

product, service, trademark, or brand name beyond an identification reasonably related to the use of such service or property on the cablecast.³

3. On November 11, 2006, the Center for Media and Democracy (“CMD”) and Free Press jointly filed a complaint against Comcast alleging that CN8 transmitted VNRs without providing the sponsorship identification required by Section 76.1615.⁴ Specifically, CMD alleged that on September 26, 2006, CN8 transmitted two VNRs, one produced for General Mills concerning the “Wheaties Fit to Win Challenge” and one produced for Allstate concerning life insurance. CMD also alleged that on September 28, 2006, CN8 transmitted a VNR produced for Trend Micro Software concerning laptop computer security and that company’s security software, and on October 3, 2006, transmitted a VNR produced for General Mills concerning the 75th anniversary of their product “Bisquick.”

4. On April 26, 2007, the Enforcement Bureau (“Bureau”) issued a letter of inquiry⁵ to Comcast to determine, among other things, whether the VNRs were transmitted as alleged, and if so, whether Comcast disclosed the sources of the VNRs in its cablecasts.

5. Comcast responded to the letter of inquiry on July 2, 2007.⁶ Comcast admits that on September 26 and 28 and October 3, 2006, respectively, CN8, transmitted portions of the VNRs produced on behalf of the following entities without any sponsorship identification: General Mills “Wheaties Fit to Win Challenge;” Allstate Insurance; Trend Micro Software “Remote File Lock”; and General Mills “Bisquick 75th Anniversary.”⁷ Comcast argues as a threshold matter that Section 76.1615 appears to be invalid because the statutory provision underlying that rule, Section 317 of the Communications Act, as amended (the “Act”), applies only to broadcasting and not to cablecasting.⁸

³ 47 C.F.R. § 76.1615. The rule also contains additional requirements for cable operators under certain circumstances.

⁴ See Complaint of Timothy Karr, Campaign Director, Free Press, and Diane Farsetta, Senior Researcher, Center for Media and Democracy, dated November 14, 2006 (File No. EB-06-IH-5669) (“*Complaint*”). The *Complaint* also cited a cablecast carried by Comcast on September 21, 2006, which allegedly failed to provide the required sponsorship identification. On September 21, 2007, we issued an *NAL* to Comcast finding that its cablecast of portions of a VNR produced on behalf of “Nelson’s Rescue Sleep” apparently violated the sponsorship identification requirements of Section 76.1615. *Comcast Corporation*, Notice of Apparent Liability for Forfeiture, DA 07-4005 (EB rel. Sept. 21, 2006).

⁵ See Letter from Hillary S. DeNigro, Chief, Investigations & Hearings Division, Enforcement Bureau, to Comcast Corporation, dated April 26, 2007 (“*LOP*”).

⁶ See Letter from Megan Anne Stull, Esquire, Willkie, Farr & Gallagher LLP, Counsel for Comcast Corporation, dated July 2, 2007 (“*Response*”).

⁷ See *id.* at 4-7. Portions of the General Mills “Wheaties Fit to Win Challenge” and the Allstate Insurance VNRs were cablecast on September 26, 2006. Portions of the Trend Micro Software “Remote File Lock” VNR were cablecast on September 28, 2006. Portions of the General Mills “Bisquick 75th Anniversary” VNR were cablecast on October 3, 2006.

⁸ See *Response* at 1-2. The Commission has previously concluded that the sponsorship identification requirements also apply to origination programming by cable operators. See *Commission Reminds Broadcast Licensees, Cable Operators and Others of Requirements Applicable to Video News Releases*, Public Notice, 20 FCC Rcd 8593, 8594, n.6 (2005); *Amendment of the Commission’s Sponsorship Identification Rules (Sections 73.119, 73.289, 73.654, 73.789 and 76.221)*, Report and Order, 52 FCC 2d 701 (1975), ¶ 37 (“We see no reason why the rules for such cablecasting should be different from those for broadcasting, for the consideration of keeping the public informed (continued....)”).

