

**RECEIVED**

By Office of the Commission Secretary at 9:40 am, Nov 13, 2023

Caleb P. Burns  
202.719.7451  
cburns@wiley.law

Andrew G. Woodson  
202.719.4638  
awoodson@wiley.law

**wiley**

Wiley Rein LLP  
2050 M St NW  
Washington, DC 20036  
Tel: 202.719.7000

**wiley.law**

November 6, 2023

Federal Election Commission  
Office of the General Counsel  
1050 First Street, NE  
Washington, D.C. 20463

**Re: Advisory Opinion Request (Sony Pictures Television)**

Dear Commissioners:

On behalf of Sony Pictures Television Inc., a subsidiary of Sony Pictures Entertainment Inc. (collectively “Sony”), we respectfully request an advisory opinion from the Federal Election Commission (“FEC” or “Commission”) pursuant to 52 U.S.C. § 30108. Specifically, we seek confirmation that the production and distribution of a fictional entertainment program – that includes a candidate for U.S. Senate as a cast member – is exempt from regulation by the FEC pursuant to the so-called media exemption of federal campaign finance law.

**BACKGROUND**

Sony is a leading global media company – incorporated in Delaware and headquartered in Culver City, California – 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.<sup>1</sup> Sony is not owned or controlled by any political party, political committee, or candidate.

Through its various divisions, Sony operates dozens of wholly-owned or joint-venture production companies including studios like Columbia Pictures, TriStar Pictures, and Sony Pictures Animation. Among its film credits, Sony has produced some of the industry’s most notable franchises including *Spider-Man*, *Jumanji*, *James Bond*, *Bad Boys*, *Peter Rabbit*, *Resident Evil*, *Men In Black*, *Hotel Transylvania*, *Ghostbusters*, and *Venom*. Sony is also one of the television industry’s leading content providers – producing and distributing programming in every genre and on many different platforms. Sony currently produces *Outlander*, *The Last of Us*, *The Boys*, *Wheel of Time*, and *For All Mankind*.<sup>2</sup>

<sup>1</sup> Sony, *Divisions*, <https://www.sonypictures.com/corp/divisions.html>.

<sup>2</sup> Sony, *Explore Our Titles*, <https://www.sonypictures.com/tv-allshows>.

Since 2017, Sony has produced and distributed a show called *The Good Doctor*, a fictional drama about a young surgeon – Dr. Shaun Murphy – with autism and savant syndrome.<sup>3</sup> ABC airs new episodes of the show on Monday nights from 10-11 P.M. Eastern. Sony distributes older episodes in syndication to local television stations across the country and viewers can access current and past episodes on Hulu. Finally, the Armed Forces Network has the right to exhibit episodes on military bases.

One of the many actors on the show is Hill Harper, who plays Dr. Marcus Andrews.<sup>4</sup> Mr. Harper's character has been an integral part of the show over its first six seasons. Sony has paused production of future seasons because of the recent writers' strike and ongoing actors' strike, but is planning to resume production in the near future. However, older episodes of *The Good Doctor* featuring Mr. Harper's character remain available through syndication and on Hulu.

Mr. Harper has filed as a candidate in the 2024 Democratic primary to represent Michigan in the U.S. Senate.<sup>5</sup> No past or planned episodes of *The Good Doctor* refer to Mr. Harper's candidacy, much less advocate for his election. Indeed, the only reference to the name "Hill Harper" on the show is in the brief credit sequence at the opening of each episode.

All of Sony's distribution agreements – whether with ABC, Hulu, or individual stations – predate Mr. Harper's decision to run for office, and 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. More generally, Mr. Harper does not have any input or control over how Sony distributes *The Good Doctor*. He is simply an actor who portrays a character on the show.

### **LEGAL BACKGROUND**

The Federal Election Campaign Act of 1971, as amended, regulates contributions, expenditures, coordinated communications, and electioneering communications which are defined – in relevant part – as follows:

- "Contributions" and "expenditures" include "anything of value made by any person for the purpose of influencing any election for Federal office;"<sup>6</sup>
- "Coordinated communications" are public communications that are paid for by third parties and coordinated with a candidate. However, a public communication will only be regulated as a

---

<sup>3</sup> Sony, *The Good Doctor*, <https://www.sonypictures.com/tv/thegooddoctor>.

<sup>4</sup> *Id.*

<sup>5</sup> Joey Cappeletti, *Hill Harper, an Actor on 'CSI: NY' and 'The Good Doctor,' Is Running for the US Senate in Michigan*, Associated Press, July 10, 2023, <https://apnews.com/article/hill-harper-senate-michigan-csi-good-doctor-b820a0f56cf445830f1f086c235318a1>; Statement of Candidacy of Frank Eugene Hill Harper, filed July 10, 2023, <https://docquery.fec.gov/cgi-bin/forms/S4MI00553/1710574/>.

