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Via Federal Express

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Re: File No. EB-06-IH-2701; WXIN(TV), Indianapolis, Indiana

Dear Messrs. Bash and Scheibel:

Tribune Television Company, licensee of WXIN(TV), Indianapolis, Indiana (“WXIN”), hereby responds to the Commission Enforcement Bureau letter dated August 11, 2006 (the “LOI”), concerning whether WXIN “may have violated sections 317 of the Communications Act of 1934, as amended, 47 U.S.C. sec. 317, and section 73.1212 or 76.1615 of the Commission Rules, by airing certain video news releases (‘VNRs’) or satellite media tours (‘SMTs’) without proper sponsorship identification.”¹ The LOI was addressed to WXIN’s parent company, Tribune Broadcasting Company (“Tribune”), in connection with seven stations that it controls. (The LOI was mailed to the address of one of the stations, WGN-TV.) Because WXIN is the licensee of the station that aired one of the broadcasts referred to in the LOI, this response is submitted on its behalf. Each of the seven stations is responding separately.

The apparent basis for this investigation, according to the LOI, is a study by the Center for Media and Democracy (“CMD”) that suggests “certain broadcast stations licensed to Tribune or its subsidiaries . . . allegedly aired one or more of 36 VNRs and/or related SMTs without proper sponsorship identification.” Specifically, the LOI asserts that “[a]ccording to the CMD Study, [WXIN] allegedly aired a VNR/SMT-based segment containing material on behalf of the following person: Trend Micro (Station

¹ Section 73.1615 applies to origination cablecasting by cable television system operators, and is inapplicable to broadcast stations.

WXIN(TV), Indianapolis, Indiana), on November 9, 2005.” WXIN first will explain the background of the broadcast in question, followed by responses to the LOI’s specific questions. We will then discuss briefly the applicable law.

I. The WXIN Broadcast

On November 9, 2005, WXIN broadcast a segment featuring Kurt Knutsson, known as the “Cyberguy,” at approximately 8:35 a.m. The segment addressed the risk to Internet users of “phishing,” a scam by which a misleading Internet link is placed into an e-mail to fool a person into supplying personal financial information to the scammer. Although the segment includes material taken from a VNR referring to Trend Micro, the WXIN personnel involved in the broadcast were not aware that VNR material was in the story.

In the usual course, each week the WXIN Morning News broadcasts “Cyberguy” segments on Mondays, Wednesdays and Fridays. The “Cyber Guy” feature typically covers computer and Internet-related topics, including new web sites, hardware and software issues, and viruses and other problems that computer users may encounter on the Internet.

The “Cyberguy” video packages are obtained by WXIN from KTLA in afternoon satellite feeds sent on Monday, Wednesday and Friday. In November 2005, the station had been receiving the “Cyberguy” feeds three times per week for about three years. The feeds are recorded and reviewed by a program producer for suitability for the station’s Morning News program. Segments deemed suitable are recorded onto a show tape for running during the news program. KTLA also customarily supplies a script for each “Cyberguy” segment that is entered into the WXIN script file.

On Monday, November 7, 2005 WXIN received the “Cyberguy” segment about “phishing” and the producer approved it for broadcast. At the time of that story review, the producer was not aware that it included material taken from a VNR. The segment was recorded for the broadcast and ran in the WXIN Morning News at approximately 8:35 a.m. on November 9, 2005. The segment included live stand-ups by Knutsson before and after the taped package sent to WXIN by satellite. WXIN followed the “Cyberguy” segment with a live, in-studio interview with an FBI agent discussing Internet security issues and protection against Internet predators.

WXIN maintains recordings of its news programs for only 30 days. The station does not have a copy of the segment as broadcast on November 9, 2005. The pre-recorded portion of the story broadcast by WXIN was the same as the pre-recorded version of this “Cyberguy” segment broadcast by WPIX on November 9, 2005. (WPIX has produced a tape of the relevant news segment in its response to LOI).

Neither WXIN, nor any of the station’s employees, received any payment or consideration in any form to broadcast the “Cyberguy” segment on November 9, 2006. Nor did they receive notice of the existence of any payments made in the production chain of the segment that would trigger any disclosure requirement. Aside from taking in

the video segment off the KTLA feed and recording it for later broadcast, and integrating the live intro and closing feed around the taped package sent by KTLA, WXIN had no involvement with the production of the segment.

In November 2005, the policy of the WXIN News Department was that the station's news programs should not use VNRs except for b-roll material unless authorized by senior news management. Because no one at WXIN was aware that the "Cyberguy" story contained VNR material, no sponsorship identification was broadcast with the story.

