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# Time to Quite Paying the Payola Piper: Why Music Industry Abuse Demands a Complete System Overhaul

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# TIME TO QUIT PAYING THE PAYOLA PIPER: WHY MUSIC INDUSTRY ABUSE DEMANDS A COMPLETE SYSTEM OVERHAUL

“They [record labels] created the . . . problem, now you want us [artists] to put a target on our backs? . . . The fear . . . is that musicians who complain about indie promotion will be kept off the radio. Without commercial airplay it’s virtually impossible to sustain a career.’”<sup>1</sup>

## I. INTRODUCTION

Stars are not born—they are sculpted, manufactured, and produced. But for most record labels desperate to ensure radio airtime for their recording artists, “stardom” in the music industry comes with a colossal price tag.<sup>2</sup> While record labels may be willing to pay radio stations to attain artist airplay, it is federal payola laws that stand in their way.<sup>3</sup> Although these payola laws were originally designed to prevent the undisclosed payment of money or other consideration in exchange for guaranteed radio airplay,<sup>4</sup> both record labels and radio stations are finding new and potentially destructive ways to circumvent the laws’ requirements.<sup>5</sup> Gone are the days when simple promises of “cocaine and prostitutes”<sup>6</sup> could entice radio station programmers to play a particular piece of music.<sup>7</sup> Today, pay-for-play thrives in a \$12 billion a year<sup>8</sup>

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1. 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](http://www.salon.com/ent/feature/2002/03/13/indie_promotion/index.html?x) [hereinafter Boehlert, *Save Us from Ourselves*].

2. See discussion *infra* Part III.A.

3. 47 U.S.C. § 317 (1994); 47 U.S.C. § 508 (1994) (requiring disclosure of payments for broadcast).

4. *Id.*

5. See discussion *infra* Part III.A–B.

6. Henry Weinstein, *U.S. Indicts 3 on Music ‘Payola,’ Fraud Charges*, L.A. TIMES, Dec. 1, 1989, at A1.

7. Eric Boehlert, *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*] (explaining “[d]rugs and hookers are out; detailed invoices are in”).

8. *Id.*

business where big money talks and everyone seems willing to listen.<sup>9</sup> Although the practice of payment for broadcast may seem inconceivable to listeners, the reality of the high stakes music industry is that songs must receive airplay if both the recording artist and the record label are to survive.<sup>10</sup>

Despite laws prohibiting undisclosed payment for broadcast, the legal loopholes within these laws have effectively created a generation of payola more dangerous than what the laws sought to prevent.<sup>11</sup> This Comment addresses the need for the restructuring of federal payola laws to better accommodate the demands of a more efficient and “honest”<sup>12</sup> music industry. Part II presents a brief background on the origins of payola laws and provides a basic understanding of their application. Part III examines the current music landscape, including the concept of independent promotion, while addressing how this landscape has been hindered rather than helped by current payola laws. Part IV further examines the laws’ deficiencies and proposes an innovative solution to the payola problem. Specifically, the proposed solution would allow payment for broadcast to be partially deregulated in a manner that would eliminate the inefficiencies of opportunistic behavior by independent promoters while providing an organized exchange to determine hit record potential.<sup>13</sup> Part V concludes that payola laws must be updated to better reflect the economic realities of today’s music industry.

## II. BACKGROUND

The term “payola,” originally coined by the trade publication *Variety* in 1938,<sup>14</sup> refers to the music industry practice of exchanging money or other valuable consideration for increased exposure or promotion of a particular piece of music.<sup>15</sup> Today, the term transcends mere description of the pay-for-play system in which it was formed to include practices of

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9. See discussion *infra* Part III.A–B.

10. Carlye Adler, *Backstage Brawl*, FORTUNE SMALL BUSINESS, Mar. 4, 2002, at 170[C], LEXIS, News, News Group File, All. “For a band, airplay is like oxygen—without it, you die.” *Id.*

11. See discussion *infra* Part III.A–B.

12. The use of the term “honest” to describe the music industry may appear to be somewhat of an oxymoron. For the purposes of this Comment, use of the term “honest” will suggest the goal of creating a music community that is not plagued with the unintended consequences of payola scandal.

13. See discussion *infra* Part IV.B.

14. KERRY SEGRAVE, *PAYOLA IN THE MUSIC INDUSTRY: A HISTORY, 1880–1991* 1 (1994).

15. *Id.*

bribery and corruption in almost any industry.<sup>16</sup> Although the most famous public airing of payola arose in the late 1950s and 1960s with charges of rock and roll corrupting the music community,<sup>17</sup> payola in the music business has existed in one form or another since the industry's inception.<sup>18</sup> The scandals of the 1950s and 1960s prompted Congress and the Federal Communications Commission ("FCC") to conduct a probe into the activities of many disc jockeys and their radio stations.<sup>19</sup> Despite subsequent federal laws passed to rid the industry of the so-called "evils of payola," these attempts have proven unsuccessful.<sup>20</sup> Although the format has undoubtedly changed over the past century, "payola has remained as constant as the music industry itself."<sup>21</sup>

The pressures that have fueled payola for over a century remain true today—more songs are produced than can be heard by the listening public.<sup>22</sup> Finite airtime in turn generates competition among record companies that must secure airtime for their artists in order to turn a profit by selling more records.<sup>23</sup> Although the practice of payola has traditionally dominated "Top 40" and rock radio,<sup>24</sup> the increasing pressure<sup>25</sup> to sell

16. *Id.* at vii. For instance, the term "payola" has often been used in the political context: "In the meantime, one can only hope the scads of dough being directed to the various campaigns doesn't amount to payola, or as mayoral candidate Allan Hunter calls it, 'favour funding.'" Bill Kaufmann, *Fringe Mayoralty Candidates Dilute Meaningful Debate*, CALGARYSUN.COM (Oct. 10, 2001), at <http://www.calgarysun.com/cgi-bin/niveau2.cgi?s=societe2p=48828.html&a=1>.

17. See SEGRAVE, *supra* note 14, at 109–11. The public really started to take notice of the prevalence of payola in the music industry after investigations of popular radio deejays Dick Clark and Alan Freed began to surface. *Id.* at 109. Although Dick Clark was later exonerated, pioneer rock deejay Alan Freed was fired for taking payments from record companies. *Id.* at 110.

18. *Id.* at vii. See generally R. H. Coase, *Payola in Radio and Television Broadcasting*, 22 J.L. & ECON. 269 (1979) (providing a detailed account of payola throughout the past century).

19. H.R. REP. NO. 86-1800 (1960), *reprinted in* 1960 U.S.C.C.A.N. 3516.

20. See generally SEGRAVE, *supra* note 14 (detailing attempts throughout the past century to rid the music industry of payola).

21. *Id.* at ix.

22. Jeff 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.").

23. See *supra* note 22 and accompanying text; see also Chuck Philips, *Radio Pushes Bands for Freebies*, L.A. TIMES, Nov. 5, 1998, at A1 [hereinafter Philips, *Radio Pushes Bands for Freebies*] (explaining that for record labels, radio is the most powerful tool in selling albums because many people buy albums based solely on what they hear on the radio).

24. See Eric Boehlert, *Payola City*, SALON.COM (July, 24, 2001), at [http://www.salon.com/ent/music/feature/2001/07/24/urban\\_radio/print.html](http://www.salon.com/ent/music/feature/2001/07/24/urban_radio/print.html) [hereinafter Boehlert, *Payola City*].

25. Eric Boehlert, *Fighting Pay-for-Play*, SALON.COM (Apr. 3, 2001), at <http://www.salon.com/ent/music/feature/2001/04/03/payola2/print.html> [hereinafter Boehlert, *Fighting Pay-for-Play*]. "[T]he bottom line is the music business is wrapped in rampant insecurity and revolves around one simple, short-term question: Where is the next hit coming from? Period. And the strain internally at record companies to make those hits happen is

records has caused both urban<sup>26</sup> and country radio to take the latest payola plunge.<sup>27</sup> And while “[s]teady touring, an Internet presence, glowing press and MTV” may help to generate CD sales, “mainstream radio play is still the engine that drives the music business.”<sup>28</sup> While most other products or services are able to advertise through other media, “such ads are rare for songs.”<sup>29</sup> Rather, the popular music industry must rely heavily on songs—a combination of entertainment and advertisement—to push their message to consumers.<sup>30</sup>

### A. Payola's Origins

With the passage of the Communications Act of 1934,<sup>31</sup> the federal government assumed the charge of regulating wire and radio communications throughout the country.<sup>32</sup> The purpose of the Act was “to make available . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges.”<sup>33</sup> Authority for effectuating the stated purpose of the Act was centralized in the newly created FCC.<sup>34</sup>

Despite the FCC's power to regulate radio station airwaves, it was the United States House of Representatives that brought the problems of payola in the music industry to light. The House Special Subcommittee on Legislative Oversight initiated the government's formal investigation into

immense.” *Id.*

26. Boehlert, *Payola City*, *supra* note 24; Jason Bracelin, *Foul Play for Airplay?*, CLEVELAND SCENE (Jan. 3, 2002), at <http://www.clevescene.com/issues/2002-01-03/soundbites.html/1/index.html>. “Where urban stations differ from, say, those of the rock variety is that, for one thing, it generally costs more to get on urban stations. . . . Urban radio is so competitive that it takes that much more money to grease the wheels.” *Id.*

27. Boehlert, *Fighting Pay-for-Play*, *supra* note 25. “Now, after years of fighting the exclusive, pay-for-play approach, country radio may be the final format to succumb.” *Id.*

28. Boehlert, *Pay for Play*, *supra* note 7.

29. SEGRAVE, *supra* note 14, at x.

30. *Id.*

Payola is also crucial to the industry as it is so dependent on radio airplay, and now to a lesser extent on music video exposure. [If a food manufacturer] could not buy shelf space it could still mount a big ad campaign in magazines, billboards, television and so on. Rarely does the music industry do anything like that, certainly not for an unknown artist with a first release. Efforts are geared almost exclusively to radio exposure. A record must be played and heard before it is bought.

*Id.* at 221.

31. Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064 (codified at 47 U.S.C. §§ 151-573 (1994 & Supp. V 1999)).

32. 47 U.S.C. § 151.

33. *Id.*

34. *Id.*

payola in November of 1959.<sup>35</sup> Coming off of a well-publicized investigation into the fixing of television quiz shows,<sup>36</sup> the committee decided to turn its attention to what was perceived by many as the “rampant practice” of payola in the music industry.<sup>37</sup> The probe, focusing primarily on small independent record labels, disc jockeys, and “rock and roll” music, revealed numerous instances of tax evasion, bribes to disc jockeys, and other outside influences used to persuade radio station programming decisions.<sup>38</sup>

As a result of the subcommittee’s findings, Congress amended the Communications Act of 1934 by altering an existing payola provision and adding a new section.<sup>39</sup> Prior to amendment, section 317 regulated payments received by radio stations in exchange for the broadcast of certain materials, yet it did not address payments made to other recipients such as disc jockeys.<sup>40</sup> On September 13, 1960, nearly one year after formal investigations began, the Communications Act Amendments of 1960 were signed into law.<sup>41</sup>

The most substantial restriction on payola is found within the disclosure requirements of section 317 of the Communications Act and the FCC’s own parallel requirements in 47 C.F.R. § 73.1212.<sup>42</sup> Pursuant to section 317, any radio station that has received consideration for broadcasting certain material must disclose this fact along with the identity of the person furnishing such consideration at the time of broadcast.<sup>43</sup> With the addition of section 508, an employee of a radio station that accepts money or other valuable consideration, or any person who willingly supplies money or other consideration to an employee of a radio station for the broadcast of any particular piece of programming must disclose this

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35. H.R. REP. NO. 86-1800, at 15–18 (1960); SEGRAVE, *supra* note 14, at 100.

36. H.R. REP. NO. 86-1800, at 18; SEGRAVE, *supra* note 14, at 100. *See generally* QUIZ SHOW (Wildwood Enterprises/Baltimore Pictures 1994) (providing an interesting perspective on the quiz show scandals of the late 1950s).

37. H.R. REP. NO. 86-1800, at 18–19; SEGRAVE, *supra* note 14, at 100.

38. SEGRAVE, *supra* note 14, at 119, 120–58 (giving detailed accounts of the payola probe in the music industry).

39. H.R. REP. NO. 86-1800, at 1–2.

40. *Id.* at 20. “It became clear that the Communications Act of 1934, in placing responsibility solely on licensees, was inadequate. Since all the popular big-money programs were broadcast via national hookups, the individual licensees had no practical control over the shows or their production.” *Id.* at 26.

41. Communications Act Amendments of 1960, Pub. L. No. 86-752, 74 Stat. 889 (codified as amended at 47 U.S.C. § 317 (1994)).

42. 47 C.F.R. § 73.1212 (1999).

43. 47 U.S.C. § 317.

fact to the station.<sup>44</sup> Section 317 similarly requires that radio stations exercise reasonable diligence to ensure that this statutory duty is properly met.<sup>45</sup> Record label or radio station employees who violate the disclosure requirements of section 508 may be subject to criminal penalties of up to one year in jail and fines of up to \$10,000.<sup>46</sup>

The 1960 Amendments, though purporting to regulate payola, did not actually outlaw its practice.<sup>47</sup> Thus, a deejay or station programmer can take money from a record label to push its song so long as it is announced to the listener at the time of broadcast.<sup>48</sup> Although technically required, these disclosures are rarely made.<sup>49</sup> Most stations are unwilling to distract the listener by peppering their programming with “paid for by” announcements, nor are they willing to relinquish the image of impartiality in programming decision-making.<sup>50</sup> To many, the disclosure provisions of section 317 and the similar FCC disclosure requirements found in § 73.1212,<sup>51</sup> were a “knee-jerk reaction”<sup>52</sup> to appease critics rather than a true effort to stamp out payola in the music industry.<sup>53</sup> As a result, payola, as prevalent today as when Congress first outlawed it in 1960,<sup>54</sup> has simply taken on new and innovative forms.<sup>55</sup>

44. *Id.* § 508(a) (1994).

