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117 BIA Analysis of Hispanic and Urban Formats in the Top 50 Markets, BIA Research Inc. (*see*, Appendix L); *see also* July 1998 edition of BIA MasterAccess.

118 *See*, Interview with Roman Pineda, Caballero Spanish Media, page 6.

119 Interview with David Lykes, Chief Operating Officer of Heftel Broadcasting, page 5.

120 Interview with Luis Alvarez, WSKQ and WPAT, page 2.

121 Interview with Tom Castro, Chairman and President of El Dorado Communications, page 12.

122 Interview with Pierre Troupe, Account Executive, Jacor Communications of St. Louis, page 5.

may be more adversely affected by lack of inter-ethnic/racial understanding when dealing with advertisers or ad agencies.[123]

Consistent with the view that race and ethnicity are key factors in the media buying process, minority broadcasters rated "minority-targeted format" number two on a scale of one to ten as the most important basis for “no Urban/Spanish” dictates. "Audience income" received an average score of four followed by "audience age" and "station ownership by a minority," both of which scored an average of six.[124]

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[123] *See,* NTIA Minority Ownership report, 1997. The Supreme Court noted in *Metro Broadcasting* that, “In 1981, 13 of the 15 Spanish-language radio stations in the United States owned by Hispanics also had a majority of Hispanics in management positions, while only a third of Anglo-owned Spanish-language stations had a majority of Hispanic managers, and 42 percent of the Anglo-owned, Spanish language stations had no Hispanic managers at all.” 497 U.S. at 582 n. 34. Paul Milton Gold found in 1983 that 82% of Black-owned stations had African-American general managers, as compared to 27% of white-owned stations. Nearly 74% of the Black-owned stations had more than 75% African-American employees, compared to fewer than 38% of the white-owned, Black-formatted stations. *Public Interest Programming Service to Minority Communities by Minority-Oriented Commercial Radio Stations,* 1983, National Association of Broadcasters’ Library, unpublished paper. Further research is recommended on the relationship between the race/ethnicity of the sales staff of minority-format stations, advertisers, ad agencies, representative firms, and a station’s advertising performance.

[124] Note that the analysis of power ratios in Table 2 of Section II-C-2-c, page 79, indicates that minority owners are less able to convert their audience ratings into revenues than their majority-owned counterparts of similar size. While minority broadcasters responding to the survey believed their race or ethnicity was a less significant factor in the imposition of “no Urban dictates” than format, power ratio data indicate minority owners averaged lower power ratios than their majority counterparts of similar size.

Barthwell Evans in her study of minority broadcasters reported two instances in which advertisers canceled their ads when it was announced that the new owner of the station was a minority. While these two anecdotes do not provide direct evidence proving that the owner’s race or ethnicity was a factor in the advertising decisions, the timing of the decision raised concerns in the minority owners’ minds. *See,* “Radio Broadcasting,” 8 Yale Law and Policy Review 380, 404.

***Question*: To what extent do the following factors influence an advertiser or advertising agency to adopt a "no Urban dictate" policy?**	**Average Response on a scale of 1 to 10 *(1 denotes the highest level of importance)***
Format that targets the minority audience	2
Audience income	4
Audience age	6
Station ownership by an ethnic minority	6

Respondents to CRF's survey were also asked to rate factors that influence advertisers to impose "minority discounts." The "minority composition of the audience" on average was rated three on a scale of one to ten; "audience income and minority audience composition as even factors" on average was rated four; the "ability to reach minorities by means of general media" (*e.g.*, general market radio) also was rated four; and "audience income" was rated five. Significantly, the minority composition of the audience was rated first and the income of the audience— as a single factor—was rated last.

***Question*: In your estimation which of the following factors influences advertisers or advertising agencies to impose "minority discounts?"**	**Average Response on a scale of 1 to 10 *(1 denotes the highest level of importance)***
Racial/ethnic composition of audience	3
Evenly, audience income and racial/ethnic composition	4
Ability to reach minority audience via general market media outlets not targeted to minorities	4
Audience income	5

The survey questionnaire also asked if "minority discounts" are likely to be imposed on a minority-targeted station even though the income of its audience is comparable to that of non-minorities in the market. Seventy percent of the respondents said that the rate for spot sales[125] would be discounted in such instances. Seven percent said they would not, and 23 percent declined to respond based upon lack information.

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[125] A spot sale is an advertisement for a stipulated length of time (*e.g.* 60 seconds) and duration (*e.g.* five times a day for twenty days).

