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When the Flock Ignores the Shepherd-Corralling the Undisclosed Use of Video News Releases

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When the Flock Ignores the Shepherd—Corralling the Undisclosed Use of Video News Releases¹

Jeffrey Peabody*

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1. Public Statement, FCC, FCC Commissioner Adelstein (Nov. 14, 2006), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-268464A1.pdf [hereinafter *Adelstein Public Statement*] (“When the flock ignores the shepherd, it’s time to build a fence. Since the industry is patently incapable of self-regulation, it’s up to the FCC to enforce our disclosure rules.”).

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I. INTRODUCTION

As long as mass media has existed, corporations and governments have sought to control, or at least influence, the message being delivered. While in the early days of radio and television such sponsorship was explicit,² today's advertisers have become experts at promoting their messages without drawing attention. One particularly popular form of modern sponsorship can be found in so-called "video news releases" ("VNRs"). These VNRs, considered "analogous to a printed press release,"³ are increasingly relied upon by broadcasters to supplement their local reporting. Filmed and written to look like regular news stories, VNRs deliver a hidden commercial message under the guise of important information. The broadcasters do not have to disclose the real source of these segments because they aren't "paid" to play them: companies—and the government—freely distribute VNRs, hoping to get them aired. What was once America's trusted source of news—the network newscast—has become open mic night for the government and powerful commercial interests, blurring the line between journalism and commercialism, all while the present sponsorship identification rules ensure that the public will remain none the wiser.

Part II of this Note will examine the history of VNRs and the recent scrutiny they have faced from the FCC, the media, and Congress. Part III will discuss the current sponsorship identification laws and why they are inadequate to deal with this growing problem. Part IV will discuss the proposed Truth in Broadcasting Act and other recent proposals to amend current FCC disclosure rules and explain why these changes alone are insufficient to remedy the existing problems. Finally, Part V will propose new legislation, coupled with enforcement guidelines, which will help ensure that the viewing public is adequately informed when broadcasts contain material funded by corporate entities.

2. For example, many early radio shows were named after their sponsors: *Kraft Music Hall*, *Maxwell House Showboat*, and the *Kodak Chorus* were all popular broadcasts during the 1930s and 1940s.

3. MEDIALINK WORLDWIDE INC., Annual Report (Form 10-K), at 3 (Mar. 31, 2006), available at <http://www.secinfo.com/d12TC3.ufr8.htm>.

II. HISTORY OF VIDEO NEWS RELEASES⁴

What are VNRs, who makes them, and why are they so common? The American Marketing Association, one of the largest professional organizations for marketers, defines a VNR as “[a] publicity device designed to look and sound like a television news story. The publicist prepares a 60- to 90-second news release on videotape, which can then be used by television stations as is or after further editing.”⁵ The VNR is then offered to local and network broadcasters, free of charge, in the hope that the stations will air the segment and provide the company or product with free advertising. Robin Andersen,⁶ in her book “Consumer Culture & TV Programming,” describes the strategy advertisers use in producing their VNRs:

For example, if the VNR is for Clairol, the news angle might be something like this: “Women are getting promoted to higher management positions and are thus more concerned about the way they look, so they’re coloring their hair more often. We spoke to somebody from Clairol about this phenomenon.” Or the producer could take a health angle on skin cream: “Yes, doctors say that all women should use face protection every time they go outside. Even if they’re only walking around New York, they can apply a Neutrogena cream containing number 15 sunblock protection.” Clearly, then, the VNR is the video equivalent of complementary copy and advertorials.⁷

Since VNRs are little more than press releases, it is unsurprising to find that they are primarily produced by public relations firms. Many of these firms employ former news professionals to accurately capture the “local news” look, critical for widespread adoption of a VNR.⁸ A well-designed VNR will attract the attention of news producers by having a “news hook” while subtly selling the product. VNR producers will often use diversity as another tactic; a VNR segment showing different ethnic groups may appeal to the station’s diversity needs. The focus of a VNR is getting the product name out there, not providing material that is valuable to the viewing public. This underscores the fact that while news stations argue that VNRs provide them with much-needed footage, the news value of any material so supplied is limited, at best.

4. For additional perspective on the history of VNRs, specifically with respect to government-funded VNRs, see generally Janel Alania, Note, *The “News” From the Feed Looks Like News Indeed: On Video News Releases, the FCC, and the Shortage of Truth in the Truth in Broadcasting Act of 2005*, 24 CARDOZO ARTS & ENT. L.J. 229 (2006); Ellen P. Goodman, *Stealth Marketing and Editorial Integrity*, 85 TEX. L. REV. 83 (2006).

5. AMERICAN MARKETING ASSOCIATION, *MARKETING TERMS DICTIONARY*, <http://www.marketingpower.com/mg-dictionary-view3393.php> (last visited Mar. 18, 2008).

6. Director, Peace and Justice Studies Program; Associate Professor, Department of Communication and Media Studies, Fordham University.

7. Robin Anderson, *Consumer Culture & TV Programming* 29 (1995).

8. *Id.*

A. Video News Releases—A Boon to Advertisers and Broadcasters Alike

So why use prepackaged news segments at all? For the companies that pay for the creation of VNRs, the benefits are clear: cheap advertising and increased credibility.⁹ The cost of producing a VNR in the early 1990s ranged from \$10,000 to \$100,000,¹⁰ but can now be done for less than \$25,000.¹¹ VNRs offer a low-cost alternative to pricey prime time commercial spots, which average \$125,000 for a 30-second spot, without having to sacrifice exposure.¹² The cost to get a VNR into the hands of news stations will drop even more with the emergence of the Internet and podcasts as viable information sources;¹³ almost anyone will be able to get their corporate message delivered to the front door of a television station. As stations become inundated with VNRs, their ability to sift through the material and use only the most objective footage will shrink—meaning that more and more corporate propaganda will make it on air and into the public's mind. Indeed, many local stations already rely on both Internet delivery services and major network news feeds—for example, PR Newswire, CNN Newsource, CBS NewsPath, and Pathfire—to supplement their locally produced material.¹⁴