45. *Id.* § 317(c). There has, however, been wide-ranging debate as to what constitutes reasonable diligence. *Loveday v. FCC*, 707 F.2d 1443, 1449 (D.C. Cir. 1983) (holding that “[a] duty to undertake an arduous investigation ought not casually be assigned to broadcasters”).

46. 47 U.S.C. § 508(g).

47. *Id.* §§ 317, 508; Frank Saxe & Jeff Silberman, *FCC Fines Radio over Adams Deal*, *BILLBOARD*, Oct. 28, 2000, at 87 (explaining “payola is not accepting some kind of compensation for airing something; rather payola is the failure to disclose it”).

48. 47 U.S.C. § 317.

49. *See* Boehlert, *Pay for Play*, *supra* note 7 (explaining that most radio stations choose not to make such disclosures as it unduly interferes with the flow of the broadcast).

50. *Id.* 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.” *Id.*

51. 47 C.F.R. § 73.1212 (1999).

52. SEGRAVE, *supra* note 14, at 141.

53. *Id.* Other commentators criticized the congressional payola inquiry in 1960 by noting: “No attempt was made to understand the phenomenon under consideration, to enquire what would happen if the proposed legislation was passed, or to consider, if payola had adverse consequences, whether there were alternative ways of dealing with it.” Coase, *supra* note 18, at 306.

54. *See* SEGRAVE, *supra* note 14, at 195–221 (examining payola abuses of the 1980s despite the presence of federal regulation).

55. *See* discussion *infra* Part III.A–B.

### B. FCC Sponsorship Requirements

The FCC may exercise its discretion to make factual findings to determine if the alleged actions violate sections 317 and 508 only once a formal complaint is filed.<sup>56</sup> If a violation is found, the FCC must determine what penalty is warranted, then turn the issue over to the Department of Justice for enforcement.<sup>57</sup> Violators may be subject to monetary sanctions<sup>58</sup> or nonrenewal of station licenses.<sup>59</sup> The FCC's determination of whether to conduct an investigation turns on two preliminary issues: (1) whether payment for broadcast has actually occurred; and (2) if so, whether there was a disclosure accompanying the material that was sufficient to immunize it.<sup>60</sup>

Explicit exchanges of consideration for the inclusion of matter in a radio program require disclosure even if payment is made to a third party.<sup>61</sup> In *In re General Media Associates, Inc.*,<sup>62</sup> where a hidden payment was made to a third party rather than directly to a broadcaster, the FCC nevertheless required an appropriate sponsorship identification.<sup>63</sup> The FCC reasoned that "[h]ad the consideration for the inclusion of broadcast matter been received by the radio stations . . . instead of by General Media they would have been required to make an appropriate sponsorship identification pursuant to section 317(a)(1) of the Communications Act."<sup>64</sup>

Even exchanges that involve nominal amounts of consideration may require disclosure. In *In re KMAP*,<sup>65</sup> where a listener sent nominal amounts of money to a station disc jockey to ensure the airing of a dedication song,

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56. *Southeast Fla. Broad. Ltd. P'ship v. FCC*, No. 90-1482, 1991 U.S. App. LEXIS 26581, at \*1, \*7 (D.C. Cir. 1991).

57. Commission Warns Licensees About Payola and Undisclosed Promotion, Public Notice, 4 F.C.C.R. 7708, 7709 (May 18, 1988); see, e.g., *United States v. Vega*, 447 F.2d 698 (2d Cir. 1971).

58. 47 U.S.C. § 503 (1994); Commission Warns Licensees About Payola and Undisclosed Promotion, Public Notice, 4 F.C.C.R. 7708, 7709 (May 18, 1988); see, e.g., *In re KMAP, Inc.*, 44 F.C.C.2d 971, 974-75 (1974).

59. See *Southeast Fla. Broad.*, 1991 U.S. App. LEXIS 26581, at \*6-\*7. The Court of Appeals upheld the FCC ruling: "The FCC has discretion to create its own standards for renewal expectancy as long as it engages in reasoned decisionmaking." *Id.* at \*7. While the FCC possesses the discretion to deny renewal expectancy credits to existing radio stations, there is little uniformity or oversight in their decision to do so. *Id.*

60. See 47 C.F.R. § 73.1212 (1999).

61. *In re Gen. Media Assocs., Inc.*, 3 F.C.C.2d 326, 327 (1966).

62. *Id.*

63. *Id.* at 327.

64. *Id.*

65. 44 F.C.C.2d 971, 974-75 (1974).



the FCC determined a payola violation had occurred.<sup>66</sup> According to the FCC, the language of the Act clearly includes all matter for which payment is made, such that the benefit derived by the purchaser of the broadcast time is not the determinative factor in whether an appropriate announcement must be made.<sup>67</sup> Thus, the FCC's focus appears to be on whether in fact payment has occurred rather than on the actual value of the payment.<sup>68</sup>

In the absence of an explicit agreement, the FCC nevertheless requires disclosure if an activity was intended to induce or has the practical effect of inducing broadcast.<sup>69</sup> Radio station promotions such as record hops, door prizes, or live entertainment supplied by the record label that have the effect of influencing programming decisions must also be accompanied by a proper disclosure.<sup>70</sup> Additionally, the common practice of supplying radio stations with free records, even without an explicit agreement for broadcast, must also be disclosed.<sup>71</sup> Thus, while considering the parties intent, the FCC conducts a fact-intensive investigation to determine whether the exchange was an innocent business transaction or an

66. *Id.* On rehearing, the FCC affirmed the original decision, declaring:

Receipt of consideration by the station, directly or indirectly, is a necessary element to trigger the requirements of Section 317(a) of the Act and [§ 73.1212]. In general, we believe a practice of a licensee permitting its announcers to keep money sent by listeners constitutes payment to the announcers in lieu of additional salary, wages or bonuses, and constitutes indirect consideration . . . .

*Id.* at 975. *But see In re Applications of Kaye-Smith Enters.*, 71 F.C.C.2d 1402, 1408 (1979) (holding that nominal amounts of consideration did not trigger payola disclosure requirements).

67. Broadcast Material Sponsorship Identification, 25 Fed. Reg. 2406, 2406 (Fed. Communications Comm'n Mar. 16, 1960) [hereinafter Sponsorship Identification].

68. *Id.*

69. *Id.* at 2406-07.

[R]eceipt of any records by a station which are intended by the supplier to be, or have the practical effect of being an inducement to play those particular records or any other records on the air, and the broadcast of such records, requires an appropriate announcement pursuant to section 317.

*Id.*

70. *Id.* at 2407. "Although ostensibly it may appear that money, services or other valuable consideration is being provided gratuitously . . . the accompanying announcement shall clearly state that such consideration is being provided . . . ." *Id.*

71. *Id.* The 1960 Amendment did, however, permit record labels to supply records so long as the number sent was not unreasonable:

No announcement is required unless the supplier furnished more copies of a particular recording than are needed for broadcast purposes. Thus, should the record supplier furnish 50 or 100 copies of the same release, with an agreement by the station, express or implied, that the record will be used on a broadcast, an announcement would be required because consideration beyond the matter used on the broadcast was received.

H.R. REP. NO. 86-1800, at 20 (1960).

improper inducement.<sup>72</sup>

The FCC's sponsorship identification rules found in § 73.1212 essentially mirror section 317, although § 73.1212 adds more specific disclosure requirements. The FCC rule provides that payment for broadcast disclosures must specifically state that the material has been "sponsored, paid for, or furnished, either in whole or in part, and by whom or on whose behalf such consideration was supplied."<sup>73</sup> In earlier cases, the FCC indicated that the exact wording of the identification should be left to the station's discretion so long as the disclosure conveyed to the listeners that the program had been paid for by the sponsor.<sup>74</sup> The disclosure requirements were later refined so that "mere mention of the name of a sponsor" was no longer adequate.<sup>75</sup> Although the language of § 73.1212 clearly dictates the exact wording for sponsorship disclosure, the FCC has nevertheless declared "the public interest would be better served by continuance of our policy of dealing with the subject on a case-by-case basis."<sup>76</sup> The FCC's case-by-case assessment of potential payola violations, however, has resulted in enforcement measures that have been inconsistent at best.<sup>77</sup>

In recent years, the FCC's enforcement of payola violations has been considerably lax.<sup>78</sup> This reduced enforcement may be a result of numerous factors, including the FCC's inability to take on large radio conglomerates that currently possess powerful political influence,<sup>79</sup> unwillingness to investigate in the absence of a formal complaint,<sup>80</sup> or perhaps lack of real

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72. Sponsorship Identification, *supra* note 67, at 2407.

73. 47 C.F.R. § 73.1212 (1999).

74. *In re* NBC, 27 F.C.C.2d 75, 75 (1970).

75. *In re* Midwest Radio-Television, Inc., 49 F.C.C.2d 512, 515 (1974).

76. *In re* Termination of Plugola Rulemaking and Affirmation of Disclosure Requirement, 76 F.C.C.2d 227, 228 (1980).

77. For instance, in *In re Gen. Media Assocs.*, 3 F.C.C.2d at 327, the FCC declared that even nominal amounts of consideration required disclosure, whereas in *In re Applications of Kaye-Smith Enters.*, 71 F.C.C.2d at 1408, nominal amounts of consideration did not trigger payola disclosure requirements.

78. See Chuck Philips, *Clear Channel Fined Just \$8,000 by FCC for Payola Violation*, L.A. TIMES, Oct. 20, 2000, at C1 [hereinafter *Clear Channel Fined*].

79. *Id.*

80. Brooks Boliek, *Berman Chides Clear Channel*, HOLLYWOOD REP., Jan. 23, 2002, at 3; see also *Southeast Fla. Broad.*, 1991 U.S. App. LEXIS, at \*1.

But the FCC acts only if a formal complaint is filed that someone at a station is receiving illegal payments. Since the new pay-for-play payola has become a profitable part of the day-to-day business at nearly every pop music station in America, who's going to complain?

Boehlert, *Fighting Pay-for-Play*, *supra* note 25.

desire or manpower to enforce the laws.<sup>81</sup> Regardless of the rationale, because the FCC tends to impose weak punishments for payola violations, the music industry has continued to disregard the laws' requirements because it remains economically advantageous to do so. For example, in 2000, payola violations committed by Clear Channel Communications, Inc. ("Clear Channel"), the nation's largest radio conglomerate, resulted in the imposition of a mere \$8,000 fine.<sup>82</sup> Such an inconsequential fine does little to deter radio conglomerates such as Clear Channel—with gross revenue exceeding \$7.9 billion<sup>83</sup>—from testing the bounds of payola laws in the future.<sup>84</sup> Although violation technically carries with it a possibility of monetary sanctions and license nonrenewal, because of inconsistent enforcement, violation is a gamble the industry is willing to take.<sup>85</sup>

### C. *The Impact of the Telecommunications Act of 1996*

The primary purpose of the Telecommunications Act of 1996 was to "promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."<sup>86</sup> The Act was designed to deregulate broadcast ownership by directing the FCC to modify its regulations of AM and FM broadcast stations.<sup>87</sup> Prior to the Act, persons or entities were unable to own no more than four radio stations within any given commercial area.<sup>88</sup> The main impetus behind these ownership rules was "to keep [radio] ownership as

81. On the issue of whether FCC officials really cared to stringently enforce federal payola laws, John Conyers, Jr., a ranking Democrat from Michigan on the House Judiciary Committee, replied, "The environment for enforcement is not alive in America anymore. There seems to be a new environment now, one that says unless you are a flagrant, notorious violator, no one will take you to task anymore." Chuck Philips, *Conyers to Press for Tougher Enforcement of Laws on Payola*, L.A. TIMES, Jan. 7, 2002, at C1 [hereinafter Philips, *Conyers to Press*].

[S]ome wonder how the current system, which revolves around federally licensed airwaves, has avoided close regulatory examination. "The Justice Department has never stuck its nose in this far enough . . . I don't know what exactly will trip the [Department of Justice's] trigger if it hasn't already been tripped. There are certainly enough smatterings of improprieties in this ordeal."

Boehlert, *Fighting Pay-for-Play*, *supra* note 25 (alteration in original).

82. *Clear Channel Fined*, *supra* note 78. The \$8,000 fine was imposed on Clear Channel for payola violations in connection with the guaranteed airplay of a Brian Adams' song in exchange for free concert appearances. *Id.*

83. Adler, *supra* note 10.

84. *Clear Channel Fined*, *supra* note 78.

85. See discussion *infra* Part III.

86. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 56 (1996).

87. See *id.* § 202(a)-(b), 110 Stat. at 110.

88. See *id.*; 47 C.F.R. § 73.3555(a)(1) (1995).

diverse as possible and keep the stations' focus as local as possible."<sup>89</sup> The new regulations, however, set forth the number of stations an entity may own, but adjusted that number based on the size of the applicable market.<sup>90</sup> Thus, "in a radio market with 45 or more commercial radio stations, a party may own, operate, or control up to 8 commercial radio stations."<sup>91</sup> Additionally, the FCC may "permit a person or entity to own, operate, or control, or have a cognizable interest in, radio broadcast stations if the Commission determines that such ownership, operation, control, or interest will result in an increase in the number of radio broadcast stations in operation."<sup>92</sup> The effect of this deregulation is that ownership rules are now virtually nonexistent, thereby changing the dynamic of station ownership by concentrating the power in fewer hands.<sup>93</sup>

When Congress increased the number of radio stations that any given entity could own, many companies capitalized on this by purchasing numerous radio stations.<sup>94</sup> For example, Clear Channel merged with AMFM, Inc. to form the world's largest radio conglomerate, with more than 1,200 radio stations in the United States alone.<sup>95</sup> Such consolidation essentially redefined the environment in which record companies and radio stations are now forced to operate.<sup>96</sup> Radio stations "gain leverage in

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89. Eric Boehlert, *Radio's Big Bully*, SALON.COM (Apr. 30, 2001), at [http://www.salon.com/ent/feature/2001/04/30/clear\\_channel/index.html](http://www.salon.com/ent/feature/2001/04/30/clear_channel/index.html) [hereinafter Boehlert, *Radio's Big Bully*].

