

The Long Road to Desuetude for Payola Laws: Recognizing the Inevitable Commodification of Tastemaking

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I. INTRODUCTION

For a recording company and its respective artists, getting a song on commercial radio is equivalent to making it in the industry. Since most consumers select their music purchases based on what they hear on popular radio, "[it] is the most powerful promotional tool to sell albums."¹ Record companies

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1. Douglas Abell, *Pay-For-Play: An Old Tactic in a New Environment*, 2 VAND. J. ENT. L. & PRAC. 52, 53 (2000).

therefore, have a strong incentive to do whatever they can to facilitate the broadcasting of their artists' songs.² Although many people believe that what they hear on the radio are the program directors' and disc jockeys' ("DJ") personal song choices, in reality, it is the recording industry that controls the majority of what gets played. This "pay-for-play" system, known as payola,³ has been common practice in the music industry for nearly a century.⁴ In fact, the practice has become so commonplace in the business that most people may even "forget" that it is illegal.⁵ Though prohibited by federal statute, payola, ("the practice of making undisclosed payments or other inducements to radio broadcast personnel in consideration for the inclusion of material in radio programming")⁶ continues to reemerge in new forms despite numerous investigations and attempts to curtail it.

Section 317 of the Communications Act of 1934, as amended in 1960, requires that broadcasters disclose to their listeners, at the time of broadcast, whether any of the songs they air have been paid for by money, services, or other consideration.⁷ The key factor is the "presence of an exchange for any consideration....[I]f a station solicits consideration of any type or a party pays consideration of any nature to broadcast certain material, the Federal Communications Commission ("FCC") will likely find a payment for broadcast and require a disclosure."⁸ Section 508 broadens the requirement by designating that "any employee of a radio station,"—not just a program director or executive—"who accepts or agrees to accept" any money or other consideration

2. *See id.*

3. The term "payola" originally came from an article in *Variety* magazine in 1938 in reference to "the music industry practice of paying money to people in exchange for promoting a particular piece of music." *Id.* at 53.

4. 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, 645 (2002).

5. *See 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, 411 (2002).

6. J. Gregory Sidak & David E. Kronemyer, *The 'New Payola' and the American Record Industry: Transactions Costs and Precautionary Ignorance in Contracts for Illicit Services*, 10 HARV. J.L. & PUB. POL'Y 521, 521 (1987).

7. "All matter broadcast by any radio station for which any money, service or other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station. . . from any person, shall at the time the same is so broadcast, be announced as paid for or furnished...by such person." 47 U.S.C. § 317(a)(1) (2005).

8. Abell, *supra* note 1, at 59.

in exchange for the inclusion of a song or program matter in a broadcast, must disclose this fact before the material is aired.⁹ The party “providing or promising to provide the money, services, or other consideration” is required to make the same disclosure.¹⁰ Additionally, under § 317, radio station licensees are required to “exercise reasonable diligence” to find out from their employees any information necessary to allow them to make the appropriate announcements and comply with the statute.¹¹

In conjunction with the federal statute, the FCC imposes rules and regulations to enforce the provisions. The corresponding section of the Code of Federal Regulations explains that in addition to declaring that the broadcast matter was “sponsored, paid for or furnished,” the station must “fully and fairly disclose the true identity” of the person, corporation, or association who or on whose behalf the payment was made.¹²

If disclosed, pay-for-play remains legal under the statutory scheme; so long as the station announces to its listeners at the time of the broadcast that the song or programming has been paid for, the approach is permissible.¹³ However, disclosures by radio stations are rarely made, as stations are generally “unwilling to distract the listener by peppering their programming with ‘paid for by’ announcements.”¹⁴ Instead, radio and record industry executives attempt to exploit loopholes¹⁵ in the statutes and circumvent the laws by engaging in practices that narrowly escape illegality, claiming that their practices fall within the permissible definition of pay-for-play.

Payola has negative consequences when music on commercial radio is determined by whoever is willing to pay the most. This practice reduces the role of artistic merit, research, and sales, and unduly commodifies artistic

9. 47 U.S.C. § 508(a) (2005).

10. Payola and Sponsorship Identification, Federal Communications Commissions Home Page, (Oct. 13, 2005) <http://www.fcc.gov/eb/broadcast/sponsid.html>.

11. See 47 U.S.C. § 317(c) (2005).

12. See Sponsorship identification; list retention; related requirements, 47 C.F.R. § 73.1212(e) (2005).

13. Under 47 U.S.C. § 317 and 47 U.S.C. § 508 the exchange of consideration in exchange for broadcast is permissible so long as there is adequate announcement and disclosure of such consideration.

14. Katunich, *supra* note 4, at 648.

15. See *id.* at 644.

expression. There is less room for "creative freedom" on the airwaves, as "the role of the DJ [is] reduced to a mere robot."¹⁶ Some argue that payola has basically changed the music on the radio "from an artistic expression to an infomercial."¹⁷ As a result, unsuspecting listeners may not realize they are listening to an infomercial due to the lack of required disclosure and a failure to comply with the federal payola statutes.¹⁸ Additionally, because payola has become the standard, radio station conglomerates have begun to realize that they can demand perks from record labels.¹⁹ Banking on the fact that some record labels are engaging in the practice and are willing to pay, radio stations may take the liberty to begin to extort money from record labels.²⁰ As a result, small record companies who cannot exert influence in order to reap the benefits of payola may be put out of business because they lack the means to participate in illegal pay-for-play.

Despite these negative consequences, payola is not a good target for law enforcement for a number of reasons. Payola, which has become a steady component of the music industry, may, in actuality, be of questionable harm. Pay-for-play practices that are analogous to payola are a common aspect of other realms of the entertainment industry, making it troublesome that there is such a strong aversion to the practice in the music business. Additionally, with the constant introduction of new media, such as satellite radio, internet radio, MP3 players and more, commercial radio is losing its significance in the industry. Given its historic power, payola investigations and prosecutions are almost frivolous. Therefore, law enforcers should rarely prosecute against payola in commercial radio broadcasting in light of: (a) the advent of new media which reduce the importance of traditional commercial radio, (b) the legality of undisclosed product placement in other areas of the entertainment industry, and (c) the questionable harm involved.

Part II of this comment will review the historical background of payola, outlining the many investigations which have been brought against violators of the payola laws

16. Greene, *supra* note 5, at 414-415.

17. Abell, *supra* note 1, at 55.

18. See 47 U.S.C. § 317; see 47 U.S.C. § 508.

19. Abell, *supra* note 1, at 66.

20. *Id.* at 55-56.

over the past sixty years, and emphasizing the practice's reemergence throughout this time period. Part III discusses the newest forms of payola that have emerged in the record industry today, focusing on the corrupt promotional practices which the industry employs to attempt to circumvent the federal statutes. Part IV delves into New York Attorney General (and now, New York's Governor-Elect) Eliot Spitzer's investigation into the music industry and the payola practices that are prevalent there. It also discusses the recent settlements Spitzer has reached with Sony BMG Music Entertainment and Warner Music Corp., and their impact on payola in the industry. Finally, Part V proposes that law enforcers should conserve tax dollars, time, and energy by only investigating and prosecuting payola in limited circumstances, especially given the legality of similar pay-for-play practices in other entertainment realms, the introduction of new media and technology that are lessening the importance of commercial radio, and the doubtful harm of the practice.

