

# Should Billboards Be Subject To Road User Fees?

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ROAD user fees are a well established concept in the United States, with almost \$23 billion being collected by federal, state, and local governmental units for this purpose in 1979.<sup>1</sup> One major type of road user, however, has escaped road user fees. This is the off-premise highway billboard, a type of advertising that derives its value solely from the public's investment in roads and highways. This article examines a possible basis for a road user fee on these signs, suggests a rationale for the imposition of the road user fee, and suggests ways it can be implemented.

## THE NATURE OF THE OUTDOOR ADVERTISING BUSINESS

In order to understand billboards as a direct use of the road it is first necessary to understand the nature of the outdoor advertising business. Billboards, more properly referred to as off-premise outdoor advertising signs, must be distinguished from on-premise signs. The on-premise sign is an integral part of the business it identifies and serves to index the business environment, that is, to inform people where they can find various goods and services. The off-premise advertising sign, on the other hand, is designed to use the roadside environment to advertise a good or service found at some other location.

Off-premise signs can be subdivided in several different categories. Some billboards provide directional information to motorists while others feature product advertising. Product advertising is of many types, with cigarette and liquor manufacturers being the largest advertisers.<sup>2</sup> Directional signs are located primarily in rural areas

1. U. S. Department of Transportation, *Highway Statistics* 1979, p. 39.

2. In urban areas these firms sometimes account for a very large portion of the revenues of outdoor advertising firms. For example, an official of Foster and Kleiser in Chicago reported that approximately 60 percent of their volume comes from cigarette and liquor advertising.

and on urban highways with large volumes of long-distance travelers, while billboards featuring product advertising are located primarily in urban areas.

Off-premise signs can also be subdivided into standardized and nonstandardized industry. The latter consists primarily of advertiser-owned billboards giving information regarding tourist and other highway related services. These nonstandardized signs come in a great variety of sizes, but are generally smaller than those erected by the "standardized" industry. The firms comprising the standardized industry own outdoor advertising structures and lease space to advertisers. They employ two basic types of signs, the poster panel and the painted bulletin. The poster panel is designed for the posting of paper "bills"—hence the name "billboards" that is now commonly applied to all off-premise outdoor advertising signs. The standardized poster panel is 300 square feet in size, although the industry also uses a smaller poster panel of 72 square feet, appropriately called a "junior" panel. The second type of standardized industry sign is the painted bulletin usually measuring 14 feet by 48 feet (672 square feet), but sometimes ranging to 2,500 square feet or even larger.<sup>3</sup>

#### BILLBOARDS AS A DIRECT USE OF THE ROAD

Although off-premise outdoor advertising signs are located on private property, they clearly derive their value solely from their direct use of the road. The only "use" of a billboard occurs where the reflected image meets the eye—on the road; no good or service is provided at the location of the sign. As an official of the Outdoor Advertising Association of America testified: "The Outdoor Advertising Association members do not sell signs; they sell circulation."<sup>4</sup> The sign companies do nothing to create this "circulation;" it comes from the public's investment in roads and highways.

#### *View from the Courts*

The courts have long recognized that billboards represent a use of the roads rather than a use of private property. This doctrine was first held over 60 years ago in the case of *Churchill and Tait v. Rafferty*.<sup>5</sup>

3. As an example, in 1980 Foster and Kleiser offered to lease a 6,000 square foot sign located alongside the approaches to the San Francisco-Oakland Bay Bridge for \$7,000 monthly.

4. Testimony given by Mr. George F. McInturff before a public hearing to consider a challenge to the constitutionality of the State College Borough, Pennsylvania, Sign Ordinance 888, March 13, 1978.

5. *Churchill and Tait v. Rafferty*, 32 Philippine Rpts. 580, 609 (Phil. Isl. Sup. Ct. 1915), *app. dismissed* 248 U.S. 591 (1918).

