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

INTRODUCTION

In March 2004, the *New York Times* reported that a video news release ("VNR") produced by the Department of Health and Human Services had been broadcast by television news programs in Oklahoma, Louisiana, and other states, without disclosing the role of the Department as the source of the story.[1] A year later, on the heels of revelations that conservative commentator Armstrong Williams had received nearly a quarter of a million dollars from the Department of Education to speak in support of the No Child Left Behind Act on his televised news program and in his newspaper column (the payment was disclosed neither to viewers nor to readers),[2] as well as a Government Accountability Office (GAO) ruling that the Bush administration had violated covert propaganda laws by distributing VNRs relating to programs of the Office of National Drug Control Policy and the Department of Health and Human Services without disclosing their origins,[3] the *Times* published a front page exposé detailing the widespread production of such "prepackaged news" segments by federal agencies and their pervasive use by broadcast media outlets without disclosure of their source.[4]

The subsequent media attention given to the use of this long-established public relations practice by the United States government and the public outrage it generated[5] led the Federal

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1 Robert Pear, *U.S. Videos, for TV News, Come Under Scrutiny*, N.Y. TIMES, Mar. 15, 2004, at A1.

2 David D. Kirkpatrick, *T.V. Host Says U.S. Paid Him to Back Policy*, N.Y. TIMES, Jan. 8, 2005, at A1; *see also* Clay Calvert, *Payola, Pundits, and the Press: Weighing the Pros and Cons of FCC Regulation*, 13 COMMLAW CONSPECTUS 245 (2005).

3 Prepackaged News Stories, Memorandum from Comptroller Gen. of the United States, 2005 U.S. Comp. Gen. LEXIS 29 (Feb. 17, 2005) [hereinafter Prepackaged News] (reminding agencies of the constraints of the "publicity or propaganda prohibition" and that such prepackaged news stories may only be used if there is clear disclosure of the governmental role in providing the material); *see also* Kirkpatrick, *supra* note 2 (making public the nature of the relationship between Williams and the Department of Education). **R**

4 David Barstow & Robin Stein, *Under Bush, A New Age of Prepackaged News*, N.Y. TIMES, Mar. 13, 2005, at A1.

5 *See Flack Attack*, 12 PR WATCH 1 (Second Quarter, 2005), http://www.prwatch.org (explaining the reasoning behind the "fake news" theme of that issue of the newsletter). More specifically, statements issued by FCC Commissioners Michael J. Copps and Jonathan S. Adelstein referenced public demands for an FCC investigation, the former citing contact

Communications Commission ("FCC") in April 2005 to issue a Public Notice seeking comment on the issue and reminding broadcasters of their obligation to disclose all entities and individuals involved in the production and distribution of VNRs, and of the responsibilities delineated by the FCC sponsorship identification rules already in place.[6] FCC Commissioner Jonathan S. Adelstein went a step further, expressing his disdain for the growing "commercialization of the media" and intimating that the FCC might in fact augment the current requirements, in speeches delivered before the Media Institute,[7] the National Conference for Media Reform,[8] and the Senate Committee on Commerce, Science, and Transportation[9] in May 2005. In the aforementioned Senate testimony, Adelstein expressly endorsed Senate Bill S. 967, the Truth in Broadcasting Act of 2005, calling it "an effective complement to our existing sponsorship identification rules" that would "explicitly and unambiguously require Federal agencies that produce prepackaged news stories to announce, within the news stories themselves, that the government is the source of the stories."[10] Adelstein's apparent belief was that by ensuring disclosure of the role of federal agencies in the production and

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from "tens of thousands of citizens," and the latter referring to letters from Senators John F. Kerry and Daniel Inouye, Executive Director of Free Press Josh Silver, as well as to "thousands of emails about VNRs." Commission Reminds Broadcast Licensees, Cable Operators and Others of Requirements Applicable to Video News Releases and Seeks Comments on the Use of Video News Releases by Broadcast Licensees and Cable Operators, (Apr. 13, 2005), 20 F.C.C.R. 8593 (public notice) [hereinafter Commission Reminder].

6 Commission Reminder, *supra* note 5. **R**

7 Jonathan S. Adelstein, Commissioner, Federal Communications Commission, "Fresh is Not as Fresh as Frozen:" A Response to the Commercialization of American Media, Speech before the Media Institute, Wash. D.C., 2004 FCC LEXIS 7458, at *5 (May 25, 2005) (characterizing the "increasing commercialization of the media . . . [e.g.] video news releases masquerading as independent legitimate news; PR agents pushing political and commercial agendas that squeeze out real news coverage and local community concerns" as one the "most pernicious symptoms" of media consolidation and expressly calling for the assistance of the American public in monitoring and enforcing the use of VNRs). (Note the Lexis date of 2004 is incorrect; the speech was actually given May 25, 2005. *See* The Media Institute, http://www.mediainstitute.org/speakers.html (last visited Apr. 6, 2006)).

8 Jonathan S. Adelstein, Commissioner, Federal Communications Commission, Speech before the National Conference for Media Reform, St. Louis, Mo. (May 14, 2005), 2005 FCC LEXIS 2949, at *2 (expressly calling for the assistance of the American public in monitoring and enforcing the use of VNRs by asking the attendees to record television news segments that look like VNRs or advertisements without disclosure).

9 Jonathan S. Adelstein, Commissioner, Federal Communications Commission, Speech before the U.S. Senate Committee on Commerce, Science, and Transportation (May 12, 2005), 2005 FCC LEXIS 3142, at *1-2 [hereinafter Adelstein Speech] (explaining the current sponsorship disclosure regulations and stating that the FCC intended, through the Public Notice, to "learn more about how VNRs are used, and whether there is a need for the Commission to refine its rules further to protect the public.").

10 *Id.* at *6.

distribution of these promotional "news" segments, the broadcasters receiving the segments and making decisions about their use would become aware of government involvement in the "reporting," and thus enable the viewers and listeners to better understand the "nature and source of the information being presented."[11]

While the response and intended action of the FCC may be viewed as a hopeful sign that the era of "fake news" is coming to an end, it is difficult to see how the proposed Truth in Broadcasting Act will make a substantial difference in the type and quality of news the American public sees. This paper will argue that the regulation in its current form is insufficient to achieve the ends set out by Commissioner Adelstein. Specifically, this paper contends that, in order to truly impact the quality and breadth of the information presented to television news viewers, thereby enabling the public to make more informed critiques of and decisions about such information, the Truth in Broadcasting Act must be extended to implicate the video news releases produced on behalf of corporations, organizations, and other interested parties.

Part I of this Article will discuss video news releases in general: their uses in the public and private sectors, benefits both to the organizations that produce or purchase them and the media outlets that use them, and the mechanics of the production-to-living-room-process.

Part II will examine the Truth in Broadcasting Act of 2005. It will discuss the FCC rules and regulations currently in place and the way in which the proposed Act would enhance them. Furthermore, Part II will briefly explore the intersection between the FCC regulation and the recently issued (Sept. 30, 2005) report of the Government Accountability Office, which concluded that a government-produced VNR that fails to disclose its government source is in violation of the ban on covert propaganda.[12]

Part III will explain why the FCC's disclosure requirement is insufficient to accomplish the purpose of the regulation by discussing past disclosure requirements and the lack of effective (or perhaps any) enforcement efforts made by the FCC. This Part sets forth an alternative argument that video news releases are in effect advertising and should be regulated as such: if source disclosure under the FCC regulation is insufficient to achieve the

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11 *Id.* at *7.

12 Department of Education—No Child Left Behind Act Video News Release and Media Analysis, 2005 U.S. Comp. Gen. LEXIS 171 (Sept. 30, 2005) [hereinafter No Child Left Behind].

desired end, then perhaps consumer-focused VNRs should be subject to the Federal Trade Commission's ("FTC") rules on truth and accuracy in advertising.

Part IV will examine the response of the public relations community to FCC or other agency regulations. What impact will required disclosure of the sources for all prepackaged news segments have on the public relations industry? Will it render the VNR obsolete? And if so, would this be such a bad thing? This Part will argue that it is actually in the best interests of VNR producers to disclose the source of the information provided, as this will lead to more informed consumer decisions and therefore better products. Or, at the very least, disclosure of sources will force public relations professionals to develop new and innovative ways to pitch and present their products.

Part V will conclude by discussing and refuting the likely First Amendment-based criticism of a rule requiring source disclosure.

I. TOOLS OF THE TRADE: THE MANY BENEFITS OF THE VNR

According to the Public Relations Society of America ("PRSA"), a leading public relations industry trade organization, video news releases are "pre-produced videos distributed to television stations to inform target audiences about an event, product, service or organization."[13] Medialink Worldwide, Inc., one of the VNR industry's "largest players,"[14] calls the VNR the "television version of the printed press release. Instead of words on paper, VNRs are sound and pictures produced by former local and network television news journalists on behalf of clients—companies, organizations, governmental agencies—and distributed without charge to the newsrooms of television stations."[15] Medialink's Web site proudly proclaims, "[m]ore often than not, the video you see over the shoulder of your local anchor of a wide range of feature stories and breaking news are Video News Releases . . . . Every major television station in the world now uses VNRs regularly, and most are from Medialink. It's a fact."[16]

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[13] Public Relations Society of America, http://www.prsa.org/_Awards/bronze/2005categories.asp?ident=brnz1 (last visited Apr. 6, 2006) (listing and explaining the types of entries that will be accepted in the organization's annual competition for the recognition of outstanding public relations tactics).

