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THE GHOST OF ALAN FREED: AN ANALYSIS OF THE MERIT AND
PURPOSE OF ANTI-PAYOLA LAWS IN TODAY'S
MUSIC INDUSTRY

“Alan Freed may merely have been born too soon; playing records on the radio may have gotten him in trouble with the law, but he probably could have been a highly respected and successful grocer.”¹

I. INTRODUCTION

As state and federal officials renew the battle cry against the seemingly pervasive practice of record companies plying radio stations with funds or valuable goods to obtain airplay for songs, the debate continues as to whether such restrictions are necessary, and if so, in what form.² With one major record label bound by restrictions on its pay-for-play activities and saddled with a ten million dollar settlement, it seems that a change is in the wind for the music industry as a whole.³ Yet the underlying questions remain whether the laws are adequately designed to deal effectively with

1. Bob Greene, *Payola, Part 2—Will Anyone Even Notice?*, CHI. TRIB., June 24, 2001, at C2. Alan Freed was noted for reviving radio during an era when its biggest stars were turning to television. See Radio Hall of Fame, Disc Jockey, Alan Freed, <http://www.radiohof.org/discjockey/alanfreed.html> (last visited Jan. 9, 2006) (offering Freed's biography). From the start of his career in radio, Freed featured rhythm and blues and rock 'n' roll's early performers. See *id.* (same). “Freed's endorsement of rhythm and blues—and his subsequent popularity with both black and white teenagers—made him a lightning rod for both racists and musical conservatives.” *Id.* Despite his involvement in the 1959 payola scandal, he is remembered for his contributions to radio and was inducted into the Radio Hall of Fame in 1988. See *id.* (noting Freed made rock 'n' roll and Top 40 indispensable part of radio). For a further discussion of Freed's involvement with payola scandal, see *infra* notes 26, 29 and accompanying text.

2. See Brian Garrity, *Payola Probe Fallout Begins*, BILLBOARD, Aug. 7, 2005, available at LEXIS, BILLBD File (noting that attorney general views Sony BMG settlement as merely beginning of reforms in record industry); see also Marc Fisher, *Paying for Airplay: The Beat Goes On*, WASH. POST, Aug. 7, 2005, at N06 (describing findings of New York investigation); Press Release, Office of New York State Attorney General Eliot Spitzer, *Sony Settles Payola Investigation* (July 25, 2005), available at http://www.oag.state.ny.us/press/2005/jul/jul25a_05.html (detailing extent of investigation).

3. See generally Assurance of Discontinuance Pursuant to Executive Law Section § 63(15), *In the Matter of Sony BMG Music Entertainment*, Attorney General of the State of New York (July 22, 2005), available at <http://www.oag.state.ny.us/press/2005/jul/payola.pdf> [hereinafter Assurance of Discontinuance] (describing investigation's findings of payola practices at Sony's record labels). Others likely to be affected by Sony's settlement include the three other major record labels—Warner Music Group, Vivendi Universal Music Group and EMI Music Group—all of which are still under investigation by the New York Attorney General's office. See Garrity, *supra* note 2 (reporting executives at other major record companies were initially flippant about effects of Sony settlement). Further, the FCC has announced that it will review the settlement terms for evidence of payola infractions.

the perceived problem of payola, and whether payola is even a problem at all.⁴

The trade magazine *Variety* coined the term “payola” in 1938 to refer to the practice of making undisclosed payments or exchanges of value in return for inclusion of material in radio broadcasts.⁵ Payola scandals have been a part of the music industry throughout the past, most notably in the 1950s and 1960s and again in the 1980s.⁶ While the practice has decidedly changed in form since its inception, “[p]aying for songs has been almost standard operating procedure for years and years.”⁷

In the forty-five years since the enactment of federal anti-payola statutes, the practice has not only remained prevalent, but has developed into a sophisticated system of exchange between record companies and radio conglomerates.⁸ A recent investigation by the New York State Attorney

See *U.S. to Revisit Payola Inquiry*, L.A. TIMES, Aug. 9, 2005, at C3 (citing “mountain of evidence” collected by Spitzer).

4. See Robert Hilburn, *Critic's Notebook: The Public, Not Payola, Rule the Air*, L.A. TIMES, July 29, 2005, at E1 (asserting payola not controlling force in music industry); Jacob Slichter, *Price of Fame*, N.Y. TIMES, July 29, 2005, at A23 (describing artists' conflicted feelings over necessity of payola).

5. See Lauren J. Katunich, Comment, *Time to Quit Paying the Payola Piper: Why Music Industry Abuse Demands a Complete System Overhaul*, 22 LOY. L.A. ENT. L. REV. 643, 644 (2002) (providing brief overview of history of payola); see also Commission Warns Licensees About Payola and Undisclosed Promotion, 4 F.C.C.R. 7708, 7709 (1988) (reminding that payola violations are infractions of United States Criminal Code and may subject broadcasters to sanctions under Communications Act); J. Gregory Sidak & David E. Kronemyer, *The “New Payola” and the American Record Industry: Transactions Costs and Precautionary Ignorance in Contracts for Illicit Services*, 10 HARV. J.L. & PUB. POL'Y 521, 521 (1987) (analyzing forces that promote payola throughout history of radio industry). The word “payola” was formed as a contraction of the words “pay” and “Victrola,” an old fashioned record player. See Michael Gormley, *Sony BMG Music Agrees to \$10 Million “Payola” Settlement*, LAW.COM, July 26, 2005, <http://www.law.com/jsp/article.jsp?id=1122294925140> (briefly describing background of payola).

6. See Katunich, *supra* note 5, at 645 (commenting on scandals of 1950s and 1960s). The scandals of the 1960s prompted passage of the federal anti-payola statutes. See *id.* (discussing impact of 1960s payola scandals). Those in the 1980s introduced the independent promoter and what appeared to be a more developed system for exchanging consideration. See *id.* at 645-46 (discussing impact of more recent payola scandals).

7. See Charles Duhigg & Walter Hamilton, *Paying a Price*, L.A. TIMES, July 26, 2005, at A1 (describing common use of payola). For a discussion of the ways in which the practice of payola has changed since its inception, see *infra* notes 18-20 and accompanying text.

8. See Assurance of Discontinuance, *supra* note 3, at 5 (claiming that simple bribes to local deejays have become elaborate corporate strategy). Following large scale consolidation among radio stations in the wake of the Telecommunications Act of 1996, record company executives are able to negotiate promotion deals for acquiring airplay across a large number of stations serving a variety of geographic markets. See *id.* (noting radio conglomerates negotiate large-scale promotion deals for airplay across United States). It is the fundamental conflict between views on proper allocation of radio airtime that drives the continuing controversy over pay-for-play practices in the United States, raising concerns about the efficacy of the current laws at curtailing payola and the potential need for reform or repeal. See

General's Office has drawn national attention to the issue of payola practices in the music industry.⁹ Current federal law prohibits payment for the broadcast of material only when such payment is not disclosed to the listener.¹⁰ Moreover, the Federal Communications Commission (FCC) has carved out several exceptions to the statute through its administrative hearings.¹¹ The result is a statutory scheme riddled with loopholes through which record companies and radio stations continue to conduct their pay-for-play.¹²

This Note analyzes federal anti-payola regulations, concludes that current laws are ineffective in curtailing undisclosed payments for broadcast and proposes that the laws be restructured to reflect the commodity market of radio. Part II summarizes the history of payola practices in the United States and discusses the fact that, despite legislative investigations in the 1960s, payola continues to flourish throughout the record industry.¹³ Part III provides a précis of current federal anti-payola regulations.¹⁴ Part IV offers criticism of current anti-payola regulations, describes the facts and impact of New York authorities' investigation and

generally 149 CONG. REC. S1669 (2002) (expressing desire for reform of current federal payola laws); Statement of Commissioner Jonathan Adelstein (Aug. 8, 2005), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-260453A1.pdf (noting airwaves belong to public); Letter from Columbia Records Executive Vice President, In the Matter of Sony BMG Music Entertainment (Feb. 6, 2003), *available at* <http://www.oag.state.ny.us/press/2005/jul/payola2.pdf> [hereinafter Sony Correspondence] (indicating record company views airtime as scarce commercial resource).

9. *See generally* Garrity, *supra* note 2 (describing findings of New York inquest); Arshad Mohammed, *FCC Plans Payola Investigation*, WASH. POST, Aug. 9, 2005, at D02 (reporting that FCC plans further investigation of possible violations of federal payola laws in wake of New York inquiry); Assurance of Discontinuance, *supra* note 3 (containing findings of investigation that were published on state attorney general's website).

10. *See* Communications Act, 47 U.S.C. § 317(a)(1) (2000). The Act provides: All matter broadcast by any radio station for which any money, service or other valuable consideration is directly or indirectly paid, or 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.

Id.

11. *See* Kaye-Smith Enter., 71 F.C.C.2d 1402, 1408 (1979) (setting forth "friendship exception").

12. *See* Eric Boehlert, *Record Companies: Save Us from Ourselves!*, SALON.COM, Mar. 13, 2002, http://archive.salon.com/ent/feature/2002/03/13/indie_promotion/index.html (noting that industry observers find FCC rules to be "antiquated and inefficient").

13. For a discussion of various payola scandals and investigations in United States history and their impact (or lack thereof) on curtailing payola, see *infra* notes 18-29 and accompanying text.

14. For a discussion of the development of current federal anti-payola statutes, see *infra* notes 39-61 and accompanying text.

settlement with Sony and debates the merits of payola regulations.¹⁵ Further, Part IV explores opposing views on the necessity of payola regulation and concludes that current methods of obtaining airplay come at a high cost to the industry, artists and the public; therefore, some revision of current regulations is necessary.¹⁶ Hoping to induce further discussion of a balanced solution to this decades-old debate, Part V proposes adjustments to the current structure of the payola regulations to account for the scarce nature of the valuable resource of broadcast radio airtime.¹⁷

II. DEVELOPMENT OF PAYOLA

A. *Payola and Public Scandal*

Payola has influenced the music industry from its earliest days, with some instances dating back to the 1800s and the sale of sheet music.¹⁸

15. For a more detailed discussion of the Sony investigation, see *infra* notes 111-30 and accompanying text.

16. For a discussion of the impact of the Sony settlement in light of previous anti-payola actions on the part of record companies, see *infra* notes 131-49 and accompanying text.

17. For an analysis of several viewpoints on necessary revisions to current federal payola restrictions, see *infra* notes 203-25 and accompanying text.

18. See Richard Kielbowicz & Linda Lawson, *Unmasking Hidden Commercials in Broadcasting: Origins of the Sponsorship Identification Regulations, 1927-1963*, 56 *FED. COMM. L.J.* 329, 349 (2004) (describing evolution of payola from 1800s to present); Cliff Doerksen, *Broken Record*, *N.Y. TIMES*, July 29, 2005, at A23 (documenting origins of payola). Music publishers at the end of the nineteenth century hired nomadic vaudeville performers to incorporate their melodies on the music theatre circuits in order to increase the audiences for their music. See Kielbowicz & Lawson, *supra*, at 349 (introducing first appearance of payola in music industry). "If audiences liked what they heard, the publishers would profit from the sale of copyrighted sheet music." Doerksen, *supra*. Under this nascent pay-for-play system, performers could earn almost as much from payola as they could from their theatrical salaries. See *id.* (noting even non-musical acts could profit from "trickle-down benefit" of payola system).

With the introduction of silent movies, the same publishers turned their attention to theatre organists, and supplied inducements for their melodies to be played along with the films. See *id.* (describing new payola-supported class of entertainers). As sound was incorporated into film, the promotional deals were aimed at the movie studios producing the movies. See *id.* (indicating payola's opportunistic qualities). All seemed to be going well for the music publishers until the advent of radio. See *id.* (recognizing similarities between publishers' reactions to radio and reactions to advent of internet by today's radio conglomerates). To the publishers, radio seemed to overexpose songs before they reached the height of their market value. See *id.* (describing prior life cycle of songs as maximum of two years). In fact, radio served to broaden the market for hit songs and, simultaneously, shorten the life cycle of those songs. See *id.* (noting it used to take months to "infect the public with hunger for a particular tune"). This combination allowed for more songs to be exploited as "cash cows." See *id.* (noting song life cycles shortened from months to weeks).

By the 1930s, one radio network openly contemplated charging music publishers a flat rate for each exposure of a song. See *id.* (claiming NBC's plan was thwarted by era's star bandleaders). Standing in their way, however, were bandleaders and singers loath to see their own payola profits reduced. See *id.* (assert-

The practice spread to radio by the 1930s, when some bands accepted payments to endorse particular songs on their radio shows.¹⁹ Yet it was in the 1950s that payola truly blossomed in radio, feeding off competition between independent record labels and established companies.²⁰ Payola stems from a basic economic concept: far more records are released each week than the finite airtime available can accommodate; as a result, payola acts as a pricing mechanism to allocate the scarce resource of airtime exposure to new songs in accordance with basic theories of supply and demand.²¹ Nevertheless, for policy reasons, Congress proscribed the practice in the 1960s and subjected violators to criminal penalties.²² The

ing bandleaders and singers would never have accepted interference with their own payola arrangements). Nevertheless, by the 1940s, deejays began sharing in the spoils of payola. *See id.* (describing decline of bandleaders in favor of disc jockeys at close of 1940s). For a detailed history of payola in America and England, from its origins in music publishing through the drugs and paper adds of the early 1990s, see KERRY SEGRAVE, *PAYOLA IN THE MUSIC BUSINESS: A HISTORY, 1880-1991* (1994).

19. *See* Kielbowicz & Lawson, *supra* note 18, at 350 (explaining development of payola in radio).

20. *See id.* (recognizing that changes in radio were prompted by competition from television and inception of rock 'n' roll); Michael Roberts, *Playola*, WESTWORD, Oct. 18, 2001, <http://www.westword.com/issues/2001-10-18/mesage.html> (summarizing early payola scandals among radio deejays).

21. *See* Sidak & Kronemyer, *supra* note 5, at 521 (articulating economic incentives behind payola practices); Katunich, *supra* note 5, at 645 (observing that finite airtime generates competition); *see also* Sidak & Kronemyer, *supra* note 5, at 533 (noting Top 40 stations may receive fifty or more singles each week, yet have mere three to four play list slots open for new releases).

The supply and demand chain in the music industry model is comprised of record companies and radio stations. *See* Sidak & Kronemyer, *supra* note 5, at 521 (describing market participants). The domestic record industry currently consists of four major companies: Sony BMG Music Entertainment, Warner Music Group, Vivendi Universal Music Group and EMI Music Group. *See* Assurance of Discontinuance, *supra* note 3, at 2 (reporting Sony is "one of the four major record companies"); Chris Morris & Alexander Woodson, *\$10 Mil Fine for Sony BMG in Payola Probe*, HOLLYWOODREPORTER.COM, July 27, 2005, available at LEXIS, THR File (noting that other three majors are Universal, EMI and Warner). A record company is, in its simplest form, "a vertically integrated company capable of acquiring and developing talent . . . and manufacturing and distributing prerecorded music." Sidak & Kronemyer, *supra* note 5, at 525. At the other end of the industry are 10,000 commercial radio stations which license a portion of the national airwaves. *See* Eric Boehlert, *Pay for Play*, SALON.COM, Mar. 14, 2001, <http://archive.salon.com/ent/feature/2001/03/14/payola/index.html> (explaining that record companies rely on about 1,000 of those stations to create hit songs). Radio stations, unlike record companies, "are competing providers of a public good—namely, the free broadcast of music, news, sports, and other entertainment." *See* Sidak & Kronemyer, *supra* note 5, at 526 (noting that most common radio format is Contemporary Hit Radio, also known as Top 40 radio). Popular Top 40 radio stations compete for listeners based on the attractiveness and predictability of their rather repetitive portfolio of hit singles. *See id.* (explaining portfolios are based on restricted list of nationally ranked singles).

