WHAT IS NEWS?: THE FCC AND THE NEW BATTLE OVER THE REGULATION OF VIDEO NEWS RELEASES

Clay Calvert

I. INTRODUCTION

The Federal Communications Commission ("Commission" or "FCC") seems to have the tendency to attempt to regulate categories of content that defy clear, coherent, and concise definitions. The Commission's call in April 2007 to regulate what it termed "excessively violent programming" on broadcast, cable, and satellite television is a recent example. Also in 2007, the Commission was repeatedly required to defend in federal court its aggressively heightened regulation of "indecent" speech. The fights over content-control

† John & Ann Curley Professor of First Amendment Studies and Co-Director of the Pennsylvania Center for the First Amendment at The Pennsylvania State University. B.A., 1987, Communication, Stanford University; J.D. (Order of the Coif), 1991, McGeorge School of Law, University of the Pacific; Ph.D., 1996, Communication, Stanford University. Member, State Bar of California. The author thanks Benjamin Cramer, Lauren DeCarvalho, and Thomas Markey of the Pennsylvania State University for their review of this article.


2 See 18 U.S.C. § 1464 (2000) ("Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both.").

3 In June 2007, the Second Circuit dealt a blow to the FCC's recent policy decision to punish (after many years of having ignored them) the accidental broadcast of unscripted and fleeting expletives when it held that "the FCC's new policy regarding 'fleeting expletives' is arbitrary and capricious under the Administrative Procedure Act." Fox Television Stations, Inc. v. FCC, 489 F.3d 444, 447 (2d Cir. 2007). In September 2007, Robert Corn-Revere represented CBS before the Third Circuit, challenging, in an oral argument, the FCC's determination that the 2004 Super Bowl halftime show featuring the brief exposure of Janet Jackson's breast was indecent. Rita K. Farrell, CBS Appeals Its Punishment For Incident at a Super Bowl, N.Y. TIMES, Sept. 12, 2007, at C9; see also In re Complaints Against Various Television Licensees Concerning Their February 1, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show, Forfeiture Order, 21 F.C.C.R. 2760, ¶ 1 (Feb. 21, 2006) (imposing "a monetary forfeiture in the amount of $550,000 against CBS"). The FCC defines indecent speech "as material that, in context, depicts or describes sexual or excretory activities
authority prompted the Second Circuit to suggest that "technological advances may obviate the constitutional legitimacy of the FCC's robust oversight" of indecency. 4

Beyond violence and indecency, however, there is another category of content that similarly eludes easy explication onto which the FCC is encroaching—namely, news. For example, in October 2006 the FCC ruled that an interview conducted by comedian and talk show host Jay Leno with California Governor Arnold Schwarzenegger on The Tonight Show with Jay Leno qualified as a "bona fide news interview," 5 and thus was exempt from the federal "equal opportunities" statute affecting broadcast opportunities for qualified candidates for public office. 6 This decision undoubtedly pleased broadcast journalists, as the FCC specifically noted that the Commission "defers to the reasonable, good faith judgment of broadcasters regarding newsworthiness." 7 The FCC supported its conclusion in the Schwarzenegger interview dispute by stressing that "the Commission has ruled that other news interview programs or segments thereof with unique and innovative format elements, such as the Sally Jessy Raphael Show, Jerry Springer, Politically Incorrect, and Howard Stern, qualify for the news interview exemption." 8 It is clear, in this particular area, that the FCC takes a deferential approach to the judgment of broadcasters in deciding what constitutes news. 9

The problem, however, is the FCC's inconsistency. The Commission fails to take a similar hands-off approach in other areas affecting broadcasters' news judgment. In particular, the FCC Enforcement Bureau's issuance of a Notice of Apparent Liability for Forfeiture against Comcast Corporation in September 2007 10 is extremely troubling for First Amendment advocates, free-press sup-

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4 Fox, 489 F.3d at 466.
5 In re Equal Opportunities Complaint Filed by Angelides for Governor Campaign against 11 California Television Stations, Order, 21 F.C.C.R. 11,919, ¶ 1 (Oct. 26, 2006) [hereinafter Governor Campaign Order].
6 See 47 U.S.C. § 315(a) (2000) (providing a "bona fide news interview" exception to the general rule that "[i]f any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station").
7 Governor Campaign Order, supra note 5, ¶ 10.
8 Id. ¶ 9.
9 Id. ¶ 10.
10 In re Comcast Corporation, Notice of Apparent Liability for Forfeiture, 22 F.C.C.R. 17,030, (Sept. 21, 2007) [hereinafter Comcast Notice I].
porters, and broadcast news producers. The FCC censured Comcast for showing portions of a video news release ("VNR") on an affiliated regional cable network, CN8, during a daily consumer-issues segment called Art Fennell Reports. VNRs are "the TV version of a press release." They are "news stories sponsored by corporations, professional associations, government agencies, lobbying groups, and/or their public relations firms." VNRs are "distributed to TV stations for free, in hopes that they will be aired in local newscasts." Although the FCC readily acknowledged that CN8 received the VNR "at no charge," it nonetheless concluded that Comcast and CN8 violated a federal rule requiring the disclosure of sponsorship of material. Comcast contravened the rule by "willfully airing the VNR material at issue without proper sponsorship identification." The FCC determined that there was "too much focus on a product or brand name in the programming," and that it amounted to "promotional material, furnished by a product manufacturer." The decision, though insignificant monetarily (Comcast Corporation was fined $4000), carries significant ramifications for television newscasts na-

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11 The First Amendment to the United States Constitution provides, in pertinent part, that "Congress shall make no law ... abridging the freedom of speech, or of the press." U.S. CONST. amend. I. The Free Speech and Free Press Clauses were incorporated more than eight decades ago through the Fourteenth Amendment Due Process Clause to apply to state and local government entities and officials. See Gitlow v. New York, 268 U.S. 652, 666 (1925).
12 Professor George Rodman, chair of the Department of Television and Radio at Brooklyn College, recently described a video news release as: a ready-to-broadcast recording designed for use in television news programs. Created by professionals, these videos feature good production values. Most VNRs include not only a preproduced news story, complete with reporter and voiceover, but also the same footage without the reporter—to allow stations to use their own reporters to package the story. GEORGE RODMAN, MASS MEDIA IN A CHANGING WORLD 412 (2d ed. 2008).
13 Comcast Notice I, supra note 10.
15 Id.
16 Id.
17 Comcast Notice I, supra note 10, ¶ 8.
18 See 47 C.F.R. § 76.1615 (2007) ("When a cable television system operator engaged in origination cablecasting presents any matter for which money, service, or other valuable consideration is either directly or indirectly paid or promised to, or charged or accepted by such cable television system operator, the cable television system operator, at the time of the cablecast, shall announce that such matter is sponsored, paid for, or furnished, either in whole or in part, and by whom or on whose behalf such consideration was supplied . . . .").
19 In re Comcast Notice I, supra note 10, ¶ 8. In this case, the VNR material used was for a sleep-aid product called "Nelson's Rescue Sleep." Id.
20 Id. ¶ 7.
21 Id. ¶ 8.
22 Id. ¶ 1.
tionwide because local television stations have aired unattributed clips from VNRs created by public relations firms for decades. More importantly, there are First Amendment concerns implicated by the FCC’s attempts to regulate VNR usage due to the fact that “an editor’s decision to quote from or use extensive portions of a video news release is not inconsistent with independent editorial judgment.” Comcast spokeswoman Sena Fitzmaurice responded by explaining that “the segments in question were chosen by journalists in the course of reporting.” In making clear that Comcast would contest the FCC’s ruling, Fitzmaurice emphasized that her company “did not receive any consideration, benefit or payment” for airing portions of the Nelson’s Rescue Sleep VNR.

