

## PAYOLA—CAN PAY-FOR-PLAY BE PRACTICALLY ENFORCED?

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Payola is against the public interest. It turns the whole notion of encouraging and promoting this important part of our cultural heritage into a commercial vehicle. Some of the most imaginative art on earth was born in the hearts and souls of American composers. I believe that music is one of our major contributions to world culture. Allowing creativity to be stifled because of questionable commercial endeavors or legal gymnastics is just plain wrong. I believe that's what the government had in mind when they implemented laws prohibiting the influence of money on airplay.—John Conyers Jr.<sup>1</sup>

### INTRODUCTION

Payola or pay-for-play, in the context of broadcast radio, is the playing of music or other programming by radio stations in exchange for payments or other valuable consideration given on behalf of a record label.<sup>2</sup> Record labels engage in this practice in order to promote their artists on the radio, which is the most successful way to gain publicity. Until recently, federal anti-

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<sup>1</sup> Chuck Phillips, *Conyers to Press for Tougher Enforcement of Laws on Payola*, L.A. TIMES, Jan. 7, 2002, at B1 (quoting John Conyers Jr., Representative for the House Judiciary Committee (D-Mich.)).

<sup>2</sup> See Free Press, *Ten Things You Need to Know about Payola*, <http://freepress.net/payola/=faqs> (last visited Oct. 27, 2007) (providing basic facts about payola); see also Lauren J. Katunich, *Time to Quit Paying the Payola Piper: Why Music Industry Abuse Demands a Complete System Overhaul*, 22 LOY. L.A. ENT. L. REV. 643, 644 (2002) (defining the term "payola").

payola laws<sup>3</sup> have only been enforced three times since their enactment.<sup>4</sup> Quiz show scandals prompted the first major payola investigation in the 1960s, which fully exposed the rampant abuse of payola practices in radio broadcasting. The investigation led to radio disc jockeys being stripped of all authority to make musical programming decisions and the firing of nationally renowned disc jockey, Alan Freed.<sup>5</sup> The second enforcement occurred in 2000, when the Federal Communications Commission ("FCC") fined Clear Channel Communications, Inc. \$8,000 for not disclosing payments it received to increase airplay of a Bryan Adams song. Despite limited enforcement, there have been constant allegations and news reports about the flagrant abuse of payola<sup>6</sup> by record labels that want to increase radio airplay of their songs. The current effects of payola are present in the monotonous radio playlists, high CD prices, and the limited number of new artists heard on the radio. However, until recently, Congress and the FCC have rarely enforced anti-payola laws, rendering them largely ineffective.

It was not until 2003, when former New York Attorney General Eliot Spitzer<sup>7</sup> began a three-year payola investigation, resulting in \$35 million in settlements that the FCC begrudgingly awoke

<sup>3</sup> The anti-payola laws were codified by 47 U.S.C. §§ 317 and 508, which prohibit broadcasting stations and their employees from receiving undisclosed payments in exchange for a song's airplay on the radio. The FCC is empowered to regulate payola by the Communications Act of 1934. The Act gave the federal government the power to regulate wire and radio communications throughout the country. It essentially gave the federal government the power (through the Federal Communications Commission) to regulate radio station airwaves. Communications Act of 1934, 47 U.S.C. §§ 151-573 (2007).

<sup>4</sup> See Federal Communications Commission, Payola and Sponsorship Identification, <http://www.fcc.gov/eb/broadcast/sponsid.html> (last updated Oct. 18, 2007) (listing three enforcement actions of payola laws dating before 2007).

<sup>5</sup> See, e.g., Sanford Nowlin, *Payola's Last Song?*, SAN ANTONIO EXPRESS-NEWS, Apr. 2, 2006 at B1. Alan Freed, who coined the phrase "rock 'n' roll," was a nationally renowned radio disc jockey convicted of commercial bribery charges in 1962 as a result of payola practices; Elizabeth Guider, *Quiz Scandal Crossed Wires in '59*, VARIETY, Jul. 31, 2005, available at <http://www.variety.com/index.asp?layout=variety100&content=jump&jump=article&articleID=VR1117926754&category=1930>.

<sup>6</sup> See Interview by Ray Suarez with Christopher Sterling, Professor, George Washington University, at PBS (Jul. 26, 2005), available at [http://www.pbs.org/newshour/bb/business/july-dec05/payola\\_7-26.html](http://www.pbs.org/newshour/bb/business/july-dec05/payola_7-26.html) (discussing the frequency of payola in the radio industry).

<sup>7</sup> Eliot Spitzer retired from his post as the Attorney General when he was elected as the 54th governor of New York State in 2007. See Danny Hakim, *Spitzer is Sworn and Begins Push on Ethics Rules*, N.Y. TIMES, Jan. 2, 2007, at A1; Danny Hakim, *Thorny Issue Faces Spitzer in Day-After Pleasantries*, N.Y. TIMES, Nov. 9, 2006, at P15.

from its 40-year payola slumber.<sup>8</sup> The FCC engaged in its own nation-wide payola “investigation”<sup>9</sup> and issued a consent decree in April 2007, which resulted in a \$12.5 million settlement between the four largest broadcasting conglomerates. The consent decree also called for a good faith agreement by record labels and radio stations to allot 42,000 hours for independent music on their broadcast stations.<sup>10</sup> Some activists, scholars and artists view this settlement as a positive step in the right direction to eliminating payola, while many others criticize it as a slap on the wrist for record and broadcast companies. These critics contend that payola will continue in the radio industry unless the record and broadcast companies are forced to pay a substantial fine or the executives behind these corporate entities are held criminally liable for their payola practices.

What can be done to tame the payola beast in radio, then? This note chronicles the payola practice and explores the possible remedies to practically enforce this controversial practice. The FCC appears to be so overwhelmed with complaints of indecency

<sup>8</sup> See William Triplett, *Radio Finetunes Deal*, DAILY VARIETY, Mar. 6, 2007, at 4 (noting that federal investigations relating to payola practices, which were brought by Eliot Spitzer, resulted in fines “totaling more than \$36 million” for four major record labels); see also Ryan Underwood, *Radio Industry Challenged to Avoid Payola Relapse*, TENNESSEAN, Mar. 11, 2007, at A1 (positing that New York State Attorney General Eliot Spitzer’s “aggressive payola investigation,” which resulted in at least \$36 million in fines caused record labels and radio companies to handle their relations with each other with caution).

<sup>9</sup> The term “investigation” is placed in quotations to indicate that although the FCC purported to investigate payola practices, it failed to conduct a legitimate and thorough investigation, especially after Eliot Spitzer provided the FCC with a “mountain of evidence” supporting the notion that the recording industry’s biggest labels were engaging in payola. See Phil Rosenthal, *FCC’s ‘Swift’ Action a Bit Late to Payola Party*, CHI. TRIBUNE, Aug. 10, 2005 at C3. Instead, the FCC simply released a consent decree that levied less than half the amount of fines that New York State had issued to the same record labels that were found guilty of payola. See Interview by Chuck D. with Paul Porter, Co-Founder of musical activist group, Industry Ears, in Washington D.C. (Mar. 5, 2007), available at <http://www.voxunion.com/realaudio/coupradio/PPorterFCC.mp3> [hereinafter Paul Porter Interview].

<sup>10</sup> See John Dunbar, *4 Radio Firms Settle Payola Case*, PHILA. INQUIRER, Apr. 14, 2007, available at [http://www.philly.com/inquirer/business/20070414\\_4\\_radio\\_firms\\_settle\\_payola\\_case.html](http://www.philly.com/inquirer/business/20070414_4_radio_firms_settle_payola_case.html) (explaining that Clear Channel Communications Inc., CBS Radio, Entercom Communications Corp. and Citadel Broadcasting Corp., four of the nation’s largest radio station owners, agreed to pay a fine of \$12.5 million and to avoid engaging in payola practices, in compliance with a consent decree issued by the FCC); see also Press Release, Industry Ears, *Industry Ears Statement on the FCC Payola Settlement: Radio Has the FCC Playing the Tunes* (Aug. 2007), <http://www.industryears.com/press.php?subaction=showfull&id=1173147951> [hereinafter Industry Ears Press Release] (stating that as a result of “consent decrees between record companies and New York State,” an agreement was reached for the four major record labels to pay a \$12.5 million fine).

on radio and television that it cannot adequately investigate radio payola practices.<sup>11</sup> This note examines the effectiveness of a possible RICO suit brought against record labels or broadcasting conglomerates as a solution to the payola problems in radio. Alternatively, this note proposes that other state attorney generals throughout the country bring their own lawsuit against record and broadcasting companies, similar to former New York State Attorney General Eliot Spitzer's effective payola lawsuits.

Part I of this note traces the history of payola and its origins throughout radio. Part II examines how the modern era of payola began to take shape, the passage of the Telecommunications Act of 1996 and the emergence of independent promotion used by record labels to circumvent anti-payola laws. Finally, Part III provides an analysis of the current state of radio and what can be done to practically enforce payola in the hopes of ending payola once and for all.

## I. PAYOLA'S BEGINNINGS

### A. *The ABCs of Payola*

The term "payola" was first coined by the trade publication *Variety* in 1938.<sup>12</sup> The term is a combination of "payment" and the name "Victrola," the name of the wind-up record players used at the time.<sup>13</sup> In a conventional sense, payola exists when a sponsor "promotes a media experience, such as a musical work,

<sup>11</sup> The number of indecency complaints involving radio and television broadcasting steadily increased from 2000 until 2006. Federal Communications Commission, *Indecency Complaints and NALs: 1993-2006*, <http://www.fcc.gov/eb/oip/ComplStatChart.pdf> (last visited Oct. 27, 2007). As a result of the Federal Communications Commission's struggle to deal with an overwhelming number of concerns in 2006 "over the content of television and radio shows," it worked to revamp the system it used to handle such indecency complaints. Frank Ahrens, *FCC Aims to Speed Evaluation of Indecency Complaints*, WASH. POST, Feb. 9, 2005 at E01, available at <http://www.washingtonpost.com/wp-dyn/articles/A9272-2005Feb8.html>.

<sup>12</sup> Celia Wren, *Do You Speak Showbiz: Variety Celebrates 100 Years of Slangage*, BOSTON GLOBE, Feb. 27, 2005 at D1, available at [http://www.boston.com/news/globe/ideas/articles/2005/02/27/do\\_you\\_speak\\_showbiz](http://www.boston.com/news/globe/ideas/articles/2005/02/27/do_you_speak_showbiz) (stating that *Variety*, a trade publication which has been responsible for introducing "quirky jargon it uses to report on the business of entertainment," is the earliest source for slang terms such as "payola," which was coined in 1938).

<sup>13</sup> See Rosenthal, *supra* note 9 (noting that the term "payola" is a blend of the words "payoff" and "Victrola"); see also *\$10M 'Payola' Settlement*, CBS NEWS, Jul. 25, 2005, <http://www.cbsnews.com/stories/2005/07/25/entertainment/printable711424.shtml> (explaining term payola as a contraction of "pay" and "Victrola" record players).

by purchasing audience exposure to the experience as a form of advertisement [without disclosure of such payment].”<sup>14</sup> The problem with this form of stealth marketing is that it “blurs the line between publicity and advertising by concealing sponsorship for a price.”<sup>15</sup> The practice of a radio station exchanging payment for playing a song is illegal payola only if the station fails to inform listeners that it was paid to do so.<sup>16</sup> However, radio stations are “reluctant to pepper their programming with announcements like ‘[t]he previous . . . [song] was paid for by Sony Records.’”<sup>17</sup> Furthermore, radio stations want to maintain the illusion that they “sift through stacks of records and pick out only the best ones for their listeners.”<sup>18</sup>

The theory of harm behind payola is that undisclosed sponsorship of songs inhibits competition, over-commercializes radio, and deceives the listening audience into thinking songs are selected for airplay based on merit rather than payment.<sup>19</sup> Record labels engage in radio payola because “radio airplay remains the greatest stimulant to sales of most recordings. Airplay by a popular radio station ‘may stimulate airplay at radio stations in other geographic [locations].’”<sup>20</sup> Since radio airplay acts as the gatekeeper for all popular music, attaching monetary

<sup>14</sup> Ellen P. Goodman, *Stealth Marketing and Editorial Integrity*, 85 TEX. L. REV. 83, 89 (2006).

<sup>15</sup> *Id.* at 90.

<sup>16</sup> See generally 47 U.S.C. § 317 (2007). In addition to section 317, section 73.1212(a) of the Federal Communication Commission’s Rules requires that “a sponsorship identification be given [w]hen a broadcast station transmits any matter for which money, service, or other valuable consideration is either directly or indirectly paid or promised to, or charged or accepted by such station.” David D. Oxenford & Brendan Holland, *A \$12.5 Million Teaching Tool: The Recent Payola Consent Decrees*, Jun. 2007, [http://www.dwt.com/practc/broadcast/bulletins/06-07\\_Payola.htm](http://www.dwt.com/practc/broadcast/bulletins/06-07_Payola.htm) (internal quotations omitted).

<sup>17</sup> Eric Boehlert, *Pay for Play*, SALON, Mar. 14, 2001, <http://archive.salon.com/ent/featuRosre/2001/03/14/payola/print.html>.

<sup>18</sup> *Id.*

<sup>19</sup> See Douglas Abell, *Music: Pay-for-Play: An Old Tactic in a New Environment*, 2 VAND. J. ENT. L. & PRAC. 52, 55 (2000) (claiming that payola leads to songs being given airplay based on payment rather than “research, marketing, and requests.”); see also Goodman, *supra* note 14, at 99–100 (arguing that mandatory sponsorship disclosure would help prevent these evils).

<sup>20</sup> Rachel M. Stilwell, *Which Public? Whose Interest? How the FCC’s Deregulation of Radio Station Ownership Has Harmed the Public Interest, And How We Can Escape From the Swamp*, 26 LOY. L.A. ENT. L. REV. 369, 394 (2006); see Lorne Manly, *How Payola Went Corporate*, N.Y. TIMES, Jul. 31, 2005 (“Radio is still the biggest single factor to get something going . . . commercial radio reaches more people in a shorter period of time, and that is the recipe for a hit.”).

requirements to radio access instead of using a system of meritocracy limits exposure for many diverse artists.<sup>21</sup>

To counteract these social ills, Congress enacted anti-payola disclosure laws in order to bolster “public trust in the institutional media.”<sup>22</sup> The FCC was empowered to regulate payola practices under Section 317 of the Communications Act of 1934, which required:

All matter broadcast by any radio station for which service, money or any other valuable consideration is directly or indirectly paid or promised to . . . the station so broadcasting . . . shall be announced as paid for or furnished, as the case may be by such person.<sup>23</sup>

The purpose of the legislation was to inform the listening audience that it was hearing or viewing matter which was being broadcast in exchange for consideration, rather than because of artistic merit.<sup>24</sup> Therefore, such sponsorship had to be clearly identified.<sup>25</sup> The FCC has jurisdiction over any payola complaints to determine whether an alleged action violates sections 317 and/or 508,<sup>26</sup> the anti-payola laws. If a formal complaint is filed alleging that a radio station is receiving illegal payments, the FCC investigates the matter and then refers it to the Department of Justice if enforcement is needed.<sup>27</sup>

<sup>21</sup> See Boehlert, *supra* note 17 (asserting that, despite the corruption in payola radio practices, payola served a real purpose in providing independent artists an opportunity to be on an equal playing field with major artists, as long as they could afford it); Goodman, *supra* note 14, at 103 (positing that payola practices reduce the diversity of artists or views on the market because they cause the market to be flooded with only a limited number of products).

