

1001 G Street, N.W.
Suite 500 West
Washington, D.C. 20001
tel. 202.434.4100
fax 202.434.4646

Writer's Direct Access

November 27, 2006

Jack Richards
(202) 434-4210
richards@khlaw.com

The Honorable Kevin J. Martin
Chairman
Federal Communications Commission
445 Twelfth St., S.W.
8th Floor
Washington, D.C. 20554

Re: Video News Releases

Dear Chairman Martin:

The National Association of Broadcast Communicators ("NABC") objects to continued efforts by the Center for Media and Democracy ("CMD") to manipulate and distort the Commission's sponsorship identification requirements applicable to the production and use of Video News Releases ("VNRs").¹ Last month, NABC rebutted CMD's first report on VNRs,² entitled *Fake TV News: Widespread and Undisclosed*.³ Last week, CMD released yet another report, "*Still Not the News: Stations Overwhelmingly Fail to Disclose VNRs*," making equally outrageous and unsupported claims.⁴

CMD Misstates the Commission's Rules Regarding VNR Disclosure Requirements

During a recent teleconference involving the troubling participation of Commissioners Adelstein and Capps, CMD released its latest report and claimed that the Commission's sponsorship identification rules require broadcasters to disclose every use of any part of any

¹ NABC is an organization formed to represent the interests of VNR production companies throughout the country. See www.broadcastcommunicators.org. A list of NABC's membership is attached.

² See letter from Jack Richards, Greg Kunkle, counsel for NABC, to the Honorable Kevin J. Martin, Chairman, FCC (October 16, 2006) (providing an analysis of the Commission's sponsorship identification rules and applicable precedent).

³ Diane Farsetta and Daniel Price, *Fake TV News: Widespread and Undisclosed*, Center for Media and Democracy, April 6, 2006.

⁴ Diane Farsetta and Daniel Price, *Still Not the News: Stations Overwhelmingly Fail to Disclose VNRs*, Center for Media and Democracy, November 14, 2006 ("Supplemental Report").

The Honorable Kevin J. Martin
November 27, 2006
Page 2

VNR.⁵ During the call, Commissioner Adelstein agreed with CMD's theory and referred to hundreds of thousands of dollars in fines and "imprisonment" as possible sanctions for broadcasters who fail to disclose their VNR usage. A spokesman for CMD expressed his gratification that stations were becoming "afraid to use" VNRs, and that CMD's reports were "hurting [NABC's members'] bottom line."

Following the teleconference, Commissioner Adelstein issued a printed News Release commending CMD for its continued study of VNRs. The News Release contains a litany of inflammatory and derogatory comments regarding the VNR industry as well as broadcasters who use VNRs.⁶

Among other assertions, the Commissioner states "many broadcasters are apparently ignoring the FCC...in running VNRs without disclosure." He claims that stations have developed "such an ingrained pattern of running VNRs that even a direct investigation by the FCC isn't enough to snap them out of it." He talks about the broadcasters' "embarrassment of informing viewers they are merely transmitting corporate propaganda in lieu of real news." He says "stations that fail to disclose who is behind these stories show a lack of respect for their viewers, as well as the FCC and the broadcast industry's ethics guidelines." He goes on to state that "the [broadcast] industry patently is incapable of self regulation," and that "it's up to the FCC to enforce [its] disclosure rules."⁷

**The Rules Require Disclosure Only When A VNR
is Controversial or Political
or Payment has been made to the Broadcaster**

NABC appreciates the Commission's need to ensure compliance with its sponsorship identification requirements. It is disingenuous at best, however, for CMD (with the support of a

⁵ Telephone Conference, Center for Media and Democracy, Release of "*Still Not the News: Stations Overwhelmingly Fail to Disclose VNRs*," (November 14, 2006) ("CMD Teleconference").

⁶ Interestingly, the Commission's sponsorship identification rules do not distinguish between printed News Releases (such as the Commissioner's written statement) and video materials (such as VNRs) or subject video material to a stricter standard than printed material. (e.g., 47 C.F.R. 73.1212 (d); 47 C.F.R. 76.1615 (c)). Such a distinction would produce incompatible results, such as requiring source identification of a VNR while not requiring identification of similar content taken from printed materials.