[14] Barstow & Stein, *supra* note 4. R

[15] Medialink Worldwide, Inc., http://www.us.medialink.com/default.aspx?id=235 (last visited Apr. 7, 2006) (describing the comprehensive VNR services the company offers to its clients). The company also states that the use of VNRs was "pioneered professionally by Medialink." *Id.*

[16] *Id.*

While such a statement may be viewed as mere puffery, the truth is that Medialink produces and distributes about a thousand VNRs each year,[17] which it disseminates to networks such as FOX and 130 of its affiliates through a video feed service.[18] Cable operator CNN has a similar feed service, which it uses to distribute releases to 750 stations in the United States and Canada.[19] In a 2003 National Public Radio panel discussion on the use of video news releases, co-host Bob Garfield reported that Nielson Media Research revealed that one hundred percent of television stations were using VNRs by 1994, and eighty percent were using them several times a month.[20]

Medialink is far from the only producer of such segments. Corporations, organizations, and the public relations professionals who serve them can choose from a number of PR firms specializing in the production and distribution of VNRs.[21] One reason that VNRs are so widely used stems from the expansion of televised news coverage: more local stations are providing more hours of on-air news time without adding reporters.[22] Many stations simply do not have the funds or human resources to produce all of their own news segments, and the video releases available via satellite feed are of high production value and free to use.[23] Companies and organizations that wish to have their products publicized or messages disseminated must compete with thousands of others for air time. The more "newsworthy" the information appears, the more likely it is to be broadcast; the more pressure a media outlet

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17 Barstow & Stein, *supra* note 4. R

18 *See id*; *see also* SourceWatch *Web Sites with VNRs Available for Public Viewing*, http://www.sourcewatch.org/index.php?title=video_news_release (last visited Apr. 6, 2006).

19 Barstow & Stein, *supra* note 4. R

20 Transcript: *The Nightly News Sell*, On the Media (Oct. 24, 2003), http://www.onthemedia.org/transcripts/transcripts_102403_news.html (last visited Oct. 11, 2005). Medialink president Larry Moscowitz responded that the company determined "prima facie and scientifically and electronically that every station in America with a newscast has used and probably uses regularly this material from corporations and organization that we provide as VNRs . . . ." *Id.*

21 SourceWatch, *Companies that Produce and/or Distribute VNR's [sic] and B-Roll*, http://www.sourcewatch.org/index.php?title=video_news_release (last visited Apr. 7, 2006); *see also* Diane Farsetta, *Desperately Seeking Disclosure*, 12 PR WATCH 1, 7 (Second Quarter, 2005), http://www.prwatch.org (listing nine "million-dollar league" PR firms that have federal contracts for work that in many cases included VNR production).

22 Barstow & Stein, *supra* note 4. R

23 *Id.* (quoting a sales pitch from TVA, a video news release production company, which stated that "no TV news organization has the resources in time, labor or funds to cover every worthy story"); *see also* Marion Just & Tom Rosenstiel, *All the News That's Fed*, N.Y. TIMES, Mar. 26, 2005, at A13 (discussing the authors' research regarding VNR use by local news directors. They found that a quarter to a third of news directors surveyed used VNRs and occasionally, rarely, or never disclosed the source; fifty-five percent of respondents cited greater burdens on staff or resources as the reason for increased VNR use).

faces to fill its expanding news cycle, the more likely these pre-produced segments are to be aired in their entirety, without any additional reporting. Indeed, a survey of television stations conducted by the Project for Excellence in Journalism found that while the audience for televised news is shrinking, stations continue to strive for high profit margins by adding programming without adding resources:

> Local broadcasters are being asked to do more with less, and they have been forced to rely more on prepackaged news to take up the slack . . . . The public companies that own TV stations are so intent on increasing their stock price and pleasing their shareholders that they are squeezing the news out of the news business.[24]

The advantage of the video news release to corporations, organizations, and governmental agencies is primarily its cost. A high-quality VNR can be produced and disseminated for less than $30,000, "and could score a comparative ad value in the six-figure range if it gets airtime in metropolitan markets."[25] Many VNR production companies also offer additional public relations services with their VNR packages. TVA Productions, for example, offers in its "National PDM" package a media advisory, supplemental fax and email blasts of the story, individualized "pitching" to producers in the top twenty-five markets, follow-up phone calls and fielding of media inquiries, and other PR services, as well as guaranteed "nationwide placement" on FOX, MSNBC, or CNBC, and all for the low, low price of $15,000.[26] Comparatively, a thirty-second advertising buy on any one of the networks could easily cost many times as much.[27]

A more obvious and more important benefit stemming from the use of a VNR instead of paid advertising is the credibility that comes from a trusted news anchor—a seemingly disinterested third

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[24] SourceWatch, *VNRs and the Corporate Bottom Line*, http://www.sourcewatch.org/index.php?title=video_news_release (last visited Apr. 7, 2006).

[25] Daniel Price, *Doctor Doctor, Give Me the News*, 12 PR WATCH 1 (Second Quarter, 2005), http://www.prwatch.org.

[26] TVA Productions, *Most Popular Service Packages*, http://www.tvaproductions.com/html/service_packages.html (last visited Apr. 7, 2006). This "guarantee" raises the question of the nature of the relationship between TVA and the broadcasters mentioned above. How can TVA ensure their clients' segments will be run? *See also infra*, Part II.

[27] *See generally* Steve McClellan, *Fox Breaks Prime Time Pricing Record*, AD WEEK (Sept. 12, 2005) http://www.adweek.com/aw/search/article_display.jsp?vnu_content_id=1001096022 (stating that while prime-time rates on the networks range from $96,000 (*Gilmore Girls*, WB) to $350,000 (*Survivor*, CBS), and from $560,000 (*Desperate Housewives*, ABC) to the record-high $705,000 (*American Idol*, FOX), the average price for a thirty second spot in the fall network lineup is $150,000).

party—reporting positively on the organization's product, service, or message. The VNR provides "the ability to deliver a targeted message to the public through the false veneer of professional journalism. Whereas [written] press releases are primarily a tool to entice favorable attention from reporters, VNRs are designed to replace the reporter entirely."[28]

Indeed, it is precisely this aspect of the VNR that makes it such a dangerous tool when used by federal agencies to publicize governmental programs and initiatives. "Congress has acknowledged the danger that groups advocating ideas or promoting candidates, rather than consumer goods, might be particularly inclined to attempt to mask their sponsorship in order to increase the apparent credibility of their messages."[29] The American public is accustomed to turning on the evening news and being presented with some semblance of balanced reporting on the ways in which their tax dollars are being spent. When a media outlet simply airs (in its entirety) a video news release produced by the government, however, the "reporting" will not include any challenges to or critiques of the supposed benefits of the given initiative. Many viewers will take a positive news report on its face. If the trusted news anchor or reporter does not ask the tough questions, who will?

But, while this danger may be obvious as it pertains to information about and analysis of governmental programs, which is exactly what led the FCC to reiterate its sponsorship disclosure rules last spring,[30] public opinion—or, at least Commission opinion[31]—thus far seems to indicate that the same danger is not yet fully perceived with regard to the promotion of corporate products or the messages of nonprofit organizations. Considering

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[28] Price, *supra* note 25. R

[29] Commission Reminder, *supra* note 5, at 8596. R

[30] *Id.*

[31] A PRSA survey, discussed in Part IV, *infra*, suggests that public opinion may actually be turning toward the approval of a broader disclosure requirement. Furthermore, the results of a study conducted by the Center for Media and Democracy may serve to galvanize additional public support for broader disclosure rules. Diane Farsetta & Daniel Price, *Fake TV News: Widespread and Undisclosed*, *http://www.prwatch.org/fakenews/execsummary* (last visited Apr. 14, 2006). The ten-month-long study tracked the use of 36 video news releases, and "identified 77 television stations, from those in the largest to the smallest markets, that aired these VNRs or related satellite media tours (SMTs) in 98 separate instances, without disclosure to viewers." *Id.* These 77 stations not only failed to augment the prepackaged message with any independent research, but they also "actively disguised the sponsored content to make it appear to be their own reporting." *Id.* The study tracked VNRs that were produced by corporate, not government clients. *Id. See also* Transcript: *The Ad that News Forgot*, On the Media (Apr. 7, 2006), *http://www.onthemedia.org/transcripts/transcripts_040706_forgot.html* (last visited Apr. 14, 2006) (discussing further the results and methodology of the Center for Media and Democracy study).

the amount of money spent in the form of consumer dollars[32] and even charitable contributions,[33] is it not equally important for Americans to have access to unbiased reporting on these issues as well?