Comcast’s vow to contest the FCC decision comes as no surprise to media law experts practicing in FCC-related areas. As Brendan Holland, an attorney for Davis Wright Tremaine, LLP explained, “[g]iven that the decision seems to cross into the territory of a cable operator’s or broadcaster’s editorial and journalistic discretion protected by the First Amendment, one can imagine that the cable operator (and any broadcasters fined in the future) will attack vigorously the FCC’s interpretation.” Although the sponsorship-disclosure rule that the FCC found Comcast had violated applies to cable television system operators, there is a similar regulation that targets over-the-air broadcast stations. As such, the Commission’s decision clearly carries implications for traditional local newscasts on network-affiliated stations as well.

It is inevitable that many similar skirmishes will develop in the near future. In particular, FCC Commissioner Jonathan S. Adelstein issued a press release in September 2007 lauding the Enforcement Bureau’s response to Comcast’s use of the VNR and urging “quick action on the many other pending video news release complaints.” Commissioner Adelstein was referring to the FCC’s unprecedented issuance of letters of inquiry to seventy-seven broadcast stations.

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24 Id. at 129.
26 Id.
29 See 47 C.F.R. § 73.1212 (2007) (requiring the disclosure of sponsorship identification “when a broadcast station transmits any matter for which money, service, or other valuable consideration is either directly or indirectly paid or promised to, or charged or accepted by such station”).

Only five days after the Nelson’s Rescue Sleep VNR decision, the FCC again censured both VNRs and Comcast. This notice was premised on the use of four different VNRs during the same \textit{Art Fennell Reports} program that was the target of the initial decision.\footnote{In re Comcast Corporation, Notice of Apparent Liability for Forfeiture, 22 F.C.C.R. 17474, ¶¶ 1, 8–11 (Sept. 26, 2007) [hereinafter Comcast Corporation II].} The FCC, in meting out its $16,000 proposed fine in this second case, rejected Comcast’s contention that “no sponsorship identification is required unless consideration is received or promised as part of an express or implied agreement in exchange for use of the VNR.”\footnote{Id. ¶ 5.} The proposed fines in both cases, although small, were unprecedented. The FCC had never before fined a broadcaster “for airing VNRs without a disclosure.”\footnote{Seth A. Stern, \textit{FCC Begins to Regulate “Fake News”: Sponsorship Disclosures Required for Video News Releases}, MEDIA, PRIVACY & DEFAMATION L. COMMITTEE NEWSL., Fall 2007, at 7.}

Additional fines against other companies seem destined. \textit{Broadcasting \\& Cable} reported in October 2007 that “more than 100 TV stations and some cable operators face potential fines for unidentified video news releases.”\footnote{John Eggerton, \textit{Adelstein: Adamant About Ads}, BROAD. \\& CABLE, Oct. 22, 2007, at 3.} According to Commissioner Adelstein, it makes no difference whether there was a direct exchange of consideration or monetary payment between the television station and the VNR producer. He specifically noted that “[u]nder the law, any valuable consideration up or down the chain of production requires disclosure. Even nonpolitical VNRs can be deceptive if they lead consumers to believe a segment to be honestly researched when, in fact, it was produced by a third party with a commercial or governmental self-interest.”\footnote{Id.} Commissioner Adelstein’s reference to “nonpolitical VNRs” may have been a not-so-subtle effort by the democratic commissioner to indicate that his resolve and concerns go beyond the Armstrong Williams controversy in which the Department of Education paid a journalist to support its policy in the news media.\footnote{See generally Janel Alania, \textit{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, 230 (2006) (“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) . . . .”); Brian Blackstone, \textit{FCC to Probe Williams’s Deal}, WALL ST. J., Jan. 17, 2005, at B3 (discussing the government-paid-for television commentary of Armstrong Williams in support of the No Child Left Behind Act).}
ber 2007, more than two years after the story broke, the FCC levied fines against ten stations both for "violating [FCC] sponsorship identification rules by airing Armstrong Williams’ Department of Education-funded plugs for its No Child Left Behind initiative in 2003,"38 and for the repeated use of VNRs by the federal government under the administration of President George W. Bush to convey political messages.39

Rather than permit the FCC to interfere with the news judgment and editorial discretion of broadcast journalists, marketplace forces and an increased emphasis on media ethics should be permitted to dictate the outcomes in this area. Indeed, journalism scholars typically view the undisclosed, covert use of VNRs as unethical. Importantly, punishing broadcasters for VNR use without attribution ultimately results in treating them in a decidedly different and disparate fashion from print newspaper publishers. Print news is not regulated by the FCC but does sometimes use and paraphrase quotes and other information directly from press releases—the print equivalent of a VNR40—without attribution. If the FCC’s current policy approach to VNRs is allowed to continue, the result will be unequal and unjust treatment between broadcast journalists and print journalists with regard to government regulation of the use of public relations-generated materials.

When one compares the FCC’s decidedly deferential approach to the construct of news reflected in its October 2006 ruling regarding Jay Leno’s interview with Arnold Schwarzenegger41 to its heavily hands-on attack on news judgment in its September 2007 decisions affecting Comcast’s use of VNRs,42 it becomes clear that the FCC should refrain from regulating such an elusive form of content as news. This article analyzes and critiques the FCC’s troubling efforts to regulate news and, in particular, its recent policing and punishing of television stations for using materials gleaned from VNRs even when they accept no monetary or other form of consideration.

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39 See generally Edward J. Lordan, Defining Public Relations and Press Roles in the Twenty-First Century, PUB. REL. Q., Summer 2005, at 41, 42 (“It appears that the Bush administration has taken the use of video news releases (VNRs) to an entirely new level. At least twenty different federal agencies, including such critical information distributors as the State and Defense departments, have released video news releases during the Bush years.”); Richard W. Stevenson, Bush Defends the Offering of Videotaped News Releases, N.Y. TIMES, Mar. 17, 2005, at A28 (“President George W. Bush ... defended his administration’s practice of providing television stations with video news releases that resemble actual news reports, saying that the practice was legal and that it was up to broadcasters to make clear that any of the releases they used on the air were produced by the government.”).
40 See Green & Shapiro, supra note 14, at 10.
41 See supra notes 6–11 and accompanying text.
42 See supra notes 12–23 and accompanying text.
Part I offers an introduction to the issue. Part II demonstrates the difficulty of defining the slippery concept of news. Part III then examines VNRs, including an analysis of what they are, how they are used, and the potential harms they cause. Notably, this part examines viewpoints and opinions regarding VNRs held by three distinct groups: (1) journalists; (2) public relations practitioners; and (3) public interest groups, including the Center for Media and Democracy, a vocal VNR opponent that has conducted its own in-depth research on VNR usage. Next, Part IV provides an overview of the FCC's regulation of broadcast news, including both a brief analysis of the judicial opinions and statutes affecting the Commission's regulatory powers in this area, as well as the FCC's statutory authority over VNRs. Finally, Part V argues that the FCC must step away from its current approach of targeting VNRs for which there is no direct consideration, in light of: (1) the definitional difficulties in conceptualizing news; (2) the First Amendment rights of journalists; and (3) the high barrier of the strict scrutiny standard of judicial review, which the FCC probably will need to overcome in court to justify its aggressive new approach to regulating VNRs.

II. THAT'S NEWS TO ME: THE TROUBLE WITH DEFINING NEWS

In the most recent edition of their undergraduate-level textbook on journalism writing and reporting, professors Bruce D. Itule and Douglas A. Anderson write that "the definition of news is elusive." Itule and Anderson are not alone in this observation. Professors Kathleen Hall Jamieson and Karlyn Kohrs Campbell recently explained that despite many efforts to define what news is, "no neat, satisfactory answer" can be given. Echoing one of the possible definitions offered by Itule and Anderson, Jamieson and Campbell conclude that "the best answer seems to be that news is what reporters, editors and producers decide is news."