The dilemma of whether race or income is the primary factor in influencing media bias was addressed by Tom Castro, Chairman and President of El Dorado Communications. On average, he maintains, the Hispanic household is larger than that of the general population. While per capita income may be low, household consumption is greater in certain product categories. Nonetheless, negative stereotypes often deter Spanish radio buys. According to Mr. Castro:

> *If I'm selling groceries, Hispanics are the best possible consumers that there are. And this is not my data. Its been demonstrated by many people that Hispanics will spend more (as an index against a norm). Hispanics will overspend on groceries compared to everybody else. So if you use the index of 100 with 100 being the norm, Hispanics might index at 120 or 130% for groceries. Why? Because the households are larger; because the family structure and lifestyle is such that people don't go out to eat at restaurants as much. They eat with each other more. And so, Hispanics are great consumers for groceries and everything that's inside of a grocery store which might be 30% of what you hear on a radio station, 40% of the advertising is either the grocery store itself or all the products you find inside of grocery stores. So if logic held, you would spend more to reach that Hispanic consumer than you would spend to reach anybody else. Because you know that once you reach 'em, they're going to spend 20 or 30% more than the typical consumer will for those kind of products. Well, instead what you find is people telling you, "Well, we don't advertise to Hispanics. Or when we do it's a token buy." As opposed to really seriously going after the consumer. Why is that? Usually, people will be economically rational. I think it's a combination of things. On the one hand, you have prejudice, which is hard to quantify and prove, but is there. And there are just people who say, "Well, I don't want Hispanics in my grocery store." Or you have consumer product people sitting in a place like Cincinnati or Minnesota, or some other location where there are not a lot of Hispanics. So all they know about Hispanics is they've been to Mexico once or twice and saw a lot of poor people there. They watch TV and most of the people on TV that are Hispanic are pimps, prostitutes, illegal aliens, drug dealers, somehow on the opposite side of the law. And so, to them it's not an attractive market.*[126]

Evidence surfaces from time to time indicating a negative view of minority patrons on the part of advertisers. American Airlines issued an apology for stereotyping Hispanics in its pilots' manual. As reported in the New York Daily News:

> *In a section titled, "Survival in Latin America," the manual says that Latin American passengers can become drunk and unruly, don't expect planes to leave on time and that there are reports of people making false bomb threats to delay planes if they are running late.*[127]

[126] Interview with Tom Castro, El Dorado Communications, page 4.

[127] *Airline to Latin Americans: Sorry,* New York Daily News, August 21, 1997.

The national retail chain, Macy's,[128] was alleged to have unfounded fears of pilferage by minorities. According to Mr. Alvarez:

> *...I was managing a station where the sales [representative] came back and she was practically in tears because the agency had told her that the client said that the reason they don't advertise in the Hispanic market (it was a Macy's department store) was because their pilferage will increase.*[129]

Other individuals interviewed for this study noted that advertisers are cautious about minority consumers due to perceptions linked to stereotypes about thievery. Michael Banks, Station Manager of the urban formatted station WBGE-FM, said he was told by one potential advertiser:

> *Your station will bring too many Black people to my place of business.*[130]

Another example was provided by the Co-Owner of an AM/FM in the southern region:

> *[F]or example, 4 or 5 years ago a store moved [from New York] to Huntsville... on the South end of town. [Huntsville] is divided racially by North and South. Most of the Blacks live North. And in this very nice little strip mall, this guy said, "I know I need your audience. Your people spend more than the average White customer that comes in here. And let me try you." So we put an OES schedule on for him — an optimum effective schedule — on the radio station. And Black folks showed up. And then he said, "I'm going to have to cancel my business." I said 'Why?' He said, "Well, my pilferage rate is higher." I said, 'Can you prove that?' [He responded] "No, but, I don't have enough people, and I have suspicious people coming in here. And I believe they're shoplifting."*[131]

Byron Lewis made the same point:

> *Sometimes, there's even the matter [of too many Blacks],... particularly if you get into the franchise business, and you get a disproportionate amount of Black traffic. There's some people who own stores—franchise outlets—who still don't want to advertise their market, because they'd rather spend their money on a broad basis, because they just don't like the traffic. So I think that there's still a*

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[128] *Compare*, David Hinckley, *Macy's ups black, Hispanic advertising*,, New York Daily News, December 14, 1998, 1998 WL 21937063, (Macy's department store reported to have increased its advertising on black and Hispanic media by 50% in response to pressure from minority media advocates).

[129] Interview with Luis Alvarez, WSKQ and WPAT (Spanish Broadcasting System), page 2. *See also*, Mira Schwirtz, *Sharpton Leads Ethnic Media Demonstration Outside* Y&R, Mediaweek, June 22, 1998, 1998 WL 10320331.

[130] Survey of WBGE-FM. *See also*, interview with Ken Smikle page 10.

[131] Interview with Co-Owner of a station that has requested anonymity, pages 4-5.

