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Clear Channel v. Competition Act of 2002: Is There A Clear End in Sight?

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LEGISLATIVE UPDATE

CLEAR CHANNEL V. COMPETITION ACT OF 2002: IS THERE A CLEAR END IN SIGHT?

I. INTRODUCTION

Senator Russell Feingold (D-WI) recently introduced a new bill to amend the Communications Act of 1934, entitled "the "Competition in Radio and Concert Industries Act of 2002" ("Competition Act").[1] The Act is designed to "increase programming and content on radio that is locally and independently produced, to facilitate competition in radio programming, radio advertising, and concerts, and for other purposes."[2] The Competition Act aims to reverse the negative

1. S. 2691, 107th Cong. (2002), *available at* http://thomas.loc.gov.

2. The full text of the Act is as follows: "Competition in Radio and Concert Industries Act of 2002—Amends the Communications Act of 1934 to authorize the Federal Communications Commission (FCC) to revoke any broadcast station license of construction permit for: (1) willful and repeated unfair or deceptive acts or practices that significantly hinder or prevent the broadcast of programming or content produced, promoted, or created by a person independent of the licensee or permittee; or (2) conviction or final adjudication of an antitrust unfair trade practice violation regarding concert venues or promotion.

Directs the FCC to prescribe regulations which address: (1) improperly influencing the sale of satellite cable programming or content to any other radio station or unaffiliated concert venue, or of any song, work, or sound recording, programming, concert performance, or concert promotion to persons not affiliated with the licensee, permittee, or affiliate thereof; (2) discrimination against unaffiliated musicians or content providers; and (3) the making of exclusive contracts with musicians or providers which prevent other licensees or permittees from obtaining programming or content from such musicians or providers.

Requires the FCC to: (1) designate for hearing any radio broadcasting application that would result in the applicant owning, operating or controlling radio stations having a national audience reach exceeding 60 percent; (20 review

effects of the Telecommunications Act of 1996 ("Telecom Act"). Specifically, the Competition Act would direct the Federal Communications Commission ("FCC") to (1) heavily scrutinize future mergers; (2) revoke licenses of radio stations that use tying arrangements between radio, promotion or concert industries to discriminate against artists, concert promoters or other radio stations; (3) investigate "pay-for-play" ("payola") practices; (4) probe whether soaring concert ticket prices can be attributed to massive media consolidation; and (5) determine whether the combined effects of these practices have affected the strength of diversity, localism and consumer approval in the radio and concert industries.[3] Although the Competition Act has won support from record labels, artists, independent radio station owners and consumers, the Act will face a tough battle against well-established industry practices, big radio money funneling into the hands of GOP policy makers and proponents of further deregulation, including the FCC's chair Michael Powell.[4]

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the use of privately-controlled audience measurement systems for the determination of local markets of radio stations; (3) modify its rules concerning attributable interests in radio stations and limitations on local marketing agreements; and (4) prohibit the licensee of any radio station from using its control over broadcasting matter to extract money or other valuable consideration from a record company, artist, concert promoter, or related entity. S. 2691, 107th Cong. (2002).

3. Bill Holland, *Feingold Introduces Competition Bill*. BILLBOARD, July 6, 2002, at 9 [hereinafter Holland, *Feingold Introduces Competition Bill*].

4. *Id.*; Feingold states, "I hear about these problems everywhere I go. People are very concerned." Other supporters include: "Jenny Toomey, indie recording artist and executive director of the Future of Music Coalition; Greg Hessinger, executive director of the American Federation of Television and Radio Artists; Jim Winslow, executive director of the National Association of Black Owned Broadcasters; and Gene Kimmelman, executive director of Consumers Union. The National Association of Recording Arts and Sciences, the Recording Artists Coalition, and the Recording Industry Association of America (RIAA) also support the measure. Future of Music Coalition, *FMC Joins Broad Artist Coalition in Letter to FCC and Congress on Current Issues in Radio*, (May 24, 2002); In a joint statement to Congress and the FCC, the following groups support reform in current payola practices and investigation into the impact of radio consolidation: the American Federation of Musicians, American

This paper will include a background section illustrating the legislative history leading up to the Telecom Act. The background section will demonstrate the effects of the Telecom Act within the communications industry, specifically addressing payola and the FCC's response to those effects. This paper will specifically highlight Clear Channel Communications and Clear Channel Entertainment ("Clear Channel"), which as a result of the Telecom Act's relaxation of ownership limits, has in just six years become the most dominant radio and concert conglomerate in the world. The analysis section will address how the Competition Act aims to rectify the alleged problems in both the radio and concert industries. Finally, in support of the Competition Act, the impact statement will address the current state of radio and concert industries; in particular, how public policy goals such as diversity and localism, have all but disappeared in the minds of legislators and big conglomerates such as Clear Channel. In effect, these industries eagerly submit to the whims of those who have money, irregardless of whether quality programming dwindles to more and more homogenous, cookie-cutter rock and pop. Additionally, this section will address the Act's likelihood of passage, weighing both Clear Channel's political ties to Washington and the FCC's chairman, Michael Powell's, pro-deregulatory outlook. Efforts in support of the Competition Act are notable, yet without overwhelming legislative support, artists willing to stand in opposition to huge radio conglomerates and lobbying money, stations will continue to spoon-feed listeners the same money-driven songs over and over again.

II. BACKGROUND

The purpose of this section is to explore the legislative history,

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Federation of Television and Radio Artists, Association for Independent Music, Future of Music Coalition, Just Plain Folks, Nashville Songwriters Association International, National Association of Recording Merchandisers, National Federation of Community Broadcasters, Recording Academy, Recording Industry Association of America, *at* http://www.futureofmusic.org/news/radioissuesstatement.cfm.

including the FCC's role in gradual radio deregulation, the enactment of the Communications Act of 1934 ("Communications Act") and its evolution up to the Telecom Act. The legislative history reveals that public policy goals of the Communications Act are neither expressly written within the Communications Act, nor are they goals currently practiced within the music industry. An emphasis on Clear Channel's history and evolution to become the most dominant media powerhouse illustrates both the positive and negative effects of the Telecom Act, but more importantly, how public policy considerations effectively vanished in the midst of massive consolidation.

A. Evolution of FCC Regulation

As a public asset, radio is a distinct medium that historically exists to serve the public interest.[5] The 1927 Radio Act "provided structure and oversight to the public spectrum, [but] it failed to clearly define the "public interest," and generated serious debate."[6] Although legislators required broadcasters to deliver diverse programming and information beneficial to the American public, the failure of clearly defining "public interest" ultimately left the FCC with full discretion in determining public policy goals.[7] The 1934 Communications Act revised the 1927 Radio Act, yet still purported two characteristics important to radio broadcasting: localism and program diversity.[8] Since 1934, the FCC has regulated radio, and from its first approval of radio multi-ownership in 1938, the FCC's decisions ultimately side with public policy considerations.[9] Approval often hinged on traditional antitrust concerns such as entry barriers, program

5. *FMC Joins Broad Artist Coalition*, *supra* note 4.

6. Peter DiCola and Kristin Thompson, *Radio Deregulation: Has it Served Citizens and Musicians?* (Nov. 18, 2002), *at* http://www.futureofmusic.com/research/radiostudy.cfm.

7. *Id.*

8. *Id.* (citing Benjamin Bates and Todd Chambers, *The Economic Basis for Radio Deregulation*, 12:1 J. MEDIA OF ECON. 22 (1999)).

9. DiCola and Thompson, *supra* note 6.

diversity and censure, independent station owners and undue economic power, particularly in terms of advertising revenue. This brief examination of the FCC's ownership decisions illustrates not only a consistent application of public policy goals, but also a gradual relaxation in ownership rules and regulations.

In 1938, the FCC first limited radio ownership when it denied an application for a new AM station on the basis that the applicant already owned another AM station in the local market.[10] The Commission found that a "commonly owned, same service station would not compete with each other and that granting the application could preclude a competitive station from entering the market."[11] In the early 1940's, the FCC revisited the question and continued to deny application for multiple ownership in a "primary service area," except "where the public interest would be served by multiple ownership."[12] In the 1960's, the FCC changed its case-by-case analysis with a blanket prohibition rule that prevented multiple ownership if the radio stations' signals overlapped.[13] The stated purpose of multiple ownership rules was "to promote maximum diversification of program and service viewpoints and to prevent undue concentration of economic power contrary to the public interest."[14]

Local ownership rules are based on two principles: first, that "it is more reasonable to assume that stations owned by different people will compete with each other, for the same audience and advertisers, than station sunder the control of a single person or group;"[15] and second, that "the greater the diversity of ownership in a particular area, the less chance there is that a single person or

10. Genesee Radio Corp., 5 F.C.C. 183 (1938).

11. *Id.*

12. *Id.*

13. 16 F.C.C.R. 19861, F.C.C. Comm'n Order No. 01-329, *available at* http://www.fcc.gov/Bureaus/Mass_Media/Notices/2001/fcc01329.txt [hereinafter *Multiple Ownership Rules*]. (See Amendment of Sections 73.35, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, Report and Order.)

14. *Id.* at 1476-77 (¶ 2).

15. *Id.* at 1477 (¶3).

group can have an inordinate effect, in a political, editorial, or similar programming sense on public opinion at the regional level."[16] In the early 1970's, the FCC prohibited local ownership even further in order to maximize the number of independent owners of broadcast media. The Commission found that common owners could "use practices [such as special discounts] which exploit [their] advantage over the single station owner."[17] Later, however, the Commission allowed ownership of an AM-FM combination.

During the 1980's, the FCC began a trend of relaxing ownership rules.[18] The Commission rationalized that multiple ownership would not contradict the principles of diversity and competition because the number of media outlets have increased since 1964, and that common ownership would encourage efficiencies which would generate programming benefits. Furthermore, the Commission "determined that ownership diversity was not an end in itself, but a means of 'promoting diversity of program sources and viewpoints.'"[19]

In 1992, the Commission reaffirmed its analysis and "declared that increases in the number and types of media outlets warranted further relaxation of the rule."[20] In fact, the FCC found that

16. *Id.*; *See AP v. United States*, 326 U.S. 1, 20 (1945) (stating that the First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public"). Local ownership limits has been continually supported, and particularly was reaffirmed in *Associated Press v. Untied States*.

17. *Id.* at 313 (¶ 25).

18. Dicola and Thompson, *supra* note 6. ("[the] FCC gradually raised the ceiling on the number of stations a particular owner could control nationwide; from 7 AM and 7 FM in 1953, to 12 AM and 12 FM in 1984, to 18 AM and 18 FM in 1992, to 20 AM and 20 FM in 1994. At the local level, owners remained restricted to one station per band. Local caps were raised from one station to two stations per band in 1992").

19. *Multiple Ownership Rules*, *supra* note 13, at 1724 (¶ 7).

20. *Revision of Radio Rules and Policies,* Report and Order, 7 FCC Rcd 2755, 2773-74 (¶ 35) (1992), *available at* http://www.fcc.gov. The FCC cited to an increase in radio and television stations, particularly cable radio networks, when it decided that ownership rules would not harm diversity or competition.

limiting ownership actually hurt diversity, opposite of what had been believed for the previous 50 plus years.[21] The FCC then determined the maximum number of radio stations a single entity could own based on four tiers of radio markets. For example, in the first tier, markets having 40 or more radio stations, a single entity could own 3 AM and 3 FM stations, not exceeding 25% of an audience share.[22] The FCC acknowledged that this limit was "substantially more restrictive than ordinary antitrust concerns would mandate." Therefore, the threshold standards for evaluating antitrust claims are more stringent in the radio industry than in other industries. This line of reasoning further supports the FCC's dual interest in ownership rules—economic concentration considerations and protecting and promoting a diversity of voices.[23]

Although the FCC has always purported these public policy interests, the Telecom Act received criticism for abandoning long-held policy goals. Even today, legislators continue to debate over the definition of "public interest."[24] The Telecom Act, evidenced by Clear Channel, will show that deregulation has ultimately

21. *Id.* at 2774 (¶37) ("The Commission found that the inability of radio stations to realize the efficiencies arising form common ownership harmed diversity and competition by making it more difficult for radio stations to compete and to provide valuable programming services").

22. *Id.* at 2776 (¶40). On reconsideration, the Commission modified the local ownership rules to allow only 2 AM and 2 FM stations in markets with 15 or more radio stations. "Evidence that grant of any application will result in a combined audience share exceeding 25% will be considered prima facie inconsistent with public interest."; *See id.* at 2783 (¶56). Further more, the Commission will order divestiture of any station if that station reaches or exceeds 40% local market share.

23. *Id.* at 2780 (¶50). These concerns are distinct from antitrust objectives.

24. Dicola and Thompson, *supra* note 6. ("It [public interest] has been the notorious fudge factor in the FCC's rule making over the years," notes Patricia Aufderheide. "Failure to serve the public interest has been a stick with which to beat recalcitrant operators; it has been a modesty curtain behind which entire changes of regulatory ideology have taken place; it has been the favorite invocation of every stakeholder in the regulatory process").
PATRICIA AUFDERHEIDE, COMMUNICATIONS POLICY AND THE PUBLIC INTEREST 13 (Guilford Press) (2001).

harmed the public interest.The next section will detail the Telecom Act and illustrate how its enactment allowed further relaxation of ownership rules that effectuated a massive consolidation and alleged decline in diversity, independent radio ownership, an increase in payola and discrimination against artists.

B. The Telecom Act's Impact on Current Radio and Concert Industries

The Telecom Act provided for "pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advance telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition, and for other purposes."[25] In addition, revisions specifically addressing broadcast ownership rules seek "diversity in programming and diversity in the viewpoints expressed."[26] In 1995, the Telecom Act attracted significant attention for the telephone and cable industries, specifically for allowing Baby Bell phone companies to compete in long-distance business and deregulating cable rates.[27] Two hundred pages of legislation described the Act, yet lifting radio ownership limits found its place on the bottom of the priority list, receiving little if any attention.[28] Furthermore, the FCC typically seeks input and holds public hearings concerning further deregulation, the Act was enacted without FCC input.[29] Although radio industry insiders eagerly waited for the enactment, few, if

25. 104 CONG. REC. S652 (1996).

26. Dicola and Thompson, *supra* note 6. (quoting FCC Chairman Reed Hundt, Speech entitled, "The Hard Road Ahead," (Dec. 26, 1996), *in* PATRICIA AUFDERHEIDE'S, COMMUNICATIONS POLICY AND THE PUBLIC INTEREST 289 (Guilford Press) (1999)).

27. Eric Boehlert, *One Big Happy Channel?*, Salon.com, (June 28, 2001), *at* http://dir.salon.com/tech/feature/2001/06/28/telecom_dereg/index.html?pn=1 [hereinafter Boehlert, *Happy Channel*].

28. *Id.* Apparently, President Clinton never mentioned during his 'extensive remarks' that the Act would effectively lift all ownership limits for radio station broadcasters nationwide. *Id.*

29. *Id.*

any, recognized the impact the Telecom Act would have on the radio and concert industries.[30]

The Telecom Act was praised as revolutionary since the bipartisan effort attempted to transform the media industry from a nationwide monopoly to a more diverse and competitive industry.[31] Legislators widely believed that relaxing ownership limits would increase program diversity.[32] However, consolidation allowed fewer owners to control more and more stations, giving rise to contentions that the industry was now less diverse and less competitive. In fact, the Act effectuated over 4,000 of the country's 11,000 radio stations to change hands in twelve months.[33] Since the Act, over 10,000 radio station transactions occurred worth approximately $100 billion.[34] Although the Act intended many stations to acquire a couple of hundred stations each and "cash in on efficiencies of scale," the Act nevertheless

30. *Id.* One former head of a major radio groups states, "We were watching the vote come down in a hotel room in '95 and we were high-fiving each other. We knew the multiple-station deals we'd been working on would come to fruition." *Id.* Radio broker Gary Stevens commented that "the irony is that even though radio deregulation was an 'afterthought' in the Telecom Act, no other communications industry has been so dramatically affected by the legislation." *Id.*

31. Aimee M. Adler, *Notes and Comment: Competition in Telephony: Perception or Reality? Current Barriers to the Telecommunications Act of 1996*, 7 J.L. & POL'Y 571, 580 (1999).

32. DiCola and Thompson, *supra* note 6. This theory was based on economist Peter O. Steiner's assertion that "multiple stations in a local market would provide more program diversity in a given market than would five separate owners." Steiner suggested that "a single station owner would be less inclined to program to compete for the same batch of listeners." *Id.* at 8-9. Therefore, "the local owner would program his stations to appeal to a variety of different listeners." *Id.* at 9 (*citing* Christopher Sterling, *Radio and the Telecommunications Act of 1996: An Initial Assessment*, IV J. RADIO STUD. 5 (1997)). The Future of Music Coalition's recent study suggests that this argument, a rational that "put a twist on the definition of diversity," was used to promote deregulation. Dicola and Thompson, *supra* note 6, at 9.

33. Jeff Leeds, *Clear Channel's Dominance Obscures Promotions Conduit*, L.A. TIMES, Aug. 3, 2001, § 3, at 1 [hereinafter Leeds, *Promotions Conduit*].

34. Boehlert, *Happy Channel*, *supra* note 27. There are now 1,100 fewer station owners, down 30 percent since 1996.

produced only two companies as industry leaders—Clear Channel and Viacom's Infinity Broadcasting.[35] Together these companies control one-third of all radio advertising revenue, and in some markets control nearly 90 percent of all advertising dollars.[36] In just six years, deregulation has spiraled the radio and concert industries into such rapid consolidation that Congress now fears that public policy goals of the Communications Act are at the mercy of huge radio conglomerates. The Telecom Act not only relaxed local ownership caps, but it completely eliminated national radio ownership caps altogether, sending both established and newly emerging radio stations on a buying frenzy. In effect, 5,133 radio station owners dropped to 3,408, a 33 percent decrease.[37] The effect of the Act, as Feingold notes, triggered a tremendous wave of consolidations and harmed diverse interests, ranging from the independent station owners to independent artists and consumers.[38]

Although the Telecom Act amended the Communications Act of 1934, it is often criticized for not embracing the public policy goals of the original Act. Congress enacted the Communications Act with the intent to promote diversity and competition in radio broadcasting.[39] Specifically, Sections 309(a) and 310(b) of the 1934 Act address diversity promotion and competition by limiting radio multi-ownership as its public policy goals. Unlike the Communications Act and the history of FCC's policy-based decision, the Telecom Act does not specifically include or even address specific public policy considerations. The Telecom Act directed the FCC to relax local ownership rules. Section 202(b)(1), entitled "Local Radio Diversity—Applicable Caps," revised local ownership rules allowing an entity to own up to eight radio stations in one market.[40] Neither the legislative history nor

35. *Id.*

36. *Id.*

37. Dicola and Thompson, *supra* note 6.

38. 148 Cong. Rec. S6252 (daily ed. Jun. 27, 2002) (statement of Senator Feingold).

39. S. 2691, 107th Cong. § 2(a)(9) (2002), *available at* http://thomas.loc.gov/.

40. Telecommunication Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

the Telecom Act imports or even addresses the public policy goals specifically mentioned in Sections 309(a) and 310(b) of the Communications Act. Although Section 202(h) of the Telecom Act states that the FCC can "repeal or modify" any ownership rules that are "no longer in the public interest," the absence of an explicit public policy section addressing diversity promotion and competition by limiting radio stations grants the FCC greater discretion in approving radio ownership acquisitions and mergers that may be contrary to public interest.

Senator Feingold proposes the Competition Act to prevent further harm to radio and concert industries. Feingold presented numerous Congressional findings illustrating the Telecom Act's negative impact on artists, record labels and consumers alike as support for the Competition Act. Specifically, Congress found that since the enactment of the Telecom Act, radio station ownership has decreased about 25 percent. [41] More problematic, however, is that the same radio entities are purchasing promotion services and advertising, and then leveraging into all aspects of radio, concert

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(Codified at 47 C.F.R. 73.3555(A)(1) (1996)). "The revised local radio ownership rule provides:
(A) in a radio market with 45 or more commercial radio stations, a party may own, operate, or control up to 8 commercial radio stations, not more than 5 of which are in the same service (AM or FM):

(B) in a radio market with between 30 and 44 (inclusive) commercial radio stations, a party may own, operate, or control up to 7 commercial radio stations, not more than 4 of which are in the same service (AM or FM);
(C) in a radio market with between 15 and 29 (inclusive) commercial radio stations, a party may own, operate, or control up to 6 commercial radio stations, not more than 4 of which are in the same service (AM or FM); and

(D) in a radio market with 14 or fewer commercial radio stations, a party may own, operate, or control up to 5 commercial radio stations, not more than 3 of which are in the same service (AM or FM), except that a party may not own, operate, or control more than 50 percent of the stations in such market."

41. S. 2691, 107th Cong. § 2 (2002), *available at* http://thomas.loc.gov/. When President Clinton signed the Telecom Act, there were 5,100 owners of radio stations; that number has now changed to 3,800 owners, a decrease of about 25 percent.

promotion, and venues.[42] This vertical integration has allowed radio station owners to have exclusive agreements with concert venues. In result, "radio station owners have the incentive and the ability to favor the musical artists and groups they promote."[43] Further, Congress also finds that vertical integration of industries have increased concert ticket prices; in the five-year period following the Telecom Act, "concert ticket prices have increased by more than 50 percent more than such prices had increased in any previous 5 year-period.[44] The Act aims to remedy a decline in diversity—both in programming and format and also in result of independent artist's lack of access to radio and increased syndication and voice-tracking.[45]

Massive consolidations have effectively allowed radio station groups to collect alternative sources of income, often in the form of independent promoters, play list fees, and concert tour promotion.[46] Congress suggests that the incentives of alternative sources of income negatively affect programming decisions; these decisions result in a decline in music diversity.[47] One primary

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42. *Id.*

43. *Id.*

44. *See generally* S. 2691, 107th Cong. § 2 (2002). Between 1991 and 1996, tickets increased approximately 21 percent, compared to an increase in the Consumer Price Index of about 15 percent. "From 1996 to 2001, the average concert ticket price increased by more than 61 percent, while the Consumer Price Index increased by 13 percent."

