12-1-2006

Truth in Broadcasting Act: Can It Move the Media away from Indoctrinating and Back to Informing

Antonella Aloma Castro

Recommended Citation
Available at: http://digitalcommons.lmu.edu/elr/vol27/iss2/2
TRUTH IN BROADCASTING ACT: CAN IT MOVE THE MEDIA AWAY FROM INDOCTRINATING AND BACK TO INFORMING?

I. INTRODUCTION

A recent news story on prescription drug benefits narrated by public relations consultant Karen Ryan included an “interview” with Tommy Thompson, former Secretary of Health and Human Services.\(^1\) The video concluded with Karen’s “typical sign-off: ‘In Washington, I’m Karen Ryan reporting.’”\(^2\) This segment was distributed by CNN’s video feed service and aired in forty of the nation’s largest television markets.\(^3\) The Medicare Prescription Drug Improvement and Modernization Acts were debated for nearly six years.\(^4\) Despite the hotly contested issue, the news story made no mention of the proposed prescription drug plan’s vocal critics and, more importantly, it failed to disclose that it was written, filmed, and edited by the United States government, rather than the private sector.\(^5\)

The 109th Congress drafted the Truth in Broadcasting Act (the “Act”) in an effort to end the government’s common use of video news releases (“VNRs”) to disseminate biased information on its political agendas.\(^6\) VNRs are complete, ready-to-use audio or video news segments produced “in the same manner as television news stations produce materials for their own news segments.”\(^7\) The fact that VNRs are intentionally designed to be indistinguishable from independently produced news segments should alarm the public because government propaganda becomes indistinguishable from the news. Moreover, the fact that the press silently serves as a distributor for government propaganda can be viewed as a violation of Americans’ First Amendment rights of free speech and

---

2. See id.
3. See id.
5. See Barstow & Stein, supra note 1.
7. Id.
freedom of the press. These mounting concerns motivated Congress to draft the Truth in Broadcasting Act. This proposed legislation will protect the integrity of the First Amendment by making news stations accountable for VNRs from government agencies. Specifically, the Act will force networks to disclose the source of each prepackaged news stories.

However, some broadcasters argue that the Truth in Broadcasting Act will infringe on their First Amendment rights. Specifically, broadcasters fear that the disclaimer requirement would chill the use of any information provided by the government. This conceivably could result in an unbalanced reporting of critical issues.

Despite these concerns, the Truth in Broadcasting Act should be passed because it will restore broadcast media’s role of supplying independent news stories. Further, contrary to some broadcaster’s assertions, the Act does little to increase the regulatory burden on broadcasters. Instead, it relies on the existing penalties of the Federal Communications Act of 1934 to mandate disclosure of government sources during the use of government-supplied VNRs. As Justice Bork stated, “the concerns of the First Amendment only extend to the ‘discovery and spread of political truth.’” Since neither of these concerns includes protecting political VNRs disguised as news stories, the Act will properly uphold the First Amendment rights to free speech and freedom of the press.

This Comment begins by tracing the United States government’s historical and current practices of using the media to promote its agenda. Part II will explore and rebut the broadcasters’ principle contention that their First Amendment rights would be violated by the Truth in Broadcasting Act. Next, Part III will lay out prior legislation aimed at regulating broadcasters and explain why the Truth in Broadcasting Act is needed. In Part IV, this Comment will analyze possible deficiencies of the

---

8. Id.
9. See id.
12. Id.
13. S. REP. No. 109-210, at 1 (2005) (“[t]he purpose of S. 967 is to amend the Communications Act of 1934 to ensure that Federal Government-produced pre-packaged news stories contain announcements that inform viewers that the information within was provided by the United States Government”).
Act and propose potential additions to the Truth in Broadcasting Act. Part V of this Comment will examine what Congress is willing to do to ensure the federal government is held accountable for deceiving the American public and how additional legislation will compliment the Truth in Broadcasting Act. Finally, this Comment will conclude with an endorsement of the Truth in Broadcasting Act.

II. THE UNITED STATES GOVERNMENT'S BACKGROUND AS A SPIN MACHINE

A. The Price of Publicity is Steep

According to one estimate, the Bush administration spent over $250 million on commercial public relations contracts during its first term—nearly double what the second Clinton administration spent.\(^\text{15}\) This spending has paid for controversial public outreach strategies, including secret columnist contracts and distribution of VNRs supplied by undisclosed federal agencies.\(^\text{16}\) In a recent example, the Department of Education awarded a $240,000 contract to Armstrong Williams, a prominent black pundit, to promote the No Child Left Behind Act ("NCLB") in African-American communities.\(^\text{17}\) In fulfillment of the contract, Williams regularly mentioned the NCLB during his broadcasts and "interview[ed] Education Secretary Roger Paige for [television] and radio spots that aired during [Williams' 2004 show]."\(^\text{18}\) "Williams' contract was part of a $1 million dollar deal with Ketchum," a public relations firm "that produced [VNRs] designed to look like news reports."\(^\text{19}\) The problem with the contract was that it used tax dollars to persuade American taxpayers to support the government's political agenda. By lobbying with public money, the government violates Congress' prohibition on propaganda.\(^\text{20}\)

\(^{15}\) Barstow & Stein, supra note 1.
\(^{16}\) See generally id. (describing widespread use of video news releases by Bush administration).
\(^{18}\) See id.
\(^{19}\) Id.
\(^{20}\) See id.
Prior to the Williams incident, the Bush administration hired syndicated columnist Maggie Gallagher to “push for a $300 million initiative encouraging marriage as a way of strengthening families” in her syndicated column. Gallagher also “had a $21,500 contract with the Department of Health and Human Services to help promote Bush’s proposal.” In addition, Gallagher “received an additional $20,000 from the Bush Administration in 2002 and 2003 for writing a report, titled ‘Can Government Strengthen Marriage?’, for a private organization called the National Fatherhood Initiative.” The public should be alarmed when the federal government can award contracts to privately employed journalists since the journalists then have an explicit conflict of interest. Specifically, to whom do these journalists owe their loyalty? On the one hand, their role is to promote a “marketplace of ideas” by collecting information and informing the American public. On the other hand, they have become government contractors hired to promote their employers’ agenda.

