



607 Fourteenth Street N.W.
Washington, D.C. 20005-2011

PHONE: 202.628.6600

FAX: 202.434.1690

www.perkinscoie.com

Marc Erik Elias

PHONE: (202) 434-1609

FAX: (202) 654-9126

EMAIL: MElias@perkinscoie.com

August 11, 2008

BY HAND DELIVERY

Thomasenia Duncan, Esq.
General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463

Re: Melothé, Inc.

Dear Ms. Duncan:

Pursuant to 2 U.S.C. § 437f, we seek an advisory opinion on behalf of Melothé, Inc. Melothé seeks affirmation that its new venture—an interactive multi-channel Internet TV station featuring live and pre-recorded news, analysis, and commentary about one or more federal candidates—will qualify for the press exemption at 2 U.S.C. § 431(9)(B)(i).

I. FACTUAL DISCUSSION

Melothé is a for-profit corporation that has re-engineered the way video is delivered over the Internet. Melothé's technology allows live and pre-recorded content to be delivered over the Internet with high quality and smoothness in true full-screen format without the need for buffering or downloading any software. It can also integrate all the interactive features of the Internet.

Melothé is currently exploring commercial opportunities for its new technology, including building and operating Internet TV stations for movies, music videos and other content. As part of its strategy to promote its new technology and grow its business, Melothé would also like to launch an Internet TV station focused on the campaign(s) of one or more federal candidates. Through an interactive multi-channel Internet TV site, Melothé plans to

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broadcast daily from the campaign's headquarters, carrying news coverage, commentaries, features and editorials. It will feature both live and prerecorded programming.

While the content of the campaign-TV site(s) will likely feature, and be supportive of, Democratic candidates, Melothe is neither owned nor controlled by any political party, political committee or candidate, nor will the proposed Internet sites be owned or controlled by any political party, political committee or candidate. Rather, Melothe will exercise editorial control over all content displayed on its websites. And while the coverage provided on the sites may be of particular interest to campaign supporters and volunteers, the sites will be viewable by the general public and access will be free.

Possibilities for programming include:

- **Daily Morning Briefing: a daily 15-minute live segment, "briefing" volunteers and interested viewers on what's happening in the campaign today.**
- **Live or pre-recorded interviews with campaign staff members including those with a direct interest in volunteer activities such as state directors, volunteer coordinators, field directors, on-line organizers, crowd builders, etc.**
- **Daily News Report: featuring campaign news from the perspective of campaign-TV commentators.**
- **Lively round-table discussions featuring Democratic Party leaders, campaign representatives, political commentators and other guests to talk about campaign news and issues, and to respond to Republican attacks and negative news stories.**
- **Coverage of campaign events around the country by volunteer correspondents.**
- **Full start-to-finish live or pre-recorded broadcasts of campaign speeches, major rallies or other events.**
- **Live or pre-recorded "reports from the road" including recognition of outstanding local volunteers and their activities.**
- **Pro-Democrat/Anti-Republican commentaries.**

The campaign-TV sites may also include interactive features such as blogging, surveys, and contests, as well as links to other press entities sites and to the websites of the featured candidate(s). Finally, if permitted, Melothe would also consider allowing its commentators, guests, and hosts to solicit money for the featured campaign(s).

II. LEGAL DISCUSSION

A. Application of the Press Exemption Generally

1. Statutory language and history

The Federal Election Campaign Act of 1971, as amended, 2 U.S.C. § 431 *et seq.*, regulates the making of “contributions” and “expenditures” in connection with federal elections. *See, e.g.*, 2 U.S.C. §§ 441a, 441b. The Act exempts from the definition of “expenditure”

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 ...

2 U.S.C. § 431(9)(B)(i). To implement this statute, Commission rules provide exemptions from the definition of “contribution” and expenditure” for the costs incurred in covering or carrying such news stories, commentaries or editorials. *See* 11 C.F.R. §§ 100.73, 100.132.

The press exemption was crafted to be “consistent with First Amendment principles.” *McConnell v. FEC*, 540 U.S. 93, 208 (2003). The authors of the Act wanted to “make it plain that it is not the intent of the Congress in the present legislation to limit or burden in any way the [F]irst [A]mendment freedoms of the press and of association ... [The exemption] assures the unfettered right of the newspapers, TV networks, and other media to cover and comment on political campaigns.” H.R. Rep. No. 93-1239, at 4 (1974).

The exemption “does not afford carte blanche to media companies generally to ignore FECA’s provisions.” *McConnell*, 540 U.S. at 208. Nonetheless, the press exemption “must be construed and applied to preserve the full protections of the First Amendment for both fact and commentary in a bona fide press entity, consistent with the legislative intent behind the adoption of the exemption.” Commissioners Wold, Elliott, Mason and Sandstrom, Statement of Reasons for Voting to Withdraw the Commission’s Complaint in *FEC v. Forbes, et al.* (May 26, 1999).