22. *See* 47 U.S.C. § 508 (2000) (requiring disclosure of payola and imposing criminal penalties for violators); Sidak & Kronemyer, *supra* note 5, at 522 (commenting on limited applicability of section 508). For a further discussion of con-

effect was a promotional culture in which songs, records and performers contended with each other to obtain more broadcast exposure than their competitors.²³

A House of Representatives investigation revealed that payola was already a pervasive issue in radio, involving almost every aspect of the music business.²⁴ The investigation into payola began in November 1959, following another widely publicized investigation into quiz show fraud, and was prompted by a letter alleging the great extent to which payola influenced music selection in radio.²⁵ The House committee called famed deejays such as Dick Clark, of American Bandstand notoriety, and Alan Freed, often credited with coining the term “rock ‘n’ roll,” to testify about their participation in the payola scandal.²⁶ Dick Clark’s appearance before the committee revealed that payola practices intertwined with every part of the music and broadcast industries, from recording and distributing companies to talent agencies.²⁷ In fact, Clark supposedly had connections with “six small music publishing houses, seven small recording companies, two distributing companies, one record pressing company, two production companies and one talent agency.”²⁸ While Clark was thereafter merely required to divulge his financial interests in music enterprises, Freed eventually pled guilty to charges of commercial bribery, thereby effectively ending his career.²⁹

B. *The Curious Nature of Record Promotion*

Notwithstanding the public outrage following revelations of airplay bought and sold, members of the music industry realize that it is the unique nature of both record promotion and radio that combine to make pay-for-play such an appealing practice to everyone from deejays to CEOs

gressional and administrative restrictions on payola, see *infra* notes 39-61 and accompanying text.

23. See Kielbowicz & Lawson, *supra* note 18, at 350 (“Payola afflicted all stages of the music industry, from composers angling to land recording contracts to record promoters bribing deejays for more airtime.”). Some deejays involved in payola practices received several thousand dollars per year, more than double their salaries. See *id.* (noting other payola included expensive holiday gifts).

24. See *id.* at 348 (discussing findings of House of Representatives’ investigation).

25. For a more detailed discussion of the House payola investigation, see *infra* note 43 and accompanying text. The widespread nature of payola came to light as a result of the House Special Subcommittee on Legislative Oversight’s investigation into rigged quiz shows. See Kielbowicz & Lawson, *supra* note 18, at 347 (noting both scandals “merged in the public’s mind to form one image of commercialism’s corrupting influence on broadcasting”).

26. See *id.* (reporting that public followed exposés in popular press). In fact, “Clark expressed surprise about the uproar over payola and denied that he had violated broadcast regulations.” *Id.*

27. See *id.* at 351 (describing Clark’s testimony before House committee).

28. *Id.*

29. See *id.* (indicating Clark’s level of involvement); Roberts, *supra* note 20 (chronicling demise of Alan Freed).

of record companies.³⁰ Record promotion entails securing radio airplay for newly released songs; airplay is essentially advertising for new albums that allows the consumer to preview the product before purchase.³¹ In fact, it is undisputed that “radio airplay is the single most significant driver of music sales.”³² But there is a finite amount of airtime available and the limited availability of radio airplay is further compounded by the short lifecycles of most songs.³³ Add to this radio’s own need to operate as an economically savvy business and you have the seedlings of a pay-for-play system.³⁴

Complications in the supply and demand theory arise because radio stations cannot determine the extent of listener demand for a new song at the time they must decide whether to add a song to their playlists.³⁵ Because of this, a highly organized market exists for assessing the broadcast

30. See Katunich, *supra* note 5, at 646 (noting that while other products and services can be advertised via other media, this is rarely possible and often ineffective for songs); see also Kielbowicz & Lawson, *supra* note 18, at 348-49 (describing influence on public opinion by accounts in popular press blaming advertising for debasing effects on recording industry).

31. See Sidak & Kronemyer, *supra* note 5, at 526 (suggesting radio airplay informs consumer of availability of new products).

32. Assurance of Discontinuance, *supra* note 3, at 2; accord Sidak & Kronemyer, *supra* note 5, at 526 (identifying radio as most important vehicle for record sales); see also Chuck Philips, *Payola Probe Focuses on Latin Music Airplay*, L.A. TIMES, June 4, 1998, at A1 (noting many people purchase songs heard on radio based on assumption that those are best available). The more exposure a song receives, the more people are likely to hear it and purchase it. See *Nobody In Particular Presents, Inc. v. Clear Channel Commc’ns, Inc.*, 311 F. Supp. 2d 1048, 1060 (D. Colo. 2004) (“[R]adio air play of [record labels’] records and live concerts by their artists are essential to generate demand for the records themselves.”); Carlye Adler, *Backstage Brawl*, FORTUNE SMALL BUS., Mar. 4, 2002, at 170[C] (“For a band, airplay is like oxygen—without it, you die.”); see also Assurance of Discontinuance, *supra* note 3, at 2 (noting connection between song chart positions and sales figures). Further, increased airplay is reflected in the published charts purporting to reflect popularity; the higher a song’s rank the more likely retailers will stock the song and consumers will purchase it. See *id.* at 2 (“[I]ncreased airplay translates into increased sales.”).

33. See Sidak & Kronemyer, *supra* note 5, at 528 (discussing notoriously short time frame in which songs must debut on radio stations nationwide). Ron Stone, an artist manager, notes that, “you only get [twelve] weeks for your record to get any traction at radio. After [twelve] weeks the next wave of record company singles come over the breach.” Boehlert, *supra* note 21 (describing need to secure hit status in short time).

34. See Sidak & Kronemyer, *supra* note 5, at 526 (stating that radio stations compete for listeners on basis of their song portfolios). The Arbitron Ratings Company estimates audience market shares for radio stations; rates charged for advertising increase as a station’s Arbitron ratings increase. See *id.* at 527 (describing connection between popularity of station and advertisers’ willingness to buy airtime). Thus, radio stations face an opportunity cost when choosing to play one song over another based on its popularity with listeners. See *id.* (noting that if audience dislikes song selection, station’s audience and advertising rates decline).

35. See *id.* at 527 (maintaining that such quandaries are exacerbated by short product life cycle of popular songs).

value of a new song.³⁶ The process works like this: “Every Tuesday night, all [Top 40] radio stations polled by the various trade publications submit their playlists for the week ending that day. Those lists, when aggregated, become the published national hit records charts.”³⁷ It is the object of a record company’s promotion staff to induce a sufficient number of radio stations to add the song in order to have it reported as a hit single.³⁸

III. ANTI-PAYOLA LAWS AND REGULATIONS

With the passage of the Communications Act of 1934,³⁹ the federal government obtained broad power to regulate wire and radio communication across the nation.⁴⁰ The purpose of the Act was to ensure efficient nationwide wire and radio communications at a reasonable cost to the public.⁴¹ The Act vested authority in the newly created FCC to effectuate

36. *See id.* (declaring that playlists of highly rated radio stations “can be a leading indicator of eventual consumer demand”).

37. *Id.* at 526. *Billboard* ranks new singles on the basis of both airplay and sales of the record; alternatively, *Radio & Records* ranks singles based solely on airplay, providing a truer account of a song’s success at radio. *See id.* at 527 (noting that highly rated song portfolio has immense proprietary value to radio stations); *see also* *United States v. Goodman*, 945 F.2d 125, 126 (6th Cir. 1991) (describing process of tallying song popularity at *Radio & Records*).

38. *See Sidak & Kronemyer*, *supra* note 5, at 527 (describing two factors spurring record companies to seek hit status of songs).

39. Pub. L. No. 73-416, 48 Stat. 1064 (codified as amended at 47 U.S.C. §§ 151-573 (1994 & Supp. V 1999)).

40. *See Katunich*, *supra* note 5, at 646 (describing government’s assumption of wire and radio regulation).

41. *See* 47 U.S.C. § 151 (2005) (enumerating purposes of Act). Note that the line between programming and advertising, which purportedly exists in the United States, is not as clear in other parts of the world. *See Global Views Vary on Pay-for-Play*, BILLBOARD, May 9, 1998, available at LEXIS, BILLBD File (reporting that different business cultures lead to models vastly different from American version). *But see* Kai R. Lofthus, *Payola Alleged in Norway*, BILLBOARD, Dec. 11, 1999, available at LEXIS, BILLBD File (documenting Norwegian radio station suspended for selling “power rotations” for songs). For example, in Italy, radio stations commonly “present” artists in exchange for having their logo appear on the record and receiving credit as a co-publisher. *See Global Views Vary on Pay-for-Play*, *supra* (noting this practice was popular in France fifteen years ago but is now completely absent). In many European countries, pay-for-play is permitted by existing rules governing advertising; however, programmers doubt the economic efficiencies of buying advertising space for spins and question the ethics of playlists determined by the highest bidder. *See* Mike McGeever, *Pay-for-Play Sparks Talk at NAB Europe*, BILLBOARD, Dec. 19, 1998, available at LEXIS, BILLBD File (debating whether cost of ad space for “x” number of spins could be better spent by record companies); *see also Global Views Vary on Pay-for-Play*, *supra* (noting increase in pay-for-play not limited to America). In contrast, payola is illegal in places like Japan and Hong Kong. *See id.* (contrasting Asian countries’ approach to payola). Yet, as in America, programming can still be influenced through purchases of adjacent advertising. *See id.* (noting correlation between number of advertisement spots purchased and number of spins). This prompts the question of whether government regulation can ever really curtail payola. *See id.* (noting other nations face similar payola scandals where practice is banned).

its provisions.⁴²

Despite the FCC's role in regulating America's airwaves, the House Special Subcommittee on Legislative Oversight actually initiated the first federal investigation into payola practices in radio.⁴³ Following the Subcommittee's inquiry, Congress amended the Communications Act by altering the existing section 317 and adding section 508 ("Amendments of 1960").⁴⁴ While section 508 is commonly referred to as "the payola statute," it is section 317 that contains the most significant restrictions on the practice of pay-for-play.⁴⁵ This provision requires that a radio station disclose to the public, at the time of broadcast, any receipt of significant consideration in exchange for broadcasting certain material, including the

42. See Katunich, *supra* note 5, at 646 (documenting creation of FCC).

43. See *id.* at 647 (reporting first investigation began in November 1959). The House Special Subcommittee on Legislative Oversight turned its attention from an investigation of fixed quiz shows to payola in radio when it received a letter asserting that, "commercial bribery has become a prime factor in determining what music is played on broadcast programs and what musical records the public is surreptitiously induced to buy." See Kielbowicz & Lawson, *supra* note 18, at 347 (claiming letter spurred investigations). The investigation of November 1959 focused primarily on disc jockeys and independent record labels peddling "rock 'n' roll"; the inquiry revealed numerous instances of bribes and tax evasion at stations across the country. See *id.* (detailing investigations by FCC, FTC, state district attorneys and United States Attorney General). The investigation was also responsible for tarnishing the reputations of two notable disc jockeys: Alan Freed, who is often credited with coining the term "rock 'n' roll," and Dick Clark. See Roberts, *supra* note 20 (summarizing history of payola and radio).

44. See 47 U.S.C. §§ 317, 508 (2000). Section 317(a)(1) states:

All matter broadcast by any radio station for which any money, service or other valuable consideration is directly or indirectly paid, or 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.

Id. § 317(a)(1). Section 508 states, in pertinent part:

(a) [A]ny employee of a radio station who accepts or agrees to accept from any person . . . or any person . . . who pays or agrees to pay such employee, any money . . . for the broadcast of any matter over such station shall, in advance of such broadcast, disclose the fact of such acceptance or agreement to such station.

(b) [A]ny person who, in connection with the production or preparation of any program or program matter which is intended for broadcasting over any radio station, accepts or agrees to accept, or pays or agrees to pay, any money . . . for the inclusion of any matter as a part of such program or program matter, shall, in advance of such broadcast, disclose the fact of such acceptance or payment or agreement to the payee's employer.

Id. § 508(a); see Katunich, *supra* note 5, at 647 (asserting that Subcommittee was attempting to prevent recurrence of bribes to deejays).

45. See Sidak & Kronemyer, *supra* note 5, at 522 (noting that viewed apart from section 317, section 508 has narrow scope); see also Katunich, *supra* note 5, at 647 (documenting same).

identity of the sponsor.⁴⁶ The articulated purposes of section 317 and the more explicit disclosure requirements of 47 C.F.R. § 73.1212 function to inform the listening audience that it is hearing material that has been paid for, so that the public “know[s] by whom it is persuaded.”⁴⁷ Section 508, in turn, requires that radio station employees notify the licensee when consideration is exchanged for broadcast so that the licensee can arrange proper disclosure.⁴⁸

The Amendments of 1960 were designed to address payments made to recipients other than the radio station itself, such as disc jockeys or other employees.⁴⁹ Nevertheless, neither the original provisions of the Communications Act nor the Amendments of 1960 actually outlawed the practice of paying for airplay.⁵⁰ Rather, these statutes and their corollary

46. See 47 U.S.C. § 317 (2000); Sidak & Kronemyer, *supra* note 5, at 522 (acknowledging that public disclosure is also necessary for licensee disclosures required under section 508).

47. See Termination of “Plugola” Rulemaking and Affirmation of Disclosure Requirement, 76 F.C.C.2d 227, 227 (1980) (enumerating purpose of statutes); see also Nat’l Broad. Co., 27 F.C.C.2d 75, 75 (1970); 47 C.F.R. § 73.1212 (2004) (asserting same principle of public’s need to know); Kielbowicz & Lawson, *supra* note 18, at 332 (“Moreover, the sponsorship identification rules express a basic goal of American communication law and policy: to foster a healthy marketplace of ideas with minimal government intervention.”).

The purpose of the statutes is necessitated by the unique ability of songs to act as advertisements. See Sidak & Kronemyer, *supra* note 5, at 526 (describing songs as disguised commercials capable of persuasion). “In the case of legitimate advertisements, the identity and commercial interest of the sponsor are apparent from . . . the contents of the advertisement itself. Section 317 is concerned with material, such as an otherwise innocuous sound recording, that communicates no apparent or ostensible advertising message when broadcast.” *Id.* at 522; see Kielbowicz & Lawson, *supra* note 18, at 331 n.2 (“[Payola] represent[s] disguised advertising—that is, the audience does not readily recognize the promotional nature of the communication.”).

In fact, “[a]s far back as the Radio Act of 1927 . . . there has been an unvarying requirement that all matter broadcast [in exchange for] valuable consideration . . . be announced as paid for or furnished and by whom.” Midwest Radio-Television Inc., 49 F.C.C.2d 512, 514 (1974) (emphasis omitted) (setting forth appropriate disclosure); see also *Loveday v. FCC*, 707 F.2d 1443, 1448-49 (D.C. Cir. 1983) (stating same). The original disclosure provisions contained in the Radio Act have largely been incorporated into the current law without significant changes or debate. See *id.* at 1449-52 (commenting on legislative history of provisions).

48. See Sidak & Kronemyer, *supra* note 5, at 522 (noting section 508 actually addresses limited situation arising between radio station and its employees). Section 508 assumes a naïve licensee unaware of the actions of its employees, highly unlikely in this age of power deals brokered at the highest levels of radio and record entities. See *id.* (rejecting idea of uninvolved radio licensee in modern radio business model).

49. See Katunich, *supra* note 5, at 647 (explaining shortcomings of section 317 discovered in congressional investigation and how shortcomings influenced Amendments of 1960).

50. See *id.* at 648 (noting laws purport to regulate payola yet do not explicitly outlaw it); see also 47 U.S.C. § 317 (2005) (imposing restrictions but not outlawing payola).

FCC regulations simply prohibited *undisclosed* payment for broadcast of material.⁵¹

The FCC enabled stricter application of the statutory anti-payola laws via administrative hearings for its radio licensees.⁵² These regulations require disclosure of overt exchanges of consideration for the inclusion of matter in a radio program, regardless of whether the payment is made to a third party.⁵³ Even nominal amounts of consideration may require disclosure to the public.⁵⁴ Further, the FCC has held that determinations about whether a disclosure must be made are not based on who received the benefit derived from purchase of broadcast time.⁵⁵ In fact, following the

51. See Katunich, *supra* note 5, at 648 (asserting that although technically required, disclosures are rarely made).

52. See, e.g., Gen. Media Assoc., Inc., 3 F.C.C.2d 326, 327 (1996) (holding that disclosure provisions apply even when consideration given to third party); KMAP, Inc., 44 F.C.C.2d 971, 971-72 (1974) (holding nominal amounts of consideration trigger disclosure provisions); *Midwest Radio-Television*, 49 F.C.C.2d at 514-15 (noting that mere mention of sponsor's name is inadequate disclosure); *Nat'l Broad. Co.*, 27 F.C.C.2d at 75 (determining that exact wording of sponsorship disclosure is left to licensee discretion); *Cont'l Broad., Inc.*, 15 F.C.C.2d 120, 130-31 (1968), *reconsideration granted in part*, 17 F.C.C.2d 485 (1969), *aff'd*, 439 F.2d 580 (D.C. Cir. 1971) (holding that benefit derived from purchase of broadcast not determinative of whether identification is necessary); *WHAS, Inc.*, 40 F.C.C. 190, 193 (1964) (holding that licensee must identify principal rather than agent if there is constructive notice of agency relationship).