45. Besides violating original public policy goals clearly expressed within the original Communications Act, Congress specifically found that the concentration of ownership of radio stations and a "reduction of localism" has exceeded Congress's intentions. Specifically, Congress finds that "top 50 radio groups owned 8.6 percent of the total number of radio stations. By 2000 they owned 27.5 percent of the total number of radio stations. Furthermore, the top 50 radio groups accounted for 43.6 percent of the total radio station revenues in 1995. By 2000 that percentage had increased to 62.5 percent." More shocking, however, is that the top 10 groups "account for almost 50 percent of all radio station industry revenues, while owning 17.6 percent of all commercial radio stations." *See generally* S. 2691, 107th Cong. § 2 (2002).

46. S. 2691, 107th Cong. § 2(a)(15) (2002).

47. S. 2691, 107th Cong. § 2(a)(18) (2002). Congress also notes that the first amendment embraces the values of diversity on the radio as well as right of

form of alternative revenue, payola, is a practice inconsistent with the original Communications Act of 1934 (Sections 317 and 507).[48] Congress urges the FTC to revise outdated payola laws in order to accommodate musical diversity and legitimate promotional activities.[49]

The Competition Act aims not to reverse the Telecom Act, but revise it in order to (1) rectify negative affects of the Telecom Act and (2) provide the FCC and courts with functional guidelines to maintain future competition and diversity in these rapidly changing and dynamic telecommunication industries. The Act aims to prohibit any entity that owns "radio stations, concert promotion services, or venues from leveraging their cross-ownership in an anti-competitive manner."[50] It also calls for the FCC to highly scrutinize future mergers of large radio station ownership groups and its effects on independent radio stations, concert promoters and consumers.[51] The legislation also requires the FCC to modernize the Federal payola prohibition.[52] Feingold hopes this legislation will restore competition in the radio and concert industry by allowing independent radio stations and concert promoters to compete with the big radio conglomerates.[53] The Act will "promote competition, local input, and diversity, and promote consumer choices.[54]

C. Market Forces Embrace the Telecom Act: The Evolution of Clear Channel

Competitors, consumers, artists and record labels may cry

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people to receive a wide range of information. S. 2691, 107th Cong. § 2(a)(19) (2002).

48. S. 2691, 107th Cong. § 2(a)(17) (2002).

49. S. 2691, 107th Cong. § 2(a)(18) (2002).

50. 148 CONG REC. S6252 (daily ed. June 27, 2002) (statement of Sen. Feingold), *available at* http://thomas.loc.gov.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

"antitrust violation," "discrimination," "payola" and "more diversity," but despite universal animosity towards Clear Channel, there is not a single company that does not envy, if **not simply** stand in awe, at Clear Channel's accomplishments. Clear Channel grew from owning one radio station to owning more radio stations, outdoor advertising displays and producing more concerts than any other company in the entire world.[55] Although Clear Channel's success can be attributed to founder L. Lowry Mays, its true domination resulted from a combination of pure genius and a well laid-out plan. An outside perspective would assume a complicated, comprehensive plan to become the largest media conglomerate; in reality, Mays' plan was simple. Once President Bill Clinton signed the Telecom Act, Clear Channel bought as many radio stations in as many markets as possible. Few recognized the name "Clear Channel" prior to 1996 unless they lived in San Antonio; today, it is nearly impossible to avoid Clear Channel, whether one realizes its widespread presence or not. This section provides a brief history of Clear Channel and its rise to become the most dominant radio and entertainment conglomerate in the world.

The dominant empire,[56] Clear Channel, had relatively humble beginnings when it purchased its first radio station in 1972.[57] Two years later, founder L. Lowry Mays purchased San Antonio's WOAI-AM, making it a news-talk station.[58] Mays slowly added more properties, cut costs and earned the reputation of "Cheap Channel."[59] Clear Channel's beginnings of major acquisitions

55. Susan Mandel, *$23.8 billion merger and still going strong*, THE NATIONAL LAW JOURNAL, Oct. 30, 2000, at B1.

56. Michael Roberts, *Taking on the Empire*, Westword.com, (Aug. 23, 2001), *at* http://www.westword.com/issues/2001-08-23/feature2.html/1/index.html [hereinafter Roberts, *Taking on the Empire*].

57. *Id.* The companies' chairman L. Lowry Mays purchased KAJA-FM, along with the assistance of Red McCombs, prior owner of the Denver Nuggets and deed owners of the Minnesota Vikings football team.

58. Jeff Leeds, *Clear Channel: An Empire built on Deregulation*, L.A. TIMES, Feb. 25, 2002, § 3, at 1[hereinafter Leeds, *An Empire*].

59. *Id.*

began in 1984 when it purchased Broad Street Communications.[60] Four years later, Clear Channel explored beyond the radio industry and purchased its first TV station in Mobile, Alabama, creating its own television branch.[61] Although Clear Channel slowly acquired stations and ventured into different markets, the last five years are unprecedented to that of its first twenty-five years.[62] In 1995, although considered a power-house by industry standards, Clear Channel had just 16 TV stations and 43 radio stations in 32 markets.[63]

Then, in 1996 President Clinton enacted the Telecommunications Act which would forever change the radio and concert industry, and in particular Clear Channel. Specifically, the bill increased limits of station ownership in a single market from four to eight and completely eliminated the limits on national ownership.[64] With the golden ticket in hand, Clear Channel cashed in. It acquired Paxson Communications Corporation, which owned 43 radio stations, bringing the total of company owned stations to 173 at the end of 1997.[65] The FCC also approved Clear Channel's acquisition of Jacor Communications in 1999, which added over 450 stations,[66] "making it the largest radio station group in the world."[67] In 2000, Clear Channel bought AMFM Inc. for $23.5 billion, bringing its number of stations to 870.[68] This merger was considered the "biggest radio deal in history."[69]

60. *Id.* At that point, Clear Channel had properties in Oklahoma City, New Orleans and New Haven, Connecticut.

61. *Id.*

62. *Id.* "The company was a mere mouse compared to its current elephantine self." *See* Roberts, *Taking on the Empire*, *supra* note 56.

63. Roberts, *Taking on the Empire*, *supra* note 56.

64. *Id.*

65. *Id.*

66. *Id.*

67. Information regarding Clear Channel's acquisition of Jacor, *available at* http://www.premiereradio.com (last visited Nov. 25, 2002).

68. Roberts, *Taking on the Empire*, *supra* note 56. Another source reports that Clear Channel bought AMFM for $23.8 billion. Mandel, *supra* note 55.

69. Mandel, *supra* note 55.

In just six years, Clear Channel "today consists of what were once 70 separate broadcast companies."[70] Clear Channel continued merging and acquiring, bringing its current number of stations to more than 1,200 in the United States in addition to a few hundred more overseas.[71] Evidence suggests that this number will continue to rise, even more so if the FCC sides with further deregulation.[72] Clear Channel now has 30 times the number of stations Congress would have previously allowed.[73] As evidence of their radio market power, no competitor owns even one-quarter the number of Clear Channel stations.[74] Further, although Clear Channel reaches just over 50 percent of the population[75], it is worthy to note that through Premiere Radio Networks, a subsidiary of Clear Channel, over 100 syndications reach 180 million people a week. As a result, Clear Channel radio reaches over 70% of the American population.[76]

Clear Channel's aggressiveness did not stop short of the radio industry. Clear Channel became the most powerful concert producer and entertainment promoter when it acquired SFX Entertainment for $4.4 billion in 2000.[77] The company more than doubled its size with this acquisition.[78] In August 2000 alone, Clear Channel had 22 acquisitions.[79] In 2000 alone, revenues

70. Boehlert, *Happy Channel*, *supra* note 27.

71. Roberts, *Taking on the Empire*, *supra* note 56.

72. See Clear Channel, *at* http://www.clearchannel/radio/premiere.bhp (last visited Nov. 25, 2002). Regarding the internet radio industry, Clear Channel's "growth strategy is to continue its commitment to internal development, to expand through acquisitions and to lead network radio into the next millennium." *Id.*

73. Dicola and Thompson, *supra* note 6.

74. *Id.*

75. Clear Channel, *supra* note 72.

76. *See* Clear Channel, *supra* note 72. This figure is based on an estimate of 11,000 AM-FM radio stations in the United States.

77. Roberts, *Taking on the Empire*, *supra* note 56. SFX also went on an acquisition spree. The Justice Department reviewed 18 separate transactions in four years. *Id.* Those acquisitions made SFX a national powerhouse in nearly every market in the country. *See* Leeds, *Promotions Conduit, supra* note 33.

78. Mandel, *supra* note 55.

79. *Id.*

totaled approximately $5 billion. [80] Clear Channel's unique power grew to unprecedented force since its radio stations and concert division worked together to create what executives call "synergy"—"the ability to use radio stations owned by the company to relentlessly promote its own concerts."[81] Although some note that Clear Channel's acquisition of SFX Entertainment for $4.4 billion was a mark of genius, competitor's immediately questioned its "synergy," or in other words, its leveraging as a possible antitrust violation.

Despite earning the number one position in both radio and concert industries[82], Clear Channel continues to grow in multiple industries at an unprecedented rate. Whether one realizes it or not, Clear Channel is everywhere. Its initial entry into the radio industry has spurred entry and near domination in almost every area of entertainment, most notably, in radio, concert, sports and advertising industries. Not only does Clear Channel own over 1200 radio stations reaching over 110 million listeners every week, their Premier Radio Network syndicates more than 100 programs to more than 7,800 radio stations, reaching over 180 million listeners a week.[83] According to Clear Channel's statistics, 54% of all people ages 18-49 in the United States listen to a Clear Channel radio station on a daily basis.

If not by radio, Clear Channel will find a way to reach you. The entertainment giant currently owns, operates and/or exclusively books 135 live entertainment venues, including 41 amphitheaters

80. *Id.* Clear Channel's size is demonstrated by the number of its employees. At the end of 2000, Clear Channel had over 29,000 employees.

81. Roberts, *Taking on the Empire*, *supra* note 56. Don Howe, Clear Channel executive stated, "by partnering up with SFX, we're able tot bring to bear for SFX some very key ingredients of the concert business, which is the research of that artists will do well here and what records sell well here. Those are all the things that SFX will benefit from that our competitors will not—and the benefits flow back to the stations as well." *Id.*

82. Leeds, *Promotions Conduit*, *supra* note 33.

83. See Clear Channel syndications, *available at* www.clearchannel.com/Radio/index.php (last visited Nov. 25, 2002). Such syndications include Rush Limbaugh, Dr. Laura Schlessinger, Rick Dees, Casey Kasem, Jim Roberts, Carson Daly and Art Bell. *Id.*

in the United States and 30 venues in Europe.[84] If owning the venues were not enough, Clear Channel managed to produce more than 30 major music tours, including Madonna, Janet Jackson and "NSYNC.[85] In 2001, Clear Channel generated approximately 70 percent of concert ticket revenues in the United States.[86] Clear Channel is now attempting to cut out the middlemen—the promoters—by becoming the promoters themselves, evidenced by recent acquisitions.[87] Clear Channel is not just limited to the United States; it operates in nine European countries and has begun its march to acquire, well, almost everything it can. Most recently, an early November 2002 draft of the Communications Bill confirmed the relaxation of foreign media ownership rules.[88] Clear Channel International's CEO Roger Parry said the firm is selling its smaller British assets to allow for future acquisitions, including Capital Radio.[89] Sources say the bid for Capital Radio would cost up to $789.8 million.[90]

Clear Channel produces and markets more entertainment events than any other company in the world.[91] Over 66 million people attend approximately 26,000 events, which include not only live concerts, but also Broadway productions[92], Broadway shows[93],

84. See Clear Channel Entertainment, *available at* www.clearchannel.com/Entertainment/ent_music.php (last visited Nov. 25, 2002). In addition, Clear Channel has entertainment venues in 65 countries in the world. See Clear Channel Outdoor, *available at* www.clearchanneloutdoor.com/corp/prDetail.as;?id=20 (last visited Nov. 25, 2002).

85. *Id.*

86. *Id.*

87. *Id.* Clear Channel acquired top concert promoters in Cleveland (Belkin Productions), Denver (Chuck Morris Presents) and Phoenix (Evening Star Productions). *Id.*

88. See Radio Crow news, *available at* http://www.radiocrow.com/news_docs/radiotv43.htm#111702_1 (last visited Nov. 17, 2002).

89. *Id.*

90. *Id.*

91. Clear Channel Entertainment, *supra* note 84.

92. *Id.* Clear Channel was a producing partner of "The Producers, A New Mel Brooks Musical," winner of 12 Tony Awards including Best Musical of

family entertainment shows[94], and sports events.[95] In just three years SFX Sports Group, a division of Clear Channel, has become a leader in talent management and marketing agency that represents the world's elite professional athletes in basketball, baseball, football, hockey, tennis, gold, soccer, figures skating and the Olympics.[96]

Clear Channel's Television and Film division produces network and cable programming on major broadcast[97] and cable networks and also has produced major motion pictures. Another Clear Channel division is Clear Channel Entertainment-Exhibition in which it collaborates with Fortune 500 Companies such as Pfizer Inc., Target Stores, TIME and Hewlett-Packard to bring over 200 exhibits to leading museums and research institutions.[98] Clear

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2001. *Id.*

93. *Id.* Clear Channel's Theatrical Group secured presenting rights to Disney's "The Lion King" and "Aida" and also the tours of "Mamma Mia" and "The Producers." *Id.*

94. *Id.* Clear Channel partnered with Warner Brothers to produce "Scooby Doo: Stagefright—Live on Stage." *Id.*

95. *Id.* Clear Channel stages over 660 events per year and over 250 hours of network and cable programming. *Id.* Such sporting events include Supercross, USHRA Monster Truck Jam presented by Ford trucks, and IHRA Drag Racing. *Id.* Not only does Clear Channel produce these events, it recently acquired the International Hot Association (IHRA), a premier drag racing series, in 2001. *Id.*

96. *Id.* SFX acquired F.A.M.E. in 1998, which at the time, was the world leader in athlete representation. *Id.* Some athletes represented include Michael Jordan, Kobe Bryant, Roger Clemens, Pedro Martinez, Jerry Rice, Andre Agassi, and Greg Norman. *Id.* The SFX Sports Group also develops and produces nationally televised sporting events such as Michael Jordan's Celebrity Invitational and the American Century Golf Championship. *Id.* The Sports Group is comprised of nine offices in the United States and has branches in Europe and Australia. *Id.*

97. See Clear Channel Entertainment, *supra* note 84. Clear Channel has produces programming on HBO, CBS, NBC, ESPN, the WB, and A&E and the History Channel, including shows such as the WB's "Smallville", HBO's "Arli$$", and the motion picture "Hardball." *Id.*

98. Information regarding Clear Channel Exhibits is available *at* http://www.clearchannel.com/Entertainment/ent_exbt.php (last visited Nov. 25, 2002). Other Clear Channel exhibits include: "Masters of the Night. . .The true Story of Bats," "Extreme Deep: Mission to the Abyss," "Microbes: Invisible

Channel's most notable exhibit, "Titanic: The Artifact Exhibit," attracted over 11 million worldwide.[99]

From the time people leave their homes in the morning until 7pm at night, no other company in the world reaches more people than Clear Channel."[100] Clear Channel itself claims that the company is the "#1 'out of home' media company in the world. The company owns over 770,000 outdoor advertising displays.[101] Not only does Clear Channel own advertising space on bulletins, airport displays[102], mass transit displays, convenience store posters

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Invaders. . .Amazing Allies," "Chicano Now: American Expressions," Inside Africa," and "SPACE: A Global Celebration." *Id.* More than 80 million people have attended Clear Channel's exhibits. *Id.*

99. Clear Channel Entertainment, *supra* note 84.

100. See Clear Channel Outdoor, *available at* http://www.clearchanneloutdoor.com (last visited Nov. 25, 2002). Clear Channel reaches approximately 92 percent of the population in the top 25 markets in the country. *Id.* One example of strategic planning is Clear Channel's presence in shopping malls. *Id.* Clear Channel advertises in over 350 shopping malls, specifically in places where 80% of shoppers make purchasing decisions. *Id.* See Clear Channel Radio Sales, *available at* www.clearchannelradiosales.com/Update/about.html (last visited Nov. 25, 2002). More specifically, Clear Channel claims that "[Clear Channel Outdoor] is Chicago's #1 choice." *Id.* One example of local Chicago Clear Channel advertising is DePaul University's recent campaign to advertise online learning. Advertisements stating, "DePaul University. Learn At Your Doorstep," were conveniently placed at mass transit rail sites, including large bulletins in downtown stations such as Union Station, and smaller advertisements placed at el stops throughout the city. To demonstrate Clear Channel's revenue power for its outside advertising space, it is worthy to note that the Union Station "backlit 8-sheet diorama," which reaches over 7 million "upscale, suburban professionals," that are "92 percent college educated" and where over 52% have incomes that exceed $75,000, would cost up to $89,600 for four weeks; a 30-sheet poster, reaching over 93% of the Chicago general population, would cost $206,640 for four weeks. See Clear Channel's outdoor advertising rates, *at* http://ratecard.clearchannel.com/RateCardExternal/frameset.asp (last visited Nov. 25, 2002). DePaul's rail station display (full service) would cost up to $140,585. *Id.*

101. Leeds, *Promotions Conduit*, *supra* note 33.

102. Clear Channel Outdoor, *supra* note 100. Clear Channel reaches six out of ten travelers each day.

and taxi cabs[103], but it also owns over 50 outdoor advertising spaces in New York's Times Square.[104] Specifically, through Eller Media, Clear Channel's outdoor advertising space has been utilized by McDonald's, the "Message from God" series, and the advertising campaign publicizing the National Football League's switch from CBS to Fox Broadcasting.[105]

The Telecom Act effectively gave Clear Channel the green light to become the most powerful radio and entertainment company in the world. In terms of revenue, Clear Channel's sales jumped from $74 million to approximately $8 billion (2001), a 100-fold increase in less than a decade.[106] Its unprecedented growth naturally received criticism from competitors and industry insiders. Concert producer Kevin Lyman states, "I don't have anything against Clear Channel, but the company grew so quickly, and whenever that happens, you're going to wind up with some bad eggs in the basket."[107] Yet with further deregulation proposals looming on Capitol Hill, Congress, artists and consumers fear that companies like Clear Channel will use their leveraging power to undermine policy goals first recognized in the Communications Act of 1934. Already, Clear Channel is continually criticized for unfair trade practices, skirting radio ownership limits and monopoly power. The next section will examine how the Competition Act will affect industry practices and future consolidation, and in particular, how the Act could potentially affect Clear Channel.

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103. *Id.* Clear Channel Taxi Media provides "roof mounted, backlit taxi display advertisements in major United State's taxi markets," including New York, Los Angeles, Los Vegas, Boston and Miami. *Id.*

104. See additional information on Clear Channel outdoor, *at* http://www.clearchanneloutdoor.com/corp/default.asp (last visited Nov. 25, 2002). Clear Channel Spectacolor creates and operates such video screens as those seen in Times Square. *Id.*

105. *Id.*

106. Leeds, *Promotions Conduit*, *supra* note 33.

107. Roberts, *Taking on the Empire*, *supra* note 56.

III. ANALYSIS

The purpose of this section is to provide a comprehensive analysis of how the Competition Act will change both the radio and concert industries. The Act's language, although somewhat broad and vague in parts, attempts to protect long-held public policy goals of the Communications Act of 1934, including diversity, localism and protection of musical artists. Massive consolidation and cross-leveraging into the concert, promotion and venue arenas ran contrary to Congress's original intent.[108] Specifically, one radio station president and general manager stated:

I wonder if Congress knew when it passed the telecom bill that people are pigs. Did they realize that half a dozen, all males, would someday control what goes on the radio, which have no obligation to satisfy anyone but Wall Street? I don't think they had any idea what would happen in the radio field.[109]

Nevertheless, these public policy goals have taken a second seat to massive consolidation and conglomerate's ability to cross-leverage into the concert, promotion and venue arenas. This Act does not intend to reverse the Telecom Act's massive consolidation effects; rather, its aim is to (1) urge the FCC to heavily scrutinize further consolidation and (2) reinstate traditional public policy goals first established in 1934.[110] In order to protect

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108. Leeds, *Promotions Conduit*, *supra* note 33. Andrew Jay Schwartzman, president of Media Access Project states "Our worst fears have been realized. A lot of the things Clear Channel is doing are the traditionally questionable industry practices, now on steroids." *Id.*

109. Paul Farhi, *Texas Firm Crafts Biggest Radio Group in U.S.; Hicks, Muse to Purchase SFX Broadcasting*. THE WASH. POST., Aug. 26, 1997 [hereinafter Farhi, *Biggest Radio Group*]. Statement made by Geoff Lebhar, president and general manager of Washington's WWDC-AM and FM.

110. S. 2691, 107th Cong. § 4 (2002), *available at* http://thomas.loc.gov (last visited Nov. 25, 2002). Section Four, entitled "Enhanced Scrutiny of Further Consolidation in Radio," calls for the FCC to conduct hearings for any application which renews, grants, transfers a license for any commercial radio station that has an aggregate national audience that exceeds 60 percent. Specifically, this section calls for the FCC to conduct hearings to determine

these goals, this analysis will first describe how the Competition Act directly attacks (a) independent promotion, (b) payola, and (c) voicetracking and syndication. Secondly, this analysis will illustrate how cross-leveraging power in the concert industry has negatively affected artists and ticket prices. Finally, this analysis will focus on alleged unfair competition claims against Clear Channel since the company is often criticized for using its power to exploit these industry practices to gain greater leverage in the entertainment industry.