<sup>6</sup> 52 U.S.C. § 30101(8)(A)(i), (9)(A)(i).

coordinated communication if it contains certain content including, among other things, a reference to a clearly-identified Senate candidate within 90 days of an election.<sup>7</sup>

- An “electioneering communication” is 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.<sup>8</sup>

A corporation is generally prohibited from making contributions and expenditures for coordinated communications.<sup>9</sup> Although corporations may make electioneering communications, they are subject to reporting.<sup>10</sup> In addition, federal law prohibits corporations from coordinating electioneering communications with candidates.<sup>11</sup>

Excepted from these prohibitions and reporting requirements are “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.”<sup>12</sup> The Commission has applied this so-called media exemption by examining:

- 1) Whether the entity engaging in the activity is a media entity; and
- 2) Whether the entity is acting in its “legitimate” media function when conducting the activity.<sup>13</sup>

The media exemption not only exempts programming, but also “advertisements to promote [the] underlying product.”<sup>14</sup>

---

<sup>7</sup> 11 C.F.R. § 109.21(c).

<sup>8</sup> 52 U.S.C. § 30104(f)(3).

<sup>9</sup> *Id.* § 30118.

<sup>10</sup> *Id.* § 30104(f).

<sup>11</sup> *Id.* § 30118.

<sup>12</sup> See *id.* § 30101(9)(B)(i) (exempting media from the definition of “expenditure”); 11 C.F.R. §§ 100.73, 100.132, 100.29(c)(2) (exempting media from the definitions of contribution, expenditure, and electioneering communication); *Internet Communications*, 71 Fed. Reg. 18,589, 18,609, Apr. 12, 2006 (collecting authority that what a media “entity says in broadcasts, news stories and editorials is absolutely protected under the press exemption, regardless of whether any activities occurred that might otherwise constitute coordination under Commission regulations”); Factual & Legal Analysis at 9, Matter Under Review (“MUR”) 6089 (People with Hart, Inc.) (May 28, 2009) (observing that the media exemption “also encompasses what otherwise would be deemed ‘coordinated communication’ between a candidate or committee and a *bona fide* corporate media entity”).

<sup>13</sup> See, e.g., FEC Adv. Op. 2011-11 at 6-7 (Colbert).

<sup>14</sup> FEC Adv. Op. 2010-08 at 7 (Citizens United).

### **QUESTION PRESENTED**

Is Sony's production and distribution of a fictional entertainment program that includes a cast member who is now a candidate for U.S. Senate exempt from regulation pursuant to the media exemption?

### **DISCUSSION**

This request seeks explicit confirmation that the FEC's media exemption applies to scripted entertainment content like *The Good Doctor*. The Commission, numerous individual commissioners, campaign finance law reformers and academics have all stated – at various times – that the media exemption applies to entertainment. Therefore, content like *The Good Doctor* should not be subject to regulation as a matter of campaign finance law.

First, in 1980, the Commission observed that the media exemption applies to periodical publications “appearing at regular intervals . . . and containing articles of news, information, opinion or entertainment.”<sup>15</sup> More recently, the Commission authoritatively cited, quoted, and affirmed this language in its 2006 Internet Communications rulemaking.<sup>16</sup>

Second, and more specifically, the Commission concluded that a fictional cable television series, *American Candidate*, was exempt from regulation pursuant to the media exemption. There, the Commission held:

[A] work of fiction that is not intended to influence a Federal election[] is generally not subject to regulation under the [campaign finance laws]. . . . To the extent that an actual Federal candidate or officeholder is depicted or discussed in the series as it is promoted, broadcast, cablecast, or webcast, including depictions or discussions that constitute “express advocacy,” the Commission concludes that there will be no contribution, expenditure, or electioneering communication under the “press exemptions.”<sup>17</sup>

Third, other commissioners have gone further and concluded that the Commission has no basis to consider the type of content – entertainment, fictional, or otherwise – of a media entity's communications. To qualify for the media exemption, it is simply enough that the media entity is not controlled by a candidate or political party.<sup>18</sup>

---

<sup>15</sup> FEC Adv. Op. 1980-109 (Hansen) (emphasis added).

<sup>16</sup> *Internet Communications*, 71 Fed. Reg. 18,589, 18, 610 (Apr. 12, 2006) (quoting FEC Adv. Op. 1980-109).

<sup>17</sup> FEC Adv. Op. 2003-34 (Showtime).

<sup>18</sup> Statement of Reasons of Vice Chairman Bradley A. Smith, and Commissioners Michael E. Toner and David M. Mason, MUR 5315 (Aug. 25, 2003) (Wal-Mart Stores, Inc.).