The Bush administration is not alone in this practice. In 1983, during the height of the Iran-Contra scandal, the State Department established the Office of Public Diplomacy for Latin America and the Caribbean. The office’s role was to inform the public about the Reagan administration’s policies in Central America. While the State Department did conduct news briefings, it also engaged in what an internal State Department memorandum described as “white propaganda.” To ensure the secrecy of the State Department’s operations, the memorandum explained that the office would “not communicate its activities on a regular basis to its Director of Communications.” The memorandum then described how the State Department made anonymous arrangements for a Nicaraguan opposition leader to appear on various news stations. In addition, the memorandum documented the office’s contracts with journalists and academics to prepare op-ed columns critical of the Nicaraguan

22. Id.
23. Id. at C4.
26. See id.
27. See id. at 2.
28. See id. at 3.
29. See id.
government’s arms build-up. One such op-ed, “Nicaragua is Armed for Trouble,” appeared in the Wall Street Journal under the byline of Rice University Professor John Guilmartin. The tagline made no mention of Guilmartin’s government contract.

More recently, the Clinton administration was able to bring the government spin machine into American households. In an attempt to gain support for its anti-drug campaign, the White House’s Office of National Drug Control Policy (“ONDCP”) was given a $1 billion dollar budget for a print and television anti-drug advertising campaign. The government offered to purchase ads from television networks and the print media at half-price. To further entice networks to sign up, the government made the following offer: if the networks inserted government approved anti-drug messages into their shows, they did not have to run the ONDCP ads at all and could resell the time already underwritten by Congress to private advertisers. The same deal was offered to print publications. Many outlets capitalized on the deal, and the White House was allowed to pre-approve scripts for shows such as ER and Beverly Hills 90210.

In response to the government’s continued intrusion of Americans’ living rooms, the National Organization for the Reform of Marijuana Law filed a complaint with the Federal Communications Commission (“FCC”). The complaint alleged that the networks’ failure to reveal the government as a sponsor of their shows violated FCC disclosure rules. In December 2000, the FCC ruled that “listeners [and viewers] are entitled to know by whom they are being persuaded.” The FCC chided the networks for not being candid with their viewers, but stopped short of fining the networks because the arrangement did not technically break the law.

30. See id. at 2.
32. See id.
34. See id.
36. See Forbes, supra note 33.
39. Id.
40. Id.
41. Id.
months after President Clinton was out of office, the Bush administration discretely ended the ONDCP program.\textsuperscript{42} The Bush administration appears to have ceased giving federal payouts to networks for furthering the government’s agenda; however, in order to get its message out, it has invested heavily in VNRs.\textsuperscript{43} Networks have been incorporating and airing VNRs since the early 1990s.\textsuperscript{44} The following is an example of the Bush administration’s abuse of VNRs: a release on prescription drug benefits was narrated by public relations consultant Karen Ryan and included a somewhat scripted “interview” with Tommy Thompson, then-Secretary of Health and Human Services.\textsuperscript{45} The video ended with her typical sign-off: “In Washington, I’m Karen Ryan reporting.”\textsuperscript{46} Distributed by CNN’s video feed service, the segment, in full or in part, aired in forty of the nation’s largest television markets.\textsuperscript{47} The report made no mention of any of the law’s vocal critics.\textsuperscript{48} Even more importantly, it failed to disclose that it was written, filmed, and edited by the government.\textsuperscript{49} The Supreme Court’s mandate that the “interests of listeners and viewers are paramount and must override, to a certain degree, the free speech rights of broadcasters” has been severely undercut by broadcasters’ current use of government VNRs.\textsuperscript{50} The Truth in Broadcasting Act, if adopted, would reiterate broadcasters’ role as public fiduciaries with an obligation to present the views and voices representative of their communities.\textsuperscript{51} Otherwise, Americans will continue to receive scripted government propaganda.


\textsuperscript{43} Barstow & Stein, \textit{supra} note 1, at 1; see also \textit{supra} Part I.

\textsuperscript{44} See David Lieberman, \textit{Fake News}, TV GUIDE, Feb. 22, 1992, at 10 (providing examples of VNRs released in early 1990s).

\textsuperscript{45} See Barstow & Stein, \textit{supra} note 1, at A34 (describing the format of the interview in which Thompson knew questions ahead of time).

\textsuperscript{46} See \textit{id}.

\textsuperscript{47} See \textit{id}.

\textsuperscript{48} See \textit{id} (describing the format of the interview in which Thompson knew questions ahead of time).

\textsuperscript{49} See \textit{id}.


III. POTENTIAL FIRST AMENDMENT VIOLATIONS

Many have interpreted the First Amendment as "creating a neutral marketplace of ideas."52 This marketplace theory assumes that the process of exchanging ideas without "governmental interference will lead to the discovery of truth, or at least the best perspectives or solutions for societal problems."53 Furthermore, "in order for a democracy to function effectively, citizens whose decisions control its operation must be intelligent and informed."54 The freedoms of speech and press have achieved a "preferred position" in our society.55 Furthermore, the "people's ability to act as a sovereign has been perceived as the 'central meaning of the First Amendment.'"56 Currently, the people's access to unbiased information is being impeded by broadcast media's use of VNRs. Yet broadcasters still argue that their actions are excusable and protected under the First Amendment.

The most common argument against the passage of the Truth in Broadcasting Act is that any mandatory regulation would violate the broadcasters' freedom of speech. In response to broadcasters' concern, the Supreme Court has recognized that it is dealing with two distinct free speech protections when it applies the First Amendment to broadcast regulation or licensing cases.57 The right to broadcast on radio and television under the First Amendment differs from the right to speak, write, or publish.58 Broadcasters have argued for an unabridgeable broadcast right comparable to the right to speak, write, or publish.59 However, the Court rejected their argument in NBC v. United States.60 The Court observed that "freedom of utterance is abridged to [many] who . . . use the limited facilities of radio . . . is not available to all."61 Therefore, radio is unique and is subject

52. Ingber, supra note 24, at 1.
53. Id. at 3.
54. Id. at 4.
55. Id.
56. Id. at 8 n.33 (citing New York Times Co. v. Sullivan, 376 U.S. 254, 273 (1964)).
58. Id.
60. NBC v. United States, 319 U.S. 190, 226 (1943).
61. Id.
to regulation. The same reasoning was applied in *Red Lion Broadcasting Co. v. FCC*, where the Supreme Court held that television stations must give persons who are maligned during a broadcast a reasonable opportunity to respond over the network. However, when a state statute required newspapers to give a political candidate the right to equal space in order to reply to criticism, the Supreme Court held that the requirement was an unconstitutional infringement upon the freedom of the press. The Supreme Court has justified the different First Amendment protection given to broadcasters on the basis that there are limited frequencies which can be used for broadcasting—thus, there is no question that the frequencies must be allocated and regulated. Additionally, regulation of broadcasting is permissible in order to promote the quantity and quality of coverage of public issues.