II. Questions

Question 1: As described above, the "Cyberguy" segment in the WXIN Morning News broadcast on November 9, 2005 included VNR material that referred to Trend Micro. WXIN was not involved in the inclusion of the VNR material into the production of the segment.

- a. WXIN received the "Cyberguy" segment from KTLA by satellite on November 7, 2005.
- b. WXIN received a script of the "Cyberguy" segment from KTLA.
- c. WXIN received the "Cyberguy" segment from KTLA on November 7, 2005.
- d. WXIN broadcast the "Cyberguy" segment containing VNR material on November 9, 2005 at approximately 8:35 a.m.
- e. WXIN does not have a video copy of the November 9, 2005 Morning News broadcast.
- f. WXIN possess a script of the "Cyberguy" segment broadcast on November 9, 2005.
- g. WXIN was not aware that the "Cyberguy" segment contained VNR material when it was received from KTLA and broadcast by WXIN.
- h. WXIN had no reason to believe that any person involved in the production of the "Cyberguy" segment paid or received consideration for the inclusion of material in the segment.
- i. WXIN did not use any sponsorship identification in connection with the broadcast of the "Cyberguy" segment.

Question 2: To the best of our knowledge, no WXIN employee or representative, or any employee or representative of any other entity controlled by Tribune, received or was promised any consideration from any source in exchange for airing the VNR material at issue.

Question 3:

- a. WXIN policy requires compliance with the Communication Act and all Commission rules and policies, including the sponsorship identification rules. Talent agreements used at WXIN include a signed affidavit attesting that on-air talent have not accepted and will not accept payment from third parties for the inclusion of broadcast material.
- b. WXIN News Department policy does not allow the use of material from VNRs in news programs except for "b-roll" or file footage, unless the use of the VNR material has been approved by senior news management. In those cases, station policy requires identification of the source with a courtesy or similar on-screen credit.

Question 4: Enclosed with this letter are the following documents relevant to the inquiry:

- a. A copy of the program rundown, showing major segments of the WXIN Morning News program broadcast on November 9, 2005 from 8:00 a.m. to 9:00 a.m.
- b. A copy of the script of the "Cyberguy" segment broadcast by WXIN on November 9, 2005.
- c. A copy of the affidavit used in WXIN talent agreements.

III. WXIN Did not Violate the Sponsorship Identification Rules

Three sections of the Commission's sponsorship identification rules arguably apply to this inquiry. Two of those sections were promulgated under Section 317 of the Communications Act, and one was enacted under Section 507 of the Communications Act.

A. Section 317 of the Communications Act

Section 317 of the Communications Act provides, in relevant part:

(a)(1) All matter broadcast by any radio station for which any money, service or other valuable consideration is directly or indirectly paid, promised to or charged or accepted by, the station so broadcasting, from any person, shall, at the time the same is so broadcast, be announced as paid for or furnished, as the case may be, by such person: Provided, That "service or other valuable consideration" shall not include any service or property furnished without charge or at a nominal charge for use on, or in connection with, a broadcast unless it is so furnished in consideration

for an identification in a broadcast of any person, product, service, trademark or brand name beyond an identification which is reasonably related to the use of such service or property on the broadcast.

(2) 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 or any program involving the discussion of any controversial issue 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.

42 U.S.C. § 317(a).

The Commission enacted two sponsorship identification rules under the authority of Section 317(a). The first rule requires sponsor identification when the station has received consideration from a third party in exchange for the broadcast:

When a broadcast station transmits any matter for which money, service or other valuable consideration is either directly or indirectly paid or promised to, or charged or accepted by such station, the station, at the time of the broadcast shall announce: (1) that such matter is sponsored, paid for, or furnished, either in whole or in part, and (2) By whom or on whose behalf such consideration was supplied: provided, however, that "service or other valuable consideration" shall not include any service or property furnished either 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 an identification which is reasonably related to the use of such service or property on the broadcast.

47 C.F.R. § 73.1212(a).

The Commission's second sponsorship identification rule was enacted under the permissive authority granted in Section 317(a)(2), and relates only to "any political broadcast matter or any broadcast matter involving the discussion of a controversial issue":

In the case of any political broadcast matter or any broadcast matter involving the discussion of a controversial issue of public importance for which any film, record, transcription, talent, script, or other material or service of

any kind is furnished, either directly or indirectly, to a station as an inducement for broadcasting such matter, an announcement shall be made both at the beginning and conclusion of such broadcast on which 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: Provided, However, That in the case of any broadcast of 5 minutes' duration or less, only one such announcement need be made either at the beginning or conclusion of the broadcast.