90. Telecommunications Act of 1996 § 202(b), 110 Stat. at 110.

91. *Id.* § 202(b)(1)(A).

92. *Id.* § 202(b)(2), 110 Stat. at 110–11.

93. See Boehlert, *Radio's Big Bully*, *supra* note 89 (explaining "just a handful of companies control radio in the 100 largest American markets").

94. See *id.*

95. Michael Roberts, *Taking on the Empire*, DENVER WESTWORD (Aug. 23, 2001), at <http://www.westword.com/issues/2001-08-23/feature2.html/1/index.html> [hereinafter *Taking on the Empire*]. Clear Channel currently owns stations in 247 of the nation's 250 largest radio markets, dominates Top 40 radio formatting, and controls sixty percent of all rock radio. Boehlert, *Radio's Big Bully*, *supra* note 89.

[L]ast year, the company spent \$4.4 billion to purchase SFX Entertainment, the nation's dominant concert venue owner and touring promoter. Clear Channel also owns a radio research company, a format consultancy, regional radio news networks, an airplay monitoring system, syndicated programming, radio trade magazines like the Album Network, 19 television stations and 700,000 outdoor billboards worldwide. With so many resources at hand, the company has all but cut off its business with outside vendors.

*Id.*

96. Philips, *Conyers to Press*, *supra* note 81. Representative John Conyers, Jr. explains that consolidation after the Telecommunications Act has significantly affected the public airwaves: "But now we seem to be going in a different direction. Less regulation. Less oversight. Less enforcement. Competition is drying up. Monopoly is on the rise. The whole thing is becoming more of a business and less of an arena for communication about new musical ideas." *Id.*

negotiating programming and advertising contracts through their control of a larger segment of the audience.”<sup>97</sup> With multiple stations in the same market controlled by one entity, the number of station outlets available—should a station in one market refuse to air a song—is considerably reduced.<sup>98</sup> Moreover, due to nationwide consolidation, “the capacity to leverage stronger stations in some relevant markets to anticompetitively advantage less competitive stations in other local markets and regions”<sup>99</sup> has worked to the detriment of not only smaller radio rivals, but record companies and recording artists as well.<sup>100</sup>

This radio outlet shortage, exacerbated by deregulation, is what produces payola in the first place.<sup>101</sup> Record companies, realizing that there is only a finite amount of airtime and radio stations on which to air their material, are tempted to gain access to these scarce radio outlets by turning to payola.<sup>102</sup> New radio conglomerates hungry for revenue to compensate for the expensive consolidation process are exploring potentially illegal ways to increase profits through joint marketing airplay, promotions, and free radio concerts.<sup>103</sup> Furthermore, consolidation has left individual station owners in debt and searching for ways to turn a profit.<sup>104</sup> Thus, the natural result of consolidation has pressured both station owners and record companies to turn to payola for a quick solution.<sup>105</sup>

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97. Steve Knoll, *Radio Station Consolidation: Good News for Owners, but What About Listeners?*, N.Y. TIMES, Dec. 30, 1996, at D5.

98. Boehlert, *Radio's Big Bully*, *supra* note 89.

99. James W. Brock, *Antitrust, the "Relevant Market," and the Vietnamization of American Merger Policy*, 46 ANTITRUST BULL. 735, 748 (2001).

100. *Id.* at 748–49.

101. *See id.* (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*, *supra* note 22 (“The promotion business has gotten even tougher since the mid-'90s, 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.”).

102. *See supra* note 101 and accompanying text.

103. Chuck Philips & Michael A. Hiltzik, *2 Officials Urge FCC to Probe Possible Payola*, L.A. TIMES, Jan. 14, 1999, at C1.

104. *Clear Channel Fined*, *supra* note 78 (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”); Patrick M. Reilly, *Radio's New Spin on an Oldie: Pay-for-Play*, WALL ST. J., Mar. 16, 1998, at B1.

105. *See Clear Channel Fined*, *supra* note 78; *see also* Chuck Philips, *Radio Exec's Claims of Payola Draw Fire*, L.A. TIMES, Mar. 7, 2002, at C1 [hereinafter Philips, *Radio Exec's Claims*] (“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.”).

### III. THE RESTRUCTURING OF THE MUSIC LANDSCAPE

The music landscape has changed considerably since November 1959 when the House Special Subcommittee on Legislative Oversight initiated its first investigation into payola. "Rock and Roll," once thought of as the evil that spawned payola,<sup>106</sup> has since become a staple of America's musical taste.<sup>107</sup> Radio, once the only real medium for artists to expose their crafts, now faces competition from music videos and the downloading of music files over the Internet.<sup>108</sup> With the passage of the Telecommunications Act of 1996, radio stations, once individually owned and operated, have turned into huge conglomerates with station ownership now concentrated in fewer hands.<sup>109</sup> Despite these transformations, the payola laws, written in 1960, have not evolved to adequately reflect or inhibit instances of payola in today's music landscape.<sup>110</sup> The payola of today is a natural and creative response to laws that in theory wanted to bring about its demise but in practice failed to provide the adequate weaponry.

#### *A. It's Not "Technically" Payola: An Intricate Web of Actors Is Born to Avoid Detection*

In their failure to draft laws to adequately prohibit payola, the FCC and Congress may have paved the way for a generation of payola that is arguably more destructive than what the laws originally sought to prevent. The loopholes created by sections 317 and 508 may have been the result either of Congress' desire to protect a free enterprise system or a fear that a

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106. See SEGRAVE, *supra* note 14, at 90–92. A common sentiment regarding rock music in the late 1950s was that "much of the juvenile stuff [rock music] pumped over the airwaves these days hardly qualifies as music." *Id.* at 92. The congressmen on the subcommittee were consistently hostile to rock and roll, defining it as "raucous sound" that could only have been forced on the public through the use of illegal payola practices. *Responsibilities of Broadcasting Licensees and Station Personnel: Hearings Before a Subcomm. of the House Comm. on Interstate & Foreign Commerce on Payola and Other Deceptive Practices in the Broadcasting Field*, 86th Cong. 869, 870 (1960).

107. SEGRAVE, *supra* note 14, at viii–ix; see also *Limp Bizkit Top 1 Million with First-Week Sales* (Oct. 25, 2000), at <http://www.mtv.com/news/articles/1431237/20001025/story.jhtml> (noting that hard rock act Limp Bizkit's sale of over one million copies in the first week of release places the band as one of the top first-week album sellers of all time).

108. See Boehlert, *Pay for Play*, *supra* note 7. "Steady touring, an Internet presence, glowing press and MTV help, of course, but mainstream radio play is still the engine that drives the music business." *Id.*

109. Boehlert, *Radio's Big Bully*, *supra* note 89; see also text accompanying notes 95–96.

110. Boehlert, *Fighting Pay-for-Play*, *supra* note 25 (explaining that the payola laws are both out of date and irrelevant to today's marketplace).

complete ban may be unconstitutional.<sup>111</sup> Regardless of the rationale, the music industry has successfully adapted to the payola laws by exploiting their glaring deficiencies.<sup>112</sup> The primary tool used to make a mockery of payola laws has no elaborate maker or convoluted design; rather, it is the pure and simple use of a middleman.<sup>113</sup>

Independent record promoters, or “indies”<sup>114</sup> as they are known in the music business, thwart the requirements of the payola statutes by acting as “high-priced toll collector[s]” between record labels and radio stations.<sup>115</sup> Because radio stations are one step removed from record label money, these payments are not technically payola.<sup>116</sup> Prior to the late 1970s and early 1980s, the requirements of sections 317 and 508 posed little credible threat to record labels found in violation of payola statutes because the probability of criminal prosecution was remote.<sup>117</sup> What compounded the risk of engaging in payola was the increase in litigation growing out of the Racketeer Influenced and Corrupt Organizations Act (“RICO”)<sup>118</sup> in the late 1970s and early 1980s.<sup>119</sup> Although sections 317 and 508 were held in 1975 not to imply a private cause of action,<sup>120</sup> when used in conjunction with RICO the expected penalty costs of private treble damages for engaging in payola-like violations increased considerably.<sup>121</sup> Record

111. See discussion *infra* Part IV.B.

112. See Boehlert, *Fighting Pay-for-Play*, *supra* note 25 (discussing the intricacies of the independent promotion system).

113. See Boehlert, *Pay for Play*, *supra* note 7 (describing independent promoters as “shadowy middlemen”).

114. See Boehlert, *Fighting Pay-for-Play*, *supra* note 25. Indies are also sometimes referred to as “quarterbacks” in the music industry. Philips, *Radio Exec's Claims*, *supra* note 105.

115. See Boehlert, *Fighting Pay-for-Play*, *supra* note 25.

116. *Id.*

117. The FCC will not investigate allegations of payola unless a formal complaint is filed. See, e.g., *In re Application of KMAP, Inc.*, 63 F.C.C.2d 470, 479 (1977). It is then the responsibility of the Department of Justice to prosecute alleged violations of section 508. See *id.*

118. 18 U.S.C. §§ 1961–1968 (2000).

119. See *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 481 (1985). “Congress originally intended RICO to be applicable only to situations where known members of organized crime had infiltrated legitimate businesses. In practice the civil provisions of the statute have been used to redress wrongs in a wide variety of cases, including those throughout the entertainment industry.” Steven Jay Gabe, *Use of RICO in Entertainment Suits*, ENT. L. & FIN., Oct. 1991, at 3.

120. *Guitar v. Westinghouse Elec. Corp.*, 396 F. Supp. 1042, 1054–57 (S.D.N.Y. 1975).

121. 18 U.S.C. §§ 1961–1968; J. Gregory Sidak & David E. Kronemyer, *The “New Payola” and the American Record Industry: Transactions Costs and Precautionary Ignorance in Contracts for Illicit Services*, 10 HARV. J.L. & PUB. POL’Y 521, 537–39 (1987). In one of the most infamous payola scandals in music history, Joseph Isgro, a heavyweight independent promoter with alleged mob connections, was indicted in 1989 on various counts, including the violation of RICO anti-racketeering statutes as well as violation of payola statutes. Weinstein, *supra* note 6. The charges against Isgro were dropped in 1990 because of prosecutorial

companies now had an added incentive to cease their questionable in-house promotional activities and delegate all responsibilities to an outside player.<sup>122</sup>

With only a finite amount of material that can be played on any given station, indies can serve as lobbyists for their client record companies by supplying radio stations with “pertinent information and data related to the quality and nature of the recording, its likely demographic appeal, its advertising support, sales performance and, ultimately, the likelihood of its public acceptance as a ‘hit record.’”<sup>123</sup> Although indies can serve this legitimate role,<sup>124</sup> that role takes a back seat to their primary goal of persuading station program directors that the addition of a particular song to the station’s playlist will increase listener demand, thus increasing the station’s advertising demand.<sup>125</sup> The persuasive techniques employed—and the rising costs of such techniques<sup>126</sup>—now have the industry

misconduct, were retried in 1995, and subsequently thrown out in 1996. Chris Morris, *Isgro Faces Possibility of New Trial*, BILLBOARD, Jan. 28, 1995, at 19. The tale of Isgro’s money, drugs, and the mob was told in the 1991 novel *Hit Men*, a book about the world of independent promotion and the exceptional power they exerted over the record companies in the 1980s. FREDRIC DANNEN, *HIT MEN* (Vintage Books 1991) (1990).

122. See Sidak & Kronemyer, *supra* note 121, at 538. Record labels and independent promoters similarly adapted to the threat of RICO statutes by altering the terms of the parties’ contractual relationship:

During the mid-1980s, a record company would retain independent promoters under contracts with incomplete and unspecified terms that reflected the record company’s need to minimize its knowledge of the promoter’s activities. . . . The record company also might avoid inquiring whether the independent promoter uses payola in conducting his business, and particularly whether he intends to use payola to promote the record for which the record company has retained him. . . . If the record company failed to steer this course of precautionary ignorance and the independent promoter in fact dispensed payola, the record company might be deemed to have willfully caused the independent promoter to have committed an act of payola.

*Id.* at 538–39.

123. *Id.* at 529 (citing Complaint at 6–7, *Isgro v. Recording Indus. Ass’n of Am.*, No. 86-2740 (C.D. Cal. Apr. 30, 1986)).

124. Despite their questionable existence, indies also serve as efficient lobbyists for band managers. As one band manager put it:

Without independent promoters, you would have everyone calling the radio stations to try to get a song added. I would call, the record label would call, even the artist may call. No radio station wants to hear from all of us . . . indies allow the rest of us to get on with our jobs.

Telephone Interview with Anonymous, Band Manager (Sept. 21, 2001) (name withheld upon request of interviewee).

125. Sidak & Kronemyer, *supra* note 121, at 529.

126. Eric Boehlert, *The “Bootylicious” Gambit*, SALON.COM (June 5, 2001), at [http://www.salon.com/ent/feature/2001/06/05/sony\\_payola/print.html](http://www.salon.com/ent/feature/2001/06/05/sony_payola/print.html) [hereinafter Boehlert, *The “Bootylicious” Gambit*] (describing that in the 1980s companies may have spent \$12 million a year on independent promotion, whereas in 2001, some companies “spend that much every few



questioning whether indies are still worth their weight in gold.<sup>127</sup>

To secure airtime for their client's artists, indies form strategic alliances with a station's general manager or program director, typically by guaranteeing the station a lump sum of money termed "promotional support."<sup>128</sup> The lump sum guarantee of approximately \$100,000 per annum places the indie as the exclusive point man at that given station.<sup>129</sup> The promotional budget supplied by the indie, supposedly used by the radio station to buy T-shirts, billboard ads, and station vans, is in reality spent by the station in any manner that it sees fit.<sup>130</sup> Radio stations are able to accept the money or other consideration<sup>131</sup> from the indies as promotional support because it is not tied directly to the purchase of airtime for any particular song.<sup>132</sup> Rather, the money or consideration supplied by the indie serves primarily to have a song added to the station's playlist.<sup>133</sup> An "add" in industry parlance signifies that a station has put one of the songs into the station's rotation.<sup>134</sup> Once the song is added, it is theoretically in the hands of the station's programmers to decide how many radio spins the song receives.<sup>135</sup> While indies do not generally dictate the

months").