43 See United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 813 (2000) (writing that a "content-based speech restriction" is permissible "only if it satisfies strict scrutiny," which requires that the law in question "be narrowly tailored to promote a compelling Government interest").
44 See discussion infra Part V.C. (describing why there is some contention and debate about whether strict scrutiny would apply to the FCC's disclosure requirements for VNRs carried on over-the-air broadcast television).
45 BRUCE D. ITULE & DOUGLAS A. ANDERSON, NEWS WRITING & REPORTING FOR TODAY'S MEDIA 11 (7th ed. 2007) (observing that definitions of news range from "something you haven't heard before" to "what editors and reporters say it is," ultimately concluding that "whatever it is, news is an extremely complex term, and it is different things to different people").
47 Id.
If lawmakers and courts were to adopt such a definition of news—a definition in which news is whatever journalists decide it is—then legislators and judges would be required to concede that they cannot create a "legal" definition of news. Instead, the task of creating a definition would be left to journalists. As the California Supreme Court observed when considering the defense of newsworthiness to the privacy tort of public disclosure of private facts,\(^{48}\) "[i]f 'newsworthiness' is completely descriptive—if all coverage that sells papers or boosts ratings is deemed newsworthy—it would seem to swallow the publication of private facts tort, for 'it would be difficult to suppose that publishers were in the habit of reporting occurrences of little interest.'"\(^{49}\)

Part of the dilemma that journalists experience in trying to create a definition may be due to the very nature of the construct of news. In particular, Professor Pamela J. Shoemaker explained that:

> [N]ews is a primitive construct—one that requires no definition in ordinary conversation, because everyone knows what it is. A primitive construct is so integrated into our lives that we do not question its existence. When asked to define a primitive term, it is difficult to do so without using the term in the definition.\(^{50}\)

In some ways Shoemaker's concept of primitive construct is reminiscent of Justice Potter Stewart's observation about obscenity more than four decades ago in *Jacobellis v. Ohio*, when he proclaimed "I know it when I see it."\(^{51}\) Justice Stewart simultaneously acknowledged that, in attempting to explicate what is obscene, the nation's highest court was "faced with the task of trying to define what may be indefinable."\(^{52}\) The problems encountered in defining news, indeed, mirror the difficulty in defining obscenity,\(^{53}\) a task the late Justice Wil-
What is News?

liam Brennan once called “resistant to the formulation of stable and manageable standards.”

The difficulties that journalists grapple with in explicating news are not new challenges brought about in recent years by the advent and prominence of “infotainment,” or by “the blending of entertainment and news” to the point that “the line between hard news and infotainment continues to blur.” As Howard Tumber, a sociology professor, explained “two of the enduring questions of the sociology of news and journalism are ‘what is news’ and ‘what makes news.’” A look back at a 1942 college textbook on news writing confirms the age-old nature of the problem in conceptualizing news, explaining “it is easier to recognize news than to define it.” The textbook offers more than a half-dozen opinions on what news is, including, but not limited to: “an account of a recent event which interests readers;” “whatever readers want to know about;” and “anything that people will talk about.”

The authors of this 1942 textbook acknowledge the difficulty in creating a definition of news, writing that, “[i]n general, the newspaper reporter depends upon his intuition to recognize news, to distinguish between news and non-news, and to estimate the importance of news.” When it comes to the law, of course, it is not appropriate to rely on the “intuition” of the FCC or its current chairman, Kevin J. Martin, to divine what is and is not news protected by the First Amendment.

Given the problems that those who practice and teach journalism have in defining news, today the concept often is thought of in terms of common characteristics or core values that comprise news. These characteristics and values include “timeliness, proximity to the audience, prominence of those involved, consequence, conflict, suspense, human interest, novelty, and progress.”

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55 See, e.g., Bonnie M. Anderson, Journalism’s Proper Bottom Line, NIEMAN REP., Winter 2004, at 51, 51 (“In recent years, punditry, opinion and so-called infotainment have permeated newscasts and newspapers to such a degree that it is now difficult for the average news consumer to distill the news from what they read and watch.”).
60 Id.
61 Id. at 20.
62 W. RICHARD WHITAKER, JANET E. RAMSEY & RONALD D. SMITH, MEDIA WRITING: PRINT, BROADCAST AND PUBLIC RELATIONS 13–14 (2000) (noting that the standard criteria for news include “timeliness, proximity to and impact on readers, presence of conflict, prominence of the people involved, unusual aspects of the event and pegging the event to a larger trend”); see also Mary Jane Alexander, Civic Journalism as Rationale for Aggressive
thermore, news can be conceptualized in terms of what it does. Professor Mi-
chael Schudson of the University of California, San Diego, writes that news
"builds expectations of a common, shared world; promotes an emphasis on and
a positive valuation of the new; endorses a historical mentality . . . ; and en-
courages a progressive rather than cyclical or recursive sense of time."63

In conclusion, there is no concise or consistent definition of news identifi-
able by scholars and practitioners in the journalism field. This problem, at the
operational level of journalism practice and scholarship, compounds the pre-
dicament the FCC faces at the legal level when it attempts to dictate to broad-
cast journalists the boundaries of news. Ultimately, the FCC is attempting to
define news when it punishes journalists for using VNRs without attribution,
insofar as it presumes VNRs are more closely akin to sponsored commercials
than news.

III. CONTRASTING VIEWS ON VIDEO NEWS RELEASES: WHAT
SOME BELIEVE ABOUT THE USE OF VNRS

Despite the FCC’s campaign in late 2007 against the broadcast of VNRs for
which no consideration was received, VNRs are not a new form of media con-
tent. In the early 1980s, VNRs were a “cottage industry” and a “few independ-
ent production houses in New York, Los Angeles, and Washington D.C. domi-
nate[d] what was at the time a small marketplace.”64 VNR production and dis-
tribution has since expanded dramatically into a multimillion dollar industry.65

Researchers confirm both the changing nature and explosive growth of
VNRs. Professors Mark D. Harmon and Candace White, observed that when
production companies initially produced VNRs in the mid-1980s, they consti-
tuted “clumsy promotional efforts on videotape,” which were sent to television
stations and rarely used.66 By the 1990s, VNR producers had become “more
sophisticated in connecting VNRs to topical events, placing sponsor logos less
obtrusively, and understanding the needs of newsrooms.”67 Harmon and White
describe today’s VNRs as “important communications tool[s] for private and
nonprofit organizations.”68

Notwithstanding their popularity for decades with business and television
stations, VNRs remain controversial. It is not surprising that VNRs attract

Coverage of Domestic Assault, 19 NEWSPAPER RES. J. 1, 3 (1998).
64 Green & Shapiro, supra note 14, at 10.
65 Id.
66 Mark D. Harmon & Candace White, How Television News Programs Use Video
67 Id.
68 Id.
regulatory attention, as the use of VNR footage has been characterized as: “operating in a grey zone between information and surreptitious advertising or hidden propaganda.” Described as a “Trojan horse for PR,” the material disguised as “serious journalism frequently hides the true concerns of the contractors that provide the information,” deceiving both viewers and journalists.

This predicament raises ethical questions and quandaries for journalists. In particular, the ethics code of the Society of Professional Journalists (“SPJ”) provides that journalists should “[d]istinguish news from advertising and shun hybrids that blur the lines between the two.” In addition, the SPJ code of ethics states that members of the press should “[i]dentify sources whenever feasible.” This ethical obligation of disclosure seems to require journalists to identify the source of any videotape—including videotape containing VNRS used during a newscast or public affairs program—to the public. Similarly, the ethics code of the Radio-Television News Directors Association (“RTNDA”) suggests that professional electronic journalists should “clearly disclose the origin of information and label all material provided by outsiders.” In addition, the RTNDA code provides that electronic journalists should “recognize that sponsorship of the news will not be used in any way to determine, restrict, or manipulate content.”