*The success of billboard advertising depends not so much upon the use of private property as it does upon the use of the channels of travel used by the general public. Suppose that the owner of private property, who so vigorously objects to the restriction of this form of advertising, should require the advertiser to paste his posters upon the billboards so that they would face the interior of the property instead of the exterior. Billboard advertising would die a natural death if this were done, and its real dependency not upon the unrestricted use of private property but upon the unrestricted use of the public highways is at once apparent. Ostensibly located on private property, the real and sole value of the billboard is its proximity to the public thoroughfares. Hence, we conceive that the regulation of billboards and their restriction is not so much a regulation of private property as it is a regulation of the use of the streets and other public thoroughfares.*

This view has been reaffirmed many times in the intervening years, including the classic case *General Outdoor Advertising Company vs. Department of Public Works*.<sup>6</sup>

*(Outdoor advertising signs) constitute a franchise upon the public highways. . . (The billboard interests) are not asserting a natural right. . . They are seizing for private benefit an opportunity created for quite a different purpose by the expenditure of public monies.*

In a recent case, *Modjeska Sign Studios, Inc. vs. Berle*, the court stated:<sup>7</sup>

*Billboards and advertising signs are of little value and small use unless great highways bring the traveling public within view of them, and their enhanced value when they are seen by a large number of people was created by the State in the construction of the roads and not by the signs' owners.*

#### *Sign Industry Pricing Practices*

Lease rates for off-premise outdoor advertising signs reflect this dependence on public streets and highways. For example, one large outdoor advertising company priced its 672 square foot painted signs in Chicago at \$1,960 per month in 1981. These signs are "rotated" to a different location every 60 days and the company guaranteed an

6. *General Advertising Co., Inc. v. Department of Public Works*, 289 Mass. 149, 198 N.E. 799, 813 (Mass. Sup. Jud. Ct. 1935) *app. dismissed* 296 U.S. 542 (1935) and 297 U.S. 725 (1936). Two other landmark cases were: *Keibro, Inc. v. Myrick*, 113 Vt. 64, 30 A.2d 527 (1943); and *New York State Thruway Authority v. Ashley Motor Court*, 176, N.E.2d 566 (New York Court of Appeals, 1961).

7. *Modjeska Sign Studios, Inc. v. Berle*, 402 N.Y.S.2d 359, 373 N.E.2d 255 (N.Y. Ct. of App. 1977).

average monthly "circulation" of 1,236,000, or approximately 41,200 daily.<sup>8</sup> The same company offered the same size sign in the New York market for \$2,700 monthly, while in San Antonio it was offered for \$900 monthly. The differences in price were accounted for mostly by differences in circulation, that is, by the number of people travelling by the sign on public roads.

Another major company now prices their signs solely on the basis of traffic volumes, charging \$1 per thousand monthly circulation for the 672 square foot painted bulletin.<sup>9</sup> The circulation figures are derived from traffic counts gathered by state and local governments.

#### *Direct or Indirect Uses of the Roadways*

Billboard owners and users usually contend that billboards benefit from the roads in the same fashion as do all highway-oriented businesses such as motels, restaurants, and gas stations—or even as businesses in general. This argument completely ignores the difference between direct and indirect uses of the roads.

Many types of businesses gain advantages from their close proximity to major highways, and particularly from nearness to important roadway junctions or interchanges. These considerations are a major factor in locational decisions—either because firms depend on motorists for their clientele or because they need easy access to roads for the transportation of goods. While quite important to many firms, these benefits are still indirectly derived and are almost impossible to measure with any degree of accuracy. The highway billboard, on the other hand, benefits directly and solely from its use of the roadway, and in direct relationship to the volume of traffic on the road. The outdoor advertising industry itself recognizes this direct relationship in its pricing policies.

#### THE NEED FOR A ROAD USER FEE ON BILLBOARDS

A national road user fee on billboards could provide a highway beautification fund to landscape roadsides, install and maintain motorist information systems, and to acquire billboards that are nonconforming under the Highway Beautification Act. Such a tax appears to hold the only hope for ever completing this removal program.

