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Recommended Citation

McGrath, Christian () "Political Video News Releases: Broadcasters' Obligations under the Equal- Opportunity Provision and FCC Sponsorship-Identification Regulations," *University of Chicago Legal Forum*: Vol. 1993: Iss. 1, Article 17.
Available at: <http://chicagounbound.uchicago.edu/uclf/vol1993/iss1/17>

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Political Video News Releases: Broadcasters' Obligations under the Equal- Opportunity Provision and FCC Sponsorship-Identification Regulations

Christian McGrath†

In the last decade, video news releases ("VNRs") have emerged as a significant phenomenon in television news coverage of political events. VNRs, the visual equivalent of press releases, have become essential components of the media efforts of political campaigns. In the 1992 presidential primaries, every major political candidate aired at least one VNR.¹

VNRs are video stories produced by political campaigns or public relations firms, designed to mimic the appearance of regular news programming.² Distributed free of cost to news programmers, VNRs are an economical way for stations to cover daily political events without incurring the cost of maintaining a reporter on the national campaign trail. For the candidates who produce them, VNRs are an effective way to reach the television-viewing electorate, while influencing media reporting of political events. Despite increasing VNR use and their important role in television news programming today, federal courts and agencies have not addressed the difficult issues raised by broadcasters' reliance upon political VNRs.

Significantly, authorities such as the Federal Communications Commission ("FCC" or "Commission") have not yet determined how broadcasters' use of political VNRs interacts with the "equal time" provision of the Federal Communications Act of 1934 (the "Act").³ Section 315⁴ of the Act provides that if a broadcast licen-

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¹ Mark Thalheimer, *Video Sources in the Newsroom*, in Martha FitzSimon, ed, *Covering the Presidential Primaries* 35, 41 (Freedom Forum Media Studies Center, 1992) ("Freedom Forum Survey") (on file with the University of Chicago Legal Forum).

² Although VNRs are produced on a wide range of topics, this Comment considers only those VNRs that promote political candidates.

³ Communications Act of 1934, Pub L No 73-416, 48 Stat 1064 (1934), codified at 47 USC §§ 151 et seq (1988) ("Act").

⁴ 47 USC § 315 (1988). Section 315 not only requires broadcasters to provide opposing candidates with equal time, but also mandates that any candidate wishing to purchase air

see⁵ permits any legally-qualified candidate to use its facilities, that licensee must provide all other candidates for the same office equal opportunities to use its facilities.⁶ In 1959, Congress exempted four classes of "bona fide" programming from the equal-opportunity provision.⁷ Under section 315(a)(1), the appearance of a legally qualified candidate on any "bona fide newscast" does not obligate a licensee to provide opposing candidates equal opportunity.⁸

This Comment considers whether the broadcast of a political VNR during a regularly-scheduled newscast triggers the equal-opportunity requirement of section 315 of the Federal Communications Act. Part I traces the development of VNRs and explores how broadcasters use them today. Part II examines the legislative history of the Act and its 1959 amendments, concluding that VNRs are beyond the scope of the types of programming that Congress intended to exclude from the equal-opportunity provision. Part III analyzes several recent FCC rulings that extend the scope of the "bona fide" exemptions and determines that, despite the trend towards the relaxation of the equal-opportunity provision, the FCC continues to regard political VNRs as subject to that requirement. Finally, Part IV considers existing FCC regulations and concludes that broadcasters presently airing VNRs without disclaimers informing viewers that the material was furnished by a political campaign violate the Commission's regulations on sponsorship identification.

I. DEVELOPMENT OF VIDEO NEWS RELEASES

Since the early 1980s,⁹ VNRs have been a prominent component of television news broadcasting.¹⁰ Also known as "electronic

time be allowed to do so at comparable rates and in comparable time periods. For a discussion of broadcasters' equal-opportunity obligations under section 315, see *Kennedy For President Committee v FCC*, 636 F2d 417; 421 n 14 (DC Cir 1980).

⁵ All broadcast stations are FCC licensees. Networks, which are not separately licensed, are also involved in programming decisions. This Comment uses the term "licensee" to include both individual stations and networks.

⁶ 47 USC § 315.

⁷ Pub L No 86-274, S 1, 73 Stat 557 (1959), codified at 47 USC § 315(a)(1-4) (1988).

⁸ 47 USC § 315(a)(1).

⁹ Video news releases were first used around 1980 by Hollywood film producers to generate publicity for upcoming movies. Michael deCourcy Hinds, *TV News Gets A Subtle Sales Pitch As The Press Release Goes Electronic*, NY Times A18 (Apr 21, 1987).