II. HISTORICAL BACKGROUND OF THE ISSUE OF PAYOLA

Payola has been a near constant aspect of the recording industry for over sixty years.²¹ Despite the numerous attempts to curb payola—via the strengthening of the federal payola statutes²² and repeated investigations into the practice—it has reemerged in new forms throughout history. This is indicative of its perseverance and the unlikelihood that it will be disappearing anytime soon. Because of the existing competition between record companies to get their respective artists' music played on commercial radio, which is currently a label's best marketing effort,²³ payola has been a part of the business since the music industry's inception.²⁴ The practice gained enormous popularity and notoriety in the 1950s, which was the golden age of radio featuring the DJ as a "powerful gatekeeper who determined what music the

21. See Katunich, *supra* note 4, at 644-645.

22. See 47 U.S.C. § 317; see 47 U.S.C. § 508.

23. See Abell, *supra* note 1, at 53.

24. See Assurance of Discontinuance Pursuant to Executive Law § 63(15), *In re the Matter of Sony BMG Music Entertainment*, 3, ¶ 5 [hereinafter, "Sony Assurance of Discontinuance"] (2005).

public heard.”²⁵ Before long, certain individuals in the recording industry began exploiting this fact by bribing DJ’s to play their music.²⁶ “Booze, broads, and bribes came to signify the situation,”²⁷ and the practice eventually grew into a scandal that resulted in a Congressional and FCC investigation into the activity in 1959.²⁸

As a result of this initial payola investigation, new federal payola laws were enacted in 1960 as amendments to the Communications Act of 1934.²⁹ Though the payola laws were incorporated in 1927,³⁰ the provision was sparingly enforced and contained numerous loopholes.³¹ In order to resolve many of the statute’s deficiencies, changes were made to the existing payola provisions so that violations now include payments to parties other than the radio station heads themselves, such as DJs or any employees of the station. The result was an expansion of the existing statutory section on payola³² and the addition of a new section³³ which addresses the specific disclosure of payments to individuals connected with broadcasts.

Despite the reforms to the federal payola laws, the illegal practice reemerged in the late 1960s and 1970s. In accordance with the free-wheeling times, payola in this era came in the form of “illicit payments involving increasingly large sums of money, drugs, and prostitutes.”³⁴ In 1973, a new payola investigation began when a federal grand jury in Newark, New Jersey, while conducting a drug investigation against a mob figure, discovered connections to the director of artist relations at Columbia Records.³⁵ As a result, Senator James Buckley of New York announced an investigation into this latest payola scandal which was to include Columbia Records as well as other record companies and radio

25. Abell, *supra* note 1, at 53.

26. *See id.*

27. *Id.* at 55.

28. *See* Katunich, *supra* note 4, at 646-647.

29. *See* Communications Act Amendments, Pub. L. No. 86-752 (1960).

30. *See* Telecommunications Act of 1934, 47 U.S.C. § 151.

31. *See* Katunich, *supra* note 4, at 644.

32. § 317 now requires radio stations to “exercise reasonable diligence” to uncover any information or details about consideration being exchanged for airtime so that proper disclosure can be made. *See* 47 U.S.C. § 317.

33. *See* 47 U.S.C. § 508(a).

34. Abell, *supra* note 1, at 55.

35. Sidak, *supra* note 6, at 547.

stations.³⁶ The Recording Industry Association of America (“RIAA”)³⁷ provided full cooperation and announced “a comprehensive action program designed to help insure that business practices within the industry are based on sound legal and moral principles.”³⁸ This program specifically created “standards of conduct, calling for any record company employee who maintains contact with radio stations” to sign “no-payola” affidavits.³⁹ Though twenty-one people were ultimately indicted by the Newark grand jury,⁴⁰ the FCC inquiry “was converted into a non-public proceeding” and it ended up fading from public consciousness.⁴¹

Sparked by the increased use of independent promoters, in the early 1980s, payola returned in a new form.⁴² The record companies hired middlemen to engage in payola for them in an effort to shield themselves from risk. Specifically, the record labels employed independent promoters or “indies”; the promoters then passed along some of the money they received from the label to radio station programming directors to persuade them to play that label’s artists.⁴³ Usually, the indie attempted to persuade the station personnel to add a particular record to its playlist, or to play it more frequently or during peak hours. The argument indies employed was that adding such records would lead to that station receiving a higher “Arbitron market-share rating,”⁴⁴ and an increased

36. *See id.*

37. The RIAA is a trade group—with record companies as members—that represents the United States recording industry by working to protect intellectual property rights and the First Amendment rights of artists. *See About Us*, Recording Industry Association of America, <http://www.riaa.com/about/default.asp> (last modified 2003).

38. Sidak, *supra* note 6, at 547.

39. *Id.* at 547-548.

40. *See U.S. v. Crocker*, 586 F.2d 1049, 1051 (3d Cir. 1977) (Defendant, program director and DJ at New York’s WBLS-FM was subpoenaed and interrogated on whether he had “ever received cash or merchandise from a record company or its representatives to influence his decisions on what records would be played.”)

41. Sidak, *supra* note 6, at 548.

42. Independent promoters basically act as “high-priced toll collectors,” and act as middlemen allowing the record companies to be “one-step removed” from the radio stations and “thus, payment no longer falls within the technical definition of payola.” *See Gregory M. Prindle, No Competition: How Radio Consolidation Has Diminished Diversity and Sacrificed Localism*, 14 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 279, 308 (2003).

43. *See Lorne Manley & Jeff Leeds, Ideas & Trends: Spin Control; How Payola Went Corporate*, N.Y. TIMES, July 31, 2005, at D1.

44. The Arbitron Ratings Company “periodically estimates audience shares for

demand for advertising on the station.⁴⁵

In late 1983 and early 1984, the Los Angeles Times printed a number of pieces publicizing the increased use and cost of independent promoters in the record industry and their use of "paper adds."⁴⁶ In response to the Times' stories, in September 1984, the Subcommittee on Oversight and Investigation of the House Committee on Energy and Commerce ("Subcommittee") began an inquiry into the practice of independent promotion.⁴⁷ The Subcommittee concluded that though "paper adds made the broadcast industry susceptible to improper relationships between promoters and radio stations," there was no violation of § 508 which "prohibits only the undisclosed acceptance of valuable consideration for the *actual* broadcast of programming material."⁴⁸ Despite the investigation, indies continued to supply radio station programmers with "cocaine, prostitutes, and hundreds of thousands of dollars,"⁴⁹ in exchange for the airplay of such artists as Bruce Springsteen, Prince, and more. By 1985, the record industry was reportedly spending between \$60 and \$100 million on independent promotion.⁵⁰

In 1986, an "NBC Nightly News New York" report entitled "The New Payola," made payola allegations against certain rock music radio stations and identified particular independent promoters as the perpetrators.⁵¹ As a consequence, a federal grand jury in New York subpoenaed the RIAA to produce any documents or materials in reference to independent promotion. Subsequently, all of the major and independent record companies either suspended or reduced

radio stations within a given geographic market." See Sidak, *supra* note 6, at 527. As a station's Arbitron rating rises, advertising rates for that station rise as well.

45. See *id.* at 529.

46. "Paper adds" act as a deception of the record company by the independent promoter who makes a "report to a trade publication by a radio station that a particular song has been added to the station's playlist when in fact it has not." *Id.* at 543.

47. See *id.* at 552.

48. Sidak, *supra* note 6, at 552-53 (emphasis added). This contention was overruled in 1991 in *United States v. Goodman*, 945 F.2d 125 (6th Cir. 1991). There, the court disagreed with the defendant who argued that since all he cared about was the "paper adds," and there had been no actual broadcast of his records, § 508 should not be implicated. *Id.* at 129. The court held that under the plain language of the statute, "the government need only prove that defendant paid money for the purpose of having his records broadcast, whether or not they actually were broadcast." *Id.*

49. Abell, *supra* note 1, at 53.

50. See Sidak, *supra* note 6, at 553.

51. See *id.* at 557.

their use of independent promoters.⁵² Though three more grand juries commenced investigations, the "new payola" scandal did not lead the FCC to conduct its own investigation, and by 1987 these investigations faded as well, with there allegedly being "no evidence of wrongdoing."⁵³

Clearly, despite the repeated investigations and prosecutions, payola has managed to survive for the past sixty years. It has reemerged in new shapes and forms, but despite the efforts of law enforcement, it has not been quelled. In essence, though payola is often legislated against, such legislation is rarely enforced.

III. PAYOLA'S LATEST EMERGENCE

Not surprisingly, payola has once again cropped up in the context of commercial radio. In fact, in all likelihood it has been a constant mechanism since the last investigation of the late 1980s. However, just as it has done in the past, payola has reinvented itself once again, "gone are the days when simple promises of 'cocaine and prostitutes' could entice radio station programmers to play a particular piece of music. Today [payola] thrives in a \$12 billion a year business where big money talks and everyone seems willing to listen."⁵⁴

The issue with today's payola, however, is that it is unclear if it is actually illegal payola at all. There are a number of tactics employed by the record labels and recording companies which on their face appear to be legal, but are subtle rejuvenations of traditional payola. Though those participating in these practices argue that they are legally circumventing the federal laws, the question again focuses on the exchange of consideration—in any form—for the broadcasting of programming without disclosure. Examples of these practices range from record labels providing radio stations with free copies of their artists' albums,⁵⁵ to free trips for program directors and other radio station personnel to resort destinations to view artists' performances.⁵⁶ An

52. See *id.* at 558.

53. *Id.* at 559-560.

