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VIA ELECTRONIC FILING

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street S.W.
Washington, DC 20554

**Re: Use of Video News Releases by Broadcast Licensees
MB Docket No. 05-171**

Dear Ms. Dortch:

The Radio-Television News Directors Association (“RTNDA”) has learned that, in an unprecedented regulatory intrusion into newsroom operations, the Commission’s Enforcement Bureau (“Bureau”) recently submitted formal Letters of Inquiry (“LOIs”) to 77 U.S. television stations.¹ The letters obligate the stations, *inter alia*, to collect and turn over to the agency tapes and transcripts of newscasts, news outtakes, and VNRs; to answer detailed questions concerning the identification, selection, production, editing, and broadcasting of specific news stories; and to submit statements that are descriptive of news department practices and policies. Even if these proceedings were to result in no further regulatory action, compliance with the requirements of the LOIs has and will, in and of itself, consume the time, attention, and energy of innumerable station managers and employees, lawyers and consultants, professional membership and trade association representatives, etc. Given that: (1) the LOIs appear to have been prompted by a biased and inaccurate study regarding VNR use; (2) the Commission itself has indicated that sponsorship identification rules do not apply in most cases where a licensee has not received or been promised consideration for the broadcast of certain material; (3) enforcement action has been initiated before the Commission has concluded a pending proceeding concerning potential regulation of VNR use; and (4) the investigation already has had a chilling effect on the dissemination of newsworthy information to the public, RTNDA is particularly troubled by the Bureau’s actions.

The Bureau is following the lead of an organization that is unrelenting in its hostility to the principles of free speech and a free press that have sustained our

¹ RTNDA is the world’s largest professional organization devoted exclusively to electronic journalism. RTNDA represents local and network journalists in broadcasting, cable and other electronic media in more than 30 countries, including those who are the subjects of the Bureau’s investigation.

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democratic institutions for more than 200 years. And, in a linguistic twist that would have earned the admiration of George Orwell himself, this group refers to itself as the “Center *for* Media and Democracy” (“CMD”) (emphasis added).²

Government Regulation vs. Voluntary Private Sector Initiatives

As a preliminary matter, this proceeding provides an excellent illustration of the fundamental legal distinction between government regulation of speech, on one hand, and voluntary initiatives by private media enterprises or the professional membership and trade associations in which they and their employees participate, on the other. It is a basic tenet of American constitutional law that the restrictions embodied in the Bill of Rights run against the *government*. Accordingly, the First Amendment guarantees of freedom of expression constrain the regulatory power of government (“Congress shall make no law . . . abridging the freedom of speech, or of the press”). But no similar limitation is placed on the actions of private media enterprises or the trade associations in which they participate.³

As the Commission is well aware, RTNDA has adopted voluntary standards pertaining to VNR use,⁴ and understands that many newsrooms have incorporated these standards into their own policies. It is, however, perfectly permissible for private sector organizations to adopt guidelines for constitutionally protected communications if and to the extent that they believe such guiding principles are appropriate.⁵ RTNDA and its members are committed to providing accurate and credible news stories. That commitment extends to appropriate identification of materials received from third-party sources. As discussed below, however, the First Amendment clearly restricts governmental constraints aimed at the same or similar

² CMD has been described as a “counterculture public relations effort” that specializes in the telling of unsubstantiated “scare-mongering tales about a corporate culture out of control.” Center for Consumer Freedom, “Center for Media and Democracy,” http://www.activistcash.com/organization_overview.cfm/oid/12 (last visited Oct. 3, 2006).

³ See *CBS v. Democratic National Committee*, 412 U.S. 94 (1973).

⁴ See Attachment B.

⁵ Cf., *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 214, 256 (1974) (“A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated.”).

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objectives. FCC regulation of broadcast speech can be sustained only if, at a minimum, such action is necessary or appropriate to advance a “substantial” governmental interest.⁶ But, far from being substantial, the goal outlined in CMD’s complaint—the termination of existing industry practices involving the use of VNRs⁷—is not even a *legitimate* objective of governmental action.

CMD’s Report is Flawed

CMD’s complaint is accompanied by a report that may be found at the website www.prwatch.org.⁸ This report purports to demonstrate the existence of an “ongoing crisis and scandal” in which many stations are supposedly abdicating editorial control over newsroom operations to rapacious corporate interests.⁹

Given its issuance of LOIs to each of the stations named by CMD in its complaint, it appears that the Bureau simply assumed the veracity of the report without further vetting. (CMD would, presumably, call journalists to task for similar behavior.) Upon even cursory inspection, however, it is apparent that the piece is far from a “well documented and researched report.”¹⁰ As demonstrated in Attachment A, the report is rife with unsubstantiated accusations and misleading half-truths. CMD fails to disclose its methodology, embellishes its conclusions, and offers little, if any, new information about VNR use. Most importantly, the piece does not constitute a credible basis upon which the Commission can justify the extraordinary step of inserting itself into broadcast newsrooms and questioning their exercise of editorial discretion.

⁶ See *FCC v. League of Women Voters of California*, 468 U.S. 364, 380 (1984).

⁷ See *Fake TV News: Recommendations* – Center for Media and Democracy, April 6, 2006, <http://www.prwatch.org/fakenews/recommendations>.

⁸ Diane Farsetta and Daniel Price, Center for Media and Democracy, *Fake TV News: Widespread and Undisclosed*, April 6, 2006, <http://www.prwatch.org/fakenews/execsummary>.

⁹ Letter from Timothy Karr, Campaign Director, Free Press, and John Stauber, Executive Director, Center for Media and Democracy, to Chairman Kevin J. Martin, and Commissioners Deborah Tate, Jonathan S. Adelstein and Michael J. Copps (April 6, 2006), *available at* http://www.freepress.net/docs/fcc_complaint_4-06-06.pdf.

