
FCC Enforcement Monitor

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Headlines:

- *FCC Begins to Move on Pending Video News Release Complaints*
 - *Failure to Monitor Tower Lighting Results in \$12,000 Penalty*
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Video News Releases Garner \$4,000 Fines for Two Television Broadcasters

After a flurry of complaints from advocacy groups a few years ago raised the issue at the FCC, the Commission has been pondering how to treat Video News Releases (VNRs) with respect to its sponsorship identification rule. The result has been a growing backlog of enforcement investigations involving VNRs. However, the release of two decisions proposing fines for stations that aired all or part of a VNR without identifying the material on-air as being sponsored appears to indicate that the dam is about to break. In its first VNR enforcement actions in years, the FCC fined two unrelated television stations \$4,000 each for violating the sponsorship identification requirements found in Section 317 of the Communications Act and Section 73.1212 of the FCC's Rules.

Under Section 73.1212, also known as the sponsorship identification rule, broadcasters must announce on-air that the material is sponsored (aired in exchange for money, services or other valuable consideration), and identify the sponsoring party. The sponsorship identification rule indicates that "service or other valuable consideration shall not include any service or property furnished without or at a nominal charge for use on, or in connection with a broadcast unless it is so furnished in consideration for an identification of any person, product, service, trademark, or brand name beyond identification reasonably related to the use of such service or property on the broadcast." This part of the rule requires broadcasters, in certain instances, to provide sponsorship identification even though no money, service or other valuable consideration changed hands.

In the first case, the FCC initiated a 2007 inquiry and issued a subsequent Notice of Apparent Liability ("NAL") following receipt of a joint complaint filed by two consumer advocacy groups. The NAL alleged that a Minnesota television station failed to transmit the required sponsorship identification information when airing a 2006 VNR produced by General Motors ("GM"). According to the NAL, the VNR focused on convertible cars and included information on only GM cars, an interview with a GM employee, and 12 separate shots of cars manufactured by GM.

In defending its decision not to air a sponsorship identification notice, the station asserted that the VNR was part of a "news report relating to new car designs that included the GM VNR" and that the VNR had

been provided, for no consideration, by an affiliate of the broadcaster. Furthermore, the broadcaster claimed that the FCC inquiry was an “impermissible encroachment of the Station’s editorial discretion” and that its “news report was no different from the use of a press release, and that the Commission has specifically recognized that a broadcaster is not required to make a sponsorship announcement in cases in which news releases are furnished to a station and editorial comment therefrom is used during a program.”

However, between 1960 and 1975, Congress and the FCC collectively provided 35 examples of consideration that would (or would not) trigger the obligation to provide sponsorship identification. In the NAL, the FCC referred to some of those examples in determining that a fine would be appropriate in this case. Among the examples given were:

(a) A bus company prepares a scenic travel film which it furnishes free to broadcast stations. No mention is made in the film of the company or its buses. No announcement is required because there is no payment other than the matter furnished and there is no mention of the bus company.

(b) Same situation as in (a), except that the bus, clearly identifiable as that of the bus company which supplied the film, is shown fleetingly in highway views in a manner reasonably related to that travel program. No announcement is required.

(c) Same situation as in (a), except that the bus, clearly identifiable as that of the bus company which supplied the film, is shown to an extent disproportionate to the subject matter of the film. An announcement is required.

The FCC stated that the GM VNR was not exempt from sponsorship identification because the depiction of GM’s success was “disproportionate to the subject matter of the program segment” and the inclusion of 12 shots of GM cars, including some close ups, could not be considered “fleeting or transient.” As stated in the NAL, the sponsorship identification rule is “grounded in the principle that listeners and viewers are entitled to know who seeks to persuade them,” and the FCC has “broad authority to investigate complaints of this nature.” The base forfeiture for sponsorship identification violations is \$4,000, and the FCC assessed that amount against this particular broadcaster for the violation.

In the second case, also initiated as a consequence of a joint complaint filed by two consumer advocacy groups, the NAL alleges that a New Jersey television station failed to provide adequate sponsorship identification prior to the broadcast of a VNR associated with cold remedies. In this instance, the VNR, sponsored by a local hospital, was broadcast on the station in October 2006. The station provided the hospital’s sponsorship information in airing the VNR. The VNR provided general information about the transmission and treatment of colds and included an interview with a doctor from New York University. During the interview, the doctor indicated that in order to speed recovery, individuals could “take an intranasal zinc preparation, like Zicam.” According to the NAL, the VNR contained four separate shots of the Zicam product. The doctor also suggested that cold sufferers might consider taking a decongestant and drinking chicken soup, but did not provide any other specific product references.

The FCC concluded that the product identification was again disproportionate to the subject matter and required that the makers of Zicam be identified as a sponsor as well. The FCC also stated that the hospital sponsorship identification information may have resulted in “viewer confusion” since the VNR was about the Zicam product and not about the local hospital. The FCC therefore levied the base forfeiture of \$4,000.

For additional firm publications on sponsorship identification issues, please visit us at:
<http://www.commlawcenter.com/sponsorship-id-payolaplugola>.

Lights Out Results in \$12,000 Fine for a Georgia Tower Owner

The FCC's recent enforcement activities continue to focus on tower violations, including failure to exhibit and monitor tower lighting in accordance with Sections 17.47 and 17.51 of the FCC's Rules. According to the NAL, the FCC has proposed a \$12,000 forfeiture for a Georgia tower owner for failing to light and monitor its 226 foot tower.

As a consequence of a December 2010 complaint, Atlanta field agents requested that the Federal Aviation Administration issue a Notice to Airmen ("NOTAM") alerting pilots of the hazard created by the unlit tower. The field agent contacted the tower owner, who allegedly admitted that he "had no means to monitor the towers lights and was unaware of the NOTAM process, thereby violating Section 17.47(a) of the FCC's Rules, which mandates that tower owners confirm at least once every 24 hours that the antenna structure is properly lit. Such observations may be undertaken manually or through the use of an automated monitoring system that has the capability to notify the broadcaster if the lights cease to operate. Failure to illuminate a qualifying tower results in a violation of Section 17.51, which requires certain towers to display obstruction lights between sunset and sunrise.

Based on power consumption records from the local utility provider, the FCC later determined that the tower had been unlit for a period of two months. The base fines for failing to conduct the required observations and to display red obstruction lights are \$2,000 and \$10,000 respectively, resulting in the \$12,000 forfeiture here.

If you have any questions about the content of this publication, please contact the authors below, or the Pillsbury attorney with whom you regularly work.

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