In commenting on the lesser degree of First Amendment protection afforded to radio and television, Justice Stevens stated that "broadcast media ha[ve] established a uniquely pervasive presence in the lives of all Americans." As technology becomes more available and Americans are much busier, their reliance on broadcast media for newsworthy information increases. Justice Stevens' remark is perhaps even more applicable today than when he wrote it in 1978. Thus, Congress is explicitly justified in regulating broadcast media in order to protect the public's right to unbiased information.

Broadcasters have also been unsuccessful in challenging network decency laws on constitutional grounds. For example, in *Gagliardo v. United States*, the appellant argued that 18 U.S.C. § 1464, which makes it a crime to broadcast obscene language, was unconstitutional. In disagreeing with appellant's contention, the *Gagliardo* court adopted the following reasoning: "[i]t is well established that Congress has the power

---

62. *Id.*
65. FCC v. Nat'l Citizens Comm. for Broad., 426 U.S. 775, 795 (1978); *see also* CBS v. Democratic Nat'l. Comm., 412 U.S. 94, 101 (1973) ("Broadcast media pose unique problems not present in the traditional free speech case. . . . Because the broadcast media utilize a valuable and limited public resource, there is also present and an unusual order of First Amendment values.").
69. *See, e.g.*, Gagliardo v. United States, 366 F.2d 720 (9th Cir. 1966).
70. *See Id.* at 722.
under the Commerce Clause... to impose penal sanctions on what it considers to be morally objectionable conduct so long as... [it] has a real and substantial relation to the national interest." Under 18 U.S.C. § 1464, an individual who "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... ."

The passage of this criminal statute suggests that broadcasters were unable to regulate themselves and that Congress needed to get involved in order to protect the moral welfare of American citizens. Such Congressional involvement is arguably more intrusive to broadcasters than the Truth in Broadcasting Act because it restricts the content of broadcasts, as opposed to merely requiring disclosure of government sources. Further, the Truth in Broadcasting Act stands on more substantive ground than do obscenity regulations because the Act seeks to protect the public from disguised propaganda and preserve the right to receive legitimate news, as opposed to protecting mere moral sensibilities.

Similar to the battle against obscenity, Congress now faces the task of protecting Americans from the onslaught of political propaganda. The Truth in Broadcasting Act does not seek to censor or prevent any network from airing a story; it simply requires the media to disclose the source of its government provided stories. Instead of violating the freedom of the press, the Act would preserve journalistic independence because it would force networks to separate government manufactured stories from their own stories, and possibly encourage them to cease airing the biased news altogether. This preservation of journalistic independence could occur in several ways: (1) by airing a disclaimer, viewers would be able to make the decision to change the channel, which could affect ratings, or (2) broadcasters would engage in more independent news-gathering, which would re-establish the media's integrity. An additional side effect would be that the public would be making informed decisions about political propositions. The Truth in Broadcasting Act would preserve one of the objectives of the First Amendment to facilitate the ability of the public to discern the truth through the exchanging of ideas.

71. Id.
73. See generally Barstow & Stein, supra note 1,
75. See Ingber, supra note 24, at 4.
Clearly, Congress can justify its proposed legislation by tying it to a valid national interest—protecting the public's interest in obtaining unbiased news. Also, people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with ends and purposes of the First Amendment: "It is the right of viewers and listeners, not the right of the broadcasters, which is paramount." Additionally, free speech and freedom of the press should not be used as a shield to protect conduct that is, in reality, debilitating those rights. The First Amendment prohibits the government from "abridging the freedom of speech, or of the press." Further, the First Amendment promotes the search for truth in a marketplace of ideas, ensures that the population is equipped with enough information to govern itself, and supports citizens to make independent decisions. An additional function of the First Amendment is its check on the abuse of the government's power.

In the past, the media has filled this role by remaining independent. Recently, however, the media has become the government's co-conspirator. Consequently, Congress should be able to preserve the integrity of the First Amendment, and broadcasters should be precluded from defending their actions with the very rights they are trampling.

IV. LEGISLATIVE BACKGROUND

The first substantial piece of legislation aimed at regulating the media is the Federal Communications Act of 1934. Under that act, the FCC is able to fine broadcasters that operate without a license. Further, if a broadcaster violates any of the regulations, the FCC is permitted to revoke or refuse renewal of their operating license. Since it is a privilege, not a Constitutional right, to a license, the FCC has discretion in issuing and

77. U.S. CONST. amend. I.
78. See Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[t]he best test of truth is the power of the thought to get itself accepted in the competition of the market... ").
80. See id.
81. See id.
82. See id. at 872.
83. See id.
85. See id. §§ 501–503.
86. See id. § 312.
denying a broadcaster's license.\textsuperscript{87} In recent years, the Supreme Court has even upheld the FCC's regulation of the content of broadcast media.\textsuperscript{88} For example, in \textit{Red Lion Broadcasting Co. v. FCC}, the Supreme Court upheld an FCC rule that required broadcasters to provide a right of reply under certain circumstances.\textsuperscript{89} The regulation was justified by the scarcity of the broadcast spectrum and the government's role in allocating frequencies.\textsuperscript{90}

The Truth in Broadcasting Act was proposed with the goal of increasing the transparency of broadcasters' source material.\textsuperscript{91} On April 28, 2005, Senators Lautenberg, Kerry, Clinton, Kennedy, Dorgan, Boxer, Feingold, Akaka, and Corzine of the 109th Congress introduced the Truth in Broadcasting Act.\textsuperscript{92} This piece of legislation seeks to "amend the Communications Act of 1934 to ensure that prepackaged news stories contain announcements that inform viewers that the information within was provided by the United States Government. . . ."\textsuperscript{93} The Truth in Broadcasting Act has been drafted to acknowledge the changes in media technology as well as the government's use of the broadcast media to disperse and gain support for its political agenda.\textsuperscript{94} Specifically, the Truth in Broadcasting Act seeks to add the following language to the Communications Act of 1934:

(a) DISCLAIMER REQUIRED – Any prepackaged news story produced by or on behalf of a Federal agency that is broadcast or distributed by a network organization, broadcast licensee or permittee, or multichannel video programming distributor in the United States shall contain an announcement supplied by the Federal agency within the prepackaged news story that conspicuously identifies the United States Government as the source for the prepackaged news story.