53. See *Gen. Media Assoc.*, 3 F.C.C.2d at 326-27 (applying disclosure provisions even in cases of third party consideration). In *General Media Associates*, the FCC held that where a hidden payment was made to a third party rather than directly to the broadcaster, appropriate sponsorship identification was required. See *id.* at 326 (asserting producer solicited payments from clients who wanted inclusion of certain information in radio program). The FCC concluded that if the payment had been received by the radio station rather than General Media, a disclosure would have been required; therefore, the same underlying policy of section 317(a)(1) necessitated a disclosure in that case. See *id.* at 327 (noting General Media had notified stations that some content had been paid for).

54. See *KMAP*, 44 F.C.C.2d at 974-75 (holding listener payments to disc jockeys to ensure requests would be played required disclosure). *But see* *Kaye-Smith Enter.*, 71 F.C.C.2d 1402, 1408 (1979) (holding nominal amounts of consideration did not trigger disclosure provisions). In order to escape the disclosure requirements the item must be furnished to the broadcaster "without charge or at a nominal charge." See *Kielbowicz & Lawson*, *supra* note 18, at 367 (noting possibility of circumventing disclosure provisions).

In *KMAP*, the FCC determined that a radio station violated the disclosure provision by failing to announce that listeners had sent small amounts of money to announcers along with their requests for songs, in an attempt to ensure the broadcast of the dedications. See 44 F.C.C.2d at 974 (noting that station acknowledged general counsel's letter recommending disclosure announcement).

55. See *Cont'l Broad.*, 15 F.C.C.2d at 130-31 (holding any individual or agency purchasing broadcast time must be announced as sponsors). In *Continental Broadcasting*, the FCC overturned an examiner's finding that there was no violation of either section 317(a)(1) or 47 C.F.R. § 73.199(a) from a radio station's failure to broadcast sponsorships disclosure for indirect payments from freelancers for an appearance on a radio program, under the theory that their appearance did not constitute "matter" under the definition in the statute. See *id.* at 130 (noting examiner's belief that desire for mere personal exposure removed payment from sponsor-

1950s investigations and ensuing administrative hearings, the concept of “sponsor” included “any party maneuvering to influence broadcast content to promote goods or services.”⁵⁶ Nevertheless, despite the rather explicit wording for sponsorship disclosures contained in 47 C.F.R. § 73.1212, the FCC has held that the exact wording of sponsorship identification remains in the licensee’s discretion, provided that the licensee adequately conveys that the sponsor has paid for program material.⁵⁷

The FCC requires licensees to exercise “reasonable diligence” in obtaining information that enables them to comply with the requirements of sections 317 and 508 and associated regulations.⁵⁸ A licensee who knows that an agent has made arrangements with a station on behalf of another must make announcements identifying the principal rather than the agent as the sponsor.⁵⁹ Nonetheless, a licensee may safely accept the apparent sponsor’s representations that he or she is the real party in interest, as “[a] duty to undertake an arduous investigation ought not casually be assigned to broadcasters.”⁶⁰ Despite such actions, and because a record’s success remains inextricably linked to radio airplay, members of record companies and radio stations alike have continued to skirt the confines of payola laws in an effort to remain on top of the market.⁶¹

sponsorship requirements). Rejecting this theory, the FCC concluded that anything broadcast in exchange for valuable consideration met the terms of the statute and required disclosure. *See id.* at 131 (same); *see also* 47 U.S.C. § 317(a) (2000) (stating sponsorship requirements).

56. *See Kielbowicz & Lawson, supra* note 18, at 349 (noting expanded view of sponsors raised questions about scope of section 317).

57. *See Nat’l Broad.*, 27 F.C.C.2d at 75 (requiring announcement to be understandable by audience). Note that mere mention of the sponsor’s name without more is inadequate. *See Midwest Radio-Television*, 49 F.C.C.2d at 514 (requiring inclusion of “paid-for” or “sponsored by”).

58. *See Commission Warns Licensees About Payola and Undisclosed Promotion*, 4 F.C.C.R. 7708, 7708 (1988) (holding that reasonable diligence standard may require higher duty of care for stations whose formats make them particularly susceptible to payola).

59. *See WHAS, Inc.*, 40 F.C.C. 190, 192 (1964) (calling for disclosure of “true identity” of sponsor); *see also Loveday v. FCC*, 707 F.2d 1443, 1449 (D.C. Cir. 1983) (rejecting requirement of arduous investigation for licensee). In *WHAS*, the licensee argued that it had not violated the disclosure requirements because the provision in the rules is phrased in the disjunctive and contemplates alternative methods of compliance. *See WHAS*, 40 F.C.C. at 192-93 (arguing in support of its announcement of identity of party on whose behalf payments were made). In fact, the licensee announced the agent who had paid to air material on behalf of another as the sponsor in interest. *See id.* at 192 (noting failure of station to distinguish between real sponsor and apparent sponsor). The FCC rejected this theory and cited the last sentence of Section 3.654(c) of the rules in its holding: “Where an agent or other person contracts . . . with a station on behalf of another, and such fact is known to the station, the announcement shall disclose the identity of the person . . . in whose behalf such agent is acting . . .” *Id.*

60. *See Loveday*, 707 F.2d at 1449 (explaining why rigorous investigation not necessary).

61. *See Chuck Philips, Radio Pushes Bands for Freebies*, L.A. TIMES, Nov. 5, 1998, at A1 (noting “[r]ecord companies have long tried to influence the programmers

IV. CRITICISMS OF ANTI-PAYOLA LAWS AND REGULATIONS

Payola has continued despite all the foregoing restrictions because of the ability of record labels and radio stations to exploit the structure of the statutes and their exceptions, and because of a blatant disregard for the regulations altogether.⁶² Further, the practice has become institutional in nature, a seemingly inextricable part of the day-to-day workings of the music business.⁶³ Despite agreement among parties on both sides of the issue that the current system is not healthy for the music business, it appears unlikely a middle ground approved by all parties will be reached in the near future.⁶⁴

A. *Loopholes*1. *Role of the Independent Promoter*

In order to accomplish the immense task of promoting a new single across the nation in a timely manner, record companies subcontract with independent promoters, which allows flexibility as the number of projects requiring promotion changes.⁶⁵ In this capacity, independent promoters act as brokers for hit singles, providing radio stations with “pertinent information and data related to the quality and nature of the recording, its likely demographic appeal, its advertising support, sales performance and, ultimately, the likelihood of its public acceptance as a ‘hit record.’”⁶⁶ The

who decide which of more than 5,000 songs offered each year will be played in the roughly 250 new slots per station in each year”).

62. See 47 U.S.C. § 317(a)(1) (2000) (requiring disclosure of material broadcast in exchange for consideration); Kaye-Smith Enter., 71 F.C.C.2d 1402, 1408 (1979) (articulating friendship exception). For detailed discussion of how the music industry has exploited loopholes in the payola statutes, see *infra* notes 70-75, 93-101 and accompanying text.

63. For a discussion of the institutional nature of payola in music, see *infra* notes 103-10, 134-44 and accompanying text.

64. For a discussion of the universe of arguments for and against payola practices, see *infra* notes 158-77 and accompanying text.

65. See Sidak & Kronemyer, *supra* note 5, at 528 (detailing that promotion loads will change for labels with few releases or releases by temperamental and unpredictable artists). The authors note that if a record company were to keep a staff of in-house promoters sufficient to handle their peak business times, the cost would be prohibitive. See *id.* (claiming that record companies would have excess staff if they were vertically integrated into promotion to extent necessary to accommodate peak loads). Journalist Eric Boehlert notes:

There are 10,000 commercial radio stations in the United States; record companies rely on approximately 1,000 of the largest to create hits and sell records The indies get paid for every one: \$1,000 on average for an “add” at a Top 40 or rock station, but as high as \$6,000 or \$8,000 under certain circumstances.

Boehlert, *supra* note 21. Compare these amounts with the \$4,000 paid by Sony directly to a radio station to obtain airplay for a Franz Ferdinand song on a single radio station. See Sony Correspondence, *supra* note 8 (illustrating various exchanges for airplay).

66. See Sidak & Kronemyer, *supra* note 5, at 529 (quoting reported member of “The Network” of independent promoters). During the 1980s approximately

independent promoter's role for record companies is to enkindle enough clout with playlist creators at radio stations to get a song the airplay needed for success.⁶⁷ Following the massive radio consolidation that occurred in the wake of the Telecommunications Act of 1996,⁶⁸ however, independent promoters became toll collectors with potentially exclusive access to almost sixty percent of the top one hundred stations in the United States.⁶⁹

Independent promoters achieved a comparative advantage over in-house company promoters due to their ability to exploit the significant number of loopholes within sections 317 and 508 and their accompanying regulations.⁷⁰ The enactment of the Racketeer Influenced and Corrupt Organizations Act⁷¹ (RICO) gave record companies further incentive to outsource their promotion activities.⁷² Though criminalized in the 1960s, those guilty of payola infractions under sections 317 and 508 faced minor penalties and infrequent prosecution.⁷³ With the passage of RICO, however, record companies faced the potential of treble damages and far

thirty independent promoters dominated the field in a loose cooperative known as "The Network." *See id.* at 528-29 (describing background and organization of "The Network"). Members of "The Network" were often hired together to promote a single song nationwide. *See id.* at 529 (explaining how members of "The Network" performed job of securing playtime on radio stations and promoting records). Further, "The Network" had exclusive access to playlists at forty-one major radio stations. *See id.* (describing how "The Network" members worked together to promote record nationwide).

67. *See id.* (describing purpose of independent promoters to record companies). For in depth discussion of the role of specific human capital (clout) and exclusive dealing among independent promoters, *see id.*

68. Pub. L. No. 104-104, 110 Stat. 56 (codified in scattered sections of 15 U.S.C. and 26 U.S.C.).

69. *See* Boehlert, *supra* note 21 (noting that while independent promoters were once scattered across America, they now have firms stretching coast to coast). Note that independent promoters have made their way into every genre of music. *See* Eric Boehlert, *Payola City*, SALON.COM, July 24, 2001, http://archive.salon.com/ent/music/feature/2001/07/24/urban_radio/index.html (explaining how every genre of music has independent promoters including urban radio that does not advertise to that fact).

70. *See* Sidak & Kronemyer, *supra* note 5, at 531 (noting specifically that "friendship exception" immunizes otherwise punishable conduct when performed by independent promoters).

71. Racketeer Influenced and Corrupt Organizations (RICO) Act, Pub. L. No. 91-452, 84 Stat. 922 (1970) (codified at 18 U.S.C. §§ 1961-1968 (2005)).

72. *See* Sidak & Kronemyer, *supra* note 5, at 538 (arguing potential of facing private treble damages forced promotion out from under auspices of record companies).

73. *See id.* at 537 (asserting that small penalties and remote probability of detection provided little negative incentive to record companies). The authors further note that the "volume of RICO litigation grew precipitously in the late 1970s and early 1980s." *See id.* at 537-38 (explaining how RICO created incentive for record companies to contract-out record promotion and avoid vertical integration).

more frequent prosecution by the government.⁷⁴ Thus, record companies increasingly shifted their promotions practice to independent promoters in order to insulate themselves from allegations of wrongdoing.⁷⁵

In an effort to further distance themselves from potentially illicit deals, record companies shied away from express or implied agreements guaranteeing airplay in return for the purchase of the promoter's services.⁷⁶ The necessary ambiguities of the agreements that ensued gave record companies little ability to enforce their covenants.⁷⁷ The record companies' inability to effectively monitor or control the independent promoters led to opportunistic behavior, often taking the form of rapidly escalating "add" prices and "paper adds."⁷⁸

74. *See id.* at 537 (explaining sections 317 and 508 were held not to imply private right of action).

75. *See id.* at 538 (explicating that pursuant to federal statute governing complicity, record companies could be prosecuted as criminals). Record companies could face criminal liability if found to aid, abet, counsel, command, induce or procure acts of payola; or if found to have willfully caused an act of payola. *See id.* at 539 (noting many avenues exist to prosecute record companies). A consequence of such laws is the vagueness of contracts between record labels and independent promoters. *See id.* (asserting vagueness reduced liability of record companies involved in payola).

76. *See id.* (explaining such incomplete contracts were necessary in order to minimize record company knowledge, and therefore liability of promoter activity).

77. *See id.* at 541 (noting that only method of enforcing such contracts was termination of repeat business).

78. *See id.* at 543 (explaining paper adds are either deceptions of record companies by independent promoters or failure of independent promoters to perform). A paper add occurs when the radio station reports the addition of a song to its play list to the charting companies, yet never actually airs the song. *See id.* (noting paper adds are breach of contract). Paper adds are now a rare occurrence due to Broadcast Data Services (BDS), a company that electronically monitors airplay in major radio markets and which provides record companies with a detailed readout of actual airplay. *See* Boehlert, *supra* note 21 (claiming paper adds have been replaced by so-called "lunar rotations"—song spins in early morning hours which do not risk station ratings).

Record companies' ability to keep tabs on the results of an independent promoter's work, and thus reduce the number of paper adds generating payment without actual airplay, was greatly enhanced with the emergence of BDS. *See* Sidak & Kronemyer, *supra* note 5, at 553-54 (noting BDS has assisted record companies ability to monitor airplay). Nonetheless, it was not long before record companies themselves learned how to manipulate such a service in their own favor. *See* Assurance of Discontinuance, *supra* note 3, at 24 (detailing Sony's use of BDS "thumbprints" in commercials to artificially inflate airplay charts). Record companies are unafraid of policing BDS to ensure they get what they pay for from radio stations. *See* Sony Correspondence, *supra* note 8 (detailing airtimes of Celine Dion song at numerous radio stations).

Despite the introduction of some ability for record companies to monitor the results of promoters' services, independent promoters are still in a position to act ostensibly as gatekeepers of radio airwaves. *See* Duhigg & Hamilton, *supra* note 7 (illustrating that labels' desperation for airplay fuels payola). Among the correspondence released in the Sony investigation were emails indicating senior staff members at Sony's Columbia Records were concerned that radio giant Clear Channel would refuse to air any of Columbia's releases unless more money was

The typical arrangement between a record company and an independent promoter involves a retainer in addition to a separate fee based on reported airplay, or “adds.”⁷⁹ The cost of an independent promoter’s services in breaking a new record can be staggering—approximately \$100,000 to \$250,000 per song.⁸⁰ Many times this cost is passed on to artists by way of a recoupment provision included in their contracts.⁸¹ Moreover, even if program directors at a radio station discover a song on their own, or would have played a song without outside encouragement, the independent promoter will still be paid for the add.⁸² Despite the high costs, record companies continue to pay promoters because they fear that refusal to pay risks losing airplay for *any* artist from the company’s roster.⁸³

Likewise, the system for exchanging funds between record companies, independent promoters and radio stations has become highly sophis-

exchanged for promotional services. *See id.* (describing industry practices that cause continued participation in payola arrangements).

79. *See* Sidak & Kronemyer, *supra* note 5, at 541-42 (stating that many independent promoters are hired on project-by-project basis). For a discussion of how airplay for a song is reported, see *supra* note 37 and accompanying text. Note that “adds” are only one source of available income for independent promoters. *See* Boehlert, *supra* note 21 (noting some promoters get retainers for simply calling radio stations on behalf of songs). Promoters often receive retainers, per-add fees, “bill-backs” for promotional expenses incurred acquiring radio station favor and additional fees to increase the number of times a song is played on a particular station. *See id.* (reporting that cost of getting song on playlists is entirely separate from cost to increase spins).

80. *See* Boehlert, *supra* note 21 (suggesting record companies rarely know what has become of money given to independent promoters).

81. *See id.* (reporting that labels can occasionally get artists to bear costs of promotion); *see also* Lynn Morrow, *The Recording Artist Agreement: Does It Empower or Enslave?*, 3 VAND. J. ENT. L. & PRAC. 40, 43-44 (2001) (describing recording costs as advance to artist to be recovered by record company from future royalties earned by artists). Simply described, record companies cover the costs accrued recording and promoting an album on the understanding that the artist will pay back those costs out of the profits. *See* John Nova Lomax, *Streamlining the Hitmaking Process*, HOUSTON PRESS, Nov. 18, 2001, available at <http://www.houstonpress.com/issues/2001-11-08/racket.html> (asserting artists have little room to refuse such agreements when signing recording deals). This practice becomes all the more burdensome upon the realization that record labels receive ninety percent of a record’s profit, as well as retaining the rights to the recording. *See id.* (noting this diminishes artists’ ability to pay back advances). “In modern times, the recoupment provision in all record contracts has payback conditions so onerous and unfair that in many cases, the amount often can never be paid back unless albums achieve gold—or increasingly, platinum-level sales.” Bill Holland, *Artists & Lawyers Decry Contract Clause*, BILLBOARD, Oct. 6, 2001, at 1, available at 2001 WLNR 8724585 (arguing standard recording contract resembles loan).