⁷ See News Release, Commissioner Jonathan Adelstein, Commissioner Adelstein Commends The Center For Media Democracy And Free Press For Its Continued Study Regarding Video News Releases (November 14, 2006). In view of the Commissioner's participation in the CMD teleconference, and his subsequent News Release, his objectivity in the matter of VNRs may fairly be called into question.

The Honorable Kevin J. Martin
November 27, 2006
Page 3

sitting Commissioner during a pending investigation) to claim under the guise of the public interest that the Commission's existing rules require disclosure when in fact they do not.

As made clear in the rules -- supported by decades of precedent -- sponsorship identification is required *only* when a VNR: (1) raises controversial issues of public importance,⁸ (2) discusses political matters,⁹ or (3) involves the payment of money or other consideration to the broadcaster as an inducement to include the material in a broadcast.¹⁰

There is no FCC rule that requires broadcasters to disclose each use of every VNR. Broadcasters are free to use VNRs that reference commercially available products or services (and that do not deal with controversial or political matters or involve the payment of money or other valuable consideration to induce broadcast), without violating the Commission's sponsorship identification requirements.

If broadcasters were required to disclose each use of every VNR, as CMD and Commissioner Adelstein claim, then the Commission's detailed rules on sponsorship identification -- not to mention decades of precedent interpreting them -- would have been unnecessary. The rules simply would have required that *all* sponsored material be disclosed *all* of the time. To the contrary, they require disclosure only in the limited circumstances outlined above.

**CMD Mischaracterizes the Rules Instead of
Seeking A Full and Fair Rulemaking Proceeding**

Rather than requiring blanket disclosures of all VNRs, the Commission has deferred to the First Amendment and broadcasters' editorial discretion in establishing specific sponsorship identification requirements applicable only in particular situations. If CMD dislikes the Commission's current rules, it has every right to file a Petition for Rulemaking seeking to change them. That way, all interested parties would have a full and fair opportunity to express their opinions by submitting comments and reply comments during a public rulemaking proceeding. The Commission could analyze the record and decide based on the facts and arguments presented whether the existing rules are somehow inadequate and should be changed.

⁸ See 47 C.F.R. §§ 73.1212, 76.1615.

⁹ *Id.*

¹⁰ *Id.*

The Honorable Kevin J. Martin
November 27, 2006
Page 4

Instead of seeking a rule change based on a fair hearing and a public record, however, CMD (with Commissioner Adelstein's apparent blessing) has chosen to engage in the moral equivalent of regulatory slander by mischaracterizing the current rules and impugning the integrity of numerous broadcasters and the entire public relations, public affairs and corporate communications industry.

**The Payola Rules Apply To Payments to Broadcasters,
Not to Payments to VNR Producers**

Commissioner Adelstein's support of CMD's effort is badly misplaced. During the CMD teleconference, Commissioner Adelstein cited no FCC rules requiring sponsorship identification of all VNRs (perhaps because there are no such rules). Instead, he argued that the "payola" statute -- 47 U.S.C. § 507(b)¹¹ ("Disclosure of Payments to Individuals Connected with Broadcasts") -- applies not just to payments to individuals connected with broadcasts, but to any payments to individuals "up and down the chain of [VNR] production."¹² As a result, he claimed, all VNRs produced by companies that receive compensation to produce them must be disclosed whenever used by a broadcaster, even if the broadcaster received no money or other consideration from the companies as an inducement to include the VNRs as part of a broadcast.

With due respect to the Commissioner, he has misstated the payola statute. Even the title of the section makes clear that it does not apply to payments to producers of VNRs; it applies to "...*Payments to Individuals Connected with Broadcasts.*"¹³ VNR producers are not individuals connected with broadcasts; they are individuals connected with the production of VNRs. Whether and how to include a VNR in a broadcast is solely within the editorial discretion of the broadcasters. VNR producers have no influence over that decision.

Moreover, the language of the statute itself does not govern payments made to the producer of the VNR. It governs payments made *to the broadcaster* or other entity in the position to influence the broadcaster's editorial decision-making process:

"...any person who...accepts or agrees to accept, or pays or agrees to pay, any money, service or other valuable consideration *for the inclusion of any matter as*

¹¹ Cited as 47 U.S.C. § 508(b).

¹² CMD Teleconference.

¹³ 47 U.S.C. § 508, emphasis added.