127. *Id.* (explaining that some record labels may begin to question continued indie payment in certain markets). "Concerned about the pervasive and costly pay-for-play independent-promotion system that has become entrenched at commercial radio, some are wondering if it's time for federal regulators, in effect, to save the industry from itself." Boehlert, *Fighting Pay-for-Play*, *supra* note 25.

128. Boehlert, *Fighting Pay-for-Play*, *supra* note 25. Although indies typically provide "annual promotion budgets to pop and rock stations," it is reported that indies in the urban-music genre actually "make direct cash payments to radio programmers to play specific songs." Philips, *Radio Exec's Claims*, *supra* note 105.

129. Michael Roberts, *Playola: Most Radio Stations Pick Songs That Are Good for Everyone but Aspiring Musicians and Listeners*, DENVER WESTWORD (Oct. 18, 2001), at <http://www.westword.com/issues/2001-10-18/message.html/1/index.html> [hereinafter Roberts, *Playola*].

130. Boehlert, *Pay for Play*, *supra* note 7.

131. What is exchanging hands is not always actual dollar bills. For instance, in the old days of payola scandals, the most common methods used to gain influence with radio programmers were the provision of prostitutes and drugs. SEGRAVE, *supra* note 14, at 198. Today, it is common for independent promoters to appease the station owners with other kickbacks such as gift certificates, cars, and exotic trips. Boehlert, *Fighting Pay-for-Play*, *supra* note 25. "Sources say American Express gift certificates have become the currency of choice among stations looking for something in exchange for playlist adds." *Id.*

132. Jeff Leeds, *Small Record Labels Say Radio Tunes Them out*, L.A. TIMES, Sept. 16, 2001, at C1 [hereinafter Leeds, *Small Record Labels*].

133. Boehlert, *Pay for Play*, *supra* note 7.

134. Boehlert, *Fighting Pay-for-Play*, *supra* note 25.

135. See Boehlert, *Pay for Play*, *supra* note 7.

Everyone says indies don't force stations to add records. That's ridiculous . . . [b]ecause [if there is friction] the indie will get on the phone with the

exact number of spins that a song receives,<sup>136</sup> those that possess significant industry pull can typically generate enough incentive for the station to push a particular single.<sup>137</sup>

Indies themselves are by no means victims of record company exploitation. Although the indie must produce the “perks” to entice the radio station into adding a song to a playlist,<sup>138</sup> once successful, they reap very lucrative benefits from the record labels themselves.<sup>139</sup> The services that an independent promoter provides are not inexpensive.<sup>140</sup> Every time a reporting FM radio station adds a new song to their playlist, the indie who pushes the song receives a paycheck from the record label to recoup the expenses paid to the radio stations, while keeping a large portion for himself.<sup>141</sup> The average market rate for an addition to a playlist is typically

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station [general manager] and say, “Look, your [program director] has not been cooperative over the last few months on adds I need.” The G.M. either says to the indie, “Our relationship is about access, not influence,” or he caves. Most G.M.s cave and have a word with the P.D.: “Look, we have \$100,000 a year riding on this relationship with our indie.” Then suddenly—bam—a song you know the P.D. hates shows up on the air.

*Id.*

136. *Id.* “Today, indies pay stations for ‘access,’ not airplay. At least in theory.” *Id.* Money provided to the indies “doesn’t guarantee any sort of success, just that the single will have access to the airwaves. If the song catches on and eventually crosses over to the mainstream Top 40 format, indie costs balloon to more than \$1 million.” Boehlert, *Save Us from Ourselves*, *supra* note 1.

137. Boehlert, *Pay for Play*, *supra* note 7. Furthermore, independent promoters can influence radio station programming decisions without triggering disclosure requirements through the use of other enticements such as gift certificates or expensive dinners. *See supra* note 131 and accompanying text. This is because the FCC, in an administrative ruling, carved out a gaping loophole in section 508 of the Communications Act when it held that, with respect to gifts given by record promoters to radio station personnel, “social exchanges between friends are not ‘payola.’” *In re Applications of Kaye-Smith Enters.*, 71 F.C.C.2d 1402, 1408 (1979). So long as gifts between “friends” are not given with the specific quid pro quo of receipt of airtime, they are a permissible way of influencing playlist decision-making. *See id.* As a result of these ambiguities, record companies have successfully manipulated their use of independent promoters in order to minimize their own exposure to criminal liability. *See supra* note 122 and accompanying text.

138. Indies will typically guarantee a radio station \$100,000 per annum to become the exclusive point man at that given station. Roberts, *Playola*, *supra* note 129. The money that the indies provide to the stations are used to “defray expenses for contest giveaways, vacation fly-aways, concerts, conventions and other promotions.” Chuck Philips, *Logs Link Payments with Radio Airplay*, L.A. TIMES, May 29, 2001, at A1 [hereinafter Philips, *Logs Link Payments*]. Once the indie controls the station, they are systematically paid for the addition of any song to the station’s playlist. *Id.*

139. *See* Boehlert, *Pay for Play*, *supra* note 7.

140. Eric Boehlert, *More Waves in the Radio Business*, SALON.COM (Aug. 6, 2001), at [http://www.salon.com/ent/music/feature/2001/08/06/radio\\_records/index.html](http://www.salon.com/ent/music/feature/2001/08/06/radio_records/index.html).

141. Boehlert, *Pay for Play*, *supra* note 7 (explaining that indies will pass along approximately sixty percent of the money to the stations owners and will keep the remaining

\$1,000 in large markets such as Los Angeles or New York,<sup>142</sup> but that price can skyrocket to upwards of \$8,000 if the record label is desperate enough to get the song placed in the station's rotation.<sup>143</sup> The indies keep detailed "banks"<sup>144</sup> of which radio stations have added a particular song and invoice accordingly.<sup>145</sup> To launch a single at rock radio stations over several weeks can cost a record label upwards of \$250,000 in indie fees.<sup>146</sup> The annual industry price tag for employing indies to carry out such "promotional" expenses is an estimated \$100 million a year.<sup>147</sup> Despite these costs, record companies are willing to front these exorbitant fees because both record labels and artists recognize that "airplay is like oxygen—without it, you die."<sup>148</sup>

### 1. You Made Your Bed, Now Lie in It<sup>149</sup>

The music industry may have successfully shifted the legal risk of violating payola laws onto the independent promoters, but in doing so, they may have become a slave of their own design.<sup>150</sup> Today, most everyone within the music industry recognizes that indies can make or break an artist's career.<sup>151</sup> Because of long standing relationships with radio

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amount for themselves). Even the indies that become the point men in smaller markets such as Greenville, South Carolina, are likely to make a handsome living. "You could gross between half a million and 1 million dollars each year. That's with no staff—just a couple of phones and a fax machine." *Id.*

142. See Chuck Philips, *U.S. Widens Probe into Bribery in Latin Radio*, L.A. TIMES, Nov. 3, 1999, at A1 (comparing radio broadcast outlets in Los Angeles and New York with those of smaller markets).

143. Boehlert, *Pay for Play*, *supra* note 7.

144. Philips, *Logs Link Payments*, *supra* note 138. "Like a bank account, there are debits and credits, deposits and withdrawals." *Id.*

145. *Id.*

146. Boehlert, *Pay for Play*, *supra* note 7.

147. Leeds, *Small Record Labels*, *supra* note 132.

148. Adler, *supra* note 10, at 170. On very rare occasions, however, there may be some songs that grab the attention of station programmers without the use of independent promotion. While engaging in payola exchanges through the use of independent promoters may not be an absolute prerequisite to a song receiving radio airplay, the possibility of getting a song on the air entirely without independent promotion is slim. See John Nova Lomax, *Streamlining the Hit-Making Process*, HOUSTON PRESS (Nov. 8, 2001), at <http://www.houstonpress.com/issues/2001-11-08/racket.html/1/index.html>.

149. "They, who must accept the onus for having started the practice, are now moaning the blues." SEGRAVE, *supra* note 14, at 80.

150. Boehlert, *The "Bootylicious" Gambit*, *supra* note 126. "Of course, the labels, always searching for a competitive edge, pay the fees willingly, and have only themselves to blame for runaway costs. 'Indies are only in business through the benevolence and stupidity of record companies,' says one indie who's benefited for years." *Id.*

151. Boehlert, *Pay for Play*, *supra* note 7. "Indies are not the guys U2 or Destiny's Child

programmers and financial alliances with station managers, indies are paid not only for what they can do to get a song *on* the air, but also out of fear of what pull the indie may possess in keeping the single *off* the air.<sup>152</sup> Because the record labels need to ensure that the indie will be working *with* them and not *against* them in promoting their lesser known artists,<sup>153</sup> labels continue to pay for songs by popular artists that the station would likely play even without the indie's efforts.<sup>154</sup> Even on those rare occasions where the station programmer is the one to discover a song by a new artist and adds the song based solely on its merit, the indie controlling that station will be paid for the add.<sup>155</sup>

Despite persistent problems, record labels cannot afford to relinquish the influence vis-à-vis the indies that they ultimately have on a station's playlist. Indies with considerable clout recognize that they are an indispensable asset to the record companies and are able to capitalize on the industry's vulnerabilities by charging whatever fee they see fit.<sup>156</sup> Legal recourse against an independent promoter that acts opportunistically is virtually nonexistent as the use of the indie to skirt payola laws borders on the edge of illegality.<sup>157</sup> According to one promotion veteran, "If you have to pay [an indie] \$10,000 to shut your boss up, goddamn it, you pay, let me tell you."<sup>158</sup> Thus, record companies have given birth to their own prisoner's dilemma: either continue to pay whatever fees the indies demand or eliminate their existence. As history dictates, the latter is not likely an option.

Since payola's beginnings in the 1890s, movements to prohibit the practice have been used as competitive weapons by industry insiders who would encourage others not to engage in the practice, but would nevertheless do so themselves.<sup>159</sup> The early 1980s marked the resurgence

thanked on Grammy night, but everyone in the business, artists included, understands that the indies make or break careers." *Id.*

152. Boehlert, *The "Bootylicious" Gambit*, *supra* note 126. "But the companies are also afraid of the indies. They're reluctant to confront them for fear that they could retaliate by sabotaging future hits." *Id.*

153. *Id.*; see also Boehlert, *Pay for Play*, *supra* note 7 ("The fear is that if a label tangles with the indie over billing, he could torpedo the labels' next project by bad-mouthing a new single or keeping it off the air until his previous invoice is paid.").

154. Boehlert, *The "Bootylicious" Gambit*, *supra* note 126.

155. Boehlert, *Pay for Play*, *supra* note 7.

156. See Boehlert, *Fighting Pay-for-Play*, *supra* note 25.

157. See *id.*

158. *Id.*

159. SEGRAVE, *supra* note 14, at ix-x. "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 violating the ban since it would

of discussions intended to limit or eliminate the use of independent promoters. When Warner Communications, Inc. and CBS began talks of dropping independent promoters, other record companies promised to do the same, so long as Warner and CBS took the lead.<sup>160</sup> However, after Warner and CBS terminated the use of independent promoters, competitors failed to follow suit. Instead, they used the opportunity to increase their independent promotion expenditures, thereby gaining greater shares of airplay.<sup>161</sup>

The Warner-CBS boycott highlights the dangers of challenging independent promoters. In early 1981, although songs from the Who and Loverboy originally received overwhelming response, the singles from both bands plummeted off the charts once the Warner-CBS independent promotion ban went into effect.<sup>162</sup> As Dick Asher, then president of CBS, noted:

All of a sudden, it just came off the air. It's one thing to 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 the stations might have been playing it, the listeners might have been liking it, they actually could reach back and pull it off.<sup>163</sup>

The disastrous results of their termination of independent promoters in 1981 led Warner and CBS to resume the use of independent promoters shortly thereafter, albeit at rates considerably higher than before.<sup>164</sup>

The lessons learned by companies such as Warner and CBS in the 1980s are all the more apparent in the year 2002. The market for independent promoters has skyrocketed with the increased enforcement of private RICO causes of action and the consolidation of radio stations through the Telecommunications Act of 1996.<sup>165</sup> The only way to successfully excommunicate indies would be by an across-the-board ban by all record labels. Reality, however, dictates that no such consensus will ever be reached, nor would such a boycott effectively stay in existence.<sup>166</sup>

give them an advantage over competitors." *Id.*

160. DANNEN, *supra* note 121, at 209.

161. *Id.* at 214. "As Warner and CBS product got knocked off the air, the other labels began to dominate Top 40 airplay as never before. Warner's sales dropped, and it suffered a decline in U.S. market share." *Id.*

162. *Id.* at 210-12.

163. *Id.* at 211.

164. *Id.* at 213-15.