54. Katunich, *supra* note 4, at 643-644.

55. Though in excess this practice would be an example of payola, "no announcement is required unless the supplier furnished more copies of a particular recording that are needed for broadcast purposes." H.R. REP. NO. 86-100 (1960)

56. In essence, the purpose of these trips is to "convince executives to play the

additional way for money to exchange hands “quietly” is to pay broadcasters through indirect means, such as American Express gift checks or other gift certificates that are difficult to trace.⁵⁷ For example, one major label admitted that it had sent more than \$1,000 in Best Buy gift certificates in one day to an Infinity station in Rochester, New York.⁵⁸

Another common practice is a record company arranging for its band or artist to perform live on the radio or appear at a radio station’s concert for either a reduced rate or for free. The record company does this “with the clear understanding that each such performance will take place only if the station gives the artist’s recorded work airplay.”⁵⁹

In 1998, a member of Limp Bizkit’s⁶⁰ managing company described this version of “reverse payola”—as the radio station is often now the party in control—where bands “find themselves forced to play concerts sponsored by radio stations for little or no money” to get themselves an add to a radio station’s playlist, or even to prevent themselves from being dropped from that playlist.⁶¹ Again, this is clearly an exchange of consideration for airtime, implicating the payola laws.⁶²

Finally, record companies make “mega marketing deals” with radio stations that involve the payment of large sums of money in exchange for what appears to be “advertising time.” Record companies basically purchase blocks of advertising time during which their music is played—sometimes sounding like advertisements for an artist, but often simply sounding like the broadcast of the song.⁶³ By doing this, the station is receiving a form of airplay as well as adding to their number

label’s records,”—they are not ordinary business practices that can be exempt from being payola violations. See Abell, *supra* note 1, at 63.

57. See Jeff Leeds, *Infinity Said to Fire Radio Programmer Over Gifts*, NY TIMES, Nov. 20, 2004, at C1.

58. See *id.*

59. Sony Assurance of Discontinuance, *supra* note 24, at 7, ¶ 18.

60. Limp Bizkit is a hip-hop influenced rock band who was approached by a Portland, Oregon radio station for such a deal. See Neil Strauss, *Pay-for-Play Back on the Air But This Rendition Is Legal*, N.Y. TIMES, Mar. 31, 1998, at A1.

61. See *id.*

62. See Abell, *supra* note 1, at 63 (“If a broadcaster is getting something valuable, like an artist performing at the station’s concert, in exchange for playing the artists song and they don’t identify the sponsor of the record, then they are in violation of the law.”)

63. See Sony Assurance of Discontinuance, *supra* note 24 at 23, ¶ 59.

of “spins,” which improves the songs’ position on the charts.⁶⁴ This enables the record labels to cite the charts and “present the public with a skewed picture of the country’s ‘best’ and ‘most popular’ recorded music.”⁶⁵ In addition to increasing the spins, oftentimes those labels that make major advertising deals with the stations will do so with the expectation that they will be added to the station’s playlist. One anonymous record executive commented on this tactic saying: “A radio station will hint, ‘Hey take out ads on the record and we’ll see if we can get your band added.’ It happens all the time. So you run 15 or 18 spots and suddenly you’re added.”⁶⁶ Although any consideration exchanged for airtime constitutes a violation of the federal payola statutes, such practices, when backed by record companies’ and radio stations’ arguments of legality, will continue to abound.

In addition to these concealed attempts to provide compensation legally, the independent promoters of the 1980’s payola scandals are coming back. The independent promoters have again become powerful entities who many artists fear they have to provide fees, or their records will not be played in the future.⁶⁷ It has become almost common knowledge in the industry that radio stations deal solely with indies—not the record labels or musical artists; “if you want to pitch a song, you have to go through the independent promoter.”⁶⁸ Today, rather than making individual deals, indies typically pay an annual fee to a radio station—usually \$100,000 or more— “not for airplay, they say, but for advanced copies of their playlists,” and in return, they charge the record labels for every song that ends up added to that playlist.⁶⁹ In reality, “as those in the business know,” the annual fees are paid “to get [indies’] client’s songs on the air,” while receiving payments from those clients for their “efforts.”⁷⁰ Eliot Spitzer commented on this practice of

64. Charting companies track the number of times a song is played on the air—track its “spins”—and use these numbers to compile charts to indicate the popularity of a song. See *id.* at 6, ¶ 15.

65. *Id.* at 7, ¶ 22.

66. Strauss, *supra* note 60, at A1.

67. See Ralph Blumenthal, *Charges of Payola over Radio Music*, N.Y. TIMES, May 25, 2002, at B7.

68. *Id.*

69. Leeds, *supra* note 57, at C1.

70. Jacob Slichter, *The Price of Fame*, N.Y. TIMES, July 29, 2005, at A23.

independent promoters paying annual fees “not tied to airplay of specific songs,” arguing that it is used to “perpetuate the fiction that stations are not receiving money or promotional items in exchange for airplay.”⁷¹ This process, like the underhanded promotional tactics employed, is yet another way to “sidestep the law,” while costing record labels “tens of millions of dollars each year.”⁷²

IV. NEW YORK ATTORNEY GENERAL ELIOT SPITZER'S INVESTIGATION OF THE MUSIC INDUSTRY

As a result of this recent wave of payola, after receiving numerous tips from industry insiders, in 2004, New York Attorney General (now Governor-Elect) Eliot Spitzer began an investigation into how the music industry influences which songs reach the airwaves, and whether the tactics employed violate the federal payola statutes.⁷³ In addition to the federal violations, payola practices are illegal under New York laws which prohibit the paying of bribes to radio station employees.⁷⁴ Major record companies were subpoenaed for their contracts with independent promoters and other related information, and record executives were questioned regarding the same. Though the investigation began to focus on Sony BMG Music Entertainment,⁷⁵ the home to artists such as Britney Spears and Jennifer Lopez, other record companies such as EMI, Universal, and Warner Music were also part of Spitzer's investigative probe.⁷⁶ Spitzer soon discovered that Sony BMG and its many record labels⁷⁷ were engaging in

71. Jeff Leeds, *Payola or No, Edge Still To the Big*, N.Y. TIMES, July 28, 2005, at E1.

72. Leeds, *supra* note 57, at C1.

73. See Press Release, Sony Settles Payola Investigation (July 25, 2005) (on file with www.oag.state.ny.us/press/2005/jul/jul25a_05.html).

74. New York Penal Law § 180.00 makes it a misdemeanor for “anyone to confer (or offer to confer) a benefit upon another party with the intent to influence the recipient's conduct regarding the business affairs of the recipient's employer, without the employer's consent.” See Sony Assurance of Discontinuance, *supra* note 24, at 4, ¶ 11.

75. Sony BMG Music Entertainment is a “partnership of the Japanese electronics maker Sony and the German media conglomerate, Bertelsmann.” Leeds, *supra* note 71, at E1. Sony is the second largest record company in the world. Sony Assurance of Discontinuance, *supra* note 24, at 2, ¶ 2.