Comcast states that although it does not believe that the Commission has the authority to apply Section 317 in the context of cable programming or to enforce Section 76.1615 of the Commission's rules, it nonetheless responded to the inquiries set forth in the LOI.⁹ Comcast contends that even assuming the validity of the rule, CN8's use of the VNR material did not violate Section 76.1615.¹⁰ Specifically, Comcast argues that no sponsorship identification is required unless consideration is received or promised as part of an express or implied agreement in exchange for use of the VNR. Comcast further states that CN8 and its employees did not receive and were not promised any consideration from any source in exchange for cablecasting the VNR material on September 26 and 28, and October 3, 2006.¹¹

III. DISCUSSION

6. Under Section 503(b)(1) of the Act, any person who is determined by the Commission to have willfully or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission shall be liable to the United States for a monetary forfeiture penalty.¹² To impose such a forfeiture penalty, the Commission must issue a notice of apparent liability, and the person against whom the notice has been issued must have an opportunity to show, in writing, why no such forfeiture penalty should be imposed.¹³ The Commission will then issue a forfeiture if it finds by a preponderance of the evidence that the person has violated the Act or a Commission rule.¹⁴ We conclude under this standard that Comcast is apparently liable for a forfeiture for its apparent willful and repeated violation of Section 76.1615 of the Commission's rules.

7. Section 76.1615(a) of the Commission's rules makes clear that when a cable television system operator engages in origination cablecasting, it must identify the sponsor of material whenever that operator accepts "money, service or other valuable consideration" to carry that material. The phrase "service or other valuable consideration," however, does not include "service or property furnished either

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about those who try to persuade it would appear to be the same in both cases."). We will not revisit that conclusion here.

⁹ See Response at 3.

¹⁰ See *id.*

¹¹ See *id.* at 3-4, 5, 7. In addition, Comcast notes that it paid CNN Newsource a licensing fee for access to the VNR material. See *id.* at 5.

¹² See 47 U.S.C. § 503(b)(1)(B); 47 C.F.R. § 1.80(a)(1); see also 47 U.S.C. § 503(b)(1)(D) (forfeitures for violation of 14 U.S.C. § 1464). Section 312(f)(1) of the Act defines willful as "the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate" the law. See 47 U.S.C. § 312(f)(1). The legislative history to Section 312(f)(1) of the Act clarifies that this definition of willful applies to both Sections 312 and 503(b) of the Act, H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982), and the Commission has so interpreted the term in the Section 503(b) context. See, e.g., *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991) ("*Southern California Broadcasting Co.*"). The Commission may also assess a forfeiture for violations that are merely repeated, and not willful. See, e.g., *Callais Cablevision, Inc.*, Notice of Apparent Liability for Monetary Forfeiture, 16 FCC Rcd 1359 (2001) (issuing a Notice of Apparent Liability for, *inter alia*, a cable television operator's repeated signal leakage). "Repeated" merely means that the act was committed or omitted more than once, or lasts more than one day. *Southern California Broadcasting Co.*, 6 FCC Rcd at 4388, ¶ 5; *Callais Cablevision, Inc.*, 16 FCC Rcd at 1362, ¶ 9.

¹³ See 47 U.S.C. § 503(b); 47 C.F.R. § 1.80(f).

¹⁴ See, e.g., *SBC Communications, Inc.*, Forfeiture Order, 17 FCC Rcd 7589, 7591, ¶ 4 (2002) (forfeiture paid).

without or at a nominal charge for use on, or in connection with, a cablecast,” *unless* such service or property is “furnished in consideration for an identification of any person, product, service, trademark or brand name beyond an identification reasonably related to the use of such service or property on the cablecast.”¹⁵ Thus, while the proviso to the rule exempts service or property furnished without charge for use on or in connection with a cablecast from the duty to announce the sponsor or source of such material, the exception to that proviso preserves the duty when there is too much focus on a product or brand name in the programming. We now turn to consideration of Comcast’s use of each of these VNRs without providing sponsorship identification.

A. General Mills “Wheaties Fit to Win Challenge”

8. CN8’s cablecast featuring the General Mills “Wheaties Fit to Win Challenge” was part of a daily segment focusing on consumer issues during the program “Art Fennell Reports” on September 26, 2006.¹⁶ The segment, concerning health and fitness, featured the General Mills “Wheaties Fit to Win Challenge,” a program promoting nutrition and exercise, and included portions of a VNR produced on behalf of General Mills and its “Wheaties” brand.¹⁷ The VNR material used in this consumer-issues segment contains both mentions of the “Wheaties” brand name and extensive images of the product.¹⁸ Indeed, it is the only product shown or mentioned during the segment. We do not believe that this type of promotional material, furnished by a product manufacturer, can or should be considered within the scope of the proviso, which is directed to material that contains only fleeting or transient references to products or brand names.¹⁹ We conclude that this material falls within the exception specifically set forth in the proviso to the rule and that a sponsorship announcement was required. Because the VNR itself was the “valuable consideration” provided to CN8 and because it was not within the scope of the proviso for nonpromotional material, we reject Comcast’s argument that it received no consideration for the cablecast. We therefore find that Comcast violated Section 76.1615(a) of the Commission’s rules by willfully airing the VNR material at issue without proper sponsorship identification.²⁰

B. Allstate Insurance

9. CN8 cablecast a report concerning life insurance as part of a daily segment focusing on consumer issues during the program “Art Fennell Reports,” on September 26, 2006.²¹ The segment, introduced with a reference to September as “National Insurance Month,” strongly encourages consumers to have and to periodically review their life insurance policies and included portions of a VNR produced

¹⁵ 47 C.F.R. §76.1615(a).