(b) Presentation. The announcement required under subsection (a) shall be broadcast or distributed so as—

(1) to promote consistency with the announcement requirements required under sections 317 and 507;

(2) in the case of television and other video programming—

\textsuperscript{87} See id. § 301; see also id. § 307.
\textsuperscript{89} Id. at 392. (Right of reply is granted to an individual who is personally attacked during a broadcast, or to political opponents of an endorsed candidate.).
\textsuperscript{90} Id. at 400.
\textsuperscript{92} Id.
\textsuperscript{93} Id.
\textsuperscript{94} See id.
(A) to be visible for the entire duration of the prepackaged news story; and
(B) to include the conspicuous display of the statement ‘PRODUCED BY THE U.S. GOVERNMENT’; and
(3) in the case of radio and other audio programming, to audibly inform the audience of the source of the prepackaged news story.

(c) REMOVAL OF DISCLAIMER PROHIBITED – It is unlawful for any person to remove an announcement required by this section.

(d) FCC TO DETERMINE NATURE OF DISCLAIMERS – The Commission shall determine the exact design, presentation, and additional language, if any, required for the announcements described in subsection (a).

(e) DEFINITIONS – In this section:

(1) AGENCY – The term ‘agency’ has the same meaning such a term in section 551 of title 5, United States Code, and includes the Executive Offices of the President.

(2) MULTICHLANNE VIDEO PROGRAMMING DISTRIBUTOR – The term ‘multichannel video programming distributor’ has the meaning given that term in section 602.

(3) NETWORK ORGANIZATION –
(A) IN GENERAL – The Commission shall define the term ‘network organization’ for purposes of this section.
(B) INCLUSION – In defining ‘network organization’, the Commission shall include all entities that may provide a prepackaged news story to a broadcast licensee.

(4) PREPACKAGED NEWS STORY – The term ‘prepackaged news story’ means a complete, ready-to-use audio or video news segment designed to be indistinguishable from a news segment produced by an independent news organization.”

95. 5 U.S.C. § 551 (2000) (“‘Agency’ means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—the Congress, the courts of the United States, the governments of the territories or possessions of the United States.”).

96. S. 967.
Should this bill pass, Congress will not have the ability to directly regulate broadcasters or the government agencies that provide the VNRs. The enforcement of the Act will come from the FCC's ability to issue fines, engage in committee reviews, and revoke—or refuse to renew—licenses due to violations of the Act.97

In addition, the Act is specifically aimed at prepackaged news stories.98 It does not impede the media's ability to obtain and report information about the government in other manners, such as interviews or press conferences. As long as the information being broadcast has come from the independent efforts of the broadcasters, the Act would not interfere with the broadcasters' stories in form or content.99 This limitation reiterates the importance that Congress has placed on protecting the right of the public to obtain accurate and unbiased information.

V. IMPACT ON THE BROADCAST FIELD

A. The Thoughts of Networks

One argument against the passage of the Truth in Broadcasting Act is that broadcasters should be allowed to pick segments based on news standards alone and should not be forced to change the appearance of their broadcasts.100 The reference to "appearance" relates to the disclaimer required by the Act if the broadcaster utilizes a government agency’s video news release.101 Yet, there is no evidence that the addition of a disclaimer would de-emphasize the importance of what was being reported. Since the majority of producers and reporters at TV stations know the origin of VNR video before deciding to air it,102 adding a disclaimer would not result in more work for the networks. Although the broadcast decision-makers may know that the source of their stories is the government, their station managers might not.103 The confusion about the origin of the story allows some government videos to reach journalists through network news feed

98. S. 967 § 342(a).
99. See id. § 342(a), (b)(2)(B).
100. Truth in Broadcasting Hearing, supra note 11, (testimony of Douglas Simon, President and CEO of D S Simon Productions, Inc.).
102. Truth in Broadcasting Hearing, supra note 11.
103. Id.
services. Essentially, this practice suggests that the people who air the stories might not be aware of where the news originates because they are not in the position to approve and select what goes on the air. It is counterintuitive that a station, being susceptible to sanctions, would not to be more stringent in monitoring credibility and origin of its stories. In addition, the public’s interest in obtaining both sides of a controversial issue is not served by broadcast networks’ practice of airing stories from unknown sources.

One vocal critic of the Truth in Broadcasting Act is Douglas Simon, Chief Executive Officer of a public relations firm that has supplied pre-packaged news stories to broadcasters. Although Simon agrees that increased government control over news broadcasts is not the hallmark of democracy, he does not believe that the Truth in Broadcasting Act offers the best solution. One complaint is that the Act “calls for the FCC to create the design, presentation and language of a disclaimer that news stations would be required to air throughout the entire segment.” In turn, networks would be more concerned about the appearance of their broadcast and less concerned about the content. Also, “[d]epending on the politics of the administration in power, and in their viewing area, broadcasters may feel pressure if they run or don’t run government video.”

Nonetheless, requiring broadcasters to disclose their use of government VNRs could also relieve the pressure broadcasters feel to air or not to air the government’s video. Specifically, the government could become less inclined to produce biased VNRs, or broadcasters could use the requirement as a means toward justifying their decision not to use them. It is worth mentioning that Simon aired prepackaged news stories for both the Clinton and the Bush administrations. Mandating a network to place a disclaimer on the screen for the duration of the segment ought not to chill news stations that are committed to accurately informing the public. Instead, this disclaimer would require those stations that habitually air VNRs from government agencies to rethink the methods they employ to acquire news.

104. Id.
105. Id.
106. Id.
107. Id.
108. Truth in Broadcasting Hearing, supra note 11.
109. Id.
110. Id.
According to Simon, another drawback is that the government might "alter the format of the video it produces, to avoid disclosure requirements." Even "[w]orse, the government may turn to unregulated third parties or pop-up think tanks to become the source of the video and escape restrictions."