> *subjective attitude or racial attitude that gets in the way of sound business practice which is one of the things that you encounter when you work the minority side of the marketing fence.*[132]

More recently, the national rep firm, Katz, issued an apology for language contained in a memo alledgedly used to train its salesforce.[133] The memo contained several references to Blacks and Hispanics as "suspects" rather than "prospects.'[134] Under the heading, "Keys to Success," the memo said:

> *Get buyers to understand that WABC is one of the most upscale select stations in New York. We must get the buying community to understand and appreciate the unique qualitative, personality and foreground profile of WABC. Advertisers should want* ***prospects not suspects****.*[135]

The memo also said:

> *When it comes to delivering* ***prospects not suspects****, the urban[-formatted stations] deliver the largest amount of listeners who turn out to be the least likely to purchase. Median age is 23. Very young and very, very, poor qualitative profile.*[136]

The phrase "prospects not suspects" has been criticized by minority broadcasters and community activists, including the Reverend Al Sharpton, as perpetuating the stereotype that minorities are responsible for thievery.[137]

Elsewhere, the memo says:

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[132] Interview with Byron Lewis, The Uniworld Group, page 18.

[133] The Katz Radio Group has five separate radio representation companies — Christal Radio, Eastman Radio, Katz Radio, Katz Hispanic Media and Sentry Radio. Collectively, these companies represent more than 2,000 radio stations in 270 markets. The memo was alleged to be by used by Katz sales staff on behalf of radio stations owned by Walt Disney/CapCities/ABC. Interview with Judith Ellis, Emmis Broadcasting, page 22.

[134] The full text of the memo ("Katz memo") and Katz statement of apology are on file with CFR.

[135] Katz memo, page 1 (emphasis added).

[136] *Id*., at 12 (emphasis added).

[137] *See, Advertisers Show Bias by Tuning Out Black Radio,* Clarence Page, The Cincinnati Post, July 2, 1998 19A, 1998 WL 13550328.

> *The indices highlight the importance of effectively reaching New York's "white" population but the White population also accounts for almost 3/4's of each category. We have to drill this home that while the Black and Hispanic segments of the New York population are significant, they comprise very small portions of the upscale, educated and affluent [aged] 25- 54.*[138]

The memo also stressed that advertisers "can easily overbuy Black."[139] The memo argued that advertisements on urban stations reach less economically affluent young African-Americans, and that you can reach "upscale Blacks" through "non-ethnic stations."[140]

Other anecdotal evidence obtained by CRF expressed sentiments similar to that of the Katz memo. A sales presentation prepared by Sinclair Communications[141] was used in the New Orleans market to discourage advertisers from buying more than one, or "overbuying", urban radio stations. CRF requested permission to reproduce the full presentation for the purpose of dissemination with this study, however, permission was denied by Sinclair Communications.[142]

The Sinclair presentation sets forth various demographic data, including age and income, in an effort to show that Sinclair's audience would provide a more profitable market. However, Sinclair explicitly relies upon racial data noting:

"***BEWARE***

BY ALL MEANS, BUY ONE URBAN STATION FOR COVERAGE OF THE BLACK POPULATION....BUT DON'T SACRIFICE THE "ANGLO" POPULATION BY **OVERBUYING URBAN! 1 URBAN STATION WILL GIVE YOU THE BLACK "REACH" YOUR NEED!"**[143]

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138 Katz memo, page 4.

139 *Id.*

140 *Id.*

141 According to Barry Drake, Chief Operating Officer, Sinclair Communications, the presentation was prepared by Sinclair's national sales manager. Telephone interview with Barry Drake, November 20, 1998.

142 Telephone interview with Barry Drake, Sinclair Communications, January 8, 1999, (presentation is on file with CRF).

143 Capitals and emphasis in original.

The New Orleans metro market consists of several parishes (i.e. political subdivisions) and three urban radio stations— KMEZ-FM (owned by Sinclair),[144] and WQUE and WYLD (owned by Clear Channel Communications). The Sinclair presentation describes the "upscale population" in the New Orleans metro market as residing in five "non-ethnic" parishes. The presentation describes the listeners of its competitor's urban stations as residing mostly in the "Black" Orleans Parish: "The majority of WYLD's and WQUE's Adult 24-54 listeners are located within the Orleans Parish, which is a predominantly Black area with a low-income, downscale socioeconomic profile."

According to Sinclair, the presentation was intended to show that the Sinclair urban station, KMEZ, reached the economically affluent "money demo"—Black listeners aged 25 to 54. In contrast, WQUE was characterized as reaching mostly 12 to 34 year olds —"They have no money!" According to Sinclair, buying advertisements on more than one urban station in the New Orleans market would amount to duplicated reach among Black listeners. Buying advertisements on one urban station, (i.e. KMEZ), according to Sinclair, delivers the necessary reach with "NO ANGLO WASTE" (capitals in original).