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70 *Id.*

71 SPJ describes itself as:

the nation’s most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry through the daily work of its nearly 10,000 members; works to inspire and educate current and future journalists through professional development; and protects First Amendment guarantees of freedom of speech and press through its advocacy efforts.


73 *Id.*

74 RTNDA identifies itself as:

the world’s largest professional organization exclusively serving the electronic news profession, consisting of more than 3,000 news directors, news associates, educators and students. Founded as a grassroots organization in 1946, the association is dedicated to setting standards for newsgathering and reporting. Although news techniques and technologies are constantly changing, RTNDA’s commitment to encouraging excellence in the electronic journalism industry remains the same.


76 *Id.*
used during a newscast it indirectly sponsors the news, not wholly unlike direct sponsors who pay for commercial airtime. By extension, electronic journalists should be mindful to prevent VNR-creating companies’ indirect sponsorship from determining, restricting, or manipulating news content.

A. Views from the Field of Journalism

Professor Louis W. Hodges of Washington and Lee University has explored what he calls “the very serious moral problems associated with video news releases.”77 Hodges asserts that when journalists use VNRs without disclosing to the viewing audience the source of their production, “journalists become mere public relations (PR) agents, and they lose their independence.”78 Essentially, Hodges believes that “VNRs contain an unfiltered message posing falsely as journalism.”79 Some journalism educators believe that the use of VNRs by broadcast journalists is not inherently wrong, as long as certain conditions—most notably, disclosure—are met. For example, Professor Kevin Stoker of Brigham Young University writes that “[n]ews organizations need to inform audiences about the source of VNRs and not give the impression that it is work produced independently of the organization promoted in the video.”80 He advocates that “[v]oiceovers by anchors should disclose whether the script was prepared by the same organization that produced the video.”81 He further notes that “[t]he principles of attribution, or should we say honesty, still apply in the age of technology.”82

In addition to a disclosure-first requirement, Professor Wendy N. Wyatt of the University of St. Thomas calls for an independent-verification requirement. Wyatt contends that “although journalists should be able to trust the integrity of information they receive from PR sources (because of PR professionals’ obligations), journalists’ obligations require that they engage in a process of verification much like the process that should occur when gathering information from any source.”83

It is important to note that Hodges, Stoker, and Wyatt each wrote within the context of an ethical examination of the use of VNRs by broadcast journalists,

78 Id.
79 Id.
81 Id.
82 Id.
rather than within the framework of a legal examination of the government regulation of VNRs that would encompass First Amendment-based free press concerns. While there may well be ethical obligations for journalists to engage in sponsorship disclosure and independent verification when using materials from VNRs, this is not to suggest that there also must be concomitant legal obligations to engage in the same disclosure-and-verification requirement.

Leading journalism trade associations have also registered concerns regarding VNRs. In April 2006, the SPJ issued an official statement urging broadcast companies to fully disclose their use of VNRs. It proclaimed that “[t]elevision’s use of unattributed video news releases is irresponsible, misleading and could lead to increased control of the content of news reports by federal regulators.” Despite calling for caution and disclosure when using VNRs, the SPJ statement makes clear that the organization would “stop short of endorsing” a mandate for “an investigation by the Federal Communications Commission, clarification of corporate identification rules and penalties for ‘all stations that air fake news.’” In the statement, Fred Brown, co-chairman of SPJ’s ethics committee and a columnist for the Denver Post, declared that “it’s never a good idea when government tells journalists what they can and cannot do in the content of their news reports.” He also explained that “[SPJ] would oppose any expansion of the FCC rule . . . [i]nstead, we would call on television to clean up its own act.”

In essence, SPJ views industry self-regulation—not government regulation—as the preferred solution to the problem of the undisclosed use of VNR-packaged materials by television news stations. Moreover, SPJ seems to be saying that decisions about how and in what manner VNRs are used (or not used) are matters of ethics, not issues of law.

Like SPJ, RTNDA strongly opposes government intervention in the editorial decision-making processes of broadcast journalists in regard to VNRs. In an October 2006 letter to FCC Secretary Marlene H. Dortch, shortly after the Commission sent letters of inquiry to television stations asking about their use of VNRs, the law firm representing the RTNDA wrote on its behalf:

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85 Id.
86 Id.
87 Id.
88 Id. In a separate commentary, Brown made clear that it is not the use, in and of itself, of VNRs that is wrong; it is only the non-disclosure of their use and the failure to verify facts in them that is ethically problematic. “If a station thinks the subject is relevant, useful and interesting but doesn’t have the resources to cover it with its own staff, then why not use a VNR?” Fred Brown, *SPJ Condemned Use of VNRs Long Before Latest Scandals*, QUILL, May 2005, at 34.
Determining the content of a newscast, including when and how to identify sources, is at the very heart of the responsibilities of electronic journalists, and these decisions must remain far removed from government involvement or supervision. The government would not dream of inserting itself into a print newsroom to dictate or otherwise oversee how newspaper editors utilize press releases. Given the constitutional and statutory difficulties with the Bureau’s intrusion into local television newsrooms, the Commission should halt the present VNR enforcement action and rescind the letters of inquiry.\textsuperscript{89}

The media has already engaged in self-regulation with regard to VNRs. Print news organizations have alerted the public when their broadcast brethren use VNRs without attribution. For example, \textit{Sacramento Bee} columnist Sam McManis publicly exposed the use of “sound bites, B-roll footage and even a chart” from a VNR by multiple regional-Emmy winner, Lynsey Paulo.\textsuperscript{90} This phenomenon suggests that the journalistic ethos of bringing truth to bear, coupled with competitive forces within the media industry, make self-regulation within the VNR context an especially compelling solution. Moreover, journalism scholars and two leading journalism trade organizations agree that industry self-regulation is the better remedy for the ills perceived by some resulting from VNR usage.

B. Views from the Field of Public Relations

Unsurprisingly, VNR producers and those who work in public relations defend VNR creation and use. In a May 2006 commentary, Kevin E. Foley, President and CEO of an Atlanta company that produces VNRs, explained that financial realities often necessitate their use, due to the fact that “commercial interests in television today demand financial accountability from news operations. With fewer resources at their disposal, the pressure is on the producers to fill airtime with newsworthy, informative and even entertaining content. It’s a daunting challenge in many TV markets without outside help.”\textsuperscript{91} Writing in the April 2004 issue of \textit{Quill} magazine, Gary Hill, then-chair of SPJ’s ethics committee, emphasized that “[t]he temptation, especially for smaller newsrooms with limited staff and resources, is enormous. Record the feed, copy the suggested ‘lead-in’ for your anchor to read and drop the item in your newscast. Suddenly a two-minute hole in the newscast is filled and no one is the wiser.”\textsuperscript{92}


\textsuperscript{91} Kevin E. Foley, \textit{Are Video News Releases All Bad?}, BROAD. & CABLE, May 1, 2006, at 42.

The VNR industry has also openly questioned the seemingly accepted assumption that television viewers are necessarily harmed in some way when portions of a VNR are aired without attribution or disclosure of their source. As Foley wrote in Broadcasting & Cable, "if the newscaster airs a story that holds the viewer's attention and the viewer walks away informed or entertained, who has been hurt? Newscasters decide the editorial value of the content we offer as they've always done, so it's not as though there aren't safeguards in place." Foley further intimated that a distinct disparity would be created by singling out broadcast journalists for public criticism and government punishment when they use VNRs, while print journalists often use written press releases without attribution and are not subject to similar condemnation or FCC oversight.

In June 2005, the Public Relations Society of America ("PRSA") issued a statement criticizing government attempts to increase regulatory authority over the use of VNRs, asserting that "excessive government regulation on the production and dissemination of such materials could have a chilling effect on open communication and work against providing the public with vital, interesting information from myriad points of view and sources." Rather than extending government regulation over the use of VNRs, PRSA contended that "the vigorous self-regulation of standards for excellent ethical practices already in place among those industry segments . . . provides broadcasters and, ultimately, the public with all the information required to make decisions about the sources of information and financial sponsorship of prepackaged materials."