II. The Current (and Prospective) State of Affairs

A. *The FCC Regulations*

The proposed Truth in Broadcasting Act of 2005 would amend the Communications Act of 1934 by requiring any prepackaged news story produced by or on behalf of a federal agency and broadcast or distributed by a network, broadcast licensee, or multichannel video programming distributor in the United States to contain an announcement supplied by the agency and made within the body of the segment, that conspicuously identifies the United States government as the source of the information.[34] The Act would furthermore make it unlawful for the broadcaster to remove any such identifying announcement. It

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[32] The U.S. Department of Labor Bureau of Labor Statistics 2003 Consumer Expenditures Report (the most recent year for which data is available) shows that in that year American consumers spent an average of $40,817 per consumer unit on such goods as *inter alia*, food, alcoholic beverages, transportation, apparel and services, entertainment, and personal care products and services. The average number of persons in each "consumer unit" was 2.5, including 1.3 "earners" per unit. U.S. Bureau of Labor Statistics, Report 986: Consumer Expenditures in 2003 (June, 2005), http://www.bls.gov/cex/csxann03.pdf.

[33] The Urban Institute, a nonpartisan economic and social policy research organization, reported that American taxpayers claimed $143.5 billion in tax deductions for charitable donations, and that the average charitable contribution per filed income tax return was $1,106, or 2.2% of income in 2003. The Institute's findings are based on data made available by the Internal Revenue Service. The Urban Institute, Center on Nonprofits and Philanthropy, National Center for Charitable Statistics, *Profile of Individual Charitable Contributions by State, 2003*, http://nccsdataweb.urban.org/kbfiles/680/CharGiv_03.pdf (last visited Apr. 6, 2006).

[34] Bill Tracking Report S. 967, 109th Cong. (introduced Apr. 28, 2005, Sen. Frank Lautenberg (D-NJ)). Originally, the Bill was presented by Senator Robert Byrd (D-W. Va.) as an amendment to Public Law 109-13, An Act Making Emergency Supplemental Appropriations for Defense, the Global War on Terror, and Tsunami Relief, for the fiscal year ending September 30, 2005, and for other purposes. The amendment stipulated as follows:

> Unless otherwise authorized by existing law, none of the funds provided in this Act or any other Act, may be used by an executive branch agency to produce any prepackaged news story intended for broadcast or distribution in the United States unless the story includes a clear notification within the text or audio of the prepackaged news story that the prepackaged news story was prepared or funded by that executive branch agency.

Pub. L. 109-13, tit. VI, § 6076, 119 Stat. 231, 301 (2005).

This amendment expired on September 30, 2005. The Bill, co-sponsored by Senators Lautenberg, Feingold (D-CA), Akaka (D-HI) and Corzine (D-NJ), which would make the restriction permanent, was passed by the Senate Committee on Commerce, Science, and Transportation on October 20, 2005. 151 Cong. Rec. D. 1066. *See also* Christopher Lee, *Update: Prepackaged News*, Wash. Post, Oct. 26, 2005, at A17 (reporting on the passage of the Bill by the Committee and emphasizing that, although the Bill must pass the full House

defines "prepackaged news story" as a "complete, ready-to-use audio or video news segment designed to be indistinguishable from a news segment produced by an independent news organization."[35]

In his May 2005 testimony before the Senate Committee on Commerce, Science, and Transportation, FCC Commissioner Adelstein stated that this bill would not only satisfy the current FCC sponsorship disclosure rules, but also would "not impose any new burden on broadcasters and cable companies, and, in fact, would appear to simplify compliance."[36]

In order to understand the ways in which the Truth in Broadcasting Act of 2005 would augment existing regulations (or not), it is important, first, to understand the regulations currently in place.

The sponsorship identification provisions are contained in sections 317[37] and 508[38] of the Communications Act of 1934, and in sections 73.1212[39] and 76.1615[40] of the Federal Communications Commission Rules. The Rules generally require that "if payment has been received [by] or promised to a broadcast licensee or cable operator" in consideration for airing certain material, such payment must be disclosed and the source of the payment identified at the time of airing.[41] However, the language of § 317(a)(1) is broader than the above generalization might indicate. The section states that "[a]ll matter broadcast . . . 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, from any person, shall at the time the same is so broadcast, be announced as paid for or furnished . . . by such person . . . ."[42] It is not unreasonable to view the provision of a fully-produced, two-minute "news" segment and accompanying b-roll[43] as "valuable consideration," as this material saves the

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and Senate, the "political fight over the Bush administration's prepackaged news stories . . . is far from over.").

Unless otherwise indicated, any references in this Note to the Truth in Broadcasting Act will refer to the Lautenberg Bill.

35 *Id.*

36 Adelstein Speech, *supra* note 9, at *7. R

37 47 U.S.C. § 317 (2005).

38 *See id.* § 508.

39 47 C.F.R. § 73.1212 (2005).

40 *Id.* § 76.1615.

41 Commission Reminder, *supra* note 5, at 8594. R

42 47 U.S.C. § 317(a)(1) (emphasis added).

43 "B-roll" refers to the raw footage used to produce the edited version of the VNR. B-roll can be edited by the broadcaster or cable outlet and combined with footage from other sources to produce an original news segment. Sheldon Rampton, *Fake News? We Told*

broadcaster considerable time and financial resources. Under this reading, all VNRs used by television news programs are subject to the FCC's disclosure requirement.

However, subsection (a)(2) of § 317 gives the Commission the right to require a similar announcement in the case where the broadcast is of "any political program or any program involving the discussion of any controversial issue" and where the material furnished includes "any films, records, transcriptions, talent, scripts, or other material or service of any kind . . . *without charge or at a nominal charge*, directly or indirectly."[44] Since this subsection includes language referring to materials and services provided at a nominal charge or no charge and subsection (a)(1) does not, the § 317(a)(1) disclosure requirement is not read as broadly as the preceding paragraph would allow. Indeed, subsection (a)(1) contains a proviso, echoed in the corresponding FCC rule, which expressly states that:

> 'service or other valuable consideration' shall not include any service or property furnished either without or at a nominal charge for use . . . in connection with[ ] a broadcast unless it is so furnished in consideration for an identification of any person, product, service, trademark, or brand name beyond an identification reasonably related to the use of such service or property on the broadcast.[45]

One would be forgiven for wondering whether any material is ever furnished to any broadcaster for any reason other than in consideration for identification beyond that which is reasonably related to the broadcast. However, this is the rule as it currently exists.

Similarly, in order to provide parties with the information necessary to air any required disclosure, § 508(a) requires any station employee who has accepted or agreed to accept consideration for airing certain program matter to disclose that fact to the station *prior to* the airing of such matter.[46] Likewise,

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You So, Ten Years Ago, 12 PR WATCH 1, 9 (Second Quarter 2005). This Article does not argue that the Truth in Broadcasting Act should extend to b-roll, since the use of the raw footage necessitates input from the reporter. *See* Sandy Hausman, *VNRs Revisited Following FCC "Crackdown,"* O'DWYER'S PR SERVICES REPORT, Oct. 2005, at 40 (discussing the preference for b-roll by reporters who want "'actual footage rather than a pre-produced package' . . . . 'B-roll cannot stand on its own,' says [PR firm] Hill & Knowlton Managing Director Sallie Gaines, who adds that local reporters must play a role in turning those pictures into a story.").

44 47 U.S.C. § 317(a)(2) (emphasis added).

45 47 C.F.R. § 73.1212(a)(2).

46 47 U.S.C. § 508.

§ 508(b) mandates disclosure by any person involved in the "production or preparation" of the matter who has agreed to furnish the consideration, and § 508 (c) requires this same disclosure to be made by the person supplying the broadcast matter to the person receiving it.[47] In this way, the regulations place the onus on all parties involved in the production, distribution, receipt, and airing of any materials for which consideration has been provided to disclose the consideration to one another. The purpose of such requirements is to provide the relevant information "up the chain of production and distribution, before the time of broadcast," so that the licensee can air the obligatory disclosure.[48]

The rules in their current form, then, may be understood to require disclosure of source only when consideration other than the prepackaged news story itself has been furnished; or, in the case of segments discussing political or controversial issues, when any materials have been furnished. However, the determination of what constitutes a "controversial" issue is not entirely clear. Indeed, when asked who would judge whether material was sufficiently political or controversial to trigger the disclosure requirement, FCC spokeswoman Rebecca Fisher said that she was "not certain."[49] Assuming that the FCC would be the body making these determinations, upon what standards would such a measurement be based? The FCC's response to the 2003 Janet Jackson "wardrobe malfunction" might indicate to some that the agency's view of what constitutes an issue of public importance may not mirror the view of the entire American populace.[50] Reasonable minds may differ on what constitutes a controversial issue of public importance: a segment dealing with an issue like abortion would clearly qualify; one dealing with prescription drug use would not be so clear.[51]

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47 *Id.*

48 Commission Reminder, *supra* note 5, at 8595. **R**

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

50 *See, e.g.*, David Carr, *When a TV Talking Head Becomes a Talking Body*, N.Y. TIMES, Nov. 25, 2004, at E1 ("CBS has been slapped with a record fine of $550,000 by the Federal Communications Commission for broadcasting Janet Jackson's 'wardrobe malfunction' during the February Super Bowl."); Frank Ahrens & Leonard Shapiro, *NFL Strives for G-Rated Super Bowl*, WASH. POST, Feb. 6, 2005, at A01 ("The government proposed fining CBS-owned stations a total of $550,000 for last year's halftime show, but that was only the start. By the end of the year, the FCC had levied nearly $4 million in indecency fines for a variety of shows.").