¹⁰ *Making News: Are Video News Releases Blurring the Line Between News and Advertising?*, 56 Consumer Rep 694 (1991). Although this Comment considers only VNRs in television broadcasting, similar devices have also gained widespread use in radio broadcast-

press releases" and "newsclips,"¹¹ VNRs range typically from ninety seconds to two minutes.¹² VNRs imitate the look and feel of regular news programming. Unlike traditional news stories, however, VNRs are designed to promote particular products.¹³ VNRs offer a means of presenting a product to television audiences at a fraction of the cost of purchasing comparable air time.¹⁴ Because VNRs appear on news programs, they have the additional advantage of showing a product in what most viewers assume to be an "objective" forum.¹⁵

Use of VNRs has become particularly prevalent in television coverage of political events. A recent survey of television news operations in the United States revealed that one of every ten stations broadcast at least one VNR from a major political candidate in the preceding year, with some broadcasters airing as many as thirty VNRs during the 1992 presidential primaries.¹⁶ Indeed, use of VNRs by television news broadcasters has more than tripled since the 1988 presidential election.¹⁷

As political campaigns become increasingly sophisticated and technology dependent, many candidates have seized upon VNRs as an inexpensive way to reach voters. During the 1992 presidential primaries, both the Republican and Democratic parties incorporated VNRs into their publicity strategies. The Bush campaign transmitted VNRs with footage of the President's campaign activities, accompanied by an "upbeat" narration, to more than six hundred local TV news departments weekly.¹⁸ The Clinton campaign also made extensive use of VNRs.¹⁹

ing and in the print media. "Radio releases" are advertiser-produced radio spots. See Keith Elliot Greenberg, *Radio News Releases Make the Hit Parade*, Pub Relations J, Briefings § 6 (July 1992). Advertisers also provide newspaper publishers with ready-to-print feature articles, op-ed columns, and cartoons that promote particular products or industries. See Michael Max Phillips, *New Public Relations Tools Blur Line Between News, Ads*, Chicago Trib C1 (Dec 26, 1991).

¹¹ Alissa Rubin, *Video News Releases: Whose News Is It?*, Pub Relations J 18 (Oct 1985).

¹² Id.

¹³ Hinds, NY Times at A18 (cited in note 9).

¹⁴ The cost of airing a VNR is about half the cost of airing a commercial of equal length. See Rubin, Pub Relations J at 18 (cited in note 11).

¹⁵ Phillips, Chicago Trib at C1 (cited in note 10).

¹⁶ FitzSimon, ed, *Covering the Presidential Primaries* at 36 (cited in note 1).

¹⁷ Less than 3 percent of the news stations surveyed had used candidate VNRs in 1988, while 12 percent used them in 1992. Id at 41.

¹⁸ Bill Turque, Howard Fineman, and Clara Bingham, *Wiring Up the Age of Technopolitics*, Newsweek 25 (June 15, 1992).

¹⁹ Id.

Broadcasters have embraced VNRs as a means of providing political news coverage that they are unable to produce independently. VNRs allow smaller affiliate stations, which lack the resources and manpower to cover the daily developments of national politics, to compete with better-funded stations that have reporters on the campaign trail.²⁰ Recent advances in VNR technology and sophistication have made the medium increasingly attractive to television broadcasters. In the early 1980s, VNRs were generally distributed to broadcasters on videocassette.²¹ In the last decade, however, advances in satellite technology and a proliferation of local television stations with satellite receiver dishes have made the transmission of VNRs via satellite more affordable. As a result, the VNRs currently received by broadcasters are more timely and of a higher quality than ever before. Satellite technology also enables VNR producers to append additional footage to the VNR's fully-produced story, and allows broadcasters to easily edit VNRs before incorporating them into their regular news programming.²²

As VNRs have become more prevalent, broadcasters have used them in varying ways. In the absence of governmental regulation, broadcasters have established a wide range of policies governing VNR use.²³ Of the broadcasters responding to a recent survey by the Freedom Forum,²⁴ only one-third banned the use of candidate VNRs outright. About half of the responding stations required that the broadcast of candidate VNRs be acknowledged, either by an on-screen graphic or in a voice-over.²⁵ The remaining stations—nearly 20 percent of those responding—used political VNRs without requiring that the material's source be identified.

Moreover, the Freedom Forum Survey reveals that broadcasters using VNRs vary significantly in the degree to which they edit the material before broadcast. While most broadcasters reported editing both the video and audio tracks, 15 percent broadcast

²⁰ The Freedom Forum Survey reveals that stations with smaller news staffs, which tend to be in smaller markets, make the greatest use of candidate VNRs. Forty-three percent of smaller stations (having a staff of less than thirty-seven people), but only 17 percent of larger ones, broadcasted a VNR in the preceding year. John Pavlik and Mark Thalhimer, *From Wausau to Wichita: Covering the Campaign Via Satellite*, in FitzSimon, ed, *Covering the Presidential Primaries* at 44-45 (cited in note 1).

