



FEDERAL ELECTION COMMISSION
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ADVISORY OPINION 2023-10

Caleb P. Burns, Esq.
Andrew G. Woodson, Esq.
Wiley Rein LLP
2050 M St NW
Washington, DC 20036

Dear Messrs. Burns and Woodson:

We are responding to your advisory opinion request on behalf of Sony Pictures Television Inc. regarding the application of the Federal Election Campaign Act, 52 U.S.C. §§ 30101-45 (the “Act”), and Commission regulations to the production and distribution of a fictional entertainment program that includes a candidate for U.S. Senate. The Commission concludes that, under the facts presented here, the requestor’s production and distribution of *The Good Doctor*, a fictional entertainment program, is exempt from regulation under the Act’s media exemption.

Background

The facts presented in this advisory opinion are based on your letter received on November 6, 2023, and publicly available information.

Sony Pictures Television Inc. (“Sony”) is a subsidiary of Sony Pictures Entertainment Inc., a global media company incorporated in Delaware, headquartered in Culver City, California, and whose operations include motion picture production, acquisition, and distribution; television production, acquisition, and distribution; digital content creation and distribution; operation of studio facilities; and development of new entertainment products, services and technology.¹ You state that Sony Pictures Entertainment Inc. is not owned or controlled by any political party, political committee, or candidate.²

¹ Advisory Opinion Request (“AOR”) at AOR001.

² *Id.*

Since 2017, Sony has produced and distributed a fictional television show called *The Good Doctor*.³ Sony distributes older episodes of the show in syndication to local television stations across the country, as well as through a major online streaming platform and the Armed Forces Network.⁴ Mr. Hill Harper has played a regular character on the show since its inception.⁵

On July 10, 2023, Mr. Harper filed as a candidate in the 2024 Democratic primary to represent Michigan in the U.S. Senate.⁶ You state that no past or planned episodes of *The Good Doctor* refer to Mr. Harper's candidacy, nor do they advocate for his election.⁷ Mr. Harper's name only appears on the show in the credit sequence at the opening of each episode.⁸

Further, you state that all of Sony's distribution agreements, whether with ABC, Hulu, or individual stations, predate Mr. Harper's decision to run for office, and that Sony has no plans to distribute *The Good Doctor* with any greater frequency in Michigan than it did prior to the announcement of Mr. Harper's candidacy.⁹ Mr. Harper does not have any input or control over how Sony distributes *The Good Doctor*; he is merely an actor who portrays a character on the show.¹⁰

Question Presented

Is Sony's production and distribution of a fictional entertainment program that includes a candidate for U.S. Senate as a cast member exempt from regulation under the Act's media exemption?

Legal Analysis

The Commission determines that, yes, under the facts described in the request, Sony's production and distribution of a fictional entertainment program that includes a candidate for U.S. Senate as a cast member is exempt from regulation under the Act's media exemption.

³ AOR002.

⁴ *Id.*

⁵ *Id.*

⁶ Statement of Candidacy of Frank Eugene Hill Harper, filed July 10, 2023, <https://docquery.fec.gov/cgi-bin/forms/S4MI00553/1710574/>.

⁷ AOR002.

⁸ *Id.*

⁹ *Id.*

¹⁰ AOR002.

The Act and Commission regulations define the terms “contribution” and “expenditure” to include any gift of money or “anything of value” for the purpose of influencing a federal election.¹¹ An electioneering communication is defined as a broadcast, cable, or satellite communication that refers to a clearly-identified federal candidate, is not coordinated with a candidate, is disseminated within 30 days of a primary or 60 days of a general election, and is targeted to the candidate’s electorate.¹²