165. See discussion *supra* Parts II.C, III.A.

166. The mid-1980s marked more talk about the elimination of independent promoters. Despite the talk, independent promoters were confident that no such ban would effectively take

While it is unlikely that independent promoters will become extinct under current payola laws, there are some promising indications that their use is being scaled back. In May 2001, Columbia Records declared that it would curb indie payments on behalf of the new single "Bootylicious" from the girl group phenomenon Destiny's Child.<sup>167</sup> Albeit a minor distinction, the label declared that it would pay the minimum \$1,000 to indies whose radio stations were in the large markets, but it would refuse to pay indies for the adds in "smaller-market stations."<sup>168</sup> The result of Columbia's risky endeavor was that two weeks after pop-sensation Destiny's Child released the "Bootylicious" single, 113 pop stations added the song to their playlists.<sup>169</sup> However, the 113 stations playing the "Bootylicious" single was a drop off from the 150 radio stations that were playing Destiny's Child's prior single "Survivor" two weeks after that song's release only a few months earlier.<sup>170</sup> It was speculated that "Bootylicious" was kept off the air in markets where indies still maintain exceptional influence as retaliation against Columbia's move to limit independent promotion.<sup>171</sup>

Despite Destiny's Child's popularity, Columbia's decision to limit the use of indies in such a fashion is virtually unheard of.<sup>172</sup> Some industry insiders speculated that Columbia made this move to test the waters for a challenge to the future of independent promoters.<sup>173</sup> Although "Bootylicious" did incredibly well on the radio, the drop off of nearly forty stations adding the song to the station rotation is a sobering reminder of the power that indies exercise over the industry. Furthermore, the somewhat successful curtailment of indie promotion for artists as popular as Destiny's Child do not reflect the likely outcome if other less popular artists fail to pay indie fees.<sup>174</sup> It remains to be seen whether record labels that house high-profile acts such as 'NSYNC or Britney Spears will also attempt to

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place. One such indie stated, "It's hard to imagine the industry sticking together long enough to walk away from us." Patrick Goldstein and Robert Hilburn, *About-Face on Record Promotions*, L.A. TIMES, Mar. 6, 1986, at C1. A Los Angeles-based record executive seconded the indies' confidence in the future of independent promotion by commenting that he could not imagine the industry doing without the services of independent promotion indefinitely, stating: "There will clearly be independent promotion in the future." *Id.* As this Comment indicates, the predictions of the 1980s seem to have proven correct.

167. Boehlert, *The "Bootylicious" Gambit*, *supra* note 126.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. Boehlert, *The "Bootylicious" Gambit*, *supra* note 126.

174. *See id.*

limit independent promotion for their artists. It should be clear, however, that the move will unlikely extend to lesser-known artists who must still rely on the indies to get the attention of radio station executives.<sup>175</sup>

## 2. What Does Independent Promotion Mean for Artists?

For radio stations and record companies, the use of indies seems to be a win-win situation. Radio stations get paid big money by record companies that in turn pass many of the costs onto the artists themselves through recoupment provisions in artist contracts.<sup>176</sup> Dirk Lance of the rock band Incubus exclaims:

[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.<sup>177</sup>

Presumably, artists themselves would not mind paying independent promotion fees in order to increase their exposure, and thus ultimately increase their own profitability. Yet, this is not the way that Dirk Lance views the utility of independent promotion:

Independent promotion is money that disappears from a band's pocket that is charged to the band and no one knows where it goes or what it actually does. There's an idea of what it is supposed to do, but you don't know that. You don't know that if I pay \$5,000 to an independent promoter I'm going to see 5,000 spins on my record. You're going to pay somebody that money and maybe something will happen and maybe it won't. It's gambling. And it's gambling with somebody else's money. Ultimately, it's gambling with *my* money. Independent promotion doesn't really guarantee anything. It's payola, but

175. *See id.*; *see also supra* text accompanying note 30.

176. Bill Holland, *The Dirtiest Word in the Record Business*, BILLBOARD, Oct. 6, 2001, at 90.

According to recording artists and representatives, the dirtiest 10-letter word in the record business is "recoupment." In modern times, the recoupment provision in all record contracts has payback conditions so onerous and unfair that in many cases, the amount often can never be paid back unless albums achieve gold—or, increasingly, platinum-level sales.

*Id.* "Who pays? The artist, for one. Most record companies recoup their costs for independent promotion from the artist's CD royalties—which, of course, would be depleted by the lack of airplay." Boehlert, *Payola City*, *supra* note 24.

177. Telephone Interview with Dirk Lance, Bass Player, Incubus (Oct. 6, 2001).

with unclear results. It's a smoke and mirrors game.<sup>178</sup>

An ambiguity exists between those who proclaim that an artist has no shot of breaking through without independent promotion and artists like Dirk Lance who question its value. This seeming contradiction may be explained with the recognition that not all artists are at the same stage of their careers. Unknown artists introduced to the world of radio buy into the hype that independent promotion is the only way to launch a career.<sup>179</sup> Indies, because they already have the attention of the radio stations' programmers, ostensibly make good on their promises by getting the songs of lesser known artists on a station's playlist.<sup>180</sup> Thus, the use of the indies, while not promising a song's success, may be a necessary stepping stone in any artist's career.<sup>181</sup>

However, it seems unfair to force popular artists who have a proven history of success to pay independent promotion fees, when in all likelihood their song will automatically be added to a playlist because of listener demand. Ultimately, the successful artists are forced into "subsidizing the payola system."<sup>182</sup> Popular artists are effectively required to continue to pay independent promotion fees in order to ensure that the record labels will not alienate the indies from pushing songs of the label's lesser-known artists.<sup>183</sup> While record labels may absorb the independent promotion costs of unsuccessful artists, the artists who actually produce revenue for the record labels are the ones left holding the bag.<sup>184</sup> The fear of indie retaliation has undoubtedly kept the record companies willing to play the independent promotion game.<sup>185</sup> However, their willingness to continue to pay is no doubt softened by the fact that many of the costs can

178. *Id.*

179. See Leeds, *Small Record Labels*, *supra* note 132 (explaining that unknown artists have little hope of receiving radio play without independent promotion expenditures).

180. Leeds, *Middlemen*, *supra* note 22 (explaining that a virtually unknown rock band named Smackradio received more airplay than popular acts like Staind and Sum 41 at a Monterey, California rock station after receiving help from one particular indie).

181. See Boehlert, *Pay for Play*, *supra* note 7. "'The labels have created a monster,' agrees longtime artist manager Ron Stone. Nevertheless, Stone views indies as an important insurance policy for his clients. 'I never want to find out after the fact that we should've hired this indie or that indie. I want to cover all the bases.'" *Id.*

182. Lomax, *supra* note 148.

183. See Boehlert, *Pay for Play*, *supra* note 7.

184. See Boehlert, *Payola City*, *supra* note 24. "The result is a brazenly money-driven system that revolves around chronic payoffs; it actually costs artists earnings . . ." *Id.*; see also Telephone Interview with Dirk Lance, *supra* note 177 (discussing the invoicing of independent promotion expenses to artists).

185. See Boehlert, *Pay for Play*, *supra* note 7.



be shifted to the artists themselves.<sup>186</sup>

### *B. Other Industry Practices Challenging the Laws*

Payola laws, written in 1960 to prohibit payments made to individual radio station disc jockeys, do not adequately reflect the current pay-for-play landscape.<sup>187</sup> The laws' inability to adequately adapt to the changing face of the music industry is illustrated not only by the emergence of independent promoters, but also in the form of "reverse payola" in which radio stations are the parties now exploiting the laws' deficiencies.<sup>188</sup> Despite the existence of source disclosure laws,<sup>189</sup> record companies and radio stations continue to push the limits by devising new strategies involving undisclosed payment for broadcast.<sup>190</sup> Perhaps the most influential, and potentially dangerous, promotional tool utilized by radio stations is that of the free concert.<sup>191</sup>

The payment of money from record labels is not the only factor in determining radio programming.<sup>192</sup> There may be numerous concerns when a radio station agrees to increase airplay in exchange for an artists' free concert appearance.<sup>193</sup> The payola implications are illustrated through a familiar hypothetical scenario. KROC, a large Los Angeles modern rock radio station, plans to rent a venue and put on a showcase of the country's largest rock acts. To ensure the show's success, the station builds up hype for the artists playing at the event, therefore increasing airplay for any artist

186. Lomax, *supra* note 148.

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 [sic] 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.

*Id.*

187. See Boehlert, *Fighting Pay-for-Play*, *supra* note 25 (explaining that the payola laws are both out of date and irrelevant to today's marketplace).

The FCC is obviously ill-equipped to deal with this new form of payola. It's no longer about some deejay in the control room stuffing a few bucks into his back pocket. These days payola is being done right out in the open by huge conglomerates. And nobody in Washington seems to care.

*Clear Channel Fined*, *supra* note 78 (quoting Jeff Cohen, founder of Fairness and Accuracy in Reporting, a New York-based media watchdog group).

188. Brock, *supra* note 99, at 750 (defining "reverse payola"); see also *Radio Pushes Bands for Freebies*, *supra* note 23.

189. 47 U.S.C. § 317 (1994); 47 C.F.R. § 73.1212 (1999).

190. See *Radio Pushes Bands for Freebies*, *supra* note 23.

191. See *id.*

192. See *id.*

193. See *id.*

who signs on. KROC secures an up and coming band named Audiovent to play at the show. Even if KROC is unwilling to pay the same fees that the band would command for a similar performance, Audiovent accepts the invitation realizing that they will not get the push on their new album that they hope to secure. Should Audiovent be unwilling or unable to comply, at the very minimum, they will not receive the increased airtime exposure that they would have received if they were to play the show. This deal between the artist/record label and the radio station begs two ultimate questions. First, does this unwritten agreement border on extortion? Second, is this exchange sufficiently prohibited under the section 317 or § 73.1212 disclosure requirements?

The potential for radio station abuse when demanding artist compliance or denying critical airtime is rather chilling. When an artist such as Audiovent, who may be unwilling to rearrange an entire tour schedule to accommodate KROC's request,<sup>194</sup> refuses to play at the scheduled event, they do so at their peril.<sup>195</sup> Stations often refuse to air a band's latest release unless they commit to the free concert, or the station may threaten to ban all of a record label's upcoming releases if the label is unable to persuade the band to perform.<sup>196</sup> Furthermore, "[h]uge radio chains can demand—and obtain—exclusive rights to sponsor local concerts, as well as extract other privileges (such as exclusive in-studio interviews and appearances)."<sup>197</sup> A recent antitrust suit filed 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

194. Neil Strauss, *Pay-for-Play Back on the Air but This Rendition Is Legal*, N.Y. TIMES, Mar. 31, 1998, at A1.

I'll be looking at a Limp Bizkit tour and the itinerary will say "Boston, Hartford, New York," and I'll get a call that says we have to play this radio-station show on the West Coast. So we have to cancel Boston, fly the band out and at the end of the day it ends up costing \$20,000 to \$25,000.

*Id.* (quoting Jeff Kwatinetz, whose company manages Limp Bizkit).

195. *Radio Pushes Bands for Freebies*, *supra* note 23. "Artist managers contend that the stations coerce bands by refusing to air their latest releases unless they commit to perform in concert. Many artists now view it as little more than a shakedown that is broadly undermining the live concert business." *Id.*

196. *Id.* Some argue that the fact that artists in turn receive increased air exposure for agreeing to play at a free concert legitimizes this practice. See Sponsorship Identification, *supra* note 67, at 2407 (explaining that the artist also receives a benefit from playing at these "record hops"). While this may help a new artist gain exposure, "[t]he problem is that the bigger you get, everybody wants an exclusive, and some stations get really mad and penalize you for performing at a competing station's show by refusing to air your record at all." *Radio Pushes Bands for Freebies*, *supra* note 23 (quoting Michael Lippman, manager of Matchbox 20).

197. Brock, *supra* note 99, at 749.

airplay and other on-air promotional support.”<sup>198</sup> Termed by some as the “new payola,”<sup>199</sup> such practices could have devastating effects on both artists and record labels.<sup>200</sup>

Aside from decisions that keep band managers and artists up at night wondering which path to travel, the question remains whether section 317 or § 73.1212 actually require disclosure of such transactions and furthermore, whether the laws sufficiently protect artists against such exploitation. In the past, the FCC scrutinized “record hops,” which include free performances, when they appear to be an inducement to broadcast.<sup>201</sup> However, the context of this enforcement has always been a one-sided transaction whereby the disclosure requirements have been in place to ensure that record labels do not unduly entice radio stations into programming decisions.<sup>202</sup> Thus, while under section 317 a radio station is still required to disclose that song play is in exchange for a concert appearance,<sup>203</sup> the statute does not prohibit radio stations from pulling or denying artist airtime as a bargaining tool in securing the concert performance.<sup>204</sup> By failing to include language broad enough to encompass prohibition of radio station extortion, the FCC’s sponsorship disclosure language leaves open the question as to whether these inducements are

198. *Taking on the Empire*, *supra* note 95.

199. Telephone Interview with Dirk Lance, *supra* note 177; *Clear Channel Fined*, *supra* note 78 (explaining that the guaranteed “airplay of artists’ songs in exchange for free appearances at radio station concerts” is the “new form of payola”).

200. *See Taking on the Empire*, *supra* note 95.

Many of our artists make their money on live performances, not CD sales. So they have to fly to the city where the festival is, which may make them lose money on a date they could have been headlining, and then they have to fly back, which may make them lose *another* date—and on top of that, they may lose a date they would have normally played in that city, and that would have made them a lot more income, because they’ve already played there on the tour. That’s why artists hate them [free concerts].

*Id.* (quoting Frank Riley of High Road, a California talent agency).

201. *See Sponsorship Identification*, *supra* note 67, at 2407.

202. *See id.*

203. *Clear Channel Fined*, *supra* note 78; 47 U.S.C. § 317 (1994).

204. *See* 47 U.S.C. § 317 (containing no language that indicates that radio station extortion is prohibited). For instance, the language in the FCC’s sponsorship identification guidelines, while requiring disclosure if the “record hop” induces airplay, does not sufficiently cover enticements made by radio stations to record companies. *See Sponsorship Identification*, *supra* note 67, at 2407. The statutory language makes it clear that what is actually being regulated are those instances where the artist offers themselves up to increase radio airplay and does not contemplate radio station extortion of artists. *Id.* “[W]here a disc jockey or station licensee anticipates a financial benefit to be derived from participation in a ‘record hop’” and “[l]ess direct, but just as financially advantageous are the benefits to performers, distributors and record manufacturers from air exposure in return for their *contributions* to the ‘record hop.’” *Id.* (emphasis added).

covered.