8. Foster and Kleiser, *Foster and Kleiser 1981 Bulletin Rates*.

9. *Signs of the Times*, November 1979, pp. 40-42, 45.

*The Highway Beautification Act*

Passed with much fanfare in 1965, the Highway Beautification Act was supposed to result in the removal of existing billboard clutter from rural roadsides and the prevention of its future spread.<sup>10</sup> It has accomplished neither objective.

*Control of New Signs.* The Act has been very ineffective in controlling the erection of new billboards along the Nation's rural roadsides. New signs were supposed to be erected only in areas of commercial or industrial use and were made subject to size, spacing and lighting criteria. Unfortunately for the stated objectives of the Act, the Secretary of Transportation was not allowed to set any national standards for size and spacing, but was to enter into agreements with the states based on "customary use." This has been defined in a rather curious way.

The Bureau of Public Roads first proposed a maximum size of 400 square feet for new signs, but later changed this to 650 square feet even though a national inventory showed that size larger than all but 1.85 percent of existing billboards.<sup>11</sup> Finally, the Federal Highway Administration developed a "model agreement" in cooperation with the Outdoor Advertising Association of America that was adopted by 32 states.<sup>12</sup> The "model agreement" set a maximum size limitation of 1,200 square feet, equal to the floor area of a medium-sized three bedroom house and approximately twice the size of the largest billboards normally erected along the Interstate system. The chief negotiator of the agreements and head of the Scenic Enhancement Division of the Federal Highway Administration, and who now is employed by the Outdoor Advertising Association of America as an "environmental consultant," later testified:<sup>13</sup>

*That size limit is the outer limit of what is used by the industry in major urban areas within the United States. . . . I doubt greatly that more than one sign out of 2,000 now erected, or erected since those controls were established, even approaches that 1,200 square feet limit.*

"Customary spacing" in the guidelines, and in most of the states, was defined as every 500 feet on the Interstate system, and every 300

10. 23 U.S.C. Sec. 131.

11. U. S. Cong., House, *Hearings on H.R. 7797*, 90th Cong., 1st Sess. 1967, p. 961.

12. Commission on Highway Beautification, *Staff Papers*, June 1974.

13. From testimony of George McInturff given before a public hearing to consider a challenge to the constitutionality of the State College Borough, Pennsylvania, Sign Ordinance 888 (March 13, 1978).

feet on the primary system outside of municipalities, and every 100 feet on the primary system within municipalities. Under the spacing criteria it is possible to have 10.5 billboard sites per mile on each side of the road along on Interstate highway, a total of 21 sites on both sides. Since two faces are permitted at each site, 42 billboards per mile are allowed along any portion of the Interstate system that is zoned commercial or industrial. On the primary system the comparable figures are 35 sites and 70 faces per mile. Within municipalities the allowable sites reach the somewhat absurd level of 106 per mile with 212 possible sign faces. If each of these signs were of the maximum allowable size (1,200 square feet per site), the total area of the sign faces would be equal to approximately three football fields for each mile of roadway.<sup>14</sup> To contend that the size and spacing requirements serve as any effective control of signboards is obviously absurd.

Since the size and spacing requirements contained in most of the agreements amount to virtually no control of outdoor advertising, the designation of commercial and industrial areas becomes all important. Unfortunately, local zoning authorities often do not place great importance on providing an uncluttered view for the Interstate motorist. The real or imagined benefits to be derived for local businesses through billboard advertising usually assume a greater priority. In practice, therefore, many local communities, and particularly rural counties, have attempted to circumvent the Highway Beautification Act by zoning long stretches of rural highways as commercial and industrial areas. The absence of any requirement that such areas actually contain commercial or industrial land uses, and the acceptance by the Federal Highway Administration of such zoning makes this provision perhaps the largest loophole in the entire Highway Beautification Act.<sup>15</sup>

The designation of "unzoned commercial and industrial areas" is another huge loophole permitting billboards along predominantly rural roadsides. The original idea was that this designation would encompass areas that were easily recognizable to the average motorist as genuine commercial and industrial areas, but that were located in jurisdictions lacking comprehensive zoning. It has not turned out that

14. Bruce Brennan, *Outdoor Advertising Control Under the Highway Beautification Act of 1965: A Review of State Statutory and Case Law*, Transportation Research Board, NCHRP Project 20-6, Study No. 34, March 1979.