However, the Act and Commission regulations provide for a set of exclusions to these definitions known as the “press exemption” or the “media exemption.”¹³ The Act states that “[t]he term ‘expenditure’ does not include . . . any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate.”¹⁴ Commission regulations further stipulate that neither a “contribution” nor an “expenditure” results from “[a]ny cost incurred in covering or carrying a news story, commentary, or editorial by any broadcasting station (including a cable television operator, programmer or producer) . . . unless the facility is owned or controlled by any political party, political committee, or candidate[.]”¹⁵ Similarly, Commission regulations exempt from the definition of “electioneering communication” any communication that “[a]ppears in a news story, commentary or editorial distributed through the facilities of any broadcast, cable or satellite television or radio station, unless such facilities are owned or controlled by any political party, political committee, or candidate.”¹⁶ Thus, costs and communications coming within this exemption are not contributions, expenditures, or electioneering communications under the Act or Commission regulations.

The legislative history of the press exemption indicates that Congress did not intend to “limit or burden in any way the First Amendment freedoms of the press and of association.”¹⁷ The exemption was enacted to “[assure] the unfettered right of the newspapers, TV networks, and other media to cover and comment on political campaigns.”¹⁸ Six years later, in 1980, the Commission observed in an advisory opinion that the media exemption applies to publications “containing articles of news, information, opinion or entertainment.”¹⁹

¹¹ 52 U.S.C. §§ 30101(8)(A)(i), (9)(A)(i); 11 C.F.R. §§ 100.52(a), 100.111(a).

¹² 52 U.S.C. § 30104(f)(3); 11 C.F.R. § 100.29(a).

¹³ For the purposes of this opinion, the terms “press” and “media” are used interchangeably.

¹⁴ 52 U.S.C. § 30101(9)(B)(i).

¹⁵ 11 C.F.R. §§ 100.73, 100.132.

¹⁶ 11 C.F.R. § 100.29(c)(2).

¹⁷ H.R. Rep. No. 93-1239, 93d Cong., 2d Sess. at 4 (1974).

¹⁸ *Id.*

¹⁹ Advisory Opinion 1980-109 (Hansen) (this language was cited by the Commission in 2006, *see Internet Communications*, 71 Fed. Reg. 18,589, 18, 610 (Apr. 12, 2006)).

The Commission has historically conducted a two-step analysis to determine whether the media exemption applies. First, the Commission asks whether the entity engaging in the activity is a press or media entity.²⁰ Second, the Commission applies the two-part analysis presented in *Reader's Digest Association v. FEC*, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981), which requires it to determine:

- (A) Whether the entity is owned or controlled by a political party, political committee, or candidate; and
- (B) Whether the entity is acting as a press entity in conducting the activity at issue (*i.e.*, whether the press entity is acting in its “legitimate press function”).²¹

1. Sony is a Media Entity

The Act and Commission regulations exclude from the definition of contribution and expenditure costs for content produced by “any broadcasting station (including a cable television operator, programmer or producer).”²² Excluded from the definition of “electioneering communication” is any communication that “[a]ppears in a news story, commentary or editorial distributed through the facilities of any broadcast, cable or satellite television or radio station.”²³ In advisory opinions from 1980 and 2003, the Commission concluded that both an entertainment periodical and a fictional television show were covered by the media exemption.^{24 25} The Commission thus concludes that Sony is a media entity because it regularly produces television programming, including fictional entertainment, for distribution via broadcast and cable television.

2. The Two-Part *Reader's Digest* Test

- (A) Sony is not Owned or Controlled by a Political Party, Political Committee, or Candidate

²⁰ See, e.g., Advisory Opinions 2011-11 (Colbert), 2005-16 (Fired Up!), 1996-16 (Bloomberg), and 1980-90 (Atlantic Richfield).

²¹ See also *FEC v. Phillips Publ'g*, 517 F. Supp. 1308, 1312-13 (D.D.C. 1981); Advisory Opinions 2007-20 (XM Radio), 2005-19 (Inside Track), 2005-16 (Fired Up!), and 2004-07 (MTV).

²² 52 U.S.C. § 30101(9)(B)(i); 11 C.F.R. §§ 100.73, 100.132.

²³ 11 C.F.R. § 100.29(c)(2).