Some professionals in the public relations field choose to foist the blame for VNRs back onto the journalists who use them without attribution. According to Liese Hutchison, a faculty member of the St. Louis University communications department and ethics officer for the St. Louis Chapter of PRSA, "[t]he problem is not that the public relations profession is sending out video news releases. [VNRs] are only controversial when the media don't identify the source of the information they are using." While Hutchison's point has merit,

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93 Foley, supra note 91.
94 Id. ("One of the most common practices in print journalism is to lift quotes and even blocks of copy from press releases. Reporters from local weekly newspapers to The New York Times do it every day without ever disclosing to the reader the source of the material. And you know what? Nobody cares.").
96 Id.
97 Rick Stoff, PR's Take on VNRs, ST. LOUIS JOURNALISM REV., May 2006, at 9.
it is important to remember "there are two parties to this deceptive practice—the agencies that produce the fake news clips and the stations that air them." It is unsurprising that some public relations experts disagree with Hutchison's "blame-the-news-media" approach. Writing in Public Relations Tactics, Douglas Simon noted that after The New York Times exposed the federal government's use of VNRs, "some in our [public relations] industry felt it was the broadcasters' fault for not disclosing the source for their broadcast. It seems an odd and ineffective strategy to blame the media for using the stories we send them." Hutchison concurs with Foley's sentiment regarding the apparent disparity in the amount of public attention now being paid to the treatment of VNRs when compared with newspapers' use of printed press releases, observing that "[f]or a long time the print media have used our press releases word-for-word and sometimes put bylines on them. There hasn't been a word raised about that."

C. Views of Public Interest Groups

Diane Farsetta, a senior researcher for the Center for Media and Democracy ("CMD"), proclaimed that "[a] viewer's right to know where her or his news comes from must be respected," in a May 2006 commentary. Media oversight organizations like CMD and Free Press have taken it upon themselves to investigate and reveal to the public what these organizations believe to be deceptive use of VNRs. For instance, to keep the public apprised of specific stations that have used VNRs without disclosure, Free Press featured a link on its Web site replete with a United States map dotted with virtual push-pins that indicated the location of stations that had been accused of using un-

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98 Brown, supra note 88, at 34.
101 See supra note 94 and accompanying text.
102 Stoff, supra note 97, at 9.
104 Center for Media and Democracy, About CMD, http://www.prwatch.org/cmd/index.html (last visited Apr. 3, 2008) (describing itself as "a non-profit, non-partisan, public interest organization that strengthens participatory democracy by investigating and exposing public relations spin and propaganda, and by promoting media literacy and citizen journalism").
105 Free Press Home Page, http://www.freepress.net (last visited Apr. 3, 2008) ("Free Press is a nonpartisan organization working to reform the media in the U.S. we promote diverse and independent media ownership, strong public media, and universal access to communications.").
disclosed VNRs. When a visitor to the Web site placed the cursor over a virtual pushpin, the call letters of the station in question, as well as its contact information, were revealed.

CMD is one of the leading opponents of the unlabeled and undisclosed use of VNRs, filing multiple complaints with the FCC and lauding the Commission’s September 2007 actions against Comcast. Despite the recent aggressive actions of the FCC, however, CMD is not halting its assault against VNRs. In particular, CMD and Free Press filed a formal complaint with the FCC on October 11, 2007, urging the FCC to investigate what the organizations collectively called “newly documented VNR broadcasts.” They urged the FCC to “expedite action on its investigations of the 110 other stations,” and “strengthen and clarify disclosure requirements for fake TV news.” They further noted that “undisclosed VNRs have compromised local news programming in every market” and “[t]he integrity of broadcast journalism remains at risk until TV stations stop airing fake news.”

In their joint complaint, CMD and Free Press recommended that the FCC take a number of different steps directly aimed at VNRs. Specifically the two public interest groups recommended that: (1) “All broadcast of provided and/or sponsored video footage be required to carry a continuous, frame-by-frame visual notification of its source;” (2) “All broadcast of provided and/or sponsored audio material be required to include a verbal notification at its beginning and/or end, disclosing its source;” and (3) “Broadcasters be required to...

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107 Id.

108 See Ctr. for Media & Democracy, Fake News Heats Up, and CMD Makes History!, PR Watch, Fall 2007, at 2, available at http://www.prwatch.org/pdfs/PRW14.3.pdf. The Comcast fine is the first-ever sanction for airing a VNR, a sponsored PR video that mimics the structure and style of television news reports. The fine is a direct result of Center for Media and Democracy (CMD) investigations, and of a joint complaint filed with the FCC by CMD and Free Press. The FCC’s action against Comcast is precedent-setting. It firmly rejects the public relations industry’s argument that no disclosure is needed if television stations are not paid to air VNRs. Hopefully, the FCC will soon address the nearly 140 other undisclosed VNR broadcasts that were documented in CMD’s two reports, “Fake TV News” and “Still Not the News.”

109 Letter from Timothy Karr, Free Press Campaign Director & Diane Farsetta, Center for Media and Democracy Senior Researcher, to Kevin J. Martin, FCC Chairman (Oct. 11, 2007).

110 Id.

111 Id.

112 Id.
place in their public file a monthly report on their use of all provided and/or
sponsored material. CMD and Free Press’s suggested courses of FCC ac-
tion all posit a substantial governmental role in enforcing their proposed dis-
closure requirements.

D. Summary

As long as VNRs fill the content needs of local broadcast television news
producers at no cost to them, it seems inevitable that television journalists will
continue to use VNR footage. As a writer in Public Relations Quarterly ob-
served more than a decade ago, “it is apparent that VNRs are here to stay.”

Journalism scholars and trade associations generally agree that the use of
VNRs should be disclosed by the television stations that choose to use them.
Similarly, CMD’s proposed solution—“do not use VNRs or, if you do, label
them on-air showing who provided and paid for them”—hinges on openness
and disclosure. The real issue, however, is whether such disclosure should
arise as a result of the threat of government-enforced sanctions for non-
disclosure, or whether it should take place voluntarily, through more vigorous
self-enforcement of ethical standards like those embraced by SPJ and RTNDA.
First Amendment concerns about freedom of the press—specifically the right
not to speak—lie squarely in the balance.

IV. GOVERNMENT AUTHORITY OVER BROADCAST TELEVISION
NEWS: FIRST AMENDMENT CONCERNS, AND A JUDICIAL AND
REGULATORY OVERVIEW

The FCC makes it clear that due to First Amendment concerns of press free-
dom, it “cannot interfere with a broadcaster’s selection and presentation of ma-
terial for the news and/or its commentary,” except “in some narrow areas,”
including “penaliz[ing] licensees for knowingly broadcasting false informa-
tion.” Similarly, the FCC advises consumers that “complaints regarding
news distortion, rigging, or slanting can be filed with the FCC.”

113 Id.
114 See Jerome Aumente, Video News Releases: Proceed with Caution, AM. JOURNALISM
Rev., Dec. 1995, at 33 (describing the appeal of VNRs to “budget-strapped local TV sta-
tions”).
115 Diane Orr, Incorporating VNRs into Your Public Relations Program, PUB. REL. Q.,
Spring 1994, at 22.
117 FCC CONSUMER FACTS: COMPLAINTS ABOUT BROADCAST JOURNALISM 1 (2008),
118 Id.
What is News?