¹⁰ Statement of Commissioner Jonathan S. Adelstein, Federal Communications Commission, Press Conference on Fake TV News: Widespread and Undisclosed, April 6, 2006, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-264822A1.pdf (“Adelstein Statement”).

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Nonetheless—without instituting a rulemaking proceeding, without public discussion of the considerable information received in response to the Commission’s April 2005 Notice of Inquiry,¹¹ and without giving broadcasters the benefit of answers to the questions posed therein regarding application of the sponsorship identification rules to VNR use¹²—the Bureau has launched an investigation that places the onus on newsrooms to respond, painstakingly, to a voluminous list of inquiries based solely on CMD’s tenuous allegations and an interpretation of the sponsorship identification rules that is, at best, a stretch.

The Bureau’s Action Departs from Established Precedent

The perfunctory approach evidenced by the Bureau’s LOIs has never been a hallmark of broadcast regulation, and with good reason. Even during the Fairness Doctrine era, when the Commission enforced an agency-constructed regime it eventually determined to be unconstitutional, the Commission gave broadcast journalists the benefit of the doubt. Under its Fairness Doctrine procedures, the Commission would not consider a Fairness complaint unless the complainant established a *prima facie* case against the broadcaster. Requiring complaints to pass an initial Commission review before they resulted in enforcement action ensured that “broadcasters are not burdened with the task of answering idle or capricious complaints.”¹³ CMD’s complaint not only is biased and exaggerated, but also inaccurate, as detailed in the attached critique. Given the report’s obvious flaws, the Bureau’s decision to move forward with investigations of *every station* mentioned in the report is inexplicable.

A 1979 federal appeals court case demonstrates just how far the Commission has strayed from its Fairness Doctrine policies. In *American Security Council Education Foundation v. FCC*, the D.C. Circuit upheld the Commission’s decision to dismiss a Fairness Doctrine complaint based on a study that a public interest

¹¹ Public Notice, Commission Reminds Broadcast Licensees, Cable Operators and Others of Requirements Applicable to Video News Releases and Seeks Comment on the Use and Video News Releases by Broadcast Licensees and Cable Operators, FCC 05-84 (rel. April 13, 2005) (“VNR Public Notice”).

¹² See VNR Public Notice at 4-5.

¹³ *The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act*, 48 FCC 2d 1, ¶ 19 (1974) (“Fairness Report”).

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group had conducted to advance its radical cause.¹⁴ Judge James Skelly Wright praised the Commission for its “humility” and the “conscious shrinking back . . . by a government agency whose regulatory domain overlaps that of the First Amendment.”¹⁵ Further, in discussing the many faults of the public interest group’s study, Skelly Wright penned a criticism as relevant to CMD’s report as it was when used to support the court’s rejection of the 1979 group’s claims:

The plain fact is that ASCEF was not successful in selecting news items in a realistic way. Nor can we say that rationality rules in the absence of realism, for ASCEF furnished no guidelines on how it selected the news items. . . .

The many and fatal shortcomings of the ASCEF study are apparent. . . . [A] study can succeed, but it must be shaped to fit the contours of the fairness doctrine rather than expecting the fairness doctrine to conform to its imperatives.¹⁶

Like the group in *American Security Council*, CMD selected only news items that seemingly would advance its own agenda. CMD’s apparent goal in selecting VNRs for its report was to stack the deck against broadcasters by choosing VNRs “that seemed more newsworthy (and thus more likely to be aired) than other VNRs.”¹⁷ Particularly given the feeble basis upon which it rests, the current Bureau activity contravenes even the most fundamental constitutional standards and statutory precepts. Such action is indefensible for an agency that traditionally has considered

¹⁴ 607 F.2d 438 (1979).

¹⁵ *Id.* at 454.

¹⁶ *Id.* at 458.

¹⁷ Fake TV News: Recommendations – Center for Media and Democracy, April 6, 2006, <http://www.prwatch.org/fakenews/recommendations>. Furthermore, although the study implies that CMD found an airing of each and every VNR in its carefully selected sample, the truth is that only 41 percent of the tracked VNRs were actually aired. See Democracy Now, “Fake News: Widespread and Undisclosed. . . How Corporate Propaganda Is Airing On Local Newscasts As ‘News,’” April 6, 2006 (transcript of radio program quoting CMD Study author Daniel Price as saying, “We searched for a total of 88 of them, and out of those, 36 wound up getting used in newscasts deceptively, that’s without any form of disclosure whatsoever to viewers.”).

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First Amendment values an “integral component of the public interest standard.”¹⁸

A Pervasive “Chilling” Effect

The Commission’s experience with the so-called “Fairness Doctrine” provides a useful basis for understanding how a regulatory program intended for beneficent purposes may—in actual operation—have the opposite effect. The stated purpose of the doctrine could not have been more laudatory; it was to “expand and enrich” the range of viewpoints presented over the broadcast medium on “controversial issues of public importance.”¹⁹ The mechanism for the achievement of this goal was rooted in a requirement that each individual station be obligated, in its overall programming, to present a reasonable balance of opposing and contrasting views on public issues.

After decades of experience with the administration and enforcement of this regulatory program, the FCC took a fresh look at its constitutional underpinnings. First, in a report issued in 1985,²⁰ and later in its landmark decision in *Syracuse Peace Council*,²¹ the FCC concluded that the regulatory burdens imposed under the doctrine had the actual effect of reducing—rather than expanding—broadcast coverage of controversial public issues. The agency found that government-enforced “fairness” induced many licensees to reduce their coverage of controversial issues and, in particular, the doctrine discouraged the presentation of unorthodox and unpopular points of view.