Clear Channel holds the number one position in both radio and concert industries. This section, will focus on Clear Channel, although not exclusively, to illustrate how its growth gave the company unprecedented power to utilize the aforementioned industry practices to its advantages. In addition, some competitors allege that Clear Channel, in pursuit of further industry power, uses unfair competition tactics to gain an edge over competitors and competing industries at the expense of artists, consumers and diversity on the airwaves.

A. Radio

Massive consolidation gave huge radio conglomerates not only the power to capitalize off relatively old industry practices such as independent promotion and payola, but also the power to cash in on efficiencies of scale through methods such as voicetracking and syndication. These industry methods continue to influence the ultimate radio question: who chooses what we hear on radio and what do we actually hear? The Competition Act alleges that radio conglomerates that utilize these industry practices negatively affect the overall content and quality of what we hear. This section will illustrate how the Competition Act specifically aims to either curb the negative effects or prohibit altogether a) independent

whether a transfer or assignment of a commercial radio station would dominate the local market. If the transfer or assignment allows the commercial station to operate or own a) more than 35 percent of the audience share of the local market or b) more than 35 percent of the radio advertising revenue in the local market of such radio stations, the transfer or assignment is prohibited.

promotion and payola and b) voicetracking and syndication. In addition, this legislation aims to prohibit large conglomerates, such as Clear Channel, from abusing their power through practices of unfair competition. Together, these dual purposes attempt to restore competition, diversity, localism and artist access to the airwaves.

1. Independent Promotion and Payola

Although the Competition Act is vague and ambiguous in parts, its language indicates a desire to curb the negative effects of independent promotion, sometimes referred to as "indie promotion." With a finite amount of airtime on radio stations, in addition to fewer and fewer hands controlling scarce radio outlets, record companies realize that access to the nation's airwaves are highly dependent on payment, whether it be in the form of money, concert tickets or prize packages.[111] Further, radio conglomerates and individual station owners are desperate to compensate for losses attributed to expensive consolidation processes and debt.[112]

111. Lauren J. Katunich, *Time to quit paying the payola Piper: Why music industry abuse demands a complete system overhaul.* 22 LOY. L.A. ENT. L. REV. 643, 654 (2002) (citing James W. Brock, *Antitrust, the "Relevant Market," and the Vietnamization of American Merger Policy*, 46 ANTITRUST BULL. 735, 748 (2001) (explaining "sheer size provides these [radio conglomerates] with what appears to be a growing degree of anticompetitive power and leverage in dealing with recording companies—a decisive advantage given the critical importance of air play to the commercial success of recorded music")); *see also* Leeds, *Middlemen Put Price on Airplay*, L.A. TIMES, Dec. 27, 2001 at C1 [hereinafter Leeds, *Middlemen*] ("Each year, thousands of new songs are released by record labels, but only 250 or so tunes are added per station." Also, "the promotion business has gotten even tougher since the mid-'90's, when President Clinton signed legislation to deregulate the radio industry. With only a handful of major radio companies left, it is even harder to gain access and get air time for new music acts").

112. Katunich, *supra* note 111, at 650. (citing Chuck Philips & Michael A. Hiltzik, *2 Officials Urge FCC to Probe Possible Payola*, L.A. TIMES, Jan. 14, 1999, at C1 [hereinafter Philips & Hiltzik, *2 Officials Urge FCC*]) (Also citing Chuck Philips, *Clear Channel Fined Just $8,000 by FCC for Payola Violation*, L.A. TIMES, Oct. 20, 2000, at C1 [hereinafter Philips, *Clear Channel Fined Just*

Together, these dual forces have created an entire new industry in order to quickly satisfy the needs of both record labels and radio conglomerates. Further, independent promotion companies receive money from record labels, which in turn pay radio stations directly in exchange for artist airplay.[113] Today the practice is so common that most forget that pay-for-play ("payola") is illegal.

Since 1960, federal law amendments of the Communications Act of 1934 and the FCC require that radio stations receiving any consideration for broadcasting material must disclose this fact, in addition to the identity of the person furnishing the consideration.[114] Specifically, section 508 provides that any employee receiving money or other valuable consideration for the broadcast of any programming must also disclose the transaction to the station.[115] Although stations and employees that violate section 508 may be subject to criminal penalties[116], rarely, if ever,

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$8,000] (explaining that "huge conglomerates created by the merger wave are particularly hungry for new revenue to justify their expansions. Merging is an expensive process that often leaves the surviving company saddled with debt")); *see also* Patrick M. Reilly, *Radio's New Spin on an Oldie: Pay-for-Play*, WALL ST. J., Mar. 16, 1998, at B1.

113. Katunich, *supra* note 112 (citing Philips, *Clear Channel Fined Just $8,000*); *see also* Chuck Philips, *Radio Exec's Claims of Payola Draw Fire*, L.A. TIMES, Mar. 7, 2002, at C1 ("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").

114. 47 U.S.C. § 317. One misconception about Payola is that it technically is not illegal for playing a song for money as long as the payment is disclosed to the public. Leeds, *Middlemen*, *supra* note 111. In all practicality, radio stations do not want to divulge every single payment filtering its way into the station. Furthermore, "record companies want listeners to believe stations play their tunes because the songs are hip, not because they are paid ads, so the companies go to great lengths to avoid having to use such on-air sponsorship tags." *Id.*

115. *Id.* § 508(g).

116. *Id.* §§ 317, 508. Criminal penalties include up to one year in jail and fines of up to $10,000. *Id.* The FCC may enforce monetary damages or choose not to renew the station's license. See Katunich, *supra* note 111, at 648, n. 45. (citing Southeast Fla. Broad., 1991 U.S. App. LEXIS 26581, at 6-7) (upholding the FCC ruling: "The FCC has discretion to create its own standards for renewal expectancy as long as it engages in reasoned decision making").

are disclosures made.[117] Money, through independent promotion and payola, rules who and what makes it on the radio. The original 1960 payola laws have not sufficiently evolved to accommodate the interests of labels, stations and artists in the musical landscape prior to the Telecom Act.[118] The Competition Act, through Sections 3[119] and 7[120], aims to amend out-dated payola

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117. Eric Boehlert, *Fighting Pay-for-Play*, Salon.com (Mar. 14, 2001), *at* http://www.salon.com/ent/feature/2001/03/14/payola/index.html [hereinafter Boehlert, *Pay-for-Play*] ("Stations 'are reluctant to pepper their programming with announcements like, 'The previous Ricky Martin single was paid for by Sony Records.' Besides that, stations want to maintain the illusion that they sift through stacks of records and pick out only the best ones for their listeners").

118. *Id.* (explaining that payola laws are out of date and significantly irrelevant in the music industry).

119. S. 2691, 107th Cong. § 3 (2002), *available at* http://thomas.loc.gov. Section 3 is entitled, "Prohibit[ting] the use of radio to reduce public access to diverse radio and concert programming." The full text includes regulations that specifically "prohibit a licensee or permittee of a radio station, that has an attributable interest in a programming entity or concert venue or concert promotion service from: (A) improperly influencing the decision of the entity or service, or any musician or other programming or content provider, to sell, or the price, terms, or conditions of sale of, satellite cable programming or content or satellite broadcast programming or content to any other radio station or unaffiliated concert venue or concert promotion service; (B) improperly influencing the decision of any musician or other programming or content provider to sell, or the price, terms, or conditions of sale of, any song, work or sound recording, programming, concert performance, or concert promotion service to any person or entity not affiliated with (i) the licensee or permittee, (ii) an affiliate of the licensee or permittee, or (iii) an entity in which the licensee or permittee has an attributable; (C) discriminating against a musician or other programming or content provider that does not agree to enter into a contract or other arrangement with an entity affiliated with the licensee or permittee, or in which the licensee or permittee has an attributable interest, that offers concert venue or concert promotion service; (D) requiring an exclusive contract or other arrangement with a musician or other programming or content provider that prevents other radio licensees or permittees, concert promotion entities, or concert venues from obtaining programming or content from the musician or other programming or content provider to the extent that such a contract or other arrangement (i) impairs, impedes, or prevents competition in radio programming or content, concert venues, or concert promotion, (ii) impairs, impedes, or prevents diversity of programming or content in local radio

laws in order to effectively prohibit illegality from the industry and thus restore integrity and diversity to the airwaves.

This section will describe the practices of independent promotion and payola and examine these industry practices effect on artists and diversity. Specifically, this section will examine Section 3(e)(3)(D), which addresses the practice of independent promotion. This regulation prohibits a licensee of a radio station from requiring an exclusive contract with a musician or programming or content provider. The ambiguity of "programming or content providers" most likely refers to independent promoters. This section prohibits arrangements with independent promoters that prevent other radio stations or concert venues from obtaining programming or content. [121] In addition, this section also prohibits arrangements that impair or prevent competition in radio programming, impair or prevent local radio programming diversity or is unduly long in duration.[122] Independent promotion is most criticized for its illegal practice of payola. Therefore, this section will also discuss Section 7 of the Competition Act which prohibits the licensee of any radio station

markets (iii) is unduly long in duration, or (iv) contains unreasonable renewal or extension provisions." *Id.*

120. S. 2691, 107th Cong. § 7 (2002), *available at* http://thomas.loc.gov. Section 7 is entitled, "Modification of regulations on announcement of payment for radio broadcast." The full text states, "Not later than one year after the date of enactment of this Act, the Federal Communications Commission shall modify its regulations under 317 and 507 of the Communications Act of 1934 (47 U.S.C. 317 and 508), in order to prohibit the licensee of any radio station, including broadcast by such licensee to extract money or any other consideration, whether directly or indirectly, from a record company, artist, concert promoter, or other entity or an agent or representative thereof." Feingold claims that this section "closes a loophole in the FCC regulations covering payola—to ensure that radio station broadcasts are not improperly influenced by payment, whether directly or indirectly, to the licensee of any radio station unless an appropriate sponsorship identification announcement is made." Senator Feingold's recent press releases, *available at* http://feingold.senate.gov/releases/02/06/062702medcon.html (last visited Nov. 25, 2002).

121. *See supra,* note 120 and accompanying text.

122. *Id.*

from using its control "to extract money or any other consideration, whether directly or indirectly, from a record company, artists, concert promoter, or other entity or an agent or representative thereof."[123]

(i) The Practice of Independent Promotion and Payola

What ever happened to the days where independent DJ's happened to come across a local band with the potential, the originality and the talent to actually make it in the radio industry?[124] What happened to the days where a listener could actually call the radio station, talk to the DJ and request a new, but obscure song by an unknown band? Has the thrill and incentive of discovering a new act vanished from the minds and responsibilities of DJ's? The days of creative freedom on air are done.[125] The role of the DJ has been reduced to a mere robot. DJ's and programming directors no longer sort through stacks of CD's to create a unique, fresh set list. Extensive marketing, TRL[126] visits

123. *Id.*

124. John Nova Lomax, *Streamlining the Hit-Making Process; Clear Channel wants to cut the indies out of the deal*, The Houstonpress.com, (Nov. 8, 2001) *at* http://www.houstonpress.com/issues/2001-11-08/racket.html/1/index.html (last visited Nov. 25, 2002) ("By now, it's common knowledge that virtually no commercial radio disc jockeys have anything to do with the songs played on their stations. What few listeners realize is that program directors, too, are for the most part out of the loop. With radio deregulation in the 1990s, media has become more and more concentrated, and what gets on the radio across America is decided by fewer and fewer people, with more and more cash involved and with less thought than ever given to the music's merit").

125. Bob Greene, *Payola, will anyone even notice?*, CHI. TRIB., June 24, 2001, § C, at 2. Payola, however, has been around for at least 40 years. Alan Freed, the most famous radio disc jockey who coined the phrase "rock and roll" was accused of accepting money for playing songs on air. *Id.* After the Freed scandal, Americans may not think that "a song made it onto the radio because a disc jockey thought it had a nice beat." *Id.*

126. MTV's "Total Request Live," counts down the top ten requested videos of the day. Often, current "hot" artists will appear on TRL to promote their new video or CD release.

and continuous, numbing airplay already establish the artist's popularity and demand. The playlists are already set. Even if a good DJ today happens to discover the next-big hit, chances are the new single paid its way into a spot on the coveted playlists of today's elite radio stations.[127] Although the roles of DJ's and radio station owners are ambiguous, one certainty is that the role and appearance of radio has drastically changed since the Telecom Act.

Essentially all songs on FM commercial radio have indirectly been paid for by record labels.[128] Millions of dollars each year are funneled through independent radio promoters, also known as "indies," who then transfer the money over to radio stations who add new songs to playlists.[129] "Because radio stations are one step removed from record label money, these payments are not technically payola."[130] The biggest gripe about this practice, aside from its indirect skirting of legality, is that "instead of radio playing what people want to hear, they're playing music that's backed by the deepest pockets."[131]

To demonstrate how the record labels and artists are injured by payola, a typical indie lobbies a radio station to become their exclusive promoter.[132] This exclusive relationship does not come cheap. The up-front fee generally costs record labels between

127. Greene, *supra* note 125. ("That new hit song that the disc jockey in your town seemed so in love with? Well, in some towns, the reason he was in love with the song was that he had been slipped cash to love it—or at least to say he loved it, and to play it").

128. Eric Boehlert, *Record companies: Save us from ourselves!*, Salon.com, (Mar. 13, 2002), *at* http://www.salon.com/ent/feature/2002/03/13/indie_promotion/index.html?x [hereinafter Boehlert, *Save us from ourselves!*].

129. *Id.*

130. Katunich, *supra* note 111, at 656 (citing Boehlert, *Pay-for-Play*, *supra* note 118).

131. Boehlert, *Save us from ourselves!*, *supra* note 128 (quoting a statement made by Wendy Day, founder of an artist advocacy organization entitled "Rap Coalition").

132. *Id.*

$100,000 and $400,000, depending on the size of the market.[133] The independent promoter is "the only person who is allowed to filter all the stuff that comes in from all the sources and then present it to the radio station."[134] For every song added to a playlist, the indie then sends weekly invoices to record companies detailing which songs were added and essentially, how much it will cost the record company for adding that particular song.[135] An added song could range from $800 to $5,000 in the largest markets.[136] For record companies to even launch a rock song on popular stations today, it would cost the company, and indirectly the artist, over $250,000.[137] If the song is successful and manages to reach both rock and Top 40 markets, the indie costs could reach more than $1 million.[138] The indie promoter, often referred to as the middleman, "sidestep[s] the federal anti-payola law by paying broadcasters annual fees they say are not tied to airplay of specific songs."[139]

The industry continues to point fingers at one another for creating and perpetuating problems within the independent promotion industry. For instance, radio conglomerates argue that stations lose millions of dollars each year due to independent promotion; if record labels work directly with stations without using independent promoters, millions of dollars, lost in the form of salary and bonuses, could be paid instead directly to radio stations. Pam Taylor, Clear Channel spokeswoman, addressed payola more specifically and stated that the practice "was created by the [music] industry; they continue to use [indie promoters]. The day they quit using them is the day the system ends. This is not a radio industry issue, it's a record company issue."[140]

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133. *Id.*

134. Roberts, *Taking on the Empire*, *supra* note 56.

135. Boehlert, *Save us from ourselves!*, *supra* note 128.

136. *Id.*

137. *Id.*

138. *Id.*

139. Leeds, *Middlemen*, *supra* note 111.

140. Bill Holland, *Legislation About Consolidation, Payola Due This Month*, BILLBOARD, June 29, 2002, at 9 [hereinafter Holland, *Payola Due This Month*];

Despite Clear Channel's allegation, history proves that the power to curtail independent promotion is not in the hands of the record labels. In the early 1980's Warner Communications, Inc. and CBS became the first to ban the use of independent promoters, with the expectation that other labels would follow suit. Despite overwhelming animosity towards the independent promotion industry, no labels followed Warner-CBS and instead capitalized on the opportunity to increase independent promotion expenditures in order to secure greater shares of airplay.[141] After Warner-CBS enforced their ban on the use of independent promoters, songs from the Who and Loverboy that originally received an overwhelming response plummeted off the charts.[142] Realizing

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see also Roberts, Taking on the Empire, supra note 56, stating that, Steve Smith, president and CEO of Clear Channel Entertainment blames the record labels for perpetuating independent promotion. He first states that "the independent promotion business is not unique to Clear Channel radio," but then states that "what Clear Channel has done in the last year is to try to put some restraints and controls on our relationships with independent promoters—because it is such a cause celebre." He adds that independent promoters "would be out of business tomorrow if the record labels wouldn't pay them money. The market power there is in a record business that's willing to put up the cash." Clear Channel's throws around its power in a way that seems to at least attempt to counteract the negative effects of independent promotion. Smith adds, "Clear Channel was concerned that these independent record promoters were being paid staggering sums of money, and it wasn't clear where the money was going. So we wanted to establish very specific rules of engagement. You can't put them out of business, because the record business is still throwing money at them, right? So if the record business is still throwing money at them, we're going to establish the rules." *Id.*

141. Katunich, *supra* note 111, at 644. (citing Kerry Segrave, *Payola in the Music Industry: A History, 1880-1991* 1 (1994)) ("Music companies themselves have been ambivalent about payola. They favor a strict ban since that might prevent new companies from entering the industry. Once payola is banned, those then in the industry favor violation the ban since it would give them an advantage over competitors") (citing FREDERICK DANNEN, HIT MEN (Vintage Books 1991, as stating "as Warner and DBS product go knocked off the air, the other labels began to dominate the Top 40 airplay as never before. Warner's sales dropped, and it suffered a decline in the U.S. market share").

142. *Id.*; DANNEN, *supra* note 141, at 211 (citing then President of CBS, Dick Asher stating, "All of a sudden, it just came off the air. It's one thing to

that an all-out ban by record labels would be impossible, in addition to recognizing the independent promoter's power over the industry, Warner-CBS shortly thereafter resumed the use of independent promoters.[143] Clear Channel has made attempts to rid its stations of the independent promotion industry altogether.[144] "Tired of seeing the middleman rake in what they see as rightfully theirs, Clear Channel wants the major labels to pay the company directly for playing their songs on its stations."[145] Major record labels are also trying to rid the practice of indie radio promotion.[146] If anything, major record labels will receive the most criticism, if not for directly starting independent promotion, then for perpetuating payola as an effective marketing tool and financial incentive.[147]

Clear Channel contends that the record companies should be responsible for eliminating independent promotion. One such company, Columbia Records, attempted to promote Destiny Child's new single, "Bootylicious," without the help of independent promoters.[148] In May 2001, Columbia Records

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keep something off the air to begin with, it's another thing to take something that's obviously doing pretty well and just take it off the air. Despite the fact that stations might have been playing it, the listeners might have been liking it, they actually could reach back and pull it off").

143. Katunich, *supra* note 111 (citing DANNEN, *supra* note 141, at 213-214).

144. Lomax, *supra* note 124.

145. *Id.*

146. Ed Christman, *Wishful Thinking*, BILLBOARD, June 8, 2002, at 1. ("But, as usual, they [major-labels] are tackling their problem ass-backwards. They are part of a coalition that has sent a letter to the Federal Communications Commission to investigate the business practices of Clear Channel and other radio chains and to study whether payola laws need to be modified").

147. *Id.* ("First, they [major-labels] invent a shady marketing practice designed to get them an edge. Then that practice turns around and bites them in the ass by becoming a very expensive proposition. Then the labels cry "foul" and blame the practice on whomever or whatever they were trying to subvert. The majors may not have invented payola, but they certainly managed to disguise it as a 'legitimate,' if not questionable, marketing tool").

148. Katunich, *supra* note 111, at 663 (citing Eric Boehlert, *The "Bootylicious" Gambit*, Salon.com (June 5, 2001), *at* http://www.salon.com/ent/feature/2001/06/05/sony_payola/print.html (last

decided it would pay the minimum $1,000 to indies that were in large markets but would refuse to pay indies in "smaller-market stations."[149] As a result, two weeks after "Bootylicious" was released, only 113 pop stations added the single to their playlists; in contrast, Destiny Child's prior single, "Survivor," was on 150 stations' playlists only a few months earlier.[150] Insiders suggest that the nearly forty station drop off was the result of indies keeping "Bootylicious" off stations where they "maintain exceptional influence as retaliation against Columbia's move to limit independent promotion."[151] Both history and recent attempts to halt independent promotion have failed. Payola laws have not sufficiently addressed the $300 million problem. Further, if neither the FCC nor the labels can fight the independent promotion's power, who will? Although tougher payola laws may temporarily encourage the industry for finding alternative methods of deciding what gets on the radio, it is possible that tougher laws may encourage further illegality and under the table dealing.

Tougher payola laws in the 1980's forced radio executives and label promoters to find new ways to guarantee airplay. Under-the-table financial arrangement between middlemen, often referred to as "quarterbacks", radio executives and label promoters became the new, yet illegal, industry practice.[152] Joseph Isgro, a former national independent promoter, slowed the practice of illegal independent promotion in the late 1980's when NBC reported that

visited Nov. 25, 2002) [hereinafter Boehlert, *Bootylicious*]).