<sup>22</sup> Goodman, *supra* note 14, at 125.

<sup>23</sup> 47 U.S.C. § 317 (2007). See generally R. H. Coase, *Payola in Radio and Television Broadcasting*, 22 J.L. & ECON. 269 (1979) (noting that “this section, which was taken from the Radio Act of 1927, had apparently been based on a section of the Postal Appropriations Act of 1912 under which editorial and other published material appearing in newspapers . . . had to be clearly marked ‘advertisement’ if money or other valuable consideration had been paid in return for publication.”).

<sup>24</sup> See 47 U.S.C. § 317 (2007); see also *In re Nat’l Broad. Co.*, 27 F.C.C.2d 75, 1 (1970) (asserting that section 317’s purpose “is to require that the audience be clearly informed that it is hearing or viewing matter which has been paid for, when such is the case, and that the person paying for the broadcast of the matter be clearly identified.”).

<sup>25</sup> See *supra* note 24 and accompanying text.

<sup>26</sup> See 47 U.S.C. §503 (2007); see also Katunich, *supra* note 2, at 649 (“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>27</sup> Violators may be subject to monetary sanctions or non-renewal of station licenses. See Federal Communications Commission, FCC 88-175, 4 F.C.C.R. 7708 (1988) (stating that the Department of Justice has the primary responsibility of enforcing the law); see

### B. *The History of Payola*

Radio payola practices were first reported by the press during the big band era in the 1930s. Payola occurred when band leaders and performers were given gifts by music publishers as an incentive to perform their songs during the band's radio shows.<sup>28</sup> A song's popularity with public consumers and its subsequent sheet music sales depended on exposure by the big bands on the radio, which was the primary medium through which one could gain access to consumers. Band leaders often received outright payment or a share in a publisher's profits.<sup>29</sup>

By the end of World War II, the radio programs of the big band era faded away and the rock 'n' roll era emerged.<sup>30</sup> Since the development of television led to increased competition for audiences, the radio and music industry began to change in order to recapture the American public. Radio was forced to reinvent itself, and "stations increasingly featured recorded music played by [disc jockeys]."<sup>31</sup> As a result, a promotional culture emerged "in which songs, records and performers competed with one another to maximize their exposure on radio."<sup>32</sup> As radio disc jockeys controlled access to the airwaves, "it became apparent that the playing of a record by a disc jockey increased the sales of that record and the desire of record companies to have their records played on disc jockey programs led naturally to payola."<sup>33</sup>

Payola became rampant during radio's musical heyday in the 1950's and 1960's when disc jockeys were frequently bribed by competing record companies to get exposure for fledgling rock 'n'

*also* Katunich, *supra* note 2, at 649 (explaining that the FCC must turn violators over to the Department of Justice for enforcement).

<sup>28</sup> See Manly, *supra* note 20, at 1 ("[s]ong pluggers' urged certain songs on big band leaders in the 1930's and 40's, accompanied by bundles of cash to make the musical choice easier."). See generally Coase, *supra* note 23 (discussing the historical context of payola).

<sup>29</sup> See Manly, *supra* note 20, at 1 (reporting that band leaders were given various bribes to play certain songs); see also Coase, *supra* note 23, at 286-87 (observing that record company payments to disc jockeys became widespread when record companies realized that radio play increased the sales of records).

<sup>30</sup> See Kielbowicz & Lawson, *Unmasking Hidden Commercials in Broadcasting: Origins of the Sponsorship Identification Regulations, 1927-1963*, 56 FED. COMM. L.J. 329, 347-350 (2004) (stating that rock 'n' roll reshaped radio during the 1950s); see also Coase, *supra* note 23, at 286 (noting that the big band radio programs were largely replaced with disk jockeys playing recordings).

<sup>31</sup> Kielbowicz & Lawson, *supra* note 30, at 350.

<sup>32</sup> *Id.* at 351.

<sup>33</sup> Coase, *supra* note 23, at 286-87.

roll and pop artists.<sup>34</sup> Disc jockeys were given cash payments on a weekly or monthly basis, royalties on record sales, lavish gifts, and other financial arrangements that would more than double their salaries.<sup>35</sup> The practice commonly involved a promoter from a band or record company that would typically induce a disc jockey to play a particular song on the radio.<sup>36</sup> “Payola afflicted all stages of the music industry, from composers angling to land recording contracts to record promoters bribing deejays for more airtime.”<sup>37</sup>

The first big payola scandal erupted in November 1959, when the House Subcommittee on Legislative Oversight began an investigation into payola radio practices in response to the quiz show television scandals of the late 1950s.<sup>38</sup> The investigation focused on small independent record labels, disc jockeys and

<sup>34</sup> See Rosenthal, *supra* note 9, at 3 (noting Eliot Spitzer’s payola investigation revealed that “in exchange for playing a Celine Dion song, a radio program director could score from Sony BMG’s Epic label a two-night trip to Las Vegas for two with the chance to meet Dion.”). See generally Oxenford & Holland, *supra* note 16 (“the terms of the Consent Decrees provide a set of best practices toward which all broadcasters should strive in order to avoid allegations of payola.”).

<sup>35</sup> See Coase, *supra* note 23, at 294 (highlighting that such gifts included “a share in a record company, advertisements in the disc jockeys’ hit sheets, the reimbursement of recording stars’ fees for appearances on the disc jockeys’ programs or at record shops which they organized, expensive gifts, and mortgage loans on disc jockeys’ homes”); Kielbowicz & Lawson, *supra* note 30, at 350 (revealing that individuals at “congressional hearings recounted colorful stories about payments to station personnel”).

<sup>36</sup> See Kielbowicz & Lawson *supra* note 30, at 350 (specifying in addition to deejays, record librarians or program managers were also persuaded by the promoters to play particular music); see also *United States v. Goodman*, 945 F.2d 125, 126 (6th Cir. 1991) (discussing the fact that the defendant in this case “promoted records by contacting radio stations throughout the United States in an effort to persuade the stations to add records to their play-lists. He was compensated by record companies based upon the success of his endeavors.”).

<sup>37</sup> Kielbowicz & Lawson, *supra* note 30, at 350.

<sup>38</sup> The hearing’s primary purpose was to investigate payola practices. See *Responsibilities of Broadcasting Licensees and Station Personnel: Hearing on Payola and Other Deceptive Practices in the Broadcasting Field Before the Spec. Subcomm. on Legis. Oversight of the H. Comm. on Interstate & Foreign Commerce*, 86th Cong. 1 (1960) [hereinafter *Responsibilities of Broadcasting Licensees*]; see also Coase, *supra*, note 23, at 292. The FCC’s lax enforcement of Section 317 resulted in rampant payola practices by television advertisers who rigged quiz shows such as the NBC program “Twenty One.” Advertisers would also pay to have contestants appear on a game show so that the contestant could talk about that advertiser’s product on the game show. Coase, *supra* note 23, at 288–291. These practices “merged in the public’s mind to form one image of commercialism’s corrupting influence on broadcasting.” Kielbowicz & Lawson, *supra* note 30, at 347. The controversy first gained national attention on August 28, 1958, when various newspapers published interviews by former contestants on “Twenty One.” The contestants claimed the program was rigged by advertisers engaging in payola practices. The articles subsequently led to an investigation by New York prosecutor Joseph Stone and led to subsequent Congressional hearings on payola. Free Press, *Payola – Fifty Years of Pay for Play*, <http://www.freepress.net/payola/=history> (last visited Aug. 27, 2007).

other corrupt influences in the business.<sup>39</sup> Representative Oren Harris commented on the numerous complaints about payola practices in broadcasting by stating:

The quality of broadcast programs declines when the choice of program materials is made not in the public interest, but in the interest of those who are willing to pay to obtain exposure of their records. The public is misled as to the popularity of records played. Moreover, these practices constitute unfair competition with honest businessmen who refuse to engage in them. They tend to drive out of business small firms who lack the means to survive this unfair competition.<sup>40</sup>

Ironically, Congress and the FCC were well aware of such practices, yet did little to enforce the laws under section 317 of the Communications Act, even though lawmakers and industry critics repeatedly questioned the FCC's failure to act.<sup>41</sup> "By most accounts, payola was hardly an industry secret."<sup>42</sup> An additional enforcement problem was that the statutory language of section 317 referred specifically to the need for disclosure of payments made to the station directly.<sup>43</sup> Payola in the 1950's did not usually involve payments to radio stations, but involved

<sup>39</sup> See Assurance of Discontinuance Pursuant to Executive Law Section 63(15), In the Matter of Sony BMG Music Entertainment, Attorney General of the State of New York, (Jul. 22, 2005), available at <http://www.oag.state.ny.us/press/2005/jul/payola.pdf> [hereinafter Consent Decree] (describing the focus of the probe as being independent record labels, disc jockeys, and other outside influences); see generally *Responsibilities of Broadcasting Licensees*, *supra* note 38.

<sup>40</sup> See Coase, *supra* note 23, at 292 (quoting *Responsibilities of Broadcasting Licensees*, *supra* note 38, at 1 (statement of Rep. Oren Harris, Chairman, H. Spec. Subcomm. on Legis. Oversight)).

<sup>41</sup> See Kielbowicz & Lawson, *supra* note 30, at 354 (noting that the FCC was dominated by appointees from President Eisenhower, who were "disinclined to regulate broadcast content"); see also Lawrence W. Lichty, *The Impact of FRC and FCC Commissioners' Background on the Regulation of Broadcasting*, 6 J. BROADCASTING 97, 105-06 (1962) (finding that a majority of commissioners serving from 1953 to 1960 believed in minimal FCC scrutiny of broadcast programming practices).

<sup>42</sup> Kielbowicz & Lawson, *supra* note 30, at 354. Perhaps corruption amongst the FCC itself may have been partly responsible for the lax attitude in regulation. Indeed, Commissioner Richard A. Mack was alleged to have been given money by broadcast stations in order to receive licenses, and would later resign amid further assertions of impropriety. See Coase, *supra* note 23, at 287; see also *Crooked Halos*, TIME, Mar. 17, 1958, available at <http://www.time.com/time/magazine/printout/0,8816,863138,00.html>.

<sup>43</sup> See Communications Act of 1934, ch. 652, § 317, 48 Stat. 1064, 1089 (1934) (current version at 47 U.S.C.S. § 317 (2007)) (specifying announcement must be made when radio stations receive money in exchange for broadcasting material); see also Coase, *supra* note 23, at 296 (concluding that section 317 referred to disclosure of payments made to radio stations).

payments made directly to disc jockeys.<sup>44</sup> Since the disc jockeys were secretly receiving personal bribes to play songs on the air, there was no actual violation of the anti-payola laws under section 317.<sup>45</sup>

As a result of the investigations, Congress expanded upon the disclosure requirements for payola practices by enacting the Communications Act Amendments of 1960.<sup>46</sup> The Amendments added several provisions to Section 317, such as requiring radio stations and their employees to exercise due diligence to ensure that payment disclosure announcements took place if a song was paid to be played on the radio.<sup>47</sup> In addition to the amendments, Congress included in the Communications Act an affirmative obligation on the part of station or record company employees to disclose any sort of payola practice to that radio station or else they would be subjected to imprisonment and fines of up to \$10,000.<sup>48</sup> Section 508 strengthened the anti-payola laws by creating an affirmative duty for radio station employees to disclose payments and by attaching criminal liability to anyone

<sup>44</sup> See Coase, *supra* note 23, at 296 (“payola in the 1950’s did not, generally speaking, involve payments to stations; rather they were made to disc jockeys.”); see also Daniel Gross, *What’s Wrong With Payola?*, SLATE, Jul. 27, 2005, available at <http://slate.com/id/2123483/nav/tap1/> (noting popular DJ in 1950s era took cash in exchange for playing records).

<sup>45</sup> “All matter broadcast by any radio station for which service, money, or any valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting, from any person, shall at the time the same is so broadcast, be announced as paid for or furnished, as the case may be, by such person.” Communications Act of 1934, ch. 652, § 317, 48 Stat. 1064, 1089 (1934) (current version at 47 U.S.C.S. § 317 (2007)). This language, quoted from section 317, only applied to radio station management or executives and not individual disc jockeys. See Coase, *supra* note 23, at 296.

<sup>46</sup> See Coase, *supra* note 23, at 295 (concluding that subcommittee deliberations resulted in amendments to the Communications Act); see also *Communications Act Amendments: Hearing on H.R. 11341 Before a Subcomm. on Communications and Power of the H. Comm. On Interstate & Foreign Commerce*, 86th Cong. 1 (1960) [hereinafter *1960 Amendments*] (noting previous congressional investigation provoked legislative action).

<sup>47</sup> See 47 U.S.C. § 317 (2007) (“The licensee of each radio station shall exercise reasonable diligence to obtain from its employees, and from other person with whom it deals directly in connection with any program or program matter for broadcast, information to enable such licensee to make the announcement required by this section.”); see also *1960 Amendments*, *supra* note 46, at 162 (highlighting under new amendment radio stations were obligated to use “reasonable diligence”).

<sup>48</sup> See 47 U.S.C. § 508 (2007) (requiring that station or record company employees disclose any sort of payola practice to that radio station or else they would “be fined not more than \$10,000 or imprisoned not more than one year, or both”); see also Kielbowicz & Lawson, *supra* note 30, at 363 (stating that “[t]o assist stations in exercising ‘reasonable diligence,’ Congress added an entirely new section to the Communications Act that imposed the disclosure requirement on anyone involved in placing plugs in broadcast programs.”).

who engages in undisclosed payola practices in violation of section 317. In addition, section 508 remedied the problem posed by individual disc jockeys, whose actions were not punishable under the original anti-payola laws under section 317, by providing for criminal punishment of individuals who engage in undisclosed payola for their own personal gain.<sup>49</sup> “Traditional sponsorship identification rules [under section 317] applied when a station cooperated in promoting the interests of someone else; the latest proposal [under section 508] applied when stations or networks inserted covert promotions for their own enrichment.”<sup>50</sup>

### C. *The Fallout After the First Payola Scandal*

In the aftermath, the payola scandal created headlines and new laws, ruined careers, and tarnished the reputation of the music industry in the eyes of the American public.<sup>51</sup> “Music fans were newly suspicious every time they heard a disc jockey describing a record with unusual enthusiasm.”<sup>52</sup> As a result, many radio stations and broadcasters fired their disc jockeys despite those disc jockeys’ insistence that money did not influence their broadcast selections.<sup>53</sup> Eventually, programming power was taken away from individual disc jockeys and given to

<sup>49</sup> See Goodman, *supra* note 14, at 99 (commenting that “Congress strengthened 317 by extending the sponsorship disclosure requirement to broadcast station employees, and [by] criminalizing the failure to do so.”); see also Kielbowicz & Lawson, *supra* note 30, at 363 (stating that “[t]he provision expressly covered employees as well; they had to disclose the fact of such acceptance or payment or agreement to their employers.”).