According to the Regional Marketing Manager of WQUE and WYLD, advertisers usually purchase advertisements on the top five stations in a market when making national buys *despite the fact that this may result in duplicated audience reach*.[145] WQUE and WYLD are among the top five stations in the New Orleans market.[146] In his view, "racism can only explain why it is negative to buy more than one urban station, but positive to buy more than one general market station."[147] Mr. Wilson also said that it was "disingenuous" to promote KMEZ based upon a higher percentage of "upscale" age 25 - 54 listeners, because the audience of WQUE and WYLD is "four times the size of KMEZ."

The Sinclair presentation omits the fact that the Clear Channel urban formatted stations, WQUE-FM and WYLD-FM had average 1996 local commercial shares of 14.7 and 8.4, respectively. KMEZ's 1996 average local commercial share was 4.9.

In 1996, Sinclair Communications owned 26 radio stations nationally, including three general market and one urban formatted station (KMEZ) in the New Orleans market. One can thus surmise that urging advertisers not to "overbuy" urban stations (i.e. buying only KMEZ) would benefit Sinclair's general market stations.

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[144] Sinclair sold KMEZ-FM in 1998.

[145] Telephone interview with Ernest Wilson, Regional Market Manager, Clear Channel New Orleans, December 9, 1998.

[146] Ranked according to average 1996 local commercial shares, WQUE ranked first, WYLD ranked forth, and KMEZ (Sinclair's station) ranked ninth in the New Orleans metro market. *See,* BIA MasterAccess, August 1997 edition.

[147] Telephone interview with Ernest Wilson, note 145, *supra.*

According to Sinclair's Chief Operating Officer, the presentation was given to Allied Radio Partners, a subsidiary of The Interep Store, to encourage national advertisers to place advertisements on KMEZ.[148] Ironically, Sinclair's competitors, WQUE and WYLD, are represented by another Interep subsidiary, Clear Channel Radio Sales.[149]

Cautioning advertisers not to "sacrifice the 'Anglo' population by overbuying urban" echoes sentiments expressed in the Katz memo urging sales people to tell advertisers that the "white" population is of paramount importance:

> *If an advertiser is buying 100 grps [gross rating points - a measure of the station's audience reach] and is targeting professional/managers, they only need to buy [less] GRPS of Black exposure and [even less] GRPS of Hispanic exposure. Anything more would be overkill and would meant [sic] that effective frequency and schedules would not be placed against the more important "White" segment of the population.* [150]

ABC radio and its representatives had an incentive to direct business away from urban, Spanish and other minority formats to general market ad placements, because of the types of formats ABC stations used. Of the 28 stations ABC radio owned in 1997, only one could be classified as minority format; KMKY-AM in San Francisco, a rhythm and blues/oldies station which ABC bought in 1997. [151] Its other 27 stations programed to the general market specializing in formats including Children's, talk, and album-oriented rock.[152]

Both the Katz memo and the Sinclair presentation emphasized the "value" of the "White" population over Blacks and Hispanics. Though age and income were cited as reasons for directing ads away from minority-formatted broadcasters, the race and ethnicity of the audience also appeared to be a factor in the recommendation.[153]

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[148] Telephone interview with Barry Drake, November 20, 1998.

[149] BIA MasterAccess database, August 1997 edition.

[150] Katz memo, *supra* note 134, at 4.

[151] BIA MasterAccess database, 1998.

[152] *Id.*

[153] As noted above, under certain anti-discrimination statutes, it is sufficient to demonstrate that race is one factor leading to the challenged practice. Specifically, judicial cases interpreting the Fair Housing Act's prohibitions have recognized that discriminatory intent need only be one motivating factor for the conduct. *See, Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977); *United States v. City of Parma*, 661 F.2d 562, 575 (6th Cir. 1981), *cert. denied*, 456 U.S. 926 (1982) ("There is no requirement that such intent be the sole basis of official action"). Rather, "[w]hether motivated by animus, paternalism, or economic

Both documents were designed to steer ad placements away from stations serving minority communities, reflecting the authors' economic interests in general market ad dollars.[154] Practices such as these carried out on a national scale appear to undermine the advertising performance of minority-formatted stations.

The Katz memo and the Sinclair presentation rely upon audience research data to support their assertions about the superior "value" of White consumers over Black and Hispanic consumers. Hence, the reliability of data supplied by audience research services is critical. Statements about audience

considerations, intentional . . . discrimination is prohibited by the Act." *United States v. Scott,* 788 F. Supp. 1555, 1562 (D. Kan. 1992).