Having already admitted that broadcasting executives know the source of the video tapes, it would seem nearly impossible for the government to escape detection. The idea that a government entity would seek media outliers to air its stories and gain support for its policies—as opposed to admitting that a story came from its office—would defeat the entity’s purpose of inundating the public with its message. Additionally, the government would not want to rely on a minority of viewers to promote its policies. A license must be obtained to transmit any form of communication to the public, therefore, regardless of the size of the network, it would be obligated to comply with the Act. Moreover, the FCC would be authorized to bring an action against entities broadcasting without a license, thus closing off the government’s alternatives to compliance with the Act.

Another critic of the Truth in Broadcasting Act is Dan Jaffe, Executive Vice President of the Association of National Advertisers. Jaffe believes that this bill would make it difficult for networks to convey a legitimate message without the aid of governmental VNRs. His view is founded on the fact that a pre-packaged story is not always used in its entirety. Often, the station will incorporate a segment of the prepackaged story into another story, simply as a means of adding another viewpoint. Disagreeing with Mr. Jaffe, Stanley Ingber’s observation seems noteworthy: "[c]ontent based restrictions leave the public with an incomplete, and perhaps inaccurate, perception of the... political universe." Nevertheless, it is fair to say that the Truth in Broadcasting Act is not an attempt to interfere with the content of the broadcast.

111. Id.
112. Id.
115. Doug Halonen, Vote Near on VNR Labeling: Backers Say They Have Votes to Clear Senate Committee, TELEVISION WEEK, October 17, 2005.
116. Id.
117. See id.
An additional critique of Jaffe's position is that, if the network's priority was to provide legitimate news messages, then the Truth in Broadcasting Act would not exist. The reality is that news stations have not been as concerned about the quality and reliability of their stories as they once were. Networks have other means of obtaining alternative views on a topic. Although not as convenient, networks could engage in independent information gathering, which would easily cure Mr. Jaffe's concerns.

Although Barbara Cochran, President of the Radio-Television News Directors Association, agrees with "the need for broadcast journalists to identify the origin of material they use from outside sources," she does not think there should be a "legal or regulatory burden that broadcasters would have to adhere to."\(^1\) Cochran's critique seems to stem from freedom of the press concerns. Still, the Supreme Court has rejected an "unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish."\(^2\) In order to ensure the public's right to have the broadcast media function in its prescribed manner of granting access to various "social, political, esthetic, [and] moral . . . ideas," regulation of broadcast media has been permitted by the Supreme Court pursuant to the First Amendment.\(^3\) However, the Truth in Broadcasting Act does not seek to regulate the content of the broadcast; rather, the Act seeks to maintain the independence of the press.\(^4\) Mandating a disclaimer does not "abridg[e] the freedom of . . . the press."\(^5\) As discussed previously, the Act does not attempt to instruct broadcasters on what they can or cannot report. Instead, the aim of the act is to educate the public as to where the news is coming from.\(^6\) Therefore, Cochran's argument is not substantiated with concrete examples of how broadcasters would be harmed.

---

120. Halonen, *supra* note 115.
123. *See S. REP. NO. 109-210, at 1 (2005).*
124. *U.S. CONST. amend. I.*
If Cochran’s opinion was adopted, the result would be a discretionary, albeit strongly suggested, use of disclaimers. Broadcasters would have no incentive to adhere to it. Moreover, if broadcast networks took it upon themselves to disclose their government sources, there would be no need for legislation. In essence, the networks are requesting the ability to self-police, and so far, that has done nothing to ensure that the public’s First Amendment rights are being protected.

B. In Support of the Truth in Broadcasting Act

Broadcast licensees have an affirmative obligation to provide full and fair coverage of public issues. It is reasonable for Congress to conclude that the public’s interest in being informed requires periodic accountability on the part of those who are entrusted with the use of broadcast frequencies. Further, Congress and the FCC have authority such that they may conclude that licensees, not individuals merely utilizing broadcast media, should be given the task of selecting the material to be broadcast because licensees are responsible if the public’s legitimate needs are not met. The Supreme Court has stated that, under the Federal Communications Act of 1934, “Congress intended to permit private broadcasting to develop with the widest journalistic freedom consistent with its public obligations.” It is “[o]nly when the interests of the public are found to outweigh the private journalistic interests of the broadcasters [that] government power [would be correctly] asserted within the framework of the Act.”

Currently, the public’s interests have been jeopardized by broadcasters’ practice of utilizing government VNRs without disclosure to the public. Therefore, the Truth in Broadcasting Act is a measure that is both warranted and consistent with Congress’ purpose in drafting the

126. See 47 U.S.C. § 151 (2000); see also CBS, 412 U.S. at 111 (stating that “the broadcaster must provide free time for the presentation of opposing views if a paid sponsor is unavailable and must initiate programming on public issues if no one else seeks to do so.” (citation omitted)).

127. See 47 U.S.C. § 151; see also CBS, 412 U.S. at 102 (explaining the difficulty of balancing the public’s right to be informed with broadcaster’s First Amendment rights, but that “Congress and its... regulatory agency have established a delicately balanced system of regulation.”).

128. See 47 U.S.C. § 151; see also CBS, 412 U.S. at 111 (acknowledging the impossibility of recognizing all viewpoints and granting the right to exercise editorial judgment to the broadcaster).

129. CBS, 412 U.S. at 110.

130. Id.

131. See S. REP. NO. 109-210, at 7 (2005); see also Iacono, supra note 118, at 12–13.
Federal Communications Act of 1934: to ensure that the public’s interest in obtaining reliable information takes priority over broadcasters’ freedom of speech or in this case, to use any means available to compile a story.

Further, The Truth in Broadcasting Act is an effective measure against the practice of utilizing government VNRs without adequate disclosure. The Truth in Broadcasting Act would indirectly strengthen the Federal Communications Act of 1934 by tightening the current weaker standards under which broadcasters must disclose sponsorship and renew their licenses. Currently, sections 317 and 507 of the Federal Communications Act of 1934 make the FCC responsible for overseeing and ensuring that the entities it regulates, including broadcasters, cable operators, and producers, provide sponsorship identification. However, subsection 317(c) only requires a station to “exercise reasonable diligence” to determine whether the party paying is the party in interest. Thus, the language of subsection 317(c) does not mandate a full-fledged investigation by the broadcaster.