76. See Paul Williams, *Franz Ferdinand Cited in U.S. Payola Probe*, MUSIC WEEK, Aug. 6, 2005, at 4.

77. Sony is the owner of numerous labels including Epic Records, Columbia Records, SONY Urban, SONY Nashville, Zomba, and RCA. See Assurance of

payola and “offering inducements to radio stations and their employees” in exchange for airtime of Sony artists.⁷⁸ These inducements came in many forms, such as pure bribery with cash, financial incentives such as purchasing equipment and free concerts, vacation packages, and the use of independent promoters.⁷⁹ These incentives were given in exchange for both airplay of specific songs, as well as to simply “buy the good will” of radio employees who will then play Sony BMG artists on a regular basis.⁸⁰

E-mails uncovered in Spitzer’s investigation illustrated these practices. For example, one correspondence showed that Epic Records’ promotional department paid more than \$4000 for a trip to Miami for a Buffalo radio station’s program director and three of his friends in exchange for adding Franz Ferdinand’s song, “Take Me Out” to the station’s playlist.⁸¹ Similar situations including free trips to that same program director were given in exchange for playing songs by Jennifer Lopez and Good Charlotte.⁸² Another example was an e-mail wherein an Epic employee contacted a Clear Channel employee offering to do anything possible to get a new rock group, Audioslave, played on the station.⁸³

On July 25, 2005, Spitzer announced he had reached a settlement with Sony.⁸⁴ Admitting that some of its employees “pursued improper promotion practices,” but not conceding or denying Spitzer’s allegations, Sony agreed to enter into an Assurance of Discontinuance with the Attorney General to

Discontinuance, *supra* note 24, at 8, ¶ 23.

78. See Press Release, Sony Settles Payola Investigation.

79. The settlement outlines Sony BMG’s payola practices as follows:

(a) on occasion, bribing radio station employees to play its songs; (b) providing a stream of financial benefits to radio stations, including purchasing equipment, paying off invoices and providing free concerts, all on condition that its records receive airplay; (c) providing vacation packages, electronics, gift cards and other valuable items to radio stations for contest giveaways in exchange for airplay; and (d) using independent promoters as conduits for illegal payments to radio stations to obtain airplay. Assurance of Discontinuance, *supra* note 24, at 2, ¶ 4.

80. *Id.* at 8-9, ¶ 27.

81. See Williams, *supra* note 76, at 4.

82. See *id.*

83. The e-mail exclaimed: “WHAT DO I HAVE TO DO TO GET AUDIOSLAVE ON WKSS THIS WEEK?!!? Whatever you can dream up, I can make it happen!!!” Assurance of Discontinuance, *supra* note 24, at 14, ¶ 40.

84. See Press Release, Sony Settles Payola Investigation.

“conclude any action” commenced against it.⁸⁵ Under the settlement’s terms, Sony has agreed to stop its payola practices—“making payments and providing expensive gifts to radio stations and their employees.”⁸⁶ In accordance with this settlement, Sony has agreed to contribute \$10 million to a New York charity,⁸⁷ pay \$100,000 to cover the costs of the investigation, implement certain “business reforms,”⁸⁸ and make a statement acknowledging its wrongdoing.⁸⁹ Spitzer announced that this is the first instance of an entertainment company agreeing to such extensive reforms.⁹⁰

Within twenty-four hours of the Sony settlement, the FCC Commissioner requested Spitzer to hand over his evidence so he could evaluate it for possible federal violations.⁹¹ The evidence in reference to Sony alone indicates that there may have been federal violations at fifty to sixty radio stations nationwide.⁹² Accordingly, the Commissioner is urging the FCC to conduct its own payola investigation which could lead to fines, prison time, and license forfeiture. The

85. See Assurance of Discontinuance, *supra* note 24, at 26.

86. Press Release, Sony Settles Payola Investigation.

87. Sony is to donate \$10 million to the Rockefeller Philanthropy Advisors who will distribute the funds to New York State’s non-profit corporations to fund music education and appreciation programs. See Assurance of Discontinuance, *supra* note 24, at 27, ¶2.

88. Sony basically must agree not to provide any consideration to any radio personnel unless properly disclosed or for advertising purposes which are properly disclosed. Certain “nominal consideration” may be provided—for example, twenty copies of a CD it is promoting, twenty concert tickets per year, and modest personal gifts, meals, and entertainment. Independent promotion practices are to be monitored, and though indies may be employed, Sony may not “provide any item of value” to them to be passed along to radio employees. Finally, Sony must set up a database to maintain all expenditures it makes in connection with radio and hire a compliance officer to assure that these reforms are kept in place. Assurance of Discontinuance, *supra* note 24, at Exhibit B.

89. Statement of Sony BMG Music Entertainment:

Despite federal and state laws prohibiting unacknowledged payment by record labels to radio stations for airing of music, such direct and indirect forms of what has been described generally as ‘payola’ for spins has continued to be an unfortunately prevalent aspect of radio promotion. Sony BMG acknowledges that various employees pursued some radio promotion practices on behalf of the company that were wrong and improper, and apologizes for such conduct. Sony BMG looks forward to defining a new, higher standard in radio promotion. Assurance of Discontinuance, *supra* note 24, at Exhibit A.

90. See Press Release, Sony Settles Payola Investigation.

91. See *Biz Left to Sing the Blues: Majors Mull Who’s Next After Top N.Y. Cop Puts Hit on Radio*, VARIETY, Aug. 1, 2005, at 17 [hereinafter *Biz Left to Sing the Blues*].

92. See *id.*

Commissioner issued a statement commenting on the scandal, expressing his thoughts that this might “represent the most widespread and flagrant violation of any FCC rules in the history of American broadcasting.”⁹³ In support of an FCC investigation, the Commissioner suggested that the FCC “owe[s] it to the American public, music lovers and creative artists...to end this deception.”⁹⁴ The FCC Chairman backed up the Commissioner’s statement with a release of his own wherein he made it clear that the “Commission will not tolerate non-compliance,” and that though payola may be a widespread practice, rooted in history, “to the extent it is going on, it must stop.”⁹⁵ As a result, the Enforcement Bureau of the FCC⁹⁶ is currently reviewing the Sony settlement and investigating any incidents that evidence violations of federal payola laws.⁹⁷

After the Sony settlement, Spitzer’s investigation turned its focus to Warner Music Group Corp.,⁹⁸ and on November 22, 2005, Spitzer announced his second victory in the form of a settlement.⁹⁹ Warner entered into an Assurance of Discontinuance with Spitzer, wherein, like the Sony settlement, Warner “without admitting or denying” Spitzer’s allegations, acknowledged that some of its employees pursued “improper promotion practices.”¹⁰⁰ Spitzer’s team uncovered “illegal payoffs” in the form of bribes to radio programmers with cash, airfare, electronics, and tickets to sporting events and concerts; contest giveaways to stations’ audiences including iPods, concert tickets, and gift certificates; and the

93. Press Release, FCC Comm’r Jonathan Adelstein, FCC Commissioner Adelstein Comments on Payola Scandal (Aug. 8, 2005) (on file with U.S. Federal News).

94. *Id.*

95. See Press Release, FCC Chairman Kevin J. Martin, FCC Chairman Martin Comments on Payola Scandal (Aug. 8, 2005) (on file with U.S. Federal News).

96. The FCC Enforcement Bureau will be handling the FCC payola investigation; it is the same department which handles penalties for indecency.

97. See Press Release, FCC Chairman Kevin J. Martin, FCC Chairman Martin Comments on Payola Scandal.

98. Warner Music Group Corp. is the third largest record company in the United States and is the owner and operator of various labels such as Warner Music Bros. Records, Reprise Records, Lava Records, and Atlantic Records. See Assurance of Discontinuance Pursuant to Executive Law § 63(15), In the Matter of Warner Music Group Corp., 7, ¶ 19 (hereinafter “Warner Assurance of Discontinuance”). Warner Music is the home to such artists as Green Day, My Chemical Romance, and R.E.M.

99. See Press Release, Warner Second to Settle in Payola Investigation (Nov. 22, 2005) (on file with http://www.oag.state.ny.us/press/2005/nov/nov22a_05.html).