<sup>50</sup> Kielbowicz & Lawson, *supra* note 30, at 370.

<sup>51</sup> See Bob Greene, *Payola, Part 2: Will Anyone Even Notice?*, CHI. TRIB., Jun. 24, 2001, at C2 (“Why did a disc jockey play a song? Because he thought it had a catchy tune, because he liked the lyrics or the sound of the singer’s voice. That’s what America had sort of believed.”); see also Miriam Longino, *A Century in the Arts*, ATLANTA J. CONST., July 4, 1999 at K5 (highlighting the headlines that the payola scandal made when “DJs testif[ied] before Congress that they had accepted money to play certain records”).

<sup>52</sup> Greene, *supra* note 51, at K5.

<sup>53</sup> Many disc jockeys were fired as a result of payola; including national renowned disc jockey Alan Freed, who coined the phrase “rock ‘n’ roll.” Freed’s career was ruined after he admitted he accepted money from record labels after he was indicted by a New York grand jury on bribery charges. See, e.g., Nowlin, *supra* note 5; see also Kielbowicz & Lawson, *supra* note 30, at 351. During the Congressional investigatory hearings, music and cultural icon Dick Clark was also questioned concerning his role in payola practices in connection with his popular music television program, *American Bandstand*. There were frequent allegations that Clark was cross-promoting the records of artists with whom he was financially involved by playing or featuring that artist or the artist’s songs on his show. Clark denied he had violated any broadcast regulations. However, the ABC network eventually forced Clark to relinquish his financial holdings in various musical enterprises. *Id.* at 351–52.

station managers.<sup>54</sup> Radio stations made this shift in their broadcast decision-making processes in order to protect themselves from payola sanctions.<sup>55</sup> In addition, because more radio stations were emerging, “competition for listeners became so fierce that managers could no longer afford to have disc jockeys experimenting with [unpopular or unknown songs].”<sup>56</sup> Consequently, station managers began imposing more centralized programming, which led to the rise of formulaic Top 40 play lists.<sup>57</sup>

Ironically, by reining in the disc jockey’s musical decision-making power in favor of a centralized control model, the radio stations actually facilitated a new and more comprehensive form of payola practices.<sup>58</sup> Record executives were now able to engage in payola practices solely by reaching a station’s program director, rather than multiple disc jockeys.<sup>59</sup>

<sup>54</sup> See Kielbowicz & Lawson, *supra* note 30, at 352 (explaining that station managers took more control over station programming); see also Richard Harrington & Jacqueline Trescott, *Pay-to-Play Record Scandal? Safeguards Working, Local Stations Say*, WASH. POST, Mar. 5, 1986, at D1 (“[t]he major difference between then and now . . . is that the power of song selection has been transferred from the deejay to the program and music directors.”).

<sup>55</sup> The idea was that if access to the disc jockeys were limited, record labels would have a harder time engaging in undisclosed payola. It was thought that radio stations, as a result, could protect themselves from violating section 508 and subjecting themselves to any criminal liability. In reality, however, divesting broadcast programming decisions from local disc jockeys actually facilitated payola practices. Record labels no longer had to bribe multiple disc jockeys at various stations. Instead, they needed only to bribe one program manager or corporate executive, who would have influence over multiple radio stations in an area. See Robert Lindsey, *Payola’s Return to Records Reported*, N.Y. TIMES, Mar. 6, 1985 at A14.

<sup>56</sup> Eric Zorn, *For The Record: Money Still Talks in Radioland*, CHI. TRIB., Feb. 20, 1985, at C1 (observing that “The new programming practices only centralized the activity moving it closer to the seats of power and making it harder to detect.”); see Lindsey, *supra* note 55, at A14 (“Under the “Top 40” format . . . a radio station limits its music play list to 40 or fewer current hits, which are played several times daily.”).

<sup>57</sup> See Kielbowicz & Lawson, *supra* note 30, at 352 (noting that station managers imposed more strictures on deejays, leading to more “Top 40” style broadcasting formats); see also Lindsey, *supra* note 55, at A14 (describing the increased use of “Top 40” airplay by radio stations); Zorn, *supra* note 56 (“The new programming practices only centralized the activity moving it closer to the seats of power and making it harder to detect.”).

<sup>58</sup> See Zorn, *supra* note 56, at C1 (discussing new programming practices that concentrated activity among higher authorities, and therefore made payola practices harder to detect); see also Manly, *supra* note 20, at 1 (explaining that Congress’ regulation of payola fostered unintended results as power to make decisions moved from several disc jockeys to program directors alone).

<sup>59</sup> See Manly, *supra* note 20, at 1 (noting that disc jockeys lost power to choose music to play on the air, instead this became the responsibility of program directors); see also Stilwell, *supra* note 20, at 412 (reporting that, in 2002, Cox Radio CEO Bob Neil claimed that program directors make decisions on individual records).

## II. NEW AGE PAYOLA BEGINS TO TAKE SHAPE

### A. *The Rise of the Indies*

While radio stations occupy one side of the payola spectrum, record labels occupy the other. After the first payola scandal and the 1960 amendments, record companies began to distance themselves from payola allegations by relying on independent promoters<sup>60</sup> (“indies”) to do their dirty work in hopes of circumventing the anti-payola laws.<sup>61</sup> As conduits for the record labels, indies lobbied radio stations across the country to play new particular songs.<sup>62</sup> The practice of using indies thwarted anti-payola statutes because “[through the use of indies,] radio stations [were] one step removed from record label money,” and, therefore, the payments received [were] technically not payola.<sup>63</sup> Record labels realized the benefits of employing indies, and thus the indies “became a source of continuity in a rapidly changing industry as well as a cost-cutting alternative to in-house promotional staffs.”<sup>64</sup> The indies forged close relationships with

<sup>60</sup> See Boehlert, *supra* note 17 (stating that indies are “shadowy middlemen” to whom record companies will pay millions of dollars to get their songs played on the radio. Indies pay stations large sums of money in “promotional payments” and then every time stations add an artist’s song to play lists, indies get paid by record labels); *see also* Eric Boehlert, *Record Companies: Save Us From Ourselves!*, SALON, Mar. 13, 2002, available at [http://dir.salon.com/story/ent/feature/2002/03/13/indie\\_promotion/index.html](http://dir.salon.com/story/ent/feature/2002/03/13/indie_promotion/index.html) (discussing that record companies and radio stations are arguing over who is going to clean up current play-by-play systems, while radio stations continue to play songs that will make money for them, rather than music that people want to hear).

<sup>61</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.” Katunich, *supra* note 2, at 656. “Today, rather than making individual deals, indies typically pay an annual fee to a radio stations- usually \$100,000 or more – ‘not for airplay, they say, but for advanced copied of their play lists,’ and in return, they charge the record labels for every song that ends up on that play list.” Krystal Conway, *The Long Road to Desuetude for Payola Laws: Recognizing the Inevitable Commodification of Tastemaking*, 16 SETON HALL J. OF SPORTS & ENT. L. 343, 353 (2006).

<sup>62</sup> See Conway, *supra* note 61, at 354 (clarifying that Indies pay an annual fee to radio stations under the guise of payment for advanced play lists, as a way to ‘side step the law’); *see also* Katunich, *supra* note 2, at 657 (explaining that because there is a limited number of songs that can be played on the radio, indies can act as lobbyist for record companies by supplying crucial information to radio stations, such as the likelihood of popularity for recording, and target demographics).

<sup>63</sup> See Katunich, *supra* note 2, at 656; *see also* Sarah Greene, *Clear Channel v. Competition Act of 2002: Is There a Clear End in Sight?*, 12 DEPAUL-LCA J. ART & ENT. L. & POL’Y 387, 415 (2002) (discussing indies’ role in removing radio stations from record label money and thwarting anti-payola laws).

<sup>64</sup> Zorn, *supra* note 56 (stating that one consequence of radio station consolidation in the mid-1970’s was “streamlining of operations that resulted in the increased importance of independent promoters [indies]”); *see* Gregory M. Prindle, *No Competition: How Radio*

radio programmers “by guaranteeing the station a lump sum of money deemed ‘promotional support.’”<sup>65</sup>

During the 1980s, the power of indie promoters and their exorbitant costs were becoming a cause for concern in the industry. The influential indies were a small group of less than 30 promoters known as “The Network,” who dominated the radio industry and operated an informal cartel using questionable business practices to achieve their goals.<sup>66</sup> The Network members were “often hired to work as a loosely knit association in promoting the same record nationwide,” and had allocated among themselves access to playlists at forty-one important radio stations in two dozen American cities.<sup>67</sup> As the indie promoters obtained a stranglehold on radio station playlists throughout the nation, the prices that indies charged the record labels began to skyrocket.<sup>68</sup> Despite the frustrations felt by record label executives concerning excessive fees and shady business practices, many label executives were afraid to stop paying indie

*Consolidation Has Diminished Diversity and Sacrificed Localism*, 14 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 279, 308-09 (discussing negative financial impact on record companies if labels forfeit use of indies to push promotional radio airplay).

<sup>65</sup> See Katunich, *supra* note 2, at 658; see also Boehlert, *supra* note 17 (stating that “[t]he problem for record companies has always been that there are too many radio stations – and too many egos – nationwide for staffers to keep close tabs on. So they need to hire Indies. . .”).

<sup>66</sup> See Stilwell, *supra* note 20, at 395–96. “The Network” dominated the indie field and was highly influential in the music industry. *Id.* Joe Isgro, an accused ‘soldier’ for the Gambino organized crime family, was “[t]he Network’s most notorious and powerful member . . .” *Id.*; Published reports and allegations claimed that indies often gave sex, money, drugs and other favors to personnel at important radio stations to insure that their songs got added to the station’s play list. Zorn, *supra* note 56. Indie promoters also employed a “paper adds” technique, paying radio stations to put songs on chart ranking lists. *Id.* As a result, certain songs appeared to be chart ranking hits, however, in actuality, the songs were not largely popular. *Id.*; see, e.g., Stilwell, *supra* note 20, at 394. Indies used “paper adds” because a song that increases in its chart position is a positive sign in the music industry that the song is popular, thus increasing the prospects that it may become a lucrative hit for the record labels. *Id.*

<sup>67</sup> 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, 529 (1987); See *id.* (stating the indie’s purpose is to persuade radio station program directors to add particular records to playlists in order to “increase the station’s Arbitron market-share rating, thereby increasing demand for advertising on that station”); see also Jane Scott, *Exposing Rock’s New Payola*, CLEVELAND PLAIN DEALER, Aug. 2, 1991 at 33 (highlighting “The Network’s” tremendously influential role in music and radio industries and its ability “to keep records off the air if the labels didn’t ‘pay up.’”).

<sup>68</sup> See Sidak & Kronemyer, *supra* note 67, at 549 (quoting an industry CEO, who said that “the [indie] costs had become ‘unbearable,’ having increased during ‘the last several years . . . four and five times what they once were. . .’”); see also Stilwell, *supra* note 20, at 397 (noting that, by 1982, CBS Records had fired 300 employees and closed nine sales branches, while spending at least \$10 million on independent promotion).

promoters for their services.<sup>69</sup> The Network exercised its monopoly power to harm any record companies that attempted to terminate their contracts with Network members.<sup>70</sup>

### *B. Payola Makes Headlines Again, But Still No Change*

During the mid-1980s, a series of *Los Angeles Times* and *Billboard* articles reported on the elusive indie promotion practices and on record labels' efforts to control the "wildly escalating costs of independent promotion."<sup>71</sup> In response, the Senate Subcommittee on Oversight and Investigations conducted a three-month preliminary investigation concerning indie promotion practices.<sup>72</sup> The Senate Subcommittee stated, "Because of the enormous sums of money involved and the manner in which record promotion . . . operate[s,] there are ample opportunities and incentives for improper or illegal activities."<sup>73</sup> Despite these statements, the "staff uncovered no credible evidence of specific incidents of improper or illegal activity" and did not conduct a full-scale investigation into indie

<sup>69</sup> See Sidak & Kronemyer, *supra* note 67, at 551 (stating that the *Times* reported that record companies in 1983 feared that indie promoters would suppress airplay if they did not buy independent promotion services); see also Zorn, *supra* note 56 (reporting that if a major label refused to pay for indie services, it was popularly understood that powerful indies could blacklist the label's records at certain radio stations or keep the label's songs off trade publication reports for chart positions, "in effect discouraging other stations from playing the song and keeping the record out of stores").

<sup>70</sup> In 1980, Warner Communications Inc. (which includes Warner Bros., Electra/Asylum and Atlantic records) and CBS records (which includes Columbia, Portrait and Epic) both announced that they were boycotting the indie stronghold and would no longer continue to employ the services of indie promoters. As a result, both companies experienced significant financial losses after the Network retaliated . . . by arranging for radio stations to stop playing singles by Warner Bros. and CBS artists. The boycott abruptly ended in 1981 when both Warner and CBS returned to employing indie promoters. See Sidak & Kronemyer, *supra* note 67, at 549–50; Stilwell, *supra* note 20, at 396.

<sup>71</sup> Stilwell, *supra* note 20, at 397; see Sidak & Kronemyer, *supra* note 67, at 551–52 (chronicling a series of exposé articles written in the *Los Angeles Times* in 1983 on indie practices).

<sup>72</sup> See Sidak & Kronemyer, *supra* note 67, at 552 (stating that in response to the scandals reported in the *Los Angeles Times*, the Senate Subcommittee on Oversight and Investigation launched a preliminary investigation of independent promotion in 1984); Stilwell, *supra* note 20, at 397 (noting that in July 1984, the Subcommittee was in the midst of a three-month investigation of independent promotion.).