51 *See* Nat'l Welfare Rights Org. v. Gilmore Broad., 41 F.C.C.2d 187, 196-97 (1973) (holding that a broadcaster failing to disclose that a pharmaceutical company had paid for a public service announcement ostensibly sponsored by the American Association of

As for the form such disclosure should take, in the case of segments concerning "candidates for public office, the sponsor shall be identified with letters equal to or greater than four percent of the vertical picture height that air for not less than four seconds."[52] In the case of a broadcast matter involving a political or "controversial issue of public importance," the Rules require the broadcaster or cable operator to make an announcement both at the beginning and the end of the segment, unless the segment is less than five minutes in length, in which case the announcement need be made only once.[53]

What does this mean in practical terms? When ABC Corporation pays Channel Z Nightly News to air a segment about ABC's new product, the FCC Rules would require that Channel Z disclose this payment to viewers by announcing something along the lines of, "the following is a promotional announcement paid for by ABC Corporation." When Candidate X provides to Channel Z a 30-second video spot of himself shaking hands and kissing babies, Channel Z must run a caption along with the footage indicating that the message is sponsored by Candidate X (or his political party or committee). Where Organization Y provides materials to Channel Z in order to induce Channel Z to air a segment about, for example, a proposed controversial ballot initiative, Channel Z must make an announcement like, "materials for the following (or preceding) program have been provided by Organization Y," at both the beginning and the end of the segment. If the segment is less than five minutes in duration, however, only one such announcement must be made.

While the current regulations appear to assist in informing the viewer in certain situations of "when the program ends and the advertisement begins,"[54] they do not implicate video news releases. The Truth in Broadcasting Act would extend the § 317(a)(2) disclosure requirement to all VNRs sponsored by government agencies. The Bill as proposed mandates an announcement of source consistent with that required by sections 317 and 508.[55] Additionally, it requires the announcement "to be visible for the

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Pediatricians did not violate § 317 because the issue set forth in the ad, treatment of hyperactivity in children with prescription drugs such as Ritalin, was not a controversial issue of public importance).

[52] 47 C.F.R. § 73.1212(a)(2)(ii).

[53] *Id.* § 73.1212(d).

[54] Richard Kielbowicz & Linda Lawson, *Unmasking Hidden Commercials in Broadcasting: Origins of the Sponsorship Identification Regulations, 1927-1963*, 56 FED. COMM. L.J. 329, 343-44 n.80, (quoting FCC REP., PUBLIC SERVICE RESPONSIBILITY OF BROADCAST LICENSEES 47 (1946)).

[55] Truth in Broadcasting Act of 2005, S. 967, 109th Cong. § 2 (2005).

entire duration of the prepackaged news story" and to include the "conspicuous display" of the statement "PRODUCED BY THE U.S. GOVERNMENT."[56] Where the current regulations require disclosure only when consideration is exchanged or controversial issues are involved, the new Act would require disclosure of the government's involvement within all VNRs run in their entirety.[57]

The proposed Bill is thus a step in the right direction, since it would enable viewers of broadcast news to see that the segment their local anchor is "reporting" on was not actually produced by the station, but rather, by the government. If the purpose of all of the FCC sponsorship disclosure requirements is to ensure that the public knows the source of the persuasive information it sees, then this purpose is surely better served by the Truth in Broadcasting Act than by the current regulations.

However, by not extending to implicate the VNRs produced by non-governmental bodies, the Bill stops short of complete effectiveness. If the FCC truly believes that "consumers have a right to know who is trying to persuade them,"[58] then surely this right applies to all persuasive messages, and not just those emanating from the government. Furthermore, in what way does the new Act inculpate those VNRs produced not by federal agencies themselves, but rather by outside public relations firms? Is it not reasonable to assume that the new rule would spur the creation of something similar to the so-called "527" groups spawned by stricter campaign finance laws? These groups, which used soft donations to spread the messages of politicians or political parties, escaped the Federal Election Commission's regulations by avoiding the use of "magic" words expressly advocating a candidate's election or defeat and by not making direct contributions to campaigns.[59] What would prevent a group organized in the private sector from producing a VNR implicitly advocating a governmental program and escaping the disclosure requirements in the same way as the 527 groups have escaped the campaign finance rules? Requiring disclosure on all VNRs used by broadcasters would make it more difficult for this type of group to evade the regulation. The same reasoning applies to the public relations firms retained by governmental agencies. For example,

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56 *Id.*

57 *See Commerce Okays Weaker VNR Measure*, O'DWYER'S PR SERVICES REP., Nov. 2005, at 37 (reporting on the Senate Commerce Committee's approval of a change to the original bill, which would require disclosure only for VNRs run in their entirety).

58 Adelstein Speech, *supra* note 9, at 3. R

59 *See* SourceWatch, *527 Committee*, http://www.sourcewatch.org/index.php?title=527_committee (last visited Apr. 7, 2006).

even if the viewer is unaware of the meaning behind the name Ketchum Inc. (the Bush Administration's PR firm), simply seeing the company's name at the bottom of the screen during a "news" report should signal that the story has not been independently produced. Ideally, this would cause the viewer to further investigate the program or policy being advocated; if such investigation is unrealistic, at the very least, it should provide the viewer with the motivation to think just a bit more critically about the message being presented.

Where the topic of the VNR is not a politically oriented program or policy, but rather, a message about a company's new consumer product or even something as seemingly benign as trends in holiday gift ideas, the viewer's awareness of the source of the message is equally important. Again, if the FCC's goal is to provide the public with knowledge about the party seeking to persuade them,[60] it is imperative that the public know that the message they see is a persuasive one and not an unbiased report presented by the producers and anchors of their local news program.[61] Video news releases—regardless of who produces them—are not news. They are promotional pieces designed by self-interested parties to present a product or idea in the best possible light. The viewing public should thus be put on notice not to take the content of the seemingly independent message at face value.

B. *The Government Accountability Office Report*

In May of 2004, the Office of the Comptroller General issued its first report declaring that the Medicare video news release produced by the Department of Health and Human Services violated the ban on covert propaganda by failing to disclose that the Department was the source of the material.[62] The report found that, although the materials were labeled so that the receiving television news stations could identify their source, parts of the materials, "the story packages and lead-in anchor scripts," were targeted not only to the television news stations but also to

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[60] *See* Adelstein Speech, *supra* note 9, at *3. **R**

[61] This Note recognizes that product placement is used in consumer-friendly, soft news programs like *Good Day New York* and others; however, although FCC Commissioner Adelstein has mentioned product placement as another area where the current disclosure rules should be more strictly enforced, a discussion of this issue is beyond the scope of this Note. *See id.* at *2-3.

[62] Matter of: Department of Health and Human Services, Centers for Medicare & Medicaid Services—Video News Releases, Comptroller General of the United States, 2004 U.S. Comp. Gen. LEXIS 102 (May 19, 2004).

the television viewing audience.[63] Since neither the story packages nor the accompanying scripts identified the Department or the Centers for Medicare and Medicaid Services (an agency within the Department) as the source of the content, and since the content was attributed to "individuals purporting to be reporters, but actually hired by [a Department] subcontractor," the administration's use of taxpayer funds to finance the VNR amounted to covert propaganda.[64]

The Department of Justice Office of Legal Counsel ("OLC") rebutted this report in July of 2004, saying that the purpose of the Department of Health and Human Services VNR was not to persuade or advocate, but rather simply to present information and to "help TV stations and their audiences understand the basic provisions of the new Medicare law."[65] The OLC recognized that while some VNRs may present facts in a "biased or selective manner in order to advocate a particular view, the VNRs in question do not editorialize about proposed legislation or otherwise advocate a position on a question of public policy."[66]

This immensely helpful exchange, with the OLC calling the VNR "informational" and the GAO calling it "propaganda," continued over the course of 2004 and 2005.[67] The passage of the Byrd amendment[68] superseded the OLC's opinion. The GAO issued one additional report on September 30, 2005,[69] which reiterated the Comptroller General's position that a federal agency must inform the viewing public of its involvement in the production of a video news release in order not to be found in violation of the ban on covert propaganda, and, in light of the Byrd

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63 *Id.* at *33.

64 *Id.* at *28. It is, however, worth noting that the only component of the VNR package that was deemed to violate the covert propaganda ban was the viewer-facing story itself, and not the b-roll or the "slate." The slate is a video feed supplied by the producer of the VNR to the broadcaster, and which lists certain key facts about the accompanying VNR. *Id.* at *11. Since the b-roll and the slate were intended to be viewed in their entirety only by the broadcaster and not the television audience, and since the source was disclosed to the broadcaster within the b-roll and within the slate, the GAO found that these components did not violate the ban. *Id.* at *29.