82. *See* Boehlert, *supra* note 21 (noting independent promoters would get paid even if president of record company convinced station to play song).

83. *See id.* (explaining that labels fear ability of promoters to keep projects off air until outstanding bills are paid).

ticated, although hardly more efficient.⁸⁴ One alternative to blatant exchanges of money favored by the radio groups is an artist's pro bono appearance at a radio station concert.⁸⁵ These concerts bolster the broadcaster's ratings and popularity, thus increasing potential advertising revenue, all at minimal cost to the station.⁸⁶ Yet the decision whether to participate in promotional concerts creates a concern for record companies about the potential boycott of artists by competing radio stations in the market, or by stations they refuse to perform for.⁸⁷

For example, Chancellor Media radio stations sold A&M Records a \$237,000 marketing campaign built around a series of commercials and contests to promote the Bryan Adams song, "On A Day Like Today."⁸⁸

84. *See id.* (noting that drugs and prostitutes are out and detailed invoices are in). The *Los Angeles Times* released internal documents from one independent promotion company; the documents, known as "banks," indicate the date a station played a song followed by a dollar amount received from the artist's label. *See* Chuck Philips, *Logs Link Payments with Radio Airplay*, L.A. TIMES, May 29, 2001, at A1 (stating documents implicate all major U.S. record labels in payola practice). Frequently, payments from record labels passed on to radio stations via independent promoters take the form of untraceable American Express gift cards, itemized as "promotional funds" for the station to putatively use for t-shirts and giveaways. *See, e.g.*, Assurance of Discontinuance, *supra* note 3, at 8-13 (describing exchanges); Eric Boehlert, *Fighting Pay-for-Play*, SALON.COM, Apr. 3, 2001, <http://archive.salon.com/ent/music/feature/2001/04/03/payola2/index.html> (noting similar payola exchanges). For a discussion of the various tactics used by Sony executives to bury what is arguably payola money, *see infra* notes 113-14 and accompanying text.

85. *See* Philips, *supra* note 61 (describing how station receives ratings boost from concert and artists get sales-boosting exposure).

86. *See id.* (commenting that radio stations loved ratings increase so much that almost 200 now stage their own shows).

87. *See id.* (asserting that radio coerces band participation by threatening to withhold airplay). Critics of the concert quid pro quo deals, often referred to as "payola," believe such shows undermine the ability of young bands to develop as successful touring acts. *See id.* (listing critics' reasons for objections to free radio show practices). "Critics say the concerts foster one-hit wonders and rob young bands of the opportunity to polish material in front of small club audiences—a path followed by nearly every successful touring act, from the Rolling Stones to Jimmy Buffett." *Id.* Concerns about the power of radio stations to pull airplay from an act that refuses to perform at such shows have grown in light of the widespread radio consolidation and ventures into concert promotion since the Telecommunications Act of 1996. *See id.* (claiming conglomerates now control airplay, live venues and more).

88. *See* Chuck Philips & Michael Hiltzik, *Radio Conglomerates Skirt Payola Laws*, *Critics Say*, L.A. TIMES, Dec. 16, 1998, at A1 (providing details of promotional deal); *see also* Frank Saxe & Jeff Silberman, *FCC Fines Radio over Adams Deal*, BILLBOARD, Oct. 28, 2000, at 87, available at 2000 WLNR 6564966 (noting paltry fine unlikely to have chilling effect on payola). *See generally* BRYAN ADAMS, *On a Day Like Today*, on ON A DAY LIKE TODAY (A&M Records 1998). The Chancellor-A&M deal included promotion of the single on ten stations in six major markets, including Detroit, Orlando, Philadelphia and Boston. *See* Philips & Hiltzik, *supra* (describing agreement). The package included contest giveaways and a commitment from each station to play a sixty-second commercial for the album ninety-six times over a two week period, as well as teaser spots for the four Adams concerts. *See id.* (stating same).

The song hit the charts and disappeared off radio almost instantaneously—except at four major radio stations owned by Chancellor.⁸⁹ Not coincidentally, Adams was scheduled to perform charity concerts at all four of the radio stations for free.⁹⁰ It was not until the *Los Angeles Times* reported on the story almost two years later that the FCC investigated—eventually fining the radio conglomerate for violations of the anti-payola statute.⁹¹ All of this can arguably be characterized as pay-for-play; yet “the system today seems to adhere to the letter, if not the spirit, of the payola laws.”⁹²

2. *Statutory Loopholes*

Sections 317 and 508 prohibit only *undisclosed* payments for airplay; arguably so long as radio stations announce that a song has been paid for, record companies would be free to continue the current practice of making payments for broadcast.⁹³ Additionally, in a 1979 administrative hear-

89. See *id.* (reporting Chancellor and A&M denied exchange of airplay for advertising and concerts); Saxe & Silberman, *supra* note 88, at 87 (noting A&M threatened to cancel concerts unless agreement for airplay was provided).

90. See Philips & Hiltzik, *supra* note 88 (detailing artist requirements). For his part in the deal, Adams was required to record voice-overs for the commercials, participate in promotional interviews at several of the stations and perform for free at the radio benefit shows. See *id.* (describing obligations of Adams in exchange for promotion of his single). The cost to A&M to transport Adams, his band and road crew to all of these events was estimated at \$250,000—on top of the previously paid amount. See *id.* (noting record label complained but did not object).

91. See Saxe & Silberman, *supra* note 88, at 87 (claiming negative press from *Los Angeles Times* prompted radio company to state that it did “not make airplay decisions based on the sale of these packages”). Two years after the *Los Angeles Times* published the details of the deal, and one year after radio giant Clear Channel acquired the Chancellor stations, the FCC fined Clear Channel a mere \$8,000 for violation of the payola laws. See Chuck Philips, *Company Town: Clear Channel Fined Just \$8,000 by FCC for Payola Violation*, L.A. TIMES, Oct. 20, 2000, at C1 (reporting only after stories in *Los Angeles Times* did FCC approach Chancellor for copy of A&M promotional contract for review); Saxe & Silberman, *supra* note 88 (noting same). Compare this to the millions of dollars in recent fines levied on broadcasters who aired “indecent” material; likewise, the fine pales in comparison to the \$237,000 the radio stations received for the deal in the first place. See Philips, *supra* (determining promotion price is seven times FCC fine); Saxe & Silberman, *supra* note 88, at 87 (same).

92. See Boehlert, *supra* note 84 (noting that it is possible to circumvent payola statutes).

93. 47 U.S.C. §§ 317, 508 (2000). Charles Kelley, an enforcement chief in the mass media division of the FCC notes, “[i]t is permissible for a station to accept money in exchange for broadcasting something It’s just that they need to announce that they’re doing it in some manner that is clear to their audience.” Neil Strauss, *Pay-for-Play Back on the Air but this Rendition Is Legal*, N.Y. TIMES, Mar. 31, 1998, at A1. Nevertheless, stations “are reluctant to pepper their programming with announcements like ‘[t]he previous Ricky Martin single was paid for by Sony Records.’” Boehlert, *supra* note 21 (claiming many radio stations avoid such announcements as interruption of flow of broadcast). Moreover, stations have a vested interest in maintaining the public perception that they sift through piles of CDs and select the best for their listeners. See *id.* (claiming such reputation bene-

ing, the FCC carved out a gaping exception to the existing rules, commonly known as the “friendship exception.”⁹⁴ In *Kaye-Smith Enterprises*,⁹⁵ the FCC held that “gifts of nominal value or social exchanges between friends are not ‘payola.’”⁹⁶ Such an exception allows record companies and radio stations to use a middleman in order to sidestep the restrictions—virtually anything of considerable value could conceivably be passed off as a social exchange between friends.⁹⁷

Compounding the limited reach of the statute and the existing loopholes, the FCC has been lax in its oversight of licensees regarding payola practices, and has imposed only one fine for payola, for \$8,000, in the last decade.⁹⁸ Any enforcement seems to occur only in the wake of public

fits stations); *see also* Lomax, *supra* note 81 (asserting radio stations encourage illusion that only best songs are “cherry-picked” for listeners). Radio stations are able to flaunt the regulations requiring disclosure due to the lax efforts of the FCC in enforcing the rules. *See* Duhigg & Hamilton, *supra* note 7 (describing Sony’s outright bribes to stations and deejays).

94. *See* *Kaye-Smith Enter.*, 71 F.C.C.2d 1402, 1408 (1979) (incorporating licensee’s argument that services accepted by station employees constituted “social relationships” outside ambit of disclosure requirements).

95. *See id.* (considering application for license renewal).

96. *See id.* at 1408 (stating holding).

97. *See* Sidak & Kronemyer, *supra* note 5, at 531 (asserting “friendship exception” creates “gaping loophole” in section 508).

98. *See* Philips, *supra* note 91 (describing FCC action as “weak slap on the wrist from a feeble commission that is no match for Clear Channel”). Previously, the only extensive enforcement of the sponsorship provisions occurred in the 1930s during labor disputes with The Kohler Company, and in conjunction with the payola investigations in the 1950s. *See* Kielbowicz & Lawson, *supra* note 18, at 344 (detailing payola publicity scandal in connection with dispute between National Association of Manufacturers and Kohler). A former chief of the FCC’s now defunct Complaints and Compliance Division claims he “directed actual enforcement efforts to prevent the very same types of payola that are being uncovered today by Mr. Spitzer.” Arthur L. Ginsburg, *Payola and the FCC*, N.Y. TIMES, Aug. 3, 2005, at A18. The former chief asserted that responsibility for payola prevention rests with the FCC, and the New York investigation highlights the Commission’s failure to protect the public. *See id.* (arguing Commission should have greater police role).

The FCC applies a two dimensional test to scrutinize potential violations of section 317, analyzing the amount of consideration exchanged and the amount of sponsorship identification broadcast. *See* Kielbowicz & Lawson, *supra* note 18, at 359 (describing FCC’s two-part test). Where the amount exchanged and the amount of identification broadcast are both extensive, disclosure is required. *See id.* (setting forth rubric for FCC scrutiny). Disclosure is not required where both elements are limited. *See id.* (discussing application of new section 317(a)(1)). Where the amount of one element is high and the other is low, the situation is reconciled by close scrutiny. *See id.* (noting FCC’s interpretations). Violations can result in criminal penalties, including fines up to \$10,000, one year imprisonment or both, as well as administrative sanctions and nonrenewal of license. *See* Commission Warns Licensees About Payola and Undisclosed Promotion, 4 F.C.C.R. 7708, 7709 (citing *United States v. Vega*, 447 F.2d 698 (2d Cir. 1971)) (explaining penalties for infractions). Yet the FCC acts only if a formal complaint is filed alleging that a station is receiving payment in violation of the laws. *See* Boehlert, *supra* note 84 (wondering who would raise complaints over such profitable system).

payola scandals and, therefore, it is likely the FCC will pay closer attention to its licensees following the recent Sony investigation.⁹⁹ Such inattentive enforcement of FCC rules provides no incentive for radio or record companies to change their ways.¹⁰⁰ This lack of enforcement, coupled with the apathy of audiences toward payola, also creates a strong argument against the merit of anti-payola statutes.¹⁰¹

Lack of apparent injury to the listener is not a defense to a violation of the disclosure provisions. See *N. Pac. Radio Corp.*, 40 F.C.C. 138 (1960) (holding that lack of awareness of responsibility is also not justification for failure to disclose).

Further, the Government is not required to produce proof of actual broadcast of the material for which consideration was exchanged; rather, the plain language of the statute looks only to whether the defendant paid money for the *purpose* of having material broadcast. See *United States v. Goodman*, 945 F.2d 125, 129 (6th Cir. 1991) (holding Government did not have to prove actual broadcast). In *United States v. Goodman*, the defendant was convicted of bribing radio station programmers to incorporate songs he was promoting into their playlists in violation of section 508. See *id.* at 126-27, 129 (detailing charges). The defendant argued that section 508 required actual broadcast of the material, or in the alternative, that the Government failed to prove he intended the songs to be broadcast. See *id.* at 128-29 (claiming without actual broadcast or proof of intent there was no violation). The court rejected both of these theories, holding that the plain language of the statute requires proof only of payment for the purpose of broadcast of the material, and the payments proffered by the defendant contemplated actual broadcast. See *id.* at 129 (finding paying to have songs placed on playlists sufficient to contemplate broadcast).

99. See Kielbowicz & Lawson, *supra* note 18, at 344 (describing FCC disclosure enforcement); Philips, *supra* note 91 (stating FCC last looked into payola practices following series of stories in *Los Angeles Times*). The FCC has already begun to review the Sony settlement for evidence of payola violations by its licensees. See *U.S. to Revisit Payola Inquiry*, *supra* note 3 (noting that FCC “will not tolerate non-compliance”); see also Mohammed, *supra* note 9 (noting civil penalties could be up to \$32,500 per violation). For a further discussion of the findings of the Sony investigation, see *infra* notes 113-22 and accompanying text.

100. See Philips, *supra* note 91 (arguing paltry fines are no deterrent); see also Boehlert, *supra* note 84 (reporting complaints from artist managers that Justice Department fails to investigate situation).

101. See Greene, *supra* note 1 (arguing modern Americans are unconcerned with how their music gets to radio). For a further discussion of public apathy towards payola in radio, see *infra* notes 147-49 and accompanying text.

Given the difference in public attitude toward payola currently, it does not appear that payola in radio should receive treatment different from payola in any other industry. See Katunich, *supra* note 5, at 673 (analogizing radio to supermarkets). In fact, most other industries frequently secure commercial airtime on both television and radio in order to promote their products. See *id.* (noting other industries utilize practices akin to payola). For example, observe the product placement agreements common in motion pictures and television shows. See Greene, *supra* note 1 (“Any time you go to the movies and see a brand-name product—a soft drink, a candy bar, a luxury car—being used by one of the stars, you figure that a payment has been made.”). A business arrangement produced the appearance of that particular good on screen, and “the audience knows it, and has been conditioned to accept it.” See *id.* (arguing good did not “magically appear” on screen). In its likely oldest and most common form, payola exists in the slotting fees paid to supermarkets by manufacturers to achieve prominent shelf space for their products. See *id.* (“Pay the money, get your product on the shelf.”).

B. *History Repeating: The Continuing Battle Against Payola in Radio*¹⁰²1. *Prelude to the Sony Scandal*

The early payola scandals were characterized by bribes made to disc jockeys who had exclusive control over what songs received airplay.¹⁰³ As a result of these controversies, control over playlists was placed in the hands of radio station executives, putatively to avoid the reach of similar bribes.¹⁰⁴ Yet as authorities discovered during the recent Sony investigation, this shift in power simply allowed for the brokering of large-scale promotion exchanges at the highest levels of both record companies and radio stations.¹⁰⁵

Just like pay-for-play in the music industry says nothing about the possible artistic merit of a song, neither do slotting fees guarantee consumers that the product they purchase will be healthy or delicious. *See id.* (commenting that idea of payola as acceptable in supermarkets but not radio is illogical). With a successive movement toward pay-for-play in most industries, it is difficult to justify its criminalization in the music industry, especially in light of the convoluted black market system which has been created. *See* Katunich, *supra* note 5, at 673 (condemning government's apparent mischaracterization of payola).

102. Bill Siddons, manager of both multi-platinum and developing recording artists, notes:

Payola is institutional these days. Record companies provide financial rewards to stations that support their records. Paying for "promotions" is the easy example. Indie promo exists to serve the needs of stations and their decision makers. Need court side seats to the basketball game? Your kids [sic] school supported? A guaranteed job or "consultancy" if you're fired? Stick with me and add my records!

Reply Comments of American Federation of Musicians, American Federation of Television and Radio Artists, Future of Music Coalition, The Recording Academy and the Recording Artists' Coalition, In the Matter of Broadcast Localism, MB Docket No. 04-233, 12-13 (Jan. 3, 2005), available at <http://www.futureofmusic.org/images/DABreplycomments.pdf> [hereinafter Reply Comments].

103. *See* Doerksen, *supra* note 18 (describing deejays as "gatekeepers of pop"); *see also* Assurance of Discontinuance, *supra* note 3, at 3 (acknowledging disc jockeys had "significant control" over selection of records).