²¹ Rubin, *Pub Relations J* at 21 (cited in note 11).

²² *Id.*

²³ For specific examples of broadcaster VNR policies, see FitzSimon, ed, *Covering the Presidential Primaries* at 42-44 (cited in note 1).

²⁴ *Id.* at 43.

²⁵ *Id.*

VNRs without any editing.²⁶ Although the survey did not correlate those broadcasters that broadcast VNRs without disclaimers with those that broadcast VNRs without prior editing, the significant size of both groups suggests that some amount of crossover is likely. The survey results, therefore, suggest that some television stations currently broadcast VNRs with neither a disclaimer (either visual or oral) nor any independent editing.

II. EQUAL OPPORTUNITY AND CONGRESSIONAL INTENT

Despite increasing reliance upon VNRs, broadcasters airing such footage have not been required to comply with the equal-opportunity provision of the Federal Communications Act. The historical development of that provision and its legislative purpose, however, suggest that broadcasters airing VNRs should be held subject to the equal-opportunity requirement.

A. History of the Modern Equal-Opportunity Provision

The equal-opportunity provision of the Federal Communications Act of 1934 requires broadcasters who make their facilities available to a candidate for public office to afford "equal opportunities" to buy air time to all other qualified candidates for that office.²⁷ Initially, federal courts and regulators interpreted the equal-opportunity requirement as inapplicable to ordinary news coverage of political events.²⁸ The obligation to provide equal coverage was thought to be triggered primarily when broadcasters aired advertisements or endorsements produced and paid for by political campaigns. In practice, the FCC enforced the provision only against broadcasters taking advantage of their position to advance one candidate to the detriment of opponents.²⁹

²⁶ Id at 44.

²⁷ 47 USC § 315.

²⁸ As the Senate Committee on Interstate and Foreign Commerce observed in 1959: Over the years the consensus has been that section 315 did not apply to news coverage of political campaigns. . . . Thus, for three decades . . . no serious challenge has been made to the established station practice of inserting recorded extracts of appearances by candidates into their radio and television news broadcasts.

Broadcasting Equal Time Requirements—Newscasts, S Rep No 562, 86th Cong, 1st Sess, in 2 USCCAN 2564, 2567 (1959).

²⁹ See, for example, *Allen H. Blondy*, 40 FCC 284 (1957), in *Use of Broadcast Facilities by Candidates for Public Office (Revised)*, FCC-58-936 Public Notice 63585 Section III-12 (Oct 1, 1958), in 105 Cong Rec 14458, 14459 (July 28, 1959).

In 1959, however, the FCC changed course, holding that the equal-opportunity rule applied to appearances of political candidates on regularly-scheduled newscasts. In *Lar Daly*,³⁰ a candidate for both the Republican and Democratic nominations for mayor of Chicago contended that the Columbia Broadcasting System ("CBS") violated section 315 when it denied him broadcast opportunities comparable to those afforded to other candidates. The FCC agreed and expanded the scope of a section 315 "use" to include news coverage of political events such as candidates filing nomination petitions, reporters interviewing candidates, or candidates greeting foreign dignitaries.³¹

Lar Daly provoked a "national furor."³² Industry spokesmen called the FCC's opinion "perhaps the most severely crippling decision ever to be handed down with regard to broadcasting journalism."³³ Legislators expressed concern that the new FCC interpretation would undermine Congress's efforts to promote coverage of political events. They predicted that the "inevitable consequence" of the FCC interpretation would be that "a broadcaster will be reluctant to show one political candidate in any news-type program less he assumes the burden of presenting a parade of aspirants."³⁴

In response to the FCC's decision in *Lar Daly*, a number of lawmakers proposed legislation codifying the historical equal-opportunity exemption for news coverage of political candidates.³⁵ These legislators emphasized that television had become "an integral part of political campaigning and . . . one of the most universal sources of information for the voters about the candidate."³⁶ The legislators' primary concern was that broadcaster-created, candidate-neutral news programming not be restrained;³⁷ the airing of programming with content, format, or participants determined by a candidate would still trigger the equal-time obligation.

³⁰ *CBS, Inc.*, 18 Pike & Fischer ("P&F") Radio Reg 238 (1959), reconsidered denied, 26 FCC 715, 18 P&F Radio Reg 701 (1959) (interpretive opinion) ("*Lar Daly*").

³¹ The FCC also held that coverage of the Chicago City Republican Committee's formal endorsement of one candidate and of the incumbent candidate's appeal for funds for the March of Dimes constituted a "use" under section 315. *Id.* at 238-39.