Not only are VNRs cheaper than traditional advertising methods, but companies gain additional benefits by packaging their commercials in a news format. First, consumers have come to expect neutrality in a news broadcast and may place inordinate trust in the message being delivered by their local news anchor.¹⁵ Second, the growth of TiVo and other

9. See generally Alania, *supra* note 4 (discussing the benefits VNRs provide to companies and government agencies).

10. Robert B. Charles, *Video News Releases: News or Advertising?*, 9 THE WORLD & I 96 (1994).

11. See, e.g., Joe Mandese, *The Art of Manufactured News*, BROADCASTING & CABLE, Mar. 28, 2005 (estimating the price of a 3-minute VNR at \$15,000 - \$25,000).

12. Brian Steinberg, *Targetcast: Network TV's Prime-Time Spot Cost Drops 12%*, ADVERTISING AGE, Mar. 31, 2008 at A1.

13. "Podcasting" is a method of distributing audio and video files through an electronic subscription model. Individuals subscribe to "feeds," which can be automatically delivered to the individual's computer or portable music player. Most, if not all, major news sources provide podcasts of their programs or segments, including ABC, CBS, NBC, CNN, and Fox. Major newspapers have also gotten involved, providing audio versions of their top stories or op-ed pieces.

14. Laura Miller, *The Fake News Cycle*, 12 PR WATCH 2 (2005), available at <http://www.prwatch.org/files/PRW12Q2.pdf>; see also PR Newswire Home Page, <http://www.prnswire.com> (last visited Mar. 18, 2008).

15. This was confirmed in a 2005 survey, which found that, while overall public opinion of all news sources has declined for several years, local television news is viewed favorably by seventy-nine percent of viewers, topped only by local daily newspapers, which are viewed favorably by eighty percent of readers. In contrast, network television news and major national newspapers are viewed less favorably, at seventy-five percent and sixty-one

commercial-skipping devices means that traditional commercial segments are less likely to be viewed; hiding a commercial in a segment that viewers *want* to watch increases brand exposure. Finally, packaging a commercial as a “news segment” may avoid compliance with the Federal Trade Commission’s “truth in advertising” rules.¹⁶

News stations, in turn, rely on VNRs as a necessary tool to maintain their profit margins. As network news audiences dwindle, networks have responded by slashing the number of reporters they employ by an average of thirty-five percent from 1985 to 2002.¹⁷ The local picture is not much better: local news staffing levels have remained relatively constant or have dropped in most markets between 1998 and 2004, while the volume of local news programming has reached record levels.¹⁸ Local newsrooms must supply an average of 3.6 hours of news each day and have come to rely on third-party material, including VNRs, to meet this increased demand without breaking their budgets.¹⁹ One study, tracking the content of local news programs, noted an increase in the use of third-party material from fourteen percent in 1998 to nearly twenty-four percent in 2002.²⁰ The study found that, for the most part, “stations have opted for efficiency over quality,” and that this trend is likely to continue for the foreseeable future.²¹

B. “Fake News” and the Bush Administration

While VNRs have been in existence since at least the 1980s,²² no real scrutiny had been placed on their use prior to 2004, when the Bush administration received criticism for using federal resources to produce and distribute hundreds of pro-administration news segments, many of which

percent, respectively. See THE PEW RESEARCH CTR. FOR THE PEOPLE AND THE PRESS, PUBLIC MORE CRITICAL OF PRESS, BUT GOODWILL PERSISTS 2 (2005), available at <http://people-press.org/reports/pdf/248.pdf>.

16. See generally Alania, *supra* note 4 (arguing that FTC rules should be applied to VNRs).

17. Project for Excellence in Journalism, Annual Report, Network TV Newsroom Investment: Staffing and Workload (2006), available at <http://www.journalism.org/node/1229>.

18. *Id.*

19. Project for Excellence in Journalism, Annual Report, Local TV: Average Hours of News Per Day (2006), available at <http://www.journalism.org/node/1229>.

20. Tom Rosenstiel & Marion Just, *Five Ways to Build Viewership*, SPECIAL REPORT: LOCAL TV NEWS 92 (Nov./Dec. 2002), available at http://www.journalism.org/files/Local_TV_2002_study.pdf.

21. THE STATE OF THE NEWS MEDIA: LOCAL TV (2005), available at http://www.stateofthenewsmedia.org/2005/narrative_localtv_contentanalysis.asp?cat=2&media=6.

22. DWJ Television, self-described as a leading producer and distributor of video press kits, claims to have produced the first VNR in 1980. See DWJ Television, <http://www.dwjtv.com> (last visited Mar. 18, 2008).

were aired on local news stations without any disclosure that the government had created them.²³ This prompted the FCC to release a statement reminding broadcasters that all government-sponsored VNRs must contain adequate disclosure identifying the government as the source of the material.²⁴ The General Accounting Office (“GAO”) went a step further, finding that several of the government-sponsored VNRs rose to the level of “covert propaganda” expressly prohibited by law.²⁵

The media attention drawn to government-sponsored VNRs led to congressional action as well—in April of 2005, Senators John Kerry and Frank Lautenberg introduced the Truth in Broadcasting Act, with the express purpose of ensuring that “prepackaged news stories contain announcements that inform viewers that the information within was provided by the United States Government”²⁶ This legislation would require that any prepackaged news story “produced by or on behalf of a Federal agency” and intended for public broadcast must “conspicuously identif[y]” that the news story was prepared by the United States Government.²⁷ While this appears to be a valuable piece of legislation, Part IV of this Note will discuss why the Act, as currently amended, will fail to

23. David Barstow & Robin Stein, *The Message Machine: How the Government Makes News; Under Bush, a New Age of Prepackaged News*, N.Y. TIMES, Mar. 13, 2005, at A1, available at <http://query.nytimes.com/gst/fullpage.html?res=9A03E5DD153CF930A25750C0A9639C8B63&sec=&spon=&pagewanted=all>. President Bush was certainly not the first president to use VNRs to promote his agenda; President Clinton used VNRs to promote his policies, but President Bush is the first to garner widespread attention for the practice. See, e.g., Sherrie Gossett, *Fake News Under Bill Clinton*, Media Monitor, April 28, 2005, available at <http://www.aim.org/media-monitor/fake-news-under-Bill-Clinton/> (documenting the use of VNRs during the Clinton administration).