[154] Legal research should be conducted to analyze the extent to which these practices may violate public policy in the Communications Act of 1934, as amended, 47 U.S.C. §§151 *et seq*. For example: (1) Title I, Sec. 1 states that the Act's purpose is to regulate interstate commerce to ensure radio communications service is available "to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex..." To the extent that competitors are steering business away from a broadcaster based on the race or ethnicity of the station's audience, it may limit the availability of radio to minority communities because it undermines the financial viability of serving those communities. Arguably, this may constitute discrimination under the Communications Act, particularly if the caution not to buy time on minority-formatted stations is based on the audience's race, color or national origin; (2) Section 257 of the Act emphasized that the FCC shall carry out the national policy "favoring diversity of media voices, vigorous economic competition...and promotion of the public interest, convenience, and necessity." 47 U.S.C. 257 (b). Discouraging ad business on stations which serve the minority community decreases the incentives to provide such service, thereby potentially affecting diversity of media voices. It also appears to affect minority-formatted stations' ability to earn revenues, and their ability to raise capital. (*See* page 56 comments of Tom Castro asserting that advertising practices steer ads away from minority oriented stations, and harm minority broadcasters' ability to serve the public interest, compete, and raise capital to buy additional stations). The FCC is empowered to use other sections of the Communications Act of 1934, as amended, to remedy market entry barriers for small businesses and entrepreneurs identified through a Section 257 analysis. 47 U.S.C. 257(a); and (3) Sections 307(c)(1) and 310(k)(1)(A) of the Act require that the FCC take into account whether the licensee is operating in the public interest as a consideration in license renewal.

Other statutes and public policies may also apply to the extent that characterizations about a broadcaster or its audience are unfair, false, misleading or misrepresentations of fact. For example, Section 5(a)(1) of the Federal Trade Commission Act states that "Unfair methods of competition in or affecting commerce...are hereby declared unlawful." 15 U.S.C. § 45(a)(1). The Lanham Act prohibits false or misleading descriptions of fact, or misrepresentations of fact, by any person in connection with any goods or services, that may cause confusion or deceive regarding the goods or services of another person. 15 U.S.C. § 1125 (a)(1).

characteristics are usually based upon "qualitative" studies of listeners developed by audience research services—some of which are accredited and some of which are not.

The broadcast industry, Congress and the FCC have long recognized the importance of accuracy in audience research services.[155] The Media Ratings Council (MRC) is an industry-sponsored organization that promotes audience research services that are valid, reliable and effective.[156] Services that have disclosed their methodologies to the Media Ratings Council are subjected to its review process which includes an extensive procedural audit. Fourteen services are currently accredited by MRC as meeting its standards (*see*, Appendix F).

Questions have been raised concerning the ascription methodologies employed by some audience research services.[157] Ascription involves using answers from completed surveys to supply answers for incomplete survey instruments. Ascription has been approved by MRC in certain instances. However, concern has been raised about the ascription of entire survey instruments— not just a few missing answers.[158]

While the accuracy of the data upon which the Katz memo and Sinclair presentation are based has not been specifically called into question, their comparisons of the "qualitative profile"of general market and minority-format station listeners underscores the importance of reliable ratings and qualitative data. In short, assessments of an audience's qualitative profile may not be accurate, if the methodology upon which those conclusions were drawn is flawed.

In summary, a variety of factors may contribute to "dictates" and "minority discounts." Negative views about the minority consumer and concerns about product image, in certain instances, appear to outweigh economic justifications for targeting minority consumers. As the next section demonstrates, some advertisers are adjusting their media buying practices as the minority population continues to expand. The ability of minority-owned media to take advantage of these new developments in the marketplace, however, has not been demonstrated.

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[155] A 1966 Congressional oversight committee concluded: "The purchase and use by broadcasters of rating surveys importantly affect the performance of broadcasters in two respects, first, in relation to listeners and viewers, and second, in their competitive relations to each other. The FCC has vital responsibilities with regard to both these aspects." House Comm. on Interstate and Foreign Commerce, Broadcast Ratings, H.R. NO.1212, 89TH CONG., 2D SESS., AT 11 (1966) (*see* Appendix G).

[156] Board members of the Council represent blue-chip radio and television broadcasters, cable-casters, print organizations, advertising agencies and industry trade associations (see Appendix F).

[157] Interview with Bob Jordan, President of International Demographics Inc., which prepares The Media Audit, a rating service, page 6. *See also*, Appendix I for a fuller analysis of audience research methods.

[158] *Id.*

4. Current Marketplace Developments.

Despite the challenges, most media executives interviewed acknowledged that trends are improving. The fact that the 1996 earned income of African-Americans—estimated to be $367 billion—constituted the fifteenth largest economy in the world,[159] has encouraged some advertisers to reevaluate their marketing strategies. Similarly, Hispanic purchasing power in 1997 was estimated at $266.5 billion—a 7.7 percent increase over 1996.[160] As Byron Lewis puts it, "Now it's all numbers driven."