¹⁸ *Syracuse Peace Council against Television Station WTVH Syracuse, New York*, 2 FCC Rcd 5043, ¶ 20 (1987). Recently, in the context of indecency enforcement, Commissioner Jonathan Adelstein aptly noted that the FCC should exercise its authority to regulate protected speech “with the utmost restraint, lest we inhibit constitutional rights and transgress constitutional limitations.” Statement of Commissioner Jonathan S. Adelstein, Federal Communications Commission, *In Re: Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, Notices of Apparent Liability and Memorandum Opinion and Order, http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-06-17A4.pdf.

¹⁹ *Fairness Report*, 48 FCC 2d 1, at ¶¶ 14, 49.

²⁰ *Inquiry into Section 73.1910 of the Commission’s Rules and Regulations Concerning the General Fairness Doctrine Obligations of Licenses*, 102 FCC 2d 145 (1985).

²¹ 2 FCC Rcd 5043 (1987).

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This problem was exacerbated by the fact that opportunistic, politically motivated individuals took full advantage of the possibilities that the policy created for the promotion and expansion of just such a “chilling” effect. For example, in actions that are evocative of CMD’s sweeping VNR complaint against 77 television stations, at least two presidential administrations encouraged surrogates to unleash a barrage of Fairness complaints against stations carrying controversial programming that the government officials found to be offensive.²² This “massive strategy . . . to challenge and harass” broadcasters was inspired by the hope that these stations would find the challenges to “be so costly . . . that they would be inhibited, and decide it was too expensive to continue.”²³ The White House political operatives were absolutely delighted with the results of their efforts, as numerous stations dropped the offending programs from their schedules. In the end, the strategy was said to have been successful in almost all respects.²⁴

In the instant proceeding, we are witnessing a virtual “replay” of the struggles that ultimately led to the demise of the Fairness Doctrine. In fact, in a very fundamental way, the regulatory burdens imposed under the Bureau’s VNR policy are even more onerous and intimidating than the duty to present opposing views under the now-defunct Fairness regime. Under that regulatory program, balancing or “contrasting” views did not have to appear in the same program or programs that caused the station to incur Fairness obligations in the first instance. A station’s duty was simply to present a rough balance of contending positions somewhere in its overall programming schedule.

In contrast, under the Bureau’s apparent VNR policy, the station’s regulatory duty must presumably be satisfied within the “four corners” of each and every broadcast for which the duty applies. Given the complexities of VNR distribution and use, the burden imposed becomes particularly onerous. VNRs are, essentially, the video or audio equivalent of a press release. They come in a variety of forms. They may contain voiceless film clips, such as space shuttle footage, Defense Department “file tape” or manufacturing video; suggested written scripts, or ideas for “localizing” a “story.” Often, VNRs contain complete, audio-video presentations, otherwise

²² See Notice of Inquiry, *Inquiry into the General Fairness Doctrine Obligations of Broadcast Licensees*, 49 Fed. Reg. 20317, 20332 (1984).

²³ F.W. Friendly, *The Good Guys, the Bad Guys, and the First Amendment* 39 (1976).

²⁴ *Id.* at 40-42.

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known as “prepackaged news stories.” VNRs also enter newsrooms through a variety of means, whether by overnight mail, notification regarding satellite feeds, or direct delivery to newsroom computer systems through network feed subscription services. Many stations require collaboration between reporters and management in evaluating the content and possible use of VNRs; still others leave the decisions up to the station’s executive producer. The material contained in VNRs is more likely to be used as background footage or excerpted in stories that the newsrooms produce themselves. Where stations do use VNRs, they often pull video from the release and write a story based on the VNR and independent facts their journalists obtain. The story may be supplemented with local video. As news programs are in an almost continual state of preparation, editing and distribution, it follows that a news executive who made use of VNRs would be occupied on nearly a full-time basis with the examination and satisfaction of the station’s VNR legal obligations. These issues would have to be analyzed and acted upon on a program-by-program basis, virtually around the clock.

Given these circumstances, it should come as no surprise that the Bureau’s enforcement letters already are having a potent “chilling” effect on stations that use outside video to supplement their news coverage. Frustrated by the lack of clear guidance from the Commission on VNR use and the obvious disconnect between the Bureau’s suggested legal interpretation and the real-life operation of broadcast newsrooms, some news operations have eliminated the use of outside video altogether. As a result, their viewers have lost access to video that might explain or illustrate the promises of a newly released life-altering drug, or the potentially fatal dangers posed by a common food. The stations’ coverage of sports, consumer news, and entertainment undoubtedly also has suffered. Thus, as the Fairness Doctrine was found to be unconstitutional, it follows, *a fortiori*, that the Bureau’s VNR program will ultimately fall victim to the same fate.

Statutory Considerations

According to RTNDA’s members, the LOIs state that the Bureau is investigating whether stations have violated Section 317(a)(1) of the Communications Act of 1934, as amended,²⁵ and section 73.1212 of the Commission’s rules by airing VNRs without proper sponsorship identification. As demonstrated in the attached critique, CMD’s study is flawed in that certain of the stations named in its complaint either

²⁵ 47 U.S.C. § 317(a)(1).

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did not air the material cited by CMD, removed corporate references, used material from VNRs to enrich independent reporting or did, in fact, make appropriate disclosures. Regardless, RTNDA submits that, where the licensee or its employees did not receive consideration for broadcast of the program material, and where the broadcast did not contain political matter or discuss a “controversial issue of public importance,” no violation occurred.

Section 317(a)(1) generally states that stations are required to make a sponsorship identification announcement when they broadcast any matter for which “money, service, or other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting.” Section 317(a)(1) includes an exception to this general obligation, however, for any material that a station receives “without charge or at a nominal charge for use on, or in connection with, a broadcast unless it is . . . furnished in consideration for an identification in a broadcast of any person, product, service, trademark, or brand name beyond an identification which is reasonably related to the use of such service or property on the broadcast.”