149. *Id.*

150. *Id.*

151. *Id.*

152. Chuck Philips, *Radio Exec's Claims of Payola Draw Fire*, L.A. TIMES, Mar. 7, 2002, § 3, at 1 [hereinafter Philips, *Radio Exec's Claims*] Chief Operating Office Mary Catherine Sneed of Radio One Inc., the nation's largest broadcaster of black music, states, "The way it works now at urban radio is that [middlemen] give cash under the table to the program director at the station and then kick back money to the vice president of promotion at the record label. It's not legal. We can't operate like that. Radio One intends to clean up this mess." Unlike independent promoters who have exclusive annual contracts to pop and rock stations, urban music "quarterbacks" are "believed to make direct cash payments to radio programmers to play specific songs."

Isgros and a group of powerful independent promoters "were buying air play by providing radio programmers with cash, cocaine and prostitutes."[153] The then, "New Payola," was temporarily suspended when every major record label suspended the use of independent promoters, effectively driving 200 promoters around the country out of business.

"New Payola," however, seems to have found itself, once again, in the forefront of scandal and investigation in the music industry. For instance, Radio One's Chief Operating Officer, Mary Catherine Sneed, is now attempting to rid Radio One of illegal practices that not only include under-the-table cash payments, but "basic old payola stuff: sex, and drugs."[154] Although certain radio executives criticize the illegal practice, the same executives and companies, including Clear Channel, are allegedly creating shell companies effectively allowing the same practice to occur while appearing legal in its books.[155] Some illegal cash payments at urban radio stations have been successfully prosecuted. However, most companies insulate payola practices by requiring independent promoters to sign contracts that affirm that their practices do not violate payola laws and are even known to hire former FCC

153. Henry Weinstein, *U.S. Indicts 3 on Music 'Payola,' Fraud Charges*, L.A. TIMES, Dec. 1, 1989, § A, at 1. Isgro was charged with racketeering, conspiracy to defraud Columbia Records, making undisclosed payola payments to radio stations, mail fraud, filing false tax returns, conspiracy to distribute cocaine, and conspiracy to impede the Internal Revenue Service. NBC also alleged that Isgro was linked to the Mafia. Before Isgro, two of Isgro's former associates Ralph Tashjian and William Craig, plead guilty to payola-related charges, including making payments nearing $300,000 to program directors in the South and West.

154. Philips, *Radio Exec's Claims*, *supra* note 152.

155. *Id.* ("Radio One is trying to use its leverage to get additional money from the record companies to put to their bottom line. We intend to . . . ask the FCC to write new rules because we think the tactics being used by Radio One and other broadcast groups are outrageous") (quoting Representative John Conyers (D-MI), "No matter how it is accomplished, payola is illegal. When radio stations, so-called independent promoters, or their employees demand money from record companies and recording artists for airplay, the payments are illegal unless disclosed, no matter how the transactions are structured").

attorneys to review contracts and station practices.[156] The middlemen, or "quarterbacks," are essentially the same as independent promoters, yet without the same exclusive, annual contracts and enough room to allow illegal cash flow.[157] "I've spent my whole life staying away from independent promoters, but at this point what we are doing is like standard operating procedure approved by the FCC."[158] Sneed adds:

We've had our attorneys and FCC attorneys look the contracts over. For us, this is just another revenue stream. We're a big public company and we owe it to our stockholders. We'd be crazy not to try to tap into this. Everybody's doing it: Cumulus, Clear Channel, all the big groups.[159]

In trying to rectify the "illegal quarterbacking system," however, labels criticize stations for intentionally refusing to play new music.[160] However, insiders allege that these complaints exist only because someone at the label is no longer getting paid.[161] Although the FCC has conducted investigation of illegal payola, Sneed suggests that the FCC has never sanctioned the

156. *Id.* (Richard Robinson, assistant U.S. attorney in Los Angeles states, "Our office has successfully prosecuted charges involving secret cash payments made to Latin-music program directors in the past, and we continue to be interested in investigation any such illegal payments in other music markets as well.")

157. *Id.*

158. *Id.*

159. *Id.*

160. Philips, *Radio Exec's Claims*, *supra* note 152. Since Radio One, Inc. has tried to avoid an illegal quarterbacking system, music executives allege that Radio One has threatened airplay if labels do not directly pay its new promotional agent, Ventura Media Group. According to Broadcast Data Systems, Radio One's play lists at several stations froze after the broadcaster issues its decree on February 7. Radio One denied the allegations and stated that it "backed off playing some new music" because of "reorganization of an in-house research department."

161. *Id.* (Sneed states, "We've been having a terrible time trying to get the record labels to accept the fact that we're finally going to change all this at urban radio. Somebody at some label is going to get cut out of some secret transaction when Radio One starts doing things the right way").

quarterbacking system.[162]

In the last two years, the Los Angeles Times obtained internal documents of several independent promoters exposing detailed logs, called "banks," that essentially list the date a station airs a single and its corresponding price that the label paid.[163] Not only does the bank reveal the price labels are paying for each song, the stations that add more songs throughout the year inevitably earn the most money and charge the largest fees.[164] At the time the banks were exposed, in May 2001, insiders expected that the blatantly revealed practice would act as a smoking gun for Congress to conduct a full industry investigation.[165] One insider stated that "an appropriate government investigation could blow this whole industry wide open."[166] Although this form of payola seems no different than the old form once outlawed, investigations have not yet effectuated a change in apparent outdated payola laws.[167]

Although the L.A. Times reported that "an appropriate government investigation could blow this whole [recording] industry wide open," Bob Greene, former columnist of the Chicago Tribune, speculates that payola practices no longer raise eyebrows as it once did in the past.[168] Radio executives admit to traditional methods and "new" methods of payola within their own

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162. *Id.*

163. Chuck Philips, *Logs Link Payments with Radio Airplay*, L.A. TIMES, May 29, 2001, at A1 [hereinafter Philips, *Logs Link Payments*] ("The promoter makes "deposits" when the right songs are played and "withdrawals" for the station to receive payment in the form of cash, travel and tickets to events"). Essential, therefore, the banks work like a bank account, including deposits and withdrawals.

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. Greene, *supra* note 125 ("Because what at the time of the first payola scandal was thought to be shocking—the idea that a company would be expected to pay money to a purportedly neutral exhibitor so that the exhibitor would let the public know about the company's product—now is assumed to be the standard way of doing business in the United States").

companies. Despite massive exposure of illegal payola schemes throughout the industry, how do labels and radio stations continue to avoid investigations and subsequent violations?[169] Promotion companies deny illegality.[170] Promoters also claim that support from labels have no effect on musical decisions or programming.[171] Yet some independent promoters privately brag about their ability to influence programming. One explanation is that former FCC attorneys draft present contracts between record labels, independent promoters and radio stations in order to skirt payola laws.[172] Other insiders contend that inadequate payola laws cannot overpower the strength of the industry practice.[173] Although the FCC and DOJ are enforcing payola laws, perhaps the consequences for violating these laws are too slight to effect an industry change. For instance, Clear Channel was fined $8,000 for violating payola laws, however, the fine is a "weak slap on the wrist from a feeble commission that is no match for Clear Channel

169. Philips, *Logs Link Payments*, *supra* note 163. Although the practice has been "exposed", industry insiders, including Program Direct Dennis Constantine of KINK-FM in Portland Oregon states, "the document you have in your hand is typical of the kind of paperwork most independents use for their private bookkeeping." The Los Angeles times reported that most of the nation's top promoters do use bank tallies.

170. *Id.* (citing one promotion company's, Michele Clark Promotion, denial of illegality, "[W]e aren't doing anything wrong here. The support I get from labels has no effect whatsoever on the musical decision of the program directors at my stations.")

171. *Id.* Program Director Dennis Constantine, of KINK-FM, an Infinity Broadcasting station in Portland, Oregon, adds, "I don't know hot it got out [stations and independent promoter's use of a bank-log]. But we don't do anything illegal or unethical here. No matter what the companies pay [Clark] or what she writes in that bank, it has absolutely no bearing on how we program this station.

172. *Id.* (stating that contracts "specify that independent promoters are free to pitch specific songs to broadcasters, but the broadcasters are not obligated to add any song to their play lists. All radio stations need to do in exchange for an annual fee is give promoters advance notice of which songs they plan to add to their weekly playlist. The promoters in turn bill the labels for each song that gets added").

173. Katunich, *supra* note 111, at 663.

or any of the other big radio conglomerates that are powerful players in Washington," said Jeff Cohne, founder of Fairness and Accuracy in Reporting.

(ii) The Impact of Independent Promotion and Payola on Artists and Diversity

Record labels must expend enormous amounts of money for their artists to succeed. Although record labels are financially hurt by the continuing payola practice, artists are perhaps the most hurt when thousands and thousands of dollars are required to have limited exposure.[174] Record labels that spend an exorbitant amount

174. Jeff Leeds, *Small Record Labels Say Radio Tunes Them Out*, L.A. TIMES, Sept. 16, 2001, §3, at 1 [hereinafter Leeds, *Small Record Labels*] Jeff Robinson, owner of Third Monk Records, says of rock singer Matthew Harrison that "the company can't afford the hidden costs of obtaining radio airplay." Robinson further suggests that the necessary costs of obtaining independent promoters effectuate an impermeable barrier to entry. "They've [independent promoters] got it locked up and there's absolutely no room to do what I'm trying to do. And if you can't get exposure for your product, you'll never be able to sell any records." Robinson sent copies of his album to 185 national radio stations. Without independent promoters on his side, only three stations elected to play the record, including two stations that refuse to work with independent promoters and one college station. One program director Robinson spoke with—Mike Skot, director of KCDU-FM, informed Robinson that independent promoter, National Music Marketing had an exclusive contract to work with KCDU and discuss new records with programmers. Robinson stated that Skot said "'he couldn't do anything because they're under contract' and cannot deviate from the list of songs allowed by National." In response, Charles Cohn president of New Wave, which owns KCDU states, "We can talk to as many advisors as we choose. The agreement that we have with National is strictly regarding information. We tell them our adds before we tell the general public, and that's it. The radio stations play whatever records they want to play. If this was a very popular local band that created real passion in the Monterey market, we would seriously look at playing a record like that." Robert Walker, president of San Francisco-based Heyday Records explains the cost of releasing a CD: "I can release a CD for $1,000. But the cost of promotion has gone way up. Even to get airplay on some of the smaller stations, you're talking $1,500 for a six-to eight-week promotion. And we're talking specialty [radio] shows, which means you get two or three spins a week. For full-blown, heavy-rotation

of money on marketing and promotion services, through independent promotion, in turn pass those costs onto the artists themselves through recoupment provisions in contracts.[175] In essence, successful artists ultimately "subsidize the payola system."[176] Although the artists are most hurt, there are few artists willing to make a concerted effort to fight the system "because they fear [that] retaliation"[177] could ruin their careers.

Domination in the national market allows stations full discretion to play or limit a certain artist. Insiders have suggested that this power is abused from one city to the next; in particular, Clear Channel has been accused of boycotting certain artists for working with non-Clear Channel affiliated promoters and radio stations.[178]

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airplay you are talking hundreds of thousands of dollars."

175. Bill Holland, *The Dirtiest Word in the Record Business*, BILLBOARD, Oct. 6, 2001, at 90 [hereinafter Holland, *Dirtiest Word*]; Katunich, *supra* note 111, at 664. Telephone Interview with Dirk Lance, Bass Player, Incubus (Oct. 6, 2001). Recording artists and representatives contend that "recoupment" is the dirtiest 10-letter word in the record business. A recoupment provisions requires artists to compensate record labels for recording and promotional expenses; the unfair conditions can be so extreme in many cases that unless albums achieve gold, or more often, platinum level sales, artists will never reap any financial benefits of their work. *Id.* Further, Dirk Lance of Incubus stated, "[Record labels] go and they hire these people [indies] and they never ask the band. So you get a bill, I saw a bill the other day. I sold three million records but somehow I didn't make any money because its $500,000 in independent promotion. Who approved that? We didn't. Yet they want to try to charge it to us."

176. Lomax, *supra* note 124; *see also* Boehlert, *Pay-for-Play*, *supra* note 117. Even though singles of successful artists will normally be added to playlists, artists are still required to pay independent promotion fees. If record labels do not pay the fees, labels fear that independent promoters will retaliate and refuse to promote the label's lesser-known artists.

177. BILLBOARD, Feb. 2, 2002, at 96, *at* http://www.lexis.com (last visited Nov. 25, 2002). In prior published reports, Britney Spears was mentioned as an example of an artist punished by Clear Channel for using another company for her concert promotion.

178. Roberts, *Taking on the Empire*, *supra* note 56. Clear Channel allegedly withholds airplay from artists who choose to work with outside promoters and radio stations. Sources "maintain that warnings are plainly stated and out in the open, with potential clients being told that any misstep will lead to airplay

Insiders are fully aware of Clear Channel's power and contend that obvious threats of boycotting artists is unnecessary because the act is almost expected.[179] For example, Toadies, a Texas band whose previous appearance was promoted by NIPP, reluctantly signed with Clear Channel because insiders warned that if they continued to work with NIPP, they could kiss airplay goodbye.[180] If a pop or rock song hopes to have any success, insiders suggest that artists must have Clear Channel on its side. Although most artists and label reps carefully answer, if not discretely shy away from, questions regarding pressure of big radio corporations, Steve Leeds, Universal senior VP, bluntly stated, "we all know the implications of pissing off our friends at Clear Channel."[181]

Unknown artists without money to spend will have a nearly impossible chance of making it on the radio. Even if independent labels have access and the money to hire independent promoters, major labels' financial advantage allows them to "bud up the promoters' base rates," offer bonuses to stations that add songs, incentives, [and] concert tickets.[182] In some cases, independent labels even offer promoters a percentage of album sales revenue.

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boycotts not just in one city, but everywhere Clear Channel rules. 'They're like, 'Catch a cold in Denver and you get the flue everywhere else.'" On group suffered a radio ban in Denver for two years following a dispute: "I wound up with the whole fucking system on my ass. Denver is a prime example of what's wrong with deregulation. Everything that could go wrong with it has gone wrong in Denver."

179. *Id.* ("They do things under the table, with no specifics, since everybody knows they use their leverage to their benefit. We're talking about 1,200 stations here. Everybody knows if you cross them, you'll get crucified—so why would they have to tell you that?").

180. *Id.* Andy Somers, an agent for the Toadies, claimed that "radio is the key to record flying. We have to have it." *Id.* Somers called NIPP to apologize and then signed Clear Channel onto the show.

181. Leila Cobo, *Slipping Sales, Media Consolidations, Payola Dominate Discussion*, BILLBOARD, Mar. 20, 2001, at 78.

182. Michael Roberts, *Playola*, Westword.com, (Oct. 18, 2001), *at* http://www.westword.com/issues/2001-10-18/message.html/1/index.html [hereinafter Roberts, *Playola*] (Few stations will listen to a song prior to collecting payment. Since he [the local record producer] can't afford to pay an independent promoter, he has to kiss hometown airplay goodbye").

Lebantal adds, "You'd offer anything. Your sister, anything. You have to give them some kind of reason to [push] this record over a major-label record."[183] Dave Lebental, president of small rock label, Pinch Hit Records, states "the game is stacked against every little guy. It's not set up for outsiders to come in. It's not a wide-open marketplace."[184] Paul Hart, media analyst, adds, "You would never want to say unknown acts shouldn't have access to the airwaves. But the reason why they're elevated to major airplay will strike listeners as peculiar."[185]

Representative Jon Conyers (D-MI), contends that radio conglomeration has essentially barred access to entry of new radio station hopefuls.[186] In particular, Conyers points out that both Clear Channel and Infinity control the leading stations in most markets.[187] In one instance, a Clear Channel producer particularly liked a local act, however, because of "corporate policy" the station could not place it on its playlists until it was first brought to him by an independent promoter.[188] The independent promotion firms reported that the cost of considering a song would be a minimum of $3,000.[189] And that amount simply allows the same producer to hear the same song again—there is no guarantee of airplay.[190] With its prevalent national presence and power, it makes it virtually impossible for small radio stations to compete locally at the same level as the national powerhouses.

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183. Leeds, *Small Record Labels*, *supra* note 174.

184. *Id.*

185. Leeds, *Middlemen*, *supra* note 111. Peter Hart words for Fairness and Accuracy in Reporting, a media watchdog group. Hart's comment specifically refers to those artists whose promoters both promote and either own the label or manage artists.

186. Jon Pareles, *The Many Futures of Music, Maybe One of Them Real.* N.Y. TIMES, Jan. 10, 2002, § E, at 1 [hereinafter Pareles, *Many Futures of Music*]. (quoting Conyers as stating, "The music business is getting more and more and more concentrated, which makes it in the end, and not so far away, harder to get into the business and start up").

187. *Id.*

188. Roberts, *Playola*, *supra* note 182.

189. *Id.*

190. *Id.*

If anything, Payola needs to be revamped in order to protect starving artists. One alternative-country singer-songwriter Mando Saenz, believes his chances of getting his song on a Clear Channel station at "pretty slim and none."[191] He added that from a local's standpoint, "Why even try when everything's stacked up against you before you even walk into the office?"[192] Besides denial of airplay, independent promotion swallows the remainder of limited salary any artist expects to receive from a CD release.[193] A recent antitrust suit against Clear Channel alleges that "[a]rtists or bands are coerced into signing up with Clear Channel via an assortment of heavy-handed tactics, including the 'nationwide practice of threatening to deny and in fact denying critical airplay and other on-air promotional support."[194]

Small independent record labels are devastated by independent promotion.[195] Small companies are unable to afford the massive prices for independent promotion companies.[196] Some insiders suggest that independent promotion will eventually cause small record labels to go extinct.[197] As a result, "good," quality music produced by independent artists with independent record labels

191. Lomax, *supra* note 124.

192. *Id.*

193. *Id.* In order to subsidize the payola system, record labels have instituted what's described as *recoupment*, or as *Billboard* magazine describes as "the dirtiest word in the record business." The process of recoupment follows: "In simple terms, record labels will pay for an artist to record an album and promote it. For these services, labels expect to reap 90 percent of the what profits occur, if any. They leave 10 percent to the artist, which seems miserly on its own. But it gets much worse. Out of that tenth, the label expects to recoup its production and promotion costs. What is left over after that, the artist is welcome to. Worse still, the label gets to keep the recording after its costs have been recouped, even though by this time the artist has paid for it with the pittance the label has pretended to give him. What all this amounts to is successful acts subsidizing the payola system.

194. Katunich, *supra* note 111, at 667-78 (citing Boehlert, *Taking on the Empire*, *supra* note 56).

195. *Id.*

196. *Id.*

197. *Id.* Failure to obtain radio airplay will likely drive smaller record labels to extinction.

will be prohibited from radio simply because the music does not have the requisite financial backing to afford independent promotion fees.

A combination of dropping CD sales, internet piracy, and indie promotion, costing over $100 million each year and estimated up to $300 million by one record company executive[198], has resulted in record companies calling on the FCC to develop updated, tougher payola rules for radio.[199] The Recording Industry Association of America ("RIAA") petitions the FCC to review the current rules.[200] From there the FCC, if it decides the rules need to change or need clarification, will accept written public comments from all interested parties, from record companies, to Indies, artists, and even every day radio listeners.[201] Commissioners would evaluate the comments and then make a decision.[202] In a similar investigation, the FCC recently released 12 studies on the current media marketplace, particularly focusing on media ownership and how it affects diversity, localism and competition.[203] One foreseeable problem in petitioning the FCC is gaining artists' support. Artists are generally adamantly opposed to the current payola schemes primarily because they sacrifice revenues by indirectly paying promotion companies or by providing radio stations with free benefit concerts. Yet most

198. Greg Kot, *Music Industry raises its voice for radio reforms*, CHI. TRIB., May 23, 2002, *available at* http://www.chicagotribune.com/business/showcase/chi-0205230238may23.story?coll=chi-n.

199. Boehlert, *Save us from ourselves!*, *supra* note 128; *see also* Eric Boehlert, *Will Congress Tackle Pay-for-Play*, Salon.com (June 25, 2002), *at* http://salon.com/ent/feature/2002/06/25/pfp_congress/index.html [hereinafter Boehlert, *Will Congress Tackle Pay-for-Play*]. The Recording Industry Association of America's Hilary Rosen, president and CEO, states, "We believe the FCC has the authority to make new rules to more closely regulate practice and regulate [independent] promoters' relationship with radio stations."

200. Boehlert, *Save us from ourselves!*, *supra* note 128.

201. *Id.*

202. *Id.*

203. For more information on radio ownership *see* http://www.fcc.gov/ownership (last visited Nov. 25, 2002).

artists will not sign onto a petition since fighting radio conglomerates could potentially hurt their career.[204] One manager stated, "You'd have to be nuts to come forward."[205]

With only a handful of companies deciding what finds its way on the airwaves, it is only natural to question if independent promotion limits the diversity of programming and music on radio. Critics suggest that the "practice of payment for broadcast results in mediocre radio—with radio stations airing songs not based on research, sales, and requests, but with airtime going to the highest bidder."[206] Money could potentially exclude a range and quality of music and programming appealing to a broader audience than what we see today. With only a handful of record labels and independent promotion companies deciding what we hear on the radio today, a decline in diversity is possible, if not imminent.

Playlists are now controlled by only a few programmers. Clear Channel, controlling over 1,200 radio stations, had only six promoters with access to its stations in 2001. Six independent promotion companies are therefore controlling what millions and millions of people hear each day. Listeners no longer call in and request the songs they want to hear. The selection of songs is in a select few hands. Jenny Toomey, executive director of Future of Music Coalition states,

When there's only two people who own 70 percent of the important commercial market radio stations, then they can force you to pay huge amounts of money. Now, if there were more folks who owned more stations, and more diversity of stations, then you could hear more music and you could promote on those stations

204. Boehlert, *Save us from ourselves!*, *supra* note 128. (One manager claims that record labels are to blame. "They [the labels] are the fucking problem, now you want us to put a target on our backs? Fuck it." If musicians complain about indie promotion, they fear they will be kept off the radio. "Without commercial airplay it's virtually impossible to sustain a career").