> *[D]espite the fact that African-Americans have a lower median income than say the Hispanic population, the Asian population and the general market, we have a higher annual purchasing power. And the purchases that we make reflect our desire to buy products that have imparted prestige and status associations. So we're probably 34 - 35 million people in the country. But we have an annual income over $400 billion which makes us 7th or 8th largest consumer nation in the world. In other words, we actually have more purchasing power than many other European countries (Spain, places like that). The truth is, the Black preference for buying things that have the badge of prestige makes us a valued customer. That you see across all product lines. Now, that phenomena is what the clients begin to pay attention to.*[161]

Evidence that advertisers are interested in the Black and Hispanic markets can be found in the increasing amount of advertising expenditures targeted to these market segments. 1997 advertisements in all media targeted to Hispanics totaled $1.4 billion dollars—up 17% from 1996.[162] 1997 targeted advertising to African-Americans totaled over $1 billion.[163]

While these developments are encouraging, they have not served to close the gap between marketing expenditures on minority-formatted versus general market radio stations. In several Arbitron markets the market share of listeners for Black and Spanish stations has increased. Their share of the advertising revenues, however, lags far behind that of general market stations. One minority radio station owner commented:

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[159] The 1997 Report on The Buying Power of Black America, Target Market News Inc., pages 13 and 14.

[160] *Strong Economy Buoys Purchasing Power*, Hispanic Business, December 1997, page 58. Estimates are based upon U.S. Census data regarding per capita income.

[161] Lewis at page 7. *See also* Interview with Sherman Kizart, The Interep Radio Store, page 5.

[162] *Strong Economy Buoys Purchasing Power*, Hispanic Business, December 1997, page 60.

[163] Target Market News, Dollars Spent Advertising to Black Consumers, Target Market New web site: http:\\www.targetmarketnews.com, accessed September 1998.

> *Now, in many markets, large and small, from LA and NY to the Rio Grade Valley and Mobile, minority targeted radio stations are rating leaders. There is demographic change and Arbitron is slowly documenting this. But the ad dollars haven't been reallocated yet. The large, established non-minority owned stations are getting an unfair share of the revenue. And, they are fighting like hell to hold onto the revenue allocation that represents the past. Now they'll say to the ad agencies, "look at my oldies station, it has a 20% Hispanic audience. You don't need to buy a minority formatted station." There is a show down coming. All we ask is that economic rationality be employed. Green is green, not black, brown or yellow.*[164]

Consistent with Tom Castro's claim that general market stations are attempting to discourage buys on minority-targeted stations, the Katz memo exemplifies a strategy to gain revenues that would otherwise flow to minority-targeted stations. According to the Katz memo, minorities can be adequately reached through ABC/Disney and other general market outlets, thus reducing the need to buy minority-targeted radio.

> *A 12x schedule on WQCD, WLTW, WTNS, WABC, WPLJ, WKTU, and WCBS-FM delivers 93.6 Black [ages] 25-54 rating points.* ***Don't even need to use an ethnic station****. These same stations deliver 82.8 Hispanic [ages] 25-54 rating points with a 12x schedule. Get all of the ethnic ratings you need by not using an ethnic station. Drill this home. Buyers are not aware of this.*[165]

Tom Castro explains that one consequence of such strategies is that highly-skilled minority sales professionals who were trained at minority-owned stations are hired for higher salaries at general market stations. More importantly, Castro says that the loss of commercial buys results in lower profits for minority entrepreneurs which increases the difficulty of leveraging a minority-formatted station to acquire additional stations in order to enjoy the benefits of competition as a multiple station owner. With respect to the public interest, Mr. Castro points out that the programming quality of minority-owned stations can decline due to lessened profitability and they become less competitive in the marketplace. Hence, there is a vicious cycle of events that leads to the decline of minority-formatted and minority-owned radio.[166]

The same view was echoed by Roman Pineda, President of the Hispanic division (Caballero Spanish Media) of the Interep Radio Store. He notes that industry leaders have paid attention to the fact that Spanish radio is top rated in several markets, reflecting the growing minority population (see Chart E regarding Hispanic and minority population and projected population trends, page 64). He believes that the problem lies with smaller advertisers that have not invested in systems for evaluating their investment in minority-targeted advertising.

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[164] Telephone Interview with Tom Castro, El Dorado Communications, December 17, 1998.

[165] Katz memo, page 4 (emphasis added.) 25-54 rating point refers to the ability to reach audiences between the ages of 25-54.

[166] Interview with Tom Castro, El Dorado Communications, page 6.