47 C.F.R. § 73.1212(d).

B. Section 507 of the Communications Act

Section 507 of the Communications Act requires broadcast licensees to make an appropriate sponsorship identification in several circumstances where, in the course of program production, consideration is furnished by a third party for the inclusion of material in the program for broadcast, or for the broadcast of a program. The Commission has described the thrust of Section 507:

[S]ection 507(a) requires that each station who has accepted or agreed to accept consideration for the airing of program matter, or any person who has paid or has agreed to so pay any such employee, must disclose that fact to the station prior to the airing of the matter. Similarly, section 507(b) imposes such a duty of disclosure upon any person involved in the production or preparation of broadcast matter who receives or agrees to receive, or provides or promises to provide, such consideration. The disclosure must be made to each payee's employer, the person for whom the material is being produced, or the licensee. Section 507(c) requires this disclosure by anyone who supplies broadcast matter to the person to whom he or she provides the matter. In this way, the information must ultimately be provided up the chain of production and distribution, before the time of broadcast, to the licensee so that it can timely air the required disclosure.

Commission Reminds Broadcast Licensees, Cable Operators and Others of Requirements Applicable to Video News Releases, 20 FCC Rcd. 8593 (2005) (the "Public Notice"), at 2-3. Under Section 317(b), a station that has received information under Section 507 must broadcast a sponsorship identification even if the station received no consideration itself.

Pursuant to that provision, the Commission rules require licensees to make the proper sponsorship identification if they receive a report required under Section 507:

In any case where a report has been made to a broadcast station as required by section 507 of the Communications Act of 1934, as amended, of circumstances which would have required an announcement under this section had the consideration been received by such broadcast station, an appropriate announcement shall be made by such station.

47 C.F.R., § 73.1212(c).

C. The Broadcast at Issue Did Not Require the Inclusion of a Sponsorship Identification Announcement

The Commission historically has interpreted the Congressional intent under Section 317 to be that “not all material broadcast necessitates sponsorship identification.” *Complaint of Barry G. Silverman Against Station KOOL-TV*, 63 F.C.C.2d 507, ¶ 15 (1977). Considering the plain language of Section 317, the Commission recognizes that “Congress intended to limit this requirement to certain well-defined program types.” *Id.* Applying that narrow interpretation, the Commission implemented rules which providing the limited circumstances under which sponsorship identification is required. *See generally* 47 C.F.R. 73.1212; 47 U.S.C. 317.

Here, the segment at issue – broadcast within a bona fide newscast – falls outside the scope of material requiring sponsorship identification. Neither WXIN nor its employees or agents received consideration or assumed any obligation to broadcast the material at issue. WXIN did not receive a report indicating that someone in the chain of production or distribution of the VNR paid or received money for inclusion of material that was broadcast by WXIN. In any event, requiring station investigation into whether any such transactions occurred clearly would be beyond the station’s “reasonable diligence” obligation. Lastly, Section 73.1212(d) of the Commission’s rules, regarding the broadcast of matters of a political or controversial nature, has no application to the segment at issue.

1. WXIN’s Use of a VNR in its News Program Did Not Require a Sponsorship Identification Under Rule 73.1212(a) Because WXIN Received No Payment, Service or Other Valuable Consideration for the Broadcast

The critical element in the analysis under Rule 73.1212(a), as the Commission has plainly stated, is a broadcaster’s receipt of payment or consideration in exchange for the broadcast of matter. In the Public Notice, the Commission noted that the Communications Act generally requires “that, when payment has been received or promised to a broadcast licensee . . . for the airing of program material, at the time of the airing, the station . . . must disclose that fact and identity of who paid or promised to provide the consideration.” Public Notice at 2. As the Commission has explained:

The purpose of Section 317 of the Act and section 73.1212 of the rules is to require that the audience be clearly informed that it is hearing or viewing matter which has been paid for when such is the case, and that the person

paying for the broadcast of the matter be clearly identified. Accordingly, a sponsorship identification announcement must state in language understandable to a majority of the audience that the station has received consideration for the matter broadcast and from whom, the consideration was received.

Application of Sponsorship Identification Rules, 41 R.R.2d 761, 762 (1977). See also *Advertising Council Request*, 17 F.C.C.2d 22616, 22620-21 (2002). In the absence of consideration, however, no sponsorship identification is required. See *Complaint of Barry G. Silverman Against Station KOOL-TV*, 63 F.C.C.2d 507, ¶ 15 (1977) (finding 73.1212(a) “clearly inapplicable” where there was no evidence that the licensee “was paid, directly or indirectly, any consideration for the presentation of the . . . spot announcement”).