Section 73.1212(a) of the Commission’s implementing regulations, in turn, provides that the sponsorship ID announcement provided under Section 317(a) must disclose (1) that the program matter was sponsored, paid for, or furnished, and (2) by whom or on whose behalf the consideration was supplied or promised. The regulation repeats the statutory exception for services or property furnished without or at a nominal charge, without the requirement of a specific identification.

The so-called “payola statute,” Section 507 of the Act, requires disclosure to the station by any station employee who accepts compensation for broadcasting specific material.²⁶ Section 507 also provides that program suppliers and persons involved with the production or preparation of a program “intended for broadcast” to disclose any payments they have received in exchange for including certain matter in the program. When a station receives any disclosures concerning payments to employees or others pursuant to Section 507, it must announce that the programming has been sponsored and identify the sponsor, even if the station itself did not receive any payment in connection with the programming at issue. Notably, Section 507(f) also echoes the exception in Section 317(a)(1) and in the FCC

²⁶ 47 U.S.C. § 508.

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regulations for services or property furnished without charge or at a nominal charge, with no special identification requirement.

Finally, Section 317(c) of the Act provides that stations are to exercise reasonable diligence to obtain information from by its employees or from any persons with which the stations deal directly about payments received for inclusion of specific material in a broadcast program received. The station must then use that information to make its sponsorship identification announcements.

The Commission's sponsorship identification rules impose a greater obligation in connection with the broadcast of political advertisements, other political material and programming regarding controversial issues of public concern. Specifically, when stations use outside material during political programming or programming discussing a controversial issue of public concern, Section 73.1212(c) provides that stations identify the source of the material, even if the material has been provided free of charge and even if the station does not make any additional on-air identification or promotion. In other words, the Section 317(a) exception for material received at no charge or for nominal consideration does not apply to political or controversial issue programming.²⁷

As noted above, the sponsorship disclosure statutes and regulations include an exception that allows stations to receive free material and use it in broadcasts without making any sponsorship announcements, provided the material is not furnished in return for the station identifying a product or person to greater degree than would be reasonably related to the broadcast.

For example, the Commission has made clear that no announcement is required if a station or disc jockey receives a small number of records or CDs without charge from a record distributor for possible airing on the station.²⁸ This principle applies to television stations as well as to radio. In fact, the Commission cited the example of news releases provided without charge in an early Public Notice interpreting the identification requirements: "News releases are furnished to a station by

²⁷ Case law provides that stations are to make good-faith determinations about whether a broadcast qualifies as discussing "a controversial issue of public importance." *See, e.g., Fairness Report*, 48 FCC 2d 1, at ¶ 29.

²⁸ *See Applicability of Sponsorship Identification Rules*, 28 Fed. Reg. 4732-34 (May 6, 1963).

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Government, business, labor, and civic organizations, and private persons, with respect to their activities, and editorial comment therefrom is used on a program. No announcement is required.”²⁹ Further, a later example confirms that the principle extends to material supplied by businesses as well as government sources or other organizations. Thus, according to the Commission: “A bus company prepares a scenic travel film which it furnishes free to broadcast stations No announcement is required.”³⁰

Section 317 of the Communications Act and similar antecedent legislation clearly was designed to prevent deception of the public growing out of concealment of the fact that the broadcast of particular program material was induced by consideration received by the licensee or employees making programming decisions.³¹ Consistent with the information it provided to the Commission in 2005,³² RTNDA suspects that not one of the 77 stations responding to the LOIs will indicate that either the station or its employees received consideration as an inducement to broadcast the VNR or SMT at issue, or any part thereof, or was otherwise obligated to do so. Almost universally, VNRs, just like paper press releases, are distributed to stations free of charge. There is no “pay for play” involved. Whether or not the material is incorporated into a newscast is left to the editorial discretion of the broadcaster. A VNR typically is evaluated to determine if it can be utilized in a story that meets the station’s basic news philosophy: (1) news content; (2) local relevance; (3) broad impact; and (4) high interest.

In essence, the editorial process serves to ensure that any use of VNR material will be “reasonably related to the broadcast,” thus removing such use from the purview

²⁹ *Id.* at 4733 (example 11).

³⁰ *Id.* at 4734 (example 26).

³¹ *See* Communications Act Amendments, 1960, H.R. Rep. No. 1800, at § 7 (1960), *reprinted in* U.S.C.C.A.N. 3516, 3529.

³² *See, e.g.,* Comments of the Radio-Television News Directors Association, MB Docket No. 05-171, at 6 (submitted June 22, 2005) (“[N]ot a single member reported that they or their station had ever been offered payment or other consideration for broadcasting a VNR.”); Comments of the National Association of Broadcasters, MB Docket No. 05-171, at 4 (submitted June 22, 2005) (“[B]roadcasters . . . stated that stations are *not* paid or offered payment to air VNRs.”); Comments of Center for Media and Democracy, Free Press, MB Docket No. 05-171, at 3 (submitted June 22, 2005) (noting that “most VNRs are provided to television newsrooms free of charge”).

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of the sponsorship identification rules.³³ Indeed, sponsorship identification requirements historically have been applied outside the context of newscasts because of the buffer provided by the editorial process and the matching objective inherent in broadcast journalism—to fully and accurately inform the public. VNR distribution does not necessarily result in the broadcast of “sneaky commercials,” as the Commission once termed the target of its sponsorship identification rules. Instead, VNRs often pinpoint material that electronic journalists consider legitimately newsworthy. Some provide stations with video of public interest that might not otherwise be attainable, such as crash tests from the Insurance Institute for Highway Safety, information concerning a new medical procedure, or footage of obscure or fast breaking events. As CMD’s report itself illustrates, stations often pull video from the release and write a story based on the VNR and independent facts their journalists obtain. The story may also be supplemented with local video.