65 Opinion of the Office of Legal Counsel, Expenditure of Appropriated Funds for Informational Video News Releases, OLC LEXIS 7, at *17 (July 30, 2004).

66 *Id.* at *18.

67 *See, e.g.*, Prepackaged News, *supra* note 3; Letter to the Editor, *Hidden News and Government Spin*, N.Y. TIMES, Mar. 16, 2005 (stating that the "Government Accountability Office stands by its recent legal opinions on prepackaged news stories . . . . Americans deserve to know when their government is spending taxpayer money to try to influence them."); *DOJ Disagrees with GAO Opinion on Video News Releases*, 47 GOV'T CONTRACTOR 136 (Mar. 23, 2005). R

68 Bill Tracking Report, *supra* note 34. R

69 No Child Left Behind, *supra* note 12. R

amendment, not to be in contravention of Congress.[70]

While this ruling does not directly apply to the thesis of this paper, as it addresses only government-agency-sponsored VNRs, it does lend support to the notion that video news releases are not simply informational tools, but rather tools of advocacy and persuasion. The response of the Office of Legal Counsel also illustrates the fine line between creating a genuine, unbiased news segment and creating a "news" segment designed to influence opinions in very subtle ways.

Furthermore, both the GAO report and the OLC opinion discuss the VNR in the context of a newspaper editorial.[71] From the perspective of the viewer, however, the video news release may be more aptly analogized to the "advertorial," which is designed to look and sound like a written editorial, and which appears in or around the Op-Ed pages of the daily newspaper, but for which placement the newspaper has received financial consideration.[72] Because such consideration has been furnished, the reading public must be informed that what it reads does not reflect the views of the newspaper editorial staff, but rather those of some third party with an interest in persuading the reader. The VNR serves the same function. While the consideration furnished is not a cash payment, as it generally is in the case of the advertorial,[73] it is functionally the same: the broadcaster using the VNR has obtained content, which enhances the news program; it has not expended time, financial, or human resources in acquiring such content, and it can thus use the resources saved to complete other reporting or production tasks. The message seen by the viewer appears to be a message created or at least endorsed by the editorial persona on

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70 *Id.* at *27-28.

71 *Id.* at *15 n. 7 ("We find no difference between explicit advocacy that may be contained in an editorial piece and implicit advocacy of a news story that purposefully reports certain facts and omits other facts to encourage public support for its position"); Opinion of the Office of Legal Counsel, *supra* note 65, at *18 ("[T]he VNRs in question do not editorialize about proposed legislation or otherwise advocate a position on a question of public policy."). R

72 *See* What is an Advertorial, http://www.advertorial.org/what-is-an-advertorial.html (last visited Apr. 22, 2006) ("An advertorial or infomercial is an advertisement designed to simulate editorial content, while at the same time offering valid information to . . . prospective clients). *See also* Jeffrey Gettleman, *To Publicize its Good News, Newark Makes Deal with a Newspaper*, N.Y. TIMES, Oct. 25, 2005, at B6 ("[u]nlike advertisements that many cities take out in local papers or 'advertorial' articles paid for by sponsors but set in different type or labeled to distinguish them from news reports . . .").

73 Advertorials are marketed in the same way, and to the same audience, as are more traditional display ads. *See, e.g.*, The New York Times 2006 Media Kit, http://nytmarketing.com/cgi-bin/index.cgi?file=N_special_editorial_cal&view=&month (last visited Feb. 9, 2006) ("The New York Times offers a wide range of editorial and advertorial environments for advertisers.").

the screen. Viewers should thus be informed that what they see is not in fact the result of independent reporting, but rather the product of an interested third party who seeks to use the credibility of the news anchor to assist in persuading the viewer of its message.

III. The Federal Trade Commission: An Additional Means of Enforcement?

FCC Commissioner Jonathan Adelstein has repeatedly requested the "vigilance" of television news viewers in order to assist the FCC with enforcement of the disclosure requirements.[74] Although he seems to make these statements without the slightest trace of irony, surely Commissioner Adelstein must realize the difficulty faced by the viewing public in ascertaining whether the "news" they see would require disclosure, as the greatest strength of the VNR is its inability to be distinguished from an independent news segment.

While the Commissioner's request might be seen as a positive statement on the savviness of the television viewing public and its ability to see through the messages presented to it, it also highlights a deficiency in the FCC enforcement scheme itself: the FCC must rely on viewers to inform it of violations. This enforcement mechanism is insufficient, as it will necessarily favor the views of certain, more vocal, segments of the public over others.

For example, in its battle against obscenity and indecency on the airwaves, the FCC takes very seriously the e-mail and phone calls it receives from concerned viewers. However, a 2004 investigation into a $1.2 million fine levied against the FOX network for sexually suggestive content in the unscripted series, *Married by America*, revealed that, while the Commission cited 159 viewer complaints in its case against FOX, complaining letters had actually only been sent by twenty-three individuals.[75] Upon further examination, blogger and former *TV Guide* critic Jeff Jarvis discovered that all but two of the complaints were copies of form letters posted by Parents Television Council, a subsidiary of the conservative media watch group Media Research Center.[76] In

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74 *See, e.g.*, Adelstein Speech, *supra* note 9, at *6. R

75 Jeff Jarvis, *The Shocking Truth about the FCC: Censorship by the Tyranny of the Few*, Buzz Machine, Nov. 15, 2004, http://www.buzzmachine.com/archives/2004_11_15.html. *See also* Frank Rich, *The Great Indecency Hoax*, N.Y. Times, Nov. 28, 2004, § 2, at 1 (discussing the exaggerated response of conservative "family values" groups to purported television indecency).

76 Jarvis, *supra* note 75; Rich, *supra* note 75. R

other words, the FCC reached its conclusion as to public outrage surrounding the broadcast of *Married by America* based on a grand total of three actual complaints.[77]

It is thus clear that this type of enforcement mechanism leaves ample room for advocacy groups to blast the Commission with thousands of form letters. Such actions cause the Commission, in turn, to respond to these narrow interests by taking some sort of punitive action, an action which may or may not accurately reflect the severity of the violation.

Further historical shortcomings in the FCC's attempts to enforce the disclosure requirements are discussed by Linda Lawson and Richard Kielbowicz in their 2004 article, *Unmasking Hidden Commercials in Broadcasting: Origins of the Sponsorship Identification Regulation, 1927-1963*.[78] The authors cite the FCC's institutional culture as one of the reasons for its inability to enforce its sponsorship disclosure rules in the 1950s, faulting the domination of the Commission by "Eisenhower appointees disinclined to regulate broadcast content, an ideological bent reinforced by personal and political ties to broadcasters."[79] In fact, a 1959 investigation of several federal regulatory commissions revealed that the FCC was "perhaps the worst in countenancing cozy relations with the industry it supervised."[80] Even when the FCC revised the rules in 1960, in an attempt to require TV and radio stations to disclose the receipt of free records and props in exchange for on-air exposure (a practice commonly referred to as payola),[81] the broadcast industry turned to Congress for relief from the strict interpretation of the disclosure guidelines.[82] It is this congressional intervention, combined with unrelenting and negative coverage in the industry trade media, that led to the current, watered-down interpretation and enforcement of the sponsorship disclosure requirements.[83]

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77 Rich, *supra* note 75. R

78 Kielbowicz & Lawson, *supra* note 54. R

79 *Id.* at 354.

80 *Id.* (citing Bernard Schwartz, THE PROFESSOR AND THE COMMISSIONS, 75-77 (1959)).

81 *See* Calvert, *supra* note 2, at 246 (describing "payola" as "a 'widespread practice' in the music industry that represents a 'pay-to-play' formula in which recording industry representatives, in basic quid pro quo fashion, pay disc jockeys to play certain songs") (quoting Ronald D. Brown, *The Politics of "Mo' Money, Mo' Money" and the Strange Dialectic of Hip Hop*, 5 VAND. J. ENT. L. & PRAC. 59, 63 (2003)). Note, however, that while payola generally appears in the context of the music industry, the practice extends into the realm of television as well, taking the form of product placement and, in the 1950s and 60s, the exposure of a product in exchange for "transportation, accommodations, or expenses incurred in producing shows on location." Kielbowicz & Lawson, *supra* note 54, at 349-53. R R

82 Kielbowicz & Lawson, *supra* note 54, at 357-58. R

83 *Id. See also* Transcript: *FCC Commissioner Says Broadcasting VNRs Without Disclosure May*

In light of the FCC's historic inability to enforce its rules, or, at the very least, its ability to succumb to pressure from the industry it ostensibly regulates and from narrowly focused advocacy groups, and in light of the fact that the VNR is closely related to the advertorial or advertisement, perhaps an additional enforcement prong can be found in the Federal Trade Commission rules on deceptive advertising.[84] The FTC defines a "false advertisement" as "an advertisement, other than labeling, which is misleading in a material respect."[85] It is unlawful for any person, partnership, or corporation to disseminate or cause to be disseminated any false advertisement "[b]y any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in or having an effect upon commerce of food, drugs, devices, services, or cosmetics."[86] In determining whether an advertisement is misleading, the FTC can take into account not only representations made by "statement, word, design, device [or] sound . . . but also the extent to which the advertisement *fails to reveal facts* material in the light of such representations."[87]

As the VNRs produced by or on behalf of corporations that manufacture and market consumer goods are created and disseminated for the purpose of inducing the purchase of such goods, they may fall within the FTC definition of "false advertisement" to the extent that they make materially misleading statements or omissions of fact. The question thus becomes, is the failure to disclose the source of the video news release a material omission for purposes of the FTC rules?