Moreover, even when a licensee receives program material for free, the sponsorship identification rules do not apply. The Commission acknowledged that principle in its Public Notice, stating that “Section 317(a)(1) of the Act provides generally that no sponsorship identification is necessary with regard to material that is furnished to the licensee ‘without charge or at a nominal charge.’” Public Notice at 3.² The Commission’s rules similarly acknowledge that the furnishing of “any service or property” to a station “either without or at a nominal charge” does not constitute consideration requiring a sponsorship identification. See 47 C.F.R. 73.1212(a). The Commission has addressed just such a circumstance in one of its illustrative interpretations of the sponsorship identification rules:

News releases are furnished to a station by Government, business, labor and civic organizations, and private persons,

² That rule was not always so limited. In 1960, the Commission ruled records given to a station for air play by a record promoter “are intended by the supplier to be, or have the practical effect of being an inducement to play those particular records or any other records on the air, and the broadcast of such records requires an appropriate announcement pursuant to Section 317.” *Sponsorship Identification of Broadcast Material*, 40 FCC 69 (1960). The Commission considered the Congressional intent underlying Section 317 “was clearly to prevent deception on the part of the public growing out of concealment of the fact that the broadcast of particular program material was induced by consideration received by the licensee.” *Id.* But Congress reversed the Commission’s ruling by amending Section 317 to add a “proviso” stating no sponsorship identification is required where a “broadcaster was given free, or at nominal charge, programs, products or services to be used on air.” *Complaint of Nat’l Ass’n for Better Broadcasting*, 4 FCC Rcd. 4988, 4989 (1989). The Commission has described the Congressional intent:

The House Report explained that the purpose of the proviso was to avoid some of the hardships resulting from the Commission’s new interpretation of Section 317 by establishing “a general rule that an announcement shall not be required under Section 317 with respect to any service or property ‘furnished for broadcast without charge or at nominal charge,’” unless the circumstances were within the exception spelled out in the proviso. In short, the purpose of adding the proviso was to limit the scope of cases requiring a sponsorship identification under Section 317.

Id. (footnote and citation omitted). See *Loveday v. FCC*, 707 F.2d 1443, 1449 (D.C. Cir. 1983).

with respect to their activities, and editorial comment therefrom is used on a program. No announcement is required.

Applicability of Sponsorship Identification Rules, 40 FCC 141 (1963) (interpretation 11).

Here, there were no payments to WXIN for broadcast of the VNR, nor did WXIN agree to broadcast the VNR in exchange for receiving the video. There simply was no quid pro quo; the station had no obligation, contractual or otherwise, to broadcast the VNR. The VNR was supplied to WXIN without charge by a sister station, and under Rule 73.1212(a), the furnishing of “any service or property” to a station “either without or at a nominal charge” does not constitute consideration requiring a sponsorship identification. Accordingly, WXIN did not violate Section 317 or Rule 73.1212(a) by broadcasting the VNR in the news program without any sponsorship identification.

2. WXIN’s Use of a VNR in its News Program Did Not Require a Sponsorship Identification Under Rule 73.1212(c) Because the Station Did Not Receive a Report Under Section 507 of Third-Party Consideration that Would Trigger Any Disclosure Obligation and WXIN Exercised “Reasonable Diligence” Under the Circumstances

Under the Communications Act, station employees and other persons involved in the production, preparation or distribution of matters intended for broadcast are required to disclose to the licensee whether they have received or have knowledge that anyone has received consideration for the inclusion of any matter as part of the broadcast. *See* 47 U.S.C. § 507(a)-(c). If the licensee receives such a report, it is required to make a sponsorship identification announcement. *See* 47 U.S.C. § 317(b); 47 C.F.R. § 73.1212(c). Absent such a report, a licensee is expected to exercise “reasonable diligence” to determine whether sponsorship identification issues exist. *See* 47 U.S.C. § 317(c); 47 C.F.R. 73.1212(b).

Here WXIN did not receive any report that would trigger the requirements of Act or the Commission’s rules to make a sponsorship identification announcement. Moreover, WXIN exercised the “reasonable diligence” under the circumstances to determine whether a sponsorship identification was necessary, and rightly determined that none was required.