RTNDA believes that stations have operated under the premise that the current statutory provisions and FCC regulations do not require sponsorship identification for the mere inclusion of footage obtained free of charge from an outside source—*e.g.*, a video news release or consumer report posted on a website or otherwise distributed without charge—in a licensee’s news story or other programming, provided there is no express or implied promise to air the footage, and provided further that the subject is not a political issue or another “controversial issue of public importance.” In its April 2005 Public Notice, the Commission stated that “whenever broadcast stations and cable operators air VNRs, licensees and operators generally must clearly disclose to members of their audiences the nature, source and sponsorship of the material that they are viewing.”³⁴ In the same notice, however, the FCC recognized that “[i]n situations in which a broadcast licensee has not directly received or been promised consideration, has not received any Section 507 report that material has been paid for from its employees or others . . . and, acting with the requisite diligence, has no information concerning the making of such

³³ Moreover, RTNDA submits that VNRs are not programs “intended for broadcast” within the meaning of Section 507. Instead, VNRs disseminate information that may or may not be incorporated into an existing broadcast.

³⁴ *VNR Public Notice* at 2.

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promise or payment . . . no sponsorship identification is necessary with regard to material that is furnished to the licensee ‘without charge or at a nominal charge.’”³⁵

Thus, rather than providing broadcast licensees with “clear warning” that the Commission intended to depart from its traditional construction of the sponsorship identification rules,³⁶ a reasonable reading of the April 2005 Public Notice suggests that the rules would *not* apply if stations or their employees had not received consideration for including VNR material in a broadcast, unless the material concerned politics or “a controversial issue of public importance.” At the same time, the Commission sought to gain a better understanding of how VNRs are distributed and utilized, presumably so as to assess and later clarify whether there might be circumstances under which the sponsorship identification rules would apply. Rather than “issu[ing] a report, or initiat[ing] a more formal proceeding,”³⁷ as promised, however, the Bureau has launched investigations that come at the considerable expense of broadcasters, that contravene the long-established principle of interpreting Congressional directives strictly so as to minimize Constitutional problems,³⁸ and that already have inhibited the dissemination of information of interest to the public.

³⁵ *VNR Public Notice* at 3.

³⁶ *See Adelstein Statement* at 2. In fact, just one month after the FCC issued the *VNR Public Notice*, Acting General Counsel Austin C. Schlick endorsed broadcasters’ traditional interpretation of the rule during an appearance before the Senate Commerce Committee. Schlick told the Committee that the “without charge or at a nominal charge” exception to the sponsorship identification statutes applies to “for example, music recordings or video provided without charge for use on the air, if there is no special promotion by the station.” Statement of Austin C. Schlick, Federal Communications Commission, Before the Committee on Commerce, Science and Transportation, U.S. Senate (May 12, 2005).

³⁷ *VNR Public Notice* at 5.

³⁸ *See, e.g., National Labor Relations Bd. v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979).

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Government Suppression of Anonymous Speech

Finally, it would appear that CMD's goal involves the suppression of programming inputs from outside parties that—when aired—are not accompanied by overbroad disclosures of the author or source. In determining how and when to regulate in this area, in addition to the considerable First Amendment concerns raised above, the Commission should also be cognizant of our country's rich heritage of anonymous communications.

In fact, in the years leading up to and following the American Revolution, anonymous writings played a central role in the development of our modern concept of Freedom of the Press. For example, in the initial release of Thomas Paine's incendiary pamphlet, *Common Sense*, the author was identified simply as "an Englishman."³⁹ Two other British writers with an especially wide following in America wrote under the pseudonym "Cato."⁴⁰ Later, Hamilton, Madison, and Jay penned *The Federalist Papers* under the joint pseudonym, "Publius."⁴¹ The Anti-Federalists responded, utilizing such assumed names as "A Federal Farmer" (Richard Henry Lee) and "Candidus" (Samuel Adams).⁴² And Benjamin Franklin, on his own, employed no fewer than five distinct pseudonyms in his various writings.⁴³

More recently, George F. Kennan, the father of the United States' "containment policy," used the pseudonym "X" when he penned his 1947 *Foreign Affairs*

³⁹ David Freeman Hawke, *Paine* 44 (1974).

⁴⁰ Leonard W. Levy, *Freedom of Speech and Press in Early American History: Legacy of Suppression* 5 (1963).

⁴¹ Foreword of Jacob E. Cooke, printed in Thomas Engeman, Edward J. Erler, and Thomas B. Hofeller, *The Federalist Concordance* (1961).

⁴² Henry J. Storing, ed., *The Complete Anti-Federalist* (1981).

⁴³ "Benjamin Franklin. Wit and Wisdom. Name that Pen," http://www.pbs.org/benfranklin/13_wit_name.html (last visited Oct. 3, 2006).

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magazine article that argued in favor of isolating communist nations.⁴⁴ Today, the article is best known simply as the “X Article.”⁴⁵ And, of course, several of the Internet era’s most popular authors are anonymous bloggers, who have a variety of tools they can use to disguise their identities.⁴⁶

In their apparent insistence on overbroad disclosure of “all entities and individuals” involved in the creation of VNRs,⁴⁷ CMD and its supporters within the Commission would presumably have us believe that Ben Franklin and the other luminaries noted above were “bad” journalists because they participated in the fine art of anonymous advocacy. We can only hope that the full Commission will take a step back and (after a period of sober reflection) temper its actions.