The Truth in Broadcasting Act would require broadcasters to positively know who was providing the prepackaged stories because they would have to disclose the source throughout the entire broadcast. As a result, the weaker standard of “reasonable diligence” would be heightened. This heightened standard should be used because the public’s right to free speech is at stake.

Additionally, under the current law, broadcasting stations are required to apply for a license renewal every eight years. The FCC grants the application for renewal only if it determines that public interest, convenience, and necessity will be served. With this in mind, it is noted here that the FCC issued a release on April 13, 2006 to remind the media that the FCC “rules are grounded in the principle that listeners and viewers are entitled to know who seeks to persuade them.” This comment by the FCC supports the proposed piece of legislation and its heightened

133. Loveday v. FCC, 707 F.2d 1443, 1448 (D.C. Cir. 1983) (citing 47 U.S.C. § 317(c)).
134. Id. at 1449.
137. Id. §§ 307(a), (c), 309(a).
disclosure standard.

Considering the above, there is a strong argument that a failure to comply with the heightened discloser requirement of the proposed legislation would be a disservice to the public interest, convenience, and necessity, and should thus bar a renewal of license. In conjunction with the identification of sponsorship requirements mentioned above, the Truth in Broadcasting Act would have the added effect of requiring broadcasters to disclose government sources before they could obtain a license renewal from the FCC. Therefore, the Truth in Broadcasting Act will strengthen the current legislation and would place more regulatory power in the FCC.

C. Problems with Enforcement of the Truth in Broadcasting Act

An initial concern is that aside from stating it is “unlawful,” the bill itself does not outline any specific repercussions for failure to disclose the source of the pre-packaged news stories. However, the FCC, which has jurisdiction to regulate the broadcasting industry, could potentially fine networks or, as argued above, decide not to renew their licenses. This jurisdictional authority under the Federal Communications Act of 1934 would require the FCC to seriously enforce the legislation and not merely to issue warnings. On the other hand, the FCC would not have the power to discipline the government agencies providing the news because the FCC only has authority over the broadcasters. Nevertheless, it is possible that if the FCC stringently enforces the disclosure requirement by fining non-complying broadcasters, less VNRs would be produced because government agencies would not have as many broadcasters willing to risk airing VNRs. However, this result is unlikely considering the government’s long-standing history of using political propaganda to further its agenda. Instead, Congress and the FCC would have to work together to ensure politically biased VNRs are not being produced or aired to persuade Americans.

139. S. 967.
140. 47 U.S.C. §§ 151, 312.
141. Id. § 151 (“There is created a commission to be known as the ‘Federal Communications Commission’, which shall be constituted as hereinafter provided, and which shall execute and enforce the provision of this chapter.”) (emphasis added).
142. See generally id.
In the past, Congress has attempted through the Government Accountability Office ("GAO")\textsuperscript{143} to curtail government agency spending on publicity.\textsuperscript{144} More importantly, the GAO is responsible for enforcing the prohibition on deceptive domestic propaganda.\textsuperscript{145} The Congressional prohibition on propaganda has been in place since 1951.\textsuperscript{146} It states: "No part of any appropriation contained in this or any other Act shall be used for publicity or propaganda purposes within the United States not heretofor [sic] authorized by the Congress."\textsuperscript{147} The GAO is thought to be able to regulate appropriations because it oversees how tax dollars are spent.\textsuperscript{148}

However, the GAO has admitted that the provision barring domestic propaganda is difficult to enforce because the boundary between "an agency making information available to the public and... creating news reports unbeknownst to the receiving audience"\textsuperscript{149} is not entirely clear. It is particularly difficult because the GAO is aware of an "agency’s right or duty to inform the public regarding its activities and programs."\textsuperscript{150} Yet, over the years, the GAO has interpreted the prohibition as preventing "covert propaganda... materials that ‘are misleading as to their origin.’"\textsuperscript{151} The GAO reemphasized its position by stating that the "propaganda prohibition always restrict[s] the use of appropriations to disseminate

\textsuperscript{143} In 2004, the Office underwent a name change, from the Government Accounting Office to the Government Accountability Office. \textit{See Morse, supra} note 79, at 855 n.88. The sources cited in this Comment reflect the name of the Office at the time the relevant source was published.

\textsuperscript{144} \textit{Id.} at 859.


\textsuperscript{146} \textit{See id.}

\textsuperscript{147} \textit{Id.} at 4-8.


\textsuperscript{149} Morse, \textit{supra} note 79, at 859 (citing Dep’t of Health and Human Servs., Ctrs. for Medicare & Medicaid Servs. Video News Releases, B-302710 at 13 (U.S. Gen. Accounting Office May 19, 2004)); \textit{see also} Medicare Prescription Drug, Improvement, and Modernization Act of 2003—Use of Appropriated Funds for Flyer and Print and Television Advertisements, B-302504 at 6 (U.S. Gen. Accounting Office Mar. 10, 2004) ("Given the absence of definitional guidance in the statute and its legislative history, we have struggled over the years to balance the need to give meaning to this prohibition with an agency’s right or duty to inform the public....").

\textsuperscript{150} Medicare Prescription Drug, Improvement, and Modernization Act of 2003—Use of Appropriated Funds for Flyer and Print and Television Advertisements, B-302504 at 6.

\textsuperscript{151} \textit{See id.} at 8 (quoting B-223098 (U.S. Gen. Accounting Office Oct. 10, 1986)).
information without proper source attribution."\textsuperscript{152}

Moreover, covert propaganda includes "materials such as editorials or other articles prepared by an agency or its contractors at the behest of the agency and circulated as the ostensible position of the parties outside the agency."\textsuperscript{153} A critical element of violating the propaganda prohibition is "concealment from the target audience of the agency's role in sponsoring the material."\textsuperscript{154} This definition includes barring government agencies from spending funds on journalist contracts and VNRs. Despite the GAO's determination in three separate rulings that VNRs constituted "covert propaganda,"\textsuperscript{155} no further disciplinary action has yet to follow.