24. 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*, 20 F.C.C.R. 8593 (2005).

25. See Department of Health and Human Services, Centers for Medicare & Medicaid Services—Video News Releases, Comp. Gen. B-302710, 2004 WL 1114403, at *9 (C.G. May 19, 2004) (finding that “[b]ecause [the government] did not identify itself as the source of the news report, the story packages, including the lead-in script, violate the publicity or propaganda prohibition.”); Reconsideration of B-303495 Office of National Drug Control Policy, Comp. Gen. B-303495.2, 2005 WL 415074 (C.G. Feb. 15, 2005) (reaffirming GAO’s view that VNRs produced by the Office of National Drug Control Policy constituted covert propaganda and violated the publicity or propaganda prohibition). More recently, the GAO reiterated its opinion that the Department of Education’s prepackaged news stories violated the publicity or propaganda prohibition in a letter to Kent Talbert, general counsel for the Department of Education. Letter to the Honorable Kent Talbert, Comp. Gen. B-307917, 2006 WL 1985459 (C.G. July 6, 2006).

26. S. 967, 109th Cong. (as reported by Senate, Apr. 28, 2005). The Truth in Broadcasting Act was not enacted during the 109th Session of Congress but may be reintroduced during the 110th Congress.

27. *Id.* § 2.

have any significant impact on how government VNRs are used and will do nothing to stem the tide of corporate-funded VNRs.

C. The CMD Report—Documenting the Undocumented Use of Commercial VNRs

The flurry of media surrounding government-sponsored VNRs expanded to highlight the role that corporate VNRs play in news broadcasts; after April 2006, the Center for Media & Democracy (“CMD”), a nonprofit public interest organization, revealed that over seventy-seven television stations aired VNRs without disclosing the source of the material.²⁸ These stations, collectively reaching more than half of the U.S. population, used thirty-six different video news releases, often airing the VNR without any editing at all.²⁹

The CMD report quickly generated comments both for and against the use of corporate VNRs by local news stations. The FCC issued forty-two Letters of Inquiry to the seventy-seven broadcasters identified in the CMD Report.³⁰ FCC Commissioner Adelstein, in supporting the FCC probe, stated that “[w]e need a full and thorough investigation to learn all of the facts surrounding the undisclosed broadcast of what appears to be commercial material”³¹ Commissioner Adelstein went on to note that the FCC has the authority to impose fines of up to \$32,500 per violation and to consider license revocation proceedings.³²

In response, the Radio-Television News Directors Association (“RTNDA”), a professional organization representing local and network news executives, issued a letter to the FCC attacking the CMD report’s findings. The RTNDA argued that even if the report was accurate, the use of undisclosed corporate VNRs was not prohibited by the FCC’s sponsorship identification rules.³³ Another group, the National Association of Broadcast Communicators (“NABC”), formed in the summer of 2005 specifically to oppose the FCC probe. Comprised of fifteen public relations companies, many of whom produced the VNRs under investigation, NABC created a “Membership Code,” hoping to avoid further FCC scrutiny (and

28. Diane Farsetta & Daniel Price, *Fake TV News: Widespread and Undisclosed*, (April 6, 2006), available at <http://www.prwatch.org/pdfs/NFNPDFExt6.pdf>.

29. *Id.*

30. Press Release, Fed. Comm. Comm’n, FCC Launches Unprecedented Video News Release Probe, (Aug. 14, 2006) available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-267048A1.pdf.

31. See Public Statement, FCC, FCC Commissioner Adelstein (Aug. 14, 2006, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-267048A1.pdf).

32. *Id.*

33. See Letter from Kathleen A. Kirby & Lawrence W. Secret III, Counsel for the Radio-Television News Directors Association, to Marlene H. Dortch, Secretary, FCC (Oct. 5, 2006) [hereinafter *Kirby Letter*] (on file with author).

possible sanctions) by adopting a self-policing alternative to FCC regulation.³⁴ The NABC also filed a letter with the FCC, opposing any forced disclosure as a violation of the First Amendment and an unprecedented intrusion of the government into the newsroom.³⁵

The immediate responses generated by the FCC and others to the CMD report suggest two things: first, the FCC realizes that this problem will not go away on its own; second, VNRs have become so integral to the news process that changes in how they are regulated will significantly impact both the stations and their advertisers. Given the potential for abuse if left unchecked, the use of VNRs needs to be scrutinized and clear guidelines need to be established to ensure that the public is aware of this practice.

III. CURRENT STATE OF SPONSORSHIP IDENTIFICATION RULES

Before addressing what changes should be made to the current disclosure rules, it is necessary to understand exactly when broadcasters must disclose the use of VNRs, and what form the disclosure must take. The basic rules governing sponsorship disclosure can be found in the Communications Act of 1934, in sections 317 and 508.³⁶ Section 317 requires broadcasters—both radio and television—to disclose when they use material “for which any money, service or other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting”³⁷ This does not include, however, instances where the material was provided “without charge or at a nominal charge” by the person furnishing the material.³⁸ One exception to this exception rests in subsection (a)(2), which provides that the FCC may require the broadcaster to disclose the source of materials presented in connection with a “political program or any program involving the discussion of any controversial issue,” even if the materials were provided free of charge.³⁹ Since most VNRs do not address “political” or “controversial” issues and are provided free of charge to broadcast stations, it is easy to see why this requirement has not abated the widespread use of VNRs by broadcasters.