2. History of Commission interpretation

The Commission normally applies a two-step analysis in deciding whether the press exemption applies to proposed conduct. First, it asks whether the entity engaging in the activity is “a press entity described by the Act and Commission regulations.” *See* Advisory Opinion 2004-7. Second, it asks whether the press entity is owned or controlled by a

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political party, political committee, or candidate; and whether it is acting as a press entity in performing the activity. *See id.*; *see also* Advisory Opinions 2007-20, 2005-19, 2005-16.

a. Whether an entity is a “press entity”

In March 2006, the Commission approved new regulations making clear that the Internet and other electronic media can qualify as press entities. 11 C.F.R. § 100.73 (referring to “any broadcasting station (including a cable television operator, programmer or producer), *Web site*, newspaper, magazine, or other periodical publication, *including any Internet or electronic publication*” (emphasis added)); *see also* Explanation and Justification to the Internet Communications Regulations, 71 Fed. Reg. 18, 594, 18,608 (April 12, 2006) (“the media exemption applies to media entities that cover or carry news stories, commentary, and editorials on the Internet . . .”).¹

To determine whether a particular organization meets the criteria for a press entity, the Commission looks to whether the entity is in the “business of producing on a regular basis a program that disseminates news stories, commentary and/or editorials.” Advisory Opinion 2007-20.²

A profit motive is not essential to press entity status, even though the Commission has sometimes found subscription or advertising revenue to indicate a regular business, *see, e.g.*, Advisory Opinion 2000-13 n.3 (citing Advisory Opinions 1988-22 and 1980-109). As three Commissioners once said: “We do not think the Commission should consider whether a publisher makes a profit from its publications. If that were the standard, then many prominent ‘think magazines’ that are significant in the Washington debate would not qualify for the press exemption.” Commissioners Smith, Toner and Mason, Statement of Reasons, MUR 5315 (Aug. 25, 2003).³

¹ Before the regulations expressly referenced Web sites and Internet publications as press entities, the Commission had repeatedly found publishers of Internet communications to be press entities. *See, e.g.*, Advisory Opinions 2005-16; 2000-13; 1996-16.

² *See also* First General Counsel's Report, MUR 5540 *et al.*, at 5; *cf.* Advisory Opinion 1996-2 (denying application of press entity status to CompuServe, when the facts suggested that CompuServe was not itself in the business of distributing news or commentary, but rather proposed simply to provide free access to federal candidates).

³ Another commenter once argued that paid subscribers or advertisers “are not statutory requirements for the news exemption: if they were, public radio would not qualify for the exemption either, a

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Nor does ideological slant or bias bar press entity status. "Neither the statute nor the regulations require that for the press exemption to apply, the press verify its stories, be accurate, be fair or be balanced." Commissioners Mason and Smith, Statement of Reasons, MUR 5540 *et al.*, at 7. "Even seemingly biased stories or commentary by a press entity can fall within the media exemption." First General Counsel's Report, MUR 5540 *et al.*, at 5 (citing MURs 3624 and 4946). One of the first advisory opinions applying the press exemption found a subscription periodical, *The Ruff Times*, to qualify as a press entity even when the requestor, a U.S. House candidate, had apparent reason to believe that the publication would endorse him and solicit contributions to his campaign. See Advisory Opinion 1980-109. More recently, the Commission concluded that Fired Up, a network of websites featuring "unabashedly progressive" commentary, qualified for the press exemption. See Advisory Opinion 2005-16.

b. Whether a "press entity" otherwise qualifies for the exemption

Once it has been established that an entity qualifies as a "press entity," the Commission considers whether the entity is owned or controlled by a political party, political committee, or candidate, and whether it is acting as a press entity in performing the media activity. See, e.g., 11 C.F.R. § 100.73; Advisory Opinions 2005-15, 2004-7.

Ownership or control is not the same as coordination. "Allegations of coordination are of no import when applying the press exemption." Commissioners Toner, Mason and Smith, Statement of Reasons, MUR 5540 *et al.*, at 3. In fact, "the press exemption shields press entities from investigations into alleged coordination." Commissioner Weintraub, Statement of Reasons, MUR 5540 *et al.* See also First General Counsel's Report, MUR 5540 *et al.*, at 6 ("the coordination regulations exclude news stories falling within the media exemption").