Violate Federal Law, Democracy Now (Apr. 6, 2006), http://www.democracynow.org/article.pl?sid=06/04/06/1432248 (last visited Apr. 14, 2006) (highlighting the recent lack of enforcement of the FCC rules). While speaking with Commissioner Adelstein immediately after the release of the results of the Center for Media Democracy study (see Farsetta & Price, *supra* note 31), co-host Amy Goodman asked about the penalties that would be levied upon the broadcasters that aired corporate VNRs without disclosing their source. Commissioner Adelstein said: **R**

> All of these revelations that the Center for Media and Democracy has come up with happened after the F.C.C. warned the broadcasters to be on notice. So apparently these warnings went unheeded. Apparently, the only way to make them actually toe the line is to enforce the law, and that's what I have committed to do, and that's what all my fellow commissioners voted unanimously to do last April. And now it's time for us to step up to the plate and do what it is that we said we would do.

Id. The Commissioner's words, especially the statement that "the only way to make them actually toe the line is to enforce the law," suggest that the FCC views enforcement of its rules as a last resort.

84 It is worth noting that this analysis relies upon the assumption that broadcasters receive valuable consideration, in the form of the VNRs themselves, in exchange for on-air exposure of the VNR's product, service, or message. *See supra* Part II.

85 15 U.S.C. § 55(a)(1) (2006).

86 *Id.* § 52(a)(2).

87 *Id.* § 55(a)(1) (emphasis added).

In determining the materiality of the stated or omitted fact, the FTC looks to whether it is likely to affect the consumer's conduct or decision regarding a product or service.[88] If so, it is material, and "consumer injury is likely, because consumers are likely to have chosen differently but for the deception."[89]

Applying this standard to a VNR promoting a new consumer good, such as an electronic product, it is not unreasonable to conclude that the omission of the fact that the "news" segment touting the product's benefits has been produced by an entity that seeks to persuade consumers to purchase the product, and not by an objective journalist, might have an impact on the consumer's ultimate opinion about the product and decision to purchase it or not.

To the extent that knowledge of the message's sponsor enables the audience to "better decipher for itself the value and truth of the idea being disseminated,"[90] this knowledge, or the lack thereof, will affect the amount of critical thought with which the audience responds to the message. A consumer watching what is clearly a paid advertisement for a trendy and exciting new product will maintain a healthy level of cynicism as to whether the product really does all that the ad says it does. A consumer viewing an evening news report on the product launch, however, will be less likely to question the information presented; a segment produced by the manufacturer that highlights the many benefits of the product, but that appears to be a presentation of objective reporting will thus be likely to persuade the consumer to make a purchase without doing further research. In this way, the omission of source disclosure is material.

Viewed another way, the use of a VNR enables the sponsoring organization to present as fact what is actually its own, biased opinion of the product. "Claims phrased as opinions are

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[88] Letter from James C. Miller III, Chairman, FTC, to John D. Dingell, Chairman, Committee on Energy and Commerce (Oct. 14, 1983), http://www.ftc.gov/bcp/policystmt/ad-decept.hym (setting forth an FTC policy statement on deception intended to provide clarification on the ways in which the concept of "deceptive practices" will be applied).

[89] *Id.*

[90] Calvert, *supra* note 2, at 254-55 (discussing the FCC payola rules in the context of the "marketplace of ideas" free speech metaphor: if the right of free speech is analogized "to a marketplace in which contrasting ideas compete for acceptance among a consuming public," and if the truth of those ideas, as well as the existence of counter-ideas, is an essential element of a successful marketplace, failure to disclose the source of one message will result in the failure of the consumer to question what s/he sees or to look for alternative or contradictory messages). *Id.* at 253 (quoting Martin H. Redish & Kirk J. Kaludis, *The Right of Expressive Access in First Amendment Theory: Redistributive Values and the Democratic Dilemma*, 93 NW. U. L. REV. 1083 (1999)). *See also* Part II, *supra*. **R**

actionable . . . if they are not honestly held, if they misrepresent the qualifications of the holder or the basis of his opinion or *if the recipient reasonably interprets them as implied statements of fact*."[91] When a television network news program uses a VNR exclusively and in its entirety to present information about a product, service, or message, the audience may reasonably perceive the opinions contained therein as implied statements of fact. The audience might also understand that the statements contained in the VNR reflect the opinions of the journalist "reporting" on it, which would violate the deceptive advertising rules by misrepresenting the basis of the journalist's opinion. These uses would thus be actionable under the FTC rules.

Such action would augment the FCC enforcement scheme in that the focus of a proposed FTC action is the organization or corporation that creates the message, and not the broadcaster who disseminates it.[92] The FTC serves notice upon the entity believed to have violated the rules against deceptive practices and ultimately issues a final order, which forces the entity either to cease and desist such deceptive practices, or pay a fine, or both.[93] While the FTC investigative process may be complex and fairly time-consuming,[94] this additional layer of enforcement would serve to put the organizations making use of VNRs on notice of their increased level of accountability. The interest of the television news-consuming public would thus be better served, since both the creators and the broadcasters of VNRs would have an incentive to ensure that the messages they disseminate are not misleading in the statements they make or the statements they fail to make.

IV. The Public Relations Community: Effects of Regulation and Response Thereto

"'VNRs are as much a public relations fixture as the print news release,' stated George Glazer, a senior vice-president of [PR firm] Hill and Knowlton."[95] The truth of this statement is evidenced by the many benefits stemming from VNRs and their widespread acceptance and use by the broadcast media.[96] If one reason that VNRs are such an effective public relations tool lies in the apparent credibility given the message when it is "reported" by a television

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91 Letter from James C. Miller III, Chairman, FTC, *supra* note 88 (emphasis added). R
92 15 U.S.C. § 45(b).
93 *Id.* § 45(g), (l), and (m).
94 *Id.*
95 Rampton, *supra* note 43, at 10. R
96 *See supra* Part I.

journalist, it would seem likely to follow that the public relations industry has a vested interest in ensuring that any enhanced disclosure requirements are limited to the narrowest category of VNRs, those that are sponsored or produced by a government agency.[97]

While some PR practitioners have indeed distinguished between VNRs featuring governmental programs or policies and those "corporate videos hustling commercial products,"[98] the issue for most people in the PR community is not so black and white. The PRSA, for example, has called for PR practitioners who use VNRs to do so in compliance with the PRSA Code, which provides in part that any VNR including "narration or video using paid actors as an attempt to mislead broadcasters or the public into believing those spokespersons to be representatives of independent or network media organizations is considered a deceptive practice."[99] In her testimony before the U.S. Senate Committee in May 2005, PRSA president Judith T. Phair stated that anyone producing prepackaged news materials on behalf of federal government agencies should indeed disclose the government's sponsorship and be sure to clarify that the materials were not produced by an independent news organization.[100] But it is worth noting that Ms. Phair still placed the ultimate burden of disclosure to the public on the broadcasters, saying, "[w]e believe public relations professionals involved in producing video news

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97 *See* Bob Burton, *Will "Fake News" Survive?*, 12 PR WATCH (Second Quarter 2005) 1, 11-12 (stating that the "vast majority" of VNRs are produced for corporations, and quoting the following statement by Medialink Worldwide, Inc. CEO Larry Moskowitz: "Let's remember this debate, from everything I've seen, read, heard, and talked to [sic], is purely the government. I would hate to see it broaden."). *Id. See also Commerce Okays Weaker VNR Measure, supra* note 57 (quoting Doug Simon, of DS Simon Productions, who said of the Truth in Broadcasting Act: "[c]learly when they initially brought the legislation, they didn't have a full understanding of our industry . . . . What they were looking to do was put draconian limitations on a narrow part of the PR video industry as it related to government. Myself and others felt violated . . . ."). R

98 Burton, *supra* note 97, at 12. To elaborate on this point, Burton quotes Kevin Foley, from VNR producer K.E.F. Media Associates, who said, "[i]f it's a new healthcare product that got FDA approval, you know, it's something people would want to know about. And I think that's fairly harmless and I don't think people are going to walk away with any sort of sinister sense that something sinister is going on." *Id.* Foley's implication is that if the government fails to inform viewers of their role in the production of the message, there is something "sinister" going on; if a company that makes a product which has just been approved by a government agency fails to convey the same information, the omission is "fairly harmless." *Id.* R

99 *Comment of Public Relations Society of America to FCC* 2, June 24, 2005, http://media.prsa.org/article_display.cfm?article_id=480 (last visited Jan. 25, 2006). *See* Public Relations Society of America, PRSA Code of Ethics, http://www.prsa.org/About/ethics/preamble.asp?ident=eth3 (last visited Jan. 25, 2006). The PRSA Member Code of Ethics has been in place since 2000. *Id.*