Section 508 expands the disclosure rules beyond the stations themselves to the employees of the station, producers of programs, and

34. National Association of Broadcast Communicators Home Page, <http://www.broadcastcommunicators.org> (last visited Mar. 18, 2008).

35. National Association of Broadcast Communicators, *NABC Letter to the FCC* (Oct. 16, 2006), available at http://www.broadcastcommunicators.org/NABC_Letter_to_FCC.pdf.

36. See 47 U.S.C. §§ 317, 508.

37. 47 U.S.C. § 317(a)(1).

38. *Id.*

39. *Id.* § 317(a)(2).

suppliers of program materials.⁴⁰ This provision ensures that anyone who creates, distributes, and uses broadcast material must inform the public that the material is being sponsored by a corporate entity or a government agency. The FCC, in a 2000 letter, noted that the purpose behind the disclosure rules has remained consistent since the Radio Act of 1927: “listeners [and viewers] are entitled to know by whom they are being persuaded.”⁴¹ Despite this lofty goal, the disclosure rules received minimal attention until the payola scandal of the 1950s,⁴² and have not been applied to the modern VNR.⁴³

The FCC’s own rules require broadcast stations to disclose materials implicating “any political broadcast matter or any broadcast matter involving the discussion of a controversial issue of public importance”⁴⁴ In the case of traditional political advertisements, the identity of the sponsor must be displayed “with letters equal to or greater than four percent of the vertical picture height” for a minimum of four seconds.⁴⁵ For nonpolitical, noncontroversial broadcast matter, stations are only required to disclose the sponsor’s identity if the station is provided “money, service, or other valuable consideration.”⁴⁶ Like the Communications Act, the FCC rules do not require disclosure of material provided “without or at a nominal charge for use on, or in connection with, a cablecast,” unless it is furnished to secure identification beyond that “reasonably related to the use of such service or property on the cablecast.”⁴⁷

While this suggests that corporate-funded VNRs may require disclosure,⁴⁸ the FCC has taken an “I know it when I see it” approach to

40. 47 U.S.C. § 508(a)-(c).

41. ABC Television Network Investigation, 16 F.C.C.R. 1421, 23 (2000) (quoting Applicability of Sponsorship Identification Rules, 40 F.C.C. 141 (1963) as modified, 40 Fed. Reg. 41936 (Sept. 9, 1975)).

42. In the late 1950s, Congress began a probe into the practice by major record labels of paying popular deejays to promote their songs. As a result of the probe, Congress amended sections 317 and 508 of the Communications Act, prohibiting under-the-table payments to deejays. For more information about the payola scandal, see generally RICHARD CAMPBELL ET AL., MEDIA AND CULTURE: AN INTRODUCTION TO MASS COMMUNICATION (2004).

43. For a detailed analysis of the legislative history behind the sponsorship identification rules, see Richard Kielbowicz & Linda Lawson, *Unmasking Hidden Commercials in Broadcasting: Origins of the Sponsorship Identification Regulations, 1927-1963*, 56 FED. COMM. L.J. 329 (2004); see also *Loveday v. FCC*, 707 F.2d 1443 (D.C. Cir. 1983).

44. 47 C.F.R. 73.1212 (2006).

45. 47 C.F.R. 73.1212(a)(2)(ii) (2006).

46. 47 C.F.R. 76.1615(a).

47. *Id.*

48. See, e.g., Benjamin R. Mulcahy, *That's Advertainment!*, L.A. LAW., May 29, 2006, at 44 (describing the fine line between legitimate news segments that incorporates brand names, and program-length commercials that would require a disclosure).

defining when a news segment is “too” commercial.⁴⁹ In a 1974 Public Notice, the FCC stated that the question to ask is:

[W]hether the purportedly non-commercial segment is so interwoven with, and in essence auxiliary to the sponsor’s advertising (if in fact there is any formal advertising) to the point that the entire program constitutes a single commercial promotion for the sponsor’s product or services.⁵⁰

This vague definition, coupled with the FCC’s general policy not to impose sanctions if the broadcaster gave “careful consideration” in “arriving at a good-faith determination” as to whether a disclosure is warranted,⁵¹ has allowed stations almost complete freedom to use VNRs without any meaningful disclosure and without any fear of repercussion. Until rules mandating sponsor identification are in place, broadcasters will continue to value the interests of their advertisers over those of their viewing public.

IV. NO SOLUTION IN SIGHT—REMOVING THE “TRUTH” FROM THE TRUTH IN BROADCASTING ACT

Why should we be concerned about VNRs? Clearly, they allow local news stations to provide more news than if they had to personally film, edit, and produce every segment they aired. Many VNRs contain useful information, even if they are created with the purpose of promoting a particular product or service.⁵² Furthermore, the public may have an interest in learning more about commercial products, whether this information comes in the form of product reviews, comparisons, or in recommendations for particular products. The problem is not in the creation and use of VNRs; the problem is that television news remains the most popular and trusted source of information for the majority of Americans, and the public has the right to know when a particular news segment has been carefully crafted into a subtle sales pitch.

The Truth in Broadcasting Act, as originally drafted, would have strengthened the disclosure rules by requiring all government-sponsored VNRs to contain a “conspicuous display,” visible throughout the entire news segment, indicating that the material was produced by the United States government.⁵³ In the case of radio programming, stations would be required to “audibly inform” the audience of the source of the material

49. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (quoting Stewart, J.).