<sup>73</sup> Sidak & Kronemyer, *supra* note 67, at 552 (declaring the findings of the Senate Subcommittee on Oversight and Investigation of the House Committee on Energy and Commerce (quoting *Memorandum on Improper or Illegal Activities in the Record Industry from the Subcommittee Staff to the Members of the Subcommittee on Oversight and Investigations of the H. Comm. on Energy and Commerce* 3 (Sept. 14, 1984)); see Stilwell, *supra* note 20, at 397.

payola practices.<sup>74</sup> Had Congress conducted a full investigation, they would have discovered what everyone in the music and radio industry already knew: indie promoters were acting as conduits for record labels engaging in illegal payola practices.<sup>75</sup>

By 1986, the independent promotional payola scheme was brought into the public eye after a *NBC Nightly News* investigative report aired on the “New Payola.”<sup>76</sup> The scandal triggered grand jury investigations nationwide, singling out Los Angeles kingpin indie promoter Joe Isgro, who was indicted on 57 felony counts, including bribery, racketeering, and conspiracy to distribute cocaine.<sup>77</sup> Isgro pled guilty to a much lesser tax-evasion charge, while the other payola-related racketeering charges were dismissed. The investigation lasted nearly a decade

<sup>74</sup> *Responsibilities of Broadcasting Licensees*, *supra* note 38, at 1; see Sidak & Kronemyer, *supra* note 67 at 552. The Subcommittee concluded that, “although paper adds made the broadcast industry ‘susceptible to improper relationships between promoters and radio stations,’ a full Senate investigation was unwarranted.” *Id.* In 1991, Jube Shiver Jr., of the Los Angeles Times, interviewed Charles W. Kelley, chief of the enforcement division at the FCC. In response to the independent promotion regime between indies and record labels and the payola allegations of the late 1980s, Mr. Kelley stated, “Assuming that there’s no *quid pro quo*—assuming that the station is not obligated to do something’ for having prizes paid for by a promoter – ‘the station doesn’t have to mention’ who paid for them and the practice poses no legal problem, Kelley said. ‘Then again,’ he added rhetorically, ‘why would they provide a prize unless there was a *quid pro quo*?’” Jube Shriver Jr., *The Record Promoters Staging A Comeback; Entertainment: The Independents Were Nearly Put Out of Business By A Payola Probe In The ‘80s But Major Labels Are Quietly Rehiring Them*, L.A. TIMES, Jan. 22, 1991, at D7.

<sup>75</sup> See Stilwell, *supra* note 20, at 397. Motown Records’ president wrote to the president of the Recording Industry Association of America (RIAA) urging the RIAA to investigate indie practices stating, “We should be meeting about the high cost of trying to get our records played on radio, which, to a great extent, has nothing to do with the record’s quality but rather with who pays the most.” *Id.* at 397–98. Paradoxically, during Congress’ investigation into illegal payola practices, the FCC in July 1984, published its Rules Relating to Multiple Ownership of AM, FM, and Television Broadcast Stations, in an effort to increase deregulation of radio station ownership. *Id.* The FCC’s marketplace theory, which is the ideology of the radio industry, “assumes that broadcasters will inherently act in the public interest by adjusting their content to satisfy their audience’s preferences’ for diverse programming.” *Id.* The fact that this ideology was not working should have triggered the FCC to take some remedial action instead of spearheading the call to deregulation, which because of the monotonous sound on the radio, further exasperated the payola problems. *Id.*; The author explained the practice of payola among independent promoters. Katunich, *supra* note 2, at 656.

<sup>76</sup> Sidak & Kronemyer, *supra* note 67 at 556. The news story alleged that the FBI and police were investigating “corrupt practices in the rock music business, and what appears to be re-emergence of payola at rock music radio stations.” *Id.* See generally William K. Knoedelseder, Jr., *\$1 Million in Suspected ‘New Payola’ is Probed; L.A. Grand Jury Looking Into Payments by Record Promoters to Radio Programmers, But Activities May Be Within Law*, L.A. TIMES, Dec. 22, 1987, Part 1, at 1. The article reported the investigation into the possible independent promoter payola scandal, noting that much of the activity, while questionable, adhered to the law. *Id.*

<sup>77</sup> See Knoedelseder, *supra* note 76, at 1 (discussing the grand jury investigation into Joe Isgro’s activities as a promoter); see also Sidak & Kronemyer, *supra* note 67, at 556.

and cost the government an estimated \$10 million dollars.<sup>78</sup> When the indie/payola scandal of 1986 first grabbed headlines, the use of indies tapered off. However, with much smoke, but little fire, the industry quietly began reverting back to its indie payola ways after it became clear that major record labels would not be harmed by the federal government's short-lived music industry investigation.<sup>79</sup>

*C. The Telecom Act of 1996 & Corporate Radio: Bigger Payola Means Indies Win And Listeners Lose*

For most of radio's early history, broadcasting stations operated under the public trustee theory that airwaves are a public resource and that radio stations were being granted a privilege by the federal government.<sup>80</sup> Under this ideology, "up until the 1980s, FCC policy basically aimed to restrict ownership concentration both locally and nationally."<sup>81</sup> The FCC's goal was to "relentlessly guard" against ownership concentration and to "maximiz[e] the number of independent media voices."<sup>82</sup> The essence of the public trustee model was that broadcasting is a

<sup>78</sup> See Boehlert, *supra* note 17, at 3 (stating that "legendary indie heavyweight Joe Isgro battled prosecutors for nearly a decade over payola related charges."); see also Chuck Phillips, *Judge Dismisses Payola Charges Against Record Promoter Isgro*, L.A. TIMES, Mar. 26, 1996, at D1 (reporting that Isgro's recently dismissed case "had already been dismissed once and revived [and] has . . . cost the government an estimated \$10 million to pursue.").

<sup>79</sup> See Jeff Leeds, *Music Promoter to Abandon a Radio Policy He Developed*, N.Y. TIMES, Nov. 3, 2005, at C18 (explaining that there was an understood "*quid pro quo*" to the "budget" system, under which the radio stations played the songs promoted by the indie in exchange for accepting the "budget" from the indie); see also Shriver Jr., *supra* note 74 at D7. The author details the reemergence of a payola system using innovative methods: indies gave radio stations money in the form "budgets." *Id.* Radio stations used the "budget" monies to pay for "promotional materials," and in exchange, would add songs the indie was promoting to its playlist. *Id.* The indie would then bill the record companies when the companies' songs were added to the stations playlist. *Id.*

<sup>80</sup> See *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 116–20, (1973) (describing the development of federal radio regulation in which Congress licensed private radio broadcasters and treated them as "a 'public trustee' charged with the duty of fairly and impartially informing the public audience."); see also Anthony E. Varona, *Out Of Thin Air: Using First Amendment Public Forum Analysis To Redeem American Broadcasting Regulation*, 39 U. MICH. J.L. REFORM 149, 151 (2006) (noting that "[the FCC] interpreted the public trustee doctrine as requiring that broadcast stations 'be operated as if owned by the public . . . As if people of a community should own a station and turn it over to the best man in sight with this injunction: manage this station in our interest.'" (quoting The Federal Radio Commission and the Public Service Responsibility of Broadcast Licensees, 11 J. Fed. Comm. B. Ass'n 5, 14 (1950))).

<sup>81</sup> C. Edwin Baker, *Media Concentration: Giving Up On Democracy*, 54 FLA. L. REV. 839, 869 (2002).

<sup>82</sup> *Id.*

public good, to be used for public discourse and to increase viewpoint diversity.<sup>83</sup>

This ownership ideology in broadcasting started to change during the 1980s, when the FCC encouraged federal deregulation of broadcasting stations. A new ideology in broadcasting called the marketplace model emerged, where economic competition and market incentives were paramount and ownership viewpoint diversity were afterthoughts.<sup>84</sup> The marketplace model assumed that an “unbounded and unprobed . . . market will purportedly lead the concentrated but competitive firms to provide audiences with the variety and type of content they want.”<sup>85</sup>

Congress further deregulated the broadcasting industry under the marketplace model when it passed the Telecommunications Act of 1996.<sup>86</sup> The Act relaxed local ownership restrictions and eliminated national and local ownership caps, allowing a single company or entity to own up to eight radio stations in the largest markets in the country.<sup>87</sup> Under the Act, Congress believed that a “deregulated marketplace would best serve public interest as suggested by the Act’s preface, which described its purpose as ‘[t]o 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>88</sup>

<sup>83</sup> See *id.* at 870 (stating that “[w]ide dispersal of ownership had previously been seen in a sense, as a good in itself or, more programmatically, as the good of simply providing for more independent voices, more opportunities to be broadcast ‘speaker,’ less concentrated power over public opinion, as well as potentially more viewpoint diversity.”); see also Ronald J. Krotoszynski, Jr and A. Richard M. Blaiklock, *Enhancing the Spectrum: Media Power, Democracy, and the Marketplace of Ideas*, 2000 U. ILL. L. REV. 813, 814 (2000) (evaluating FCC regulation of the airwaves since its inception).

<sup>84</sup> See Baker, *supra* note 81, at 870 (asserting that “[n]ow, as long as competition exists, wide dispersal of ownership is seen as unimportant in itself and possibly inefficient. From this new perspective, the FCC appropriately allows multiple ownership within a local community as long as an adequate number of competing firms continue to prevent the concentrated firm from having monopoly power over advertising rates.”); see also Stilwell, *supra* note 20, at 370-372 (discussing the history and effects of passing the Telecommunications Act of 1996).

<sup>85</sup> Baker, *supra* note 81, at 870.

<sup>86</sup> See generally Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified by scattered section of 47 of the United States Code).

<sup>87</sup> See *id.* at § 202(a); see also Prindle, *supra* note 64, at 294 (stating that the Telecommunications Act of 1996 relaxed local radio ownership restrictions and eliminated the national ownership cap).

<sup>88</sup> See Anastasia Bednarski, *From Diversity to Duplication Mega-Mergers and the Failure of the Marketplace Model Under The Telecommunications Act of 1996*, 55 FED. COMM. L.J. 273, 275, 288 (2003) (codified by scattered section of 47 of the United States Code) (explaining that the Act created an oligarchy of four companies: Chancellor Media,

Consequently, many of the large broadcasting conglomerates bought up numerous small and local radio stations around the country, centralizing and consolidating broadcasting operations in an effort to turn a profit.<sup>89</sup> The focus became increasing advertising revenue and replacing local, diverse programming with centralized “cookie cutter formats” and monotonous playlists dominated by market research.<sup>90</sup> As a result, access to the airwaves became increasingly difficult as playlists became tighter, and a very small number of corporate gatekeepers controlled access to the public airwaves.<sup>91</sup> Broadcasters believed that experimenting with new artists or songs was a risk that could cause listeners to switch to a station playing an “older and more comforting hit.”<sup>92</sup>

Clear Channel, Infinity and Capstar, which owned a majority of the nation’s radio stations (citing Telecommunications Act of 1996, Pub. L. No. 104–104, 110 Stat. 56)); Stilwell, *supra* note 20, at 404–05 (noting that “[t]he 1996 Act radically changed the broadcasting marketplace, causing rapid consolidation of radio station ownership . . . and by 1997, ‘4,000 of the country’s 11,000 radio stations changed hands.’”).

<sup>89</sup> The FCC sought to deregulate broadcasting in radio and television under the *laissez faire* ideology, with the idea that increased market competition would create a better product for the public audience. See Randall R. Rainey & William Rehg, *Market Place of Ideas, The Public Interest, And Federal Regulation Of the Electronic Media: Implications of Habermas’ Theory of Democracy*, 69 S. CAL. L. REV. 1923, 1935 (1996) (discussing how the FCC moved away from the public trust model and began to move toward free market models); see Stilwell, *supra* note 20, at 369 (explaining that the FCC sought to deregulate broadcasting in radio and television under the *laissez faire* ideology, with the idea that increased market competition would create a better product for the public audience); see also *id.* at 406 (quoting consumer advocate Ralph Nader’s response to the FCC’s actions in the mid 90s as creating “less diversity, more prepackaged programming, and fewer checks on political power.”).

<sup>90</sup> See Stilwell, *supra* note 20, at 415 (stating that “[c]onsolidation has led to radio stations that ‘systematically exclude music that [research shows] provokes the strongest reaction – positive or negative – resulting in a music mix’ at terrestrial radio that is homogenized and predictable.”); see also Adam J. Van Alstyne, *Clear Control: An Antitrust Analysis Of Clear Channel’s Radio And Concert Empire*, 88 MINN. L. REV. 627, 660 (2004) (explaining that as a result of ownership consolidation, “it is safer for the station to remain consistent in its play list . . . [b]y only adding a few new songs, the station does not risk offending an advertiser or losing a regular listener who likes to hear familiar artists and songs.”).

<sup>91</sup> See David Hinckley, *Report Says Format Choice is Too Limited*, N.Y. DAILY NEWS, Nov. 19, 2002, Television Section, at 108, available at <http://www.futureofmusic.org/images/pressclips.radiostudy.pdf>; see also Stilwell, *supra* note 20, at 417 (“Each year, thousands of new songs are released by record labels, but only 250 or so tunes are added per station, making airplay very valuable to record labels.”) (quoting Jeff Leeds, *Middlemen Put Price on Airplay*, L.A. TIMES, Dec. 27, 2001, at C1).

<sup>92</sup> See Chris Parker, *Gimme ‘Indie’ Rock*, VILLAGE VOICE, Mar. 13, 2007, available at <http://www.villagevoice.com/music/0711,parker,76030,22.html> (“Why is it that only 10 percent of the spins at radio are from the independents, whereas 30 percent of the sales are from independent [artists] . . . [i]t’s obvious enough—its because of payola.” (quoting Tommy Silverman, CEO and Founder of Tommy Boy Records)); see also Paul F. Roberts, *The Fate of Indie Music as We Know It*, SALON, Mar. 20, 2007, [http://www.salon.com/news/feature/2007/03/20/copyright\\_royalty\\_board/print.html](http://www.salon.com/news/feature/2007/03/20/copyright_royalty_board/print.html) (stating that “[t]he lack of

i. The Telecom Act of '96: New Tricks, But Same Old Payola

The mid-90s wave of consolidation in radio facilitated and encouraged payola. Since new radio conglomerates were hungry for revenue to fund the expensive consolidation process, "the natural result of consolidation [from the '96 Act] . . . pressured both station owners and record companies to turn to payola for a quick solution."<sup>93</sup> Record label executives negotiated large scale promotion deals which resulted in airplay across a large number of stations that could reach numerous geographic markets.<sup>94</sup>

In addition to furnishing money and other valuable consideration to radio programmers, record labels attempted to boost the popularity of their artists by purchasing "spin programs" or adding songs for lunar rotations. Spin programs are airtime bought by record labels that are marketed as advertisements, but are really used to increase the amount of spins a label's song receives on a particular radio station.<sup>95</sup> This type of practice is another attempt by record labels to circumvent payola laws by purchasing advertising time on radio stations and

variety and the prevalence of pay for play has made life difficult for up-and-coming bands."); see also Otis Hart, *FCC Deal May Open Doors for Independent Music in Radio – But How Much Will Really Change?*, RELISH, Jan. 25, 2007, available at [http://www.journalnow.com/servlet/Satellite?pagename=WSJ%2FMGArticle%2FWSJ\\_RelishArticle&c=MGArticle&cid=1149192810711&path=!entertainment!general!&s=1037645508970](http://www.journalnow.com/servlet/Satellite?pagename=WSJ%2FMGArticle%2FWSJ_RelishArticle&c=MGArticle&cid=1149192810711&path=!entertainment!general!&s=1037645508970) ("[L]ess than [ten] percent of the content on commercial radio is independently produced, even though [eighty] percent of the records released in America come from independent labels . . . [t]his might have something to do with radio playlists overlapping by up to ninety-seven percent. . .").