100. See Warner Assurance of Discontinuance, *supra* note 98, at 19.

use of independent promoters "to act as conduits" for direct payments to radio stations.¹⁰¹

Pursuant to their agreement with the Attorney General, Warner agreed to pay \$5 million to the same New York charity Sony paid its \$10 million to in August,¹⁰² as well as \$50,000 in costs to Spitzer.¹⁰³ Warner was also required to make the exact statement Sony released, acknowledging and apologizing for their wrongdoing to the public and assuring future change.¹⁰⁴ Under the terms of the settlement, Warner is barred from direct payola in the form of giving cash money to radio stations, and is also required to produce written assurances from radio executives, that deals involving other types of promotions or giveaways, such as travel arrangements or artist appearances, are not payola.¹⁰⁵ Independent promoters are also banned from providing any items of value to radio station employees.¹⁰⁶

Thus far, commentators have been split on their views of the value of Spitzer's investigation. Some find the settlements encouraging: rather than "offering Florida vacations, designer sneakers and tickets to New York Yankees games to program directors, [Sony]...will have to fork over \$10 million to charity."¹⁰⁷ Spitzer himself applauded Warner for being the second "major player" in the industry to come forward and acknowledge payola practices as wrong, and to adopt new legal business practices.¹⁰⁸ Additionally, as a result of the investigation, a number of record companies reviewed and strengthened their "promotion policies," and certain radio stations have terminated the employment of

101. Press Release, Warner Second to Settle in Payola Investigation.

102. Warner agreed to deliver \$5 million to the Rockefeller Philanthropy Advisors, who will then distribute this money to numerous New York non-profit corporations "to inure to the benefit of the residents of the State of New York by funding programs aimed at music education and appreciation." See Warner Assurance of Discontinuance, *supra* note 98, at 20, ¶2. Sources close to Warner Music indicate that the company's "willingness to cooperate" with the Attorney General led to the size of the settlement being only half of what Sony paid. See Brian Garrity, *WGM Latest Label to Pay Up for Payola*, BILLBOARD, Dec. 3, 2005, at 2.

103. See Warner Assurance of Discontinuance, *supra* note 98, at 20, ¶ 3.

104. See Warner Assurance of Discontinuance, *supra* note 98, at Exhibit A; see text accompanying *supra* note 89 (mirrors the statement of Warner Music).

105. See Garrity, *supra* note 102, at 2.

106. See *id.*

107. See Anthony Violanti, *Radio Airplay: Is it All About the Money?*, BUFFALO NEWS, Aug. 3, 2005, at C1.

108. See Press Release, Warner Second to Settle in Payola Investigation.

those parties engaging in illegal practices. For example, the music director at a North Carolina station who was cited in Spitzer's investigation for improperly accepting a laptop computer, Playstation 2 equipment, and \$940 in airfare from a Sony BMG label was fired.¹⁰⁹ Despite these advances, the investigation proves that payola, which was supposedly banned by the 1960 amendments to the Communications Act, is still thriving in the business. In fact, following the Sony settlement, Warner itself had claimed to have instituted policies prohibiting illegal payola practices.¹¹⁰ As this was clearly a fabrication, this shows that despite prohibitive policies against payola and the threat of investigation, such payola practices continue.

Spitzer has not finished his investigation into the industry, as he acknowledges that other companies continue to engage in payola practices.¹¹¹ He is still looking for possible payola violations by the other two major record corporations, Universal Music Group and EMI Group.¹¹² Additionally, the radio industry "heavy hitters," who for the most part have remained silent on the payola scandal, thus far declining to comment,¹¹³ were all recently drawn into Spitzer's investigation.¹¹⁴ Obviously radio executives are a necessary piece of the payola puzzle. However, though there were mentions of certain alleged offenses by radio station executives during the Sony investigation,¹¹⁵ until recently, Spitzer did not directly involve the stations in his investigative probe. In early February 2006, Spitzer issued

109. See Leeds, *supra* note 71, at E1.

110. See Charles Duhigg, *Warner Music to Pay \$5 Million to Settle N.Y. Payola Probe*, LOS ANGELES TIMES, Nov. 23, 2005, at 2.

111. See Press Release, Warner Second to Settle in Payola Investigation.

112. See Duhigg, *supra* note 110, at 2. Since the time this comment has been written, Eliot Spitzer has in fact entered into similar settlements with both Universal Music Group and EMI Group. Both of these record companies signed an assurance of discontinuance, instituted various reforms, and donated millions of dollars to the Rockefeller Philanthropy Advisors to New York State, as did Sony and Warner previously.

113. Chris Baker, *FCC Set to Probe Payola Scandal Chairman Vows 'Swift Action'*, WASHINGTON TIMES, Aug. 9, 2005, at A01.

114. See Michael Gormley, *Big Radio Served with Payola Subpoenas*, BUFFALO NEWS, Feb. 9, 2006, at A8.

115. The internal documents of the Sony investigation outlined details of certain alleged offenses involving a Syracuse Top-40 radio station. See William LaRue, *Spitzer Turns Up the Heat on Hot 107.9: Syracuse Top-40 Station Linked to Record Company Payola Investigation*, POST STANDARD, Aug. 11, 2005, at E1.

subpoenas against all of the major radio conglomerates who he alleges were cooperating with the record companies in their payola schemes.¹¹⁶ Clearly, Spitzer has no plans to abandon his investigation any time in the near future.

V. LAW ENFORCERS SHOULD RARELY PROSECUTE PAYOLA VIOLATIONS

There are obviously a number of reasons why payola has an adverse effect on the record industry. However, it does not appear to be fading. Despite numerous investigations over the past few decades and attempts to prosecute and deter radio stations and record labels from engaging in payola, it reemerges in new forms and methods. Since investigations of payola practices have proven to be somewhat toothless,¹¹⁷ law enforcers should limit their prosecution of them in order to save tax dollars. Particularly in an era where product placement¹¹⁸—an undisclosed practice—abounds throughout the entertainment industry, officials like Spitzer should realize that payola may actually be a “price mechanism that can enhance allocative efficiency.”¹¹⁹ With the constant introduction of new technology leading to a decrease in the significance of commercial radio, it becomes even less pressing to stamp out the practice. Additionally, the FCC cannot possibly investigate every single instance of payola, as it is such a common practice.¹²⁰ Considering that it always seems

116. See Gormley, *supra* note 114, at A8. Subpoenas were issued to Clear Channel Communications, Infinity (now operating as CBS Radio), Citadel Broadcasting Corp., Cox Radio, Cumulus Broadcasting, Pamal Broadcasting, Entercom, and ABC. See *id.* Since the time this comment has been written, Infinity has entered into a settlement with Spitzer, similar to those entered by the recording companies.

117. One program director who was fired as a result of Spitzer's investigation argued that the settlement will make little difference to Sony or any of the other major labels considering that ten million tax-deductible dollars “is like one hundred dollars” to the average person. Violanti, *supra* note 107, at C1. This is another example of how payola prosecutions and investigations are somehow inconsequential.

118. “Product placement” is the placing of commercial products on screen in television and movies, both blatantly and inconspicuously, without making any disclosure that the maker of the product has likely paid for the “advertisement.”

119. Sidak, *supra* note 6, at 522.

120. This is similar to the difficulty law enforcers have faced when trying to prosecute those that illegally download music off of the internet for copyright infringement. Both “current legal regimes” are attempting to “criminalize a very common behavior.” Aaron M. Bailey, *A Nation of Felons?: Napster, The Net Act, and The Criminal Prosecution of File-Sharing*, 50 AM. U. L. REV. 473, 531 (2000).

to be employed in at least some shape or form, the “reality of lax enforcement suggests that mandatory disclosure of all payments for broadcast is implausible.”¹²¹ It is likely that the only way payola will eventually end is if it becomes an unsuitable business model—as is rapidly occurring already.

A. *Legality of Undisclosed Product Placement in Other Areas*

One reason that payola violations should rarely be prosecuted is that similar practices are entirely commonplace and entirely *legal* in many other areas of the entertainment world. “Systems of bribery” that are equivalent to payola “operate in many retail markets,” which makes it a bit perplexing that it is only in the music industry that the “concept of payola somehow seems intuitively revolting.”¹²²

For one, you would be hard pressed to find either a movie or television show that does not prominently feature products on camera.¹²³ These placements hardly ever, if at all, include an accompanying “disclosure” or announcement that the placement has been paid for.¹²⁴ For example, many television news programs such as “Today” and “Good Morning America,” feature consumer specialists who “tout products without disclosing payments they received from the manufacturers” of those products.¹²⁵ It seems as though those who engage in this industry practice realize that like any product, the creations of the entertainment industry are part of an economic business where money is passed from hand to hand in exchange for promotion and prominence. One marketer, discussing how Starbucks Coffee built an entire set for two Fox television shows, “wasn’t sure” whether the credits disclosed the placement, but argued that “contextual product placements” do not need to be disclosed as they are “a necessary part of the craft.”¹²⁶

Just as the “manufacturers of everything from soap to

121. Abell, *supra* note 1, at 65.

122. Cliff Doerkson, *Broken Record*, N.Y. TIMES, July 29, 2005, at A23.

123. According to Nielson Product Placement ratings, in Fall 2005 there were 30,877 brand placements on prime time network television. Jim Edwards, *The Fine Line Between Placement and Payola*, BRANDWEEK, Jan. 30, 2006, at 11.