104. *See* Assurance of Discontinuance, *supra* note 3, at 5 (observing record companies' ability to secure airplay nationwide through radio conglomerates); *see also* Sidak & Kronemyer, *supra* note 5, at 534 (noting payola system would be more efficient for promoters if they were able to deal with single monopolist instead of discrete stations).

105. *See* Assurance of Discontinuance, *supra* note 3, at 5 (arguing sophistication of payola strategies reflects effects of radio consolidation); *see also* Doerksen, *supra* note 18 (declaring that as control over playlist content moved higher up corporate ranks prices increased and advantages accrued to larger record companies).

Complaints of payola practices among the radio conglomerates also bring to light issues of antitrust violations. *See* Nobody In Particular Presents, Inc., v. Clear Channel Commc'ns, Inc., 311 F. Supp. 2d 1048, 1055 (D. Colo. 2004) (finding material question of fact as to whether Clear Channel conditioned airplay on use of Clear Channel promotion services). In early 2001, a Denver concert promoter brought suit against Clear Channel Communications and its subsidiary entertainment groups. *See id.* at 1055 (discussing parties as well as procedural posture of case). The concert promoter alleged that Clear Channel used its position as the

Payment for broadcasts from record companies to radio stations successfully remained under the radar following the close of the 1960 congressional investigation.¹⁰⁶ That is, until the late 1980s when an evening news broadcast brought to light the astoundingly elaborate nexus of independent promoters guarding access to radio airwaves.¹⁰⁷ In February of 1986, an “NBC Nightly News” report about independent promoters sparked a renewed federal investigation of payola in the music industry.¹⁰⁸ In 1989, the Government indicted independent promotion powerhouse Joseph Isgro on fifty-six counts, varying from RICO violations to payola to filing false income tax returns.¹⁰⁹ During Isgro’s 1990 trial in Los Angeles—the highest profile case ever developed against an independent promoter—the prosecution presented evidence that drugs and cash were distributed to programmers in exchange for airplay.¹¹⁰

nation’s largest concert producer, entertainment promoter and radio group to intimidate and coerce rock artists and their record labels into signing promotional deals with its subsidiaries. *See id.* at 1061 (citing testimony that label artists would not get spins unless Clear Channel promoted artists’ concerts, *inter alia*); Adler, *supra* note 32, at 170[C] (documenting actions by other small concert promoters taking on Clear Channel). In deciding Clear Channel’s motion for summary judgment, the court found that evidence demonstrated that radio airplay and radio promotional support were conditioned on selection of Clear Channel as an artist’s concert promoter, establishing a *per se* claim of a tying arrangement in violation of antitrust laws sufficient to survive summary judgment. *See Nobody In Particular Presents*, 311 F. Supp. 2d at 1092 (noting failure of alternate tying claim based on rule of reason analysis).

106. *See Sidak & Kronemyer, supra* note 5, at 549 (explaining that by this point in time independent promotion was in common use). The major federal criminal prosecution of independent promotion was preceded by several related investigations. *See id.* at 549-57 (describing new facets of payola in 1980s). During this time, the Senate conducted a preliminary investigation, which resulted in a finding of no credible evidence of specific instances of impropriety. *See id.* at 552 (finding industry is susceptible to misconduct but not to such level as to warrant Senate investigation). The Recording Industry Association of America (RIAA) also attempted to commence an investigation of payola practices, which it ultimately abandoned due to lack of member participation. *See id.* at 555 (asserting no member of RIAA wanted to give another advantage by ceasing payola practices).

107. *See Sidak & Kronemyer, supra* note 5, at 556 (describing event that increased awareness about payola). For a further discussion of “The Network” of independent promoters, *see id.*

108. *See Chris Morris, Spitzer on a New Beat With Probe of Music, HOLLYWOODREPORTER.COM*, Oct. 23, 2004, available at http://www.hollywoodreporter.com/thr/article_display.jsp?vnu_content_id=1000683244 (summarizing key testimony in case).

109. *See id.* (noting Isgro was later convicted of extortion charges unrelated to promotion work); *see also United States v. Isgro*, 751 F. Supp. 846, 847 (C.D. Cal. 1990), *rev’d*, 974 F.2d 1091 (9th Cir. 1992) (stating all counts on which Isgro was charged).

110. *See Morris, supra* note 108 (describing Isgro’s illicit exchanges). Witnesses revealed tales of pay-offs of cocaine, cleverly stashed in cassette cases or record jackets, in exchange for adding records. *See id.* (reporting methods of transferring money). Uncompromised testimony at trial exposed payola arrangements between Isgro and a general manager at Los Angeles radio station KIQQ-FM, with the manager to receive \$750 for each of Isgro’s songs added to the

2. *The Investigation and Settlement with Sony BMG*

In 2004, Eliot Spitzer, Attorney General of the State of New York, provoked renewed scrutiny of payola practices when he initiated an investiga-

playlist. See Larry Rohter, *At Payola Trial, Primer on Forms and Mechanics*, N.Y. TIMES, Aug. 25, 1990, at 11 (explaining programmer would typically add from zero to all of Isgro's songs). The station manager testified that Isgro paid him about \$100,000 per year for at least three years to add records to KIQQ's playlist. See Carol Baker, *They Played the Hits: Were They Paid for It?*, NAT'L L.J., Sept. 10, 1990, at 8 (stating other programmers testified to receiving payola from Isgro in cash and cocaine). The manager also testified that he typically received the cash "on a weekly basis from Mr. Isgro or his bodyguard . . . in the men's room at bars [he] would frequent." *Id.* At the pinnacle of his career as an independent promoter, Isgro had ten million dollars worth of billings to record companies. See *id.* (detailing excerpts from Isgro's trial). Prices per song have increased since Isgro's trial—starting rates are approximately \$1,000 per song and up to \$8,000 if a label is particularly desperate for airplay. See Boehlert, *supra* note 21 (recounting instances where particularly desperate record company offered \$2,500 for airplay).

The indictment was later dismissed by the district court on a finding that prosecutors had attempted to hide "wildly contradictory" grand jury testimony from one of their witnesses. See *id.* (objecting to prosecution's attempt to play down contradictory grand jury testimony); see also *Isgro*, 751 F. Supp. at 846 (dismissing for prosecutorial misconduct and fundamental unfairness). A federal court of appeals judge reversed the dismissal of the indictment, holding that while "[t]he prosecutor's misconduct before the District Court 'clearly rose to an intolerable level,' and the court would be justified in considering alternative means of sanctioning the prosecutor . . . dismissing the indictment was an unwarranted 'windfall' to the defendants." *Dismissal of Charges Against Record Promoter Joseph Isgro and Two Other Parties Is Reversed*, ENT. L. REP., Mar. 1993, at 1 (stating holding); see *United States v. Isgro*, No. 90-50531, 1992 U.S. App. LEXIS 30916 (9th Cir. Nov. 25, 1992), *rev'g*, 751 F. Supp. 846 (C.D. Cal. 1990) (reinstating indictment). Seven years later the indictment was again dismissed, this time on claims that the prosecution violated the Speedy Trial Act, following grand jury investigations in five cities and a total cost of ten million dollars to taxpayers. See Chuck Philips, *Company Town: A Payola Probe with No Payoff*, L.A. TIMES, Apr. 9, 1996, at D6 (reporting high cost of trial that put no one behind bars).

In 1999, both the president and promotion chief of Latin record company Fonovisa, pleaded guilty and were fined on tax fraud charges associated with payments made to a Spanish-language radio station. See Morris, *supra* note 108 (reporting label executives claimed they were unaware that regulations prohibited such actions in United States as such payments were common in Mexico). The programmer later admitted to receiving more than \$200,000 in payola. See *id.* (describing outcome of prosecution). Nevertheless, this investigation received little official attention, and Spitzer's probe into payola practices among the major record labels and radio stations in New York marks the "first serious inquiry into possible record industry promotion abuses" since the early 1990s. See *id.* (noting influence of independent promoters has waned in recent years).

In 2002 and 2003, Cox Radio and Clear Channel Communications both cut their ties with independent promoters. See Jeff Leeds, *Clear Channel to Cut Promoter Ties*, L.A. TIMES, Apr. 10, 2003, at BU1 (describing action as abrupt reversal for conglomerate); Morris, *supra* note 108 (reporting announcements by both companies). The break was not wholly innocent, however, as Clear Channel announced plans to sell music-related services itself, instead of through independent promoters. See Leeds, *supra* (reporting Clear Channel sees "better formula" for promotions between radio and record companies); see also Jesse Hiestand, *Clear Channel Takes Antipayola Step*, HOLLYWOODREPORTER.COM, Apr. 10, 2003, available at LEXIS, THR File (noting perception often worse than actual level of payola).

tion into practices relating to the promotion of music to radio stations.¹¹¹ The probe involved subpoenas to all four major record companies, as well as most of the large radio conglomerates.¹¹² The investigation revealed that Sony had illegally provided radio stations with financial benefits to obtain airplay and boost chart positions for its songs, through both direct deals between high-level Sony and radio executives, and indirect payments made via independent promoters.¹¹³ The inquiry also revealed that Sony used a significant portion of its promotion budget to purchase airplay, to such an extent that senior label executives were frequently involved in the transactions.¹¹⁴

When Sony provided items to radio stations, ostensibly as contest prizes, its promotion department employees went to considerable lengths to conceal the fraudulent transactions from the accounting systems, even going so far as to solicit false names and social security information from the radio programmers actually receiving the gifts.¹¹⁵ In addition to brib-

111. See Assurance of Discontinuance, *supra* note 3, at 1 (describing course of investigation). See generally Susan Butler, *Spitzer Probes Radio, Label Links*, BILLBOARD, Nov. 6, 2004, available at LEXIS, BILLBD File (reporting start of Eliot Spitzer's investigation).

112. See Morris, *supra* note 108 (reporting almost all parties issued statements regarding their compliance); see also Paul Heine & Bill Holland, *Spitzer Still Looking*, BILLBOARD, Mar. 25, 2005, available at LEXIS, BILLBD File (reporting artists' groups thrilled at attention garnered by investigation). The major parties subpoenaed in the Attorney General's investigation included: Sony BMG Music Entertainment, Vivendi Universal Music Group, Warner Music Group, EMI Group, Clear Channel Communications, Cox Communications, Entercom, Emmis Broadcasting and Infinity Broadcasting. See Morris, *supra* note 108 (stating EMI emphasized its written policy against payola).

113. See Assurance of Discontinuance, *supra* note 3, at 2 (observing aggressive promotion tactics employed at Sony labels). Such practices included: (1) bribing radio station employees; (2) purchasing equipment, paying off invoices and providing free concerts for radio stations; (3) providing vacation packages, electronics, gift cards and other valuable consideration under the guise of contest giveaways; and (4) using independent promoters to funnel illegal payments to radio stations, all on the condition of receiving airplay. See *id.* (documenting Sony's infractions).

114. See *id.* at 8 (reporting senior executives "tolerated and facilitated" payola practices among Sony labels); see also Charles Duhigg, *Hitmakers Implicated in 'Pay for Play' Plans*, L.A. TIMES, Dec. 4, 2005, at A1 (reporting *Los Angeles Times* investigation revealed two of Sony's highest-ranking executives directly implicated in New York payola probe).

115. See Assurance of Discontinuance, *supra* note 3, at 9-11 (revealing giveaways provided to programmers were typically classified as contest prizes). The government requires that winners of prizes above a certain value submit their names and social security numbers for tax purposes. See *id.* at 9 (noting SONY BMG employees were given false names and social security numbers). For example, in November 2002, a flat screen TV was provided to a Clear Channel program director. See *id.* at 10-11 (providing example of gifts given to programmers). Sony label Epic Records' Executive Vice President of Promotion solicited a fictitious winner name and social security number, and instructed his staff to classify the transaction as a contest giveaway. See *id.* (discussing method of concealing true nature of gift). On another occasion, promotions employees at Epic resorted to falsifying purchase orders for items—such as roundtrip airfare and accommoda-

ing individual radio programmers, Sony regularly provided “promotional support” to radio stations in exchange for airplay of its songs.¹¹⁶ Sony also negotiated such exchanges with radio corporations such as Infinity radio stations, resulting in a nationwide swath of radio stations adding and playing Sony label songs.¹¹⁷

Moreover, the investigation revealed that Sony had utilized various techniques to artificially increase the position of its artists on nationwide record charts.¹¹⁸ For example, Sony hired independent promoters.¹¹⁹

tions in Ft. Lauderdale for a Buffalo programmer—to avoid raising questions with the accounting department. *See id.* at 9 (finding Epic Records frequently provided programmers with valuable items in exchange for airplay).

116. *See id.* at 13 (describing promotional support to station as equally effective as direct bribes to programmers). Stations use promotional support either to assist with operating costs or to provide contest giveaways of their own. *See id.* at 13 (explaining how stations utilize promotional money). Both reduce overhead and draw listeners, thus boosting the station’s Arbitron ratings and its ability to draw advertisers. *See id.* (noting support frequently influences programming decisions yet is not disclosed to public); *see also* Sony Correspondence, *supra* note 8, at SONY 00173236 (TV and DVD radio players); *id.* at SONY 00161374, 00216512-14, 00210741 (laptop); *id.* at SONY 00113917, 00173233 (flyaway packages); *id.* at SONY 00041740, 00173185 (promotional dollars); *id.* at SONY 00041740, 00150763 (digital cameras); *id.* at SONY 00173209 (concert tickets); *id.* at SONY 00229582-83, 00164447 (passes for a promotional appearance by Kelly Rowland); *id.* at SONY 0014166 (passes for a promotional appearance by Jessica Simpson). In return for such gifts and promotional support, Sony sought actual spin commitments from the radio stations. *See* Assurance of Discontinuance, *supra* note 3, at 15 (reporting commitments are used to hold stations accountable for promotional support received). A “spin commitment” is an agreement from the radio programmer to play a song a minimum number of times, usually at specified times during the day. *See id.* (defining spin agreements). Sony would then monitor and enforce those spin commitments by using one of the electronic airplay monitoring services, such as BDS. *See id.* (explaining Sony’s use of monitoring to enforce agreements with radio). For a further discussion of the use of airplay monitors, *see supra* note 78 and accompanying text.

117. *See* Assurance of Discontinuance, *supra* note 3, at 17 (observing deal with Infinity radio stations for Celine Dion’s “Goodbye’s (The Hardest Word)”). One internal email from an Epic Records executive angered by stations’ time assignments for a new single by Celine Dion states:

OK, HERE IT IS IN BLACK AND WHITE, AND IT’S SERIOUS: IF A RADIO STATION GOT A FLYAWAY TO A CELINE [DION] SHOW IN LAS VEGAS FOR THE ADD, AND THEY’RE PLAYING THE SONG ALL IN OVERNIGHTS, THEY ARE NOT GETTING THE FLYAWAY. PLEASE FIX THE OVERNIGHT ROTATIONS IMMEDIATELY.

Sony Correspondence, *supra* note 8.

118. *See* Assurance of Discontinuance, *supra* note 3, at 18-23 (discussing findings). For a further discussion of the ways in which Sony artificially boosted the position of songs on record charts, *see infra* notes 119-22 and accompanying text.

119. *See* Assurance of Discontinuance, *supra* note 3, at 18-22 (noting independent promoters, while hired by record companies, have direct, regular access to programmers). Independent promoters often have a financial relationship with particular radio stations that typically takes the form of money and items of value from record companies funneled through the independent promoter to the station. *See id.* at 18-19 (describing transfer of money from record company to radio station). The independent promoter retains a percentage of the amount before

Promotion department documents articulated detailed policies requiring a minimum number of spins before payment would be rendered to an independent promoter.¹²⁰ Likewise, Spitzer discovered that Sony regularly purchased radio airtime to increase airplay of its songs and artificially boost the chart position of its artists through a practice known as “spin programs.”¹²¹ Finally, Sony manipulated chart positions for its songs through the use of paid commercials.¹²²

Following the above revelations, Sony agreed to a settlement with New York authorities.¹²³ As part of its settlement terms, Sony acknowledged

passing the payments along to the radio station. *See id.* at 19 (constituting payment for services). Funds reach the radio station as either straightforward monthly fees or through more sophisticated methods whereby stations draw on Sony funds held by the promoters to pay station expenses. *See id.* at 19 (commenting that “indies” sometimes pass along promotional items as well).

120. *See Assurance of Discontinuance, supra* note 3, at 21 (stipulating required numbers of spins); Sony Correspondence, *supra* note 8 (detailing market size and number of spins required for payment). The investigation revealed that Sony had relationships with both exclusive and non-exclusive independent promoters. *See Assurance of Discontinuance, supra* note 3, at 19 (explaining difference between promoters). Both were compensated with retainer fees and, in the case of exclusive promoters, with additional add fees for each time a promoter’s radio station added a Sony song to its playlist. *See id.* (reporting fees paid to independent promoters).