As Jodie Morse stated in her New York University Law Review article, "[s]everal features of the GAO make it particularly ill-suited for checking government publicity overreaches."\textsuperscript{156} First, there is no Congressional order requiring the GAO to hear every case of potential appropriations violations; instead it can hand select them.\textsuperscript{157} "Though the GAO can initiate its own audit investigations, it must also act at Congress' behest."\textsuperscript{158} "Second, it serves a purely advisory role."\textsuperscript{159} "Its legal opinions do not have any weight as precedent."\textsuperscript{160} "Lastly, it has no direct enforcement power."\textsuperscript{161} "At most, [the GAO] can refer its findings to Congress or other agencies for further investigation."\textsuperscript{162}

Recently, the GAO reported that the Department of Health and Human Services and the Office of National Drug Policy "illegally produced [VNRs] which included actors posing as reporters."\textsuperscript{163} In response, "[c]omptroller General David Walker wrote to all federal

\begin{flushleft}
\textsuperscript{152} Dep't of Educ.—No Child Left Behind Newspaper Article Entitled "Parents Want Science Classes That Make the Grade," B-307917 at 2 (U.S. Gen. Accountability Office June 6, 2006).

\textsuperscript{153} OFFICE OF GEN. COUNSEL, U.S. GEN. ACCOUNTABILITY OFFICE, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 4-10 (3d ed. 2004) (internal quotation marks omitted) (citing B-229257 (U.S. Gen. Accountability Office June 10, 1988)).

\textsuperscript{154} Id. at 4-10-4-11.

\textsuperscript{155} Morse, supra note 79, at 857-58.; see also Prepackaged News Stories, B-3044272, 1-3 (U.S. Gen. Accountability Office Feb. 17, 2005) (reiterating earlier rulings and calling on agency heads to "scrutinize any proposed prepackaged news stories to ensure appropriate disclosures").

\textsuperscript{156} Morse, supra note 79, at 859.

\textsuperscript{157} See id.

\textsuperscript{158} Id.

\textsuperscript{159} Id.

\textsuperscript{160} Id.

\textsuperscript{161} Id.

\textsuperscript{162} Morse, supra note 79, at 859.

\textsuperscript{163} Kate Cyrul, Legislators Urge Appropriators to Keep Anti-Propaganda Language in Final Supplemental Appropriations Bill, US FED NEWS, May 2, 2005.
\end{flushleft}
agencies on Feb. 17, [2005,] reiterating the GAO finding that government-produced [VNRs] that conceal their funding sources violate the federal ban on covert propaganda.'164 "However, the Bush Administration has rejected this finding and has instructed agencies that they may continue using [VNRs] that do not disclose the source of the information."165 This illustrates the problem of not being able to control the government’s current practice of creating biased news releases to further its political agenda.

Although under the proposed act the Executive Office would fall under the definition of “agency,” the FCC would only be able to regulate stories that come from the Executive Office and get aired.166 The FCC is unable to regulate the Executive Office directly.167 Should the Executive Office continue to bypass GAO recommendations, the FCC will have to single-handedly enforce the disclaimer requirement of the proposed legislation. If the FCC is able to require broadcasters to disclose government sources, it is possible that less money will be spent on the production of biased VNRs.

In light of recent case law, the FCC may have additional difficulty enforcing the disclaimer requirement of the Truth in Broadcasting Act.168 According to the D.C. Circuit Court, sponsorship identification regulations impose a minimal duty on networks to investigate the sources and financial backers of aired material.169 In Loveday v. FCC, Judge Bork’s opinion stated, “Were we to approve a stringent obligation to investigate . . . [the rule might] have the effect of choking off many political messages.”170 He further stated, “Quite aside from any First Amendment difficulties that such a rule might implicate, we are certainly not prepared to say that the public would be benefited from a decline in the number and variety of political messages it receives.”171 Although this case is not binding on all jurisdictions, no recent case has overruled it. Perhaps the Truth in Broadcasting Act signals Congress’ disagreement with the message emphasized in the Loveday opinion.

164. Id.
165. Id.
169. See id. at 1458.
170. Id.
171. Id.
VI. POTENTIAL IMPROVEMENTS FOR THE BILL

One improvement for the bill would be to outline a disciplinary process. For example, a first offense could require the FCC to warn the station that it is in violation. The network would also have to publicly qualify the story that was aired. For a second offense, the station could be fined, and publicly announce it has aired government provided news. If a broadcaster is charged with a third violation, the FCC should not renew the network’s broadcasting license. Although the third penalty appears harsh, if broadcasters continue to insist on the fallacy that they are capable of policing themselves, the FCC has to step in on the public’s behalf. There has been a well documented history of airing pre-packaged news stories,172 and with no regulation in place beside an honor code, the epidemic will continue.

The networks argue that the majority of the news does not depend on VNRs supplied by the government, nor does it use third party sources.173 However, there remains no way for the public to decipher between propaganda and independent journalism. Further, it seems that the government is not the only entity using VNRs to its advantage. After a ten month investigation, a report was issued by the Center for Media and Democracy.174 It revealed that “77 local TV stations around the [United States] had presented corporate VNRs without disclosing to their viewers that corporations provided the footage or in some cases, complete story packages, to the stations.”175 This report signals that the proposed legislation is too narrow because it only focuses on those stories that originate with the government. Perhaps the language needs to include pre-packaged news stories generally, or at least those that come from sources other than the networks themselves. Otherwise, VNRs will continue to be used to further the interests of specific groups at the cost of the nation’s right to hear and view unbiased news.

In addition, the drafters may consider adding a private right of action. This would serve as a safeguard should the FCC not aggressively enforce the Truth in Broadcasting Act. A private right of action would enforce the idea that the media should be held accountable to the public in its performance of its primary role of furnishing unbiased news to the public. Recognizing the problem with one-sided enforcement, Congress has

172. See Morse, supra note 79, at 857.
175. Id.
proposed an additional piece of legislation aimed specifically at regulating federal government agencies' ability to use federal funds as a means to develop domestic propaganda.

VII. CONGRESS' ATTEMPT TO REIGN IN GOVERNMENT SPENDING ON PROPAGANDA

Another hurdle preventing effective enforcement of the Truth in Broadcasting Act is the ability of government agencies to discard the rulings and recommendations of the GAO. The problem is further frustrated by government agencies' continued practice of using federal budgets to create propaganda. Congress realized the need for change, and on February 2, 2005, the United States Senate introduced legislation intended to stop taxpayer funded Government propaganda. The legislation was drafted in response to Congress' finding of numerous violations of the 1951 prohibition of domestic propaganda.