50. Public Notice Concerning the Applicability of Commission Policies on Program-Length Commercials, 44 F.C.C.2d 985, 986 (Jan 29, 1974).

51. *Id.*

52. Despite their commercial nature, product recall reports are one instance where a VNR may be in the public’s interest.

53. S. 967, 109th Cong. § 2 (as reported by Senate, Apr. 28, 2005).

used.⁵⁴ Furthermore, the original act would have made it unlawful to remove these announcements.⁵⁵

The current version of the bill, however, does none of this. The change in focus is evident from the legislation's new name alone: no longer the "Truth in Broadcasting Act," Senate Bill 967 is now the "Prepackaged News Story Announcement Act of 2005." The new bill requires no continuous display of sponsorship, only a "clear notification" that the material was prepared by the government.⁵⁶ Instead of a flat prohibition on removing these disclosures, the new bill allows the FCC to promulgate rules governing when broadcasters may remove or alter this notification.⁵⁷ While there is no guarantee that the FCC would make it easy for broadcasters to remove the notification, this bill is clearly a far cry from its original form. Legislation that started out as a potential watchdog has been left a toothless hound—all bark, no bite.

V. WHAT NEEDS TO HAPPEN—MANDATORY DISCLOSURE AND BEEFED-UP ENFORCEMENT

The current state of affairs is characterized by two separate problems: weak disclosure laws and minimal FCC enforcement. News broadcasters rarely must disclose anything under the current legal regime, and even if the stations fail to properly disclose the source of their material, the FCC is unlikely to step in and fine them. Two changes must therefore take place. First, Congress must pass meaningful disclosure rules that require broadcasters to adequately identify when they are using material that has been provided to them by a public relations firm or the government. Second, the FCC must evaluate its current enforcement strategies and develop a new system that will ensure that disclosure violations are documented and that the offending broadcasters are held accountable. The following sections will address common criticisms of mandatory disclosure rules and briefly outline some basic recommendations.

A. *Criticisms of Mandatory Sponsorship Identification*

Critics of mandatory disclosure rules typically fall into two basic camps: those who believe that mandatory disclosure violates First Amendment rights, either by compelling speech or by interfering in the editorial process; and those who believe that the market system is better equipped to make these changes. While there is certainly valid concern over government regulation of what news is broadcast, mandatory

54. *Id.*

55. *Id.*

56. S. 967, 109th Cong. (as reported by Senate, Dec. 20, 2005).

57. *Id.*

disclosure rules can be drafted to prevent the excessive entanglement concerns raised by critics. Similarly, market-based criticisms ultimately fail from an empirical standpoint: the fact that broadcasters are not sufficiently disclosing the sources of their material under the current regime only strengthens the argument for stricter disclosure rules.

1. Constitutional Criticisms

Critics have argued that “[d]etermining 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.”⁵⁸ Dictating the manner in which broadcasters must disclose their sources, the argument goes, would constitute an intrusion by the government into the sacrosanct halls of the newsroom. While it is true that the government should be hesitant to exert too heavy a hand in the realm of news reporting, there is a difference between compelling full disclosure and usurping editorial control. Mandatory disclosure rules would function akin to the FDA’s requirements that food manufacturers properly list the ingredients found in their products; a better informed consumer is worth the small price of compelled speech.

Some of the concern about excessive government entanglement can be alleviated by providing clear disclosure guidelines that allow news stations to customize the disclosure to “fit in” with the rest of their broadcast. The FCC already does this with respect to traditional political advertisements—a station is required to display the identity of the sponsor in letters that are a minimum size but are otherwise free to use fonts, colors, etc. that match its overall design. Such guidelines would ensure that stations effectively identify the source of their materials without having to make editorial and aesthetic sacrifices.

Critics of mandatory disclosure rules have also argued that any mandatory rules would violate the First Amendment rights of broadcasters.⁵⁹ This argument is tempered by the Supreme Court’s decision in *Red Lion Broadcasting Co. v. Federal Communications Commission*, which held that radio and television broadcasting are afforded less First Amendment protection than other media.⁶⁰ The Court justified this outcome

58. Radio-Television News Directors Association, *RTNDA Urges FCC to Halt VNR Inquiry* (Oct. 6, 2006), available at <http://www.rtna.org/pages/posts/rtna-urges-fcc-to-halt-vnr-inquiry39.php?g=11>.

59. See, e.g., Kirby Letter, *supra* note 32.

60. *Red Lion Brdcast. Co. v. FCC*, 395 U.S. 367 (1969).

by pointing to the scarcity of the resources at issue;⁶¹ this has led to more recent decisions questioning whether the same rationale can be applied to cable television.⁶² Despite some vocal criticism of *Red Lion*, the Court has declined to overturn the decision and has allowed some content-neutral restrictions to be placed on speech broadcast by cable operators.⁶³ Indeed, some commentators have gone further by arguing that since the First Amendment functions to promote public discourse, disclosure rules would actually advance fundamental interests, not hinder them.⁶⁴

Finally, the news industry argues that mandatory sponsorship identification amounts to compelled speech, and that under such rules news stations could be forced to reveal anonymous sources that they rely upon for their information.⁶⁵ Breaching this confidentiality, they contend, would endanger legitimate news efforts and place journalists in an ethical quandary. But this argument is overblown—the type of disclosure that would be required under the new rules would only apply to sponsored material, where there is a clear corporate or government interest behind the material being provided. While it is true that stations would receive complementary footage from an anonymous tipster or whistleblower, this would not raise the same concerns (and would not require the same disclosure) as when the material is professionally produced in an effort to mislead the viewing public.⁶⁶

Mandatory disclosure of sponsored material also does not run afoul of the Supreme Court's ruling in *Miami Herald*, which held that there is no constitutional difference between prohibiting specific speech and requiring newspapers to carry speech they would otherwise choose not to carry.⁶⁷ There, the Court struck down a Florida statute requiring newspapers that ran editorials critical of a political candidate to also print responses from that candidate, finding that this amounted to an impermissible exercise of government control over free speech. But the Florida statute differs from

61. *Id.* at 388 (“Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unbridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.”).