121. *See Assurance of Discontinuance, supra* note 3, at 22-23 (describing practice). A spin program is a block of advertising time during which a record company’s music is played. *See id.* at 22 (defining term). Spin programs are used to strategically vie for a higher chart position and to boost a song’s position when it shows signs of weakness—chart position often influences record purchasers and radio stations alike. *See id.* at 23-24 (explaining value of purchased block of time). The monitoring services are unable to differentiate between spin programs and unpurchased airplay; therefore the spin becomes a part of the data used by the charting companies. *See id.* at 23 (noting data discrepancies result from this shortcoming). In the past Sony has purchased spin programs for songs such as: “Take My Breath Away,” Jessica Simpson (Columbia Records); “Meant to Live,” Switchfoot (Columbia Records); “I Don’t Want to Be,” Gavin DeGraw (J Records); “Sunday Morning,” Maroon 5 (J Records). *See id.* at 23 (noting Sony’s use of spin programs to vie for higher chart positions).

122. *See Assurance of Discontinuance, supra* note 3, at 24 (noting practice made possible by broadcast monitoring services). Until 2004, BDS monitoring service selected a digital pattern from a portion of each song to act as its identifier so that when broadcasted, the result was that BDS counted a spin as if the entire song had been broadcast. *See id.* (explaining Epic Records’ use of this technique); *see also Sidak & Kronemyer, supra* note 5, at 553 (discussing comparison of patterns). Epic promotion employees were able to determine which portion of a song had been selected as the “thumbprint”; as a result, by including mere snippets of songs in 30-second commercials, Epic was credited with full spins of its songs in the data reported to charting companies. *See Assurance of Discontinuance, supra* note 3, at 24 (describing resulting boost in chart position). In addition, Sony hired interns and actors to organize fraudulent call-in campaigns to induce increased airplay of its songs by feigning listener popularity. *See id.* at 24-25 (noting many radio stations base playlists or entire radio shows on listener requests).

123. *See Assurance of Discontinuance, supra* note 3, at Exhibit A (detailing settlement terms). For a more detailed discussion of Sony’s settlement, *see infra* notes 124-27 and accompanying text.

that some of its employees had pursued improper promotions practices.¹²⁴ Pursuant to the settlement, Sony is now prohibited from: (1) providing anything of value to radio station employees or listeners, with certain exceptions,¹²⁵ in exchange for airplay or increased airplay; (2) using spin programs, paid-for advertising or a paid-for spin to generate spin detections; and (3) using its employees, interns or others to contact radio stations for purposes of acting as listeners or to manipulate station voting features in order to request airplay.¹²⁶ The settlement also penalized the record company with a provision requiring payment of \$100,000 to cover the costs of the investigation, as well as a requirement that Sony contribute ten million dollars to the Rockefeller Philanthropy Advisors.¹²⁷

Notwithstanding the settlement, Sony is still permitted to continue working with independent promoters, provided that the promoters adhere to the terms of the settlement.¹²⁸ In order to ensure conformity with

124. See Assurance of Discontinuance, *supra* note 3, at Exhibit A. The exhibit provides:

Despite federal and state laws prohibiting unacknowledged payment by record labels to radio stations for airing of music, such direct and indirect forms of what has been described generically as “payola” for spins has continued to be an unfortunately prevalent aspect of radio promotion. SONY BMG acknowledges that various employees pursued some radio promotion practices on behalf of the company that were wrong and improper, and apologizes for such conduct. SONY BMG looks forward to defining a new, higher standard in radio promotion.

Id.

125. Some examples of permissible activities include:

1. Providing items of value for radio contests or giveaways, on the condition that the general manager, licensee or owner of the radio station provides a signed letter verifying that: the item will be given away to people other than radio station employees or their relatives, an announcement that the item has been paid for by Sony will accompany the broadcast of the giveaway, and that increased airplay has not been provided in exchange for this item.
2. Purchasing advertising, or paying for broadcast of Sony music in a syndicated radio program, on the condition that airplay monitoring services are notified that such broadcasts are not intended for detection by the airplay monitoring companies.
3. Arranging for artists to appear or perform at events sponsored by radio stations.
4. Providing nominal consideration such as CDs or concert tickets to familiarize radio station employees with Sony artists, modest personal gifts for life events and holidays not to exceed \$150 per year, and meals, entertainment and travel expenses not to exceed 20 trips per radio station per year.

See Assurance of Discontinuance, *supra* note 3, at Exhibit B, IV (detailing permissible activities).

126. See *id.* at Exhibit B, III (describing prohibited activities).

127. See *id.* at 27 (describing philanthropic requirements). The ten million dollar payment will be distributed to New York State not-for-profit corporations for the benefit of programs aimed at music education. See *id.* (describing use of Sony settlement).

128. See *id.* at Exhibit B, VI (detailing restrictions on promoter relationships). Further, Sony is prohibited from reimbursing a promoter for expenses incurred by the promoter on behalf of a radio station. See *id.* at Exhibit B, VI(B)(2) (setting forth further limitations).

the settlement, Sony must hire a compliance officer and develop a company-wide set of written standards of conduct.¹²⁹ Further, any violation of the terms of the settlement will constitute prima facie evidence of violation of the applicable anti-payola laws.¹³⁰

3. *Impact of the Settlement on the Record Industry*

Following the close of the investigation at Sony, Spitzer reported that inquiries at other subpoenaed entities would continue.¹³¹ Likewise, Spitzer also expressed his hope that the Sony settlement would reflect a threshold that all record companies will meet in due course.¹³² Yet the question remains, what effect will this settlement with state authorities have on payola practices on a national level?¹³³

Previous attempts by record companies to curb payments to independent promoters as well as other payola practices have not fared well, and in fact, were quickly abandoned.¹³⁴ In 2001, Sony label, Columbia Records, shocked members of the industry when it announced a policy

129. See *id.* at Exhibit B, VIII-IX (setting forth compliance requirements). The company must also conduct reasonable inquiries into the activities of its employees and agents. See *id.* at Exhibit B, IV(B)-(C) (discussing business reforms regarding permissible activities). Sony has already fired one senior vice president of promotion at its Epic label, as well as reprimanding four other executives at Epic and in its Urban unit with financial penalties and probation. See Duhigg & Hamilton, *supra* note 7 (claiming insiders do not expect further firings); Jeff Leeds & Louise Story, *Radio Payoffs Described as Sony Settles*, N.Y. TIMES, July 26, 2005, at A1 (describing reprimands).

130. See Assurance of Discontinuance, *supra* note 3, at 30 (stating New York Attorney General's strict liability standard).

131. See Duhigg & Hamilton, *supra* note 7 (reporting intent of New York Attorney General's Office); Leeds & Story, *supra* note 129 (describing extent of payola in industry); Morris & Woodson, *supra* note 21 (claiming investigation is "far along" with other entities).

132. See Duhigg & Hamilton, *supra* note 7 (quoting Attorney General Spitzer); Leeds & Story, *supra* note 129 (describing payola as pervasive); Morris & Woodson, *supra* note 21 (reporting Spitzer's desires for similar settlements with other record companies).

133. See Fisher, *supra* note 2 (observing that large radio conglomerates participating in Spitzer's probe said they "are committed to rooting out pay-for-play arrangements"). The reporter notes this is "exactly what radio executives have said every time payola has become a public scandal." *Id.*; see also Charles Duhigg, *Sony BMG Is Sued by Small Label in 'Pay to Play' Case*, L.A. TIMES, Oct. 19, 2005, at C6 (reporting small label filed suit against Sony alleging antitrust violations in wake of New York payola investigation revelations); Charles Duhigg, *Clear Channel Fires Two After Internal Review*, L.A. TIMES, Oct. 12, 2005, at C3 (reporting Clear Channel fired two after New York investigation revealed programmers improperly accepted record company gifts in exchange for broadcast).

134. See Sidak & Kronemyer, *supra* note 5, at 549-50 (describing Warner Brothers failed attempt at terminating use of independent promotion); Eric Boehlert, *The "Bootylicious" Gambit*, SALON.COM, June 5, 2001, http://archive.salon.com/ent/feature/2001/06/05/sony_payola/index.html (chronicling Sony's attempts to end independent promotion services); Boehlert, *supra* note 12 (describing failed investigation by RIAA in 1980s).

that would greatly curtail payments to independent promoters for the new single from popular artist Destiny's Child.¹³⁵ Columbia Records declared they would only pay independent promoters for adds of the single "Bootylicious"¹³⁶ in the top fifty radio markets.¹³⁷ Columbia Records' actions limiting payments to promoters were a risky maneuver in an industry where record companies are willing to pay extraordinary amounts of money to garner a competitive edge.¹³⁸ Two weeks following the release of "Bootylicious," the song had been added to 113 pop radio stations; while those numbers were enough to ensure that the song was a bona fide smash, the group's previous single, "Survivor,"¹³⁹ debuted at 150 radio stations.¹⁴⁰ The difference, however slight, is estimated to be due to the fact that when "Survivor" was released to radio, promoters in *all* markets were paid.¹⁴¹ Similarly, in 1981, economic pressures from a particularly powerful group of independent promoters known as "The Network" prompted record companies Warner Brothers and Columbia¹⁴² to launch a boycott of independent promoter services.¹⁴³ When Warner Brothers and Columbia artists subsequently found promoter-controlled radio stations un-

135. See generally Boehlert, *supra* note 134 (reporting announcement and industry reaction).

136. DESTINY'S CHILD, *Bootylicious*, on SURVIVOR (Sony Records 2001).

137. See Boehlert, *supra* note 134 (reporting Sony offered to pay \$1,000 for adds only to promoters in top fifty markets). Insiders reported that when a label has a song it knows will be a hit, the typical response is to pay only for adds in the first week of release, but in all markets. See *id.* (commenting that \$1,000 is often only base fee). The theory behind paying independent promoters for songs radio stations are likely to play anyway is to encourage the efforts of the promoters on a label's lesser-known acts—or to prevent them from working against all the label's artists. See *id.* (comparing Sony's stand as "this war's Fort Sumter").

138. See *id.* (acknowledging such extraordinary payments are made even amid accusations of extortion-like practices by radio stations).

139. DESTINY'S CHILD, *supra* note 136.

140. See Boehlert, *supra* note 134 (comparing number of stations playing songs).

141. See *id.* (describing result as due to "put" pop stations—so known because they are controlled by promoters who can "'put' whatever they want on the playlists").

142. Columbia was at that time part of the CBS Music Group. See *id.* (noting boycott occurred before Columbia's sale to Sony).

143. See *id.* (describing these powerful promoters as able to receive three to four thousand dollars per add); see also Sidak & Kronemyer, *supra* note 5, at 549 (reporting record label executives found costs of independent promoters "unbearable"). Record companies had not previously attempted to sever ties with independent promoters "because each company wanted the next company to do it first." See *id.* at 549 (noting that record companies were reluctant to drop independent promoters unless Warner Communications or CBS took lead). In fact, when Warner and Columbia cut off payments to independent promoters, their competition not only refused to follow their lead, they reportedly increased expenditures on independent promotion. See *id.* (describing economic hit to two companies when competition failed to cease payola practices).

willing to air their songs, the artists jumped ship to labels still willing to pay for play.¹⁴⁴

Once more, Sony finds itself at a disadvantage in the ultra-competitive world of music as much of its competition—as yet unconstrained by settlement agreements—continues to pursue lucrative payola practices.¹⁴⁵ Further, despite the fact that legislators and artist groups are railing against the so-called “evils” of payola, Americans seem unlikely and unwilling to care if money is exchanged in the process of playing songs.¹⁴⁶ The shock that characterized the payola scandals of the 1950s was due to the shattering of audience perceptions that disc jockeys selected music based on catchy tunes and artistic quality.¹⁴⁷ Today, however, many Americans operate under the assumption that “no one does anything without money changing hands.”¹⁴⁸ In light of such public apathy, it seems the rationale for enacting the payola statutes has become moot.¹⁴⁹

144. See Boehlert, *supra* note 134 (noting artists Loverboy and The Who among those who left); see also Spitzer *Fallout: McClusky Dumps Biz Model*, BILLBOARD, Nov. 12, 2005, available at LEXIS, BILLBD File (reporting independent promoter powerhouse Jeff McClusky is eliminating system of fees tied to playlists he made standard operating procedure after New York payola investigation).

145. See Garrity, *supra* note 2 (commenting that other labels are still free to purchase lucrative spin programs); see also Brian Garrity, *WGM Latest to Pay Up for Payola*, BILLBOARD, Dec. 3, 2005, available at LEXIS, BILLBD File (reporting Warner Music Group has agreed to five million dollar settlement with New York authorities following payola investigation). Warner Music Group is the second major record company to settle with Attorney General Eliot Spitzer since the start of the investigation alleging bribery, fraud and illegal payments made to achieve airplay of songs by its artists. See *id.* (reporting allegations that WMG record labels “showered radio programmers with lavish gifts, trips, tickets to high-profile events and cash in exchange for airplay”). Spitzer’s investigation revealed WMG used heavy-weight independent promoters such as Michele Clark Promotions, Jeff McClusky and Associates, Tri-State and Lawman Productions and budgeted as high as \$100,000 per song. See *id.* (noting that smaller size of settlement, timing of announcement of deal and lack of press were result of WMG’s willingness to cooperate); see also Charles Duhigg, *Music Firm Settles Probe into Payola*, L.A. TIMES, Nov. 23, 2005, at C1 (reporting Spitzer’s probe revealed record labels were not always initiators of pay-for-play).

146. See Greene, *supra* note 1 (claiming that exchanging money “assumed to be the standard way of doing business in the United States”).

147. See *id.* (distinguishing modern reaction to payola); see also Doerksen, *supra* note 18 (commenting that authorities and moralists of 1950s “seized on pay-for-play arrangements to explain the unfathomable success of such a degraded musical idiom as rock ‘n’ roll”). For a further discussion of radio companies’ unwillingness to eliminate illusion of handpicked song selections, see *supra* note 93 and accompanying text.

148. See Greene, *supra* note 1 (noting that Americans assume that money changes hands in most transactions).

149. See Doerksen, *supra* note 18 (recommending rational set of regulations recognizing music as business); Greene, *supra* note 1 (arguing that Americans are no longer shocked or offended by thought of radio as marketplace).

C. *The Debate: Is There Merit to Anti-Payola Laws?*

The debate over payola in radio has existed since the beginning of the industry itself; as a result, it is important to analyze the strengths and weaknesses of each position advocating for and against payola restrictions.¹⁵⁰ Among the rationales proffered in support of federal regulation of payments made for broadcast of specific material are the limited nature of access to radio broadcast and the potential for promotion of aesthetically undesirable music.¹⁵¹ Opponents of the restrictions, however, argue that radio is simply a market for new albums and should be left to regulate itself.¹⁵² Opponents also argue that payola offers new artists a means of competing against more established hit-makers in the area of radio airplay.¹⁵³

Those engaging in legally questionable practices often maintain that there is a difference between payola and the pay-for-play stratagems actually utilized throughout the industry.¹⁵⁴ Pay-for-play is essentially an infomercial-like practice in which radio stations bill record companies for airplay, but notify listeners at the time of broadcast that the song is paid for, all of which complies with the federal payola regulations.¹⁵⁵ New pay-for-play deals and other exchanges that would otherwise arguably constitute payola evidence a shift of power in the music business.¹⁵⁶ Regardless of the technical legality of such practices, many of the same concerns associated with traditional payola still exist with respect to these deals.¹⁵⁷

150. See Kielbowicz & Lawson, *supra* note 18, at 331 (reporting origins of debate over sponsorship disclosures). The authors note that the sponsorship disclosure provisions of section 317 are the oldest statutory limitations directly impacting broadcast advertising. See *id.* (highlighting history and policy of sponsor identification).

151. See *Loveday v. FCC*, 707 F.2d 1443, 1458 (D.C. Cir. 1983) (commenting on rationale for federal regulation); Reply Comments, *supra* note 102, at 12-13 (asserting need for federal regulation of pay for play).

152. See Sidak & Kronemyer, *supra* note 5, at 521 (proposing payola as pricing mechanism in free market of music industry).

153. See Chuck Taylor, *Paid Play Changing Biz Landscape*, BILLBOARD, May 9, 1998, available at LEXIS, BILLBD File (describing artist managers amenable to record-radio partnerships).

