



C.F.R. § 73.1212. These rules require that, when payment is received or promised to a broadcast licensee for the airing of material, the station must disclose that fact at the time of airing and identify who paid or promised to provide the consideration. The required identification must be made regardless of the type of entity making the payment (*i.e.*, whether governmental, non-profit or private commercial) or the nature of the message conveyed.<sup>3</sup> These rules ensure that audiences are informed when “hearing or viewing matter which has been paid for” and that the “person paying for the broadcast of the matter [is] clearly identified.”<sup>4</sup>

The Commission has long held that the key issue in requiring sponsorship identification under Section 317 is “whether or not a station receives valuable consideration for broadcasting” the material. *Advertising Council Order* at ¶ 17. “Generally, when no payment or other valuable consideration is paid or promised,” no sponsorship identification “is necessary, since by definition there is no sponsor.” *1991 Public Notice* at 5861. Indeed, in 1963 the Commission stated that the “sole test” under Section 317 “as to whether a sponsorship identification announcement was required was whether there had been broadcast exposure in return for . . . payment.”<sup>5</sup>

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<sup>3</sup> For example, even “public service” type messages of governmental or nonprofit entities are subject to the sponsorship identification rules if payment is made to the broadcaster for airing the material. *See, e.g.*, Public Notice, *Commission Reminds Broadcast Licensees and Cable Operators of Sponsorship Identification Requirements Applicable to Paid-For “Public Service” Messages*, 6 FCC Rcd 5861 (1991) (“*1991 Public Notice*”); Order, *Advertising Council Request for Declaratory Ruling or Waiver Concerning Sponsorship Identification Rules*, 17 FCC Rcd 22616, 22621 (2002) (“*Advertising Council Order*”).

<sup>4</sup> Public Notice, *Application of Sponsorship Identification Rules to Political Broadcasts, Teaser Announcements, Governmental Entities and Other Organizations*, 66 FCC 2d 302, 303 (1977).

<sup>5</sup> Report and Order, *Amendment of Sections 3.119, 3.289, 3.654 and 3.789 of the Commission’s Rules*, 34 FCC 829, 836 (1963) (“*1963 Report and Order*”).

The commenters in this proceeding uniformly agree that broadcast stations do *not* receive consideration for airing VNRs.<sup>6</sup> Rather, “[v]ideo news releases are merely updated versions of traditional press releases” distributed to journalists.<sup>7</sup> The Commission has previously concluded that no sponsorship “announcement is necessary” when news releases “are furnished to a station by Government, business, labor and civic organizations, and private persons, with respect to their activities, and editorial comment therefrom is used on a program.”<sup>8</sup> The same logic should apply to VNRs.

Beyond the sponsorship identification requirements, existing FCC regulations impose further disclosure obligations in connection with political material and programming dealing with controversial issues even if there is no consideration. If “any film, record, transcription, talent, script, or other material or service of any kind is furnished, either directly or indirectly, to a station as an inducement for broadcasting such matter,” identification announcements are required.<sup>9</sup> Nothing in this record suggests any violation of this rule. Nor is there any evidence that VNRs typically deal with political material or programming dealing with controversial issues. Absent such evidence, there is no reason to assume a need for special rules.

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<sup>6</sup> See, e.g., Comments of Radio-Television News Directors Association (“RTNDA”) at 6 (filed June 22, 2005); NAB at 4 (filed June 22, 2005); Public Relations Society of America (“PRSA”) at 8, 13 (filed June 22, 2005); Medialink Worldwide Incorporated, *et al.* (“Medialink”) at 1 (filed June 22, 2005).

<sup>7</sup> Comments of PR Newswire Association LLC and Multivu, Inc., a PR Newswire Company (“PR Newswire”) at 5 (filed June 22, 2005).

<sup>8</sup> Notice of Proposed Rulemaking, *Amendment of Sections 3.119, 3.289, 3.654 and 3.789 of the Commission’s Rules*, 40 FCC 105, 112 (1961) (setting forth numerous sponsorship identification “case illustrations” that were later approved).

<sup>9</sup> 47 C.F.R. § 73.1212(d)-(e). See also 47 U.S.C. § 317(a)(2).