If the agency fails to do so, however, we have every confidence that the Federal Courts will ultimately act to appropriately protect First Amendment interests. In this regard, we note that the Supreme Court has been absolutely consistent in its defense of anonymous writings. For example, in *McIntyre v. Ohio Campaign Commission*,⁴⁸ the Court struck down an Ohio ordinance requiring that the authors of campaign pamphlets must identify themselves. The decision to remain anonymous, the Court stated, “may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one’s privacy as possible.”⁴⁹ Anonymity also “provides a way for a writer who may be personally unpopular to ensure that readers will not prejudice her message simply because they do not like the proponent.”⁵⁰ Ultimately, the Court determined that the First Amendment fully protects a speaker’s decision to remain

⁴⁴ George Frost Kennan and John Lukacs, *George F. Kennan and the Origins of Containment, 1944-1946: The Kennan-Lukacs Correspondence* 11 (1997).

⁴⁵ *Id.*

⁴⁶ Electronic Frontier Foundation, *How to Blog Safely (About Work or Anything Else)*, May 31, 2005, <http://www.eff.org/Privacy/Anonymity/blog-anonymously.php>.

⁴⁷ *VNR Public Notice* at 1.

⁴⁸ 514 U.S. 334 (1995); *see also* *Watchtower Bible v. Stratton*, 536 U.S. 150 (2002); *Buckley v. Am. Const. Found.*, 525 U.S. 182 (1999).

⁴⁹ *McIntyre*, 514 U.S. at 342.

⁵⁰ *Id.* at 342.

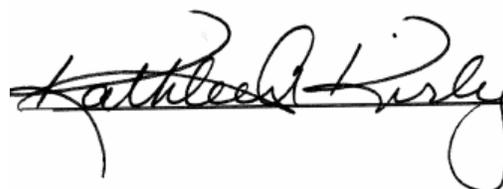
Marlene H. Dortch
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anonymous, writing “the identity of the speaker is no different from other components of the document’s content that the author is free to include or exclude.”

Conclusion

Determining the content of a newscast, including when and how to identify sources, is at the very heart of the responsibilities of electronic journalists, and these decisions must remain far removed from government involvement or supervision. The government would not dream of inserting itself into a print newsroom to dictate or otherwise oversee how newspaper editors utilize press releases. Given the constitutional and statutory difficulties with the Bureau’s intrusion into local television newsrooms, the Commission should halt the present VNR enforcement action and rescind the letters of inquiry.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Kathleen A. Kirby". The signature is written in a cursive style with a large, looping initial "K".

Kathleen A. Kirby
Lawrence W. Secret III

*Counsel for the Radio-Television News
Directors Association*

cc: Chairman Kevin J. Martin
Commissioner Michael J. Copps
Commissioner Jonathan S. Adelstein
Commissioner Deborah Taylor Tate
Commissioner Robert M. McDowell
Kris Monteith, Chief, FCC Enforcement Bureau
John Stauber, Center for Media and Democracy
Timothy Karr, Free Press

ATTACHMENT A



Wiley Rein & Fielding LLP

MEMORANDUM

TO: Radio-Television News Directors Association

FROM: Wiley Rein & Fielding LLP

DATE: September 29, 2006

RE: Critique of Center for Media and Democracy's "Fake TV News: Widespread and Undisclosed" Report

On April 6, 2006, Center for Media and Democracy ("CMD") published a "multimedia report" entitled "Fake TV News: Widespread and Undisclosed." CMD indicates at www.prwatch.org that the report is the culmination of a 10-month "study" conducted by CMD concerning the use of video news releases ("VNRs") by local television stations.¹ CMD makes several allegations in the report, most notably that VNR usage is "widespread," that "TV stations don't disclose VNRs to viewers," and that "TV stations don't supplement VNR footage or verify VNR claims."² This memorandum discusses the findings of the CMD report, critiques the methodology used by CMD, and analyzes whether CMD's conclusions are consistent with the facts alleged in the report.

CMD explains that its conclusions are based on the apparent use by 77 television stations of VNRs, or portions thereof, during their local newscasts.³ CMD purports to have identified 98

¹ Diane Farsetta and Daniel Price, *Fake TV News: Widespread and Undisclosed; A multimedia report on television newsrooms' use of material provided by PR firms on behalf of paying clients*, Center for Media and Democracy, Apr. 6, 2006, <http://www.prwatch.org/pdfs/NFNPDFExt6.pdf>, at 1 ("CMD Report").

² *Id.* at 6-7.

³ *Id.* at 4.

separate instances where VNRs or related satellite media tours (“SMTs”) were aired without disclosure to viewers that the footage utilized by the station was provided by third parties.⁴

Neither CMD nor the authors of the report offer any concrete information detailing how they actually went about selecting VNRs and tracking their usage.⁵

Concurrently with the release of its report, CMD filed a formal complaint with the Federal Communications Commission (“FCC”), which alleged that the airing of VNRs “ha[s] compromised local news programming in every market.”⁶ In its report and complaint, CMD urges intervention by the FCC to prevent broadcasters from airing materials from a VNR without “continuous, frame-by-frame visual notification” of the VNR’s source.⁷ The FCC’s Enforcement Bureau has launched an investigation based on CMD’s complaint, and has sent letters of inquiry to all 77 stations named in the report.

Though CMD claims that its report has “exposed an epidemic of fake news infiltrating local television broadcasts across [sic] country,”⁸ even a cursory look at the report’s content unequivocally demonstrates that CMD’s claim is nothing more than hyperbole. In fact, the piece unwittingly supports the conclusion that a failure by stations to disclose third party sources is the

⁴ *Id.*

⁵ CMD’s report is not only short on methodology, but also long on inconsistencies. Different parts of the report assert different findings. *Compare id.* at 4 (“CMD identified 77 television stations . . . that aired these VNRs or related satellite media tours (SMTs) in 98 separate instances. . .”), *with id.* at 7 (“Of the 87 VNR broadcasts that CMD documented. . .”) (emphasis added). The report’s station list that includes the number of VNRs and/or SMTs the station aired contains several discrepancies from the findings in the report’s appendix. *Compare id.* at 20-21 (WCBS-2, WNEP-16, KLST-8 accused of airing 2 VNRs or SMTs), *with id.* at 40-113 (WCBS-2, WNEP-16, KLST-8 only mentioned as airing a VNR or SMT once).