205. *Id.*

206. Katunich, *supra* note 111, at 671 (citing Chuck Taylor, *Paid Play Changing Biz Landscape: Rise of Direct Label/Radio Pacts Sparks Wide-ranging Debate*, BILLBOARD, May 9, 1998, at 1).

for less.[207]

Allegations exist that Clear Channel discriminates against non-Clear Channel promoters and its own artists with threats of airplay. If a non-Clear Channel promoter wishes to advertise a concert on a Clear Channel station, promoters may be forced to pay additional money, giving rise to questions of promotional and artist access.[208] Even if independent promoters buy advertising time on a Clear Channel station, promoters do not have confidence that concert advertisements and ticket giveaways will find time on the airwaves.[209] Promoting a top 10 single to radio stations alone can cost record labels millions.[210] Clear Channel's new profit-seeking innovations pressure artists to succumb or risk valuable airplay. At a three-day Clear Channel company conference, record companies were charged $35,000 each for the right to have acts perform in a room full of Clear Channel's promoters. This conference alone netted Clear Channel over $1 million.[211]

The threat of airplay forces artists to be at the mercy of huge radio conglomerates.[212] Not only do radio stations reap the benefits of free advertising and higher ratings, but radio stations have in the past offered money to local charities through forced

207. Lomax, *supra* note 124.

208. Roberts, *Taking on the Empire*, *supra* note 56. An NIPP promoter for the band Tool who wished to give twenty giveaway tickets to a concert was informed that "as a non-Clear Channel promoter, want ticket giveaways on the air, we have to buy," as if it were any other advertisement. Morreale stated, "We should have access to the same promotional opportunities as any other client, and that includes a client they own." Clear Channel's Mike O'Connor, stated that "Our practice form this point forward is that concert promoters outside of SFX [now Clear Channel] that wish on-air mentions can pay for them."

209. *Id.* Although NIPP bought advertising on Denver station KTCL for an upcoming date of the Warped Tour, neither on-air mentions by disc jockeys or ticket giveaways were handed out over the air, yet allegedly KTCL employees received the concert tickets.

210. Pareles, *supra* note 186.

211. Boehlert, *Save us from Ourselves!*, *supra* note 128.

212. Philips & Hiltzik, *2 Officials Urge FCC*, *supra* note 112. (stating that artist managers contend that dozens of acts are pressured by radio stations to perform without pay at charity concerts).

benefit concerts.[213] Not only do record label companies have to pay the radio stations for the so-called marketing campaign, but they must provide benefit concerts, free tickets to shows and give-away trips, all for the hope that the station plays their song heavily in rotation.[214] Simply put, artists must comply with record labels and stations if they have any hope of success.

In 2001, Clear Channel merged with the Ackerly Group which boasts "outdoor, TV, radio and interactive assets."[215] The merger effectively allowed Clear Channel to [finally] gain access to the Boston, Seattle and Portland, Oregon markets, three of the top twenty-five markets in the country.[216] The merger added 6,000 outdoor displays, sixteen television stations as well as programming at two others, and four radio stations, plus the sales and other services to one more station.[217] Clear Channel's presence in Seattle could potentially threaten the city's hub for independent artists and unknowns waiting to be discovered. One could argue that Clear Channel's homogenized national playlists could not only overpower the ingenuity and uniqueness of Seattle's airwaves, but also serve as a threat to struggling alternative artists waiting, and depending on Seattle, to break into the big-time music industry. If struggling independent artists depend on money and national backing to get their voices heard, its arguable that Clear Channel could potentially exclude the next Nirvana, Soundgarden, Alice in Chains, or Pearl Jam, which all were bands originally formed or discovered in Seattle.[218]

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213. *Id.* A Dallas based radio station owned by Chancellor Media charged A&M records $237,000 for a marketing campaign to promote Bryan Adams' new single, "On a Day Like Today." Although the campaign included commercials and contests, Adams was forced to perform for free at four Chancellor benefit concerts, including Detroit, Orlando, Philadelphia and Boston.

214. *Id.*

215. Information regarding Clear Channel's merger with Ackerly *available at* http://www.clearchanneloutdoor.com/corp/prDetail.asp?id=20 (last visited Nov. 25, 2002).

216. *Id.*

217. *Id.*

218. For more information regarding Seattle bands *see*

2. Voicetracking and Syndication

The Competition Act attempts to limit voicetracking and syndication in order to preserve diversity on the airwaves, and to ensure that local music and programming has access to the airwaves in order to satisfy local communities' diverse interests. Consolidation allowed stations to downsize their operations; in effect, a number of stations could operate from one building, "sharing a single advertising staff, technicians and on-air talent."[219] Voicetracking is a method in which large radio conglomerates tape radio shows from one central location and then air the pre-taped shows on radio stations throughout the country. For example, Rick Dee's Top 40 Countdown is pre-taped each week and then broadcasted nationwide on Clear Channel's pop stations. Syndication is a method where radio conglomerates license live radio programs and talk-shows throughout the country to a number of stations, regardless of whether they are owned by the radio conglomerate or not. For example, Clear Channel syndicates Dr. Laura Schlessinger's radio show throughout the country to Clear Channel affiliated and non-affiliated stations. The number of shows that are either voicetracked or syndicated allegedly not only limits programming decisions affecting overall programming diversity, but also ignores local community interests.

The Competition Act, through section six, entitled "Modification of Attributable Interest in Radio Stations and Limitations on Local Marketing Agreements," essentially "closes a loophole in the local marketing agreement regulations to ensure that any station that receives a significant amount of its play lists or advertising from another station is considered under the local ownership cap."[220] This section aims to preserve localism and

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http://www.theicebertg.com (last visited Nov. 25, 2002).

219. DiCola and Thompson, *supra* note 6.

220. The relevant text of Section 6 is as follows:

MODIFICATION OF ATTRIBUTABLE INTEREST- The Federal Communications Commission shall modify its rules under section 73.3555 of title 47, Code of Federal Regulations, in order to provide the following:(1) That a licensee or permittee of a commercial AM or FM radio station shall be treated

diversity by limiting syndication and national programming, as

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as having an attributable interest in an entity that supplies more than 15 percent of the total weekly broadcast programming hours to another licensee or permittee of a commercial AM or FM radio station if—

(A) the licensee or permittee holds equity (including all stock, whether voting or nonvoting and whether common or preferred) and debt in such entity in excess of 33 percent of total asset value of such entity, as determined by taking into account the aggregate value of all equity and debt of such entity; or
(B) the licensee or permittee holds an option to purchase or acquire such entity.
(2) That a licensee or permittee of a commercial AM or FM radio station shall be treated as having an attributable interest in another licensee or permittee of a commercial AM or FM radio station if an individual or entity serving the licensee or permittee serves such other licensee or permittee in an identical or similar capacity with regard to the provision of program content, selection of program content, or supervision of selection of program content for such other commercial AM or FM radio station.
(b) REPORTS ON SPECIAL RELATIONSHIP CONTRACTS-
(1) IN GENERAL- Not later than one year after the date of the enactment of this Act, the Commission shall prescribe in regulations requirements that each licensee or permittee of a radio station submit to the Commission a report on each special relationship contract between such licensee or permittee and another licensee or permittee of a radio station, or any person or entity having an attributional interest in such other licensee or permittee, in the market served by such licensee or permittee.
(2) SPECIAL RELATIONSHIP CONTRACT DEFINED- In this subsection, the term 'special relationship contract' means a contract, option, or other arrangement regarding management, programming, or sales, an actual or contingent financial arrangement, ownership interest, investment, or loan between the parties to such contract, option, or other arrangement or their immediate families.
(c) LIMITATION ON DURATION OF CERTAIN LOCAL MARKETING AGREEMENTS-
IN GENERAL- No local marketing agreement or other agreement entered into or renewed after the date of the enactment of this Act under which a licensee or permittee of a commercial radio station, or any person or entity having an attributional interest in the commercial radio station, provides more than 15 percent of the programming or content to another commercial radio station in the same market may have a term exceeding one year, including any period of renewal of such agreement.
S. 2691, 107th Cong. § 6 (2002), *available at* http://www.thomas.loc.gov (last visited Nov. 25, 2002).

well as national advertising.[221] Specifically, the section modifies what constitutes an "attributable interest," thereby effectuating a stricter standard for evaluating local radio ownership caps. The legislation treats a licensee of a commercial AM or FM radio station as having an attributable interest in an entity that supplies more than 15 percent of the total weekly broadcast programming hours to another licensee of a commercial AM or FM radio station.[222] The licensee also has an attributable interest in another entity if an individual or entity serves in the same capacity regarding program content or selection of program content for another AM or FM radio station.

In practice, if Clear Channel provides more than 15% of total weekly broadcasting to another station, regardless of whether it is a Clear Channel affiliate or not, then that station is considered a "Clear Channel" station. Clear Channel already owns the maximum amount of stations allowed by the FCC's ownership limits. If the Competition Act passes, Clear Channel would either have to limit the use of voicetracking or syndication to under 15% of the total broadcast programming or completely disaffiliate itself from that particular station. The Act ensures that radio conglomerates do not become too powerful by determining all programming decisions. At a minimum, the Act ensures that stations at least have the opportunity to tailor its programming to local interests. Further, limiting voicetracking and syndication, which typically contains national advertising, will allow local companies advertising time. This will not only benefit the consumers within the local community, but also the local companies thus effecting the financial prosperity of local communities.

Voicetracking potentially threatens local communities from hearing news that is pertinent to local interests. Consolidation has allowed stations to effectively manage news departments. Instead

221. *Id.*

222. *Id.* The licensee or permittee holds equity (including all stock, whether voting or nonvoting and whether common or preferred) and debt in such entity in excess of 33 percent of total asset value of such entity, as determined by taking into account the aggregate value of all equity and debt of such entity.

of operating at a local level, large powerhouses such as Clear Channel, can operate one or several news departments at the national level.[223] Although consolidation has its supporters, some fear that a few elite groups will dominate the news industry and no longer reflect the "special character of their communities."[224] Andrew Jay Schwartzman, president of Media Access Project, a Washington-based public interest group, states that "when you have one of the major sources of local news and information restructured so that one company controls a substantial proportion of the editorial voices in a community in that medium, that's not good for democracy."[225]

Although Congress suggests that programming has become more diverse, insiders suggest that sharing resources between signals, through mechanisms such as syndicated and voicetracked programming "undercuts variety, originality and, oftentimes, station personality."[226] Furthermore, consumers have criticized the "increasingly narrow playlists larded with ever more predictable

223. Steve Knoll, *Radio Station Consolidation: Good News for Owners, but What About Listeners?*, N.Y. TIMES, (Dec. 30, 1996) § D, at 5.

224. *Id.*

225. *Id.*

226. Roberts, *Taking on the Empire*, *supra* note 56. For example, a "stand-up comic will sometimes appear on four different Clear Channel stations over the span of an hour or two, as might the same staff or reporters," which is one of the reasons why industry insiders have terms Clear Channel as "Cheap Channel."; *see also* Todd Spencer, *Radio killed the radio star; Consolidation has resulted in 10,000 layoffs, the demise of a beloved trade magazine, and a decline in programming quality. But industry execs are fat and happy*, Salon.com, (Oct. 1, 2002), *at* http://www.archive.salon.com/tech/feature/2002/10/01/nab/ (last visited Nov. 25, 2002). Former managing editor of *Gavin Magazine*, Todd Spencer, states, "I was angry, but not just about being laid off. The consolidation of the radio business in the hands of a very few, powerful corporate owners has devastated the quality of commercial radio. Every year, radio programming is produced with smaller and smaller budgets by fewer and fewer people with more and more smoke and mirrors: cookie-cutter music formats, overuse of syndication, tighter, more repetitive playlists filled with inferior songs, one programming staff operating a cluster of stations and commercial breaks that never seem to end."

material,"[227] despite the FTC's findings of improved diversity of programming. Although Clear Channel's Don Howe stated that "we get a lot of benefits from having eight stations. I think the programming is more diverse and the research is stronger. That's been the result of conglomeration."[228] Further, on the other hand, the Future of Music Coalition, a Washington think tank, recently conducted a poll revealing that 68% of radio listeners want "the government to consider laws ensuring that all musical artists have a 'more reasonable chance' of getting their songs heard."[229]

Sources say that voicetracking has been a product of Clear Channel's increasing debt.[230] Clear Channel has utilized this cost-

227. Roberts, *Taking on the Empire*, *supra* note 56.

228. *Id.*

229. Information regarding the Future of Music Coalition suvey, *available at* http://www.futureofmusic.org/news/Prradiosurvey.cfm (last visited Nov. 25, 2002). The telephone survey, conducted from May 13-20, 2002 asked 500 randomly selected adults throughout the United States a variety of questions about radio. The results are as follows: 1) "Consolidation of radio station ownership is not popular. Eight of ten favor congressional action to protect or expand the number of independently owned local stations; 2) By a better than ten to one ratio—76 percent to 7 percent—radio listeners believe that DJs should be given more air time for songs they think will be of interest to their audiences rather than be required to mostly play songs of artists backed by recording companies; 3) If it can be substantiated that radio stations are paid to give air time preference to the music artists supported by record companies, the public approves by a 68 to 24 percent ration for Congress to consider passing laws to ensure that all artists have a more reasonable chance of having their songs heard; 4)Half of the respondents—52 percent—say radio would be more appealing to them if it offered more new music, less repetition and more music of local bands and artists; 5) By a ratio of six to one, radio listeners prefer a long, rather than a short, playlist that provides them a greater variety of songs and less repetition during the week; 6) Seventy-five percent would like to see low power FM stations (LPFM) expanded in their communities, especially if they offer (a) the music of local bands and artists, (b) talk shows on issues of local interest, and on local issues and (c) health, science or fitness programming. Additionally, 74 percent favor legislation to expand the number of LPFM stations in the United States.

230. Leeds, *An Empire*, *supra* note 58. Clear Channel currently operates under a $9 billion debt. On February 22, the company's stock closed Friday at $48.39, about half its record high two years ago.

cutting strategy by "repackaging" radio shows across the country. In 48 cities, listeners listen to Kiss FM. The deejays are located in Los Angeles, working for Clear Channel's top pop station KIIS-FM. Instead of live deejays talking about local news of Jacksonville, FL or Des Moine, Iowa, Clear Channel tapes segments, including play lists, upcoming concerts and phone calls, and airs these prior recordings throughout the country.[231] This digital network of voicetracking is available to 80% of Clear Channel stations.[232] Although Clear Channel argues that this strategy allows smaller markets to capitalize on "big city deejay talent," its apparent that cutting and pasting segments to create the appearance of deejays taking live request and calls from listeners[233], decreases the overall diversity in programming on a nation-wide level. Clear Channel admits that the Kiss brand is like McDonald's, but defends the cookie-cutter operation in that Kiss stations are "all localized inside."[234] In essence, Clear Channel is a factory for radio.[235] Mike Spencer, programmer at rival pop station KLUC-FM in Las Vegas, stated "They're making radio into spoon-fed generic junk." [236] Since Clear Channel not only owns radio stations, but also syndicated radio shows, it has been known to use its power by taking its syndicated shows of competitors' radio stations on place them instead on Clear Channel stations.[237]

Although syndication has opponents, Clear Channel contends that syndication allows radio to reach a greater number of people, therefore satisfying consumer's desire for sufficient, diverse radio

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231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.* (quoting Todd Shannon, a Clear Channel brand manager, "[O]ur Kiss brand is like McDonald's. When you see the Kiss ball logo, there's no mistaking what you're going to get. It's a Top 40 product, but they're all localized inside").

235. *Id.* In Chicago, Clear Channel acquired an oldies stations and converted it into a Kiss outlet that features local deejays only during the afternoon and evening shifts. Todd Cavanah, program director at competing pop station WBBM-FM stated, "Everything else is the robot."

236. Leeds, *An Empire*, *supra* note 58.

237. *Id.*

programming. In addition, Clear Channel recently attributes one of their syndicated shows, "The Trucking Bozo," for having a direct hand in soling the recent sniper killings in the Washington, D.C.-Maryland-Virginia area.[238] Trucker Ron Lantz of Kentucky was listening to 700WLW's Dale Sommers, host of the show, describe the vehicles police were looking for in connection with the shootings.[239] Lantz spotted the suspect's car parked in a Maryland rest area and called police who later apprehended the suspects.[240] Lantz "even used his own rig to block a potential escape route out of the rest area."[241] Clear Channel's CEO, L. Lowry Mays, stated, "We're proud for Clear Channel to have played a part in ending this terrible episode. We've always focused this company on serving our communities, and I can think of no higher service than what Dale Sommers and Ron Lantz did to help the authorities in this case."[242] Mays also suggested "the apprehension of the suspects underscores the power of radio to support the public interest."[243] Syndication may potentially threaten diversity on air, however, as Clear Channel promotes, there are advantages of syndicating shows throughout the country.

Voicetracking and syndication strips away responsibilities of DJ's and program directors, moreover, these methods explain the decrease in the number of people employed in the radio industry.[244] One radio veteran estimates that the Telecom Act eliminated nearly 10,000 radio-related jobs. "It's been fabulous for shareholders, but terrible for listeners and employees," says a former broadcast group chief, "[I] wanted to see radio deregulation. But I think Telecom has done a disservice to what

238. Clear Channel's recent press release regarding the sniper case is *available at* www.clearchannel.com/documents/press_releases/20021029_Corp_Tbozo.pdf (last visited Nov. 25, 2002).

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

243. Clear Channel's press releases, *supra* note 238.

244. DiCola and Thompson, *supra* note 6, at 13.

was once a great business."[245] Voicetracking has not only harmed diversity and employment, but it also harmed radio conglomerates. Florida's attorney general fined Clear Channel for $80,000 for misleading listeners into thinking that a national contest was local.[246] Clear Channel dubbed a local deejay's voice during an interview with the contest winner.[247] Enacting the Competition Act could potentially curb the negative effects associated with syndication and voicetracking.

B. Concert

This section will specifically focus on effects of the Competition Act on the concert industry. Section 3 of the Competition Act addresses unfair competition practices, particularly when a radio station entity "uses its cross-ownership of promotion services or venues to discriminate against musicians concert promoters, or other radio stations."[248] Further, this section also gives the FCC

245. Boehlert, *Happy Channel*, *supra* note 27.

246. Leeds, *An Empire*, *supra* note 58.

247. *Id.*

248. The relevant text of Section 3 is as follows: PROHIBITION ON USE OF RADIO TO REDUCE PUBLIC ACCESS TO DIVERSE RADIO AND CONCERT PROGRAMMING AND CONTENT.
(a) REVOCATION OF LICENSE FOR HINDERING AVAILABILITY OF INDEPENDENT, LOCAL PROGRAMMING AND CONTENT- Section 312(a) of the Communications Act of 1934 (47 U.S.C. 312(a)) is amended—
'(8) for willful and repeated engagement in unfair methods of competition, unfair or deceptive acts or practices, or tying the use of entities owned by the licensee or permittee for the purpose of hindering significantly, or preventing, the broadcast of programming or content, including any sound recording by a musical artist, if such programming or content is produced or promoted by a person independent of the licensee or permittee or the creator thereof is independent of the licensee or permittee; or,
(b) REVOCATION OF LICENSE FOR HINDERING AVAILABILITY OF CONCERTS- That section is further amended by adding at the end the following new paragraph:
'(9) for conviction or final adjudication under an antitrust law or unfair trade practice law of a violation of such law regarding concert venues or concert promotion.'.

(c) PROHIBITION- That section is further amended by adding at the end the following new subsection:
'(h) PROHIBITION ON HINDERING AVAILABILITY OF RADIO PROGRAMMING AND CONTENT AND CONCERTS-
'(1) PROHIBITION- Under such regulations as the Commission shall prescribe, it shall be unlawful for any licensee or permittee to carry out an act for which revocation of a license or permit is authorized under paragraph (8) or (9) of subsection (a).
'(2) PENALTIES- A licensee or permittee that violates paragraph (1) shall be subject to such penalties under title V as the Commission shall prescribe in regulations.
'(3) CONSTRUCTION WITH LICENSE REVOCATION AUTHORITY- The penalties provided under paragraph (2) for an act described in paragraph (1) are in addition to any other action which the Commission may take under subsection (a) with respect to such act.'
e) REGULATIONS-
3) ELEMENTS- The regulations under paragraph (1) shall prohibit a licensee or permittee of a radio station, or affiliate thereof, that has an attributable interest (as determined under section 73.3555 of title 47, Code of Federal Regulations) in a programming entity or concert venue or concert promotion service from—
(A) improperly influencing the decision of the entity or service, or any musician or other programming or content provider, to sell, or the price, terms, or conditions of sale of, satellite cable programming or content or satellite broadcast programming or content to any other radio station or unaffiliated concert venue or concert promotion service;
(B) improperly influencing the decision of any musician or other programming or content provider to sell, or the price, terms, or conditions of sale of, any song, work, or sound recording, programming, concert performance, or concert promotion service to any person or entity not affiliated with—
(i) the licensee or permittee;
(ii) an affiliate of the licensee or permittee; or
(iii) an entity in which the licensee or permittee has an attributable interest;
(C) discriminating against a musician or other programming or content provider that does not agree to enter into a contract or other arrangement with an entity affiliated with the licensee or permittee, or in which the licensee or permittee has an attributable interest, that offers concert venue or concert promotion service;
(D) requiring an exclusive contract or other arrangement with a musician or other programming or content provider that prevents other radio licensees or permittees, concert promotion entities, or concert venues from obtaining programming or content from the musician or other programming or content provider to the extent that such contract or other arrangement—

power to revoke the license of any radio station that uses its cross-ownership of promotion services to discriminate against musicians, concert promoters, or other radio stations.[249] The Act particularly aims to protect against unfair competition, discrimination against artists and the increasing costs of concert tickets. Specifically, critics contend that Clear Channel's practice of "synergy," leveraging one asset to benefit another, has allowed the company to "hoard radio programming, concert tickets, access to stars and concert advertising dollars for itself."[250]

At a recent Arena Managers Conference addressing concerns in the concert industry, Gary Bongiovani, editor/publisher of Pollstar industry trade magazine, stated that only few could have predicted the current state and "ills" of the concert and touring business.[251]

Right now, the industry is dominated by one player, one company that has managed to aggregate some of the best minds in the concert business and take control of many of the touring acts. They are the ones that going to beat you up for the rent and merch deals, and if you don't give it to them, they'll take the shows elsewhere.[252]

Clear Channel is considered the world's leading producer and promoter of live entertainment events.[253] After its purchase of SFX

(i) impairs, impedes, or prevents competition in radio programming or content, concert venues, or concert promotion;
(ii) impairs, impedes, or prevents diversity of programming or content in local radio markets;
(iii) is unduly long in duration; or
(iv) contains unreasonable renewal or extension provisions.
S. 2691, 107th Cong. § 3 (2002), *available at* http://www.thomas.loc.gov (last visited Nov. 25, 2002).