100 Comment of PRSA to FCC, *supra* note 99, at 3. R

releases should provide broadcasters with all the information they need in order to decide the best way to use the information contained in the releases."[101]

While Ms. Phair's Senate testimony did not expressly support the extension of the proposed FCC regulation to VNRs produced on behalf of non-government entities, the PRSA official Comment indicates the organization's positive attitude toward just such an extension:

> PRSA's position on VNRs and prepackaged news, however, goes well beyond those prepared by, and on behalf of, agencies of the U.S. government. PRSA insists that *any* VNR or prepackaged broadcast material should be produced and disseminated with the highest levels of transparency, candor and honesty. To provide open communication that fosters informed decision, we must do more than simply funnel information to the public through the media. We must reveal the sponsors for the causes and interests represented and disclose all financial interests related to the VNR.[102]

However much the PRSA supports "transparency, candor and honesty," the organization would prefer to achieve this end through self-regulation, rather than through enhanced regulation by the FCC or any other entity.[103] The PRSA's concern about external regulation, or the establishment of a specific disclosure format, is that such requirements might discourage broadcasters from using VNRs, which would "deprive the public of the kinds of information it needs and wants."[104] This concern, however, belies the organization's commitment to disclosure. If the PRSA truly advocates disclosure of source as the responsibility of its members as well as of broadcast licensees and cable operators, then it should view the FCC regulations as simply an additional means toward the achievement of this end.

Furthermore, membership in the Public Relations Society of America is purely optional, and the PRSA Code is non-binding even upon its members.[105] The PRSA does not "emphasize" enforcement of the Code, but rather only empowers its Board of Directors to bar or expel from membership any individual who has

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101 *Id.*
102 *Id.* at 4.
103 *Id.* at 5.
104 *Id.*
105 Public Relations Society of America, *PRSA Member Code of Ethics, Preamble* http://www.prsa.org/_About/ethics/preamble.asp?ident=eth3 (last visited Jan. 27, 2006) ("The Code is designed to be *a useful guide* for PRSA members as they carry out their ethical responsibilities.") (emphasis added).

been "sanctioned by a government agency or convicted in a court of law of an action that is in violation of this Code."[106] So, even though the PRSA calls for self-regulation, it does not provide its own governing body with the power to enforce its rules unless there has also been a violation of a rule imposed by an external regulatory body. Thus, the PRSA can add provision after provision to its Code of Ethics; but the only way to give those provisions any teeth is to ensure that they are mirrored in external regulations.

Interestingly, a 2005 poll commissioned by the PRSA revealed that a majority of U.S. Congressional staffers, corporate executives, and members of the general public surveyed supported government-backed disclosure requirements.[107] Specifically, seventy-one percent of 1015 adults from across the United States, eighty-nine percent of 150 "leading executives in Fortune 1000 Companies," and eighty-seven percent of 150 Congressional staffers all answered affirmatively to a question asking whether they believed "government should require TV news shows to state the sources for . . . stories" produced by companies, government, or other organizations.[108]

Even though these findings run contrary to the PRSA's own position, the Society stands by its commitment to self-regulation. Ms. Phair has supported the PRSA stance, saying that the reason that public relations "exists as a profession today [is] because it has established a level of trust with the media and the public. In our role of providing information to the public . . . that trust is essential. We can be 'trusted' only if we work diligently to earn trust."[109] Ms. Phair's contention is that the media and the public will cease "trusting" the public relations industry if they believe that the industry requires federal monitoring. However, that same PRSA poll also revealed that Ms. Phair's view of the happy, trusting relationship between PR practitioners and the public with whom they communicate might not be rooted firmly in reality.[110]

When asked whether they agreed that PR practitioners "sometimes take advantage of the media to present misleading

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106 *Id.*

107 Bob Burton, *Fake News: It's the PR Industry Against the Rest of Us*, PR WATCH http://www.prwatch.org/node/4174 (Nov. 15, 2005, 14:42 EST). A similar poll, conducted by the Center for Media and Democracy in July 2005, revealed that ninety percent of 710 respondents also supported full disclosure "in all cases" when VNRs are aired. *Id.* For further results of this poll, see Center for Media and Democracy, *Surveying the Fake News Scene*, http://www.prwatch.org/node/3845 (last visited Jan. 26, 2006).

108 Burton, *supra* note 107. The poll was conducted from early June to mid-August, 2005. *Id.* R

109 *Id.*

110 *Id.*

information that is favorable to their clients," eighty-five percent of the general public, eighty-five percent of the Congressional staffers, and sixty-seven percent of corporate executives agreed.[111] While the respondents to these questions do represent a limited sample of the American public, these high percentages may still fairly be read to indicate that the public relations industry has not quite earned the trust that Ms. Phair believes it deserves. Far from decreasing public distrust and antipathy toward the practice of public relations, federal requirements mandating disclosure of source should instead serve to assure the public that PR practitioners are actually providing them with the relevant information necessary to assist them in making informed decisions about the messages they receive.

In addition to enhancing the level of trust that the viewing public places in the PR industry, disclosure requirements might also serve to enhance the quantity and quality of tools available to the PR practitioner. If, for example, a VNR produced on behalf of ABC Corporation, which highlights the many environmental and economic benefits of ABC's new solar-powered cheese grater, must clearly indicate that it has been produced by ABC, then the traditional VNR format, where a voice-over touting the cheese grater's many fine qualities is juxtaposed over pictures of happy cheeseophiles sitting in the sun, might no longer be effective. News outlets could not air the piece in its entirety and without any additional content, since it would very clearly be a promotional segment. Instead, the PR practitioner might create a VNR that reveals something legitimately newsworthy about the product—the fact that the U.S. Olympic Cheesegrating Team won a gold medal when a power outage left the other teams with only manual cheesegrating alternatives, for example. Or, if there is nothing legitimately newsworthy about the product, perhaps the PR practitioner's energies would be better spent in exploring product placement opportunities, or producing a special, cheesegrating-themed event, or even convincing celebrities to use the product, than in trying to make a clearly self serving promotional video appear as genuine news.

Likewise, if Channel Z News, in an effort to present a balanced analysis, will not run the positive-spin VNR without also commenting on competing cheese graters or inherent design flaws, Channel Z is performing a valuable service to consumers—both in terms of providing more information material to their

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111 *Id.*

decision to purchase, and in putting pressure on ABC Corporation to produce a better product.

The above example is, of course, ridiculous. But, the point that it makes is not. Forcing the public relations industry and the broadcast news media to think more carefully about the way they present information, and about the types of messages that should be conveyed on the evening (or morning, or all-day) news should increase the quality of the dialogue resulting from these messages. If a journalist has to do her own reporting on a new product in order to make the VNR celebrating it appear more credible, perhaps she will discover that the product is inherently dangerous and should not be used by anyone, ever. Or, perhaps she will discover that the product has many more great uses than those touted by the manufacturer. If a VNR producer has to disclose the fact that the company highlighted in the segment has paid for its production, he may take greater pains to ensure that the VNR answers the questions that are likely to be generated in the viewing public as they process the message. Better informed consumers should lead to better made products, which, at the end of the day, should make the PR practitioner's job easier.

V. The First Amendment and Disclosure

As the preceding Part makes clear, not everyone involved in the production and use of video news releases will welcome a more broadly defined disclosure requirement. In addition to the expected criticism from the public relations industry, broadcasters, too, might reject additional governmental regulation as an affront to their First Amendment-based right to report freely on ideas and events. As a former FCC Enforcement Bureau Chief wrote in an opinion piece published in August, 2005:

> If the FCC decides to move more aggressively in enforcing payola and sponsorship-identification rules, it would be wise to be sensitive to the editorial discretion and First Amendment rights of broadcasters, particularly relating to news and public-affairs programming. And overly burdensome interpretations of disclosure rules, or stricter requirements, could deter broadcasters from airing certain news and public-affairs programs that would serve the public interest, and may even run afoul of the First Amendment.[112]

However justified journalists might be in their suspicions of

[112] David H. Solomon, *Payola: The Next Big Storm?*, Broadcasting and Cable, Aug. 1, 2005, at 22.

governmental regulation, requiring prepackaged news segments to be disclosed as the product of an outside entity (i.e. not the news outlet) does not impinge on the rights of broadcasters. If a television journalist wishes to use a VNR to tell a story about a product, she may do so with the blessings of the FCC.[113] The disclosure rules suggested by this Note would prevent her only from attempting to "pass off" the VNR as independent reporting.[114] A caption appearing at the bottom of the screen for the duration of the VNR would simply alert the viewer that the information conveyed is not the product of unbiased investigation. The journalist is then free to comment on the information or not. If she chooses not to do so, the caption has put the audience on notice of the actual source (and potential slant) of the information. If the journalist chooses to comment on the segment, by discussing criticism of the product or the existence of competitors, for example, she is merely doing her job—a job that requires nothing more in the presence of the broader regulation than in its absence. Furthermore, "[a]s the Supreme Court wrote more than thirty-five years ago while upholding the Fairness Doctrine in *Red Lion Broadcasting Co. v. FCC* . . . '[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.'"[115] This right of the viewing and listening audience includes the right to "decipher for itself the value and truth of the idea being disseminated."[116]

Because the First Amendment right to free speech also encompasses the right not to speak, or the right to speak without

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113 It bears mentioning that this Article is not advocating full-scale war against VNRs and the entities that use them, the critique of Part IV notwithstanding. This Article seeks only to discuss the ways in which VNRs are used and the ways in which a broader FCC regulation would ensure that their use does not mislead the television-viewing public.