As an initial matter, because WXIN was not required to make a sponsorship identification in the first instance, the station could not have violated sections 317(c) of the Act or 73.1212(b) of the Commission’s rules. The Commission has held that there is “no basis to fault a licensee for lacking reasonable diligence in a situation in which there has been no failure to make a required announcement.” *Applications of Metroplex Communications, Inc.*, 5 FCC Rcd. 5610, ¶ 5 (1990). The “reasonable diligence” requirement of Section 317(c) and Rule 73.1212(b) “was intended to fix the licensee’s level of responsibility for a failure to make required announcements and not to establish an independent basis for culpability.” *Id.* Thus, a finding that the news broadcast at issue did not require sponsorship identification negates any question of liability for any

supposed failure to exercise reasonable diligence to discover sponsorship identification issues.

Under the Act and the Commission's rules, a licensee is required only to exercise "reasonable diligence to obtain from its employees, and from other persons with whom it deals directly in connection with any program or program matter for broadcast, information to enable such licensee to make the announcement required" by Sections 317 and 73.1212. See 47 U.S.C. § 317(c); 47 C.F.R. § 73.1212(b). Thus, the Commission has concluded that it cannot "expect the licensee to be the guarantor of disclosure" under Section 507 of the Act. See *Broadcast Announcement of Financial Interests of Broadcast Stations and Networks and their Principals and Employees in Services and Commodities Receiving Broadcast Promotions*, 76 F.C.C.2d 221, ¶ 6 (1980). Further, "the reasonable diligence expected of a station with respect to programs it has not produced . . . does not require that the station investigate the circumstances surrounding the production of such programs." *Id.*

This should be especially true in the context of news broadcasts, where there may be several sources of information and footage, that may include statements by representatives of various entities and groups, included in the script or video for any given news segment. As the Commission has noted, it would be unreasonable to require licensees to "investigate the circumstances surrounding the production" of every element of a news story not produced by the broadcasting station.

In this case WXIN had no reason to undertake investigation because the station was not aware that the "Cyberguy" segment contained VNR material. WXIN was aware that the segment was produced by its sister station KTLA, and so could justifiably feel that any necessary Section 317 report would be forthcoming if necessary. Under the circumstances, it cannot reasonably be held that WXIN failed to meet any applicable due diligence obligation.

3. WXIN's Use of VNR Material in its News Program Did Not Require a Sponsorship Identification Under Rule 73.1212(d) Because the VNR Material Did Not Address a Controversial Issue of Public Importance.

Commission Rule 73.1212(d) requires a sponsorship identification in limited circumstances based on a third party's delivery of material to a station "as an inducement for broadcasting such matter," but that requirement does not apply here. That rule applies only if the material broadcast is "political broadcast matter or any broadcast matter involving the discussion of a controversial issue of public importance." 47 C.F.R. § 73.1212(d). Plainly the VNR material broadcast by WXIN was not "political" matter.

Nor did the VNR material involve discuss "a controversial issue of public importance." To apply Rule 73.1212(d), the Commission determines the controversy of broadcast material for purposes of implementing Section 73.1212(d) under an analysis used to apply the old Fairness Doctrine. Under that standard, "it must be shown that the issue presented 'is the subject of vigorous debate with substantial elements of the community in opposition to one another.'" *Barry Silverman*, 63 F.C.C.2d 507, 513

(1977) (quoting Broadcast Bureau below; holding issue whether commercial television adequately serves public interest is not controversial issue of public importance).

The issues discussed in the "Cyberguy" segment were not controversial issues of public importance. It plainly cannot be said that the existence of the "phishing" scam, and the efforts of software makers to build protections against the scam, was the subject of vigorous public debate with substantial elements of the community in opposition to one another. Accordingly, Rule 73.1212(d) does not apply to the WXIN broadcast.

IV. Conclusion

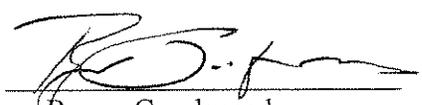
In sum, the circumstances of the broadcast by WXIN of a news story including VNR material fit precisely into the Commission's explanation in the Public Notice:

In situations in which a broadcast licensee has not directly received or been promised consideration, has not received any Section 507 report that material has been paid for from its employees or others that must make such reports pursuant to that section of the Act, and, acting with the requisite diligence, has no information concerning the making of such promise or payment, Section 317(a)(1) of the Act provides generally that no sponsorship identification is necessary with regard to material that is furnished to the licensee "without charge or at a nominal charge."

Accordingly, WXIN submits there is no basis for further Commission action in this matter. Any questions concerning this matter should be directed to the undersigned.

Respectfully submitted,

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Encl.