124. There were nowhere near a like number of disclosures in television show credits to match the 30,000+ product placements described in note 123 above. *Id.*

125. Baker, *supra* note 113, at A01.

126. See Edwards, *supra* note 123, at 11.

computers pay the folks who control crucial distribution channels to display their wares prominently” is entirely “legal, and no one minds,” viewers of movies and television shows “have accepted with equanimity the rise of (disclosureless) product placement.”¹²⁷ James Bond drives a BMW and Paris Hilton and Nicole Ritchie¹²⁸ carry Christian Dior purses and wear Fendi sunglasses on “The Simple Life,”¹²⁹ and viewers do not seem at all surprised or deceived when there is no consequent disclaimer that these companies have paid for this placement. Clearly, viewers of these media “whose producers collect millions of dollars in product-placement fees,” are “not much scandalized by corporate marketing indiscretions.”¹³⁰ Furthermore, television executives argue that it is hard to believe that “reasonable consumers are misled” or deceived about the fact that money likely changes hands in exchange for product placement.¹³¹ It is difficult to see why the music industry should be so much different.

Another example of a type of undisclosed product placement in the entertainment industry is the practice known as cooperative (“co-op”) advertising in the book industry. While it may seem that bookstores are using their own discretion to act as an “editorial presence,” recommending and prominently displaying certain books due to personal taste and reviews, in reality, how books are placed on the shelves is oftentimes the result of a type of “bookstore payola.”¹³² Basically, bookstores—particularly, large chain stores—enter into agreements with publishing companies where the booksellers retain a percentage of the publisher’s net sales to “defray advertising costs” and to in essence, “buy

127. Daniel Gross, *What's Wrong with Payola? The Pointlessness of Eliot Spitzer's Crusade Against the Music Industry*, Slate.com, July 27, 2005, <http://www.slate.com/id/2123483>.

128. Paris Hilton and Nicole Ritchie are two socialites who star in the television show, “The Simple Life.” Paris Hilton is heir to the Hilton Hotel fortune. Nicole Ritchie is the daughter of pop singer, Lionel Ritchie.

129. “The Simple Life” is a reality television show on FOX featuring Paris Hilton and Nicole Ritchie.

130. Thomas Hazlett, *Pay-for-Play Can Help Music*, Financial Times.com, Aug. 14, 2005, http://news.ft.com/cms/s/61a388f6-0ce3-11da-ba020000e2511c8,ft_acl=s01=1.html.

131. See Edwards, *supra* note 123, at 11.

132. Randy Kennedy, *The Politics of Intermediation: Bookstore Payola*, N.Y. TIMES, June 4, 2005.

coveted space on the store's front tables" or on "tall, highly visible racks," known as "stepladders."¹³³ As in the music industry where record companies recognize that songs must be heard to be bought, book publishers realize that their books must often be seen to be sold. Consequently, the way books are displayed in the store in "flashy cardboard displays" has become a "marketing force fully as powerful as the traditional ways of trying to bring a book to the public's hand-won attention."¹³⁴

Most of the major book retailers participate in this practice including Borders Books & Music, Amazon.com, and Barnes & Noble, where one veteran publishing executive said he believed that 70% of the books on the prominent tables at the front of the store were there because of co-op advertising.¹³⁵ This marketing tool, though clearly effective, is not cheap, with one publisher boasting its sales of one particular book jumped from 800 copies per week to 3,000 to 4,000 copies per week, immediately after paying for its placement on stepladders in stores nationwide.¹³⁶ Promised placement on front-of-store tables in major chain bookstores can cost publishing companies between \$10,000 and \$20,000 per book, depending on the time of year.¹³⁷

The practice of co-op advertising which leads to the placement of books at the front of the store not because "anyone at the bookstore thought the book was noteworthy or interesting," but because the publisher paid for them to be there, may seem unsavory.¹³⁸ However, the difference between this marketing system and payola in commercial radio is that co-op advertising "is not under-the-table, illegal, or even unethical—it's just that bookstores don't tell customers about it."¹³⁹ While radio stations are required to disclose when they have received compensation for airplay, bookstores have no obligation "to reveal which books they've been paid to put in the front of the store."¹⁴⁰ This is a

133. *Id.*

134. *Id.*

135. *See id.*

136. *See Kennedy, supra* note 132.

137. *See id.*

138. *Id.*

139. *Id.*

140. James Surowiecki, *The Price of Payola*, THE NEW YORKER, July 5, 2004, available at http://www.newyorker.com/printables/online/040712on_onlineonly01.

conundrum considering the same fears that accompany allowing payola to exist in the music industry attach to co-op advertising.

Opponents of co-op advertising argue that it "further concentrates money and attention on the books that need it least," making the book industry "lopsided in favor of the Stephen King's and Danielle Steel's of the book world."¹⁴¹ Bookstores discount best-sellers and give such books prime store location to "magnify the importance of [bestseller lists] out of proportion."¹⁴² This "reverse Robin Hood effect," is also complained of in the recording industry where payola tends to favor the Britney Spears' and Jennifer Lopez's of the music world.¹⁴³ Additionally, just as independent record companies and new up-and-coming artists fear they are being passed over by commercial radio because they cannot afford to pay for the broadcasting of their songs, new authors and books that lack notoriety "are given increasingly little advertising or display help," if their publishing companies do not enter into a cooperative advertising agreement with a major bookstore chain.¹⁴⁴ Thus, it is questionable why there is such a fuss over payola in commercial radio when the same fears and complaints do nothing to affect the legality of a similar practice in the book industry.

B. Commercial Radio Is Losing its Importance Because of the Advent of New Media

Another reason that prosecutors should hesitate before spending tax dollars on investigations into payola is that commercial radio is losing its importance in the music industry. Though commercial radio is still the number one marketing tool for record labels, technological advancements and the advent of new media are lessening its importance. Consequently, though it is still an important medium for record companies, "traditional radio is less powerful than it has been for decades."¹⁴⁵

One example of a new technology that is lessening the importance of commercial radio is internet radio, otherwise

141. Kennedy, *supra* note 132.

142. See Surowiecki, *supra* note 140, at 1.

143. See Kennedy, *supra* note 132.

144. See *id.*

145. Manly, *supra* note 43, at D1.

known as “webcasting.” This process of streaming music over the internet actually has the potential to go beyond the personal computer and become “widely available on mobile phones, PDA’s, special digital audio receivers, and other portable devices.”¹⁴⁶ Though it may seem inconceivable now, internet radio will likely become a viable substitute to commercial radio. First, it has the ability to combine audio elements with “visual and text-based content,” allowing it to “engage musical consumers in ways that no current media can begin to simulate.”¹⁴⁷ Second, internet radio offers a greater choice of musical genres, styles, and artists, providing an “alternative to the tightly programmed broadcast radio station playlist.”¹⁴⁸ The primary reason for this is that payola, thus far, has not infiltrated internet radio, at least not to the point where it has affected its ability to play a wide variety of music. The director of business and legal affairs of one Los Angeles based entertainment company commented on the possibility of internet radio to bring positive changes from the norms of commercial radio:

Assuming a pay-for-play system is not adopted by Internet radio...all record labels will have access to [it]..., not only those with large promotional budgets...[P]rogrammers will regain the power to decide whether to play a particular song based on merit, not financial influence.¹⁴⁹

This “merit-based system” allows the programmers to compile their playlists based on their own choices, and gives them the option to play a range of new music from developing artists or lesser known artists, without outside pressure from record companies. The record companies and artists themselves will benefit as well, since the companies will be able to save money on “promotional costs,” and artists will be able to keep more of their earnings.¹⁵⁰

Another new technology that has the ability to reduce the importance of commercial radio is satellite radio. Between the two major companies—XM and Sirius Satellite Radio—it is estimated that there will be near ten million subscribers by

146. Joseph E. Magri, *Internet Radio and the Future of Music*, 26-May L.A. LAW. 50 (2003).

147. *Id.*

148. *Id.*

149. *Id.*

150. See Magri, *supra* note 146, at 50.

the end of 2006.¹⁵¹ Satellite radio has numerous advantages over commercial radio that may entice listeners to subscribe and leave commercial radio behind. First, there is more of a variety of musical types, artists, and styles on satellite radio which at any given time of day allows a listener to tune in to stations devoted solely to such genres as rock, pop, dance, hip-hop, country, standards, classical, Christian, Latin and even International.¹⁵² XM Satellite Radio advertises that it “offers a huge variety of stations you’ll never hear on commercial radio. . . Most are unique and innovative XM Originals, which include totally new programming. Virtually every musical style is represented in depth and variety.”¹⁵³ Sirius has over 120 channels—65 of which are 100% commercial-free radio “in almost every genre imaginable,” in addition to 55 channels of news, sports, comedy, and talk radio.¹⁵⁴ Such a wide variety of music will likely prevent payola from crossing over into satellite radio. Even if pay-for-play practices should threaten to infiltrate the satellite airwaves, there are so many options and types of stations that the monotonous sound of payola-infected commercial radio will not become a problem.