249. *Id.*

250. Leeds, *An Empire*, *supra* note 58.

251. Ray Waddell, *AMC Confab Panel Discusses Consolidation, Pricing, Other Aspects of the Industry*, BILLBOARD., Oct. 12, 2002, at 17.

252. *Id.* Panelist Gary Bongiovani was also joined by John Huie, Nashville-based agent with Creative Artists Agency and Clear Channel Entertainment VPs Frank Roach and Danny Zelisko. Zelisko "rhetorically interject[ed], 'Who the hell is he talking about?'"

253. Information regarding Clear Channel's presence in both radio and entertainment industries can be found *at* http://clearchannel.com (last visited

Entertainment for $4.4 billion, it instantly made Clear Channel the nations' top live-event promoter with $2 billion a year.[254] Clear Channel reaches over 62 million people, through 135 live entertainment venues, including 44 amphitheaters in the U.S. and 28 in Europe each year.[255] Clear Channel VP Frank Roach commented that Clear Channel's arena concerts have increased by 30 percent since 2000.[256]

As radio and concert industries began to merge, critics began to question promotional practices in which radio stations promoted only artists in which they sponsored.[257] Although artists are not compelled to give Clear Channel exclusivity over their tours or individual shows, the silent threat of airtime is a realistic possibility. Artists fear that not working with Clear Channel venues will necessitate a blackballing from all Clear Channel radio stations, an act with potentially devastating effects to any artist.[258] Further, artists have allegedly accepted a smaller concert payments from Clear Channel in fear of negative repercussions concerning

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Nov. 25, 2002); *see also* Waddell, *supra* note 251 (quoting Clear Channel VP Frank Roach's statement, "Ten years ago, nobody had hear of Bob Sillerman, the initials 'SFX,' or, unless someone lived in central Texas, Clear Channel." Bob Sillerman, founded SVX/CCE, with the philosophy of spreading into new markets, make more money, and increase leverage. Basically, Sillerman "consolidate[d] the great cities").

254. Leeds, *An Empire, supra* note 58.

255. *Id.*

256. Waddell, *supra* note 251.

257. Roberts, *Taking on the Empire, supra* note 56. Rob Buswell, former Jacor head, would not directly link the anticompetitive practice of concert booking and radio support, yet he stated: "Having the stations at our disposal is a nice tool, and its' something that the other promoters in the market don't have to work with. I don't' really go to artists or managers or agents and say, 'If you play this show for us versus Universal [now House of Blues], you'll get more spins for your record.' That's not really what we're all about. But by the same token, when we have an artist we're promoting, they'll get a lot of on-air support." *Id.*

258. *Id.* Jerry Bakal of Concerts East, and independent promotion company in New Jersey, states that he regularly loses bookings because "the bands are afraid to piss off the radio stations" and because his performance space is surrounded by Clear Channel-owned venues.

airplay time.[259] Andy Sommers, agent of the Toadies, recognized airplay as a bargaining chip[260] but conceded that Clear Channel never explicitly made airplay a threat. "I just played the odds," he says, "and the odds are on their side. Do I feel Clear Channel has an unfair competitive edge? Absolutely. But I understand what they're doing. If you own the car dealership and you won the car wash, it's good business to sell dirty cars."[261] The government is taking notice. In January, Rep Howard L. Berman campaigned the Justice Department and the Federal Communications Commission to investigate allegations that Clear Channel refused to play artists' songs if the musicians declined to hire the company as their tour promoter.[262]

In a sense, an artist deciding not to sign Clear Channel as their concert promoter takes a big risk—both in terms of revenue and airplay. This general notion supports the following statistics of Clear Channel's dominant position in the concert industry: Clear Channel produced seven of the top 10 tours and 15 of the top 25.[263] In terms of revenues, Clear Channel grossed over $979 million in the United States for 2001, which accounts for 66.4% of their revenues for the year.[264] Of all the tours in the United States last

259. *Id.* Boots Hughston, an executive at 2B1 Productions, which owns Maritime Hall in San Francisco, alleges that Clear Channel throws around its weight to save money on small-scale shows. "Clear Channel will threaten agents when we make offers on shows to the point where sometimes they'll withdraw even after they've signed contracts with us," he says. "I could probably give you eighty or ninety times where this has occurred—where they'll threaten the band, tell them, 'If you play Maritime, you will not play for any of our venues anywhere else, and you'll lose your airplay.' And they'll end up accepting offers that are a lot less than mine. They'll pass on $30,000 or $50,000 form us and play for them for $10,000 or $15,000. The agents will be apologetic—like, 'I'm sorry, they blew a shit fit, this aint' going to work.' And we end up losing the show."

260. *Id.*

261. *Id.*

262. Leeds, *An Empire*, *supra* note 58. (Britney Spears is specifically mentioned in this article as an example of an artists discriminated against for not using Clear Channel as their tour promoter.)

263. BILLBOARD, *supra* note 177.

264. *Id.*

year, Clear Channel was involved at some level in over half the tours.[265]

One way Clear Channel dominates the concert industry over its competitors is by snapping-up[266] concert-promotion companies with the means to easily out-bid other companies for entire tours such as 'N Sync, U2 and the Dave Matthews Band.[267] Weiner also alleges that Clear Channel acquired Montage Mountain Performing Arts Center near Scranton, Pennsylvania at a loss in order to lock out one of its biggest concert rivals, Covanta Entertainment. Tom Etter, senior vice president of Covanta stated, "We all understand we're competitors and competition is rough, but to us this is completely unparalleled." He added, "[Clear Channel" can't make money off the Montag contract, which will probably lose money every year. So why would they do this? There has to be another motive other than profits." Congressman Weiner, in response to viewing Metropolitan's financials concerning their unsuccessful bid, stated "When you start to make in your self-interest and take losses in order to box out the competition, that rise to the level of anti-trust behavior."[268]

The astronomical fees paid to concert-promotion companies which in turn land in the hands of artists, have driven ticket prices up to "Pikes Peak" heights.[269] The House Judiciary Committee is particularly concerned about the "unconscionable ticket prices" which skyrocketed as a result of the Telecommunications Act.[270] Congress has also found that rapid consolidation has also negatively affected concert venues since the signing of the

265. *Id.* (8,160 concerts were reported in the United States; Clear Channel was involved in approximately 4,753 of the tours).

266. Roberts, *Taking on the Empire*, *supra* note 56.

267. *Id.*

268. Eric Boehlert, *Washington tunes in*, Salon.com, *at* http://www.salon.com/ent/feature/2002/03/27/beltway [hereinafter Boehlert, *Washington tunes in*] (Mar. 27, 2002) (quoting Clear Channel saying that the idea of willing to lose money is "unfounded," adding, "We're a public company, we're not going to lose money on a facility for the sake of a small competitor. To suggest we've done something wrong here is absurd").

269. Roberts, *Taking on the Empire*, *supra* note 56.

270. BILLBOARD, *supra* note 177.

Telecom Act. Since 1996, concert ticket prices have "increased by more than 50 percent more than such prices had increased in any previous 5 year-period."[271] The average concert ticket rose over 30 percent from '98 to '99.[272] In the summer of 2000, musical artists made a conscious effort to keep the prices of concert tickets down.[273] Yet, at the same time, artists are demanding a huge price for concerts since most artists make money on live performances and not CD sales.[274]

To appease both the artist and companies such as Clear Channel, concert tickets are set at an astronomical price.[275] Further, to make additional revenue, Clear Channel also sets advertising rates at premium rates.[276] Ticket prices have not yet reached their plateau. After 9/11, ticket prices rose 11 percent.[277] Ticketmaster will no longer reap financial benefits from tours if artists continue asking for a higher price.[278] As a result, Ticketmaster, along with concert venues, have increased new service charge fees and increased the

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271. S. 2691, 107th Cong. § 2 (2002), *available at* http://thomas.loc.gov (last visited Nov. 25, 2002) From 1991 to 1996, ticket prices increased by 21 percent, compared to an increase in the Consumer Price Index of approximately 15 percent. From 1996 to 2001, the concert ticket price increased by more that 61 percent, while the Consumer Price Index increased by 13 percent.

272. Eric Boehlert, *The Summer of (slightly less expensive) love*, Salon.com, (June 27, 2000, *at* http://dir.salon.com/business/feature/2000/06/27/tickets/index.html (last visited Nov. 25, 2002) [hereinafter Boehlert, *Summer*]) Despite decreasing overall attendance, the concert business still profited over $1.2 billion in '99.

273. *Id.* Limp Bizkit, Pearl Jam and Britney Spears, Creed, Dave Matthews Band and Christiana Aguilera have tried to keep prices down to $30-$40. Artists that did not try to keep their prices down, such as KISS at Irvine Meadows in California and Diana Ross and the Supremes at the National Car Rental Center in Fort Lauderdale, Florida allowed a $9.95 and $15 service fee, respectively.

274. Roberts, *Taking on the Empire*, *supra* note 56.

275. *Id.*

276. *Id.*

277. Waddell, *supra* note 251. ("If you thought in the aftermath of 9/11 that ticket prices would go up 11%—that seems to defy logic," stated Gary Bongiovani, editor/publisher of Pollstar).

278. Boehlert, *Summer*, *supra* note 272.

prior service fee, which originally covered the cost of the ticket order.[279] These fees typically increased the ticket price from 30 to 50 percent.[280] Prior to merging with Clear Channel, SFX dominated the concert tour industry—primarily by owning most major summer amphitheaters, promoting over 30 tours but also having some part in over 3,000 shows in a year.[281] Seeing that SFX's power was rapidly expanding in a variety of markets, Ticketmaster viewed SFX as a potential threat if it chose to create its own ticketing company.[282] In exchange for not competing, SFX was allowed to pocket service fees, typically around $4 per ticket. For a sold-out show, this scheme could amount to $100,000 per show.[283]

In a recent complaint to the DOJ, Congressman Anthony Weiner, D-NY, stated that Clear Channel's dominance in the concert industry is "harmful to consumers, venue owners and artists."[284] In the future, one industry expert predicts that "Ticketmaster may ultimately be a Clear Channel company, or at least their role may change."[285] Industry observers accuse Clear Channel of driving up ticket prices to "new and frightening heights" by "paying astronomical amounts to buy entire tours by

279. *Id.* Service fees could reach up to $9 a ticket. Generally, tickets include a ticket service fee, plus a facility fee, or "the honor of entering a venue." Some venues may charge $5.50 per customer. For example, Pearl Jam fights to keep its ticket prices under $30, a steal among multiplatinum acts. However, a lawn seat at Saratoga Performing Arts Center in New York includes a $6.05 service fee, a $5.50 facility fee and a $3.50 handling fee. "That $26 ticket suddenly costs $40.80—a 56 percent increase over the ticket's face value." A Britney Spears concert ticket increased 59 percent (from $22 to $35.55) due to service fees for a June 21 show at Merriweather Post outside of Washington, D.C.

280. *Id.*

281. *Id.*

282. *Id.*

283. *Id.* A sold-out Sting show that housed 15,000 fans, an average ticket included a $7.50 per ticket service fee and a $3 facility fee.

284. Boehlert, *Washington tunes in*, *supra* note 268.

285. Waddell, *supra* note 251. John Huie, Nashville-based agent with Creative Artists Agency, spoke at the Arena Managers Conference on September 22-24 in Phoenix.

big-name performers."[286] However, Steve Smith, Chief Operating Officer of Clear Channel Entertainment, denies this blanket statement and argues that the "arithmetic is fundamentally wrong" because Clear Channel's "efficiencies" keep concert ticket prices down.[287]

IV. IMPACT

This section will address legislative conflict regarding deregulation and public policy goals, particularly concerning Clear Channel. These conflicts, in addition to current lawsuits and investigations involving Clear Channel, will illustrate why the Competition Act is needed. Further, this section will highlight what legislators and lobbyists have to say about further deregulation, and in particular, Clear Channel. Secondly, this section will predict the Competition Act's likelihood of enactment. In making a prediction, the analysis will address (a) the latest FCC findings, including the FCC's and DOJ's policy view of deregulation, (b) the Future of Music Coalition's ("FMC") findings and (c) Clear Channel's close ties to the Republican party. Despite the Competition Act's noble effort to return competition, diversity and integrity to the radio and concert industries, this section will describe why Congress will not support the Act. The impact of vetoing the Competition Act will ultimately lead to further deregulation.

A. Legislative Conflict

When announcing the proposed legislation, Feingold characterized the Telecom Act as a bill "bought and paid for by soft money. Everyone was at the table except for the consumers."[288] Capitol Hill players see little hope for the bill to be

286. Roberts, *Playola*, *supra* note 182.

287. *Id.* ("Guess those 'N Sync tickets you went into debt to buy were bargains after all").

288. Holland, *Payola Due This Month*, *supra* note 140.

passed, noting that the "battle will be lengthy and expensive."[289] If the battle will be fought by a powerhouse like Clear Channel, particularly with the GOP, House and Senate on its side, chances are the bill will have little chance of being passed. One veteran stated that the bill was important, but that it would "take certainly public outrage to fuel it and a couple of years and maybe even a change in administration to try to wrestle with this one, to keep up a unified front and not let these issues be peeled away."[290] The newly elected administration, dominated by GOP in the House, the Senate, and at the top positions leaves little hope for Feingold, artists and consumers alike—at least for two more years.

One heavyweight opposing legislation changes, particularly payola provisions, has the National Association of Broadcasters already lobbying its position:

We think Congress made the correct decision [in the '96 rewrite] in allowing an element of consolidation in the radio industry that was not there before. We think Senator Feingold is flat wrong when he claims there is less diversity in program formats. The reality is that there have never been more formats and program diversity.[291]

Although insiders suspect that the bill will not pass, Jonathan Potter, president of the Digital Media Association, believes the issue will take a long-term effort. "But counter-balance that with this: Feingold was told the same thing when he started down the road of campaign finance reform. So don't ever count Russ Feingold out."[292]

On its face, massive consolidation concerns the FCC. However, history illustrates that the FCC ultimately approves further deregulation despite acknowledging that it could potentially harm the public interest. In 1997, a Dallas investment company, Hicks, Muse, Tate & Furst Inc., bought SFX Broadcasting, Inc. for $2.1 billion, which at the time, gave the company control over the

289. *Id.*
290. *Id.*
291. *Id.*
292. *Id.*

biggest radio group in the nation.[293] The acquisition added 71 stations, bringing its total to 344 stations.[294] At the time, SFX Broadcasting was twice as large as its nearest competitor, which happened to be Clear Channel.[295] What's interesting about this acquisition, however, was the FCC and Department of Justice's evident concern that these acquisitions would give too much power to a few station owners to control local advertising revenue, programming formats, independent news gatherings and overall diversity on the airwaves.[296] What is perhaps more troubling, is that in just five years, the FCC and DOJ's apparent concern over a mere 344 commonly owned stations has diminished, if not completely vanished. Three years later, the FCC approved Clear Channel, now the nation's largest radio company, to buy AMFM for 16.6 billion in stock, which would bring radio station ownership to 800 nation-wide stations.[297] In a time-frame of two weeks, Clear Channel also announced plans to acquire concert promoter SFX for $2.9 billion in stock.[298] Although the FCC required Clear Channel to sell 72 stations in 27 markets in the AMFM acquisition, its consolidation concerns have slowly diminished since 1996.

The DOJ and FCC continue to express concern with every merger and acquisition, however, the concern, investigations, biennial reviews have amounted to Clear Channel acquiring over 1,200 stations.[299] How Clear Channel appeased the FCC and DOJ

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293. Farhi, *Biggest Radio Group*, *supra* note 109.

294. *Id.*

295. *Id.*

296. *Id.* Justice officials did challenged aspects of the deal, specifically the markets in which SFX would control over 40 percent of the local radio advertising revenue.

297. *Radio Giant Clear Channel Agrees to Sell 72 Stations*, WASH. POST, March 7, 2000, at EO3.

298. *Id.*

299. Paul Farhi, *EZ Communications Sold for $655 Million; Fairfax Radio Firm Swept Up in Merger Craze*, WASH. POST, Aug. 6, 1996, at DO1 [hereinafter *EZ Communications*]. In 1996, rapid consolidation already had the DOJ inquiring about the effects of mergers on competition. Specifically, "advertisers have told antitrust officials that they are concerned that prices for

to reach its total number of stations is fascinating considering that the government entities were concerned about Westinghouse Electric Corporations purchase of Infinity Broadcasting for $3.9 billion in 1996, bringing its radio ownership to 77 stations in 13 major markets.[300] Clear Channel boasts over 1,200 stations in 300 markets; the numbers on their own suggest that the only trend the DOJ and FCC have committed themselves to is further deregulation and relaxation of ownership limits.

The FCC's decisions in the past also illustrate their tendency towards deregulation. For instance, in 1999 the practice of payola was in question when Chancellor Media, one of the largest broadcasting chains at the time, billed a record label $237,000 for a marketing campaign specifically geared towards airplay of a particular song.[301] In the same year, Cumulus, another broadcasting giant, made a $1 million deal with an independent promoter which gave him exclusive rights to lobby for particular songs with the "decision makers" of the company.[302] Although the FCC was urged to look into the matter and subsequently expressed some concern, legislators contend that the FCC and DOJ prefer to stand by idly and do nothing.[303] Three years later, independent

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air time will rise substantially in markets controlled by big station operators. A more general worry is that audiences will lose 'diversity' in radio programming."

300. Paul Farhi, *Justice Department Clears Westinghouse Purchase of Infinity; $3.9 Billion Deal Would Bring Together Nation's Two Largest Radio Station Operators*, WASH. POST., Nov. 13, 1996, at AO9 [hereinafter Farhi, *Justice Department Clears Westinghouse*]; Paul Farhi, *Justice Department Probes Antitrust Implications of Radio Mergers*, Wash. Post., Aug. 2, 1996, at FO2 [hereinafter Farhi, *Justice Department Probes Antitrust Implications*] Joel Klein, assistant attorney general in charge of the Justice Department's antitrust division suggests the DOJ philosophy by stating, "We're here to preserve competition, not to prevent mergers." In 1996, the DOJ was concerned about a $770 deal involving Jacor Communications acquisition of Citicasters Inc.

301. Philips & Hiltzik, *2 Officials Urge FCC*, *supra* note 112.

302. *Id.*

303. *Id.* Regarding payola, Senator Paul Wellstone (D-Minn) states "The FCC should look into the matter. These are the kinds of things that occur when there is no real competition. Of all the dangers that go with the increasing concentration of power in this country, the most dangerous is what is happening

promotion has become a permanent fixture in the landscape of the music business. One million dollar deals with independent promoters are rampant. Tactics to get an edge on competition, which would have been questionable three years ago, are now commonplace, if not expected, yet despite so-called investigations, nothing has yet been done to halt the negative effects of radio and concert conglomeration.

If the goals of the Telecommunications Act were to appease artists and consumers, the Act has miserably failed. Throughout the country, panels are popping up discussing the current trends and dissatisfaction with radio conglomeration and payola.[304] A general theme emerging from such conferences is the exchange of information between Washington and radio insiders and consumers.[305] This information in turn has spurred Representative John Conyers (D-MI), who sits on the House Judiciary Committee, to call for extensive investigation of independent promotion, payola and radio conglomeration.[306]

With Clear Channel's history of huge acquisitions and eventual dominance in numerous entertainment industries, it's no wonder that insiders have questioned the company's practices with suggestions of unfair trade and antitrust concerns. Radio speaking

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in the telecommunications industry." Representative John Conyers states "The idea that radio stations may have invented new ways of accepting pay-for-play confirms my worst fears about merger mania. Everywhere media conglomerates have gained ground, consumers have lost ground. I don't think Congress should stand by idly."

304. Cobo, *supra* note 181; *see also* Pareles, *Many Futures of Music*, *supra* note 186. The Billboard/Airplay Monitor Seminar took place in response to the uniform dissatisfaction with the music business. Between March 14-16, over 750 people attended the conference at the Eden Roc Resort in Miami Beach. The second annual Future of Music Policy Summit, sponsored by the Future of Music Coalition at Georgetown University, also addressed issues concerning radio conglomeration, artists' unfair contracts and payola.

305. Cobo, *supra* note 181. John Conyers, keynote speaker of the conference, stated "Our meeting is to share some news of what happens in Washington as it relates to your industry and what happens to you so I can take [it] back to my colleagues in Washington, D.C."