Assuming *arguendo* that the disclosure requirements of section 317 and § 73.1212 apply in the free concert scenario, the problem remains that such enticements may be difficult to prove. Furthermore, disclosure will not adequately protect the listener or artist. Artists often agree to play at free concerts not because the radio station has explicitly demanded it, but rather, due to the unspoken rule that their precious airtime will be decreased should they fail to do so.<sup>205</sup> Furthermore, even if a radio station were to announce they were airing a song based on an artist's agreement to play the concert, this does nothing to protect the artist against extortion, nor does it impart any beneficial information to the listener. Imagine a radio station announcement that communicates the following disclosure: "We here at KROC are only playing Audiovent's new song because they have agreed to play at our concert next month." The only fact the radio station would be disclosing is what the listener intuitively already knows—KROC wants to spark interest in Audiovent's new song in hopes that the listener will want to attend the radio station's sponsored show.<sup>206</sup> Radio stations' denial of airplay to an artist that fails to play at a free concert is a credible and precarious threat. However, the solution is not found within the weak disclosure requirements of section 317 or § 73.1212.<sup>207</sup>

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205. Bill Holland & Ray Waddell, *Artists Seek Govt. Redress of Contract, Radio Issues: Congressman Seeks Clear Channel Probes*, BILLBOARD, Feb. 2, 2002, at 3. Congressman Berman's spokesperson has declared that "they were not free to name 'the several' constituent recording artists who had approached the lawmaker about the problem, 'because they fear retaliation.'" *Id.* at 96. Similarly, others in the industry refuse to challenge companies such as Clear Channel who may be adversely affecting business:

Other promoters, record executives, and agents complain about the company's tactics, but so far they've all refused to put their name—and their business—on the line. "People are reluctant to talk because Clear Channel is so powerful . . . . Whether you love them or hate them, you still have to work with them."

Adler, *supra* note 10. It may be even more difficult for artists, who are directly and significantly impacted by independent promotions to get involved in such a debate: "They [the labels] created the fucking problem, now you want us to put a target on our backs? Fuck it . . . The fear . . . is that musicians who complain about indie promotion will be kept off the radio. Without commercial airplay it's virtually impossible to sustain a career." Boehlert, *Save Us from Ourselves*, *supra* note 1.

206. The legislative history of section 317 acknowledges just how prevalent and accepted this practice is:

It also appears that recordings by performers appearing at the "hop" . . . may have been played at frequent intervals preceding the "hop" as a means of engendering in the listener a desire to purchase an admission ticket to the "hop" or in exchange for the cooperation of performers or donors of records.

H.R. REP. NO. 86-1800, at 38 (1960).

207. Possible remedies for this unfortunate situation are beyond the scope of this Comment.

## IV. WHERE DO WE GO FROM HERE?

Cloaked in an image of bribery and corruption, there is little wonder why the concept of pay-for-play continues to draw attack.<sup>208</sup> However, by predefining the issue as such, critics fail to recognize that payola itself (not the landscape created through independent promotion) may be a legitimate tool in an industry where finite airtime requires that purely economic decisions be made. Despite the apparent deficiencies in sections 317 and 508, the proper remedy does not lie in all-out deregulation, nor does it lie in total payola prohibition. Rather, an open-market system that would allow payment by record companies directly to radio stations while still limiting the amount of airtime that can be purchased would help to minimize or entirely eliminate much of payola's unintended negative consequences. Such a system would secure record companies the opportunity to have their artists' singles played for a very limited amount of spins to spark interest,<sup>209</sup> yet the song's future airplay would be based primarily on listener response.<sup>210</sup>

The overall effect of this partial deregulation would increase market efficiency by returning independent promoters to their proper informational role,<sup>211</sup> thereby encouraging the dissemination of more accurate and valuable information to record labels and radio stations.<sup>212</sup> The exorbitant fees paid to independent promoters would, therefore, be replaced with less

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208. Payola's negative image remains as true today as it did when Congress first regulated its practice in 1960. Boehlert, *Fighting Pay-for-Play*, *supra* note 25. For instance, in 2001, Senator John McCain urged Congress to investigate the pay-for-play system, arguing, "The radio market is now clearly driven by greed and corruption rather than creativity and talent." *Id.*

209. There is strong evidence that even this initial trial period can generate a strong listener response. Strauss, *supra* note 194. For instance, in January of 1998, Flip/Interscope Records agreed to pay a Portland, Oregon radio station approximately \$5,000 to play a song by then-emerging rock act Limp Bizkit fifty times during five weeks. *Id.* The labels' decision to take a risk fronting the pay-for-play money has since paid off—Limp Bizkit is now one of the biggest rock acts in the country. See Eric Boehlert, *Napster Will Sponsor Free Summer Tour for Limp Bizkit*, SALON.COM (April 24, 2000), at [http://www.salon.com/ent/log/2000/04/24/bizkit\\_napster/index.html](http://www.salon.com/ent/log/2000/04/24/bizkit_napster/index.html) [hereinafter Boehlert, *Limp Bizkit*] (noting that at that time Limp Bizkit's current album was certified platinum six times).

210. A radio station may gauge listener response by reference to the number of listener calls and emails requesting a single or the number of albums an artist sells in the week following the secured airtime. See Deborah Evans Price, *Higher Ground*, BILLBOARD, Nov. 18, 2000, at 44 (giving examples of ways radio stations can determine which songs to play). There are likely both formal and informal ways for the station to determine whether airplay should continue.

211. See discussion *infra* Part IV.B.2.

212. J. Gregory Sidak and David E. Kronemyer proposed a similar solution to the payola problem in 1987. Sidak & Kronemyer, *supra* note 121, at 566–71. However, rather than proposing partial deregulation, Sidak and Kronemyer argued for the total deregulation of the "market for the on-the-air advertising of pop music." *Id.* at 567.

speculative forms of artist promotion. Artists could now gain exposure without being forced to bear the excessive costs of independent promotion. However, to implement a workable solution to a seemingly boundless problem, one must dismiss all preconceived prejudices and recognize what benefits payola, in its purest form, can provide.

*A. The Debate: What Will Pay-for-Play Do for the Future of "Good" Music?*

Critics of payola contend 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.<sup>213</sup> The fear is that songs unworthy of radio attention will get play simply because the record label is willing to pay.<sup>214</sup> In effect, radio stations could extort money from record labels just to have radio stations do their jobs by playing music.<sup>215</sup> Pay-for-play would transform music into an infomercial, where each paid and disclosed song is akin to a commercial exchange.<sup>216</sup> Furthermore, small record companies, unable to pay the quickly escalating costs of independent promotion, may be driven into extinction.<sup>217</sup> Thus, pay-for-play threatens the notion that only deserving songs are played on the radio, while also threatening the survival of those dedicated to making the music.<sup>218</sup>

The above arguments, while sound in theory, may fail to fully take into account the most basic of economic theories—that smart business transactions are almost always predicated on the law of supply and demand. Record labels supply money to radio stations through intermediary independent promoters based on the expectation that the paid influence will ultimately further the sale and popularity of the artist's album.<sup>219</sup> For payment to continue, the radio station must produce; that is, it must attract a steady stream of listeners to make it economically wise for

213. See Chuck Taylor, *Paid Play Changing Biz Landscape: Rise of Direct Label/Radio Sparks Wide-ranging Debate*, BILLBOARD, May 9, 1998, at 1, 1.

214. See *id.*

215. See *id.*; see also Strauss, *supra* note 194.

216. Strauss, *supra* note 194.

217. Leeds, *Small Record Labels*, *supra* note 132.

218. *Id.* (explaining that small independent record labels get locked out of radio without the ability to pay the indies). Failure to obtain radio airplay will likely drive smaller record labels to extinction. See *id.*

219. Strauss, *supra* note 194. In 1998, Limp Bizkit's label formally agreed to pay \$5,000 for the airing of the band's songs fifty times within five weeks. *Id.* The label's move to purchase the airtime skyrocketed Limp Bizkit to one of the most popular hard rock acts in the country. See Boehlert, *Limp Bizkit*, *supra* note 209; Taylor, *supra* note 213, at 82–83.

the record company to continue to pay the fee.<sup>220</sup> Radio stations that fail to play “good” music run the risk of alienating listeners, which in turn will deter record labels from securing airtime at that particular station.<sup>221</sup> Should listenership decline, the radio station will be saddled not only with the loss of promotional dollars from the record labels themselves, but also with the loss of all traditional commercial advertising revenue.<sup>222</sup> Radio stations that accept payola have an incentive not to broadcast certain material if doing so would cause a larger marginal loss in advertising revenue than the station would receive in marginal payola revenue.<sup>223</sup> Therefore, prudent business judgment demands that all involved produce and distribute music of a caliber that will satisfy its listeners.

The theory that undeserving songs will be played similarly may fail because it does not reflect the screening process at the front end of music decision-making. The reality of the music business is that record labels spend exorbitant amounts of money on artists who may never produce a single hit.<sup>224</sup> A record label is unlikely to make expenditures in the form of signing fees and production costs if they are unconvinced that the artist has a remote possibility of becoming a star.<sup>225</sup> The record label cannot recoup their initial investment if the artist fails to sell records.<sup>226</sup> The process of screening undeserving music does not begin when the songs are recorded and sent to the radio station, but rather, from the moment an artist is signed.<sup>227</sup>

220. See Joe Gardyasz, *Station Changes Format; Manager Hopes Classic Rock Music Will Attract Broader Audience*, BISMARCK TRIBUNE, Oct. 26, 1997, at 1F, LEXIS, News, News Group File, All (explaining that “[a]ttracting additional listeners is the name of the game in the radio business, because more listeners help stations bring in more advertising dollars”).

221. *Id.*; see also Coase, *supra* note 18, at 308.

222. See Coase, *supra* note 18, at 308. For instance, the Arbitron Ratings Company periodically estimates audience shares for radio stations within a geographic area. Gardyasz, *supra* note 220. National and regional advertisers rely heavily on a station’s Arbitron rating in determining on which stations to advertise. *Id.* “The Arbitron ratings are like a report card for radio stations. Stations use the ratings to measure their success against one another and to set advertising rates.” Jamie Kritzer, *Hip-Hop Station Still No. 1 in Triad*, NEWS & RECORD (Greensboro, NC), Nov. 8, 2001, at 9, LEXIS, News, News Group File, All.

223. Coase, *supra* note 18, at 308.

224. See Lynn Morrow, *The Recording Artist Agreement: Does It Empower or Enslave?*, 3 VAND. J. ENT. L. & PRAC. 40, 42 (2001).

225. See Boehlert, *Payola City*, *supra* note 24 (explaining that record labels recover many of their costs by recoupment of CD sales). If an artist fails to sell CDs, then labels will be unable to recover these costs. *Id.*

226. See Morrow, *supra* note 224, at 43–44, 49; see also Boehlert, *Payola City*, *supra* note 24.

227. Morrow, *supra* note 224, at 43. This argument is not to suggest that only signed artists have talent, nor is it to suggest that those artists signed are necessarily the most talented—a little luck in the music industry may take an artist farther than a little talent. As a general proposition,

Additionally, direct pay-for-play would provide small independent record labels with the ability to compete with powerhouse record labels that currently dominate the independent promotion market.<sup>228</sup> Because independent labels frequently lack the capital needed to participate in promotional pay-for-play gimmicks such as free concerts, trips, and giveaways, direct pay-for-play guarantees a return on the label's investment.<sup>229</sup> Many independent labels favor such a move, arguing:

If I had the opportunity to bet on my song, right now I've got to put money on the table, and it may or may not get played . . . [but] [i]f I had an opportunity to actually put the money on the table and let it get out there and let the consumer decide, to me that's more attractive than allowing the system to decide.<sup>230</sup>

By removing the speculation that comes with gambling with the indies, record labels could now provide the listening public with new and fresh music often shunned in favor of proven standards.<sup>231</sup>

### *B. A Proposed Treatment for a Seemingly Unending Problem*

One of the pillars of the American free enterprise system is the ability to promote and sell products in any fashion.<sup>232</sup> Because of this foundation, companies regularly secure airtime in the form of commercials on both television and radio airwaves. From this, product placements in motion pictures now allow a company to place its product in prominent view, while slotting fees paid to supermarkets by manufacturers to place new products in prominent positions on the shelves has also become the rule rather than the exception.<sup>233</sup> In 1994, *The Box*, an all-request music-video

however, it is fair to assume that those artists who have captured the attention of radio executives have been signed to a record label for a reason.

228. Taylor, *supra* note 213, at 82. Currently, five major record labels control the independent promotion market. Boehlert, *Save Us from Ourselves*, *supra* note 1.

229. See Boehlert, *Fighting Pay-for-Play*, *supra* note 25.

230. *Pay-for-Play Sparks Debate of Where Labels' Money Goes*, BILLBOARD, May 9, 1998, at 82-83 [hereinafter *Pay-for-Play Sparks Debate*].

231. See Strauss, *supra* note 194.

232. See generally ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (R.H. Campbell & A.S. Skinner eds., Oxford University Press 1976). The principle of economic liberalism and non-interventionist laissez-faire capitalism advanced by Adam Smith has laid the foundation of the American free enterprise system. See Michael Skube, *Books: Reviews and Opinion; Cultural Meanings in Wealth, Poverty*, ATLANTA JOURNAL-CONSTITUTION, Apr. 19, 1998, at L10.

233. Bob Greene, *Payola, Part 2—Will Anyone Even Notice?*, CHI. TRIB., June 24, 2001, at C2.



channel, began a campaign entitled “Playola,” where record companies could pay \$27,000 to have their wannabe hits played for a total of forty-two times during two weeks.<sup>234</sup> Even airlines have joined in the realm of pay-for-play by allowing record labels to purchase in-flight video time to run the music videos of contemporary music artists.<sup>235</sup> The concept of promotion, however, does not yet fully extend to cover the payment of money in exchange for securing radio airtime of a particular song.<sup>236</sup> Given the movement to allow companies to secure product prominence through untraditional forms of advertising, there is little justification for the failure to partly extend this rationale to the concept of pay-for-play on the radio.<sup>237</sup>

Failure to classify the purchasing of airtime for songs as with any other form of promotion leads to the illogical assumption that a song has a value to a record label other than as a promotional tool. Securing airtime for a particular song furthers the record label’s legitimate goal of selling its ultimate product—either the album or the artists themselves.<sup>238</sup> In a sense,

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234. Strauss, *supra* note 194. The Box Music Network has since been folded into the MTV2 music video channel. Benny Evangelista, *Former MTV Executive Named MusicNet’s CEO*, S.F. CHRON., Oct. 23, 2001, at B3.