*part of such program or program matters, shall, in advance of such broadcast, disclose the fact...*¹⁴

A VNR producer has no ability to determine whether a VNR will be included within a broadcast. That decision rests solely with the broadcaster. Payments to a VNR producer as compensation for producing a VNR, therefore, are not tantamount to payments to the broadcaster for the inclusion of the VNR as part of the broadcast.

From a public policy perspective, payments to a VNR producer to create a VNR are a far cry from payments to a broadcaster to induce the broadcaster to include the VNR in its programming. The former is a perfectly lawful, private sector business activity; the latter involves questionable payments to a Commission licensee. There is no “chain of production” that somehow converts legitimate payments to a VNR producer into payola to the broadcaster.

Section 317 of the Communications Act of 1934, as amended (“Announcement With Respect To Certain Matter Broadcast”), also provides that the payment of money, service or other valuable consideration to or accepted by “the station so broadcasting” shall be disclosed.¹⁵ The Commission’s rules contain the same reference to payments, service or other consideration to “a broadcast station” or “such station.”¹⁶ Again, there is no reference to any payments, service or consideration provided to or accepted by the producer of a VNR.

By statute, the phrase “service or other valuable consideration” is defined specifically *not* to include “any service or property furnished without charge or at a nominal charge for use on, or in connection with, a broadcast...”¹⁷ This same clarifying language is reflected in the Commission’s rules, which recognize that the furnishing of services or property to broadcasters without payment to the broadcaster is not covered by the “payola” disclosure requirements.¹⁸ Since VNRs are provided without charge or payment to the broadcasters, they do not and cannot violate the payola statute or rules.

¹⁴ 47 U.S.C. § 508(b), emphasis added. 47 U.S.C. § 508(c) contains identical language regarding the required nature of the payment at issue (*i.e.*, it must be “for the inclusion of any matter as part of such program or program matter”).

¹⁵ 47 U.S.C. § 317.

¹⁶ 47 C.F.R. § 73.1212(a); *cf.*, 47 C.F.R. § 76.1615(a).

¹⁷ 47 U.S.C. § 317(a)(1).

¹⁸ 47 C.F.R. § 73.1212(a)(2); 47 C.F.R. § 76.1615.

The Honorable Kevin J. Martin
November 27, 2006
Page 6

To our knowledge, the Commission has never construed the payola restrictions so broadly that payments to a VNR producer by a private party for a legitimate business purpose in some way constitute “payola,” as CMD and Commissioner Adelstein claim. Failure to disclose payola is an extremely serious matter. If that type of disclosure were required by the FCC, surely the Commission’s rules and case law would have made it abundantly clear long ago.

The purpose of the “payola” statute and the accompanying rules is not to stifle VNR production but to prevent outside parties from covertly tainting the broadcasting television journalist’s decision-making process. What is restricted is not the production of VNRs, but the “bribing” of stations, station employees or similarly situated individuals who are in a position to influence the airing of particular materials.¹⁹

There was never any intention in the statutes or rules to restrict VNR production companies from being paid for their services or to require broadcasters to disclose such payments if they become aware of them.²⁰ Newscasters are free to accept or reject VNRs, to modify or edit them in any way they wish, and to present them as information they deem useful to their viewers in their discretion.

The Commission’s sponsorship identification rules respect broadcaster autonomy and independence.²¹ At the same time, they recognize that legal barriers are necessary to prevent individuals with the ability to influence broadcasting decisions from accepting undisclosed payments. Apart from that, the rules empower broadcasters to decide for themselves whether sponsorship identification is necessary, except in cases of political or controversial matters, when disclosure is required.

CMD Misconstrues the FCC’s Public Notice on VNRs

CMD apparently understands the limited reach of the “payola” statute, as it acknowledges that it requires identification of “material provided by outside parties *that stations are paid to broadcast...*”²² In spite of -- or perhaps because of -- the clarity of the statute and

¹⁹ See 47 U.S.C. §§ 317, 508. See also H.R. Rep. No. 1800, Section 7 (1960), as reprinted in 1960 U.S.C.C.A.N. 3516, 3527.

²⁰ One wonders about the nature and scope of a disclosure if required under those circumstances (*e.g.*, “Company ABC was paid by company DEF to produce this video and provide it to station GHI free of charge and without consideration or obligation of any kind?”).