<sup>93</sup> Katunich, *supra* note 2, at 654.

<sup>94</sup> "As radio groups became more consolidated . . . the balance of power between radio and record labels shifted from the record labels to the radio group owners. Radio executives re-examined what they could get out of record companies by using the most ruthless of independent promoters as middlemen . . ." Stilwell, *supra* note 20, at 419. The record companies no longer had to "line the pockets of DJs and program directors in individual markets spread across the country;" now they could strike deals with executives of media conglomerates that would increase national airplay across the corporation's entire group of stations. See Nowlin, *supra* note 5.

<sup>95</sup> See Jeff Leeds, *Paid 'ads' for song plays revive payola memories*, L.A. TIMES, Jun. 11, 2004, available at <http://www.boycott-riaa.com/article/print/12499>. During a single week in May 2004, pop artist Avril Lavigne's song "Don't Tell Me" aired 109 times on Nashville radio station WQZQ-FM, from the hours between midnight and 6 a.m. *Id.* Arista Records paid the station to play the song as an advertisement under the spin program and "on one Sunday morning, the three-minute, 24 second song aired 18 times, sometimes as little as 11 minutes apart." *Id.*; see Glen Gamboa, "Declaration of Independents," NEWSDAY, Mar. 18, 2007, available at <http://www.newsday.com/entertainment/music/nyffcol5130817mar18,0,90982.column?col=ny-music-print>. Garrett Michaels, program director of San Diego rock station KBZT-FM stated, "playing songs as advertising makes 'the chart unreliable' . . . Basically, the radio station isn't playing a song because they believe in it. They're playing it because they're being paid." *Id.*

using that money instead to induce radio stations to play the labels' songs.<sup>96</sup> Lunar rotation occurs when a label purchases airtime for their songs, enabling a radio station to play a song multiple times in the late night hours to help the song's chart position.<sup>97</sup> Songs are credited as being played by radio stations even though they are not really added to that station's peak programming playlist.<sup>98</sup> "By engaging in such elaborate schemes to purchase airplay, increase spins and manipulate the charts, . . . record labels present the public with a skewed picture of the country's 'best' and 'most popular' recorded music."<sup>99</sup>

## ii. Labels Stuck In An Indie/Payola Prisoner's Dilemma

As a result of consolidation, a more "insidious kind of payola" developed, as record labels intensely competed for the small number of valuable play list openings.<sup>100</sup> Record companies only get twelve weeks for a song to get any "traction" on the radio

<sup>96</sup> *Id.* This method is also deceptive because again, it exploits the radio system to give the illusion that certain songs are popular and worthy to be played on the radio, while it excludes other songs from independent labels from being played because they cannot compete with the financial power of the big record labels.

<sup>97</sup> See Boehlert, *supra* note 17. The "paper add" practices of the 60s, 70s and 80s are no longer a viable option since all radio stations are now electronically monitored by a company called the Broadcast Data Service (BDS), which gives labels a detailed readout of songs actually played on the air. To circumvent the process, and to increase the appearance of playlist adds by a label's artist, many radio stations will add songs to their lunar rotations. These songs are detected by the BDS, but do not have an effect on the station's ratings or playlist because they are played at such odd hours of the night when audience numbers are at its lowest. *Id.*

<sup>98</sup> "Radio stations must play a song many thousands of times for it to crack the Billboard top 10. Nonetheless, a few hundred spins here and there can move a song up a place or two in the rankings. . . ." Leeds, *supra* note 95, at 1; see Stephen Holden, *The Pop Life*, N.Y. TIMES, Nov. 27, 1991 at C12 (explaining how Billboard uses radio airplay as a factor in determining the top songs and albums).

<sup>99</sup> WMG Acquisition Corp., et al., *EX-99.1 Assurance of Discontinuance Pursuant to Executive Law § 63(15)* (Nov. 22, 2005), available at <http://www.secinfo.com/d14D5a.z71n2.d.htm> at 6 (noting that in an effort to increase spins and popularity of a particular song, many labels paid people or directed their own employees to place fraudulent requests for songs to be played at radio stations).

<sup>100</sup> See Nowlin, *supra* note 5. Paul Porter, founder of Industry Ears, describes the payola scheme before and after the 1996 Act:

It used to be, 'I'll give you \$200 and a bag of cocaine . . . and a hooker if you play this record.' But at least back then it was up to an individual to make the decision whether to play it. Now the money has gotten so much bigger, that it's the blue suits making the deals. It's not just coaxing one guy in a control room. *Id.*

See also L.A. Lorek, *N.Y. Prober on Prowl for Payola; Clear Channel Reminds Employees It Forbids Pay-for-play Schemes*, SAN ANTONIO EXPRESS-NEWS, Feb. 25, 2005 at 1E (explaining that payola schemes come back in different forms through time).

before the next wave of record company singles are introduced.<sup>101</sup> Radio industry insider and long time artist manager, Ron Stone stated, “[I]f you don’t have any traction you get washed away . . . [n]ow it [has] become even more complicated and expensive because of consolidation.”<sup>102</sup> Because of the millions of dollars record labels put into their artists, the radio and music industry has become “a high-stakes poker game,” which the indies have been “winning . . . for decades by playing off record industry insecurities.”<sup>103</sup>

Today, the top three broadcasters control at least 60 percent of the radio stations in the top markets in the U.S.<sup>104</sup> As that happened a change in payola practices took place. Under the modern payola scheme, indie promotion became corporate big business.<sup>105</sup> “Drugs and hookers . . . [were] out; detailed invoices [billed to the labels by indie promoters were] in.”<sup>106</sup> As media conglomerates like Clear Channel began buying up more and more radio stations, indie promoters began charging higher and higher fees to record labels in order to get their songs on the tighter playlists. Many indie promoters working on behalf of record labels charged as much as \$5,000 for a song to be added on a radio station’s play list.<sup>107</sup> As a result of the ‘96 Telecom Act,

<sup>101</sup> See Boehlert, *supra* note 17, at 3 (discussing how independent record promoters are middle men between record companies and radio stations, and pay hundreds of millions of dollars each year in order to get songs played on the radio); see also Laura M. Holson, *With By-the-numbers Radio, Requests Are a Dying Breed*, N.Y. TIMES, Jul. 11, 2002 at C1 (commenting on the fact that songs have relatively little time to gain a popular following before they are eliminated from play lists).

<sup>102</sup> Boehlert, *supra* note 17, at 3.

<sup>103</sup> See Eric Boehlert, *Fighting Pay-for-Play*, SALON, Apr. 3, 2001, <http://www.salon.com/ent/music/feature/2001/04/03/payola2/print.html> (elaborating on pressure record companies are under to ensure their songs are added to radio playlists and further describing songs that do not rise up the charts as “the kiss of death.”); see also Boehlert, *supra* note 17 (quoting Ron Stone, artist manager who describes independent promoters as “an important insurance policy” for his clients).

<sup>104</sup> See *id.* (noting that the top three broadcasters control the majority of U.S. stations in the market).

<sup>105</sup> See Jeff Leeds, *Small Record Labels Say Radio Tunes Them Out*, L.A. TIMES, Sep. 16, 2001, at Business 1 (listing the cost of independent promoters’ services to record companies at \$100 million per year); see also Industry Ears Press Release, *supra* note 10 (describing Payola’s evolution “Payola is no longer just the little guy getting a few bucks for a few spins on the radio—the ‘new’ payola is corporately overseen and driven—a multi-million dollar business.”).

<sup>106</sup> Boehlert, *supra* note 17.

<sup>107</sup> See Boehlert, *supra* note 60 (positing that every song on a radio playlist comes with a price attached that is dependent on the market, with prices reaching as much as \$5,000 in large markets); see also Neil Strauss, *Pay-for-Play Back on the Air But This Rendition Is Legal*, N.Y. TIMES, Mar. 31, 1998, at A1 (claiming that Flip/Interscope Records agreed

indies did much less work for much more money. In the years following the '96 Act, labels attempted to recoup their losses and music sales began to slump; suddenly record labels were not so eager to pay the "staggering" prices indie were charging to do less and less work.<sup>108</sup>

Although record labels were displeased with the high price of indie promotion, the labels continued to tolerate it because they needed indies as a buffer between them and the anti-payola laws.<sup>109</sup> Additionally, the labels were afraid of the ramifications if they crossed indies and stopped paying them.<sup>110</sup> "Record companies had given birth to their own prisoner's dilemma: either continue to pay whatever fees the indies demand[ed] or eliminate their existence . . . [a]s history dictates, the latter [was] not an option."<sup>111</sup> Indies had leverage over record labels because of the long standing relationships they formed with radio programmers, and the financial alliances with station managers. Labels paid indies not only for what they could do to get a song on the air, but also out of fear of any influence indies possessed in keeping a song off the air.<sup>112</sup> Labels were frustrated with the system that they had helped create, yet there was little they

to pay KUFO-FM approximately \$5,000 to play a song by a new artists 50 times in a single week).

<sup>108</sup> See Boehlert, *supra* note 17 (stating "[i]n effect, [indies] have become an extraordinarily expensive phalanx of toll collectors who bill the record company every time a new song is added to a station's play list. . . no other entertainment industry vests so much power and pays so much money to outside sources [(indies)] who do so little work."); see also Nowlin, *supra* note 5 (explaining how the 1996 Telecom Act lifted regulations on media businesses, allowing for significant consolidation among U.S. radio stations.).

<sup>109</sup> See Katunich, *supra* note 2, at 660 ("[m]usic industry may have successfully shifted the legal risk of violating payola laws onto independent promoters, but in doing so, they may have become a slave of their own design."); see also Jacob Slichter, *The Price of Fame*, N.Y. TIMES, Jul. 29, 2005 at A23 (noting that because indies pay radio stations upfront and later collect from the record labels, who ultimately take it out of the artists' earnings, "the lines are sufficiently blurred," making it hard to prove any payola occurred).

<sup>110</sup> See Katunich, *supra* note 2, at 661 (explaining that record labels need indies to ensure that they will be working with the labels and not against them); see also Nowlin, *supra* note 5 (positing that payola, despite the challenges it faces, is a problem that will likely never go away due to its prevalence in the broadcasting industry.).

<sup>111</sup> Katunich, *supra* note 2, at 661.

<sup>112</sup> See Boehlert, *supra* note 17 (asserting that despite complaints regarding the current independent promotion practices, record labels still made sure the indies got paid simply based on the fear that "not playing and paying might cost them crucial radio airplay."); see also Katunich, *supra* note 2, at 657 ("[t]he persuasive techniques employed - and the rising costs of such techniques - now have the industry questioning whether indies are still worth their weight in gold.").

could do to fix it.<sup>113</sup> “Without airplay, the chances of CD sales diminish greatly . . . [s]o labels are desperate to maintain momentum behind new songs often at any cost . . . [a]nd the indies know it.”<sup>114</sup> As one record label employee frankly stated, “If you have to pay [an indie] \$10,000 to shut your boss up, goddamn it, you pay let me tell you.”<sup>115</sup>

Eventually as music sales began to dwindle<sup>116</sup> and listener dissatisfaction grew as a result of the same tired songs being played on standard playlists across the nation, public outcry against radio and payola practices began to grow larger and more apparent.<sup>117</sup> As Eric Boehlert of Salon magazine reported in 2001: “[There is an] obscene amount of abuse that’s going on. It’s just wrong. We need regulators to look at it, someone who stands up and says this stinks. Because the airwaves belong to the public, they’re federally licensed. You can’t do anything you want with them.”<sup>118</sup> As a result of increased news coverage, and public complaints,<sup>119</sup> the anti-payola sentiment began picking up steam in Washington as well.<sup>120</sup> Many politicians actively spoke out

<sup>113</sup> “Everyone tolerated payola when you were getting something in return,” however, as record labels eventually became frustrated with the crooked system they had created, “[i]t became untenable.” Eric Boehlert, *Payola is dead! Now what will we listen to?*, SALON, Jan. 5, 2005, <http://archive.salon.com/news/feature/2005/01/05/payola/print.html>. “[B]ecause of unprecedented consolidation in the radio industry, a handful of large broadcast groups and their exclusive indies broker unprecedented power. That makes the record companies nervous. Indie promotion is costing them in excess of \$100 million each year.” Boehlert, *supra* note 60.

<sup>114</sup> Boehlert, *supra* note 113.

<sup>115</sup> *Id.*

<sup>116</sup> “Listenership has been dropping since 2003. And after posting double-digit growth rates for most of the 1990s, radio ad sales have slowed to a barely perceptible crawl: Last year advertising revenue climbed just 2%, to \$21.4 billion.” Peter Kafka, *Radio Daze*, FORBES, Aug. 9, 2005, available at [http://www.forbes.com/digitalentertainment/2005/08/09/radio-programming-music-cx\\_pk\\_0809radio.html](http://www.forbes.com/digitalentertainment/2005/08/09/radio-programming-music-cx_pk_0809radio.html). The practice of undisclosed paying for airplay results in mediocre radio, as songs are played based on the will of the highest bidder and not on merit, sales, or requests. See Katunich, *supra* note 2, at 671.

<sup>117</sup> “Radio’s not about the music anymore . . . [a]nd it’s becoming less special every day in many places.” says Glenn Gardner operations manager at WJJO in Madison Wisconsin. Boehlert, *supra* note 103. Radio audiences are continually shrinking as fans tune into more appealing sources, like Internet and satellite radio. See *id.*

<sup>118</sup> Boehlert, *supra* note 17; see Kafka, *supra* note 116 (recognizing the detrimental effects of payola on listenership).

<sup>119</sup> See Boehlert, *supra* note 17 (discussing how growing discontent with payola practices among music industry insiders has drawn the attention of United States government’s regulatory agencies.); see also Martin Miller, *Scandals and New Technologies Signal a Staticky Failure*, CHI. TRIBUNE, Aug. 3, 2005, at C3 (stating that payola practices have subjected the radio industry to “bad publicity”).