Professor Chad Raphael observed that the FCC maintains what he characterized as “little-known rules against licensees’ deliberately distorting the news” that “prohibit deliberate staging, slanting and falsifying of news, as well as promotion or suppression of news to serve licensees’ private interests rather than the public interest.” Even in this area where it claims censorial authority over the news, the FCC treads lightly and cautiously, clearly cognizant of First Amendment concerns. As the FCC explained nearly four decades ago, “in this democracy, no Government agency can authenticate the news, or should try to do so. We will therefore eschew the censor’s role, including efforts to establish news distortion in situations where Government intervention would constitute a worse danger than the possible rigging itself.” The FCC will not consider revoking a broadcaster’s license, based upon complaints of news distortion, “unless the extrinsic evidence of possible deliberate distortion or staging of the news which is brought to our attention, involves the licensee, including its principals, top management, or news management.”

Importantly, the FCC’s approach to the VNRs at issue in the Comcast opinions had nothing to do with conveyance of allegedly false information. There were no allegations that the information taken from the VNRs was either false or inaccurate. Instead, the FCC’s new approach focuses on the conveyance of more complete information—information that otherwise was lacking and not made explicit to viewers about the source of materials taken from VNRs. As such, the current battle over VNRs between the FCC and the broadcasters can be framed as a First Amendment-rooted skirmish pitting the public’s right to know against the broadcasters’ right to freedom of the press, and government-compelled speech versus the right not to speak.

121 Id. ¶ 20.
122 See Comcast Notice I, *supra* note 10; and see Comcast Notice II, *supra* note 32 (fining Comcast on two separate occasions solely for failing to make sponsorship identification announcements when airing certain VNRs).
124 This dichotomy occurs in cases in which, as the U.S. Supreme Court recently observed, “an individual is obliged personally to express a message he disagrees with, imposed by the government.” *Johanns v. Livestock Marketing Ass’n.*, 544 U.S. 550, 557 (2005). An unenumerated First Amendment right not to speak has been recognized by the nation’s high court for sixty-five years, dating back to its decision striking down a law compelling public school students to recite the pledge of allegiance and to salute the American flag. *W. Va. Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943).
In 2006, the United States Supreme Court made it clear that "[s]ome of [the] Court’s leading First Amendment precedents have established the principle that freedom of speech prohibits the government from telling people what they must say." That is fortunate for broadcast journalists who do not want government mandates to determine what they must say about their use of VNRs. Of course, the bad news for broadcasters is, as the Supreme Court wrote three decades ago, "[b]roadcasting . . . has received the most limited First Amendment protection . . . [A] broadcaster may be deprived of his license and his forum if the Commission decides that such an action would serve ‘the public interest, convenience, and necessity.’"

The seminal "right to know" opinion allowing for regulations in the realm of broadcasting that compel types of speech is Red Lion Broadcasting v. FCC, in which the Supreme Court upheld the mandated-speech obligations of the Fairness Doctrine. The Court emphasized that "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." Taken to its logical extreme, this would suggest that the public has a right to know when materials sourced from VNRs are being used in a television newscast. The Fairness Doctrine is no longer enforced by the FCC despite recent suggestions to resurrect it. Nonetheless, the Red Lion opinion has never been overruled and thus it, as well as the public interest obligation imposed on broadcasters, are significant hurdles faced by broadcasters attempting to thwart the FCC’s enforcement of mandatory disclosure of all VNR usage.

A. Judicial Opinions Affecting Broadcast News

In 1973, four years subsequent to its opinion in Red Lion, the United States Supreme Court observed the inherent tension between government control of speech and constitutional concerns, writing that "'[b]alancing the various First Amendment interests involved in the broadcast media and determining what

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128 Red Lion, 395 U.S. at 390.
129 See generally Patrick & Hazlett, supra note 127 (noting that although the FCC abolished the Fairness Doctrine in 1987, some congressional leaders pushed for its return in 2007).
130 See 47 U.S.C. § 303 (2000) (requiring the FCC to take such actions “as public convenience, interest, or necessity requires”); see also id. § 309(a) (requiring the FCC to determine “whether the public interest, convenience, and necessity will be served by the granting of [a broadcast license] application”).
What is News?

best serves the public’s right to be informed is a task of great delicacy and difficulty.”\textsuperscript{131} The Court wrote in that case, \textit{Columbia Broadcasting System v. Democratic National Committee}, that “[o]nly when the interests of the public are found to outweigh the private journalistic interests of the broadcasters will government power be asserted within the framework of the [Telecommunications Act of 1934].”\textsuperscript{132} In delineating the boundaries of this more limited First Amendment protection for broadcast journalists, the Court compared broadcasting with print media and proclaimed that “[a] broadcast licensee has a large measure of journalistic freedom but not as large as that exercised by a newspaper.”\textsuperscript{133} This maxim was borne out a year later in \textit{Miami Herald Publishing Co. v. Tornillo}, in which the Court struck down a compelled-speech regulation that imposed mandatory right-of-reply requirements on print newspapers.\textsuperscript{134} But the Court in \textit{Columbia Broadcasting} tempered this “less-protection-for-broadcast-journalists” approach with dicta favorable to them, writing, “[f]or better or worse, editing is what editors are for; and editing is selection and choice of material. That editors—newspaper or broadcast—can and do abuse this power is beyond doubt, but that is no reason to deny the discretion Congress provided.”\textsuperscript{135} The Court further reasoned that “[c]alculated risks of abuse are taken in order to preserve higher values.”\textsuperscript{136}

More recently, the United States Court of Appeals for the District of Columbia in \textit{Serafyn v. FCC} considered the scope and sweep of the FCC’s enforcement of its policy against news distortion.\textsuperscript{137} The court upheld the power of the FCC to punish broadcasters for deliberate news distortion, noting that “within the constraints of the Constitution, Congress and the Commission may set the scope of broadcast regulation; it is not the role of this court to question the wisdom of their policy choices.”\textsuperscript{138} In fact, the court in \textit{Serafyn} rebuked the FCC for too readily dismissing a complaint that alleged that CBS was unsuited to receive a license because it aired a news program containing intentionally distorted claims that most Ukrainians are anti-Semitic.\textsuperscript{139}

The \textit{Serafyn} opinion, however, dealt with the FCC’s policy against news distortion, not the Commission’s authority over VNRs. In fact, as of early 2008, no federal district or appellate court has addressed the constitutionality

\textsuperscript{132} Id. at 110.
\textsuperscript{133} Id. at 117–18.
\textsuperscript{134} See Miami Herald Publ’g Co. v. Tornillo, 418 U.S. 241 (1974).
\textsuperscript{135} Columbia, 412 U.S. at 124–25.
\textsuperscript{136} Id.
\textsuperscript{137} Serafyn v. FCC, 149 F.3d 1213 (D.C. Cir. 1998).
\textsuperscript{138} Id. at 1217 (quoting Galloway v. FCC, 778 F.2d 16, 21 (D.C. Cir. 1985)).
\textsuperscript{139} Id. at 1216, 1225.
of the FCC’s ability to mandate disclosure by television broadcasters of materials gleaned from VNRs.

B. Statutes and Regulations Requiring Disclosure by Broadcasters

Federal laws and regulations that affirmatively mandate disclosure exist for radio and television broadcasters, as well as cable operators. Within the radio context, the general rule targeting the so-called “pay-for-play” formula of payola is:

All matter broadcast by any radio station 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, as the case may be, by such person.

The related federal regulations, which were last amended more than fifteen years ago, and are at issue in VNR disputes affecting broadcast stations, require in relevant part that:

When a broadcast station transmits any matter for which money, service, or other valuable consideration is either directly or indirectly paid or promised to, or charged or accepted by such station, the station, at the time of the broadcast, shall announce:

(1) That such matter is sponsored, paid for, or furnished, either in whole or in part, and (2) By whom or on whose behalf such consideration was supplied.

The regulation that covers disclosure requirements for cable operators mirrors that of television broadcasters.