15. For examples of "phony zoning" and misuse of the unzoned commercial area, see Charles F. Floyd, "Requiem for the Highway Beautification Act," *Journal of the American Planning Association*, forthcoming.

way. A draft agreement proposed in 1966 would have defined such areas as two industrial or commercial activities located within a radius of 300 feet, and this concept was even endorsed by the Outdoor Advertising Association of America.<sup>16</sup> In the final agreements, however, the unzoned commercial or industrial area was usually defined as 800 feet each side of only one such activity.<sup>17</sup> In practice, even the most obscure commercial or industrial use will often serve to permit several new signs.

*Removal of Nonconforming Signs.* Communities have traditionally eliminated nonconforming signs through amortization under their police powers, that is, their powers of regulation.<sup>18</sup> Despite the fact that 22 states were already removing nonconforming billboards under the earlier Bonus Law through their use of the police power, the 1965 Act required payment of cash compensation to both the sign owner and owner of the land on which the sign was located. Congress justified this change in policy on the basis that controls were being extended to the primary system where outdoor advertising was long established. There is also considerable evidence, however, that the Congress did not fully understand the implication of this action. For example, during the debate Senator Muskie emphasized that:<sup>19</sup>

*Under the bill all that can be compensated for is whatever remains of the leaseholds or the unamortized values, so that if, in fact, the billboard has been completely amortized or the leasehold has expired, no compensation will be paid under the bill.*

This, of course, is an exact description of the amortization principle that was being outlawed by the Act.

Subsequent experience has proven that Congress's belief that the value of nonconforming signs would generally decrease over time was not justified. To the contrary, the average compensation paid for the signboards has continually risen, even though the outdoor advertising industry has generally depreciated billboards over a period of 8 years or less for tax purposes. Lenient regulations regarding repair and refurbishment have allowed sign companies to continually rebuild and

16. U.S. Cong., Senate, 1965, *Hearings Before the Subcommittee on Public Roads of the Senate Committee on Public Works: Hearings on S.2084 and S.2259*, 89th Cong., 1st Sess.

17. Charles F. Floyd and Peter J. Shedd, *Highway Beautification: The Environmental Movement's Greatest Failure*, Boulder: Westview Press, 1979.

18. Norman Williams, Jr., *American Land Planning Law*, Chicago: Callaghan & Company, 5 Volumes, 1974-1975.

19. Cong. Rec. 111, 23872 (1965).

repair nonconforming signs and, in effect, perpetuate their life. Combined with unrealistically high sign appraisals, this has resulted in a continual increase in sign removal costs. A General Accounting Office report estimated future increases at 6 percent annually.<sup>20</sup> Experience has shown that this estimate is much too low, with the actual average costs of signs acquired under the program rising almost 13 percent annually between fiscal years 1976 and 1980.<sup>21</sup>

Congress made compensation mandatory for the removal of nonconforming signs, declared in a 1968 amendment that no signs are required to be removed unless the federal share of compensation is available, but has since failed to appropriate the funds necessary to complete the program within any reasonable time. The first sign removed under the beautification program was acquired in May 1971, nearly a year after the "final compliance date" of July 1, 1970, that was originally set in the Act for the removal of *all* nonconforming signs. Since 1971, approximately 107,000 nonconforming signs have been removed under the Act at a cost in excess of \$150 million. Over 133,000 nonconforming billboards remain, along with approximately 54,000 illegal signs.<sup>22</sup>

Although according to the Federal Highway Administration, approximately 46 percent of the nonconforming signs have been removed, this figure gives a false impression regarding the status of the acquisition program. Most of the billboards removed have been small and obsolete signs of little value. Most of the larger and more valuable signs remain.