306. *Id.* Conyers has been calling for a congressional investigation of independent promotion since January.

alone, however, Clear Channel's approximate 1,225 radio stations account for just 10% of the nation's total.[307]

Clear Channel is "drawing fire from plenty of folks other than amateur comedians."[308] In 2001, Nobody in Particular Presents ("NIPP"), a Denver concert-promoter, charged Clear Channel with a number of "unlawful and anti-competitive practices."[309] This suit is the first to accuse Clear Channel of violating monopoly and/or anti-trust statutes.[310] "Somebody has to take them on, and it might as well be us," stated NIPP founder Kauffman. "This company's always fought the good fight; it's epitomized independence and the entrepreneurial spirit, and we feel we have the right to do business without unfair interference. This is America, is it not?"[311]

NIPP argues that Clear Channel's monopolistic empire prevents it from competing in the Denver market. NIPP alleges that (1) Clear Channel threatens airplay if artists do sign Clear Channel as their concert promoter; (2) Clear Channel offers artists "more than 100 percent of gross sales to promote their concerts," making it impossible for NIPP and other companies to bid on the shows; (3) Clear Channel limits competitor's advertising on its stations, charges excessive advertising rates, offered only "undesirable timings and placements or eliminated [advertising availability] completely; (4) excluded NIPP artists from their 'concert calendars'; and (5) eliminated promotions for artists promoted by NIPP.[312] Ron Rodriques, *Radio & Records* editor-in-chief, recognizes that radio stations that "loathe Clear Channel is simply an understatement.[313] Dirty tactics like placing frozen turkeys on

307. Leeds, *Am Empire*, *supra* note 58.

308. Michael Roberts, *PAC-ing a Punch; Clear Channel's formation of a political action committee shows it's ready for battle*, Westword.com, (June 20, 2002), *at* http://www.westword.com/issues/2002-06-20/message.html/1/index.html (last visited Nov. 25, 2002) [hereinafter Roberts, *PAC-ing a Punch*].

309. *Id.*

310. Roberts, *Taking on the Empire*, *supra* note 56.

311. *Id.*

312. *Id.*

313. *Id.* Westword highlights such particular instances in which Clear Channel is accused of perpetuating alleged acts of misconduct with competitors:

competitors' lawns with signs reading, "Unlike this bird, your goose is cooked. This will be your last Thanksgiving in Colorado,"[314] acts in the name of competition seem to be condoned by Clear Channel.[315]

Even if NIPP obtains the money to stay afloat against Clear Channel, insiders speculate that the odds of victory are slim.[316] Considering that Clear Channel's second quarter radio division revenues increased 96 percent to $941 million, CBS Radio legal analysts states that NIPP's lawsuit against Clear Channel is "the beginning of a very, very long expensive, drawn-out, bitter brawl, and when it's over, if it's over in our lifetime, it's going to have a

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(1) Classic-rock station the "Hawk" sponsored the "Big Rock Show." Apparently, a truckload of rocks was conveniently placed in front of Fiddler's Green's ticket windows with a sign that read: "You want a Big Rock Show? Here are some big rocks." Additionally, counterfeit all-access passes and fliers stating that anyone who announced "The Hawk sucks" would receive two beers for the price of one infiltrated the concert; (2) Denver station, the "Peak" (previously an SFX station, now owned by Clear Channel), sponsored a Fillmore Auditorium concert where hundreds of pounds of raw fish were deposited in the band equipment loading area; (3) Clear Channel allegedly sent out bogus faxes detailing unauthorized promotions to agents, manages, or band representatives with the intent to confuse or insult artists; (4) Two instances of alleged Clear Channel vandalism, including one in which a Peak van was splashed with chemicals, requiring hundreds of dollars to fix and an incident involving two youths attempting to set fire to a Peak recreational vehicle. Apparently, the youths ran to a Clear Channel station's tent; (5) Stephen Meade, a morning-show host for KBPI was convicted of animal cruelty for dropping a chicken form an upper floor at Clear Channel's headquarters in 1999. Meade also allegedly attacked Rover MacDaniels, former DJ at the Peak, at a Denver restaurant and began "pummeling him." Along with other incidents of harassment and threatening phone calls, a restraining order required Meade to stay at least hundred yards away from MacDaniels and his produce for the next year.

314. *Id.*

315. *Id.* ("At some companies, a restraining order under these circumstances might jeopardize a career. At Clear Channel, it means job security").

316. Roberts, *Taking on the Empire*, *supra* note 56. One sources states, "These guys can crush you from so many angles it's incredible. They sit there and look you in the eye and basically tell you they'll fuck with you. They're just evil fucks."

significant impact on one side or the other."[317] Yet NIPP is willing to battle it out with the radio giant. "There's going to be a battle. This is what's been happening in the real world ever since the creation of capitalism: There's been a tendency to monopolize and structure the markets in order to make more profits. That's why we have the Sherman Act and the Clayton Act."[318] Instead of giving into the fight like many of their peers, NIPP concludes that they are the "last of the Mohicans."[319]

Clear Channel's spokeswoman, Pay Taylor, publicly responded to the lawsuit: "We haven't done anything wrong, and we'll vigorously defend ourselves in court. We compete hard, but we compete fairly. I'm sorry that this had to go to court, because we'd rather fight this out in the marketplace, where it belongs."[320] NIPP is not the only company to recently file a lawsuit against Clear Channel.[321]

Clear Channel's co-CEO responded to monopolistic concerns stating, "We are satisfied and excited about the ways we have grown our business. Our company competes aggressively, fairly, and totally within the law. If there is an investigation, we're confident this will continue to be proven true."[322] Clear Channel is not foreign to lawsuits. At any given time, the company has 300 pieces of ongoing litigation.[323] Steve Smith, COE of Clear Channel in October 2001, states, "[We] will do things tomorrow

317. *Id.*

318. *Id.*

319. *Id.*

320. *Id.*

321. *In the News*, BILLBOARD, Sept. 21, 2002, at 6. In September 2002, Spanish –language radio network Spanish Broadcasting System ("SBS") also filed a lawsuit against Clear Channel Communications in response to Univision Communication's announcement that it would acquire SBS's primary competitor's Hispanic Broadcasting Corp. (HBC). The Tichenor family and CCC are HBC's principal shareholders. SBS claims antitrust and unfair competition, yet CCC filed a motion in U.S. District Court on August 29 dismissing the claim for failure to state a claim "upon which relief can be granted."

322. BILLBOARD, *supra* note 177.

323. Mandel, *supra* note 55.

that will have the potential to offend or shock you—that you will think are inappropriate. But we'll also do something tomorrow that you will think is brilliant, genius, great work . . . My suggestion is to just judge us by our body of work."[324] Infinity chief executive, Mel Karmazin, adds, "I find it extraordinary that anyone would sue the words 'antitrust' and 'radio' in the same sentence."[325]

Congress is also taking notice of Clear Channel's proclivity towards monopolistic behavior.[326] Representative Howard Berman (D-CA) wrote to Attorney General John Ashcroft and Michael Powell, and asked the DOJ and FCC to investigate Clear Channel's business practices, particularly the 'persistent allegations that record companies often must pay radio stations to play music of their artists."[327] Berman further alleged that Clear Channel's consolidations have "negatively affected recording artists, owners of sound-recording copyrights, consumers, advertisers, and competitors in the radio and television industries."[328] The House Judiciary Committee urged Ashcroft and Powell to "fully and aggressively investigate these allegations and vigorously prosecute any wrongdoing."[329] In particular, Clear Channel is under fire for denying artists airplay if they do not sign Clear Channel on as their concert promoter.[330] In addition, Berman is concerned that Clear Channel is purchasing radio and television stations through "shell corporations" in order to skirt the FCC station-ownership limit rules.[331]

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324. Roberts, *Playola*, *supra* note 182.

325. Paul Farhi, *Top 2 Radio Station operators to Merge in $4.9 Billion Deal*, WASH. POST, June 21, 1996, at AO1 [hereinafter Farhi, *Top 2 Radio Station operators*].

326. *Id.* (Representative Rick Boucher (D-VI) and John Conyers (D-MI_ have also voiced similar concerns.

327. Boehlert, *Save us from ourselves!*, *supra* note 128.

328. Roberts, *Taking on the Empire*, *supra* note 56.

329. BILLBOARD, *supra* note 177.

330. *Id.*

331. *Id.*; *see generally* Jeff Leeds, *Clear Channel Drawing Static; Radio No. 1 broadcaster disputes critics who say it conceals stations to evade FCC ownership caps*, L.A. TIMES, Mar. 3, 2002, § 3, at 1. Advertising and

This current investigation will not be Clear Channel's first challenge. In the late 1990's the DOJ conducted an informal inquiry of antitrust allegations, and more recently, the NIPP's ongoing lawsuit in Denver has attracted the DOJ's attention. NIPP partner Jesse Morreale reported that the DOJ has contacted many people in the industry, including NIPP, to gather information about what is happening.[332] Morreale noted, "The more large-scale the problem, the more focus and attention it gets, and there are clearly indications from the Justice Department that they have concerns about what's happening with Clear Channel."[333] In addition, Anthony Weiner (D-NY), became the second congressman to urge the DOJ to conduct an investigation of Clear Channel last March.[334] In the same week, the FCC denied Clear Channel a

competing broadcast companies have petitioned the FCC to review Clear Channel's alleged practice of "warehousing" front companies. Arthur Belendiuk, a Washington communications attorney that filed petitions opposing Clear Channel's purchase of two stations, stated, "The problem is that you have a company that's been told not to own radio stations in certain markets and has decided it's going to control those radio stations anyway." Clear Channel's spokeswoman, Pam Taylor, responded stating, "The FCC has reviewed every one of our transactions and we've abided by the rules. We just happen to be really good at maximizing flexibility under the rules that are in place." Yet even though Clear Channel owns "approximately" 1,225 stations, the company admits that it controls sales or programming at an additional 75 stations; local marketing agreements allow Clear Channel to take over another station's programming or advertising time. Clear Channel is accused of controlling "obscure companies" buying the company's divested stations. In addition, joint advertising agreements allegedly allow Clear Channel to take full control of the station's management. In one instance, Belenduik's petition alleges that one station that Clear Channel agreed to divest, KBRQ-FM in Waco, Texas, continues to employ Clear Channel employees, including management, according to an employment record and web site. Andrew Jay Schwartzman, president of Media Access Project, a consumer advocacy law firm, stated that the 1996 Telecom Act "was supposed to end these evasions by making the broadcaster limits high enough to satisfy all but the greediest . . . The greediest have kept at it."

332. *Id.*

333. *Id.*

334. Boehlert, *Washington tunes in*, *supra* note 268.

station purchase, "citing concerns about media concentration."[335] For the first time in 30 years, the FCC appointed an administrative law judge to hear the issue.[336] The DOJ's recent pro-activity may seem promising, however Clear Channel's history along with the current state of bureaucracy shows that DOJ and FCC may be on their side. First, Powell, who heads the FCC, generally favors deregulation. Also, the DOJ's current antitrust chief, Charles James, as a Washington antitrust attorney, formerly represented Clear Channel when it acquired AMFM Inc. and SFX in 2002.[337] Thus, one could realistically argue that Clear Channel, although investigated, will not be independently prosecuted by the DOJ or FTC.

The legislature is also paying attention to other industry concerns. John Conyers (D-MI) urges Congress to readdress payola.[338] Conyers hopes to hold federal hearings to address payola and its negative effects on artists, consumers, and record labels. Insiders suggest that Congress will do nothing to curb the negativity surrounding the music industry, specifically payola.[339] "There's nothing illegal about the practice, and with the Justice Department focusing on identifying terrorist cells and Congress embroiled in wartime security matters, attempts to create regulations or pass bills curtailing it aren't even near the stove, let alone on a back burner."[340]

Feingold faces an upward battle in passing this new legislation. Although radio consolidation means less diversity and fewer voices, insiders note that this fact is "irrelevant because if you look at the overall media marketplace, there have never been so many

335. *Id.*

336. *Id.*

337. Leeds, *An Empire*, *supra* note 58.

338. Chuck Philips, *Conyers to Press for Tougher Enforcement Laws on Payola; Broadcasting: Ranking Democrat on the House Judiciary Committee plans to call hearings this year*, L.A. TIMES, Jan. 7, 2002, § 3, at 1 [hereinafter Philips, *Conyers*].

339. Roberts, *Playola*, *supra* note 182.

340. *Id.*

voices."[341] When reviewing the radio and concert industry, Congress will choose their statistics, it will choose how to define the market, whether locally or nationally, rock or pop, or all stations as a whole. Somehow, Congress, particularly the new Congress, will find a new diversity of voices, a variety in programming, and incentives, including financial, to approve further deregulation.[342]

Although the legislature and consumers have urged the FCC to take action, history shows little, if anything, will be done to regulate the radio and concert industry.

B. The Future of the Competition Act: the likelihood of Congressional Support

Massive consolidation plagued the radio and concert industries. Since 1996, decisions made contrary to public interest have resulted in a decline of competition and diversity. Both industry players and consumers have asked for government intervention. Senator Feingold is the first to tackle the difficult job of amending the Communication Act of 1934 and thereby reversing the negative effects of the Telecom Act of 1996. Yet in an era where Republicans dominate the House, Senate and the presidency, the Act will have difficulty passing. This section will discuss (i)

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341. Steve Knoll, *Radio Station Consolidation: Good News for Owners, but What About Listeners?*, N.Y. TIMES, date, § D, at 5. Industries that are regulated are excited about the FCC revisiting ownership rules. (from Brooks Boliek, *FCC launches wide review of broadcast ownership rules*, HOLLYWOOD REP., Sept. 13, 2002.) David Bartlett, president of Radio-Television News Directors Association, states, "We are pleased the FCC is undertaking a review of all of its broadcast ownership rules," stated Viacom in a statement. "Flexibility in the broadcast marketplace is critical in today's highly diverse media environment, particularly in light of changes that have taken place over the years. We look forward to demonstrating to the commission that the current rules are both arbitrary and outdated."

342. Boliek, *supra* note 341. Consumers Union's Gene Kimmelman stated, "There's a selectivity here of picking the facts that will support a result. Powell has an inclination to pick the facts that favor deregulation and ignore the facts that don't."

current FCC studies, (ii) the Future of Music Coalition's recent study and (iii) Clear Channel's ties with the Republican party in order to determine the likelihood of passage.

1. The FCC Studies and Policy Views

On Thursday, September 12, 2002, the FCC officially kicked off a comprehensive review of broadcast ownership rules.[343] Despite the FCC's extensive inquiry, the "majority of commissioners signal that they support relaxing or consolidating at least some of the decades-old restrictions." In an effort to take special care with the Federal Communications Commission review of broadcast industries, Powell urges artists, entertainers, and any other stake holder to submit information and analysis to the FCC so it can make an informed decision expected spring 2003.[344] Writer Guild of America West president Victoria Riskin agrees with Powell to the extent that this process should involve an extensive analysis requiring time, however, she adds:

We should also weigh decades of precedent and wisdom in rulemaking that has served the public interest. We cannot allow this process to be manipulated by a few megacorporations that seek to control even larger sectors of our communication industries. The new ownership rules should enhance free competition and move America toward greater diversity of viewpoints in the media, not toward putting the power to decide what all Americans see on television and read in the newspapers into the boardrooms of a handful of powerful individuals.[345]

Furthermore, "the rules were written to encourage diversity of voices on the airwaves and competition among media outlets, and

343. Edmund Sanders, *FCC Reviewing Rules Governing Media Ownership*, L.A. TIMES, Sept. 13, 2002, § 3, at 1 The comprehensive inquiry involves an examination of the television, newspaper and radio markets. However, due to court decision concerning cable TV systems, TV stations, and wireless communication, it appears as if radio programming, diversity and ownership may take a backseat to other forms of broadcasting.

344. Boliek, *supra* note 341.

345. *Id.*

to prevent the biggest companies from becoming too powerful in controlling news and entertainment."[346]

What appears to be crucial at this point is the number of responses and the lobbying efforts on behalf of artists and consumers. In particular Leonard Hill, chairman of the legislative affairs committee of the Caucus of Producers, Writers and Directors, warns all those affected in the creative community that these decision made in the next six months will have unprecedented impact on the creative community as a whole.[347] "Next Thursday, the agency is expected to approve an order that starts the rule-making process. While it does not specify the direction the agency intends to take as it reconsiders the rules, experts say that they have no doubt that the proceedings are all but certain to conclude next year with most of the regulations either abandoned or broadly loosened."[348] This fear should be even more apparent with the recent changes in the Senate and House, which suggests that these decisions will effectively create lasting policies for at least two more years, and potentially longer if there is not an administrative change.

On the other hand, some insiders speculate that Powell will look at further deregulation critically.

The move begins to fulfill the long-held vision of Michael K. Powell, the agency's chairman. As an FCC commissioner during the 1990's and as chairman under President Bush, Mr. Powell has consistently voiced deep skepticism about the ownership rules,

346. Stephen Labaton, *FCC Weighs a Sharp Easing of Size Limits on Big Media*, N.Y. TIMES, Sept. 7, 2002, Section C, at 1.

347. Boliek, *supra* note 341. Leonard Hill states, "The proceeding should set off alarms within the creative community. The prospect of wholesale deregulation ahs grave implications for all those who produce, write, act, direct or compose entertainment. The battle will be between the corporations, who seek deregulation that will allow consolidation and self-dealing, and the creative community that is dependent on regulations that maintain competition and access to the national audience. I am concerned that the corporations have amassed an army of lobbyists to make the case for deregulation when the creative community seems blissfully unaware of the significant decisions that will be made by the FCC in the next six months.

348. Labaton, *supra* note 346.

saying that they were based more on a hunch and intuition than on strong empirical evidence that they actually promote diversity and competition. At least two other members of the five-person commission are also known to be critical of the old rules.[349]

Powell himself notes, "the time is up for continuing to wink at public policy. It's now time to embrace it and make it."[350] He adds, "I pride myself on being open-minded."[351] Yet many analysts believe that the proceedings have already set a course for further deregulation.[352] Further, "what is less certain—and what will be—critical, is both where and how the FCC draws the line on consolidation," analyst Blair Levin commented.[353]

Levin contends that Powell recognizes the need for new rules to accommodate the new media world.[354] Yet, in its request for comments in the Notice for Proposed Rule Making, the FCC is questioned whether it has the authority to exercise public interest goals of diversity and competition. Public policy considerations, however, have been implicit in decisions regarding radio ownership since the Communications Act of 1934. Questions such of these demonstrate a potential bias towards further deregulation.

The FCC recently released twelve empirical studies examining the media marketplace, including how media ownership affects diversity, localism and competition. Artists, owners, record label executives, independent promoters and even consumers are encouraged to comment on this study as part of the third Biennial

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349. *Id.*

350. Boliek, *supra* note 341. In regard to ownership rules of broadcast properties, including television, newspaper, and radio stations.

351. *Id.*

352. *Id.* Blair Levin, a Legg-Mason analyst and former FCC staffer who tracks media states, "The direction of the proceeding is clear—greater deregulation of media ownership that will lead to greater consolidation and a dramatic restructuring of the marketplace.

353. *Id.*

354. Labaton, *supra* note 346. ("Powell has had a very clear point of view throughout the term at the commission, which is that a lot of these rules need to be looked at right away and most of them are no longer valid." He continued, "He [Powell] believes the media world has changed dramatically and needs a strong look").

Regulatory Review of Broadcast Ownership Rules, from which the FCC will develop ownership rules and policies. Chairman Michael Powell has taken extensive steps to understand the current media market place. Powell contends that this examination is the most comprehensive review ever initiated by the FCC.[355] Powell contends that the data collected will help develop sound public policy.[356] The Media Ownership Working Group, headed by Paul Gallant, will use the public comments in conjunction with the empirical studies to advance the FCC's "understanding of the key factual areas of media ownership policy."

As predicted, the FCC studies support further deregulation.[357] Specifically, the studies suggest an increase in outlets and a decrease in the average number of radio stations has not affected format diversity. Since 1960, the number of media outlets, radio stations, television stations, newspapers, cable systems, and DBS operators, have increased by 195%, and the number of independent owners have increased by 139%. Yet, the FCC found that the average number of radio station owners decreased.[358] In response to lack of diversity complaints, the FCC contends that the average number of formats has actually remained the same since 1996.[359] Despite an increase in advertising prices, studies find that national concentration does not appear to increase advertising prices; in

355. *Id.* ("This effort is the most comprehensive look at media ownership regulation ever undertaken by the FCC. As the courts have made clear, it is critical that the FCC has a solid factual base to support its media ownership rules ").

356. *Id.* ("Collectively, these studies represent an unprecedented data gathering effort to better understand market and consumer issues so that we may develop sound public policy").

357. *Id.* ("Mr. Powell has set up a special task force and commissioned a set of studies that many lawyers and experts expect will conclude that they are no longer necessary to promote diversity and competition. The studies are expected to be completed next month").

358. *FCC Studies*, available *at* www.fcc.gov (last visited Nov. 25, 2002) [hereinafter *The FCC Studies*]. Between 1996 and 2002, the average number of radio station owners in each market decreased from 13.5% to 9.9.