¹⁶ *See Response* at 4-5.

¹⁷ *See id.* at 5-6 & Declaration of Janet Zappala.

¹⁸ *Response* at 6 and Exhibits 2 & 17. We note that the VNR material used during the segment was edited, but that the editing did not alter the product and brand-name focus of the material.

¹⁹ *See Applicability of Sponsorship Identification Rules*, Public Notice, 40 FCC 141, 148, illustrative interpretation 26(b) (1963) (“1963 Public Notice”).

²⁰ We note that there may be other bases for requiring sponsorship identification but we do not reach these in this *Notice of Apparent Liability*.

²¹ *See Response* at 4-5.

on behalf of Allstate Insurance.²² The VNR material used in this consumer-issues segment includes two interview segments with an Allstate representative, identified in the second segment by an on-screen graphic, seated in front of the Allstate logo.²³ We do not believe that this type of promotional material, furnished by a product manufacturer, can or should be considered within the scope of the proviso, which is directed to material that contains only fleeting or transient references to products or brand names.²⁴ We conclude that this material falls within the exception specifically set forth in the proviso to the rule and that a sponsorship announcement was required. Because the VNR itself was the “valuable consideration” provided to CN8 and because it was not within the scope of the proviso for nonpromotional material, we reject Comcast’s argument that it received no consideration for the cablecast. We therefore find that Comcast violated Section 76.1615(a) of the Commission’s rules by willfully airing the VNR material at issue without proper sponsorship identification.²⁵

C. Trend Micro Software

10. CN8’s cablecast featuring Trend Micro Software was part of a daily segment focusing on consumer issues during the program “Art Fennell Reports,” on September 28, 2006.²⁶ The segment, concerning laptop computer security and identity theft, included portions of a VNR produced on behalf of Trend Micro.²⁷ Specifically, the segment used a portion of the VNR in which a Trend Micro spokesman, identified by an on-screen graphic, promoted Trend Micro’s “Remote File Lock” software by explaining that it allows a consumer to move information to a folder that Trend Micro will lock down, password protect and encrypt upon notification by the consumer that their laptop has been stolen.²⁸ We do not believe that this type of promotional material, furnished by a product manufacturer, can or should be considered within the scope of the proviso, which is directed to material that contains only fleeting or transient references to products or brand names.²⁹ We conclude that this material falls within the exception specifically set forth in the proviso to the rule and that a sponsorship announcement was required. Because the VNR itself was the “valuable consideration” provided to CN8 and because it was not within the scope of the proviso for nonpromotional material, we reject Comcast’s argument that it received no consideration for the cablecast. We therefore find that Comcast violated Section 76.1615(a)

²² See *id.* at 5-6 & Declaration of Janet Zappala.

²³ See *Response* at 6 and Exhibits 4 & 19. We note that the VNR material used during the segment was edited, but that the editing did not alter the product and brand-name focus of the material.

²⁴ See *1963 Public Notice*, 40 FCC at 148, illustrative interpretation 26(b).

²⁵ We note that there may be other bases for requiring sponsorship identification but we do not reach these in this *Notice of Apparent Liability*.

²⁶ See *Response* at 4-5.

²⁷ See *id.* at 5-6 & Declaration of Janet Zappala.

²⁸ See *id.* at 6 and Exhibits 3 & 18. We note that the VNR material used during the segment was edited, but that the editing did not alter the product and brand-name focus of the material. In addition, the VNR apparently was edited to remove an on-screen graphic, “Video provided by Trend Micro.” *Compare* clip of the Trend Micro VNR associated with the November 2006 study referenced in the *Complaint*, available at http://www.prwatch.org/files/vnrs/vnr59/059_VNR.mov (last visited September 25, 2007) and Exhibit 18.