⁶ Letter from Timothy Karr, Campaign Director, Free Press, and John Stauber, Executive Director, Center for Media and Democracy, to Chairman Kevin J. Martin, and Commissioners Deborah Tate, Jonathan S. Adelstein and Michael J. Copps (April 6, 2006), *available at* http://www.freepress.net/docs/fcc_complaint_4-06-06.pdf, at 1.

⁷ *Id.* at 2.

⁸ *CMD Report* at 2.

exception rather than the rule in the local news industry. When considered in the context of the more than 1 million local news stories likely to air nationally over any given 10-month period, CMD's claim that it uncovered 98 stories utilizing VNR material without disclosure is hardly relevant, and certainly not evidence that stations have abdicated control over their newsrooms to corporate interests.

It is not, as CMD suggests, "news" that local television stations use VNRs in the same way print journalists often rely on paper press releases. In fact, contrary to the assertions of CMD and certain others, RTNDA underscored in comments filed with the FCC in response to its April 2005 Notice of Inquiry, that VNRs often are a source of newsworthy material of particular interest to the public which stations may not be able to obtain through other means. Although CMD discloses virtually none of the methodology underlying its so-called study, it does say that "many of the VNRs described in this report were selected for tracking because they seemed more newsworthy (*and thus more likely to be aired*) than other VNRs."⁹ Thus, it appears that CMD inherently recognized the public interest value of many of the stories aired and chose to track them precisely because they were more likely to be utilized by broadcast stations, in essence, skewing the results toward its desired outcome. While CMD concedes that the sample of VNRs tracked are not representative of the general population of VNRs distributed to broadcast newsrooms, the organization nonetheless touts its report as groundbreaking, and concludes that because these 36 VNRs were actually utilized by approximately 10 percent of television stations nationwide, "fake TV news" is an epidemic.

Appendix B, entitled "VNRs in Detail," represents the bulk of the CMD report.¹⁰ When the report is accessed electronically, viewers can open the QuickTime media files that CMD has

⁹ *Id.* at 30 (emphasis added).

¹⁰ *See id.* at 40-113.

provided and watch an unedited version of the VNR, as well as an example of how the VNR was utilized by a local television station. In addition to the media files provided, CMD offers written accounts of how the VNR was utilized by other stations. Its headlines are generally inflammatory (*e.g.*, “Journalistic Malpractice at WSYR-9, Clear Channel station inflicts misleading health news on their viewers.”). The appendix provides details about each of the 36 VNRs that CMD claims to have tracked and actually found on the air. Despite the fact that video proof seemingly would be essential to support CMD’s allegations, CMD fails to provide video clips for over half (56 out of 98, or 57 percent) of the broadcasts it indicts. RTNDA members have reported several instances where their stations did not utilize VNR material as alleged in the CMD report, if at all.

CMD makes the blanket assertion that newsrooms routinely disguise VNRs as genuine journalism. Moreover, CMD claims that whenever portions of VNRs or SMTs air during local newscasts, “the only interests served are those of the broadcast PR firms’ clients.”¹¹ The report does not discuss numerous examples contained in the report where stations have edited VNR material to remove corporate overtones and CMD does not appear to have made any effort to contact stations to ascertain what steps may have been taken internally by stations to ensure that the segments aired were newsworthy and credible.

CMD’s report is somewhat difficult to navigate but, spending even a short amount of time doing so, we found a number of significant errors. Those cited herein are not meant to be an exhaustive list, but to serve as evidence that the Commission’s reliance on the report in issuing formal letters of inquiry to the 77 stations cited in CMD’s complaint is misplaced, and that the report cannot be said to evidence “a betrayal of the public trust” worthy of government intervention.

¹¹ *CMD Report* at 13.

For example, CMD singles out WFAA-8 (Dallas, TX) for airing portions of a VNR furnished by Bioibérica about the supplement chondroitin sulfate.¹² Contrary to CMD's assertion that WFAA "pass[ed] off this VNR as real news,"¹³ the station simply used some of the VNR footage as background for a short report *criticizing* the product that the VNR was designed to promote. Similarly, station KYW-3 (Philadelphia, PA) utilized the VNR material in a story questioning the effectiveness of chondroitin sulfate.¹⁴

WCTI-12 (New Bern, NC) is named in CMD's report for airing footage from a VNR provided by Sallie Mae that discussed the process for applying for college student aid.¹⁵ CMD fails to mention, however, that WCTI edited out all of the product plugs for Sallie Mae's services included in the original VNR. The piece that aired on WCTI was an instructional piece about the steps necessary to apply for student loans.

Similarly, WKRN-2 (Nashville, TN) aired a report that included footage from a VNR provided by Jackson Hewitt on the best ways to receive tax deductions for charitable donations.¹⁶ Despite labeling its charge "Nashville Station Cheats on Tax Report – Local ABC news story is secretly filed by a national tax preparation franchise," CMD concedes that WKRN edited out the corporate overtones that Jackson Hewitt included in the VNR.¹⁷ What remained was a segment about maximizing one's tax refunds.

¹² *Id.* at 86.

¹³ *Id.*

¹⁴ *Id.* at 85.

¹⁵ *Id.* at 96-97.

¹⁶ *Id.* at 100-101.