<sup>120</sup> See generally *Statement of Commissioner Jonathan Adelstein Before the Federal Communications Bar Association* (Nov. 5, 2003), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-240871A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-240871A1.pdf) [hereinafter Adelstein Statement to

against payola in the music industry and criticized the FCC for its lax attitude.<sup>121</sup>

Notwithstanding the numerous statements against payola practices in radio,<sup>122</sup> the FCC failed to take any action.<sup>123</sup> Perhaps one of the crippling aspects facing the FCC is the lack of formal complaints made to the FCC regarding payola, and “since the new payola has become a . . . part of the day-to-day business at nearly every pop station in America, who’s going to complain?”<sup>124</sup> What the industry needed was to “get out brooms and flashlights and go through the entire closet . . . [and conduct] evidentiary hearings to find out who did what, and how much they paid.”<sup>125</sup>

#### *D. New York Sheds Some Light At the End of the Corruptive Payola Tunnel*

In 2003, former New York State Attorney General Elliot Spitzer launched an aggressive statewide investigation into the payola radio practices of four major record companies: Universal Music, Warner, EMI and Sony BMG.<sup>126</sup> The investigation

FCBA]; John Engen, *Financial CHAR-AID*, Vol. 117, Issue I, Jul. 1, 2007, at C30 (claiming payola in the music industry has weakened its influence on Washington politics).

<sup>121</sup> See, e.g., Phillips, *supra* note 1; see also Miller, *supra* note 119.

<sup>122</sup> In 1999, Charles Kelly, chief of enforcement in the mass media bureau of the FCC, said the new promotional practices could pose potential problems for the companies involved, and that it would “certainly [be] an area that [the FCC] could pursue. . . .” Chuck Philips & Michael A Hiltzik, *2 Officials Urge FCC to Probe Possible Payola*, L.A. TIMES, Jan. 14, 1999, at C1. In 2003, Chairman Jonathan Adelstein stated that payola was “a serious problem that has become institutionalized across a number of [radio] formats.” However, he also stated that there was “not enough hard evidence to determine what actions [the FCC] might need to take.” See *Adelstein Statement to FCBA*, *supra* note 120. In 2005, FCC Chairman Kevin Martin promised “swift action” by the FCC in response to the “widespread and flagrant violation” of FCC rules. Rosenthal, *supra* note 9.

<sup>123</sup> In 2002, Representative for House Judiciary Committee, John Conyers Jr. stated, “The [payola] problem has been growing since the Telecommunications Act. The protections for the airwaves just aren’t the same anymore. There is not enough oversight of these kinds of transactions. The government has been snoozing.” See Phillips, *supra* note 1; see also Greg Kot, *Music Industry Raises its Voice for Radio Reforms*, CHI. TRIBUNE, May 23, 2002, at N1.

<sup>124</sup> Because of the Telecom Act, indie promotion was successful in skirting antiquated payola laws. Industry insiders were well aware of the questionable and downright illegal payola practices that labels and radio stations were engaging in, yet everyone involved from the artists, to the labels, to the radio executives were extremely reluctant to take any affirmative steps to remedy the problem. Boehlert, *supra* note 103.

<sup>125</sup> Boehlert, *supra* note 60.

<sup>126</sup> The Spitzer investigation may have been prompted by the hiring of Susanna Zwerling, who spearheaded the investigation. Zwerling is an attorney whose previous job was legal adviser to Democratic FCC Commissioner Michael Copps. See Bill Werde,

uncovered incriminating e-mails between the major labels and indie promoters promising radio stations trips, concert tickets and other valuable consideration in exchange for radio airplay.<sup>127</sup> In response to the investigations, Spitzer stated, “Consumers have a right not to be misled by the way in which the music they hear on the radio is selected . . . [p]ay-for-play makes a mockery of claims that only the ‘best’ or ‘most popular’ music is broadcast.”<sup>128</sup> The investigations revealed “a kind of grass-roots collusion” amongst the major record companies, who supplemented radio programmers’ pay and station budgets in exchange for record spins.<sup>129</sup> Additionally, the investigations revealed station employees’ participation in the acquisition and concealment of such valuable consideration furnished by the record labels—a blatant violation of the anti-payola laws.<sup>130</sup>

By the end of 2006, Spitzer’s investigations led to over \$36 million in fines against the four record companies as well as an acknowledgement of improper conduct by the labels and a pledge to cease payola practices and abide by a higher standard.<sup>131</sup> Spitzer stated, “Our investigation shows that . . . [a]irtime is often determined by undisclosed payoffs to radio stations and

*Payola Probe Heating Up*, ROLLING STONE, Nov. 1, 2004, available at [http://www.rollingstone.com/news/story/6590977/payola\\_probe\\_heating\\_up](http://www.rollingstone.com/news/story/6590977/payola_probe_heating_up). Spitzer’s “tenacious pursuit not only netted a lot of money and pledges of reform, but it forced the federal government to stop looking the other way.” See Parker, *supra* note 92.

<sup>127</sup> See *id.* (asserting that Spitzer’s investigation uncovered e-mails detailing the exchange of concert tickets and “personal booty” for airplay); see also Jeff Leeds & Louise Story, *Radio Payoffs Are Described As Sony Settles*, N.Y. TIMES, Jul. 26, 2005 at A1 (noting the extent of payola discovered in e-mails and documents uncovered during Spitzer’s investigation).

<sup>128</sup> Press Release, New York State Office of the Attorney General, *Universal Music Settles Payola Probe* (May 11, 2006), available at [http://www.oag.state.ny.us/press/2006/may/may11a\\_06.html](http://www.oag.state.ny.us/press/2006/may/may11a_06.html) [hereinafter Universal Settlement Press Release].

<sup>129</sup> Underwood, *supra* note 8.

<sup>130</sup> See Press Release, New York State Office of the Attorney General, *Sony Settles Payola Investigation* (Jul. 25, 2005) available at [http://www.oag.state.ny.us/press/2005/jul/jul25a\\_05.html](http://www.oag.state.ny.us/press/2005/jul/jul25a_05.html) [hereinafter Sony Settlement Press Release] (finding that Sony BMG employees took steps to conceal payments by record labels by using fictitious contest winners to make it appear as though such payments were going to listeners and not to station employees).

<sup>131</sup> See Michael Gormley, *Warner Settles in Spitzer ‘Payola’ Probe*, ASSOCIATED PRESS, Nov. 23, 2005, available at <http://www.law.com/jsp/article.jsp?id=1132653913397&rss=newswire> (discussing how four record labels were required to pay the Rockefeller Philanthropy Advisors to New York State to fund music programs in the state and stating that “Spitzer said he hadn’t sought criminal charges in the Sony case because criminal laws governing pay-for-play are more specific and difficult to violate than the civil laws”); Stilwell, *supra* note 20, at 422–25 (discussing how the four radio groups banned independent promotions and later received subpoenas from New York Attorney General Eliot Spitzer).

their employees . . . [and] [t]his agreement is a model for breaking the pervasive influence of bribes in the industry.”<sup>132</sup> As Elliot Spitzer began compiling more and more evidence of payola practices and his investigations grabbed both national and local headlines, many politicians,<sup>133</sup> journalists and music artists<sup>134</sup> began calling for some nation-wide action by the FCC.<sup>135</sup> “After Spitzer turned over his findings to the FCC, there was talk among some industry watchers that the Justice Department might get involved and that payola would be taken seriously at the federal level.”<sup>136</sup> Although the FCC promised to take swift action and applauded Mr. Spitzer’s actions in finally uncovering the “real fire” among much smoke, the FCC was slow to respond once again.<sup>137</sup>

<sup>132</sup> Sony Settlement Press Release, *supra* note 130 (quoting Elliot Spitzer).

<sup>133</sup> Senator Russell Feingold (D-WI) weighed in on the FCC payola investigation stating that despite “pressure on the FCC to come up with a quick resolution,” it was important that “any settlement provide a strong message that payola will not be tolerated in any form.” *Sen. Feingold Calls For Strong Consent Decree On Payola*, FMQB, Jan. 31, 2007, <http://www.fmqb.com/Article.asp?t=p&id=342981>. He also suggested that investigators from the New York Attorney General’s office be invited to testify and participate in any investigation. *Id.*; see Bill Holland, *Senator Introduces Payola Bill*, BILLBOARD, Nov. 21, 2005, available at [http://www.recordingartistscoalition.com/press.php?content\\_id=137584](http://www.recordingartistscoalition.com/press.php?content_id=137584).

<sup>134</sup> See Slichter, *supra* note 109. Slichter is a member of the pop band Semisonic, who had a hit song in the late 1990s called “Closing Time.” *Id.* He applauded Spitzer’s acts stating: “Knowing what it takes to get their songs on the radio and watching their share of record sales swallowed up along the way, most recording artists would love to see the current system brought down. . . .” *Id.*

<sup>135</sup> Eliot Spitzer criticized the FCC’s lack of involvement after his investigations revealed rampant payola in New York radio. See Press Release, New York State Office of the Attorney General, *Radio Giant Named in Payola Lawsuit* (Mar. 8, 2006), available at [http://www.oag.state.ny.us/press/2006/mar/mar08a\\_06.html](http://www.oag.state.ny.us/press/2006/mar/mar08a_06.html) [hereinafter *Radio Giant Press Release*]. “Almost a year after payola was exposed in significant detail, the FCC has yet to respond in any meaningful way. The agency’s inaction is especially disappointing given the pervasive nature of this problem and its corrosive impact on the entertainment industry.” *Id.*; see Brian Ross, Richard Esposito & Vic Walter, *100s of Radio Stations in Payola Probe*, ABC NEWS, Feb. 9, 2006, available at <http://abcnews.go.com/Business/story?id=1600966&page=1>.

<sup>136</sup> See Brian Ross & Vic Walter, *Paying to Make It to the Top of the Charts*, ABC NEWS, Feb. 16, 2006, <http://abcnews.go.com/Primetime/story?id=1628380&page=1> (stating that penalties for violations could include loss of license); Neda Ulaby, *Rumored FCC Payola Settlement Angers Critics*, NAT’L PUB RADIO, Jan. 22, 2007, <http://www.npr.org/templates/story/story.php?storyId=6944954> (noting that if violations of “federal payola rules are found” in a possible FCC probe, many believed that, in addition to civil fines, “radio broadcast licenses could be at stake”).

<sup>137</sup> See Rosenthal, *supra* note 9. FCC Chairman Kevin Martin promised “swift action,” yet “[t]he urgency of Martin’s comment . . . was undercut by the fact that . . . [the FCC] seemed slow to answer [Commissioner Adelstein’s] . . . call for the FCC to follow Spitzer’s . . . investigation.” *Id.* When the Sony settlement was reached with New York’s Office of Attorney General, Chairman Adelstein stated he had “seen a lot of smoke around payola for a while, but now we know it’s coming from a real fire.” *Id.* He went on to say that “Mr. Spitzer’s office has collected a mountain of evidence on the potentially illegal

When the FCC finally decided to roll up its sleeves and began investigating, its inquiry paled in comparison to Elliot Spitzer's New York investigation.<sup>138</sup> Rather than continuing Mr. Spitzer's investigation into payola as promised, the commission took the easy way out, entering into a consent decree with a majority of the broadcasting companies on April 13, 2007.<sup>139</sup> Under the FCC consent decree, four of the nation's six largest radio station owners<sup>140</sup> agreed to close scrutiny in their dealings with record companies for the next three years and were fined a total of \$12.5 million.<sup>141</sup> The settlement terms included "limits on gifts, a promise to keep a database of all items of value supplied by those companies, the employment of independent compliance officers to make sure stations are following the rules and even a 'payola hotline' for employees."<sup>142</sup> In addition to the proposed terms, a separate "good faith agreement"<sup>143</sup> was reached with a group of independent record labels under the umbrella group American Association of Independent Music (A2IM). The agreement with

promotion practices of . . . major record companies, independent promoters and several of the largest radio station groups." *Id.*; see *Government to Examine Payola, Vows Action*, FOX NEWS, Aug. 9, 2005, <http://www.foxnews.com/story/0,2933,165168,00.html>.

<sup>138</sup> See Douglas Wolk, *The Other Foot*, THE VILLAGE VOICE, Aug. 22, 2005, available at <http://www.villagevoice.com/music/0534.soti,67086,22.html> (asserting that the FCC's investigation consisted of issuing a fact sheet on payola, which asks listeners to report unidentified examples of pay-for-play, but that this is ineffective because the problem with payola is that people can't tell when they are hearing it); see also Press Release, U.S. Senator Russ Feingold Wisconsin (D-WI), *Feingold Presses FCC Answers to Payola Investigation* (Nov. 1, 2006), available at <http://feingold.senate.gov/~feingold/releases/06/11/20061101.html> (discussing Senator Feingold's letter to the FCC urging the Commission to exert more authority in conducting payola investigation).

<sup>139</sup> See Federal Communications Commission, *Payola and Sponsorship Identification*, <http://www.fcc.gov/eb/broadcast/sponsid.html> (last visited Aug. 27, 2007) [hereinafter *Payola and Sponsorship*] (listing consent decrees against Clear Channel Communications Inc., CBS Radio Inc., Citadel Broadcasting Corp., and Entercom Communications Corp); Industry Ears Press Release, *supra* note 10 (acknowledging consent decree agreed upon by the FCC and the owners of Clear Channel, CBS, Entercom and Citadel radio broadcast companies).

<sup>140</sup> These include Clear Channel, CBS Radio, Entercom Communications and Citadel Broadcasting. See *supra* note 139 and accompanying text.

<sup>141</sup> See Dunbar, *supra* note 10 (outlining settlement agreement between the FCC and four radio broadcast companies, including: Clear Channel, CBS Radio, Entercom, and Citadel Broadcasting; noting that none of the radio stations stipulated to any wrongdoing under the settlement decree); see also *Radio Has the FCC Playing the Tunes*, *supra* note 139.

<sup>142</sup> See Industry Ears Press Release, *supra* note 10; see also Dunbar, *supra* note 10.

<sup>143</sup> See Parker, *supra* note 92 (noting that FCC Commissioner Jonathan Adelstein confirmed that good faith agreement was outside the agency's purview, as he claimed "[i]t may not be something our rules can address directly"); see also Industry Ears Press Release, *supra* note 10 (stating that "[t]h[is] good faith agreement is not enforceable by law" and broadcasters will not be held accountable).

A2IM included 4,200 hours of free airtime for independent record labels and local artists over three years.<sup>144</sup>

In the end, the independent music settlement has been characterized as “a drop in an empty bucket of promises.”<sup>145</sup> Ben Goldberg, the founder of independent record label Ba Da Bing Records, believes that despite independent exposure, the only beneficiaries of the settlement are “independent labels with major-label affiliations.”<sup>146</sup> He states, “These labels will have major distribution, major promotion, but will look like separate business entities . . . [i]t will be a complete wash.”<sup>147</sup> The radio broadcasters offered a “shameless sop” of incorporating a half-hour radio show for independent music only.<sup>148</sup> However, there is already skepticism with respect to this radio show, (that was originally planned for 90 minutes in duration) which “has [now] slid back to a mere . . . [approximately twenty] minutes of actual music . . . without a guarantee it will even be locally produced.”<sup>149</sup>

In response to the consent decree, FCC Commissioner Jonathan Adelstein stated, “While this settlement is not a panacea to all payola woes, it requires the implementation of certain meaningful reform measures that should change corporate practices and behavior.”<sup>150</sup> Although many saw the consent decree as a positive step in the right direction towards ending payola, many others felt the settlement was not enough. Craig Aaron, Communications Director for the public advocacy group, Free Press states, “This settlement . . . sends a strong

<sup>144</sup> See Dunbar, *supra* note 10 (“The free airtime, between 6 a.m. and midnight, would be granted to [small, independent labels] not owned or controlled by the nation’s four dominant music labels . . .”); see also Chris Parker, *The Price of Payola: Someone’s Listening After All*, PHOENIX NEW TIMES, Apr. 12 2007, available at <http://www.phoenixnewtimes.com/2007-04-12/music/the-price-of-payola> (reporting that part of the agreement broadcasters made with the American Association of Independent Music was “a once-a-week, half-hour radio show of ‘indie’ music chain-wide”).