The legislation, known as the Stop Government Propaganda Act, listed the following findings:

(2) On May 19, 2004, the Government Accountability Office (GAO) ruled that the Department of Health and Human Services violated the publicity and propaganda prohibitions by creating fake television new stories for distribution to broadcast stations across the country.

(3) On January 4, 2005, the GAO ruled that the Office of National drug Control Policy violated the publicity and propaganda prohibitions by distributing fake television news stories to broadcast stations from 2002 to 2004.

(4) In 2003, the Department of Education violated publicity and propaganda prohibitions by using of taxpayer funds to create fake television news stories promoting the 'No Child Left Behind' program violated the propaganda prohibition.

(5) An analysis of individual journalists, paid for by the Department of Education in 2003, which ranked reporters on how positive their articles portrayed the Administration and the Republican Party, constituted a gross violation of the law prohibiting propaganda and the use of taxpayer funds for

177. Id. ("No part of any appropriation contained in this or any other Act shall be used for publicity or propaganda purposes within the United States not heretofore authorized by Congress.").
partisan purposes.

(6) The payment of taxpayer funds to journalist Armstrong Williams in 2003 to promote Administration education policies violated the ban on covert propaganda.

(7) The payment of taxpayer funds to journalist Maggie Gallagher in 2002 to promote Administration welfare and family policies violated the ban on covert propaganda.

(8) Payment for and construction of 8 little red schoolhouse facades at the entranceways to the Department of Education headquarters in Washington, DC to boost the image of the ‘No Child Left Behind’ program was an inappropriate use of taxpayer dollars.

(9) Messages inserted into Social Security Administration materials in 2004 and 2005 intended to further grassroots lobbying efforts in favor of President Bush’s Social Security privatization plan is an inappropriate use of taxpayer funds.

(10) The Department of Health and Human Services ignored the Government Accountability Office’s legal decision of May 19, 2004, and failed to follow the GAO’s directive to report its Anti-Deficiency Act violation to Congress and the President, as provided by section 1351 of title 31, United States Code.

(11) Despite numerous violations of the propaganda law, the Department of Justice has not acted to enforce the law or follow the requirements of the Anti-Deficiency Act.

(12) In order to protect taxpayer funds, stronger measures must be enacted into law to require actual enforcement of the ban on the use of taxpayer funds for propaganda purposes.\(^{178}\)

Congress included definitions of what constitutes propaganda within the Stop Government Propaganda Act.\(^{179}\) For example, a “news release or other publication that does not clearly identify the government agency directly;” “any audio or visual presentation that does not continuously and clearly identify the government agency financially responsible for the message;” and “any attempt to manipulate the news media by payment to any journalist, reporter, columnist, commentator, editor, or news organization” is deemed propaganda under the act.\(^{180}\) These definitions of

---

\(^{178}\) Id. § 2(2)–(12).

\(^{179}\) Id. § 3.

\(^{180}\) Id. § 3(1), (2), (4).
propaganda mirror the conduct that is meant to be regulated by the Truth in Broadcasting Act.

A difference exists with respect to requiring disclosure of the government agency. The Stop Government Broadcasting Act requires disclosure by agencies that are “financially responsible,”\(^\text{181}\) compared with having to disclose the government source of any prepackaged news story as is required by the Truth in Broadcasting Act.\(^\text{182}\) Although it does not appear to be a big difference, it is possible for a government agency to produce a pre-packaged news story, but not necessarily be financially responsible for it. Therefore, both pieces of legislation are needed to cover the different scenarios.

Further, the Stop Government Propaganda Act could aid in enforcing the Truth in Broadcasting because it outlines a disciplinary action that can be taken against a violator. Specifically, it holds accountable the “senior official of an Executive branch agency who authorizes or directs funds for publicity or propaganda purposes within the United States”\(^\text{183}\). By adopting this legislation, the concern over the government’s continued use of VNRs would be resolved because the government could not escape responsibility by ignoring an advisory opinion. Another positive aspect of the Stop Government Propaganda Act is its allowance of a private right of action. “A person may bring a civil action for a violation of [this act] for the person and for the United States Government.”\(^\text{184}\)

Therefore, The Stop Government Propaganda Act should be adopted in order to hold the government responsible for its role in eroding the American public’s First Amendment rights. The Truth in Broadcasting Act would be strengthened because it would not be a one-sided regulation of broadcasters.

\(^{181}\) Id. § 3(1)-(3).
\(^{183}\) Stop Government Propaganda Act, S. 266, 109th Cong. § 4(a) (2005) (A violator is “liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of funds appropriated” for the propaganda.).
\(^{184}\) Id. § 4(c)(1).
The Truth in Broadcasting Act should be adopted for several reasons: (1) it is a Constitutional exercise of Congress' legislative power; (2) it will further the Supreme Court's determination that the First Amendment right of the public is more important than that of the broadcaster; and (3) it will curb broadcast media's reliance on government provided VNRs. By continuing to conceal the government as the source, VNRs violate the media's independence and prevent it from exposing the government's wrongdoing.185 As a result, the American public is losing confidence in the media's ability to protect it from the government's domestic propaganda. In addition, Americans are not being afforded the opportunity to evaluate opposing opinions because the sources are hidden. The Truth in Broadcasting Act is a step in the right direction.

Although the proposed legislation could include a more detailed set of consequences for violating the disclaimer requirement, it can always be amended. On the other hand, the FCC already has the authority under the Federal Communications Act of 1934 to discipline violators with fines and license revocation.186 As long as the FCC is committed to enforcing the disclaimer requirement, the Truth in Broadcasting Act will serve Congress' intent of holding the broadcast media accountable for what it brings into Americans' living rooms.

By Antonella Aloma Castro*

185. Morse, supra note 79, at 872.
186. See 47 U.S.C. § 151 (2000) ("There is hereby created a commission to be known as the 'Federal Communications Commission' which shall execute and enforce the provisions of this Act"); see, e.g., 18 U.S.C. § 1464.

* I would like to thank Bradley, my fiancé, for always supporting me and giving me what I need to accomplish my goals. In addition, I thank the American people for supplying me with motivation to write this Comment. Finally, a special thanks to all the staffers and editors of the Entertainment Law Review who worked hard to turn my writing into something worthy of publication.