³² *Chisholm v FCC*, 538 F.2d 349, 352 (DC Cir 1976).

³³ Comments of Dr. Frank Stanton, president of CBS, quoted in S Rep No 562, in 2 USCCAN at 2571 (cited in note 28).

³⁴ S Rep No 562, in 2 USCCAN at 2571 (cited in note 28).

³⁵ Four bills were introduced in the Senate in response to the *Lar Daly* decision. *Id.* at 2569.

³⁶ *Id.* at 2572.

³⁷ See Broadcasting Equal Time Requirements—Newscasts, Conf Rep No 1069, 86th Cong, 1st Sess, in 2 USCCAN 2582, 2583 (1959).

Just months after the FCC's decision in *Lar Daly*, Congress amended the Act.³⁸ The amendment evidences the importance Congress attached to uninhibited media coverage of political events:

Appearance by a legally qualified candidate on any—

- (1) bona fide newscast,
- (2) bona fide news interview,
- (3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or
- (4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),

shall not be deemed to be use of a broadcasting station within the meaning of this subsection.³⁹

Since its enactment, the 1959 amendment has been a source of significant legal commentary and controversy. Debate continues over the congressional intent underlying the inclusion of the modifier "bona fide" in all four classes of exempted programming.⁴⁰ Federal regulators and courts have labored to define the scope of the exemptions and to determine what qualifies as "bona fide" news coverage. Broadcasters, seeking to minimize the percentage of news coverage obligating them to provide equal time, have argued that the exemption covers a broad range of formats. Public interest groups, on the other hand, hoping to heighten government scrutiny of the broadcast industry, urge that the exception applies to only a narrow band of news programming.⁴¹

B. Intended Scope of the Equal-Opportunity Provision

The drafters of the 1959 amendment conceded that they were unable to "define with precision" the types of programming that

³⁸ Pub L No 86-274, S 1, 73 Stat 557 (1959), codified at 47 USC §§ 315(a)(1)-(4) (1988).

³⁹ 47 USC § 315(a).

⁴⁰ See, for example, *Chisholm*, 538 F2d at 356 ("All of the exemptions . . . contain the requirement that the program or event be 'bona fide' news, yet the language [of section 315] provides no ready clue as to how this requirement is to be satisfied. It is unclear from the statute whether the test refers to the character of the event (i.e., its inherent newsworthiness), the nature of the candidate's appearance (i.e., whether the format is that of a debate, press conference, speech, etc.), or the candidate's relation to the broadcast (i.e., whether he 'controls' it).").

⁴¹ See, for example, arguments in *In the Matter of Codification of the Commission's Political Programming Policies*, 7 FCC Rec 678, 684 (1992) ("Programming Policies").

came within the news exemptions.⁴² The lawmakers emphasized, however, that the exempted programs enjoyed a common characteristic: “[I]n almost every instance the format and production of the program is under the control of the broadcast station.”⁴³ Furthermore, “the content and format [of a bona fide news interview], and the participants, must be determined by the licensee”⁴⁴ and “the determination [to air the interview] must have been made by the station or network, as the case may be, in the exercise of its ‘bona fide’ news judgment and not for the political advantage of the candidate for public office.”⁴⁵

Political VNRs violate each of these requirements. First, to a high degree, candidates control the “format and production” of VNRs. Second, candidates determine the content, format, and participants. Finally, the primary objective of VNRs is to promote a specific candidate. Even a VNR which is edited before broadcast runs afoul of the criteria set forth by Congress. Although the candidate exerts less control over the format and production of a re-edited VNR, he still determines the content, format, and participants. Likewise, the edited VNR still promotes a specific candidate. For these reasons, political VNRs, even those edited by a broadcaster before transmission, fall beyond the scope of the exemptions and should be subject to the equal-opportunity provision.

Although the criteria for “bona fide” newscasts do not appear in the amendment, earlier versions of the legislation provided that only news programming over which the broadcaster maintained a high level of control was eligible for the “bona fide” exemption.⁴⁶ For example, one of the earlier bills stressed that the exemption applied only to programming in which “the format and the production are under exclusive control of the broadcasting station . . . as to content, presentation, length of time, and all other details and determined in good faith in the exercise of the broadcaster’s judg-

⁴² S Rep No 562, in 2 USCCAN at 2574 (cited in note 28).

⁴³ Id at 2573.

⁴⁴ Conf Rep No 1069, in 2 USCCAN at 2583 (cited in note 37).