In addition to the greater variety of music, all day talk radio such as Court TV¹⁵⁵ and E! Entertainment Radio,¹⁵⁶ and live sports broadcasts¹⁵⁷ are additional incentives to make satellite more appealing than commercial radio. Big names such as Howard Stern and Martha Stewart on Sirius, and shock-jocks Opie & Anthony on XM Radio, all of whom have their own stations on satellite, will likely lure even more

151. See Manly, *supra* note 43, at D1.

152. Sirius Satellite Radio, in its rock genres alone offers such styles as “today’s cutting edge new sounds to all the greatest classic rock, from heavy metal, alternative, jam bands, adult rock, hair bands, garage bands.” See Sirius Corporate Overview, Sirius Satellite Radio, <http://www.sirius.com/servlet/ContentServer?pagename=Sirius/CachedPage&c=Page&cId=1065475754271> (visited Jan. 10, 2006) [hereinafter *Sirius Corporate Overview*]. XM boasts that it has the “biggest playlist in the industry with access to over 2 million titles.” America’s #1 Satellite Radio Service, XM Satellite Radio, <http://xmradio.com/learn/index.jsp>. (visited Jan. 10, 2006).

153. See Sirius Corporate Overview, *supra* note 152.

154. See *id.*

155. CourtTV is a 24-hour news channel devoted entirely to courtroom happenings, legal events, current trials, etc.

156. E! Entertainment is an entertainment news channel.

157. XM broadcasts every Major League Baseball game, while Sirius airs every NFL Football game as well as basketball and hockey games in their entirety.

listeners to satellite. Finally, because satellite radio is a subscription service, it is commercial free. Both Sirius and XM have 100% commercial free music stations in comparison to today's FM stations on commercial radio which carry eighteen minutes or more commercials per hour.¹⁵⁸ Because of all these advantages, as opposed to the monotony of commercial radio which is peppered with commercials and plagued by small playlists, it appears as though "satellite radio is the future of music and audio entertainment."¹⁵⁹

As well as satellite and internet radio, there are other technologies and modern trends that have diminished the importance of commercial radio. Apple iPods and other MP3 players are the hottest products on the market. These products are generally compatible with both home and car stereos which make them a feasible alternative to commercial radio. With the possibility to hold endless songs of your choice in the palm of your hand, without having to be subject to the same old songs on FM radio and without repetitive commercial breaks, MP3 players threaten to take the music industry away from radio. Finally, the visual aspects of the music industry have increased in importance. Making music videos and appearing on MTV, as well as live appearances at clubs and lounges, are additional ways for artists to market themselves without utilizing commercial radio.

These factors show that the invention and advancement of technology have decreased and will continue to decrease the significance of commercial radio in the record industry. One commentator acknowledged this, stating:

Fifty years ago, the prospect of a big record company like Sony and a big radio station owner conspiring to fix what got played could have threatened an important component of the economy...not today with declining radio sales, the rise of Internet and satellite radio, and the advent of iTunes, iPods, and podcasting.¹⁶⁰

Though it is obviously more difficult with modern day technology, it is definitely possible to build a music career without the major record companies or commercial radio. For example, new artists can get discovered and start their music

158. See XM Radio-FAQ, XM Satellite Radio, http://xmradio.com/faq/faq_list_servlet.jsp?section_id=1§ion_main=XM%20Satellite%20Radio#11 (visited Jan. 10, 2006).

159. See Sirius Corporate Overview, *supra* note 152.

160. Gross, *supra* note 127.

career by placing their songs on the internet, through their own website or a website for promoting new artists, like Myspace.com.¹⁶¹ The advent of new technology is just one of the reasons that payola offenses should be prosecuted less frequently. There is no substantial benefit to devoting time, effort, and tax dollars to stamping out a practice in a medium that will likely decrease in importance in the years to come.

C. Payola Is of Questionable Harm

In today's commercial culture, "consumer expectations have evolved to the point where the payola laws seem outmoded and backward-looking."¹⁶² This poses the idea that payola may not be as harmful as people argue. In fact, there are aspects of payola that may actually benefit the record industry.

Critics of payola fail to realize that despite legislative attempts, the practice has endured, and payola can become a "legitimate tool in an industry where finite airtime requires that purely economic decisions be made."¹⁶³ Rather than attempting to get around the federal payola statutes by spending money on free trips, concerts, and other "promotional gimmicks," if there was no threat of prosecution, record companies could spend money "more efficiently by securing airplay directly, the best marketing and sales tool in the music industry."¹⁶⁴ The new environment of consolidated radio ownership, that began with the Telecommunications Act of 1996,¹⁶⁵ makes this a viable option for those record companies who may not be able to afford to employ independent promoters or pay huge amounts of money and

161. Myspace.com is an online community where anyone can sign up for free for purposes of meeting friends, networking, etc. MySpace.com has its own music community called "MySpace Music" where people can post their songs and members can listen to them for free by browsing through lists of artists by genre, location, etc.

162. Gross, *supra* note 127.

163. Katunich, *supra* note 4, at 670.

164. Abell, *supra* note 1, at 56.

165. Because of the Telecommunications Act of 1996, which allowed single companies to own an increased number of radio stations, four corporations have basically taken over the record industry. See Sony Assurance of Discontinuance, *supra* note 24 at 5, ¶ 13. These four companies—Chancellor, Clear Channel, Infinity, and Capstar—now control 63% of the Contemporary Hit Radio/Top 40 format on commercial radio. See Zeb E. Schorr, *The Future of Online Music: Balancing the Interests of Labels, Artists, and the Public*, 3 VA SPORTS & ENT. L. J. 67, 85-86 (2003).

consideration to many DJ's, as the consolidation "creates the possibility of securing national airplay for one price."¹⁶⁶ Basically, just as radio consolidation has made payola more pervasive—since there are less people to pay in order to get songs played—if payola was legal, the fact that there are fewer "power players" to pay a flat fee to would make it easier and cheaper for independent artists and smaller labels to get their records heard across the country.

Independent record labels that may not be receiving airtime for their artists' music would be given a legal and effective way to ensure certain songs would be played. Limited funds could be expended effectively because there would be a guaranteed return on the label's investment.¹⁶⁷ Also, songs that will have guaranteed airtime due to payment will allow labels to take more risks and provide material that absent payment would be shunned.¹⁶⁸ Additionally, because of the recent reality of "consolidated radio ownership and programming. . . eliminating payola could mean that commercial stations would become even more monotonous, if that can be imagined."¹⁶⁹ All of this supports the proposition that regulators are likely wasting energy they could use more wisely in other realms by "flailing at payola in music, where it poses no great threat to society."¹⁷⁰

D. Payola Will Continue to Reemerge As it Has Done for the Past Sixty Years Making Investigations and Prosecutions Frivolous, Since the Only Way Payola Will End is If it Becomes Unsustainable

Prosecution against those who violate payola statutes will likely do little more than waste tax dollars if it is done frequently. History is on the practice's side; despite countless investigations and inquiries it does not appear to be going anywhere. Payola is as common today as it was before the Federal Communications Act was amended in 1960, it has

166. Abell, *supra* note 1, at 55.

167. *See id.* at 56.