The record here shows that broadcasters typically use VNRs as a source from which to excerpt video (including generic video akin to file photos at a newspaper or “B-roll” at television stations) to illustrate other news stories and programming. *See* Comments of NAB at 2-4; RTNDA at 7-10. Commenters agreed that television stations do not treat VNRs as “prepackaged news stories to be aired, without alteration.” *Notice* at 1.<sup>10</sup> Given the limited usage VNRs usually receive, and the existence of Commission rules comprehensively regulating sponsorship identification and political/controversial issue programming, the record in this proceeding demonstrates no need to alter the current regulatory regime concerning VNRs.

## **II. Limited Use Of Government-Sponsored VNRs Does Not Demonstrate A Need To Alter Commission Practice Particularly In Light Of First Amendment Considerations.**

In addition to the limited usage VNR materials receives, the recent controversy generated by a small number of government-sponsored VNRs also does not warrant wholesale changes to the sponsorship identification rules.<sup>11</sup> The “vast majority” of VNRs are from private, not governmental sources. Comments of RTNDA at 6. Moreover, in the most widely publicized case where certain stations did air a prepackaged story in a government-sponsored VNR, these stations mistook the VNR for a story from a network editorial source, apparently because of confusion resulting from a new distribution format.<sup>12</sup>

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<sup>10</sup> *See* Comments of NAB at 3; RTNDA at 8-9; PR Newswire at fn. 13. Even the sole commenter expressing concern about VNRs and calling for more regulation stated that “prepackaged news stories provided in VNRs are rarely aired as provided, in their entirety.” Comments of Center for Media and Democracy and Free Press at 3 (filed June 22, 2005).

<sup>11</sup> *See Notice* at fn. 1 (citing letters to FCC expressing concern about government-sponsored VNRs); Comments of Center for Media and Democracy and Free Press at 1 (citing reports of government-funded VNRs).

<sup>12</sup> *See* Comments of RTNDA at 8 (discussing Medicare-related VNR from Health and Human Services Department).

Since that occurrence, networks that distribute VNRs have taken “definitive steps to ensure that third party material” included in feeds is “segregated from bona fide news content and easily identifiable.” *Id.* at 8.<sup>13</sup> The producers and distributors of VNRs also take care to “provide clear notice to broadcasters of the entities on whose behalf” they distribute VNRs. Comments of Medialink at 1. The Public Relations Society of America recently opined to its members that organizations producing VNRs should clearly identify them as such and “fully disclose who produced and paid for it at the time the VNR is provided to TV stations.” Comments of PRSA at 4. This renewed emphasis on clearly labeling VNRs and making them more easily identifiable by television stations should significantly reduce the likelihood of stations in the future airing VNRs mistakenly believing that they were stories from network or other editorial sources.

It is also significant that Congress has taken action regarding identification of government-funded VNRs. This spring, Congress passed the Byrd Amendment to an appropriations bill requiring federal agencies producing VNRs to disclose their sponsorship.<sup>14</sup> Although this amendment expires at the end of the fiscal year (September 30, 2005), the House very recently voted to prohibit the White House, federal agencies or their subcontractors from producing packaged VNRs unless the package includes a “clear notification” that the VNR was prepared or funded by the government. *Broadcasting and Cable* at 11 (July 4, 2005).

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<sup>13</sup> *Accord* Comments of Douglas Simon at 2 (networks label and identify the sponsors of VNR material distributed on their feeds and/or place VNR material on a “separate interface”); PRSA at 14 (noting that VNRs are placed on separate section of feeds from sources such as CNN and are labeled to differentiate them from the standard network feeds).

<sup>14</sup> 151 Cong. Rec. S3635 (daily ed. Apr. 14, 2005).

Particularly in light of these recent actions, there appears no compelling need for regulating the use of VNRs.