⁴⁵ Id. The criteria specified for programs within the other exempted classes help clarify the meaning of “bona fide.” With regard to “bona fide” news documentaries, the Conference Committee noted that such programs cannot “deal . . . predominantly with a candidate”—any candidate appearance must be “incidental” to the program. Id. Similarly, the Committee stressed, in connection with “on-the-spot coverage of bona fide news events,” the presentation may not be designed “to serve the political advantage of [a] candidate.” Id. Thus, “bona fide” contemplates neutral programming that does not advance one candidate over another.

⁴⁶ S Rep No 562, in 2 USCCAN at 2573 (cited in note 28).

ment to be a newsworthy event and in no way designed to advance the cause of or discriminate against any candidate."⁴⁷

The Senate committee indicated that it was "impressed by this approach and intended to adopt similar language in reporting [the] legislation" but ultimately deleted the language in deference to an FCC request.⁴⁸ In a letter to the Senate committee, the Commission urged Congress to delete the language because the change "would eliminate the probability of protracted litigation as to what constitutes news, news interviews, etc."⁴⁹ Accordingly, the Senate committee removed the language with no commentary other than a brief explanation that the legislators were acceding to the will of the responsible federal agency. The lawmakers stressed that they deferred to the FCC because it could better establish "definite guidelines through rules and regulations and wherever possible by interpretations."⁵⁰

The procedural rationale for the change indicates that the Senate committee did not intend to effect a significant substantive alteration to earlier versions of the legislation. Although the legislators acceded to the FCC's request to strike the licensee-control passage, Congress apparently continued to regard broadcaster control over news programming as a prerequisite for exemption. Again, given this apparent intent, editing by a broadcaster is not likely to bring a VNR within the scope of the exemptions. Despite a broadcaster's efforts, the candidate maintains control over a number of critical aspects of the VNR, including its content, format, and participants.

III. FCC INTERPRETATION OF THE EQUAL-OPPORTUNITY PROVISION

Two lines of recent FCC rulings indicate that, despite a trend limiting its scope, the equal-opportunity provision still applies to VNRs. First, the FCC has expanded the traditional agency interpretation of the programming classes eligible for exemption, suggesting that VNRs, too, may be exempt. A closer examination,

⁴⁷ Id.

⁴⁸ Id at 2573-74.

⁴⁹ Letter of John C. Doerfer, Chairman of the FCC, to Senator John O. Pastore, appended to S Rep No 562, in 2 USCCAN at 2578 (cited in note 28). Presumably, the FCC was referring to the *extra* burden of litigation to determine whether a station had "exclusive control" and whether a station had exercised "good faith in the exercise of [the station's] judgment." Id. The FCC noted that, without this language, it must only "cope with a *single* problem of developing interpretations as to what constitutes 'news, news interviews, [etc.]'" Id (emphasis added).

⁵⁰ Id at 2574.

however, reveals that political VNRs continue to fall beyond the scope of the bona fide newscast exemption. Second, the FCC's recent rulings restrict the types of political programming that constitute a "use" of a broadcast station. However, because the FCC apparently continues to regard candidate-initiated appearances as subject to the equal-opportunity requirement, VNRs, too, constitute a "use."

A. Section 315(a) Does Not Exempt Candidate-Produced Programs

In *Oliver Productions, Inc.*,⁵¹ the FCC's Mass Media Bureau exempted certain segments of the program "The McLaughlin Group" from the equal-opportunity provision, deeming it a "bona fide newscast" under section 315(a)(1). The Bureau considered primarily "whether the program reports news of some area of current events . . . in a manner similar to more traditional newscasts."⁵² The "newscast" segments of the program satisfied this criterion because a commentator read news stories in the manner of an ordinary news anchor as an introduction to a discussion of the events by the program's panelists.⁵³

The Telecommunications Research and Action Center ("TRAC"), a citizens' advocacy group, appealed the Bureau's decision to the FCC.⁵⁴ TRAC argued that exemption was inappropriate for the "McLaughlin" segments because they were produced by an independent production company rather than by a FCC licensee.⁵⁵ The FCC rejected TRAC's argument that only programming produced by licensees is eligible for exemption and instead concluded that TRAC had misconstrued the historical purpose of the exemption.⁵⁶ The FCC held that only one of the four exempted categories—news interviews—required licensee control.⁵⁷ The other three categories, the FCC concluded, were not to be interpreted so narrowly. If, therefore, a newscast is designed "to inform the public of

⁵¹ 3 FCC Rec 6642 (MM Bur 1988) ("*Oliver I*").

⁵² *Id.* at 6642, quoting *Paramount Pictures Corp.*, 64 RR2d 600, 601 (MM Bur 1988).

⁵³ *Id.* at 6642.