Fourth, even some of the most ardent supporters of campaign finance regulation have argued to the Commission that “entertainment programming . . . would be covered by the media exception.”<sup>19</sup>

This conclusion is grounded in binding First Amendment principles. Courts have repeatedly underscored that the “First Amendment shields more than political speech and verbal expression; its protections extend to entertainment.”<sup>20</sup> Indeed, as the Supreme Court said not long after it decided its seminal campaign finance case *Buckley v. Valeo*,<sup>21</sup> “[t]here is no doubt that entertainment, as well as news, enjoys First Amendment protection. It is . . . true that entertainment itself can be important news.”<sup>22</sup> In fact, the Court has long equated entertainment with news when shielding both from government regulation under the First Amendment:

The line between the informing and the entertaining is too elusive for the protection of that basic right. Everyone is familiar with instances of propaganda through fiction. What is one man’s amusement, teaches another’s doctrine. Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature.<sup>23</sup>

Thus, entertainment and news receive the same level of First Amendment protection, including that afforded by the media exemption. Notably, the Campaign Finance Institute’s Michael Malbin warned the Commission that if campaign finance law is interpreted to regulate entertainment:

---

<sup>19</sup> FEC, *Public Hearing on Electioneering Communications* at 17 (Aug. 28, 2002), (comments of Glen Shor, Associate Legal Counsel at the Campaign and Media Legal Center), <https://sers.fec.gov/fosers/showpdf.htm?docid=11190> (“August 28 Hearing”); see also FEC, *Public Hearing on Electioneering Communications* at 37 (Aug. 29, 2002), <https://sers.fec.gov/fosers/showpdf.htm?docid=11191> (comments of former FEC General Counsel Larry Norton) (agreeing that “if a [program] was produced and advertised and broadcast through normal commercial channels, then I think there is an area for exemption” of “entertainment programming” under the media exemption).

<sup>20</sup> *Bery v. City of New York*, 97 F.3d 689, 694 (2d Cir. 1996); see also *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981) (holding that “[e]ntertainment, as well as political and ideological speech, [falls] within the First Amendment guarantee; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works fall within the First Amendment guarantee”).

<sup>21</sup> 424 U.S. 1 (1976) (per curiam).

<sup>22</sup> *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 578 (1977);

<sup>23</sup> *Winters v. New York*, 333 U.S. 507, 510 (1948); see also *McConnell v. FEC*, 540 U.S. 93, 282, overruled by *Citizens United v. FEC*, 558 U.S. 310 (2010) (Thomas, J., concurring in part) (observing that “First Amendment protection was extended to that fundamental category of artistic and entertaining speech not for its own sake, but only because it was indistinguishable, practically, from speech intended to inform”); Statement of Reasons of Comm’r Sean J. Cooksey, MUR 7789 (Apr. 22, 2002) (Courier Newsroom, *et al.*) (observing that the “scope of legitimate press activity [exempt from regulation] should include all costs associated with writing, producing, publishing, or distributing news content, commentary, editorials, and other constitutionally protected speech”) (emphasis added).

I don't see how it could possibly survive a First Amendment challenge. The First Amendment requires that means be drawn to fit legitimate ends. It's just hard to see what legitimate purpose this would fit.<sup>24</sup>

Professor Malbin's point can be best illustrated by asking the following question: What legitimate government purpose would be served by exempting a candidate's hour-long appearance on a cable news show – where the candidate and host can advocate for the candidate's election – but regulating that same candidate's appearance as a fictitious character on a show that has nothing to do with a campaign? Applying the media exemption to the first show, but not the second, would render an absurd result for which there is no legitimate government purpose.<sup>25</sup>

Once the Commission affirms that entertainment programming like *The Good Doctor* is eligible for the media exemption, the principle's application here is straightforward. Sony is a media company with a well-established track record of producing and distributing films and television programming for decades. Sony's continued production and distribution of *The Good Doctor* – just as it has for six seasons already – is consistent with Sony's legitimate media function. This is true for existing episodes that include Mr. Harper's character as well as any future episodes.

### **CONCLUSION**

The Commission should affirm its long-standing precedent – supported by binding First Amendment principles – to conclude that the production and distribution of fictional entertainment programming is exempt from regulation pursuant to the media exemption of federal campaign finance law.

Respectfully submitted,



Caleb P. Burns  
Andrew G. Woodson

---

<sup>24</sup> August 28 Hearing at 6 (comments of Michael Malbin).

<sup>25</sup> A failure to apply the media exemption here has the potential to affect candidates from across the political spectrum. To name just a few actors/media personalities-turned-federal-candidates: Ronald Reagan (R-CA), Al Franken (D-MN), Donald Trump (R-FL), Ben Jones (D-GA), Fred Thompson (R-TN), Diane Neal (Ind.-NY), Fred Grandy (R-IA), and Ben Savage (D-CA).