359. *Id.* During the same period, the average number of formats remained virtually unchanged (10.1 formats in 1996 vs. 10.2 in 2002).

fact, large national owners seem to decrease advertising rates in national and regional markets.[360] In 1996, the largest station owner in each market received an average of 35.6% of radio advertising revenue.[361] In 2002, the largest owner receives 46.8% of such revenue."[362]

Further, the FCC studies find that diversity in programming and format have changed only slightly since 1996. The most significant piece of evidence that the FCC may rely on for further deregulation is the finding that radio programming diversity increased slightly from 9.26 to 9.32, or 0.74% during 1996-2001.[363] Yet the study also shows a decrease of 2.4% in the diversity of songs within the same format across local markets and an "increase of 11.48% in the diversity of songs within the same format within each local market."[364] Moreover, the FCC's questionnaire noted a "debate" regarding the "relationship between consolidation and viewpoint and source diversity."[365] The Commission has historically held that multiple owners are more likely to provide "divergent viewpoints on controversial issues," which are "essential to democracy."[366] Yet, the Commission also has noted the contrary view that a single entity owning multiple stations in a market has "commercial incentive to air more diverse programming to appeal to all substantial interests."[367] Perhaps the most valuable input is from the consumers themselves. Yet it is highly doubtful that the average radio listener or concert-goer will expend extensive time and money to comply with the FCC's

360. *Id.*
361. *Id.*
362. *Id.*
363. *Id.*
364. The FCC Studies, *supra* note 358.
365. *Id.* Viewpoint diversity "ensures that the public has access to 'a wide range of diverse and antagonistic opinions and interpretations."
366. *Amendment of Sections 73.35, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations,* Second Report & Order, 50 FCC 2d 1046, 1074 (¶ 99) (1975), *available at* http://www.fcc.gov.Bureaus/Mass_Media/Notices/2001/fcc01329.txt.
367. 16 FCC Rcd 19861, 19877.

public comment requirements. The restrictions suggest that the only contributors could potentially be the radio stations themselves. Thus, these studies, although admirable, suggest that further deregulation of ownership limits is imminent despite public and industry outcry.

2. The Future of Music Coalition Study

In response to the FCC's third biennial review of broadcast ownership rules and a series of studies supporting further deregulation, the Future of Music Coalition[368] responded with its own 145-page comprehensive report detailing how the Telecom Act resulted in less competition, fewer viewpoints and less diversity in radio programming, and a loss of localism.[369] The study, entitled "Radio Deregulation: Has it Served Citizens and Musicians?," was filed at the FCC as a public comment.[370] The study serves as a reminder to those who enacted the Telecom Act that deregulation's original goals were competition and diversity in programming and viewpoints. The 1996 FCC Chair who led the Commission during the Telecom Act's passage stated:

We are fostering innovation and competition in radio . . . The Commission's goal in this proceeding is to further competition, just as we seek to promote competition in other communications industries we regulate. But in our broadcast ownership rules we also seek to promote diversity in programming and diversity in the viewpoints expressed on this powerful medium that so shapes our culture.[371]

368. DiCola and Thompson, *supra* note 6. The Future of Music Coalition is a Washington, DC-based not-for-profit organization consisting of members from the music, technology, public policy and intellectual property law communities. "The FMC seeks to educate media organizations, policymakers and the public about music/technology issues while bringing together diverse voices to develop creative solutions to challenges in this space."

369. *Id.* at 1.

370. *Id.* at 68. The Behavior Research Center, a private research firm, conducted 500 in-depth telephone interviews. The interviewees were chosen at random throughout the United States.

371. *Id.* FCC Chairmn Rdd Hundt, Speech entitled,"The Hard Road Ahead,"

The FMC study suggests that "deregulation has not met the aspiration and stated goals of Congress and the FCC. Susan Ness, a former FCC commissioner adds, "The unintended consequences [of the act] have changed irrecoverably the face of radio."[372] The study illustrates that the Telecom Act effectively reduced ownership and initiated cost-cutting methods utilized by radio stations, such as voicetracking and syndication, leading to a loss in localism and "bland and formulaic" radio, less competition, and less diversity.[373]

A single article devoted entirely to the FMC study would not sufficiently address the detailed findings in full. However, there are several aspects of the study that directly conflict with the recent FCC studies that are worth noting. In addition, considering that no other public comment has been filed on behalf of consumers and artists, this study could potentially act as the FCC's only mechanism to evaluate the opposing side of radio conglomerates such as Clear Channel. Considering the FCC's pro-deregulatory stance, it is unclear how much weight, if any, the FCC will afford the FMC study. The major findings support enactment of the Telecom Act.

The FMC findings criticize the Telecom Act's effect on consolidation. With two parent companies, Clear Channel and Viacom, controlling 42% and 45% of industry revenues, in addition to four firms controlling 70 % of the market share or greater, the concentration levels and industry revenues indicate that the market is controlled by a strong oligopoly.[374] "The stronger the oligopoly, the greater the potential harm to the public and to local businesses." In some instances, four firms control between 95 percent and 100 percent of the listeners.[375] Further, since four firms dominate over 50 percent of the audience share,

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(Dec. 26, 1996), *in* PATRICIA AUFDERHEIDE'S, COMMUNICATIONS POLICY AND THE PUBLIC INTEREST 289 (Guilford Press) (1999).

372. Boehlert, *Happy Channel*, *supra* note 27.

373. DiCola and Thompson, *supra* note 6, at 13-14.

374. *Id.* at 3, 34. The top four firms in terms of revenue are Clear Channel (over $3 billion), Viacom (over $2 billion), Cox and Etercom.

375. *Id.* at 34.

the oligopoly becomes the "gatekeeper" in determining what we hear on air.[376]

Although the FCC found an increase in format variety, thus inferring an increase in diversity, the FMC's study is critical of traditional vague notions of "format variety" and "programming variety." Format variety consists of the number of formats available in each geographic market.[377] The study contends that format variety is not equivalent to diversity.[378] Different formats may have similar playlists. For example, a Contemporary Hit Radio ("CHR")/Rhythmic format and an Urban format share over 76% of their respective playlists.[379] In effect, a Clear Channel Urban station, a Clear Channel CHR Pop station, a Clear Channel CHR/rhythmic and even a Clear Channel Rock station could potentially play Eminem's "Lose Yourself" simultaneously all in one market.[380] Further, this example does not account for instances in which "radio companies regularly operate two or more stations with the same format in the same geographic market."[381] Therefore, two Clear Channel stations in one market could have identical playlists. Although there may be an overall increase in

376. *Id.* at 39-40.

377. *Id.* at 4.

378. *Id.*

379. DiCola and Thompson, *supra* note, at 6.

380. *Id.* at 4; *see also* http://www.mmr.247.com/mmrweb/AllAccess/Charts.asp?format=h1R (last visited Nov. 25, 2002) For the week of November 18-24, Eminem's single, "Lose Yourself," received over 9,197 spins on 1,000 stations. Mediabase is a research service that tallies the number of spins each song receives and reports when and what radio stations add new songs to their playlists.; *see also* Jeff Leeds, title, L.A. TIMES, Oct. 23, 2002, Business, at 1. Five major record labels pay about $15 million a year for racking services. "Playlists have a domino effect on music promotion campaigns, record store retail orders, concert bookings and bonuses awarded to record label promotion executives." In an effort to earn more revenue and industry power, Clear Channel bought Mediabase in 1997. "Record executives say Clear Channel's aggressive push for Mediabase is the latest example of how the industry giant is using its size and reach to tap into the tens of millions of dollars spent on radio promotion by major record labels."

381. DiCola and Thompson, *supra* note, at 4.

formats, it certainly is not indicative of diversity of playlists.

The FMC study reports that commercial radio playlists keep approximately 40-60 songs in rotation at a time. The FMC asked respondents the following:

Many commercial radio stations today have a short playlists, which means they play a limited number of songs and repeat them often during the week. Other stations have a long playlist, which means they play a greater variety and have less repletion during the week. Which type of station do you prefer—those with a short or long playlist?

Over 78 percent of respondents surveyed said they prefer radio stations that have long playlists as opposed to short playlists.[382] Further, 84 percent of listeners under 30 favor long playlists.[383] In addition, listeners desire to hear a wider range of music that includes local musicians[384], and want longer playlists with more variety.[385]

The FMC also reported that format consolidation concerns consumers. Specifically, consolidation results in less competition and less innovation in playlists.[386] Format consolidation leads to "less diversity and less interest. This lack of innovation and diversity in playlists—what we call format homogeneity or "creeping sameness"—has become a reality. Format oligopolies reinforce creeping sameness, diminishing the quality of radio for consumers."[387] Despite the FMC's findings, stations such as Clear Channel insist that "diverse playlists would be a waste of time and money."[388] Radio programmers assume that serving the public

382. *Id.* at 76.

383. *Id.* Listeners under the age of 30 are a target demographic.

384. *Id.* A quarter of respondents said they hear too little of the music they like. Further, "38 percent said that local artists are underexposed on the radio."

385. *Id.*

386. *Id.* at 36.

387. DiCola and Thompson, *supra* note, at 36.

388. *Id.* at 78. Randy Michaels, former CEO of Clear Channel, states, "I think that putting stations in the hands of people who are committed to public service and who are top broadcasters is good for the public. When we were in the Mom-and-Pop era, half the radio stations were owned by people who were as interested in playing what they liked as opposed to really serving the public.

interest consists of supplying listeners with only the "hits." Steve Smith, Production Director/Imaging Director of Clear Channel, states:

Radio is categorized, and it ought to be. Only a slim number of people would like to hear Ja Rule, Rusted Root, Barry Manilow and Dwight Yoakam on the same radio station. If you are actually looking for a station that will play Norah Jones, B-Tribe, Ned Otter, etc., then look for your closest college radio station. Give them a good listen. I guarantee you that after 30 minutes of pure hell, you will switch back to a Clear Channel Radio station, because we play the hits.

On the other hand, one can argue that listening to Nelly's "Hot in Herre" every hour on the hour this past summer made the day at the beach barely tolerable. Playlist diversity and repetitiveness of music may have contributed to the 17 percent decrease in radio listening over the past 13 years.[389]

The FMC is the first comprehensive public opinion survey on radio in the past twenty years.[390] John Nichols, author and media scholar, notes,

The Future of Music Coalition has exposed to which concentration of ownership and rank commercialism has denied the democratic promise of radio. This is a breakthrough study that will be referenced for years to come as the document that quantified a growing sense of unease with what radio has become.[391]

The FCC should give considerable weight to the FMC study when determining future broadcasting policy. The study speaks on

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When you have professional management, who is focused on serving the listener, then of necessity we are obsessed with what the public wants, and we work every day to give them what they want." (citing Greg Kot, *Rocking Radio's World*, CHIC. TRIB., April 14, 2002).

389. *Id.* at 78. From "Don't Blame Satellite Radio for Lost Audience Share," *Radio and Records* website, September 16, 2002.

390. *Id.* at 68.

391. Future of Music Coalition Press Release, *Commercial Radio Station Ownership Consolidation Shown to Harm Artists and the Public, Says FMC Study*, Nov. 18, 2002, *at* http://www.futureofmusic.com/news/PRradiostudy.cfm.

behalf of consumers, artists and record labels angered by the Telecom Act's negative effects on the radio industry. The research illustrates that consolidation has unequivocally harmed radio in terms of less competition, fewer viewpoints, and less diversity in programming.[392] More importantly, the research demonstrates that the Act has not served the "diverse needs of American citizens." Enacting the Competition Act would direct the FCC to reaffirm its commitment serve the public interest.By Congress enacting the Competition Act, the FCC would reaffirm its commitment to serving the public interest.

3. Clear Channel's Ties to the Republican Party

Insiders suggest that losing the House in 1994 instigated the revival of media deregulation.[393] During the 1994 Republican revolution, Newt Gingrich and legislative leaders, began working on new media deregulation, which evolved into the Telecom Act.[394] With Republicans now controlling the House and Senate, in addition to President Bush and Powell traditionally favoring deregulation, new media deregulatory legislation will be presented, and will pass.[395]

Clear Channel's power to leverage into numerous entertainment industries, along with unprecedented domination in the radio markets often leaves critics wondering how and why its actions have not only been tolerated, but approved by the FTC for so long. Feingold contends that soft money originally bought the 1996 Telecommunications Act.[396] Yet analysts also contend that L.

392. Dicola and Thompson, *supra* note 6, at 5.

393. Boehlert, *Happy Channel*, *supra* note 27. Critics often blame Hillary Clinton's healthcare blunder for the 1994 Republican revolution. Within hours of losing the House, Gingrich already began working on deregulation legislation. Former FCC chairman Reed Hundt stated, "Losing the House in '94 was without question a seminal moment in the political history of the media."

394. *Id.*

395. *Id.*

396. 148 CONG. REC. S6252 (daily Ed. June 27, 2002) (statement of Sen. Feingold).

Lowry May's, Clear Channel's founder, strong political ties to the Republican Party and President Bush prevent the FCC from closely watching or punishing Clear Channel.[397] For instance, President Bush, while governor for Texas, appointed Mays to a state technology council in 1996.[398] Additionally, two years later, Mays contributed $51,000 to Bush's 1998 gubernatorial campaign.[399] L. Lowry Mays and president Mark Mays have given over $100,000 in soft money donations to the Republican party since 1999.[400] In addition, Mays lends a heavy hand in local San Antonio politics as well.[401] Further, many Clear Channel executives and companies, that work closely with the radio conglomerate, such as Eller Media, have also contributed significant amounts of money to the Republican party in the last six years.[402]

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397. Leeds, *An Empire, supra* note 58.

398. *Id.*

399. *Id.*

400. *Operator of Stations Pulling Dem Ads has Strong Ties to GOP, Bush*, THE COMMERCIAL APPEAL, June 3, 2001, at DS8. The Center for Responsive Politics, a Washington nonprofit research group based in Washington that tracks political donations, found that Clear Channel gave the Republican National Committee $80,000 on June 20, 2000. L. Lowry Mays contributed $8,950 on January 30 and $3,206 on January 18, and $2,500 on February 1, 2001. More specifically, Mays gave President Bush $1,000 on March 16, 1999 and another thousand on May 4, 2000. Mays' wife, Peggy, contributed $20,000 solely to Bush in addition to thousands given to the GOP. According to Jeff Leeds articles, Clear Channel contributed $106,000 to the RNC during the presidential election cycle. Mays and his wife, Peggy, donated $37,000 in addition to the party.

401. Sherry Sylvester, *Mayoral candidates vie for funds; Both leaders in the race have friends among San Antonio's movers and shakers*, SAN ANTONIO EXPRESS, Mar. 12, 2001, at 1B. Lowry Mays threw a fundraising party for mayor candidate Tim Bannwolf that raised $300,000.

402. *See generally* http://www.opensecrets.org/softmoney (last visited Nov. 25, 2002). According to opensecrets.org, an organization that discloses individual and corporate contributions to political candidates, Brian Becker, Clear Channel executive, on behalf of Clear Channel Worldwide and Clear Channel Entertainment, contributed $5,000 and $1,000 to Eller Media and Congressman Ken Bentsen (R-TX) respectively. In addition, executive Miles Wilkin contributed $200 to Eller Media. Exec John Norman contributed $348

These statistics illustrate that Clear Channel has transcended the political arena. Clear Channel executives have not only financially supported candidates, but the company has taken an active political role in its attempt to influence the legislature in favor of its business practices by establishing a political action committee ("PACs").[403] PACs would allow corporations to contribute up to $5,000 as well as finance fundraising and lobbying initiatives, a loophole for "soft money" contributions.[404] Politics may have also influenced recent Clear Channel programming decisions. Domination over the airwaves in both television and radio not only threatens the diversity of content, but also gives unlimited power to those controlling who gets heard. This proposition raises a constitutional question of access and free speech. In one instance, Clear Channel pulled an ad attacking Republicans for "failing to protect consumers from high gas prices."[405]

Most recently, Clear Channel appointed Andrew W. Levin as

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to Eller Media. Although Clear Channel Outdoor exec and Eller Media Vice-President, Paul Meyer, contributed $1,000 to democrat Senator, Harry Reid (D-NV), he also contributed $2,000 and $1,000 to Eller Media and the Outdoor Advertising Association of American. In addition, Karl Eller, exec of Eller Media, contributed over $65,000 to the Republican National Committee in 2001. In 2002 alone, Clear Channel donated a total of $94,370 in soft money, including $69,370 to Republicans and $25,000 to Democrats. In 2000, Clear Channel contributed $82,850, all to Republicans. In 2002, Eller Media contributed $65,000 in soft money, all to Republicans. Ironically, SFX Broadcasting and Entertainment, prior to being bought out by Clear Channel, contributed $124,000 in soft money in 2000, all to Democrats. The company, on its own, has not contributed any soft money since 2000.

403. Roberts, *PAC-ing a Punch*, *supra* note 308. (quoting Founder Mays as stating, "We have seen the need to have influence and impact on legislative issues in Washington, as well as at state and local levels. This becomes important particularly as Clear Channel grows. It is critical to tell our story and defend our positions").

404. *Id.*

405. *Operator of Stations*, *supra* note 400. The ad, paid for by the Democratic National Committee and the Democratic Congressional Campaign Committee, attacked U.S. Rep. Chip Pickering (R-Miss) of not responding to the raising gas prices. Five Mississippi stations pulled the ads, and others were considering not showing the ad "because they are false."

Senior Vice President—Government Relations to act as its chief lobbyist.[406] With Clear Channel's past ties to the Republican Party, assigning Levin, a Democrat, may come as a surprise. For the past seven years, Levin served as the chief telecommunications advisor to Ranking Member John D. Dingell (D-MI) and counsel to Democratic members of the House Committee on Energy and Commerce.[407] "Clear Channel is dedicated to working closely with Washington lawmakers to achieve the best policies both for the American public and industries in which we operate,"[408] founder and CEO Mays stated. "We are thrilled to have Andy on board, given his in-depth knowledge of our industry and the tremendous respect that he has accrued with Members of Congress on both sides of the aisle."[409] If anything, Clear Channel strategically hired Levin for his history of effectively winning support from both Republicans and Democrats.[410] Levin stated, "I don't think there's been anyone in Washington to present facts that would dispel the myths about how Clear Channel operates its business. That's what I'll be doing."[411] His presence in Washington will be particularly important now since the FCC is currently reviewing broadcast ownership policies.

V. CONCLUSION

Legislators expected the Telecom Act to change radio. But no one predicted, or even fathomed, that the relaxation of ownership rules would place democracy in the hands of one company. Clear Channel exemplifies everything in the radio and concert industries that has gone wrong since the Telecom Act. A few network of

406. See Clear Channel press releases *at* www.clearchannel.com (last visited Nov. 25, 2002); see also Brooks Boliek, *Levin lobbies for Clear Channel*, THE HOLLYWOOD REP., Nov. 14, 2002.

407. *Id.*

408. *Id.*

409. *Id.*

410. Radio Crow's Radio & TV News Information, *at* http://www.radiocrow.com (last visited Nov. 25, 2002).

411. *Id.*

owners have promulgated a system of rampant independent promotion, illegal payola, syndication and voicetracking—taken together these practices threaten diversity, localism and the free exchange of ideas essential to democracy. As exemplified in the recent FMC study, consumers no longer have the patience to listen to radio when it fashions homogenized and repetitive, short playlists. Perhaps what consumers most miss are the days of judging artists by their quality and merit, and not by the size of their pocketbooks.[412] Despite FCC and DOJ investigations, it appears there is no end in sight to Clear Channel's takeover of the radio and concert industries, and more recently television, cable and broadband industries.[413] Mark Wahl, Project Director for the Center for Digital Democracy, states:

This [FMC] report is a wake-up call, for the same FCC policies responsible for radio's decline into homogenous oligopoly are now being imposed upon the high-speed Internet. If allowed to proceed, this radical deregulatory agenda will result in the Clear Channelization of broadband, threatening online openness and competition, reducing diversity of expression and inhibiting democracy.[414]

Although one could embrace Clear Channel's entrepreneurial vigor, it is time for the FCC, DOJ and the legislature to enact

412. Boehlert, *Save us from ourselves!*, *supra* note 128.

413. Alex Jones, *The Costs of Consolidation*, N.Y. TIMES, Feb. 28, 2002, at A27. Recent court decisions have further relaxed limits on television and cable-system ownership. Relaxation will encourage a frenzy of acquisitions merging local newspapers, television stations and radio stations. In 1999, FCC allowed networks to own two stations in the same city. Although consumers still have access to the news through the internet, cable programming and alternative local newspapers, a further concentration in media power has insiders speculating a foreclosure in competition. Less diversity in programming and stifled voices threaten overall quality programming. "Too much media concentration in any town is inherently unhealthy, like relying on a single dominant industry or investing heavily in only one stock. Excessive dependence on a single source of news can put at risk the free exchange of ideas essential to democracy." With the imminent future of further deregulation, Clear Channel could dominate television, radio and newspapers.

414. FMC Study, *supra* note 391.

restraints in order for competition and a diversity of voices to foster.

Senator Feingold's Competition in Radio and Concert Industries Act of 2002 is one such way to restore integrity, competition and diversity in the radio and concert industries. The Telecom Act does not sufficiently function within the confines of antitrust legislation, and an imminent, further lax in ownership rules would completely undermine both the Clayton and Sherman Acts. The Competition Act would reconcile both the Telecom Act and antitrust legislation. Although the Competition Act is somewhat ambiguous and broad, potentially making it difficult to apply, it provides a comprehensive framework that balances the interests of big business and consumers.

In an attempt to bring integrity back to the radio, the Act reaffirms the public policy goals of the Communications Act of 1934—diversity and localism. This legislation is desperately needed to combat the current evils plaguing the radio and concert industries. However, considering the FCC's history and pro-deregulatory outlook, in addition to Clear Channel's ties to the Republican party, this legislation will have a tough time passing. Yet Feingold asserts that "If we can't get it this year, I'll be working on this for years to come."[415] Until then, consumers will be the guinea pigs in a Clear Channel utopia—where one channel, one voice and one company determines what we hear, what we see and how we think. Is there an end in sight?

Sarah Greene

415. Holland, *Feingold Introduces Competition Bill*, *supra* note 3.