⁵⁴ *Oliver Productions, Inc.*, 4 FCC Rec 5953 (1989) ("*Oliver II*"), appeal dismissed sub nom, *TRAC v FCC*, 917 F2d 585 (DC Cir 1990). A subsequent request by TRAC that the Commission vacate its earlier decision was denied. *Request of Telecommunications Research and Action Center for Declaratory Ruling*, 7 FCC Rec 6039 (1992), appeal filed, *TRAC v FCC*, No 92-1097 (DC Cir Feb 28, 1992).

⁵⁵ *Oliver II*, 4 FCC Rec at 5953.

⁵⁶ *Id.* at 5955.

⁵⁷ *Id.*

major national [or] world events . . . in a conventional newscast manner," and is not aired "to advance or harm any candidacies," it is exempt under section 315(a)(1).⁵⁸

Oliver's ultimate rejection of licensee control as a determinative criterion indicates that VNRs produced by political candidates may also be eligible for exemption from the equal-opportunity provision. But the FCC stopped short of expanding the parameters of the "bona fide newscast" exemption to encompass VNRs. In *Oliver*, the FCC emphasized that the news footage included in the "McLaughlin" segments was "supplied by PBS, CNN and the commercial broadcasting networks."⁵⁹ The FCC also noted that "[t]he news videotapes often have aired on the newscasts of the originating networks."⁶⁰ Although the segments were not directly produced by an FCC licensee, they were modifications of news programming that *was* produced by licensees.

In *Oliver*, the FCC did not consider the proper treatment of news stories prepared by candidates or officials who are themselves the subject of the clips. *Oliver* does not hold that the source of political programming is irrelevant to determining exemption; rather, it provides that news programming produced (or, more correctly, "re-produced") by an independent producer, displaying indicia of reliability equivalent to that of traditional news reporting, is eligible for exemption.

*Citizens for Reagan v WCKT-TV*⁶¹ supports the conclusion that *Oliver*, and thus the section 315(a) exemptions, do not apply to political VNRs. In *Citizens for Reagan*, the FCC denied a petition for equal opportunity stemming from a Florida station's inclusion in its nightly newscast of a series of interviews with Gerald Ford, a legally-qualified opponent of Ronald Reagan in the impending 1976 presidential preference primary.⁶² The FCC emphasized that *Citizens for Reagan* had failed to demonstrate that the interviews, which were under the "total control" of the licensee,⁶³ were aired by the broadcaster in bad faith to promote Ford as a candidate, or for any reason other than their newsworthiness.⁶⁴

⁵⁸ Id at 5954.

⁵⁹ 4 FCC Rec at 5955.

⁶⁰ Id.

⁶¹ 58 FCC2d 925 (1976).

⁶² Id at 925, 927.

⁶³ Id at 926.

⁶⁴ Id at 927.

In *Citizens for Reagan*, the FCC distinguished the case before it from *Letter to Honorable Clark W. Thompson*,⁶⁵ upon which the petitioner had relied.⁶⁶ In *Thompson*, the FCC denied exempt status to a "Congressman's weekly report, a self-contained program . . . prepared and edited by the candidate himself."⁶⁷ *Thompson* established that placement of an otherwise non-exempt program within a newscast could not "bootstrap" the program into exemption under section 315(a)(1).⁶⁸ In *Citizens for Reagan*, the FCC, in distinguishing *Thompson*, emphasized the degree of candidate control in both cases:

We held [in *Thompson*] that the weekly report would not be exempt merely because of its placement within a newscast. Here, however, the Ford interviews are not "self-contained programs" and were not produced under the control of the candidate. Rather, they were produced and edited by WCKT. Thus, *Thompson* is not applicable to the facts before us.⁶⁹

In *Oliver*, the FCC contrasted the programming at issue in *Citizens for Reagan*, "which the station conducted, filmed and edited," with the weekly report underlying *Thompson*, which was "prepared by the candidate himself."⁷⁰ Although the FCC ultimately rejected *licensee* control as a requirement for exemption,⁷¹ it implicitly recognized *candidate* control as a determinative criterion. The FCC stressed that programs that "utilize methods of news gathering and reporting similar to more traditional newscasts" will qualify for exemption.⁷² Such programming, explained the FCC, is "the product of the station's news gathering functions, such as, interviewing, filming, and editing."⁷³ Clearly, VNRs, which are produced, filmed, and edited by the candidates themselves, fail to satisfy these criteria. Even in situations in which a broadcaster edits a VNR before airing, the source of the material, which is inherently biased, renders it defective. The degree of influence that a candidate maintains over even re-edited VNRs removes them from

⁶⁵ 40 FCC 328 (1962).

⁶⁶ *Citizens for Reagan*, 58 FCC2d at 927.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Oliver II*, 4 FCC Rec at 5955.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

the types of programming exempted by the FCC from the equal-opportunity provision.