Whether a press entity is found to be acting in that capacity depends on whether its materials are available to the general public and are comparable to those it normally undertakes. See *Massachusetts Citizens for Life*, 479 U.S. 238, 250-51 (1986); see also MUR 5298. The Commission thus withheld the media exemption from an entity that proposed to pay a broadcaster to distribute a broadcast, instead of receiving compensation itself, see Advisory Opinion 2004-36; from a non-profit organization barred from engaging in business activities that proposed to send free communications supporting candidates, instead of publishing a regularized periodical, see Advisory Opinion 1988-22; and from an insurance company that proposed to distribute books featuring interviews with presidential candidates, see Advisory

clearly untenable conclusion." Letter from Trevor Potter, for the Democracy Network, to the Honorable Scott E. Thomas (Oct. 26, 1999) (commenting on Draft Advisory Opinion 1999-25).

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Opinion 1987-8. In contrast, it has applied the press exemption to a television network accused of coordinating a false story with a presidential campaign, when the broadcast in question occurred on a regularly scheduled program as part of the network's regularly scheduled business. *See* MURs 5540 and 5545. At least three Commissioners applied the press exemption to a magazine mailed by Wal-Mart to more than 191,000 North Carolina readers, featuring a cover story about Republican Senate candidate Elizabeth Dole, and containing a picture of a child wearing a Dole sticker, when the company regularly published the magazine. *See* Commissioners Smith, Toner and Mason, Statement of Reasons, MUR 5315.

B. Application of the Press Exemption to Melothé's Proposed Internet TV Stations

The press exemption covers the activities of Melothé's proposed Internet TV stations. Melothé will publish news stories, commentaries, and editorials. *See* 2 U.S.C. § 431(9)(B)(i). Its websites will be "viewable by the general public and akin to a periodical or news program distributed to the general public." *See* Advisory Opinion 2000-13. It is not owned or controlled by any political party, political committee or candidate. *See* 2 U.S.C. § 431(9)(B)(i).

The regular—and indeed, sole—business of the proposed campaign-TV websites will be to distribute the aforementioned news stories, editorials and commentaries. Melothé is neither owned nor controlled by a political party, political committee, or candidate, nor will the campaign-TV sites be owned nor controlled by a political party, political committee or candidate. Melothé will retain editorial control at all times: While campaign staffers and volunteers may appear on campaign-TV shows, all content will be controlled by Melothé.

Although the proposed sites will include programming supportive of the featured Democratic candidates, neither ideological bias nor express advocacy affects the analysis of whether the press exemption applies. *See, e.g.,* Advisory Opinions 2005-19 & 2005-16; Commissioners Mason and Smith, Statement of Reasons, MUR 5540 *et al.* ("neither ... verification or express advocacy ... affects whether the press exemption applies.").

Similarly, although Melothé may or may not generate revenue through the sale of advertising, neither profit nor advertising sales are necessary to its status as a press entity. *See* Commissioners Smith, Toner and Mason, Statement of Reasons, MUR 5315.

At all times, Melothé intends its campaign-TV to act as a press entity—publishing news, editorials and commentary. It is not an organization engaged in some other line of work, issuing publications from time to time under irregular circumstances. Unlike mass mailings or special newsletters, the contents of the proposed sites will not be thrust upon unwilling or

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targeted viewers; people will choose consciously to view them. Melothé campaign-TV will be wholly devoted to the publication of regular, if partisan, content.

Melothé respectfully suggests that these circumstances present a straightforward application of the press exemption. *See* MUR 5928 (determining that Kos Media qualified for press exemption); Advisory Opinion 2005-16 (applying media exception to partisan blog Fired Up! LLC); Advisory Opinion 1996-48 (approving programming by C-SPAN including campaign commercials and candidate biographies).

Melothé's plan to focus, at least initially, on Democrats and to provide content expressly supporting their candidacies does not distinguish it from other entities found by the Commission to have enjoyed the press exemption. Nor should the possibility that some of the news, commentary, and features might include, as part of express advocacy, solicitations for the featured candidates. The exemption has covered the activities of those who have expressly avowed their partisan purpose, *see* Advisory Opinion 2005-16, as well as others who – rightly or wrongly – have been presumed at times to act from partisan motives, such as Rush Limbaugh, *see* MUR 3624; CBS News, *see* MUR 5540; or presidential candidate Steve Forbes, *see* Commissioners Wold, Elliott, Mason and Sandstrom, Statement of Reasons for Voting to Withdraw the Commission's Complaint in *FEC v. Forbes, et al.* (May 26, 1999). The press exemption presumably extends to the likes of The New Republic, National Review, The Nation, and The Weekly Standard. *See* Commissioners Smith, Toner and Mason, Statement of Reasons, MUR 5315.