62. See, e.g., *Turner Brdcast. Sys., Inc. v. FCC (Turner I)*, 512 U.S. 622 (1994).

63. For example, the Supreme Court affirmed the application of “must-carry” rules to cable broadcasters in *Turner Broad. Sys., Inc. v. FCC (Turner II)*, 520 U.S. 180. Likewise, the Court upheld the constitutionality of a federal provision that required cable operators to fully block or scramble any channel to which a subscriber does not subscribe, when so requested by the cable subscriber. See *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803 (2000).

64. See Goodman, *supra* note 4, at 130.

65. See, e.g., Kirby Letter, *supra* note 32.

66. See Goodman, *supra* note 4, at 133-37 (arguing that anonymously-produced material differs from sponsored material in key constitutional respects).

67. *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974).

sponsorship identification in three critical respects: (1) sponsorship identification is content-neutral; (2) news stations would not be forced to change the actual content of their programs; and (3) the newspaper medium is fundamentally different from television.⁶⁸ These differences suggest that the Court would distinguish mandatory sponsorship disclosure rules from the impermissible compelled speech found in *Miami Herald*.

On the other hand, there are strong First Amendment arguments *in favor of* tougher disclosure rules. First, modern constitutional jurisprudence has recognized that one role of the First Amendment is to promote the “marketplace of ideas.” Under this theory, all viewpoints and opinions should be allowed to flourish, since each contributes in some way to the overall quality of discourse. Implicit in this concept is the belief that “more news is good news”—that is, increased disclosure of factual information will tend to improve public discourse and decision making.⁶⁹ This argument has special force in the context of news reports, since the public generally relies on the veracity of this information in making important decisions. FCC Commissioner Adelstein, commenting on the FCC’s investigation into the use of VNRs, noted that “[t]he public has a legal right to know who seeks to persuade them so they can make up their own minds about the credibility of the information presented.”⁷⁰ If television is truly a marketplace of ideas, then there must be some requirement of “truth in advertising.”

Second, the First Amendment has been viewed as instrumental in achieving important personal and societal goals. We believe that free speech is important not only for the marketplace of ideas but also for allowing individuals and society as a whole to make advancements. The government must balance free speech with its other legitimate interests; this allows the government to restrict or control expression when other fundamental rights are at issue. The applicability of this argument to sponsorship identification is relatively straightforward: requiring broadcasters to disclose when the information they present as news has been created and given to them by the government or by corporate interests is a necessary step in preserving the ideals of democratic self-governance. A misinformed citizenry, unable to distinguish fact from propaganda, is

68. The Supreme Court pointed out these critical differences in approving cable “must-carry” rules over an objection based on *Miami Herald*. See, *Turner I*, *supra* note 61, at 653-56.

69. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“[T]he ultimate good desired is better reached by free trade in ideas ... the best test of truth is the power of the thought to get itself accepted in the competition of the market.”).

70. Press Release, FCC, FCC Launches Unprecedented Video News Release Probe (Aug. 14, 2006), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-267048A1.pdf.

simply incapable of making good political decisions. Because news is of paramount importance in the political process, full disclosure of the sources funding news stories finds agreement with the principles underlying the First Amendment.⁷¹

2. Market-Based Criticisms

Aside from First Amendment concerns, some critics argue that mandatory disclosure rules are an unnecessary government intrusion into an area that can be better regulated by the market itself. Since the public presumably cares about the level of disclosure it receives, consumers will choose to watch programs that adequately disclose sources over programs that fail to disclose sources. As the audience for a particular program drops, the broadcaster can respond by increasing the amount of disclosure made. In this way, critics argue, the market will naturally produce news broadcasts that contain the optimal level of sponsorship disclosure; too little or too much disclosure will drive audiences away.

But this argument fails when applied to the world of network and cable news broadcasts, both from a theoretical and empirical standpoint. Theoretically, markets only provide the correct level of disclosure when there are sufficient market incentives. In many markets, financial incentives ensure that market participants will make disclosures that benefit their consumers.⁷² In other markets, however, there is no financial incentive for a market participant to take these measures; participants are either unable to internalize the benefits of their disclosures, or informational asymmetries prevent consumers from making informed choices.⁷³ In these markets, without any externalities, participants will fail to adequately inform consumers; regulation is therefore necessary to ensure that public welfare is being promoted. In the television market, for example, the market is likely

71. This explains other situations where the government has restricted free speech in order to achieve other legitimate goals: environmental disclosures, nutritional labeling, and the Smith Act are all examples where free speech is trumped (at least to some degree) by other substantial interests. *See, e.g.,* Wendy E. Parmet & Jason A. Smith, *Free Speech and Public Health: A Population-Based Approach to the First Amendment*, 39 *LOY. L.A. L. REV.* 363 at 365 (2006) (“[I]n an information age, rights of free speech, like other Constitutional rights, can and must coexist with the state’s interest in protecting public health.”).

72. Product manufacturers, for example, often elect to place warning labels on their products, even without mandatory disclosure laws, because the cost of safety labels is significantly less than the potential cost of lawsuits.