²¹ See *in re* Complaint of Barry G. Silverman Against Station KOOL-TV, Phoenix, Arizona, *Memorandum Opinion and Order*, 63 F.C.C.2d 507 at para. 15 (1977).

²² See Supplemental Report, FAQ (available online at <http://www.prwatch.org/fakenews2/faq>) (emphasis added).

the Commission's rules, CMD has struggled to support its argument that all VNRs must be disclosed all of the time by quoting out of context a single sentence in an FCC Public Notice, a document that was not promulgated pursuant to the public notice and comment requirements of the Administrative Procedures Act and can have no binding effect for purposes of imposing new, substantive legal requirements.²³

In April of 2005, the Commission released a Public Notice reminding broadcast licensees, cable operators and others of the disclosure requirements applicable to VNRs.²⁴ The Public Notice stated that "...licensees and operators generally must clearly disclose to members of their audiences the nature, source and sponsorship of the material that they are viewing." Having made this "general" statement, which is the sole legal basis for CMD's argument, the Commission then goes on to specify the particular situations in which disclosure is actually required: (1) "when payment has been received or promised *to a broadcast licensee...*;"²⁵ (2) when the VNR includes political matters;²⁶ and (3) when the VNR raises controversial issues of public importance.²⁷ Nowhere does the Public Notice state that every VNR must be identified whenever used by a broadcaster.

Nevertheless, based on a single quotation taken out of context, CMD leaps to the conclusion that the Commission's rules require that *any* use of *any* part of *any* VNR at *any* time must be accompanied by sponsorship identification by the broadcaster. At this late date, however, having "investigated" this matter for several years, CMD has not cited a single FCC rule that allegedly has been violated by a broadcaster.

As with its first report, the VNRs cited in CMD's most recent report appear to be largely comprised of the usual litany of non-controversial topics: cosmetics, light bulbs, cereal, dog food, cold remedies, the history of the Jack O' Lantern, and, once again, pancakes. While NABC has not reviewed each example cited in CMD's latest report, on their face most of them do not involve controversial issues of public importance, political matters or the payment of money or other consideration to broadcasters in order to induce the inclusion of any VNR in a broadcast.

²³ U.S. Telephone Ass'n v. F.C.C., 28 F.3d 1232 C.A.D.C. (1994).

²⁴ See Commission Reminds Broadcast Licensees, Cable Operators and Others of Requirements Applicable to Video News Releases and Seeks Comment on the Use of Video News Releases by Broadcast Licensees and Cable Operators, *Public Notice*, MB Docket No. 05-171 (April 13, 2005).

²⁵ *Id.* at 2, emphasis added.

²⁶ *Id.* at 4.

²⁷ *Id.*

KELLER AND HECKMAN LLP

The Honorable Kevin J. Martin
November 27, 2006
Page 8

As such, CMD's latest examples of VNR "abuse" do not appear to violate Commission rules or longstanding Commission precedent -- yet CMD continues to accuse the stations at issue (and, by implication, the entire public relations, public affairs and corporate communications industry) of serious and improper conduct detrimental to the public interest.

* * *

NABC urges you, as Chairman, not to allow the Commission's enforcement powers to be manipulated and abused in this manner. CMD's allegations should be considered within the framework of the Commission's existing rules and precedent, with due respect for the First Amendment rights of newscasters. On that basis, CMD's various "reports" should be promptly rejected by the Commission.

Sincerely,

/s/ Jack Richards

Jack Richards
Greg Kunkle

Counsel for NABC

Attachment

cc: Commissioner Michael Copps
Commissioner Jonathan Adelstein
Commissioner Deborah Taylor Tate
Commissioner Robert McDowell
Catherine Bohigian, Chief, FCC Office of Strategic Planning & Policy Analysis
Sam Feder, FCC General Counsel
Kris Monteith, Chief, FCC Enforcement Bureau
John Stauber, Center for Media and Democracy
Timothy Karr, Free Press

National Association of Broadcast Communicators – Membership List

Auritt Communications Inc.

D S Simon Productions

DWJ Television

Gordon Productions Inc.

Gourvitz Communications

Home Front Communications

KEF Media Associates

MediaLink Worldwide Inc.

MultiVu

News Broadcast Network Inc.

On The Scene Productions Inc.

PLUS Media

VNR-1 Communications Inc.

West Glen Communications Inc.