Public projects are normally planned so as to *maximize* the benefit-to-cost ratio; the billboard removal program *minimizes* the benefit-to-cost ratio. In 1976 Congress directed that the first priority for removal be signs voluntarily offered by the billboard companies, while other nonconforming signs along heavily traveled rural highways be the last removed. This strategy has resulted in the very limited funds that have been appropriated for highway beautification being dissipated to little benefit except to the outdoor advertising firms.

Furthermore, the Federal Highway Administration has ruled that

20. Comptroller General of the United States, General Accounting Office, *Obstacles to Billboard Removal*, 1978.

21. Federal Highway Administration, *Annual Statistical Progress Reports*, 1977-1981.

22. Federal Highway Administration, *Annual Statistical Progress Report: Highway Beautification Program*, September 30, 1981.



beautification funds can be used to remove signs that are being acquired to make way for new construction. In other words, the meager monies available for beautification have been used to remove signs that would have otherwise been acquired with construction funds. In some states, over half of the "beautification" monies have been used in this way.

The FHWA recently estimated that completion of the beautification program would require an additional expenditure of approximately \$995 million in 1980 dollars. With a 7 percent rate of inflation, the estimated cost to complete the program in 10 years would be \$1.3 billion; a 20 year program was estimated to cost \$1.9 billion. At a more realistic inflation rate of 13 percent, the comparable figures were \$1.8 billion and \$3.7 billion.<sup>23</sup> Even these estimates are too low, however, since they are based on an average cost of \$1,808 per sign, less than recent acquisition costs and far less than required for the more valuable signs still to be acquired.

For fiscal year 1981 Congress appropriated \$8.5 million for the sign program. Of this amount, \$7.7 million was required for payments contractually obligated under the Bonus Act, leaving only \$800,000 for sign removal. The F.Y. 1982 appropriation allocated only \$500,000 for the beautification program, approximately \$7.2 million less than required just for bonus payments. If the unrealistic and incorrect favorable assumptions are made that (1) the entire \$500,000 could be used to acquire nonconforming signs, (2) the Federal Highway Administration's estimates of the cost to complete the program are correct, and (3) there will be no further inflation—in other words, make the most favorable possible assumptions—then this level of appropriations would fund the removal of all the currently nonconforming signs in slightly less than 2,000 years.

Even if the scope of the highway beautification program were significantly reduced by deregulating urban areas and much of the primary system, the cost of removing nonconforming billboards would still be far greater than the funds that Congress is likely to appropriate for this purpose. An alternative source of funding must be developed, therefore, if the program is ever to be completed. A road user fee on billboards can provide this financing source. Alternatively, or perhaps in conjunction with the national beautification program, state and

23. Federal Highway Administration, *Projected Outdoor Advertising Control Program Completion Cost*, July 1980.

local road user fees on billboards could provide a new source of revenue for these governmental units.<sup>24</sup>

#### IMPLEMENTATION

Unlike many proposed user fees or taxes, a road user fee on billboards would be relatively easy to implement. Almost all states issue billboard permits as part of their highway beautification programs, and this permitting system could easily be expanded to encompass all signs covered by the user fee. The fee itself would be based on the same two elements that the outdoor advertising industry uses to price their sign leases, (1) size of the sign, and (2) average daily traffic on the road by which the sign is located. Both data elements are quite easy to obtain. The size of signs can be determined from sign permits or simple measurement. Traffic data are collected regularly by state and local governments and are usually readily available for streets and highways on which billboards are likely to be located.