B. Candidate "Use" of a Broadcast Station

Broadcasters must provide opposing candidates with equal opportunities when the appearance of a legally-qualified candidate in programming aired on their station constitutes a "use" of the facility and is not exempted from Section 315 as a "bona fide" news program.⁷⁴ In recent years, the FCC has narrowed its interpretation of the types of candidate appearances that constitute "uses" of a broadcast facility.⁷⁵ In its 1984 Primer,⁷⁶ the FCC defined "use" expansively: "In general, any broadcast . . . of a candidate's voice or picture is a 'use' of a station . . . by the candidate if the candidate's participation in the program . . . is such that he will be identified by members of the audience."⁷⁷ The FCC further acknowledged the broad reach of this interpretation: "[A]ll appearances on the air by candidates are considered to be uses, and licensees of stations are not authorized to base their grant or denial of time to candidates on their judgment of whether the use of the time will aid or even be connected with their candidacies."⁷⁸

In 1991, the FCC abandoned the expansive interpretation of "use" and replaced it with a more restrictive definition: "We have decided to narrow our interpretation of 'use' under Section 315(a) to include only non-exempt candidate appearances that are controlled, approved, or sponsored by the candidate."⁷⁹ The FCC noted that the legislative history of both the Radio Act of 1927⁸⁰ and the 1959 amendments reveal a congressional intent to deny exemption to programming produced by candidates.⁸¹ Thus, as re-

⁷⁴ 47 USC § 315(a).

⁷⁵ *Programming Policies*, 7 FCC Rec at 685.

⁷⁶ *Political Primer 1984*, 100 FCC2d 1476 (1984) ("1984 Primer"). In an effort to assist candidates, broadcasters, and the public in understanding the complex regulations governing political programming, the FCC on occasion compiles all agency materials relevant to political programming into comprehensive public notices, referred to as Political Primers.

⁷⁷ *Id.* at 1489.

⁷⁸ *Id.* The FCC qualified this assertion by exempting the four types of broadcasts covered by section 315(a).

⁷⁹ *Programming Policies*, 7 FCC Rec at 685. The Commission reaffirmed this definition in *In the Matter of the Commission's Pol Programming Policies*, 7 FCC Rec 4611, 4613 (1992).

⁸⁰ 44 Stat 1162, S 18, repealed by Communications Act of 1934, 47 USC § 315. The Radio Act of 1927 was the precursor to the Communications Act of 1934.

⁸¹ *Programming Policies*, 7 FCC Rec at 685 ("[T]he legislative history of Section 18 of the Radio Act . . . indicates that Congress primarily was addressing candidate-initiated appearances and speeches when enacting the equal opportunities requirement. Similarly, in

cently as 1991, the FCC reaffirmed its conviction that candidate-initiated programming constitutes a "use" of a broadcast station within the meaning of section 315. Broadcasters airing candidate-initiated political VNRs should therefore be required to comply with the equal-opportunity provision.

IV. FCC SPONSORSHIP-IDENTIFICATION REGULATIONS

Current broadcaster use of VNRs may also violate other parts of the Communications Act. Section 317⁸² obliges broadcasters to disclose the identity of any party who provides materials as an inducement to the broadcaster to air specific programming.⁸³ Candidates provide news programmers with VNRs for the purpose of broadcast. Although section 317(a)(1) provides generally that no notice is required when material is furnished "without charge or at a nominal charge,"⁸⁴ section 317(a)(2) emphasizes that the FCC, which is responsible for implementing the provision, need not recognize such a limitation with regard to political broadcasting:

Nothing in this section shall preclude the Commission from requiring that an appropriate announcement shall be made at the time of the broadcast in the case of any political program . . . for which any films, records, transcriptions, talent, scripts, or other material or service of any kind have been furnished, without charge or at a nominal charge, directly or indirectly, as an inducement to the broadcast of such program.⁸⁵

Under this enabling legislation, the FCC has promulgated⁸⁶ sponsorship-identification rules that require broadcasters to append

considering the 1959 news exemptions amendment, various legislators also expressed the view that 'use' was directed only to candidate-initiated appearances." (citations omitted).

⁸² 47 USC § 317 (1988).

⁸³ Section 317(a)(1) mandates that "[a]ll matter broadcast . . . for which any money, service or other valuable consideration is directly or indirectly paid, or promised to . . . 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." 47 USC § 317(a)(1).

⁸⁴ *Id.*

⁸⁵ 47 USC § 317(a)(2).