<sup>145</sup> See Parker, *supra* note 92.

<sup>146</sup> Hart, *supra* note 92.

<sup>147</sup> *Id.*

<sup>148</sup> See Parker, *supra* note 92 (positing that the offer is merely a ploy to quiet the payola scene); see also Hart, *supra* note 92 (stating that the parties that stand to benefit are independent labels with major-label affiliations.).

<sup>149</sup> See Parker, *supra* note 92 (implying that, in actuality, independent music is receiving less airtime than provided by the agreement); see also *Will the FCC Payola Settlement Matter?*, Hypebot.com, Mar. 8, 2007, [http://hypebot.typepad.com/hypebot/2007/03/will\\_the\\_fcc\\_pa.html](http://hypebot.typepad.com/hypebot/2007/03/will_the_fcc_pa.html) (arguing that the settlement agreement to increase playing time of independent music is unlikely to “level the playing field” with corporate radio practices).

<sup>150</sup> See Dunbar, *supra* note 10 (quoting FCC Commissioner Jonathan Adelstein).

message . . . [b]ut just like in any industry, these things go in cycles . . . [a]nd as soon as the spotlight moves away, you can be sure that something like payola will start again.”<sup>151</sup>

### III. THE AFTERMATH—WHAT CAN BE DONE

If history is an accurate indicator, the current settlement will merely be just another bump in the road for payola and its players. What looked to be a national overhaul of the radio industry after Elliot Spitzer's investigations turned out to be nothing more than a blip on the radar screen as the FCC “settled their investigation before they even began; ignoring the severity of corruption in the music industry.”<sup>152</sup> Although the \$12.5 million fine imposed by the FCC is the second largest fine ever levied by the regulatory agency, it is not enough.<sup>153</sup> As compared to the hundreds of millions of dollars that record labels, indie promoters and even broadcasters have made from payola, the fine imposed by the FCC is merely a slap on the wrist.

Furthermore, Elliot Spitzer's local investigation levied \$36 million in fines against payola practices in New York State, yet the FCC is only fining the same groups \$12.5 million for the *entire country*.<sup>154</sup> The settlement agreement does nothing to actually curb or even attempt to end the pay-for-play practices in radio; in fact, the terms of the agreement do not even require the broadcasters to admit any wrongdoing whatsoever.<sup>155</sup> As

<sup>151</sup> See Underwood, *supra* note 8.

<sup>152</sup> See Industry Ears Press Release, *supra* note 10 (noting the industry's reluctance to alter the status quo of current payola practices (quoting Paul Porter, Industry Ears Co-Founder)); see also *Will the FCC Payola Settlement Matter?*, *supra* note 149 (arguing that the settlement agreement is “hardly a harsh punishment”).

<sup>153</sup> See Industry Ears Press Release, *supra* note 10 (“The reported payola consent decree does nothing to slow radio and records commitment for the pay for play system” (quoting Paul Porter, Co-Founder, Industry Ears)); see also Rachele Younglai, *Radio Firms to Pay \$12.5 Million Fine*, REUTERS, Mar. 5, 2007, <http://www.reuters.com/article/ousiv/idUSN0532493820070306> (reporting that fine was largest fine collectively levied against industry).

<sup>154</sup> See Paul Porter Interview, *supra* note 9 (stating that the federal fines levied by the FCC amounts to much less than fines levied as a result of investigations launched by Attorney General Elliot Spitzer); see also Parker, *supra* note 92 (noting that Elliot Spitzer's investigations against payola netted more than \$35 million in settlements from the four major record labels and two broadcasters).

<sup>155</sup> “For your ills, we're going to smack you on the wrist and make you do what you should've been doing in the first place.” See Parker, *supra* note 92 (quoting USC professor and former radio programmer Jerry Del Calliano). Ending payola abuse requires more than the wrist slap that the FCC has handed down. “The FCC must ensure that the stations caught with illegal gifts in hand admit wrongdoing and pay stiff financial

longtime anti-payola activist and music industry insider Paul Porter states, “Payola won’t stop unless people start going to jail or losing jobs.”<sup>156</sup> Even FCC commissioner Jonathan Adelstein stated that, “The settlements aren’t expected to end payola . . . [s]ome dishonest employees may continue to take money ‘under the table.’”<sup>157</sup> If the FCC’s own personnel are admitting that this settlement agreement will not really stop payola, then the FCC must do more. It must undertake an actual investigation or impose a substantial fine in order to finally end payola once and for all.<sup>158</sup> As Lisa Fager, president and co-founder of the music coalition Industry Ears stated, “The RIAA gets the government to do more to poor college kids than the FCC does to billion-dollar broadcast corporations who have clearly broke federal laws and abused public airwaves.”<sup>159</sup> If a trade group like the RIAA, can severely punish its own customers for illegal downloading and file sharing of music,<sup>160</sup> then a federal investigatory commission should be able to do the same with multi-billion dollar record labels.

penalties. All stations must adhere to strict reporting requirements and third-party audits and open airwaves to independent artists and local music.” Press Release, CommonDreams.org, *Slap On The Wrist Won’t Stop Payola* (Jan. 24, 2007), available at <http://www.commondreams.org/news2007/0124-02.htm> [hereinafter Common Dreams Press Release] (quoting Franie Wellings, associate policy director at Free Press).

<sup>156</sup> Meena Thiruvengadam, *FCC payola fines reach \$12.5 million*, (Apr. 13, 2007), available at [http://www.industryyears.com/iearticles.php?subaction=showfull&id=1176561708&archive=&start\\_from=&ucat=1&](http://www.industryyears.com/iearticles.php?subaction=showfull&id=1176561708&archive=&start_from=&ucat=1&).

<sup>157</sup> *Id.*

<sup>158</sup> “The consent decree . . . by the FCC once again shows the power of lobbyists [from the radio stations and record labels] in Washington D.C. and the continued deteriorating power by the public and its best interest.” Industry Ears Press Release, *supra* note 10.

<sup>159</sup> *Id.* The Recording Industry Association of America is a trade group that acts as a lobbyist group for recording artists and record labels. *See id.* Both Industry Ears and Future of Music Coalition have listed guidelines that would make any consent decree a meaningful and acceptable punishment. *See* Common Dreams Press Release, *supra* note 155; *see also* Press Release, Future of Music Coalition, Future of Music Coalition Statement on FCC Payola Settlement (Jan. 16, 2007), available at <http://www.futureofmusic.org/news/FCCpayolaconsentdecree07.cfm>.

<sup>160</sup> Hundreds of copyright infringement suits were brought by the RIAA beginning in 2003 against teenagers who illegally downloaded music onto their computers. *See* John Borland, *RIAA Sues 261 File Swappers*, CNET, Sept. 8, 2003, [http://news.com.com/2100-1023\\_3-5072564.html](http://news.com.com/2100-1023_3-5072564.html). Most of the lawsuits were settled for tens of thousands of dollars, rather than actually litigated. Many of the defendants named in the lawsuits were college students; however, some were as young as twelve years old. *See 12-Year-Old Sued For Music Downloading*, FOX NEWS, Sept. 9, 2003, <http://www.foxnews.com/story/0,2933,96797,00.html>.

### A. *The Federal Government Is Not Doing Its Job*

“The payola of today is a natural and creative response to laws that [aimed] . . . to bring about its demise but in practice failed to provide adequate weaponry.”<sup>161</sup> One of the main problems is that the FCC lacks the man power to adequately investigate any sort of payola practices engaged by large radio conglomerates with powerful political influence.<sup>162</sup> To date, the FCC has only imposed one fine on a major radio group. In 2000, the FCC imposed an \$8,000 fine on Clear Channel for engaging in payola practices concerning a Bryan Adams song.<sup>163</sup> Given its past history of enforcement actions, the FCC seems more concerned about bad lyrics and indecency complaints on television than payola. During a recent conference regarding music and payola, FCC Chairman Adelstein admitted that the FCC did not have the resources to adequately investigate payola or to examine the boxes of evidence provided by Mr. Spitzer, at the close of his investigation, because the FCC was bogged down with addressing indecency complaints related to radio and television programming.<sup>164</sup> In March 2007, for the first time in four years, all five FCC commissioners appeared before the House Commerce Committee and were sharply criticized for “failing on a number of issues including incomplete investigations.”<sup>165</sup>

<sup>161</sup> Katunich, *supra* note 2, at 655.

<sup>162</sup> *See id.* at 651–52 (citing a lack of manpower as one of the reasons the FCC’s enforcement of payola violations has been lax); *see also KCRW’s Celia Hirshman Criticizes FCC for Lack of Action on Payola*, Hypebot.com, Dec. 2, 2005, [http://hypebot.typepad.com/hypebot/2005/12/kcrws\\_celia\\_hir.html](http://hypebot.typepad.com/hypebot/2005/12/kcrws_celia_hir.html).

<sup>163</sup> *See* Katunich, *supra* note 2, at 652 (discussing the payola practices of Clear Channel, whereby a local Clear Channel radio station frequently played the Adams song (despite poor listener response elsewhere) in exchange for his performance at a local radio station benefit concert. After the concert, the station quickly stopped playing the song.); *see also* Phillips, *supra* note 1.

<sup>164</sup> *See* The National Conference for Media Reform, *FCC commissioner Adelstein talks about Payola* (Jan. 12, 2007), available at <http://fpsrv2.freepress.net/nemr07/audio07/f3-payola.mp3> responding to a question by Paul Porter, who asked why New York could do what the FCC could not [in regards to investigating payola] [hereinafter Conference Audio Transcript]; *see also* Phillips, *supra* note 1 (stating that “[u]nless you are a flagrant, notorious violator, no one will take you to task anymore. . . [i]t’s like no one is paying attention to the federal laws on the books.”); Charles R. Naftalin, *Payola and Plugola Scandals Return to Center Stage*, 7 TELECOMMUNICATIONS 3 (2007), available at <http://www.hklaw.com/content/newsletters/telecom/telecomnews1005.pdf> (predicting that after the FCC deals with a number of indecency complaints, and telecommunication service issues, they will focus more attention to payola).

<sup>165</sup> *Dingell Rips Into FCC For Incomplete Investigations*, MEDIAWEEK, Mar.19, 2007, available at [http://www.mediaweek.com/mw/current/article\\_display.jsp?vnu\\_content\\_id=1003559558](http://www.mediaweek.com/mw/current/article_display.jsp?vnu_content_id=1003559558).

Democrat appointed Commissioner for the House Commerce Committee John Dingell, bashed the commission stating, “When the FCC loses sight of its proper role, consumers suffer, as does the credibility of the FCC . . . I fear this has too often been the case.”<sup>166</sup>

*B. The Anti-Payola Statutes Are Inadequate to Address Today’s Payola Practices*

In addition to the FCC’s inability to adequately enforce the anti-payola laws, the loopholes created by section 317 and 508 have been successfully exploited by record labels and independent promoters. Perhaps one of the main issues concerning payola practices is in the language and enforcement of the anti-payola statutes.<sup>167</sup> “Payola” is a term of art and until Congress passes legislation that expands the scope of what constitutes illegal payola practices, the only punishable practice is an undisclosed promise or an exchange of consideration for broadcast time.<sup>168</sup> Radio stations and record labels have become more sophisticated at skirting payola laws, and recognize that any sort of consideration received that is used indirectly for airplay, will not violate the payola laws.<sup>169</sup> The anti-payola laws provide for punishment of a record label when the label “aids, abets, counsels, commands, induces or procures” the act of payola or “willfully causes the act to be done by another such as an independent promoter.”<sup>170</sup> Thus, the rules encourage record

<sup>166</sup> See *id.* Dingell stated further, “I wonder whether we need to schedule an oversight hearing every month in order to keep the business of the Commission on track.” In order for the FCC to adequately address the payola problem in radio, this author proposes that Congress split the FCC into two divisions; where one handles indecency complaints and one deals with payola and illegal financing, in order to be a more effective government agency and take its oversight responsibility seriously. *Id.*

<sup>167</sup> See 47 U.S.C. § 317 (2007) (discussing announcement requirements for payment of broadcasts); see also 47 U.S.C. § 508 (2007) (specifying disclosure requirements of payments to individuals connected with broadcasts).

<sup>168</sup> See Stilwell, *supra* note 20 at 417; see also 47 U.S.C. § 508 (requiring both the person providing or promising to provide money, services or other consideration and the recipient are obligated to make this disclosure so that the station may broadcast the sponsorship identification announcement required by Section 317 of the Communications Act).

<sup>169</sup> See Stilwell, *supra* note 20, at 417 (“Since this exchange of consideration is not disclosed at the time the paid-for airplay is broadcast, such exchanges are indeed payola but are difficult to prove since payment . . . is ostensibly for something other than airplay”); see also Naftalin, *supra* note 164 (discussing examples of payola that are indirect, subtle, and difficult to track).

<sup>170</sup> Sidak & Kronemyer, *supra* note 67, at 539 (codified by 18 U.S.C §2 (1982)).

company executives to hire indie promoters and then turn a blind eye to all their practices, as long as the label's artist still climb the charts.<sup>171</sup> The record company could easily circumvent the knowledge component of the statutes by avoiding inquiries as to whether the independent promoter used payola to promote the label's records.<sup>172</sup> The statutes enable indies and record label executives to exploit the system by using loopholes in the statutory language of section 508 and section 317 of the anti-payola laws. If the FCC is unequipped or unwilling to stomp out payola, by enacting harsher fines or rewriting the current laws, there may be other alternatives.

### C. Viable Alternatives

#### i. Re-Write the Laws: Examine Senator Feingold's Bill

On November 18, 2005, Senator Russell Feingold introduced the Radio and Concert Disclosure and Competition Act of 2005.<sup>173</sup> The Act proposes a multi-faceted approach to addressing various forms of payola by: (1) strengthening the FCC's ability to prove and punish violations; (2) prohibiting indie third-party indirect payola; and (3) preventing cross-ownership from hindering fair competition and requiring disclosure of payments by *anyone* who may have an interest in "improperly influencing airplay decisions."<sup>174</sup> Building on Spitzer's investigations, Senator Feingold called for a broad interpretation of the FCC's powers

<sup>171</sup> See Boehlert, *supra* note 103 (arguing that labels have found a way to avoid liability for payola laws by operating through their lawyers and hiring independent promoters); Eric Boehlert, *Payola City*, SALON, Jul. 24, 2001, available at [http://archive.salon.com/ent/music/feature/2001/07/24/urban\\_radio/index.html](http://archive.salon.com/ent/music/feature/2001/07/24/urban_radio/index.html) (stating that "the current system is able to flourish partly because the major labels, reluctant to make waves inside the profitable format, have adopted a hear-no-evil, see-no-evil mentality, turning a collective blind eye to the corrupt transactions.").