The Commission should also be especially mindful of the First Amendment issues surrounding government regulation of VNR use. Editorial discretion as to how to utilize VNRs that stations receive for free (like newspapers receive print press releases) should be left to journalists themselves, with guidance from journalist organizations such as RTNDA and the Society of Professional Journalists. Indeed, the RTNDA Ethics Committee in April 2005 adopted expanded guidelines for newsrooms to follow when considering the use of outside audio and video material in creating their own stories or programs.<sup>15</sup> The Commission must resist the suggestions of some commenters that it should change current rules simply because they consider it a better journalistic practice to attach disclosures to any and all material excerpted from VNRs provided free to stations.<sup>16</sup> In an area so intertwined with the editorial discretion protected by the First Amendment, the Commission should tread carefully and impose additional rules only when the harms are so incipient and widespread that self-policing is no longer adequate.<sup>17</sup>

As other commenters discussed in detail, imposing disclosure requirements on stations for any use (even generic) of material excerpted from VNRs when creating their own

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<sup>15</sup> Comments of RTNDA at 4 and Attachment B. RTNDA's Code of Ethics and Professional Conduct, as revised in 2000, moreover provides that professional electronic journalists should "clearly disclose the origin of information and label all material provided by outsiders." Comments of RTNDA at 4 and Attachment 4.

<sup>16</sup> See Comments of Center for Media and Democracy and Free Press at 6.

<sup>17</sup> See, e.g., *CBS v. Democratic National Committee*, 412 U.S. 94, 124 (1973) (in a decision upholding the discretion of broadcasters to refuse to air editorial advertisements under the Communications Act and the First Amendment, the court, citing "journalistic tradition and experience," commented that "editing is what editors are for; and editing is the selection and choice of material").

programming, including news, that arguably deals with controversial or political issues could well raise significant First Amendment issues, particularly given difficulties with defining which stories and programming address controversial or political issues.<sup>18</sup> Additional disclosure requirements may also lead to viewer confusion as to which part of the programming (and its message) was furnished by a private or governmental entity and which part is attributable to the station or video programming provider.

### **III. Conclusion.**

For all the reasons set forth above, the Commission should refrain from expanding the scope of its sponsorship identification rules to include material such as VNRs provided free to broadcasters, which stations may excerpt, edit or discard entirely at their discretion. Congress has required over-the-air sponsorship identification “since the promulgation of the Radio Act of 1927,” “based on the principle that the public has the right to know whether broadcast material has been *paid for* and by whom.”<sup>19</sup> As the Commission has previously recognized, its rules “reflect Congress’ view that not all material broadcast requires or necessitates sponsorship identification.”<sup>20</sup> The record in this proceeding provides no basis for the Commission to expand its sponsorship identification rules beyond Congress’ original intent so as to cover broadly

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<sup>18</sup> See Comments of PR Newswire at 16-39; RTNDA at 10-11. As PRSA commented (at 9), “in a free society almost any subject matter could be deemed controversial or political in nature by some individual or special interest organization.” Further required disclosures could also prove more confusing than enlightening for audiences. “*Continuous*, on-screen disclosure of VNR sources,” as supported by the Center for Media and Democracy and Free Press (at 6), could result in viewers believing that an entire story was sponsored by a corporate or governmental entity when, in fact, only a brief video clip included in a lengthy story or program was taken from a VNR provided for free to the station.

<sup>19</sup> *Thomas R. Sharbaugh*, 41 RR 2d (P&F) 877 (1977); *A.J. Martin*, 41 RR 2d (P&F) 881 (1977) (emphasis added).

<sup>20</sup> *Complaint of Barry G. Silverman against Station KOOL-TV, Phoenix, Arizona*, Memorandum Opinion and Order, 63 FCC 2d 507, 512 (1977).

material that no broadcaster was paid to air.<sup>21</sup> The enforcement of the Commission's existing rules obligating broadcasters "to identify the sponsor of particular program material" can ensure that viewers "know by whom they are being persuaded." *KOOL-TV*, 63 FCC 2d at 512. Especially in light of the limited, generic usage VNRs typically receive, the Commission should refrain from adopting further regulations specifically addressing VNRs.

Respectfully submitted,

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<sup>21</sup> *1963 Report and Order* at 836 (Section 317 was enacted "to inform the listening public by whom it was being persuaded; the sole test as to whether a sponsorship identification announcement was required was whether there had been broadcast exposure in return for the payment of 'any money, service, or other valuable consideration'").