In examining the historical origins of these mandatory disclosure rules, Professors Richard Kielbowicz and Linda Lawson find that the statutes are applicable to diverse categories of programming, including some non-obvious categories. They observe that “a not-so-obvious application of the regulation arises when a station incorporates a video news release furnished by a political


141 47 U.S.C. § 317(a)(1) (2000). In addition, federal statutory law also requires disclosure when an individual connected with a broadcast station receives consideration. Specifically, the statute states:

Any employee of a radio station who accepts or agrees to accept from any person (other than such station), or any person (other than such station) who pays or agrees to pay such employee, any money, service or other valuable consideration for the broadcast of any matter over such station shall, in advance of such broadcast, disclose the fact of such acceptance or agreement to such station.


142 47 C.F.R. § 73.1212(a) (2006).

143 See id. § 76.1615(a).

candidate into a newscast." Kielbowicz and Lawson ultimately distill the purpose of the disclosure requirements as "informing the audience when and by whom it was being persuaded." This purpose, indeed, seems to imply that television news programs have an obligation to disclose to their viewers when they borrow material from VNRs. Nonetheless, any government regulation intruding upon the First Amendment rights of broadcasters must still pass constitutional scrutiny.

V. A TRIO OF REASONS WHY THE GOVERNMENT SHOULD ABANDON ITS AGGRESSIVE "COMCAST" APPROACH TO REGULATING VIDEO NEWS RELEASES

A. Defining News: Leave it to the Journalists, Not the FCC

Journalists themselves have immense difficulties articulating a coherent definition of the primary commodity in which they deal—news. There is no indication that the FCC can fare any better in its attempts to identify news worthy of regulation. While the FCC has decided that a late-night chat between comedian Jay Leno and actor-turned-governor Arnold Schwarzenegger constitutes a news interview, and is thus exempt from certain federal rules affecting broadcasters' editorial decisions, it has chosen to take a much more skeptical, and ultimately, paternalistic approach to the concept of news with respect to VNRs.

The inherent subjectivity in defining news problematically allows the government great discretion and ample legal leeway in terms of both how far it will go and how fair it will be in enforcing VNR rules. This risk is made transparent by the FCC Enforcement Bureau's September 21, 2007 Notice of Apparent Liability for Forfeiture in In re Comcast Corporation. In that notice, the FCC wrote that it would enforce the VNR sponsorship-identification regulations when there was "too much focus on a product or brand name in the programming." Employing such a poorly defined "too much focus" standard raises serious legal concerns that the standard may be void for vagueness, that

145 Id.
146 Id. at 374 (noting that the goal of the disclosure requirement was never to limit content, and describing the purpose of informing the audience as "more modest" than limiting content).
147 See supra notes 5–11 and accompanying text (discussing the FCC's decision in this 2006 dispute and noting that the FCC takes a deferential approach to editorial decisions regarding what constitutes news in that context).
149 Id. ¶ 7.
is, it fails to provide clear and definite notice to broadcasters as to when the disclosure requirements will be triggered.\(^{150}\)

These definitional problems are in no way ameliorated by the additional language in the same Comcast notice suggesting that the FCC will refrain from directing its wrath toward news that incorporates VNR-sourced content if that news "contains only fleeting or transient references to products or brand names."\(^{151}\) The line separating fleeting and transient references, on the one hand, from "too much focus" is not clearly demarcated.

To avoid these void-for-vagueness legal problems, the FCC should step back from regulating VNR usage and, instead, adopt the same hands-off approach it took in the Schwarzenegger "equal-opportunities" dispute—it must "defer[] to the reasonable, good faith judgment of broadcasters regarding newsworthiness."\(^{152}\) Defining news is not the province of the government. The slippery slope of censorship created by the government-mandated labeling of news content drawn from VNRs is anathema to an independent press that must serve as a watchdog against the government. If the government has the legal power and authority to claim that it knows best what constitutes news, as the FCC's actions against Comcast's use of VNRs would indicate, then the journalistic freedom to report on that same government is in jeopardy.

B. The First Amendment Rights of Journalists

According to Commissioner Adelstein, the FCC's current crackdown on the undisclosed use of VNRs in newscasts raises nary a First Amendment issue.\(^{153}\) In a 2006 press release lauding a joint study by CMD and Free Press, which allegedly exposed the widespread, covert use of VNRs, Adelstein proclaimed:

This is not a First Amendment issue. Newsrooms are not allowed under the law to run commercials disguised as news without an honest and adequate disclosure. Clearly, the embarrassment of informing viewers they are merely transmitting corporate

150 See Grayned v. City of Rockford, 408 U.S. 104, 108 (1972) ("It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined . . . [and] we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly."); see also ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES & POLICIES 910 (2d ed. 2002) ("A law is unconstitutionally vague if a reasonable person cannot tell what speech is prohibited and what is permitted. Unduly vague laws violate due process whether or not speech is regulated.").

151 Comcast Notice I, supra note 10, ¶ 8.

152 Governor Campaign Order, supra note 5; see also supra notes 5-9 and accompanying text (explaining that the FCC takes a deferential approach to what is "news" with regard to bona-fide news interviews).

propaganda in lieu of real news is leading many to actually eliminate disclosure supplied by the VNR producer. The issue is not free speech—it is identifying who is actually speaking.154

But Commissioner Adelstein’s notion that there are no First Amendment concerns implicated by the VNR issue is simply mistaken. In November 2007, for instance, the Second Circuit observed that “[t]he First Amendment’s guarantee of freedom of speech includes both the right to speak freely and the right to refrain from speaking at all.”155 Broadcast journalists would like to exercise this unenumerated First Amendment right to refrain from speaking when it comes to mandatory disclosure of information obtained from VNRs. Print journalists routinely borrow from press releases without attribution and they are under no legal obligation to reveal that fact to readers.156 All journalists should have a right to remain silent, unfettered by government regulation. The FCC’s VNR disclosure requirements represent a clear attempt to interfere with the news decision-making processes of broadcast journalists insofar as they compel journalists to speak.

C. Satisfying the Appropriate Standard of Judicial Review: A Nearly Impossible Task

By mandating disclosure of the source of materials taken from VNRs for which there has been no direct consideration by cable and broadcast television stations to the VNR producer, the FCC is enforcing a compelled-speech regulation that requires conveyance of specific content (namely, the identity of the monetary locus of VNR production). Thus, in order to justify its viewer-oriented, “public-right-to-know” stance on the disclosure of VNRs, the FCC will most likely need to be able to satisfy the strict scrutiny standard of judicial review when the VNR rules are challenged in court.

Importantly, the phrase “most likely” is used because the Second Circuit recently observed “there is some tension in the law regarding the appropriate level of First Amendment scrutiny” in the realm of broadcasting.157 In “rebuking” the FCC’s new aggressive policy of punishing as indecent the broadcast of isolated and fleeting expletives, the Second Circuit noted that while “in general, restrictions on First Amendment liberties prompt courts to apply strict scrutiny,” it also is true that “the Supreme Court has . . . considered broadcast media exceptional.”158

154 Id.
155 Amidon v. Student Ass’n. of State Univ. of N.Y. at Albany, 508 F.3d 94, 98–99 (2d Cir. 2007).
156 See Foley, supra note 93 and accompanying text.
157 Fox Television Stations, Inc. v. FCC, 489 F.3d 444, 464 (2d Cir. 2007).
158 Fox, 489 F.3d at 464 (“outside the broadcasting context, the Supreme Court has con-
In particular, the Supreme Court observed more than two decades ago that compelled-speech obligations in the broadcast medium “have been upheld only when we were satisfied that the restriction is narrowly tailored to further a substantial governmental interest, such as ensuring adequate and balanced coverage of public issues.” The Court also noted that “our cases have not followed precisely the same approach that we have applied to other media and have never gone so far as to demand that such regulations serve ‘compelling’ governmental interests.” However, the Second Circuit’s two-judge majority opinion in Fox began to cast doubt on this long-standing precedent, declaring that “we would be remiss not to observe that it is increasingly difficult to describe the broadcast media as uniquely pervasive and uniquely accessible to children, and at some point in the future, strict scrutiny may properly apply in the context of regulating broadcast television.” Strict scrutiny has already been applied by the Supreme Court in considering content-based regulations in the realm of cable television, and thus it would be a logical conclusion that strict scrutiny would apply to VNR disclosure requirements for cable channels.