154. See Philips & Hiltzik, *supra* note 88 (quoting Ralph Nader claiming such deals are payola under different name).

155. See Philips, *supra* note 32 (distinguishing legal practices from illicit acts).

156. See Philips & Hiltzik, *supra* note 88 (noting shift of power to large radio organizations). "Industry mergers have moved the balance of power to radio groups, which today have the clout to launch a song simultaneously in scores of markets across the country—or consign it to oblivion." *Id.*

157. See Chuck Taylor, *Pay-for-Play Issue Looms at CRS Some Group Heads Skate Around Subject*, BILLBOARD, Mar. 14, 1998, available at LEXIS, BILLBD File (arguing abuses still possible with practices that comply with federal regulations).

1. *In Favor of Government Regulations of Payola*

a. Radio Is Not Available to All

The most frequent argument justifying federal regulation of payments for broadcast emphasizes the limited availability of access to radio and its impact on local and new artists.¹⁵⁸ The FCC considers broadcasters to be “temporary trustees of the public airwaves” and, consistent with this view, the Communications Act instructs the FCC to award licenses on the condition that licensees serve the public interest.¹⁵⁹ In *Loveday v. FCC*,¹⁶⁰ the court asserted that, “[u]nlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation.”¹⁶¹

Yet the limited access rationale for prohibiting payola espoused by the government was actually exacerbated by its own action of deregulating the radio industry via the Telecommunications Act of 1996.¹⁶² In the year following adoption of the Act, “more than 4,000 of the country’s 11,000 radio stations changed hands and more than 1,000 corporate mergers were proposed in broadcasting.”¹⁶³ The result is nearly sixty percent of

158. See *Loveday v. FCC*, 707 F.2d 1443, 1458 (D.C. Cir. 1983) (noting limited access makes radio unique); see also *Broad. Localism*, 19 F.C.C.R. 12,425, 12,425 n.2 (2004) (same); In the Matter of Broadcast Localism: Reply Comments, *supra* note 102, at 12-13 (same).

159. See *Broad. Localism*, 19 F.C.C.R. at 12,425 n.2 (citing 47 U.S.C. § 309(a), requiring FCC to determine whether public interest will be served when granting license applications). While his investigation focused on the major record labels, New York Attorney General Spitzer stated, “[p]ayola is corrosive to the integrity of competition . . . [Radio stations are] the ones who are most fundamentally violating the public trust.” Morris & Woodson, *supra* note 21.

160. 707 F.2d 1443 (D.C. Cir. 1983). In *Loveday*, the district court reviewed a decision of the FCC appealed by a political action committee. See *id.* at 1445, 1459 (stating that Petitioner challenged Commission’s ruling and holding that Commission’s ruling was not arbitrary or capricious). The political action committee challenged the FCC’s decision that the broadcaster had sufficiently satisfied its duty to identify the sponsors of paid political advertisements opposing a ballot initiative that the individual and political action committee supported. See *id.* at 1445 (stating challenge to Commission’s ruling regarding discharge of duty to identify sponsor). The court held that licensees need only exercise reasonable diligence in determining who was the sponsoring party. See *id.* at 1457 (deciding to require more would be impracticable burden).

161. *Loveday*, 707 F.2d at 1458 (quoting *Nat’l Broad. Co. v. United States*, 319 U.S. 190, 226 (1943)).

162. See Philips & Hiltzik, *supra* note 88 (describing consolidation of radio control). See generally Eric Boehlert, *Radio’s Big Bully*, SALON.COM, Apr. 30, 2001, <http://archive.salon.com/feature/2001/04/30/clearchannel/index.htm> (documenting actions which made Clear Channel Communications nation’s largest radio conglomerate).

163. Philips & Hiltzik, *supra* note 88.

the nation's radio stations are concentrated in the hands of a single corporate entity.¹⁶⁴

The extravagant amount of money spent acquiring radio stations requires conglomerates to place greater emphasis on bottom lines, saleable airtime and alternative streams of revenue, such as legal pay-for-play deals.¹⁶⁵ Moreover, the payola laws have not reacted to changes in the music industry—music videos, satellite radio and iPods—that provide alternatives to radio, thereby increasing access to music audiences once limited by radio's bandwidth, as well as competition and emphasis on bottom lines among radio conglomerates.¹⁶⁶ This combination has resulted in a further reduction of the number of radio station outlets available to record labels and others, thus creating additional incentive for labels to pay any price for access when desperate to get an artist on the public airwaves.¹⁶⁷

164. See Boehlert, *supra* note 162 (reporting that Clear Channel owns 247 of nation's 250 largest stations); see also Jeff Leeds, *Middlemen Put Price on Airplay*, L.A. TIMES, Dec. 27, 2001, at BUS1 ("With only a handful of major radio companies left, it is even harder to gain access and get air time for new music acts.")

165. See Taylor, *supra* note 153 (reporting consolidation economics forces companies to place emphasis on bottom line). Programmer Dave Douglas of radio station WAAF Boston notes: "As public companies, there are only two ways to enhance your bottom line: increase revenue or buy more stations." *Id.*

166. See Katunich, *supra* note 5, at 655 (positing that radio now faces competition from music videos and internet downloads). Further, listeners are showing signs of rejecting the playlists proffered by programmers. See Leeds & Story, *supra* note 129 (reporting consumers ability to be selective with music choices). The authors note that "[t]he iPod and other portable devices have begun cutting into the popularity of radio, and the growth of satellite radio has been putting pressure on the station owners to play a broader range of music." *Id.* Notably, Sirius Radio estimates that as of January 2006 its subscriber base numbers three million; rival XM Radio expects twice that figure. See Marc Schiffman, *Year in Review: Howard and Jack Spark Format Flips at Radio*, BILLBOARD, Dec. 24, 2005, available at LEXIS, BILLBD File (reporting likelihood of major gains for Sirius with welcome of Howard Stern). Moreover, Apple's iPod has inspired changes in radio formats as a result of its podcasting and shuffle features. See *id.* (reporting stations mimicking iPod's "shuffle" function have improved ratings). As a result of new alternatives to radio and the cloud of Attorney General Spitzer's payola investigations and settlements, radio is experiencing a generalized decline in audience and even in stock value. See *id.* (explaining that radio is aggressively reinvesting in itself to combat its losses). The problem of limited airspace threatened by new technologies is not a recent one—" [i]n 1982, [Warner Music Group] declared: 'MTV's role as an alternative source for musical programming is additionally significant in the face of radio playlists and formats that have become increasingly narrow in the past several years.'" Sidak & Kronemyer, *supra* note 5, at 563-64.

167. See Katunich, *supra* note 5, at 654 (stating pressure on radio stations and record companies encourages payola). See generally David Hinckley, *Stations Consider Song Ads*, DAILY NEWS (NEW YORK), Mar. 13, 2001, at 81 (asserting Clear Channel's new efforts to draw revenue from record companies is evidence of muscle of consolidation). Clear Channel was formulating plans to offer record companies short ads following the airing of their artists' songs—for a price. See *id.* (reporting Clear Channel looking to enter promotions market itself). So-called "back announcing" used to be a common practice for deejays; now saddled with debts from numerous mergers, conglomerates like Clear Channel are seeking to increase reve-

b. Permitting Payola Forces “Bad Music” on Listeners

At the Twenty-Ninth Annual Country Radio Seminar, keynote speaker Garth Brooks stated, “I would love to hear all the things we hear on radio [because] we love them, not because we can afford them.”¹⁶⁸ This statement highlights another common argument in favor of regulation of payola: payment for broadcast results in mediocre radio.¹⁶⁹ Critics of pay-for-play practices fear that radio airtime allocation will not be based on audience research, sales and listener requests, but rather on which record company has the most disposable money.¹⁷⁰ Further, critics note that, if pay-for-play transactions are permitted, radio will become one long series of infomercials.¹⁷¹

Critics also note that such practices threaten not only the quality of music propagated by radio, but also the livelihood of those who create and package music.¹⁷² The escalating costs of direct payola campaigns and independent promoters are likely to drive smaller independent labels out of business.¹⁷³ Independent labels have expressed concern about the pay-for-play systems currently in place at most radio stations, as well as those pushed by larger labels; their concern is especially due to the fact that playlists are increasingly controlled by fewer and fewer programmers.¹⁷⁴ Independent record labels find themselves unable to compete with the “majors” because they lack the funds required to support independent promoters from week to week.¹⁷⁵ Yet small labels are not the only compa-

nue any way they can. See *id.* (same). Clear Channel CEO Randy Michaels notes, “The industry spends a tremendous amount of money promoting records We have an opportunity to take some of that and put it in our books.” *Id.*

168. Taylor, *supra* note 157.

169. See Katunich, *supra* note 5, at 671 (articulating critics’ fears that airtime would go to highest bidder).

170. See *id.* (claiming radio stations could extort money from record companies to do job they are licensed to).

171. See *id.* (arguing each paid for song “is akin to a commercial exchange”).

172. See *id.* (asserting small record labels might be driven out by escalating promotions costs); see also Reply Comments, *supra* note 102, at 12-13 (claiming new artists find it difficult to compete with large labels with equally large bank rolls).

173. See Katunich, *supra* note 5, at 671 (asserting that small record companies may disappear because they cannot pay costs of independent promotion); Jeff Leeds, *Small Record Labels Say Radio Tunes Them Out*, L.A. TIMES, Sept. 16, 2001, at B1 (noting large labels can offset promotional costs with star artists). Independent record labels number about 500—a significant portion of the forty billion dollar per year record industry. See *id.* (describing prevalence of independent labels).

174. See Leeds, *supra* note 173 (claiming corporate radio is unwilling to risk ratings on unknown artists). Jeff Robinson, sole proprietor of tiny label Third Monk Records, says, “if you can’t get exposure for your product, you’ll never be able to sell any records.” *Id.* For a further discussion of radio consolidation’s effects on availability of outlets, see *supra* notes 162-64 and accompanying text.

175. See Reply Comments, *supra* note 102, at 12-13 (quoting Bill Siddons, comments filed in FCC’s Notice of Inquiry). Don Rose, president of the American Association of Independent Music says, “[i]t’s obvious to us that we’re not getting the fair share because of embedded relationships with big radio.” Leeds & Story, *supra* note 129.

nies feeling the pinch of increasing promotion costs.¹⁷⁶ A senior promotions executive at Dreamworks Nashville argues: “If radio wants us to pay for every time we’re played on the radio, they should probably help us pay for all the recording costs, artist development costs, etc. If they just want to have whoever has the most money to throw around get the most airplay, there’s a bad imbalance.”¹⁷⁷

Nevertheless, none of the above arguments adequately recognizes the basic economic principle that most transactions are predicated on the theory of supply and demand.¹⁷⁸ The theory implies that, for record companies to continue paying radio stations for airtime, the stations must attract enough listeners to make the payments economically viable for the record company.¹⁷⁹ Moreover, a radio station that fails to attract listeners risks losing not only the funds provided by record labels, but also the primary revenue source provided by traditional advertisers.¹⁸⁰ As a result, there is an economic incentive for radio stations to continue to make programming decisions based on the perceived artistic merit and entertainment value of a song even in the presence of pay-for-play exchanges.¹⁸¹

176. See Taylor, *supra* note 157 (documenting that big labels bear most costs associated with artist promotion).

177. *Id.*

178. See Katunich, *supra* note 5, at 671 (stating law of supply and demand governs); Sidak & Kronemyer, *supra* note 5, at 566 (arguing Congress and FCC “prevented an efficient market from developing”).

179. See Katunich, *supra* note 5, at 671-72 (theorizing record companies will not pay for radio time with inadequate audience). The commentator states: Record labels supply money to radio stations through intermediary independent promoters based on the expectation that the paid influence will ultimately further the sale and popularity of the artist’s album. For payment to continue, the radio station must produce; that is, it must attract a steady stream of listeners to make it economically wise for the record company to continue to pay the fee. Radio stations that fail to play “good” music run the risk of alienating listeners.

Id. (footnotes omitted). The commentator further notes that a screening process exists at the start of the decision-making process when record labels decide whether to spend money on developing a newly discovered artist. See *id.* (asserting this prevents glut of so-called “bad music”).

180. See Matthew S. DelNero, *Long Overdue?: An Exploration of the Status and Merit of General Public Performance Right in Sound Recordings*, 6 VAND. J. ENT. L. & PRAC. 181, 197 (2004) (noting that “primary economic motivation” for radio broadcasters is income, not “beneficent promotion of records”); Darryl Morden, *Rosen Puts RIAA’s Spin on Today’s Music Issues*, HOLLYWOODREPORTER.COM, Mar. 15, 2002, available at LEXIS, THR File (“A recent consumer survey shows that 34% of the public now gets music for free . . . and 24% don’t buy more music because they can’t find the product they want.”).

181. See Katunich, *supra* note 5, at 672 (asserting such theories fail to account for economic pressures that would prevent radio stations from broadcasting “bad” music). “Critics of today’s pop music falsely equate the corporate admission that millions were spent trying to alter radio station playlists as a sign that the sounds now dominating radio are being forced on us [Sony is] interested in selling records The power in determining hits rests with the public.” Robert Hillburn, *Critic’s Notebook: The Public, Not Payola, Rules the Air*, L.A. TIMES, July 29, 2005, at E1.

2. *In Opposition to Government Regulations of Payola*

a. Radio Is a Commodity Market

Record companies view the public airwaves not as a trusteeship, but as a commodity.¹⁸² Payola, absent the complications created by independent promoters, serves a legitimate purpose “in an industry where finite airtime requires that purely economic decisions be made.”¹⁸³ As a commodity market, advocates say that the market will regulate itself; that is, too much substandard music will diminish radio listenership and thereby diminish advertising rates.¹⁸⁴ Notably, this view is not limited to record companies; one commentator notes that “[t]he prevailing school of thought at Clear Channel appears to be that radio stations are mere supermarkets, with airtime a commodity to be bought and sold like shelf space.”¹⁸⁵

As a result, many proponents of pay-for-play argue that legalizing the exchanges would remove the high costs associated with the current scheme and promote efficiency and accountability.¹⁸⁶ Artist managers claim that the money currently spent on free radio shows would be better spent on legitimate pay-for-play programs, arguing that if at the end of such a deal the audience liked the song, radio stations would continue to play it with no further incentive from the label.¹⁸⁷ In essence, “[p]ay for

182. See Leeds & Story, *supra* note 129 (noting difference between artist and record labels). *But see* Boehlert, *supra* note 21 (“[R]adio isn’t really retail—that’s what the record stores are.”). Boehlert notes that radio is a truly unique entity in the music industry in that it is both an independent force and the only tried-and-true way for record companies to ensure a record’s success. See *id.* (emphasizing importance of radio airplay to artists and labels). Radio can be characterized, however, as a market in relation to the record companies that seek its services. See *Nobody In Particular Presents, Inc., v. Clear Channel Commc’ns Inc.*, 311 F. Supp. 2d 1048, 1079 (D. Colo. 2004) (“In such a market, the radio station is the seller of radio airplay of an artist’s songs.”).

183. See Katunich, *supra* note 5, at 670 (noting role payola plays in economic aspect of music industry).

184. See *id.* at 672 (theorizing that broadcasting substandard music would drive away listeners and ratings); Strauss, *supra* note 93, at A1 (noting same).

185. Lomax, *supra* note 81. Lomax notes that in this view, “songs are commercials for the CDs that carry them.” *Id.*

186. See Taylor, *supra* note 153 (“Some claim the new deals will replace the age-old practice of labels privately offering radio programmers expensive trips and lavish gifts in exchange for airplay, thus provoking honor out of admission.”). See generally Chuck Taylor et al., *Pay-for-Play Sparks Debate of Where Labels’ Money Goes*, BILLBOARD, May 9, 1998, available at LEXIS, BILLBD File (describing record labels’ attempts to confront issues of how direct pay-for-play will affect various facets of music business).

187. See Strauss, *supra* note 93 (claiming legitimate pay-for-play deals are more efficient use of record company dollars). Jeff Kwatinetz, manager of rock group Limp Bizkit, points out that:

[B]ands often find themselves forced to play concerts sponsored by radio stations for little or no money to either get added to a station’s playlist or to keep from getting dropped from it. “I’ll be looking at a Limp Bizkit tour and the itinerary will say ‘Boston, Hartford, New York,’ and I’ll get a call that says we have to play this radio-station show on the West Coast. So

play is the idea that all of the subtle quid pro quo that was going on in the past bubbles to the surface and becomes a line item in people's budgets."¹⁸⁸

Moreover, direct pay-for-play would allow small independent records labels to compete with major record labels currently controlling promotions markets.¹⁸⁹ Some independent record labels and artists would rather see legitimized pay-for-play deals put into place in order to ensure accountability on the part of radio for the consideration exchanged.¹⁹⁰ It is argued that, by bringing payola out of backrooms and into the open, opportunism will decrease and parties will be forced to perform their end of the bargain.¹⁹¹

Yet this purely economic view of radio has deficiencies.¹⁹² First, it fails to account for the impact that deregulation would have on small independent labels or up-and-coming artists who may be unable to afford the

we have to cancel Boston, fly the band out and at the end of the day it ends up costing \$20,000 to \$25,000."