²⁴ Advisory Opinion 1980-109 (Hansen) (quoted later by the Commission in a 2006 rulemaking, see *Internet Communications*, 71 Fed. Reg. 18,589, 18, 610 (Apr. 12, 2006)).

²⁵ Advisory Opinion 2003-34 (Showtime).

The requestor states that its parent company, Sony Pictures Entertainment Inc., is neither owned nor controlled by a political party, political committee, or candidate.²⁶ The Commission assumes this also means that no political party, political committee, or candidate owns or controls any of the entities in Sony's entire ownership chain, including the ultimate parent corporation.

(B) Sony is Acting in its Legitimate Press Function

The Commission considers two factors in determining whether a press or media entity is acting in its legitimate press function. They are (1) whether the press entity's materials are available to the general public, and (2) whether the materials are comparable in form to those ordinarily issued by the press entity.²⁷

In looking at these two factors, the Commission has also considered whether a press entity's press function is "distinguishable from active participation in core campaign or electioneering functions."²⁸ While the press exemption covers press or media activity, it does not cover campaign activity, even if the campaign activity is conducted by a press entity.²⁹

The Commission concludes that Sony's production of *The Good Doctor* is part of its legitimate press function under the above factors. The materials that Sony produces are available to the general public as they are widely distributed via network television stations and major streaming platforms. *The Good Doctor* is comparable to materials ordinarily issued by Sony as it is a serial fictional program similar in form, function, and distribution method to the numerous other television shows the company has produced.³⁰ Finally, there is no indication that Sony's production, distribution, and marketing of *The Good Doctor* are campaign activities. The only mention of the candidate is his name in the credits and the candidate does not have input on business, advertising, or distribution decisions related to the show. Distribution agreements predate Mr. Harper's candidacy, and the requestor has no plans to distribute *The Good Doctor* with any greater frequency in Michigan than it did prior to the announcement of Mr. Harper's candidacy. The Commission also assumes that Sony will continue to use its regular production facilities and staff for *The Good Doctor*.

²⁶ AOR001.

²⁷ See Advisory Opinions 2011-11 (Colbert); 2005-16 (Fired Up!) (citing *FEC v. Mass. Citizens for Life* ("MCFL"), 479 U.S. 238, 251 (1986)); and 2000-13 (iNEXTV).

²⁸ Advisory Opinion 2008-14 (Melothe) at 5.

²⁹ See *MCFL*, 479 U.S. at 251 (recognizing "the distinction of campaign flyers from regular publications"); *Reader's Digest Ass'n*, 509 F. Supp. at 1214 (the press exemption would not apply where, "for example, on Election Day a partisan newspaper hired an army of incognito propaganda distributors to stand on street corners denouncing allegedly illegal acts of a candidate and sent sound trucks through the streets blaring the same denunciations, all in a manner unrelated to the sale of its newspapers"); see also *McConnell v. FEC*, 540 U.S. 93, 208 (2003) (commenting that the press exemption "does not afford *carte blanche* to media companies generally to ignore [the Act's] provisions").

³⁰ Sony, Explore Our Titles, <https://www.sonypictures.com/tv-allshows>.

Conclusion

After applying the aforementioned factors, the Commission concludes that Sony's production and distribution of *The Good Doctor* falls within the bounds of the Act's media exemption.

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request.³¹ The Commission emphasizes that, if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a conclusion presented in this advisory opinion, the requestor may not rely on that conclusion as support for its proposed activity. Any person involved in any specific transaction or activity that is indistinguishable in all its material aspects from the transaction or activity with respect to which this advisory opinion is rendered may rely on this advisory opinion.³² Please note that the analysis or conclusions in this advisory opinion may be affected by subsequent developments in the law including, but not limited to, statutes, regulations, advisory opinions, and case law. Any advisory opinions cited herein are available on the Commission's website.

On behalf of the Commission,



Sean J. Cooksey,
Chairman

³¹ See 52 U.S.C. § 30108.

³² See *id.* § 30108(c)(1)(B).