⁸⁶ The FCC has acknowledged that it was motivated to develop regulations implementing section 317 by concern over unacknowledged broadcaster use of furnished *political* programming. In the *Matter of Amendment of the Commission's "Sponsorship Identification" Rules* (Sections 73.119, 73.289, 73.654, 73.789, and 76.221), 52 FCC2d 701, 710 (1975) ("*Sponsorship Identification*") ("Section 317 was not implemented by a rule until 1944 and then only because of abuses as concerns broadcasts of political and controversial issues.").

disclaimers to "any political broadcast matter" that is furnished as an inducement to broadcast.⁸⁷

Political VNRs fall squarely within the purview of this regulation. When candidates provide broadcasters with VNRs free of charge, they seek to induce the broadcast of the featured political story. The FCC confirmed its intent to require source identification for programming such as VNRs when it amended section 73.1212 in 1984, substituting the broader term "political broadcast matter" for "political program."⁸⁸ Under the new language, even a candidate VNR included in a newscast that does not itself constitute a "political program" nonetheless constitutes "political broadcast matter" and must therefore be accompanied by a source identification.

In *Request By Gary M. Sukow for Interpretive Ruling Re Fairness Doctrine*,⁸⁹ the FCC required a disclaimer in connection with the broadcast of a candidate interview conducted by an independent newscaster but facilitated by a camera crew and audio feed service furnished by a partisan political organization.⁹⁰ The FCC rejected the contention that such a disclaimer was necessary only in "situations where the Candidate is the originator of the editorial content of the tape or film."⁹¹ Instead, the FCC specifically required a disclaimer even in situations where a nonpartisan broadcaster "controls the editorial content" and an interested party "provides only the technical equipment."⁹² The provision of equipment and technical assistance constitutes sufficient "material or services" to trigger the broadcaster's obligation under the sponsorship-identification provision.⁹³

⁸⁷ The FCC Regulations Provide:

In the case of any political broadcast matter . . . for which any film, record, transcription, talent, script, or other material or service of any kind is furnished . . . as an inducement for broadcasting such matter, an announcement shall be made both at the beginning and conclusion of such broadcast on which such material or service is used that such film, record, transcription, talent, script, or other material or service has been furnished to such station in connection with the transmission of such broadcast matter.

47 CFR § 73.1212(d) (1991).

⁸⁸ See *Sponsorship Identification*, 52 FCC2d at 704 n 4.

⁸⁹ 36 FCC2d 668 (1972) ("*Gary M. Sukow*").

⁹⁰ *Id.* at 669. *Gary M. Sukow* involved an interpretation of 47 CFR § 73.119, the precursor to section 73.1212. The prior version was identical in all respects relevant to the purpose of this Comment's analysis.

⁹¹ *Id.* at 668.

⁹² *Id.*

⁹³ 36 FCC2d at 669 ("When the [National Republican Congressional] Committee provides technical equipment it is furnishing 'material or services' within the meaning of the

A political candidate who records a video news release is more involved in the production of a political broadcast than one who provides equipment to an independent news crew. Consequently, the broadcast of a VNR originated by a candidate should trigger the obligation to attach an announcement acknowledging the material's source. Even VNRs edited before broadcast are subject to the FCC's Sponsorship-Identification guidelines. Regardless of the degree of alterations that a broadcaster makes to a VNR, the footage is still produced and furnished by an outside party as an inducement to broadcast. To a much greater degree than a candidate who provides technical equipment to a broadcaster who prepares a news story independently, a candidate who furnishes a fully-produced VNR to a broadcaster, who then subsequently re-edits it, exerts substantial influence over the ultimate appearance of the news story. The broadcast of a VNR *in any form* obligates a broadcaster to acknowledge the source of the material. Despite the relatively unambiguous directive of section 73.1212, many broadcasters continue to broadcast political VNRs without acknowledging that the material was furnished as an inducement to broadcast. The Freedom Forum Survey indicates that nearly 20 percent of responding broadcasters made use of VNRs without appending any form of sponsorship identification.⁹⁴

CONCLUSION

Video news releases have become an important element of political news programming. The courts and the FCC, however, have yet to adequately regulate this new realm of political broadcasting. Because of the importance of ensuring unbiased reporting of political events, the Federal Communications Commission should move rapidly to develop guidelines governing broadcasters' use of political VNRs. The legislative intent behind the equal-opportunity requirement and subsequent agency interpretations of the provision indicate that political video news releases are within its purview. A broadcaster airing a candidate-furnished VNR should be required to provide all legally-qualified opposing candidates with equal opportunities. In addition, current FCC regulations indicate that the airing of a political VNR, whether in original or edited form,

rule. It appears, therefore, that a disclosure that the candidate furnishes the tape or film is required when the [Committee] makes available a camera crew or audio feed service.").

⁹⁴ FitzSimon, ed, *Covering the Political Primaries* at 41 (cited in note 1).

obliges a broadcaster to identify the source of that material through a sponsorship announcement in the broadcast.