114 *See* Part II, *supra*.

115 Calvert, *supra* note 2, at 254 (quoting Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969)). **R**

The "fairness doctrine," held to be constitutional in the Red Lion case, is the FCC-imposed requirement that broadcasters must give equal and fair coverage to both sides of any "public issue" discussed on the air. This doctrine "originated very early in the history of broadcasting and has maintained its present outlines for some time." Red Lion Broad. Co., 395 U.S. at 370.

116 *Id.* at 254-55. Calvert goes on to argue that, in the payola context, the mandatory disclosure of payments to media outlets may be understood "as a form of counterspeech—another well-established First Amendment doctrine—because such disclosure reveals a possible conflict of interest that actually counters the view being conveyed by the paid pundit." *Id.* at 255. This argument is equally effective in the context of the video news release: although the journalist presenting the information conveyed by the VNR does not receive a cash payment to air the segment, he does receive a benefit in the form of a reduced workload. *See* Part II, *supra*. The fact that the benefit has been received creates an analogous (potential) conflict of interest, one which also must be "countered" by the presence of the caption running throughout the segment.

attribution,[117] some might argue that a stricter disclosure requirement could prevent an entity wishing to espouse an unpopular viewpoint through the use of a VNR from doing so if it must identify itself as the producer of the segment. Perhaps this argument rests on the equation of mandatory disclosure of the identity of a VNR producer to mandatory disclosure of the identity an anonymous "source." Indeed, at a gathering of VNR production company executives, Peter Wengryn, chief executive of VMS,[118] said " [i]t would be great if broadcasters notified the public that this is a VNR, but it would also be great when broadcasters are out there reporting on a story, and they say, 'This is an unnamed source,' (that) they tell us who that unnamed source is so we understand the bias that the person is bringing."[119]

This parallelism is fallacious. The reporter who quotes the unnamed source tells the viewer or reader that the idea came from an external entity and is not the product of the reporter's own independent research. The viewer or reader accepts the information not as fact, but as an idea promulgated by a potentially self-interested party, or at the very least, by a party that may be motivated by something other than a desire to present truthful information. The "unnamed" VNR, on the other hand, appears as the reporter's own work product. The viewer thus accepts the information presented as fact, or at the very least, as an idea that has been vetted and confirmed by the independent reporter or media outlet. If the reporter would prefer not to disclose the source of the VNR, he can simply report on the information without the use of the prepackaged segment—he would thus be forced to tell the story in his own words, with his own video footage (or even the b-roll footage provided by the interested party),[120] and without the slant inherent in the video news release.[121]

Furthermore, the argument that the stories told by VNRs will cease to be told in light of the disclosure requirement ignores the

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117 *See* Wooley v. Maynard, 430 U.S. 705, 714 (1977) ("We begin with the proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all . . . .The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'") (quoting West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943)).

118 Video Monitoring Services, a company that provides its clients with media monitoring and analysis. *See* http://www.vidmon.com/index.html (last visited Feb. 11, 2006).

119 Erica Iacono, *Broadcasting Impressions*, PR WEEK (May 30, 2005), at 12.

120 *See* Rampton, *supra* note 43. R

121 It is conceivable that this method of story-telling would result in the same biased story as the presentation of the VNR would have done. But, a journalist who consistently tells biased stories would presumably have a short-lived career.

fact that, under the disclosure scheme envisioned by this Article, the producer and broadcaster of the segment must simply disclose that it was produced by some entity—for example, an entity that is not the Channel Z Nightly News. The producer need not identify herself by name, but must only identify herself as a person/entity that is external to Channel Z. The purpose is not to force people and organizations to be accountable for the information they disseminate (although that would be a welcome by-product); rather, the purpose is to encourage the broadcast news media to avoid misleading viewers by presenting an inherently partial informational segment as though it is the result of an impartial and thorough investigation.

CONCLUSION

In light of the proliferation of partisan blogs and claims that cable and network news programs unabashedly favor one side or another, one might wonder whether there is any point in encouraging the news media to appear (if not actually to *be*) impartial. Perhaps Americans no longer seek out messages that do anything other than validate the beliefs they already possess: "liberals" read the New York Times and watch CNN; "conservatives" read the Wall Street Journal and watch FOX News. Alternatively, perhaps Americans have ceased to grant any credibility whatever to the talking heads who fill them in on the days' events. Perhaps Americans have simply given up on the idea of unbiased reporting and have accepted that most of the messages they receive each day are designed to influence them in one way or another and thus should be paid no mind.[122] Perhaps the Truth in Broadcasting Act of 2005 and the debate it has sparked has been nothing more than

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[122] In an article commenting on the state of the news media following the questions raised about reporter Judith Miller's own credibility that came to light in the wake of her much-publicized refusal to name her Bush administration source, Arts & Culture Critic Steven Winn said:

> Another break of confidence with the public is the last thing any of us need, given that reporters seem to rank somewhere just north of child molesters in those who-do-you-trust polls. And now that people feel increasingly free to tailor their own media universe—a newspaper skim here, a blog there, *The Daily Show* with Jon Stewart before bed—a collective journalistic identity crisis appears to be in full flower.
>
> Now quick, a show of hands: How many people out there care? How many lose sleep over the decline of network news broadcasts or the circulation drain of metropolitan dailies across the country? How many even noticed or followed the Miller meltdown?
>
> The real bad news for brand-name journalism may be that a credibility gaffe like this one is pretty much what people have come to expect.

Steven Winn, *Journalism in Pursuit of Truth and Ego*, S.F. CHRON., Oct. 27, 2005, at E1.

an exercise in self-aggrandizement on the part of the FCC and a self-conscious display of pseudo-introspection on the part of the public relations and broadcasting industries.

It is easy enough to write off the use of VNRs as nothing more than another mechanism designed to manipulate the minds of members of the television news audience. It is easy enough to hope that viewers are savvy enough to separate out the facts from the "noise;" and if they're not, so be it. "No one . . . has ever gone broke underestimating the intelligence of the great masses of plain people," H.L. Mencken wrote in 1926.[123] Why assume that the "great masses" are paying attention to the news at all, let alone getting worked up over whether a news report may or not be misleading?

Accepting this take on the situation sells short the important role of the broadcast news media in sparking national conversation around the issues and events that influence public and private life. Perhaps worse, it guarantees that the American public remains uninformed; it ensures that the national level of discourse remains pitifully and regrettably superficial. By mandating disclosure of governmental involvement in the dissemination of certain persuasive messages, the Truth in Broadcasting Act will add necessary information to the public debate. But disclosure only in cases where the source is the government is inadequate. In fact, mandatory disclosure in only these limited instances might have the perverse effect of leading viewers to believe that the rest of the messages they see (a good percentage of which are sure to be VNRs produced by corporate or other non-independent entities) are undoubtedly the work product of the journalist: if they were anything else, the viewer might reasonably think, they would have captions as well . . . wouldn't they?

By extending the disclosure requirement to implicate the video news releases produced by non-governmental entities, however, the Truth in Broadcasting Act would encourage all

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123 John P. Robinson & Nicholas Zill, *Matters of Culture: One Person's Art is Another Person's Junk, yet Cosmopolitan Americans Outnumber Those with Less Open Cultural Views*, AMERICAN DEMOGRAPHICS, Sept. 1997, at 24.

This oft-quoted statement is commonly misquoted ("the American public" is substituted for "great masses of plain people"). *See, e.g.*, Joe Fitzgerald, *Incumbent Feels the Heat for Backing Gay Marriage*, BOSTON HERALD, Nov. 1, 2004, at 014 ("H.L. Mencken insisted no one ever lost by underestimating the intelligence of the American public."); Austin Bunn, *Terribly Smart*, N.Y. TIMES MAGAZINE, Mar. 24, 2002, at 17 ("If no one ever lost money underestimating the intelligence of the American public, there's bank to be made in overestimating the potential of the American 1-year-old."); Noel Weyrich, *Attack of the Blogs!*, PHILA. MAGAZINE, Oct. 2005 ("[I] kept thinking of the old saying by H.L. Mencken that nobody ever went broke underestimating the intelligence of the American public.").

parties involved in the production, dissemination, and discussion of "the news" both to ask more questions and to think more critically about the answers. "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail."[124] Requiring the producers of video news releases and the media outlets that use them to disclose the involvement of outside, interested sources, will serve this lofty purpose by ensuring that viewers have the tools they need to determine, for themselves, the truth of the messages presented.

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124 Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969), *quoted in* Calvert, *supra* note 2, at 254. R

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