To see how this fee might be implemented, suppose a user fee is enacted equal to approximately 10 percent of gross revenues where the standard painted bulletin of 672 square feet leases of \$1 per 1,000 circulation daily. This means that the sign would lease for \$365 annually (\$0.543 per square foot) times the average daily traffic. Thus, a tax of \$0.0543 per square foot per 1,000 average daily traffic (ADT) would constitute a tax of approximately 10 percent of gross revenue. Suppose further that this sign were located on a freeway with an ADT of 50,000. Under these assumptions the sign would lease for \$18,250 annually and the road user fee would be calculated as follows:

$$\begin{aligned} &(\text{size of sign}) \times (\text{ADT in 1000s}) \times (5.43\text{¢}) = \\ &(672) \times (50) \times (5.43\text{¢}) = \$1,825. \end{aligned}$$

For a second example, suppose that a standard poster panel of 300 square feet were located on a city street carrying 20,000 vehicles per day. If the lease rate was the same as above, the road user fee on this sign would be \$326, calculated as follows:

$$(300) \times (20) \times (5.43\text{¢}) = \$326.$$

A fee based on a percentage of gross lease revenues has some appeal, but would be much harder to implement than a fixed rate. The

24. State and local governments collect permit fees and property taxes on billboards, but these sources do not provide significant revenues.

TABLE I—NUMBER OF BILLBOARDS ON INTERSTATE AND PRIMARY SYSTEMS  
*Nationwide Totals—1980 (Thousands)*

	<i>Total</i>	<i>Interstate</i>	<i>Primary</i>
Conforming	209.6	32.5	177.1
Nonconforming	143.7	34.3	109.4
Total	353.3	66.8	286.5

Source: Federal Highway Administration, *Nationwide Summary, Outdoor Advertising Controls—National Reassessment Data*, September 1980.

TABLE II—ESTIMATED ANNUAL REVENUES FROM ROAD USER FEE  
*(Millions)*

	<i>Total</i>	<i>Interstate</i>	<i>Primary</i>
Conforming	\$66.3	\$35.3	\$31.0
Nonconforming	31.8	22.3	9.5
Total	98.1	57.6	40.5

fixed rate eliminates the necessity for gathering sales data and also eliminates the problem of setting rates for advertiser-owned signs.

#### *Estimation of Expected Revenues*

It is not possible to accurately estimate potential revenues from a national user fee on billboards with currently available data. A rough estimate can be made from data gathered by the FHWA during their recent reassessment of the highway beautification program. These data, shown in Table I, indicate there were approximately 209.6 thousand conforming billboards on the Interstate and primary systems in 1980, along with 143.7 thousand nonconforming signs.

In order to make any estimate of potential revenues from the billboard user fee it is necessary to make assumptions regarding the size of these signs and the average daily traffic for the roads on which they are located. Assume the average conforming sign on the Interstate system is 500 square feet in size, and the average size on the primary system is 400 square feet. For nonconforming signs the comparable assumed sizes are 300 and 200 square feet. Further, assume that Interstate highways on which these signs are located carry an average of 40,000 vehicles per day and comparable primary highways 8,000.<sup>25</sup> Using these assumptions and the "example" rate of \$0.0543 annually per square foot per 1,000 ADT, the estimated annual revenues from the user fee, as shown in Table II, totals \$98.1 million.

These estimates involve somewhat heroic assumptions based on

25. The roads on which billboards are located generally carry higher than average traffic volumes.

inadequate data, but are still probably of reasonable accuracy. The \$0.0543 rate used in making the estimate is an example and not a recommended rate. A user fee in the range of \$0.05 and \$0.10 per square foot per 1,000 ADT would probably represent a 10 to 13 percent tax on gross revenues from the billboards.

#### SUMMARY

Off premise outdoor advertising signs (billboards) derive their economic value solely from their direct use of the public streets and highways. They are also the major direct users of the road that have escaped road user fees. A road user fee on billboards based on size of sign and average daily traffic on the road along which the billboard is located would be relatively easy to administer, and such a fee could generate the monies necessary to fund the highway beautification program. Alternatively, the user fee could be used for other transportation or general governmental purposes.