Finally, Melothé's plan to solicit contributions from viewers as part of its commentary does not take its activity outside the ambit of the press exemption. In the Hansen/*Russ Times* Advisory Opinion, the Commission expressly held that a commentator writing for a press entity could endorse a candidate and solicit contributions to his campaign. Advisory Opinion 1980-109. The Commission concluded that "solicitations of contributions in the commentary which appeared as a regular feature . . . would be covered by the news story exemption in 2 U.S.C. 431(9)(B)(i) and would not result in a contribution to [the] campaign from Mr. Ruff, *The Ruff Times* or from Target Publishers," as long as there was no "arrangement whereby either Mr. Ruff, *The Ruff Times*, or Target Publishers would become a conduit or intermediary for a contribution made by an individual contributor to Mr. Hansen's campaign committee." *Id.* Because Melothé would not serve as a conduit, but would instead allow commentators to solicit viewers to send money directly to the campaign, solicitation for contributions on Melothé's campaign-TV would be within the press exemption.

The First Amendment principles that prompted Congress to enact the press exemption, the text of the statute and regulations, and the reasoning and history of the Commission's

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interpretation of those rules all warrant an advisory opinion permitting Melothe's proposed conduct.

QUESTIONS PRESENTED

In light of these issues, Melothe, Inc. seeks guidance on the following:

1. Does Melothe Inc.'s proposed Internet campaign-TV station qualify for the press exemption?
2. If the answer to the first question is "yes," may the proposed sites, as part of news or commentary containing express advocacy, include solicitations on behalf of the featured candidates?

Very truly yours,



Marc E. Elias
Kate Andrias
Counsel to Melothe, Inc.

MEE:gh



Marc Elias
<melias@perkinscoie.com>
09/12/2008 06:15 PM

To <NStipanovic@fec.gov>
cc <rknop@fec.gov>
bcc
Subject Re: Melothe Inc. Questions

FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL

2008 SEP 15 P 5:12

Here are the answers to the questions below:

From: <NStipanovic@fec.gov>
Date: Tue, 9 Sep 2008 11:18:52 -0400
To: Marc Elias <MElias@perkinscoie.com>
Cc: <rknop@fec.gov>
Subject: Melothe Inc. Questions

Dear Mr. Elias:

It was nice speaking with you yesterday. As we discussed, I am sending you the questions we have in regards to your request for an advisory opinion on behalf of Melothe Inc.

1. Considering the lack of publicly available information on Melothe Inc., please provide more detail on what the company does, with specific attention to the following:

a. It appears that Melothe is in the business of developing technology and providing technical capabilities to internet sites, not a media entity itself. Is this characterization correct? This is accurate, but it hopes through this project to become a media company.

b. Would Melothe operate the Internet-TV Web site, or would it be operated by another entity? Melothe would operate it.

2. Is there a possibility that the Internet campaign-TV station would devote itself exclusively to one candidate over a period of days, weeks, or months? Yes.

3. Does Melothe intend to produce content (news stories, editorials, and commentaries) beyond one election cycle? Yes.

4. How would Melothe fund the venture? It has investors and hopes to commercialize the site through advertising revenues, merchandising, etc.

5. Who would prepare content, for example for "briefing volunteers" and "pro-Democrat/Anti-Republican commentaries?" Melothe would prepare the content.

a. Who are "volunteers?" Are they volunteers of the candidate(s) or the party? Volunteers refer to volunteers of the candidate's campaign.

6. How does Melothe propose to conduct solicitations? How frequently, and in what context? It envisions program hosts, interviewers and news anchors will solicit contributions. It also envisions links to contribution pages appearing on the screen during programming.

7. Citation to 2004-36, on page 5 of Melothe's Letter, appears to be wrong. Please provide a correct citation.

I look forward to speaking with you again tomorrow morning at 11am. Robert Knop, the Assistant General Counsel, also will be on the call.

Neven F. Stipanovic
Attorney, Policy Division
Office of General Counsel
U.S. Federal Election Commission
Tel: 202-694-1650

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Marc Elias
<meli@perkinscoie.com>
09/14/2008 06:33 PM

To <NStipanovic@fec.gov>
cc <rknop@fec.gov>
bcc
Subject Re: Melothe Inc. Questions

FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL

2008 SEP 15 P 5:12

By the way, the cite should have been 2004-30 (Citizens United)

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Marc E. Elias
Perkins Coie LLP
607 14th St, NW
Washington, DC 20005

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From: Marc Elias <MElias@perkinscoie.com>
Date: Fri, 12 Sep 2008 18:15:09 -0400
To: <NStipanovic@fec.gov>
Cc: <rknop@fec.gov>
Conversation: Melothe Inc. Questions
Subject: Re: Melothe Inc. Questions

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