168. *See id.* at 56-57. This is similar to how in the book business, new authors who are published by major publishing houses are more likely to get noticed due to co-op advertising. *See* Surowiecki, *supra* note 140.

169. Slichter, *supra* note 70, at A23.

170. Gross, *supra* note 127.

just “taken on new and innovative forms.”¹⁷¹ Just as payola is as old as the history of commercial music, “[e]qually old are the music industry’s failed efforts to curb it.”¹⁷²

The fact of the matter is that the federal payola laws have not “sufficiently evolved to accommodate the interests of labels, stations and artists in the musical landscape,”¹⁷³ which has kept payola as “constant and pervasive a force as gravity.”¹⁷⁴ Even if stricter payola laws were passed, there is no guarantee that the practice would go away. Tougher statutes might temporarily stop payola, but history tells us that it is likely to reemerge sooner rather than later. Conversely, making tougher laws may not discourage the practice, but rather “encourage further illegality and under the table dealing.”¹⁷⁵ One national music journalist commented that, “Payola dates to the dawn of radio...it will take more than Spitzer to stop it...The impact of all this is that the record companies will somehow find more creative ways to conduct their usual business.”¹⁷⁶

In addition, increased consolidation in radio indicates that payola will just get easier and more effective. Clear Channel, which owns more than 1,200 radio stations nationwide, utilized only six independent promotion companies in 2001, meaning that those six companies are responsible for “controlling what millions and millions of people hear each day.”¹⁷⁷ It now seems even more unlikely that payola will stop because, as the positions of power in radio are more limited, those in the record industry can accomplish what they have been doing for nearly a century by exerting half the time, money, and effort. Radio conglomerates are aware of this, just increasing their power and enabling them to “essentially demand perks and easy revenues from record labels,” making payola the “only way to balance power among the parties,” because with the practice “airtime has a price

171. Katunich,, *supra* note 4, at 648; *see also* Ariel Katz, *The Potential Demise of Another Natural Monopoly: Rethinking the Collective Administration on Performing Rights*, 1 JOURNAL OF COMPETITION LAW & ECONOMICS 541, 586 (2005) (“The legal ban on payola has not eliminated the phenomenon; it only changed its form.”).

172. Katz, *supra* note 171, at 584.

173. Greene, *supra* note 5, at 412.

174. Doerkson, *supra* note 122, at A23.

175. Greene, *supra* note 5, at 419.

176. Violanti, *supra* note 107, at C1.

177. Greene, *supra* note 5, at 430.

that all are equally free to pay.”¹⁷⁸ A spokeswoman for Clear Channel addressed the issue of payola, emphasizing her feeling that payola shows no signs of stopping, as the practice “was created by the [music] industry.”¹⁷⁹ Clearly, though music will reinvent itself, constantly changing with the times, “the pay-for-play culture to get records on radio seems to remain the same.”¹⁸⁰

As a consequence, it appears as though the only way payola is going to end is if it ends up killing itself. The reality is that commercial radio is a business where record companies must supply good music in order to effectively sell albums. Despite the opposite popular belief, “hits cannot be bought,” and when a record label promotes the wrong song, it will lose money. Payola can get a song on the radio, but “payola is misunderstood: You can’t buy a hit. You can only buy a chance for a song to become a hit.”¹⁸¹ If payola causes radio stations to play music the consumers do not want to hear, the stations will hurt themselves.

Basically, prosecuting record labels that engage in payola is unnecessary because, “if no one likes the music, it won’t last, and the stations themselves will suffer...every radio comes equipped with an on/off switch.”¹⁸² Ultimately “you can’t keep a song...afloat for long unless there is real demand for it.”¹⁸³ If a station plays music that lacks variety and fails to display true talent, as a result of being aired solely due to the financial consideration it is receiving from a record label, listeners will be alienated. This can lead to the stations’ loss of advertising dollars: “Radio stations that accept payola have an incentive not to broadcast certain material if doing so would cause a larger marginal loss in advertising revenue than the station would receive in marginal payola revenue.”¹⁸⁴

In essence, if payola continues to bring detriment to the

178. Abell, *supra* note 1, at 66.

179. Greene, *supra* note 5, at 416.

180. Violanti, *supra* note 107, at C1.

181. Slichter, *supra* note 70, at A23. See also Robert Hilburn, *Payola Settlement Won't Change the Airwaves*, ALBANY TIMES UNION, Aug. 4, 2005, at 15 (“the record won’t stay there unless listeners accept it”).

182. Gross, *supra* note 127.

183. Surowiecki, *supra* note 140. People “can’t really be fooled or bludgeoned into liking something that they don’t.” *Id.*

184. Katunich, *supra* note 4, at 672.

music industry, even without the threat of criminal liability under federal statute or the deterrence of investigations and prosecutions, it will disappear if radio stations end up losing listeners and advertising dollars. Because technology has given listeners the liberty to remove themselves from the clutches of monotonous Top 40 radio,¹⁸⁵ payola will, in essence, "regulate itself." As one commentator noted, "[t]he power in determining hits rests with the public, and no one knows this better than radio programmers. Radio executives respond more to ratings than a truckload of plasma TV's."¹⁸⁶ If people do not like what they hear, they will change the channel to a new station or turn off commercial radio entirely, in favor of a new way to listen, such as on their MP3 players or on satellite radio.

VI. CONCLUSION

Commercial radio has traditionally been "the engine that drives the music business."¹⁸⁷ Because of this, since the early 1950's golden age of radio, competition between record companies to get the most possible airtime of their artists' songs has been fierce. In response to this, payola has been the answer that resolves the problem. Ranging from the 1950s, the beginnings of payola which consisted of record companies providing compensation to celebrity DJs, followed by the 1960s and 1970s, where payola stayed strong with "booze, broads, and bucks" as consideration for airtime, to the rise of independent promoters in the 1980s, payola has run rampant through the music industry for over sixty years.

Predictably, illegal pay-for-play has reemerged in the current time, in a new form, as a big business where sneaky tactics are employed and independent promotion is back in effect. Today record labels provide incentives such as free concerts, paid vacations, bulk advertising purchases and more in order to get around the payola statutes by disguising the consideration they are giving in exchange for broadcasting. Still, despite the camouflage, the goal of these promotional practices is the same: "gain exposure for a song by promising radio stations greater revenues, increased listenership, and

185. See Gross, *supra* note 127.

186. Hilburn, *supra* note 181, at 15.

187. Katunich, *supra* note 4, at 646.

untraceable kickbacks for programmers,"¹⁸⁸ all of which is illegal under federal laws prohibiting undisclosed payola practices.

In response to this new payola, Eliot Spitzer is the latest in a string of law enforcers throughout history's course to attempt to expose the scandal and bring it to an end. Though he successfully settled with the major record labels, having each of them sign an Assurance of Discontinuance, and though he has indicated that the investigation is still ongoing, the effect of this latest payola inquiry is still speculative. In fact, "earlier attempts to kill payola, when they had any effect at all, have tended to leave the beast stronger."¹⁸⁹

In light of the pervasiveness of the practice which has resisted extinction despite numerous attempts to end it, it seems logical to prosecute payola violations rarely, and only in its most egregious forms. There are many other factors that support such an idea. For one, commercial radio is losing its importance as a marketing tool in the industry. Today, with the advent of new media and technology, it is possible for record labels to promote their artists by taking alternative routes to commercial radio. The internet, satellite radio, MTV, and more are all viable alternatives for both record labels and their artists, and listeners nationwide. Additionally, the constancy of disclosureless product placement in other areas of the entertainment world, in both movies and television, and even in your local book store, make it perplexing that payola is viewed as such an enemy in the music industry. Finally, payola is not as harmful as it appears to be at first glance. In fact, it may actually benefit the business in some ways, as it provides a cost-efficient way for independent labels to guarantee airplay for their songs by expending limited funds, and can act as an economic tool in this (almost entirely commercial) business. After all, if a listener is dissatisfied with the musical monotony and lack of new artists and genres on commercial radio today, he or she can now switch to a substitute media to satisfy the appetite. Consequently, law enforcers should conserve the citizens' tax dollars and focus their time and energy elsewhere.

188. Abell, *supra* note 1, at 53.

189. Doerkson, *supra* note 122, at A23.