¹⁷ *See id.*

Similarly, WSYX-6 (Columbus, OH), KNTV-13 (Las Vegas, NV), KTVI-2 (St. Louis, MO) and WVVA-6 (Bluefield, WV) cut all or the overwhelming majority of product references from the segments using VNR footage, yet CMD chose not to acknowledge efforts by these news operations to produce independent, informational stories.

Under the heading of “A Spitting Image of Genuine News,” CMD lambastes nine broadcasters for airing portions of a VNR produced by the American Dental Association.¹⁸ Even in its unedited form, this VNR has no plugs for any product and does nothing more than provide information about two new dental techniques.

Stations owned by Tribune Broadcasting picked up a story by Kurt Knutsson, a KTLA-5 (Los Angeles, CA) reporter whose “CyberGuy” segments are syndicated throughout the Tribune Broadcasting network.¹⁹ Stations utilizing this material appear to have done so without knowing that portions of the story came from a third-party source. Nonetheless, these stations are maligned for misleading their viewers.

CMD’s report also contains at least four instances in which stations did disclose the source of video to their viewers. In the case of WLTX-19 (Columbia, SC), the station aired an SMT interview with paid spokesperson Robin Raskin and clearly informed viewers that, “[i]n the interest of full disclosure, we want to mention that this interview with Robin was provided by vendors at the consumer trade show.”²⁰ Similarly, CMD included WHSV-3 (Harrisonburg, VA) in its report even though it acknowledges that station made a good-faith effort at disclosure.²¹ In one of the many instances where CMD fails to provide video of the actual aired story, CMD

¹⁸ *Id.* at 56-57.

¹⁹ *Id.* at 40.

²⁰ *Id.* at 61.

²¹ *See id.* at 83-84.

charges that WHSV's disclosure that the public relations firm DS Simon Productions provided the footage was insufficient.²²

In the case of WBFS-33 (Miami, FL) and WHP-21 (Harrisburg, PA), CMD completely ignores station disclosures. WBFS aired a piece with VNR footage sponsored by Towers Perrin, a management consulting firm.²³ Though WBFS did not identify this footage via textual overlay or other visual means, at the conclusion of the piece the anchor states, "that study [the subject of the aired piece] was provided by a management consulting firm." WHP was included in CMD's complaint for airing a SMT interview with Jared Fogle, the Subway spokesperson. Not only did the station's anchor specifically identify Fogle as Subway's spokesperson before the interview, but Fogle also was identified *on screen* as a Subway spokesperson. These efforts by the station made it abundantly clear that Fogle was there in his capacity as a spokesperson.

By its own admission, the VNR sample CMD selected was not representative of the VNR population distributed to newsrooms. Even assuming that the incidents it cites were instances in which disclosures were appropriate and not made, they constitute a miniscule percentage of the local news stories typically broadcast over the given period. Regardless, CMD's embellished conclusions cannot reasonably be said to be reliable. More than half its allegations were unsupported by accompanying video (56 out of 98). Even upon cursory examination of the video CMD did provide, we found more than 20 instances where stations did make appropriate disclosures, where stations used VNR material in stories criticizing the companies or products behind the VNRs, where stations edited out corporate overtones, or where it was obvious to viewers that spokespeople were representing particular interests. The 77 stations that CMD indicts for airing at least a portion of a VNR represent only 10.3 percent of the total number of

²² *See id.*

²³ *See id.* at 45-46.

stations with a local newscast. And, of the 77 stations, 63 of them were implicated only *once*. In sum, the CMD report is anything but fair, neutral and representative in its characterizations of stations' actions.

ATTACHMENT B



ETHICS

RTNDA GUIDELINES FOR USE OF NON-EDITORIAL VIDEO AND AUDIO

April 2005

Television and radio stations should strive to protect the editorial integrity of the video and audio they air. This integrity, at times, might come into question when stations air video and audio provided to newsrooms by companies, organizations or governmental agencies with political or financial interests in publicizing the material. News staffs should find answers to the following questions when making decisions to broadcast video or audio produced and/or supplied by non-editorial sources.

RTNDA's Code of Ethics and Professional Conduct states that professional electronic journalists should "clearly disclose the origin of information and label all material provided by outsiders." The following guidelines are offered to meet this goal.

- News managers and producers should determine if the station is able to shoot this video or capture this audio itself, or get it through regular editorial channels, such as its network feed service. If this video/audio is available in no other way but through corporate release (as in the case of proprietary assembly line video), then managers should decide what value using the video/audio brings to the newscast, and if that value outweighs the possible appearance of "product placement" or commercial interests.
- News managers and producers should clearly disclose the origin of information and label all material provided by corporate or other non-editorial sources. For example, graphics could denote "Mercy Hospital video" and the reporter or anchor script could also acknowledge it by stating, "This operating room video was provided by Mercy Hospital."
- News managers and producers should determine if interviews provided with video/audio releases follow the same standards regarding conflicts of interest as used in the newsroom. For instance, some releases might contain interviews where subjects and interviewers are employed by the same organization. Consider whether tough questions were asked and if the subject was properly questioned.
- Before re-voicing and airing stories released with all their elements and intended for that purpose, managers and producers should ask questions regarding whether the editorial process behind the story is in concert with those used in the newsroom. Some questions to ask include whether more than one side is included, if there is a financial agenda to releasing the story, and if the viewers and/or listeners would believe this is work done locally by your team.
- Producers should question the source of network feed video that appears to have come from sources other than the network's news operation. Network feed producers should supply information revealing the source of such material.
- News managers and producers should consider how video/audio released from groups without a profit or political agenda, such as nonprofit, charitable and educational institutions, will be used in newscasts, if at all. Can this material add valuable insight to local stories? Has it been issued to be aired locally and

credited to the issuing organizations. Will viewers find it to be useful information?

Developed by the RTNDA Ethics Committee