73. One oft-cited example is mandatory disclosure rules in the securities industry. Investors would benefit from increased disclosure by issuers; issuers, on the other hand, regularly lack incentives to disclose (at least fully) the information investors seek. *See, e.g.,* Joseph A. Franco, *Why Antifraud Prohibitions are not Enough: The Significance of Opportunism, Candor and Signaling in the Economic Case for Mandatory Securities Disclosure*, 2002 *COLUM. BUS. L. REV.* 223 (arguing that informational asymmetries result in market failure to promote socially efficient levels of issuer disclosure).

to fail to produce the optimal amount of disclosure because consumers are unaware they are targeted for marketing. Without any way for the public to measure disclosure rates in an accurate and meaningful way, viewers lack the ability to send signals of disapproval to news broadcasters.⁷⁴ Even if customers were unhappy with their news channels, the “bulk packaging” of television services and the often limited number of competitors in a given market makes it difficult, if not impossible, for customers to effectively go somewhere else.⁷⁵

From an empirical standpoint, it is clear that the market is not creating incentives for any disclosure that goes beyond the minimal requirements set forth by Congress and the FCC. Sponsorship disclosure in the newspaper medium has been more successful. The newspaper industry has done a satisfactory job of developing and enforcing mandatory guidelines that identify advertising sections as such, and that provide for accurate and appropriate identification of where and from whom information was obtained. Meaningful disclosure was achieved, not through draconian laws regulating editorial activity but through fear that such laws would be placed into effect.⁷⁶

B. Proposed Legislative Changes to the Disclosure Rules

Having addressed several of the main criticisms surrounding the idea of mandatory sponsor identification, we can now examine what legislative efforts would properly balance the interests of broadcasters and the public alike. The following is a basic highlight of features that should be considered in drafting new sponsorship identification rules:

Require disclosure whenever a VNR is used. Under the current legal regime, stations only have to disclose the sponsors behind VNRs if the station receives valuable consideration or the VNR addresses a “political” or “controversial” issue. The sponsorship rules specifically

74. See Goodman, *supra* note 4, at 141 (arguing that market forces fail to encourage disclosure where consumers are unaware of the marketing, or where the marketing practices do not degrade their experience).

75. One might consider the growing popularity of Internet news sources as some indication that consumers are indeed moving away from television news, but there is no real evidence that this shift reflects growing dissatisfaction with the *content* of the news being offered by television stations. Even if this is an underlying motivation, the prominent news sources on the Internet are, for the most part, owned and operated by the same companies that operate television news sources.

76. To be fair, much of the impetus for these voluntary guidelines came from actual restrictions enacted by Congress as the Newspaper Publicity Act of 1912, which required newspapers and magazines benefiting from lower postage rates to accurately identify advertisements. See 18 U.S.C. § 1734. While this did force newspaper publishers to change their practices, the law has rarely been applied after its adoption and is largely obsolete. See Kielbowicz, *supra* note 42, at 332-33.

exclude complementary or nominally-priced VNRs from disclosure, overlooking the fact that VNRs save news stations thousands of dollars apiece. Mark Feldstein, director of journalism and associate professor at George Washington University, has argued that the savings for news stations amounts to an in-kind contribution from the companies and government agencies that provide the footage.⁷⁷ Until the disclosure rules close this loophole, stations will continue to use VNRs without (legally) having to provide the public with any notice.

Furthermore, requiring disclosure in all circumstances will make it easier for news directors to do their jobs. The current policies are vague and undefined—even the FCC is unclear as to who would judge what is political or controversial.⁷⁸ While the current lack of clear guidelines has given rise to an “anything goes” policy at many stations, creating mandatory disclosure rules would eliminate the guesswork while promoting ethical, responsible journalism.

Finally, a mandatory disclosure policy for all use of VNRs is aligned with industry recommendations and codes of ethics. The RTNDA, for example, updated its code of ethics in 2005, stating that “[n]ews managers and producers should clearly disclose the origin of information and label all material provided by corporate or other non-editorial sources.”⁷⁹ The guidelines also suggest that news directors include original footage and reporting whenever feasible and only rely on VNRs when their “value outweighs the possible appearance of ‘product placement’ or commercial interests.”⁸⁰ This echoes a statement made a year earlier by the Public Relations Society of America, which recommended that producers of VNRs, and the television stations airing them, should identify the sources of the material.⁸¹

Adopt industry-wide standards for the form disclosures must take. Even if broadcasters are required to disclose their sources, the FCC currently only requires that the station “clearly disclose” the “nature, source and sponsorship of the material” being used.⁸² What constitutes “clear

77. Katie Sweeney, Fuzzy Picture for VNRs, SMTs: Both Vehicles Come Under Scrutiny, and Congress Gets Into the Act, 12 PUB. RELATIONS TACTICS 6, 18 (2005).

78. Anne E. Kornblut & David Barstow, *Debate Rekindles Over Government-Produced ‘News’*, N.Y. TIMES, Apr. 15, 2005, at A17.

79. Radio-Television News Directors Association, RTNDA GUIDELINES FOR USE OF NON-EDITORIAL VIDEO AND AUDIO (April 2005), available at http://www.rtna.org/pages/media_items/guidelines-for-use-of-non-editorial-video-and-audio250.php.

80. *Id.*

81. Public Relations Society of America, *Statement of the Public Relations Society of America (PRSA) on Video News Releases (VNRs)* (Apr. 20, 2004) available at http://media.prsa.org/article_display.cfm?article_id=392.

82. Commission Reminds Broadcast Licensees, Cable Operators, and Others of Requirements Applicable to Video News Releases and Seeks Comment on the Use of Video

disclosure” remains undefined by the FCC; broadcasters have often responded by providing minimal or fleeting acknowledgments, if any warning is provided at all.⁸³ One goal of any new legislation should be to adopt uniform standards requiring VNR producers to clearly identify the nature of their material. To some extent, this is already being done: many of the large VNR producers do include identification as to who paid for the material. Doug Simon, president and CEO of the public relations company D S Simon Productions, proposed mandatory identification by the government whenever it produces a VNR;⁸⁴ extending this principle to commercially-funded VNRs would ensure that the public is adequately informed as to the source of *all* material that airs on television.