> *The reason why you have all of these Fortune 500 Companies advertising in the market is because it's already easier for them to track the benefits of advertising to Hispanics. They have the systems in place. They do see a market. And trust me, Proctor and Gamble could care less what language you speak as long as you buy their diapers. AT&T is aware of the fact that the vast majority of the long distance consumers in this market in the United States are Hispanics because they can tell: "Oh, here's a list of Hispanics' earnings. This is how much they spend a month on long distance." It's a very black & white equation. You can't accuse AT&T of discriminating against Hispanics. So when you take a look at the knowledge and the needs, most of the smaller companies, the smaller entities that don't have the resources, don't have the financial background, are not really marketing savvy, those are the ones that "may be discriminating against Hispanics" because they haven't done their homework.*[167]

With respect to the $1.4 billion dollars spent on Hispanic marketing, Mr. Pineda notes that this figure represents only 1% of the amount of general market advertising expenditures. Hispanics, on the other hand, represent approximately 10% of the population.[168] One reason that more advertisers have not allocated additional funds to the targeted market is because the same tools (*e.g.* tracking systems) used to justify general market expenditures are not available for targeted expenditures.

> *In the general market, I think there are more tools, more quantitative and more qualitative tools that enable them to make a decision. And if you're a brand manager, and you're paid on profits, and you're responsible for developing a plan that's going to move X amount of cases. Are you going to venture into an unknown territory where you can't track sales and you don't know all of the information? Or are you going to go to a safe territory like the general market that gives you exact information week-by-week of your movement that you can look good to your boss? It's the "Cover Your Ass Syndrome."*[169]

As the General Manager and Senior Vice President for two general market and one urban market station located in New York, Judith Ellis of Emmis Broadcasting is in a position to compare sales by her various stations. The Black-targeted station, WRKS-FM, has the largest listenership of the three, yet it fails to perform as well in terms of cost per point paid by general market advertisers. When asked why WRKS cannot obtain the same rates as the other non-ethnic stations, Ms. Ellis responded:

> *Because it's black. The Black consumer is less valued than the White consumer and therefore they're going to pay less for Black consumers.*[170]

On the other hand, Ms. Ellis indicated that there are companies that aggressively seek out minority-targeted outlets. Buys from these advertisers are obtained through ad agencies that handle

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[167] Interview with Roman Pineda, Caballero Spanish Media, pages 6-7.

[168] *See id.* at 12. *See also* interview with Tom Castro, El Dorado Communications, page 17.

[169] Interview with Roman Pineda, Caballero Spanish Media, page 10.

[170] Interview with Judith Ellis, Emmis Broadcasting, page 17.

minority buys exclusively. In these instances, WKRS gets rates that are comparable to general market buys. However, she noted that some buyers that handle a broad variety of products will only buy ads on WKRS for products that are traditionally viewed as Black consumer items:

Ellis: *Yes. There are some agencies that are buying just Black media. And there are other agencies that are general market buys and with those agencies we have a harder time getting the rates we deserve.*
....

Ofori: *So now, what kind of advertiser are you struggling to get into the door with? Those that do not have a targeted campaign? What are the examples of those kinds?*

Ellis: *Continental Airlines, Aruba Tourism, Staples are some that come to mind. Wamsutta, American Airlines, SAAB.*

Ofori: *And these are companies that you try to do business with and found it difficult to do it?*

Ellis: *Yeah. We've given unbelievable presentations to Chock Full O' Nuts Coffee, Folanari wine, where we've given proposals that are good; that we really had information here. And you just can't get anything accomplished. Merrill Lynch. Oh, Cadillac doesn't buy us. Intel, Dial-A-Mattress. We have one buying service that'll only buy us for fried chicken. They will only buy us for fried chicken and they were mad when I called them racist.*[171]

An article by Radio Business Report (RBR), entitled *NEDs & NUDs are duds, but they're reality* (June 1, 1998) listed several companies reported by its sources to have "no Urban" or "no Spanish" dictates. Advertisers reported in the article as "handing down dictates not to advertise on Urban...radio" include: Armour All, Aruba Tourism, Astoria Bank, Buick, Cadillac, Continental Airlines, Discovery Channel, Jos. A. Banks Clothier, The Learning Channel, NYX Science Center, Starbucks Coffee, Trans World Airlines and Volvo. Advertisers reported to have "dictates not to advertise on... Hispanic radio" include: Baskin-Robins, CompUSA, IKEA, Macy's, New Jersey State Lottery, Paramount Studios, Sony Pictures, Starbucks Coffee, and Universal Studios.

To the extent that such dictates are based on the race, ethnicity or national origin of a station's audience, or exclude a station from consideration based in part on those factors, one could argue they are contrary to public policy and to the public interest mandate of Section 1 of the Communications Act, as amended, 47 U.S.C. §151. In addition, to the extent that any of these advertisers are covered by certain anti-discrimination statutes such as Title II of the Civil Rights Act of 1964, 42 U.S.C. §2000a, or the Fair Housing Act, 42 U.S.C. §§3604 et seq., advertisers who practice minority dictates may be

[171] *Id.*, pages 18-19.

engaging in practices which violate these statutes.[172] To the extent businesses receive federal funds, they are also subject to the nondiscrimination provisions of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000(d). Legal research should be conducted on the potential applicability of these statutes and case law to companies which engage in "no Urban/Spanish dictates."