²⁹ See *1963 Public Notice*, 40 FCC at 148, illustrative interpretation 26(b).

of the Commission's rules by willfully airing the VNR material at issue without proper sponsorship identification.³⁰

D. General Mills "Bisquick 75th Anniversary"

11. CN8's cablecast featuring General Mills "Bisquick 75th Anniversary" was part of a daily segment focusing on consumer issues during the program "Art Fennell Reports," on October 3, 2006.³¹ The segment, celebrating the 75th anniversary of "Bisquick" baking mix, touted the convenience of "Bisquick" and included portions of a VNR produced on behalf of General Mills and its "Bisquick" brand.³² The VNR material used in this consumer-issues segment contains extensive images and mentions of "Bisquick," including excerpts from old advertisements for the product.³³ "Bisquick" is the only product mentioned or shown during the segment. We do not believe that this type of promotional material, furnished by a product manufacturer, can or should be considered within the scope of the proviso, which is directed to material that contains only fleeting or transient references to products or brand names.³⁴ We conclude that this material falls within the exception specifically set forth in the proviso to the rule and that a sponsorship announcement was required. Because the VNR itself was the "valuable consideration" provided to CN8 and because it was not within the scope of the proviso for nonpromotional material, we reject Comcast's argument that it received no consideration for the cablecast. We therefore find that Comcast violated Section 76.1615(a) of the Commission's rules by willfully airing the VNR material at issue without proper sponsorship identification.³⁵

12. The Commission's *Forfeiture Policy Statement* sets a base forfeiture amount of \$4,000 for sponsorship identification violations.³⁶ After considering the record and all of the factors contained in Section 503(b)(2)(D) of the Act, 47 U.S.C. § 503(b)(2)(D), and the *Forfeiture Policy Statement*, we believe that it is appropriate to propose the base forfeiture amount of \$4,000 for each of the four apparent violations of Section 76.1615. Consequently, we propose a forfeiture in the amount of \$16,000 for the cablecasts transmitted by CN8 on September 26 and 28, and October 3, 2006.

IV. ORDERING CLAUSES

13. **ACCORDINGLY, IT IS ORDERED THAT**, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Sections 0.111, 0.311 and 1.80 of the Commission's rules, Comcast Corporation is hereby **NOTIFIED** of its **APPARENT LIABILITY FOR**

³⁰ We note that there may be other bases for requiring sponsorship identification but we do not reach these in this *Notice of Apparent Liability*.

³¹ See *Response* at 4-5.

³² See *id.* at 5-6 & Declaration of Janet Zappala.

³³ See *id.* at 6 and Exhibits 5 & 20. We note that the VNR material used during the segment was edited, but that the editing did not alter the product and brand-name focus of the material.

³⁴ See *1963 Public Notice*, 40 FCC at 148, illustrative interpretation 26(b).

³⁵ We note that there may be other bases for requiring sponsorship identification but we do not reach these in this *Notice of Apparent Liability*.

³⁶ See *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Commission's Rules*, 12 FCC Rcd 17087, 17114 (1997), *recon. denied* 15 FCC Rcd 303 (1999); see also 47 C.F.R. § 1.80(b).

FORFEITURE in the amount of Sixteen Thousand Dollars (\$16,000) for willfully and repeatedly violating Section 76.1615 of the Commission's rules.

14. **IT IS FURTHER ORDERED**, pursuant to Section 1.80 of the Commission's rules, that within thirty days of the release of this Notice, Comcast Corporation **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture.

15. Payment of the forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/Acct. No. and FRN No. referenced above. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 358340, Pittsburgh, PA 15251-8340. Payment by overnight mail may be sent to Mellon Bank/LB 358340, 500 Ross Street, Room 1540670, Pittsburgh, PA 15251. Payment by wire transfer may be made to ABA Number 043000261, receiving bank Mellon Bank, and account number 911-6229.

16. The response, if any, must be mailed to the Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., Washington, D.C. 20554, to the Attention of: Hillary S. DeNigro, Chief, Investigations and Hearings Division, Enforcement Bureau, Room 4-C330, and must include the NAL/Acct. No. referenced above.

17. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices; or (3) some other reliable and objective documentation that accurately reflects the petitioner's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

18. Requests for payment of the full amount of the NAL under an installment plan should be sent to: Associate Managing Director – Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554.³⁷

19. **IT IS FURTHER ORDERED** that a copy of this Notice shall be sent, by Certified Mail/Return Receipt Requested, to Peter H. Feinberg, Associate General Counsel, Comcast Corporation, 1500 Market Street, Philadelphia, Pennsylvania, 19102, and to its counsel, James L. Casserly, Esquire, and Megan Anne Stull, Esquire, Willkie Farr and Gallagher LLP, 1875 K Street, N.W., Washington, D.C. 20006.

FEDERAL COMMUNICATIONS COMMISSION

Kris Anne Monteith
Chief, Enforcement Bureau

³⁷ See 47 C.F.R. § 1.1914.