Require “tagging” of VNRs, similar to Nielsen’s SIGMA technology. Companies that pay for VNRs and traditional commercial spots use special video encoding technology to measure how often their commercials are aired. Nielsen Media Research, the industry group that calculates television show ratings, uses its proprietary SIGMA technology to monitor video usage throughout the United States and is able to provide overnight reports to its subscribers.⁸⁵ The FCC and industry leaders should develop a universal “tag” that identifies sponsored footage. Government agencies, as well as corporations, could be assigned unique identification numbers so that client-specific reports could be generated.

One advantage in using electronic verification technology is that it is able to detect the use of footage where the original material has been edited or revoiced. This is particularly important in the VNR field, since many local stations will have their own reporters read the script, and VNRs are often edited for time. A second benefit is that this type of “tagging” does not affect the look of the VNR when it is aired; the information is stored in

News Releases by Broadcast Licensees and Cable Operators, *Public Notice*, 20 F.C.C.R. 8593, 8594 (2005).

83. See, e.g., CENTER FOR MEDIA AND DEMOCRACY, STILL NOT THE NEWS: STATIONS OVERWHELMINGLY FAIL TO DISCLOSE VNRs (Nov. 14, 2006) available at http://www.prwatch.org/pdfs/CMD_Report_Public.pdf (documenting local news stations’ continued use of VNRs).

84. Simon’s “Transparency in Government use of PR Video Act” would require that the government: (1) post on a public Web site copies of all video disseminated to news stations; (2) disclose the government sponsorship of material in email and fax pitches; and (3) identify the source of materials at the start of the VNR, as well as provide a copy of the VNR with an identification running throughout the segment. *Transparency in Government use of PR Video Act: Before the S. Comm. on Commerce, Sci. & Trans.*, 109th Cong. (2005) (testimony of Mr. Douglas Simon, President & CEO, D S Simon Productions Inc.), available at http://www.commerce.senate.gov/public/index.cfm?FuseAction=Hearings.Testimony&Hearing_ID=1497&Witness_ID=4264.

85. See Nielsen Media Research, *SIGMA: Features*, available at <http://www.nielsenmedia.com/monitor-plus/SIGMA/index.html> (last visited Mar. 19. 2008).

lines twenty and twenty-two of the video signal, similar to how closed captioning is transmitted.⁸⁶

Require television stations to document their use of VNRs. In addition to mandatory disclosure of sponsored material, stations must be required to document every instance in which they have used VNR material, even if the material has been edited or modified. While this will naturally increase the costs of doing business, broadcasters, as common carriers, owe a duty to their viewing public to disclose the sources they use. Some commentators have argued that keeping such a “library” would become prohibitively expensive for independent and smaller stations; while this is a legitimate concern, Congress can create different storage and reporting requirements dependant on the market size of a broadcaster.

C. Proposed Changes to the FCC's Enforcement Policies

As discussed above, the solution to the problem of corporate-funded VNRs requires a combination of legislative and enforcement policies; having strong rules is meaningless if the agency charged with enforcing the rules is unwilling or unable to prosecute offenders. The following are a few suggestions for changes that should be considered within the FCC:

The FCC cannot rely solely on consumer complaints. Having stronger disclosure rules is not enough—the FCC must enforce these rules. One consistent criticism of the FCC in recent years is that its enforcement of rules has been lax at best, particularly with respect to indecency.⁸⁷ Overhauling FCC enforcement is not simply a matter of throwing more money at the agency; the current system of relying on public complaints to find violators simply does not work.

The FCC should perform regular audits of VNR usage by broadcasters. This task would be made easier with the adoption of uniform, mandatory electronic tagging. The FCC would be able to generate reports of all the VNRs used by a particular television station, and then compare that report to the files stored at the station itself. For larger market stations, the auditor would be able to view the actual footage as used during the broadcast; for smaller stations, the auditor may be limited to reviewing the previous day's broadcast.

86. See WIKIPEDIA, *SIGMA (verification service)*, available at http://en.wikipedia.org/wiki/SIGMA_%28verification_service%29 (last visited Mar. 19, 2008).

87. See, e.g., Stephen Labaton, *Senate Democrats Warn F.C.C. of Tough New Oversight*, N.Y. TIMES, Feb. 1, 2007 at C3 (quoting Senator Rockefeller's criticism of the FCC's current licensing review policies: “The process of review is so pro forma that it's known as postcard renewal.”).

VI. CONCLUSION

“Fake news” is a growing problem; as news stations rely more and more on outside footage provided by businesses and the government, the opportunities to mislead the viewing public will only increase. Americans have come to trust the television—as they did with radio before it—as their primary source of information about the world and their local communities. With this trust comes responsibility—television broadcasters have been allocated limited frequency bandwidth in the belief that they are best suited to make beneficial use of the spectrum; selling out the public’s faith to the highest bidder is a dereliction of their duty.

But we cannot blame news broadcasters alone. Weak disclosure rules and lax enforcement have created an atmosphere in which anything goes. News stations are not breaking the current rules requiring sponsorship identification—they are profiting from rules that have failed to keep up with the realities of modern television. Restoring the public’s confidence in the information they see and hear on the nightly news will require fundamental changes, both from a legislative and enforcement standpoint. The industry will have to adapt as well; broadcasters will have to ensure that the material they air has been properly identified as necessary, and that they are complying with bookkeeping requirements.

These changes will not come quickly, nor will they come easily. But it is clear that change must take place. The FCC’s recent inquiry into the use of VNRs is an important first step down a road that will hopefully lead to the realization that while free speech and editorial independence are important and fundamental, so is the right of the public to be fully informed when a station airs a story as “news.” Mandatory sponsorship identification, whenever a VNR is used, strikes an appropriate balance between editorial independence and the public’s right to know.