Byron Lewis, Chairman of The UniWorld Group, in commenting on the role of his ad agency, confirmed the point that minority-owned agencies are primarily engaged with promoting the minority market:

> *[E]ssentially I'm interested in reaching a station that reaches Black audiences. In some cases it's a White-owned station. Like KISS in New York City. And that becomes just a matter of the channel. You got to use a channel that gets you the numbers against the Black audiences. No I wouldn't use a White, suburban station with predominantly White males, because I don't have an assignment that is interested in reaching White males. The mainstream agency has the responsibility and the budget to reach that segment.*[173]

And despite statistics that show increasing consumption by Blacks, buys for such markets are discounted due to a general negative perception of the market:

> *The mainstream advertising agencies have a perception that the White customer is more valuable than the Black or minority customer because of the things we mentioned. The perception is because the White*

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[172] As noted above, the Fair Housing Act prohibits advertising which indicates a preference on the basis of race, color, national origin religion, sex, handicap, or familial status. *See*, 42 U.S.C. §3604(c). Thus, if a real estate agency were to adopt a "no Urban/Spanish dictate," this might violate the Fair Housing Act. Similarly, Title II of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color ethnicity or national origin in places of public accommodation. 42 U.S.C. §2000a. Public accommodations include "any restaurant cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment." 42 U.S.C. §2000 (a)(b)(2). One could argue that a Starbucks coffee house is the 1990's equivalent of the soda fountain. To the extent that Starbucks or similarly situated businesses may have used "no Urban/Spanish dictates" to exclude stations from consideration for advertisements based in part on the race, ethnicity or national origin of the audience, it may be argued that this constitutes an attempt to avoid patronage by minority customers in violation of Title II. Although Title II does not include a specific provision prohibiting discrimination in advertising as does the Fair Housing Act, it is possible that evidence of "dictates" could form part of the evidence showing a violation of Title II. Note, in the wake of the Katz memo it was reported that Starbucks was engaged in discussions regarding advertising on a minority-formatted station. *See, Radio Waves, Tuned to B.I.A.S, Minority Stations Shunned by Advertisers,* Newsday, September 7, 1998.

[173] Interview with Byron Lewis , The UniWorld Group, page 11.

median income is higher, higher number of people in the professions....In other words, they ask for higher rates because they're reaching White customers who the advertiser feels for a variety of reasons is a more valuable customer. And if there are any Blacks thrown in there that's a bonus. But that's not the issue. Now when the Black station on the other hand comes with its numbers and it tries to get equal rates, there's the perception by certain advertisers that the customer is not necessarily in numbers or in quality equal to the White customer and, therefore, there's a difference in the rates that the stations can achieve. Now, all media is subject to negotiation. And I just don't feel the Black stations have in most cases the same leverage in order to maintain the rate that they ask.[174]

Although new developments in the marketplace favor minority-targeted advertising, some conditions have remained the same. Factors such as product image and misperceptions about the consumer potential of minorities constitute barriers that prevent minority media from closing the gap between audience share and advertising revenues. Stereotypes and the desire to target White consumers also play a role in lower advertising revenues for minority oriented stations. Mr. Lewis said:

Lewis: You don't advertise to them[minorities]. Let me put it more succinctly. The truth about it is, I've been told that the—let's just take the Caribbean—Blacks are going to come anyway. We don't turn anyone away. But in the Wintertime, the people we want to reach are the upscale, European, Canadian, American, White travelers. They come in the Wintertime. Now, Blacks come too. But you almost have no advertising welcoming Blacks during that period. That is a stated reason for not advertising to Blacks. That's our core audience. Blacks will come anyway. But underneath it, we don't want to create an imbalance.

Ofori: Are there any other product categories or services that exemplify what you have said ?

Lewis: No one will ever say that to you publicly.[175]

C. Black and Hispanic Consumer Spending Patterns - Now and the Future

Data on the racial/ethnic distribution of family income tend to reinforce the generally held perception that Hispanics and Blacks have less disposable income. Chart B contains data on median family income according to race and ethnic group. The chart shows that, based upon national averages, Blacks and Hispanics are less economically affluent than Whites and Asians/Pacific Islanders. Disparities in family income reinforce the perception that Blacks and Hispanics have less disposable income for goods and products promoted by the electronic media. Such data is often used to justify

[174] *Id.*, pages 15-16.

[175] *Id.*, at 15-16.