Id.

For example, in 1998, Washington radio station KUFO-FM and record label Flip/Interscope Records arranged a deal whereby the label paid the radio station \$5,000 to play Limp Bizkit's "Counterfeit" fifty times during a five week period. *See* Taylor, *supra* note 153 (describing arrangement). The spins were accompanied by the appropriate sponsorship announcements. *See* Strauss, *supra* note 93 (noting paid play was immunized by appropriate announcements). While the particular song did not ignite a fan frenzy over Limp Bizkit at the time, the band later went on to dominate the charts with further releases. *See id.* (acknowledging arrangement did not have desired effect of propelling band to immediate stardom).

One organizer of this deal believes that such agreements help allocate the risk of breaking a new single between radio stations and record labels. *See id.* (claiming radio takes serious risks when playing new songs). Likewise, Tom Barnes, who was also instrumental in negotiating the pay-for-play deal, believes such agreements are a method of "using money as lubrication to get more artistically advanced music on the air and helping formats stretch their boundaries." *See id.* (discussing positive effects of promotions).

188. Strauss, *supra* note 93.

189. *See* Katunich, *supra* note 5, at 673 (noting that direct pay-for-play would eliminate hidden costs associated with free concerts, trips and giveaways).

190. *See* Taylor, *supra* note 153 (discussing views of independent labels on direct pay-for-play promotions). Independent record label president Don Rose notes:

My view is that we're already paying for play . . . Except the way the current system operates, there's no accountability. So I would actually welcome an environment where I knew exactly how much it costs to get my record played on "X" radio station and I knew the price I was being charged was the same as what the majors were being charged.

Id.; *see also* Jacob Slichter, *The Price of Fame*, N.Y. TIMES, July 29, 2005, at A23 (describing ambiguities about where band's promotional expenses accrue). "[O]ther shady methods were employed on our [Semisonic's] behalf—"You don't want to know," one person on the MCA promotion staff told me." *Id.*

191. *See* Taylor, *supra* note 153 (supposing that deals in view of all players are more likely to be above-board).

192. For a discussion of the deficiencies, *see infra* notes 193-96 and accompanying text.

market price.¹⁹³ Such a view also disregards the legislative desire to maintain public interest on local airwaves.¹⁹⁴ Opponents contend that economically-based practices “clos[e] the door to local artists, beginning artists and anyone without the major financial clout of the major [record companies].”¹⁹⁵ Finally, artists and record companies are not the only parties bearing the costs of pay-for-play tactics—the fans are also affected by resulting increases in album prices.¹⁹⁶

b. Payola Provides Opportunity for Artists to Be Heard

Some artists dread a day when money or performances can no longer buy airtime.¹⁹⁷ Those artists, and their managers, theorize that it is impossible to purchase a hit song; rather, pay-for-play allows artists to purchase a *chance* for a song to become a hit.¹⁹⁸ Such views are only encouraged in a system where independent promoters further the notion that a career is impossible without the promoters’ benevolence, provided in exchange for consideration.¹⁹⁹ Proponents argue that if record labels were free to negotiate above-board deals for specified amounts of airplay with radio, independent promoters would return to their roles as information brokers, thereby reducing costs and opening the market to new artists.²⁰⁰

V. PROPOSALS FOR CHANGE

At the fall 2005 Future of Music Coalition Policy Summit, artists, lawyers, promoters and even an assistant deputy attorney general gathered to discuss the future of pay-for-play practices between record labels and radio

193. See Reply Comments, *supra* note 102, at 8 (arguing deregulation would unfairly favor major labels). The American Federation of Musicians, American Federation of Television and Radio Artists, Future of Music Coalition, The Recording Academy and the Recording Artists’ Coalition weighed in against pay-for-play tactics in response to an FCC Notice of Inquiry, stating that, “any barriers to worthy independent and local artists[’] . . . access [to] the commercial airwaves are wrong, as a matter of equity, fair trade and serving consumers.” *Id.* at 12.

194. See Notice of Inquiry, In the Matter of Broadcast Localism, 19 F.C.C.R. 12,425, 12,425 (adopted June 7, 2004) (describing localism as decades-old cornerstone of broadcast regulation).

195. See Reply Comments, *supra* note 102, at 13 (describing how local artists are frequently shut out of radio stations in favor of artists with major label backing).

196. See Slichter, *supra* note 190 (noting that fans face higher retail costs for albums resulting from payola). For a further discussion of the costs associated with payola practices and who bears them, see *supra* notes 80-82 and accompanying text.

197. See Slichter, *supra* note 190 (“How will new bands get played?”).

198. See *id.* (“The longer something new is on the air, the greater the chance that people will grow to like it.”).

199. See Katunich, *supra* note 5, at 665 (explaining that different stages of artist careers alter amounts of payment required).

200. See *id.* at 673 (arguing that removing speculative aspects of pay-for-play would encourage record labels to take risks on fresh music).

stations.²⁰¹ This meeting of the minds aside, it seems unlikely that the opposing viewpoints will ever reach a common ground on the subject of government regulation of payola.²⁰² Assuming, *arguendo*, that payola regulations are necessary, there are conflicting views regarding how these restrictions should be crafted.

In their response to an FCC Notice of Inquiry, Respondents Recording Artists' Groups ("Groups") called for the FCC to "take immediate action to confront the ongoing and insidious practice of pay for play by issuing specific rules that forbid particular kinds of behavior."²⁰³ Further, the Groups noted that pay-for-play practices have a "history of mutating." Therefore, they argued that the FCC should craft new rules that are "broad and flexible enough to adapt to changes in industry practices."²⁰⁴

Conversely, other scholars advocate a complete deregulation of pay-for-play practices in radio.²⁰⁵ A deregulation theory would permit unrestricted payment to radio stations, coupled with the ability to contractually enforce the promise of specified airplay.²⁰⁶ These scholars advocate for direct disclosure of payments only to trade publications and the FCC,

201. See Future of Music Coal., Future of Music Policy Summit, Sept. 13, 2005, <http://www.futureofmusic.org/events/summit05/panel11.cfm> (announcing panel participants and topic); see also *Music Activists Call for Payola Crackdown*, COMM'NS DAILY, Sept. 15, 2005, available at 2005 WLNR 14500860 [hereinafter Music Policy Summit] (reporting on Future of Music Policy Summit). Panelists in the session included: Neda Ulaby, Reporter, National Public Radio (moderator); Jared Ball, Educator and Journalist; Thomas Hazlett, Professor of Law and Economics, George Mason University; Jeff McClusky, President and CEO of Jeff McClusky & Associates; Don Rose, Acting President of A2IM; Andy Schwartzman, President and CEO of Media Access Project; and Jacob Slichter, author/drummer, Semisonic. See Music Policy Summit, *supra* (noting participants). Opening remarks were made by Terry Brown Clemons, Assistant Deputy Attorney General, Division of Public Advocacy, New York Attorney General's Office. See *id.* (providing list of speakers at event).

202. See Taylor, *supra* note 153 (noting differences in opinions industry-wide). "Who's to say that in a year, pay-for-play won't be as passé as the FCC's old ownership limits," remarked Paul Miraldi, director of marketing at WAXQ New York. *Id.*

203. Reply Comments, *supra* note 102, at 14.

204. See *id.* (encouraging FCC to adopt rules that will be able to manage ever-changing industry).

205. See Sidak & Kronemyer, *supra* note 5, at 567-68 (decrying authorities' failure to recognize market for hit singles and payola's role in making market more efficient).

206. See *id.* at 569 (arguing this policy would lead industry to adopt standard contract for radio airplay). The commentators propose more efficient means of determining listener demand for singles by *Billboard* and *Radio & Records* through indications of gross unit sales. See *id.* at 567-68 (suggesting weekly clearinghouse of record sales data). The suggested method is similar to the popularity statistics collected for feature films in theatrical release. See *id.* at 568 (analogizing suggested method to current Hollywood statistic keeping). The commentators note that *Billboard* and *Radio & Records* charts do not adequately indicate the relative market success of songs throughout the year; further, the time lag in chart publication minimizes their usefulness to radio programmers. See *id.* at 567-68 (describing pitfalls of current data keeping for radio).

and note that section 317(e) would allow for authorization of such a procedure.²⁰⁷ Yet deregulated pay-for-play begs the question of whether radio stations would be willing to relinquish their power to select songs for airplay to the record labels.²⁰⁸ Furthermore, complete deregulation is not an appropriate solution because radio stations could rely entirely on pay-for-play to pay their bills in place of traditional commercial advertising, thereby increasing the chance of lax attention to programming quality.²⁰⁹

A similar but less drastic alternative involves partial deregulation of the sponsorship requirements.²¹⁰ This solution also proposes disclosures made solely to the FCC, as well as restrictions on the number of spins available for purchase.²¹¹ Advocates of partial deregulation assert that songs have little value as anything other than advertisements; therefore, more attention should be placed on the *benefits* of the market system, such as the reduction of costs, speculation and corruption.²¹² Nevertheless, this proposal fails to account for the FCC's original rationale in imposing disclosure rules—"that the public know by whom it is persuaded."²¹³

In the debate over pay-for-play, positions advocated by the government and independent artists are the polar opposite of those taken by record companies and radio stations.²¹⁴ Further, while payola scandals may outrage the public, such outrage has yet to result in "significant par-

207. *See id.* at 570 (concluding that marginal costs for trade publications to print material would be minimal). "Congress granted the FCC latitude to waive 'the requirement of an announcement' for 'any case or class of cases;'" this could be construed to allow the FCC to make an exception in the case of songs. Kielbowicz & Lawson, *supra* note 18, at 369 (noting decisions must be based on "public interest, convenience or necessity" standard touted by FCC as its touchstone).

208. *See Sidak & Kronemyer, supra* note 5, at 570 (claiming radio stations would not be forced to resign privilege of song selection due to necessary opportunity cost associated with choice of music).

209. *See Katunich, supra* note 5, at 676-77 (noting deregulation would likely draw ire from traditional advertising industry).

210. *See id.* at 676 (claiming total deregulation would exacerbate problems associated with payola).

211. *See id.* at 679 (placing more regulatory power in hands of FCC for monitoring payments from record label). This theory also places the burden of public disclosure on the FCC. *See id.* at 680 (arguing FCC is best suited to responsibility of public disclosure).

212. *See id.* at 670 (advocating partial deregulation as more efficient solution without side-effects of complete deregulation). The commentator suggests attention is incorrectly placed on the stereotypes commonly associated with payola and independent promoters. *See id.* at 674-75 (claiming "record labels may have cornered the market on the catchiest form of commercials available").

213. Termination of "Plugola" Rulemaking and Affirmation of Disclosure Requirement, 76 F.C.C.2d 227, 227 (1980); *see Katunich, supra* note 5, at 676 (noting suggested method more akin to business model than public trusteeship).

214. *Cf. S. 2691*, 107th Cong. §2 (2002) (expressing desire for reform of current federal payola laws); Sidak & Kronemyer, *supra* note 5, at 566-72 (disputing that outlawing of payola is required to ensure broadcast of new songs based on artistic merit); Chuck Philips & Michael Hiltzik, *Two Officials Urge FCC to Probe Possible Payola*, L.A. TIMES, Jan. 14, 1999, at C1 (quoting legislators who claim payola is

ticipation by public interest groups in the legislative or rulemaking process.”²¹⁵ Considering all the factors, neither viewpoint adequately protects both the listening public and the market and, therefore, resolution of the payola conflict in the near future seems doubtful.²¹⁶

The government has ignored the reality of songs as advertisements, especially given the scarce resource that is free broadcast radio and has therefore refused to regulate radio as the commodity market it is.²¹⁷ The restrictions on payment for broadcast in conjunction with the market structure of radio have diminished the effectiveness of payola as a pricing mechanism.²¹⁸ Conversely, record labels have dug their own grave, so to speak, by willfully ignoring the regulations already in place and thereby increasing the costs to themselves and their artists.²¹⁹ The prevalence of payola, combined with the convoluted system it has become, weighs heavily against trusting record labels with even regulated forms of pay-for-play.²²⁰

Neither side has appropriately addressed the need for balance between radio as a marketplace and radio as a public good.²²¹ Nevertheless,

reflection of lack of competition in market); Statement of Commissioner Jonathan Adelstein, *supra* note 8 (noting airwaves belong to public).

215. See Kielbowicz & Lawson, *supra* note 18, at 375 (noting limits of public reaction).

216. For a discussion of various weaknesses of each suggested approach, see *supra* notes 178-81, 192-96 and accompanying text. Further, for a comparison of the different suggested proposals for payola reforms and the problems associated with each, see *supra* notes 201-15 and *infra* notes 217-25 and accompanying text.

217. See Sidak & Kronemyer, *supra* note 5, at 522 (theorizing that Congress was unaware that payola acts as price mechanism when it outlawed practice).

218. See *id.* at 572 (asserting that current regulatory scheme has encouraged opportunistic behavior by independent promoters at record companies' expense). The commentators further argue that Congress and the FCC have "prevented an efficient market from developing." *Id.* at 566. For example, the rules permit record companies to "lobby broadcasters generally while forbidding them to make specific efforts on behalf of individual songs." Doerksen, *supra* note 18.

219. See Boehlert, *supra* note 12 (reporting that artist groups and RIAA are calling for investigation of record companies to determine who paid whom and how much). Artists are resistant to efforts to end the reign of independent promoters for fear they, and not the record companies, will bear the brunt of promoter wrath; the common feeling is that record companies created the problem and the artists are unwilling to be the targets of repercussions. See *id.* (reporting artists feel they remain in weak bargaining position). See generally Brooks Boliek, *Berman Chides Clear Channel: Lawmaker Accuses Radio Company of 'Punishing' Musicians*, HOLLYWOODREPORTER.COM, Jan. 23, 2002, available at LEXIS, THR File (asserting record companies take improper advantage of superior bargaining position).

220. See Taylor, *supra* note 153 ("The way that money gets to radio stations from record companies is about as inefficient a process as I've ever seen in any business.").

221. See Saxe & Silberman, *supra* note 88 (discussing confusion that marks promotion business). Emmis Communications Executive Vice President of Programming Rick Cummings states, "we've always looked at the music industry and thought there ought to be a better connection . . . [The labels] have always as-

record companies have been given little incentive thus far to change their practices.²²² As discussed above, the current restrictions are infrequently enforced and contain several easily exploitable exceptions.²²³

Congress and the FCC need to revamp their rules concerning payment for broadcast in order to acknowledge the economic pressures in the music industry.²²⁴ Laws that appropriately recognize the value of radio airplay to the standard business plan of record companies, yet refrain from complete deregulation, would better serve the public interest, and the laws' stated purpose.²²⁵

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sumed we would play their records for free, and our assumption was that they'd advertise the records we added, but it never seemed to come out that way." *Id.*

222. See Duhigg & Hamilton, *supra* note 7 (documenting miniscule fine imposed by FCC for large payola violation). This may change following the Sony inquiry in New York, as the other major record companies still face investigations of their own practices. See *id.*; Leeds & Story, *supra* note 129 (commenting that some other record companies are not so concerned about impact of Sony settlement).

223. For a discussion of the exploitable exceptions, see *supra* notes 63-101 and accompanying text.

224. See Sidak & Kronemyer, *supra* note 5, at 572 (calling for Congress and FCC to "decriminalize and deregulate the advertising of pop music"); Katunich, *supra* note 5, at 684 (calling for compromise and consistency in anti-payola laws).

225. See Sidak & Kronemyer, *supra* note 5, at 571 (claiming payola "serves as a price system for efficiently allocating scarce advertising capacity for new pop records"); Katunich, *supra* note 5, at 684 (calling for recognition of music as business balanced with efficiency); Doerksen, *supra* note 18 (recommending rational set of regulations that recognize reality of music business and level playing field allowing broader competition). Doerksen fondly recalls a time during the pioneer days of rock 'n' roll, "when tiny record labels like Sun briefly had the likes of RCA on the ropes." See *id.* (noting further that earlier attempts to quash payola "have tended to leave the beast stronger").