235. Jeffrey Jolson-Colburn, *Record Companies Find Skies Friendly to Music Videos*, HOLLYWOOD RPTR., Dec. 30, 1991, at 1.

Record labels pay for the airtime as part of their marketing of a record or a longform video to the captive audience. Cost depends on how many fliers a video will reach during the month. For instance, United costs about \$9,000 per month, mid-sized Continental runs about \$4,000 and smaller America West costs about \$2,000 per month. Elektra bought airtime on seven different airlines for a sky-high blitz of the Natalie Cole video, “The Christmas Song.”

*Id.*

236. This is evident due to the current status of payola laws. See discussion *supra* Part II.A–B.

237. Americans may not be as hostile to the deregulation of payola as previously believed. See Greene, *supra* note 233. One commentator notes that regardless of what current investigations into the payola scandal discover, “Americans will yawn.” *Id.*

Any time you go to the movies and see a brand-name product—a soft drink, a candy bar, a luxury car—being used by one of the stars, you figure that a payment has been made. That particular soft drink didn’t just magically appear on screen; that particular candy bar didn’t just happen to be one that the director picked up in a vending machine. Business was done—and the audience knows it, and has been conditioned to accept it.

*Id.*

238. Artists driven by their love of music and not money would undoubtedly be unappreciative of being considered a “product” of their record label. However, while a fondness for the artist may develop, record labels arguably exist on pure economic decision-making, not on warm, fuzzy feelings. The real threat in labeling an artist’s work as a “product” is that it seems to denigrate the countless hours of work that musicians dedicate to their craft. The purpose here, however, is not to question the musical integrity of artists when recording and performing their music. Rather, the reality of the business is that once the music has been effectively recorded, it will likely need to be promoted to reach the largest segment of the listening public. To some, this may be considered “selling-out.” Perhaps those that label it as such fail to recognize that good

the song is nothing more than a commercial.<sup>239</sup> It acts to spark interest in the artist's album, merchandise, or live performance. Although listeners might derive a sense of enjoyment from a song that is often lacking with other forms of commercial advertising, the motivation is the same—sell, sell, sell. To sell the public on their ultimate “product,” record labels may have effectively cornered the market on the catchiest form of commercials available.<sup>240</sup>

Despite the fact that a song may technically be treated as a form of a commercial, there are clear dangers in allowing a record label to have unfettered authority to purchase airtime. Although record labels should be allowed to directly pay radio stations for airtime, without specified limits on the amount of airtime a label could purchase, the result would be that the label, not the listener, would dictate what song could reach the number one position on the charts.<sup>241</sup> The desire to secure their artists that number one slot would result in a bidding war between record companies whose only interest is to have an artist's radio popularity translate into record sales.<sup>242</sup> The danger of such a proposition is that record labels would likely turn around and charge the fees to the artist, ultimately decreasing artist profitability.<sup>243</sup> Artists, many of whom are still breaking into the industry,

music, without proper promotion and packaging, only takes an artist so far. While “selling-out” seems to require that musical fads and statistics sway an artist in the recording process, it speaks nothing of the process of promotion required for the public to become aware of a musical masterpiece.

239. Strauss, *supra* note 194 (explaining that the practice of payola is akin to a television “infomercial”).

240. This is not to suggest that a record label should be given unfettered authority to purchase airtime. Rather, this sets up the argument that direct payment, under certain guidelines, could be allowed and regulated.

241. Strauss, *supra* note 194 (explaining that detractors “fear the practice makes it too easy to tamper with the Billboard radio and singles charts, which do not differentiate between songs in regular programming that have been paid for and ones that haven't”). This is the concern of Incubus bassist Dirk Lance who notes that allowing record companies to dictate and define what is popular on the radio “misses the point of what radio is about.” Telephone Interview with Dirk Lance, *supra* note 177.

242. Morrow, *supra* note 224, at 41 (explaining that “the sole purpose of a record company is to sell records”).

243. For mainstream popular acts such as Britney Spears that generate more income than most Third World countries, one can hardly see justice done by increasing their profitability. See Nicholas Stein, *The 40 Richest Under 40: Celebrity Inc.*, FORTUNE, Sept. 17, 2001, at 164, 165, 190 (At age nineteen, singer Britney Spears was worth an estimated \$46 million dollars.). However, most artists will never get close to reaching the monetary status of a Britney Spears. Recently, there have been a number of movements by artists to equalize what is seen as the one-sidedness of the music industry. See Kathleen Sharp, *Recording Artists Sue, Aiming to Rock Industry*, BOSTON GLOBE, Oct. 7, 2001, at A6 (discussing how grunge rocker Courtney Love leads the way in suits filed against record labels over one-sided and unfair terms of artists' recording contracts). Record companies often get rich off of artists who do not see the same size

would ultimately pay to have their songs placed on the radio. Only this time, if they do not pay the station's price, the chances of receiving airplay would be effectively reduced from slim to none.<sup>244</sup> One possible solution would be to allow artists, through contract, to require the record label to bear the costs of secured radio time. This, however, presupposes an artist will be in a position to make such a demand. Because most recording contracts are granted on a take it or leave it basis,<sup>245</sup> most artists will be unable to pass these costs onto the record labels.<sup>246</sup>

Regardless of whether the artist is the party substantially impacted by direct pay-for-play, many of payola's other consequences will be amplified rather than eradicated by total deregulation. If a record company could, without limit, directly purchase airtime for a particular song, the radio station would have little incentive to ensure the quality of the programming.<sup>247</sup> Although stations receive considerable perks from indies to push certain songs, most of their profit stems from traditional commercial advertising revenue.<sup>248</sup> If all airtime was up for bid, stations could successfully turn a profit without the need to appease their source of commercial revenue. The need to satisfy the listening public would also suffer because the listener would likely have little choice other than tuning into a station that accepts payment for broadcast.<sup>249</sup> The enormous incentive for stations to turn to a pay-for-play system would expectedly eliminate the desire to operate in any other fashion.<sup>250</sup>

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returns. See Lomax, *supra* note 148. Thus, while it is hard to feel sorry for people making a living by playing music, fairness nevertheless dictates that they be the ones to see the rewards.

244. Despite evidence to the contrary, some argue that deserving songs will get played with or without independent promotion. "All record labels have the same chance at getting their record played, as long as the program director is passionate about the record. . . . It doesn't take one promotional dollar to get that record on the radio." Leeds, *Small Record Labels*, *supra* note 132 (quoting Jeff Deane, general manager of a California-based indie firm). Although the number of stations airing songs based strictly on the appeal of the music is undoubtedly dwindling, some smaller individualized stations remain committed to playing songs solely on perceived merit. Roberts, *Playola*, *supra* note 129.

245. See generally Morrow, *supra* note 224 (explaining how recording contracts often enslave recording artists, many of whom do not hold the power to dictate their own terms).

246. See *supra* note 186 and accompanying text.

247. See Strauss, *supra* note 194.

248. See Gardyasz, *supra* notes 220, 222 and accompanying text.

249. See Boehlert, *Payola City*, *supra* note 24.

250. This applies only to radio formats such as Top 40, rock, urban, and country that currently use payola as a means of affecting broadcast decision-making. Boehlert, *Payola City*, *supra* note 24; see discussion *supra* Part II. This likely would not apply to other formats such as talk radio, smooth jazz, or oldies where, because there is little or no pressure to sell records, payola is not an issue.

Because total deregulation of payola would effectively eliminate the need for traditional radio broadcast advertising, it is a near guarantee that the advertising industry would vehemently oppose such a move. In essence, advertisers would be forced to relinquish the medium of radio as a forum for advertisement, unless the advertisers would be willing to pay similar or higher rates to secure radio airtime. In effect, the result of total deregulation would engage both record labels and advertisers in a bidding war to secure advertising airtime. Moreover, massive radio deregulation in 1996 has already significantly impacted the way radio advertisers are forced to do business. In fact, advertisers report that huge radio conglomerate mega-chains “increasingly coerce them to buy advertising time on weaker stations as a prerequisite for purchasing advertising time on the chains’ stronger stations in other, more desirable locales and regions.”<sup>251</sup> Already suffering from radio deregulation, total payola deregulation would only aggravate advertisers’ problems by effectively pitting the advertising industry against the music industry—a debate Congress or the FCC is unlikely to foster.

Some may argue that the simplest solution to the payola problem lies neither in the current disclosure laws nor in partial deregulation, but rather, in total prohibition of payment for broadcast.<sup>252</sup> A total ban on pay-for-play, however, fails to eliminate the pressures of the music industry that spawn payola in the first place.<sup>253</sup> Instead, it exacerbates the situation by effectively denying record labels any influence on station programming. Because record sales are crucial to a record label’s bottom line,<sup>254</sup> the labels will likely adapt by finding new and potentially more damaging ways around the prohibition. Rather than eliminating pay-for-play, total prohibition would drive the current payola practice even further underground, thereby impeding any hope for a more honest and efficient music community.

Moreover, although the issue has never been explicitly addressed, a total ban on pay-for-play may be unconstitutional as a content-based regulation on speech. While a song may technically act as a commercial, it is nevertheless artistic speech presumptively protected by the First

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251. Brock, *supra* note 99, at 748.

252. See Strauss, *supra* note 194. “Detractors say the potential for misuse of pay-for-play is great. They argue that stations could extort record companies for money to put their new bands on the air.” *Id.*

253. See discussion *supra* Part III.

254. Morrow, *supra* note 224, at 41 (explaining that “the sole purpose of a record company is to sell records”).

Amendment.<sup>255</sup> Under the current regulatory system, record labels do have the option to purchase standard blocks of airtime typically allocated to traditional commercial advertisements.<sup>256</sup> Record labels rarely purchase standard blocks of commercial airtime<sup>257</sup> because the rates charged to advertisers would likely become excessively expensive if a label was forced to pay for every time a song was played. However, a complete ban on pay-for-play would require that this option could no longer legally extend to record labels. In effect, this would allow a fast food chain pushing their new value meal to purchase airtime, while Epic Records, trying to sell the listening public on their hot new artist, would be denied that same opportunity. Although the government is typically granted leniency in regulating radio broadcast airwaves,<sup>258</sup> to survive First Amendment strict scrutiny, the government would nevertheless be required to show a compelling government interest narrowly designed to advance a legitimate government goal.<sup>259</sup> Because section 317 does not currently foreclose the possibility of buying radio airtime, it is unclear whether the courts, if presented with such a question, would find the total ban to be a reasonable limitation on speech.

### 1. How the New System Would Work

Partial deregulation would improve the efficiency of radio programming by allowing payment from a record company to a radio station in exchange for a contractually enforceable guarantee of a specified

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255. See *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501–02 (1952). The mere fact that a speaker seeks to profit from an expressive activity will not necessarily transform the activity into commercial speech, deserving lessened First Amendment protection. *Id.* With respect to motion pictures, musical recordings, books, or newspapers, the profit motive will typically run parallel with an expressive content that is not necessarily commercial. See *id.*

256. See 47 U.S.C. § 317(b) (1994) (The only requirement to record companies purchasing airtime is an appropriate source disclosure announcement.); David Hinckley, *Stations Consider Song Ads*, N.Y. DAILY NEWS, Mar. 13, 2001, at 81, LEXIS, News, News Group File, All (noting that Clear Channel at one point considered a plan to sell blocks of late-night airtime directly to record labels).

257. See Boehlert, *Pay for Play*, *supra* note 7 (explaining that stations are very reluctant to “pepper their programming” with the required sponsorship disclosure announcements required under the law).

258. See, e.g., *FCC v. Pacifica Found.*, 438 U.S. 726, 735–36 (1978). While content-based regulations are typically deemed presumptively unconstitutional, the government is granted greater leeway in regulating the radio broadcast airwaves. See *id.*

259. See, e.g., *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983) (ruling that in order to withstand a challenge to First Amendment strict scrutiny the government must demonstrate that the regulation is narrowly tailored to advance a sufficiently compelling government interest).

amount of airplay.<sup>260</sup> The number of songs a label could secure would be capped to ensure that a song's position on the charts could not be bought. Record companies and radio stations would then adopt a standard contract whereby the amount of airtime purchased and the price paid for such airtime could be monitored. Because the nature of radio is of-the-moment,<sup>261</sup> contracts between radio stations and record labels likely will be a standard form contract to better accommodate timing demands.

#### a. Disclosure Requirements

The purchased airtime would still require disclosure; however, the appropriate disclosure would be made to the FCC rather than the amorphous disclosures made to the listening public at time of broadcast.<sup>262</sup> The FCC would have the authority to require timely disclosure of all monies paid, with failure to comply resulting in monetary sanctions better reflective of total business revenue.<sup>263</sup> Additionally, violation would result in the more frequent denial of renewal of radio station licenses.<sup>264</sup> Although the cost for purchasing airtime would be determined by market demand, the FCC would have the authority to oversee the payment terms of the purchased airtime. This way, if the fees the radio stations charged to

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260. Sidak & Kronemyer, *supra* note 121, at 569; *see also* text accompanying note 212.

261. Boehlert, *Pay for Play*, *supra* note 7. "Because you only get 12 weeks for your record to get any traction at radio. After 12 weeks the next wave of record company singles come over the breach and if you don't have any traction you get washed away." *Id.*

262. The legislative authorization for this disclosure procedure already exists under section 317(d) of the Communications Act. Section 317(d) currently authorizes the FCC to waive the announcement requirements where "it determines that the public interest, convenience, or necessity does not require the broadcasting of such announcement." 47 U.S.C. § 317(d) (1994). Thus, "if Congress authorized the FCC to waive the requirement for disclosure entirely in certain cases, it also authorized the FCC to mandate disclosure by some less intrusive (and, needless to say, more efficient) alternative than by the on-the-air announcement at the time a record is broadcast." Sidak & Kronemyer, *supra* note 121, at 569.