Given that federal regulations targeting VNR disclosure apply to both cable and broadcast television, it would seem inconsistent and incongruous to analyze the VNR regulations applicable in the realm of cable under the strict scrutiny standard while evaluating those that apply to broadcast under a less rigorous test. This inconsistency is particularly important in an era in which a large majority of the public receives television via cable and likely does not distinguish between when it is watching news on over-the-air stations and when it is watching news on cable stations.

160 Id. at 376.
161 Fox, 489 F.3d at 465.
162 See United States v. Playboy Entm’t Group, Inc., 529 U.S. 803, 814 (2000) (considering the constitutionality of a federal statute requiring cable television operators to either fully scramble or block cable channels primarily focused on sexually-oriented programming or to time restrict their transmission, and writing that when “consider[ing] a content-based regulation, the . . . standard is strict scrutiny”).
164 A recent analysis of data by the Television Bureau of Advertising reports that cable penetration is about 61.3%. Frank Norton, Cable Giants Aim to Rule HD, NEWS & OBSERVER, Jan. 2, 2008, at C9. The precise figure for cable penetration and subscribership was at issue in November 2007 when the FCC attempted to impose tighter regulations on the cable industry. See Frank Ahrens, FCC Chair Forced to Compromise on Cable Regulation, WASH. POST, Nov. 28, 2007, at D1 (describing the dispute over cable subscribership).
Regardless of which standard is applied, however, the Second Circuit's decision in Fox made clear that the FCC must establish that actual harm is, in fact, caused by the speech in question. Additionally, the FCC must prove that such harm, in turn, is serious enough to justify legal redress. As the court admonished, the FCC's policy decision to punish the broadcast of fleeting expletives "is devoid of any evidence that suggests a fleeting expletive is harmful, let alone establishes that this harm is serious enough to warrant government regulation."\(^{165}\) The Second Circuit then cited the Supreme Court's opinion in Turner Broadcasting System v. Federal Communications Commission which held that when regulating speech, the government carries the burden to demonstrate "that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way."\(^{166}\)

This language is very important because it forces the FCC to prove, with evidence, that the television viewing audience is actually harmed by undisclosed material taken from VNRs that appears in television newscasts. Mere speculation that VNRs may be harmful is insufficient. More significantly, neither of the FCC's September 2007 Comcast decisions cites a single study purporting to prove such harm or injury.\(^{167}\) Thus, the legal record is devoid of demonstrable harm caused by newscasts that draw upon materials from VNRs. Until the FCC is able to put forth actual studies demonstrating causation of harm, the FCC will have a slim chance of proving that its compelled-speech regulation affecting VNRs is warranted.

In terms of injury, it is important to note the FCC cannot rely on a sympathetic argument based on protecting children or minors from alleged harm, such as when the speech to be regulated is allegedly violent or indecent. The FCC, instead, is dealing with an area of content—news—that is primarily consumed by adults. Therefore, the notion that a so-called Child's First Amendment might govern here is simply wrong.\(^{168}\) This too makes the FCC's judicially mandated task of proving real harm all that more difficult.

Thus, regardless of whether the strict scrutiny standard of judicial review is applied, the FCC has yet to put forth any evidence of "real"\(^{169}\) harm that would constitute either a compelling or substantial interest.\(^{170}\)

\(^{165}\) Fox, 489 F.3d at 461.


\(^{167}\) See Comcast Notice I, supra note 10; Comcast Notice II, supra note 32.

\(^{168}\) See RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 328 (1992) ("[T]he Supreme Court has applied what might be called the 'Child's First Amendment,' permitting regulation of speech implicating children in ways that would be impermissible for adults.").

\(^{169}\) Turner, 512 U.S. at 664.

\(^{170}\) See supra note 43 and accompanying text (defining the strict scrutiny standard of judicial review); FCC v. League of Women Voters, 468 U.S. 364, 380 (1984) (defining the intermediate level of review as requiring the government to show a substantial interest before regulating); Turner, 512 U.S. at 664 (requiring the FCC to show actual harm).
VI. CONCLUSION

Government-compelled disclosure of the use of VNR-sourced information in newscasts raises complex issues. It concerns the nature of news, the scope of First Amendment freedom for broadcast journalists (including the reach of an unenumerated right not to speak), and the right of the public, via FCC fiat, to know and understand the sources from where news information is derived. The government faces problems in defining news and intruding on the editorial control and discretion of broadcast journalists in this area. Therefore, the government should first give principles of media ethics a sufficient opportunity to work before it punishes broadcasters.

It is only in the past three years that controversies involving VNR usage have made media headlines.7 Broadcast journalists must now have the chance to respond, via self-regulation, to such public disclosure of their practices. Journalism scholars and journalism trade organizations have already called for television stations to voluntarily disclose the use of materials drawn from VNRs. The ethics codes of both the Society of Professional Journalists and the Radio-Television News Directors Association advocate such disclosure. Such internal pressure is a starting point for self-regulation that should be given an opportunity to succeed before applying the type of heightened government regulation evidenced in the FCC’s Comcast decisions.

There is reason to believe that ethical self-restraint, rather than legal compulsion, is a better solution, especially if leading broadcast stations set the example for others. Blake D. Morant, dean of the Wake Forest University School of Law and a noted First Amendment scholar, writes that “major media sources must comply if voluntary restraints are to have any true beneficial effect.” In Morant’s view, the need to be perceived as credible is a priority and incentive for television stations. They know that they must meet viewers’ demand for reliable news in order to maximize their number of viewers. Although Morant’s writing did not directly address VNRs, his logic seems applicable to their use and non-use by broadcast journalists. Credibility, in particular, would appear to be enhanced if a station openly adopted a public stance and policy promising not to use VNRs or, alternatively, if it promised both to disclose and to explain any VNR-sourced material usage.

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171 See Alania supra note 37; see also Stevenson, supra note 39 and accompanying text (describing the exposure of the Armstrong Williams controversy, as well as The New York Times investigation into the use of VNRs by government agencies to promote political agendas).

172 See Stoker, supra note 80; see also Brown, supra note 88.

173 See Brown, supra note 88; see also Letter from Kirby & Secrest, supra note 89.


175 Id. at 54.
In another article, Morant makes a compelling argument in favor of self-restraint rather than government regulation of news content, asserting that “[e]thical codes, in particular, have become embedded fixtures in the operation of the media and have contributed to a professional ethos of truth and reliability.” Watchdog groups, such as the Center for Media and Democracy, that expose the use of VNRs also play an important role. They keep the media honest, as it were, and call them to task when they are not. Ethical obligations coupled with public interest group pressure can form a powerful, non-governmental duo to confront abuse of VNRs.

Ultimately, if ethics codes, internal pressures, and public interest groups collectively fail to spur or prompt the self-disclosure of VNR usage by television stations, the government still faces a steep uphill fight to police VNR usage. From issues of vagueness in regulatory terminology to the failure to prove a real harm caused by covert VNR content, the FCC’s intensified efforts to regulate the usage of VNRs for which there is no direct quid pro quo remain judicially suspect in the face of First Amendment concerns.

Future long-term research must monitor and address whether the FCC maintains its vigorous Comcast-type approach toward punishing stations that air VNRs. Furthermore, it also must address whether, in fact, broadcast and cable stations actually comply with the ethical standards and obligations journalism organizations now admonish. The FCC’s actions against Comcast may provide enough incentive, when coupled with those ethical obligations and the monitoring by public interest groups like the Center for Media and Democracy, to substantially reduce the covert use of VNR content in newscasts.

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