<sup>172</sup> See Sidak & Kronemyer, *supra* note 67, at 539 (describing the working relationship between record executives and indie promoters, "[w]hen asked how independent promoters could promise to secure airplay, one record company president responded: 'You tell me; all I know is how much it costs.'"); see also *Nobody in Particular Presents, Inc. v. Clear Channel Commc'ns, Inc.*, 311 F.Supp.2d 1048, 1060 (D.Colo. 2004) (indicating that many believe that record labels use the independent record promotion market as away to avoid liability for payola).

<sup>173</sup> See Radio and Concert Disclosure and Competition Act of 2005, S. S 2058, 109th Cong. (2005) (Awaiting committee assignment); FreePress, Bill Details, <http://www.freepress.net/congress/billinfo.php?id=164> (last updated Nov. 18, 2005) [hereinafter Bill Details] (summarizing details of bill).

<sup>174</sup> See *supra* note 173.

under the current anti-payola laws in order to make a “clear statement that this new payola is illegal as well.”<sup>175</sup> Senator Feingold’s legislation would be an important stepping-stone to enacting strong legislation that would actually address the current payola practices engaged by record labels, independent promoters and radio stations.

ii. Bring A RICO Suit

The FCC’s consent decree is not sufficient to deterring payola practices; the fines imposed are not enough and none of the payola players are being held personally liable. A lawsuit under the Racketeer Influenced and Corrupt Organizations (“RICO”) Act may be a more suitable alternative for the government or a private plaintiff to bring.<sup>176</sup> The RICO statute prohibits anyone who was employed or associated with an enterprise; that engaged in or affected interstate commerce (such as using mail or wires); where the individual operated or managed the enterprise through a pattern of racketeering activity; and the plaintiff, or person bringing the suit, was financially injured in its business because of this activity.<sup>177</sup>

A civil or criminal RICO cause of action may be brought under the Act. Typically a U.S. Attorney under the Department of Justice will bring a criminal RICO suit, whereas in a civil RICO suit, a private party, who meets the required aforementioned elements, is eligible to bring a suit.<sup>178</sup> Furthermore, the penalties imposed for RICO violations are harsh. If record companies were convicted under a criminal or civil RICO suit, they would be charged with treble damages for engaging in payola. Additionally, since a criminal conviction under RICO accompanies a significant prison sentence, and therefore, if convicted under the criminal RICO statute, radio and record label executives would be held personally liable for their payola

<sup>175</sup> Letter from Russell Feingold, U.S. Senator, to Kevin Martin, FCC Chairman (Nov. 1, 2006), available at [http://feingold.senate.gov/~feingold/payola\\_ltr\\_110106.pdf](http://feingold.senate.gov/~feingold/payola_ltr_110106.pdf).

<sup>176</sup> See 18 U.S.C. §§ 1961–68 (2007) (setting forth the RICO Act, its penalties, and procedure); 18 U.S.C. § 1963 (a) (2007) (stating that person in violation of 18 U.S.C. § 1961 can be penalized with fines, imprisonment, and forfeiture of proceeds attained through the racketeering activity (including property, interest, or contractual right in any enterprise “which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962”)).

<sup>177</sup> See 18 U.S.C. §1962 (c) (2007).

<sup>178</sup> *Id.*

actions.<sup>179</sup> Suits under the RICO act would be a viable method of combating payola practices because courts “look more favorably upon RICO claims based upon . . . bribery, kickbacks, extortion . . . and clearly criminal schemes that are advanced by the use of mails and wires.”<sup>180</sup> Many radio station employees, record label executives, and indie promoters could be convicted under RICO since payola practices of bribery or indie kickbacks most commonly take the form of payments sent in UPS packages, filled with cash, drugs or other valuable consideration to radio station employees.<sup>181</sup>

A civil cause of action under RICO exists for any individual who was injured by an entity's criminal actions.<sup>182</sup> Many federal courts have held that a RICO cause of action “will not lie unless the plaintiff can establish that the subject damages are directly caused ‘by reason of’ the criminal activities that RICO was designed to address.”<sup>183</sup> Therefore, a suitable plaintiff to bring a civil RICO suit against label executives and radio stations would have to be someone who was directly affected by payola, such as

<sup>179</sup> Under RICO, a person or group who commits any two of 35 crimes within a 10-year period and has committed those crimes with a similar purpose can charged with racketeering, and be fined up to \$25,000 and/or sentenced to 20 years in prison. See 18 U.S.C. § 1963(a) (2007); see also Gerard E. Lynch, *RICO: The Crime of Being a Criminal, Parts I & II*, 87 COLUM. L. REV. 661, 682–83 (1987).

<sup>180</sup> Jeffrey E. Grell, RICO Act, available at <http://www.ricoact.com/ricoact/index.asp> (last visited Aug. 28, 2007) (asserting that a RICO cause of action can be based upon violations of the criminal mail and wire fraud statutes, which are very broad).

<sup>181</sup> In *United States v. Elliott*, the court held that Congress, under the mail fraud statute (18 U.S.C. §1341), has the authority to regulate misuse of the mails. 89 F.3d 1360, 1363–65 (8th Cir. 1996); see Jeffrey E. Grell, *RICO Act: RICO In a Nutshell*, <http://www.ricoact.com/ricoact/nutshell.asp> (last visited Oct. 30, 2007). In order for the federal courts to confer jurisdiction over a RICO case, a “nexus with interstate commerce” is necessary. *Id.* Because the U.S. Constitution confers the postal powers upon the federal government, acts of mail fraud, even intrastate use of the mails, have an inherent nexus with interstate commerce. *Id.* Thus, modern payola practices containing “third party” indie promotion are not immune to a possible RICO violation because many indies still engage in payola practices that use channels and instrumentalities of interstate commerce, such as the mail. *Id.*

<sup>182</sup> See 18 U.S.C. § 1964 (c) (2007) (“Any person injured in his business or property by reason of a violation of section 1962 of this chapter [18 U.S.C. § 1962] may sue therefore in any appropriate United States district court . . . .”); see also *Gilbert v. Prudential-Bache Sec.*, 769 F.2d 940, 941-42 (3d Cir. 1985) (“Violations of section 1962 are criminal offenses and ‘any person injured in his business or property by reason of a violation of section 1962’ has a civil [cause of] action . . . .” (citing 18 U.S.C. § 1964 (1970))).

<sup>183</sup> See *RICO In a Nutshell*, *supra* note 181 (explaining 18 U.S.C. § 1962 and 18 U.S.C. § 1964(c)); see also *Summit Props. v. Hoechst Celanese Corp.*, 214 F.3d 556, 559 (5th Cir. 2000) (“[T]he government can punish unsuccessful schemes to defraud because the underlying [criminal] mail fraud violation does not require reliance, but a civil plaintiff ‘faces an additional hurdle’ and must show an injury caused ‘by reason of’ the violation.” (citing *Pelletier v. Zweifel*, 921 F.2d 1465, 1498, 1498-99 (11th Cir. 1991))).

a recording artist. The costs of payola, which can be as much as hundreds of thousands of dollars, are ultimately passed onto the recording artists, and taken out of whatever the musicians earn from their recordings.<sup>184</sup> As Don Henley, popular and longtime recording artist frankly stated, “I know there’s payola because I get billed for it.”<sup>185</sup> However, since the whole radio and recording industry is firmly entrenched in payola practices, it may be difficult for a recording artist to bring a civil RICO suit.<sup>186</sup> If an established recording artist were bring a suit they may be blackballed in the industry.<sup>187</sup> A more viable alternative may be for an independent artist or a music watchdog organization to bring the civil suit against record labels and radio corporate conglomerates.<sup>188</sup> Nonetheless, a RICO cause of action might be

<sup>184</sup> See Slichter, *supra* note 109. Unknown artists “buy into the hype that independent promotion is the only way to launch a career,” and popular, established artists are essentially required to continue to pay for payola in order to ensure their songs remain on the radio. Katunich, *supra* note 2, at 665. As Dirk Lance of the rock band Incubus stated, “[Independent promotion [and payola practices are] 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.” *Id.* at 664.

<sup>185</sup> See *Media Ownership: Hearing Before the S. Comm. on Commerce, Science, and Transportation*, 108th Cong. 69, Jan. 30, 2003 (testimony of Donald Henley, a prominent recording artist).

<sup>186</sup> See Tanya Anderson, a disabled single mother, brought a civil RICO suit under Oregon state law against Atlantic Recording Company and the RIAA, after she was initially sued by Atlantic for an alleged copyright infringement. The claim against Ms. Anderson is based on an allegation that she or her eight year-old daughter had illegally downloaded music on her computer in the middle of the night. Ms. Anderson is suing Atlantic for two counts of racketeering, claiming that Atlantic is engaging in coercive and deceptive collection methods against her by mistakenly and fraudulently accusing her of copyright infringement, and then forcing her to pay thousands of dollars in settlements and penalties. If this suit is successful, it may pave the way for other civil RICO suits by artists, or other non-insiders of the music industry in an attempt to bring down payola. For a list of the court documents in this case, see Index of Litigation Documents referred to in *Recording Industry v. The People*, available at [http://info.riaalawsuits.us/documents.htm#Atlantic\\_v\\_Andersen](http://info.riaalawsuits.us/documents.htm#Atlantic_v_Andersen) (last accessed Aug. 29, 2007).

<sup>187</sup> A problem that may occur in a civil RICO suit is finding a suitable private plaintiff that would be willing to bring the suit. For the same reason that record labels are afraid to cross indies, artists or industry insiders do not want to be black listed in the music and radio industry. As one manager who represents several platinum selling acts stated, “[The labels] created the fucking problem, now you want us to put a target on our backs?” Boehlert, *supra* note 107.

<sup>188</sup> In addition to a civil or criminal RICO suits, the author has examined the possibility of a possible class action suit against the major record labels, or radio corporate conglomerates like Clear Channel. Although this is beyond the scope of this article, a potential lawsuit could be brought on behalf of the listening public by a music advocacy group or perhaps on behalf of the many artists currently affected by payola. A recent antitrust suit was filed against Clear Channel in response to the corporation’s threatening to withhold radio airplay to those who refused to play at Clear Channel sponsored concerts for free. See Carlye Adler, *Backstage Brawl, Fortune Small Business*, FORTUNE, Mar. 4, 2002 at 170[C]; Katunich, *supra* note 2, at 667–68. These are mere

the most intriguing solution to combat payola. The possibility of facing treble damages and 20 years in federal prison would make payola-like violations tremendously risky, as opposed to the sanctions record labels, indies and radio stations currently face.

### iii. Follow In Spitzer's Foot Steps

If the FCC and subsequently the Justice Department are unwilling to fight against payola, then each state attorney general should look to bringing their own investigations and lawsuits against the record labels like New York has done. Due to the resulting ownership consolidation following the passage of the Telecommunications Act of 1996, media conglomerates have their influence in practically every state. If the FCC is too busy or ill equipped to handle such an investigation then states should look to remedy the problem themselves. The ramifications of Spitzer's investigations have proven to have "reverberated widely" beyond New York's borders, and it is more than likely that payola is occurring all over the country outside of New York.<sup>189</sup> If state attorney generals were willing to spend the time necessary to adequately investigate payola practices, unlike the FCC, it may result in some actual self-governance by record labels, and quite possibly the downfall of payola.<sup>190</sup> If each state levied their own fines against the payola players, the aggregate effect could prove to be a serious financial deterrent; \$12.5 million in fines is not much cause for concern for the giant media

suggestions of possible ways to combat payola and the author believes that, in the future, other scholars can build upon these alternatives to stamp out payola once and for all.

<sup>189</sup> See, e.g., Jeff Leeds, *Payola or No, Edge Still To the Big*, N.Y. TIMES, Jul. 28, 2005, at E1 ("The program director of WRHT in Greenville, N.C., who was cited by Mr. Spitzer as having improperly received a \$1,365 laptop computer, \$912 in airfare and Playstation 2 equipment from a Sony BMG label, was fired at the end of his shift Tuesday, said Gordon Herzog, chief financial officer for WRHT's parent, Archway Broadcasting."); Nowlin, *supra* note 5 (discussing how Sony BMG had given a flat-screen TV to a Clear Channel program director in San Diego, California).

<sup>190</sup> Eliot Spitzer did not employ a magical formula in his investigation. He was successful in punishing the payola players in New York because he actually spent time and money investigating the labels. Warner Music Group spokesman Will Tanous stated, in response to New York's payola investigation, "We consider this to have been a valuable process. From our perspective, radio cannot be too [financially]-driven . . . [t]he music that people hear on the radio always should represent the highest quality the industry has to offer." Gormley, *supra* note 131. The results of Spitzer's investigate indicate that record labels, if faced with an adequate deterrent, might actually begin to change their payola ways. *Id.* For example, Universal Music Group, one of the parties involved in the Spitzer investigation, agreed to make reforms as a result of the investigation. See Charles H. Kennedy, *United States: Communications Law Bulletin*, Jun. 15, 2006, available at <http://www.mondaq.com/article.asp?articleid=40522>.

conglomerates like Clear Channel that gross over \$7.9 billion, but multiply that \$12.5 million fine by 50 states and those corporate shareholders might start to notice.<sup>191</sup>

#### CONCLUSION

Payola has been one of the largest tools to keep voices off the air. Although it has been around since the turn of the century, “payola is no longer just the little guy getting a few bucks for a few spins on the radio.”<sup>192</sup> In light of the FCC’s increased deregulation in the last ten years, the new payola “is corporately overseen and driven—a multi-million dollar business.”<sup>193</sup> Payola has corrupted music and resulted in airplay of the same repetitive songs over and over again, not because they are popular, but because they are backed by the most money. The recent half-hearted settlement by the FCC has raised awareness to the evils of payola, yet it has also led many to question whether the FCC is the proper authority to finally destroy payola once and for all. Alternative methods such as Congressional re-examining and modernizing the anti-payola laws, criminal or civil RICO actions, or individual state investigations similar to New York’s, are likely the best courses of action to eliminating payola. No matter the method employed to put a permanent end to payola, what we know for certain is that the payola beast must be defeated before listeners tune out of radio, forever.

<sup>191</sup> See Adler, *supra* note 188, at 170 (comparing the revenues of Clear Channel and Nobody in Particular Presents).

<sup>192</sup> See Industry Ears Press Release, *supra* note 10.

<sup>193</sup> *Id.*