263. The monetary sanctions levied for noncompliance should be such that they would actually make a dent in the violator's pocket. The maximum penalty of \$10,000, as currently set, will do little to deter violation by billion-dollar corporations. *See* discussion *supra* Part II.B.

264. The FCC currently has this authority. 47 C.F.R. § 73.1212 (1999); *see also* discussion *supra* Part II.B; H.R. REP. NO. 86-1800, at 17 (1960). "Irrespective of which of these administrative sanctions (i.e., revocation, suspension, or cease and desist order) the FCC may contemplate . . . nothing in section 312 as so amended is intended to prevent the FCC from imposing, on the basis of the evidence adduced at the hearing, whichever sanction it deems appropriate." *Id.* However, the FCC rarely invokes its power to revoke station licenses, but will instead typically impose temporary suspension: "Revocation, of course, amounts to a death sentence for the licensee. It may also have a serious effect upon the community served by the licensee. Because of its severity, it has seldom if ever been invoked." *Id.* To ensure that radio stations abide by the requirements, the FCC should more frequently invoke its power to completely revoke station licenses rather than using minuscule fines.

secure airtime spiraled uncontrollably, the FCC could evaluate what action, if any, would be required. The FCC would then be required to compile all relevant data and provide it to the public on a monthly basis.<sup>265</sup>

The decision would ultimately be left in the hands of the record labels to determine for which songs payment will be made. For popular artists that are likely to have songs played without payment, record labels may choose to forego payment altogether. Radio stations that fail to play songs of popular artists because payment is not made would do so at the risk of alienating their own listeners. The price that radio stations set for the airtime will be systematically computed by taking into consideration price variations for peak and off-peak hours, the geographic market that the station serves, and the artist's history of successful songs at that given station. A scoring system that incorporates the above factors and determines an appropriate rate for purchase would ensure that radio stations cannot manipulate the price by charging vastly different fees to different artists or by allowing record labels to engage in bidding wars for airtime.

With pay-for-play deregulation, justifiable concern may exist that radio stations will simply replace independent promoters as the party extorting massive amounts of money from record labels in order to have a song broadcast.<sup>266</sup> The main difference, however, is that because the contractually enforceable purchased airtime could now legitimately and systematically be disclosed to the FCC, radio stations would maintain an accountability that is not now present with independent promoters. Because radio stations, unlike independent promoters, provide a service that ultimately thrives on their popularity with the listening public,<sup>267</sup> the mandatory monthly public disclosures will force radio stations to bear the brunt of negative publicity if the contracted prices are entirely unreasonable.

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265. See Sidak & Kronemyer, *supra* note 121, at 569–70 (similarly suggesting that, “the FCC could require each licensed radio station to file with the Commission quarterly and annual summaries of such data, which would be available for public inspection”).

266. In 2001, when Clear Channel toyed with the idea of the eventual elimination of indies by having record companies pay for late-night radio programming directly, shock waves rolled through the music industry. See Lomax, *supra* note 148. The major concern, however, was that because Clear Channel dominates much of the industry, the potential for abuse is great. See *id.* While this Comment's proposed solution may help to alleviate many of the negative consequences that payola produces, oversight of Clear Channel is a demon all its own.

267. In recent years, radio stations have been faced with a decrease in radio listening due to the commercial overload in station programming. Boehlert, *Radio's Big Bully*, *supra* note 89 (explaining that radio listening has declined nearly fifteen percent over the past seven years). The negative publicity associated with radio stations extorting massive amounts of money for listeners to hear their favorite artists would not facilitate the radio station's objectives of increasing listenership.

### b. The Problem of Finite Airtime

Record labels seeking to secure artist airtime would now approach radio stations directly. In managing their finite airtime, radio stations may benefit from several considerations. Although the problem cannot be entirely eliminated, taken in conjunction, these considerations would help alleviate finite airtime concerns.

With guaranteed airplay, record labels may initially be tempted to pay for all of their artists' material. Radio stations, on the other hand, cannot afford to fill airtime with too many substandard songs.<sup>268</sup> A station that supplies unpopular songs runs the risk of alienating traditional commercial revenue and listener good faith.<sup>269</sup> Allowing the stations to freely enter into such contracts could also serve as an indicator of the future success of the single or artist. Therefore, radio stations would have an incentive to preview the song to determine the likelihood of its success, including using listener call-ins and email requests as a gauge for listener response.<sup>270</sup> The radio station may choose to forego entering into the contract, or if unsure of the song's success, it may require the label to purchase airtime under the maximum amount.

Further, the number of spins purchased would be limited to ensure that a song's position on the charts could not be bought. The exact number would be determined by a compromise among the record labels, radio station owners, the FCC, and other sufficiently interested parties.<sup>271</sup> Record labels and radio stations may have reason to set a high number of secured spins. The FCC, however, remembering the impetus behind payola laws, can provide a voice of reason in the ultimate determination. The set number of spins would reflect the ultimate regulatory goal—that the secured airtime is but a compromise to help eradicate the inefficiencies and dangers of the current payola system while preserving the ideal that a party needs much more than money to secure radio airplay.

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268. See discussion *supra* Part IV.A.

269. See discussion *supra* Part IV.A.

270. See, e.g., Price, *supra* note 210.

271. It is common for industries affected by congressional regulation to come together to discuss the industry's future. Recently, musicians, members of Congress, record company executives, Internet entrepreneurs, copyright lawyers, union representatives, and computer experts gathered together at a conference to discuss how the future of music has been impacted by the free streaming of music over the Internet. Jon Pareles, *The Many Futures of Music, Maybe One of Them Real*, N.Y. TIMES, Jan. 10, 2002, at B1. In fact, there have recently been calls to the Recording Industry Association of America ("RIAA") to join together with both major and independent record labels and recording artists to discuss rewriting current FCC payola rules. Boehlert, *Save Us from Ourselves*, *supra* note 1.



Finally, because the number of spins purchased would be limited, there would be an incentive for the record label to contract with the radio stations to spread out the spins rather than have them all played in a lumped period of time. Dispersing the playtime over a period of approximately three to four weeks—including alternating playtime during different hours of the day—would help maximize the number of listeners the song could reach in this initial trial period. In turn, this would also help ensure that no one artist dominates the station's daily programming.

### c. Synthesis by Hypothetical

Apart from checks specifically enumerated within these deregulation guidelines, there are other checks inherent in a system that strikes a compromise between a total ban of pay-for-play and the unfettered capability to purchase airtime. Consider the following hypothetical: Columbia Records hopes to launch a single of a virtually unheard of female pop group named Movida. They contract with KISS FM in Los Angeles for the maximum amount of spins that could legally be purchased (for purposes of this hypothetical, the number will be set at thirty). Once the radio station has fulfilled its contractual obligations, three possible scenarios arise for the future of Movida's new single. First, the song may receive an overwhelming response causing the radio station to continually play the song after the contracted for airtime has expired. Second, the song may gain marginal listener reviews, in which case the station may choose to air the song on occasion. Third, the song may fail by receiving dismal reviews, causing the station to pull it from rotation. In each scenario, payment determinations for further airplay by record labels would be resolved after the thirty contracted-for spins have come to pass, likely eliminating the need to engage in further illicit unreported payments.

In the first instance, where the song receives overwhelming reviews, there is no incentive for the record label to continue with legal or illegal payment if the song is already a success. Continued payment would be a waste of money and would provide no clearer results beyond what has already been achieved. Where the song has failed to receive superior reviews, it is unlikely that continued payment will do anything to further the song's success. Rather than incurring more costs by promoting a failing song, record labels will reject opportunities to engage in illicit payments and will instead cut their losses. Where the song has only received a moderate response, the answer is somewhat trickier. There may still be some incentive for the record label to continue payment given the song may have some potential to gain a greater response if play increases. This is where the internal checks on radio station and record labels must be

employed to ensure that there is no payment beyond the thirty contracted-for spins. Because this new system would require the parties to turn over detailed transactions to the FCC, enforcement of the hypothetical thirty-spin maximum would make regulation more feasible.

## 2. The Future of Independent Promoters

Under this newly regulated environment, record companies and artists could use the fees once provided to the indies to seek out promotional avenues that promise clearer results.<sup>272</sup> Record companies may choose to increase artists' budgets to create music videos and interactive websites, or they may choose to focus on promoting the album through an increase in print promotion or television commercial time.<sup>273</sup> This would ultimately allow artists and their record labels to more accurately determine the most effective way to promote both established and up-and-coming musical artists.

Indies would not become extinct under this new system. Rather, they likely would move back in-house with the record labels to serve as legitimate facilitators of knowledge between the record companies, radio stations, and services such as Billboard or Arbitron that track the progress of record sales and airplay charts. Because the majority of indies maintain strong relationships with radio stations in their given regions,<sup>274</sup> they also possess a considerable amount of knowledge about the type of music that would prove to be successful on any given radio station in that area.<sup>275</sup>

272. Direct payment for broadcast may also be more beneficial for independent record labels by reducing the speculation regarding promotional costs. As the president of the independent label Rykodisc acknowledges,

If I had the opportunity to bet on my song, right now I've got to put money on the table, and it may or may not get played. . . . If [however] I had an opportunity to actually put the money on the table and let it get out there and let the consumer decide, to me that's more attractive than allowing the system to decide.

*Pay-for-Play Sparks Debate*, *supra* note 230.

273. Boehlert, *Save Us from Ourselves*, *supra* note 1. "Label sources suggest they would rather spend their marketing dollars buying radio commercials to directly promote their artists to consumers. But most record company budgets cannot support both large indie promotion and advertising budgets." *Id.*

274. *See* Boehlert, *Fighting Pay-for-Play*, *supra* note 25.

275. In 1984, a preliminary investigation of independent promotion conducted by the Senate Subcommittee on Oversight and Investigations concluded that independent promoters did provide some significant benefits to the recording industry:

These promoters bring some continuity and stability to a very transient industry. While radio station personnel often change employment throughout the United States, independents maintain their geographic locations and their acquaintanceships with the station personnel. It is also believed by some radio

Indies could therefore continue to advise the record companies as to which songs would require payment, to which regions of the country the song should be targeted, and which songs are likely to be a hit.

Allowing record companies and artists to strategically dictate the time and place of contracted-for airtime rather than paying a fee whenever a station chooses to add a song disperses the power that is now concentrated primarily in the hands of independent promoters. Accordingly, the industry will move toward a more efficient and effective system for determining potential hit records. As it stands today, indies invoice the record company with the addition of every song, which provides indies with an incentive to get as many songs as possible added to a station's playlist. Under this new system, indies will now get paid for rendering an actual service rather than for providing a quick solution around an ill-equipped and illogical law.

## V. CONCLUSION

Payola is, and always will be, a reality of the music industry. Reality continuously reminds artists, record labels, and radio stations that the music business is, in fact, a business. Artists do not eat, sleep, and buy million dollar homes on the warm, fuzzy feelings that they provide their fans. Record labels do not front artist signing fees and production costs out of the kindness of their hearts. Radio station conglomerates are not able to generate billion dollar revenues by simply providing the listener with the newest hit single.

As the music industry is a business, the laws must better adapt to balance business reality with the desires for a more honest and efficient music community.<sup>276</sup> Although seemingly at odds, the music industry,

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stations that independent record promoters who work a variety of record labels bring objectivity and experience to promotion of a record that a company promoter would not bring because of his vested interest in the company's product.

Sidak & Kronemyer, *supra* note 121, at 530. "The problem for record companies has always been that there are too many radio stations—and too many egos—nationwide for label staffers to keep close tabs on. So they need to hire indies, people with close business relationships in different markets." Boehlert, *Pay for Play*, *supra* note 7.

276. Despite persistent calls for congressional inquiry, it is unclear—given the events of September 11, 2000—whether Congress will choose to take the time to implement the needed change. *See generally* Roberts, *Playola*, *supra* note 129 ("[W]ith 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."). While it is unclear what exactly needs to happen before Congress is willing to adequately confront an issue that has plagued the music industry for over a century, the current antitrust investigation into Clear Channel seems to provide a sufficient starting point. *See generally* *Taking on the Empire*, *supra* note 95; Phillips, *Conyers to Press*, *supra* note 81 (noting that the investigation into the monopolistic practices by Clear Channel has caused some,

Congress, and the FCC must be prepared to work together to adopt ways in which these goals can coexist. Without compromise and consistency in enforcement of the laws, the music industry will continuously be plagued by payola's scandal and uncertainty.

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including Representative Conyers, to rethink the current payola laws). However, although “cries for government investigations have sometimes been answered,” the payola investigation typically fizzles when more pressing political issues or agendas come into play. SEGRAVE, *supra* note 14, at ix (noting that in the late 1980s then-Senator Al Gore promised a full investigation into payola, only to drop the issue to pursue an unsuccessful bid for the 1988 Democratic presidential nomination). Although this Comment proposes what the author believes to be a reasonable solution, Congress, the FCC, and the music industry must step up to the plate to affect change.

\* This is dedicated to my father, without whose love, support, and constant encouragement this Comment would not have been realized. Sincere thanks to the editors and staffwriters of the Loyola of Los Angeles Entertainment Law Review for their time, particularly Alexander Medina, Tom Werner, Leah Phillips Falzone, Brian E. Pellis, Scott Sterling, Rachael L. Parent, Carey Melton, and Katherine Mast for their talent and effort on my behalf. Special thanks to Paul Karl Lukacs and William Briggs, II of Lavelly & Singer LLP for their countless topic suggestions, and to Professor Susan Smith Bakhshian for her amazing editing skills. To my big brother Alex—you are the inspiration for this Comment, but more importantly, you are a constant source of inspiration in my life. Lastly, to all my friends and family (you know who you are) who have made me the person I am today—I love you all!

