

CHANGE THAT TUNE:

**How the payola settlements will affect
radio airplay for independent artists**

A Payola
Education Guide
for Musicians
and Citizens



By Adam Marcus



Future of Music Coalition
Education, Research and Advocacy for Musicians



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Background

“Payola” – a contraction of the words “pay” and “Victrola” (LP record player) – is a term used to describe the process of labels or artists paying money to radio station DJs or employees in exchange for radio airplay.

Payola began to attract public attention in the late 1950s and 1960s when rock and roll disc jockeys became powerful gatekeepers and kingmakers who determined what music the public heard. Starting in the 1960s, federal laws were passed forbidding the direct payment or compensation of DJs or other radio staff in exchange for the playing of certain records, unless such payments were announced over the air.

The prominence of payola was temporarily held in check as a result of these laws and hearings. Eventually, however, payola-like practices did resurface, albeit in a more indirect way. Standardized business practices employed by many broadcasters and independent radio promoters resulted in a *de facto* form of payola.

Consolidation in radio station ownership following the 1996 Telecommunications Act allowed an “independent promoter” system – in which cash and goods were exchanged through a paid middleman – to strengthen. That is, until 2003, when first Senator Feingold and then New York Attorney General Eliot Spitzer began following up on rumors that payola was alive and well in the music and radio industries. Using the subpoena power of the New York Attorney General’s office, investigators collected thousands of pages of evidence from radio promoters, program directors and label executives, which implicated the four major labels and the four biggest radio station owners in a pay-for-play system. In 2004, after exacting over \$35 million in fines from the record labels and two station groups, the Attorney General sent documents to the Federal Communications Commission for additional investigation into the radio station group owners that had been implicated in the AG’s findings. After a lengthy process, the FCC announced a settlement in March 2007 with the four biggest radio owners – Clear Channel, Entercom, Citadel and CBS – that included \$12.5 million in fines and a consent decree outlining the “Rules of Engagement” for the radio industry.

The New York State investigations and FCC scrutiny from 2003 to 2007 uncovered shocking evidence of wrongdoing, and resulted in large fines and many promises about better behavior. But what have the payola investigations meant for musicians, independent labels and music fans? Has there been any noticeable impact on the conduct of labels or radio station owners?

This guide will try to answer these questions, and more. We’ll briefly look at the history of payola, the development of the “indie promoter” system, the investigations by Spitzer and the FCC and the contents of the “Rules of Engagement” signed by the four largest radio companies. Finally, we’ll put this all in the context of what it means for musicians and independent labels, and how artists are interacting with radio in the 21st century.

Why Payola Is Such A Problem

Legally speaking, “payola is the practice of making *undisclosed* payments or other inducements to radio (or television) broadcast personnel in consideration for the inclusion of material in radio (or television) programming.”¹ It is perfectly legal for a record label to pay a station to play a song as long as the station’s general manager is aware of the payment and an “appropriate announcement” is made on-air. It becomes illegal when the inducements – whether money, drugs, prostitutes or anything of value – are given to the DJ, Program Director (PD), Music Director (MD), or the station itself, but are not disclosed to the public. Payola is punishable by up to \$10,000 in fines and a year in prison.²

Why would record labels and radio stations engage in payola? The underlying reason is that, as Jacob Slichter, drummer for the rock band Semisonic wrote in 2004, “There is no better guarantor of a band’s success than a hit single on the radio luring listeners into record stores to buy the album.”³ In other words, commercial radio play is a crucial component of the major label promotion and sales strategy. To ensure their songs get played, record labels employ tactics – legal and otherwise – to encourage radio stations to favor their artists.⁴ Despite radio’s declining relevancy in an increasingly online world, commercial radio airplay continues to be a major factor influencing the music purchasing habits of consumers.

Payola distorts what gets played on the radio. Instead of songs being chosen for airplay based on the merits of the performance and recording, various forms of paid consideration and business relationships determine what music gets broadcast, and how frequently. Payola serves as a barrier to access to the public airwaves; the only musicians that benefit from radio airplay are those that can afford to participate in this label/indie promoter/radio station relationship. It also misleads the public.

Looking more specifically at the negative impact of the practice: 1) Payola breaks down the relationship between radio audiences and DJs, who have traditionally been considered tastemakers that play “the best” music; 2) Songs played because of payola payments distort the charts that determine popularity; and 3) Stations are supposed to be operating in the “public interest.”

Audience Expectations: For decades, radio listeners have tuned into stations because they had a sense that the DJs had access to the newest and best music. To many listeners – and many record labels – DJs were the ultimate tastemakers. Their ability to create a hit through repeated airplay gave them an extraordinary level of power. It was exactly this power to persuade audiences and generate sales that encouraged record labels and radio personalities to engage in the bribery that became better known as payola.

¹ Sidak, J. Gregory and Kronemyer, David E., “The ‘New Payola’ and the American Record Industry: Transaction Costs and Precautionary Ignorance in Contracts for Illicit Services.” *Harvard Journal of Law and Public Policy*, Vol. 10, No. 3, pp. 521-572, 1981 Available at SSRN: <http://ssrn.com/abstract=310606> or DOI: 10.2139/ssrn.310606

² 47 USC 508

³ Slichter, Jacob. 2004. *So You Wanna Be a Rock & Roll Star*. New York: Broadway Books. p. 76.

⁴ Coase, R. H. 1979. “Payola in Radio and Television Broadcasting.” *Journal of Law and Economics* 22: 269-328.; Dannen, Fredric. 1991. *Hit Men: Power Brokers and Fast Money Inside the Music Business*, First Vintage Books Ed. p. 162.; Caves, Richard E. 2000. *Creative Industries; Contracts between Art and Commerce*. Cambridge, MA: Harvard University Press.; Slichter 2004.

Although the power of radio to create hits has only slightly diminished, the power of the DJ has been drastically reduced. As station ownership consolidated in the 1990s, playlists became more streamlined in order to aggregate the widest possible range of listeners. Automation replaced the personal selection process, leaving DJs as little more than between-commercial announcers. Today's typical commercial radio DJ has no input into what he or she plays on the radio, but that doesn't mean that labels have abandoned attempts to influence airplay. As we cover later in this guide, more recent versions of payola take place between program directors, station managers and "indie promoters." Regardless of the specific recipient of the payola, the result is that listeners primarily hear only the songs released by the world's largest labels – those with the financial backing to participate in a pay-for-play game – instead of songs that are chosen based on artistic merit.

Distorting the charts: It's not just about how radio airplay drives sales; radio airplay is a major factor in establishing an artist's legitimacy and "street value." When stations and labels engage in payola, it affects which songs are played on the air, and how frequently. These distortions are reflected in radio playlist charts in *Billboard* and *Radio and Records*, which in turn affects everything from record sales to the fees that an artist can command for live appearances. Payola is anticompetitive and grossly unfair to artists who could potentially be as successful, were airplay based solely on artistic merit or audience demand.

The public interest: The government grants radio station licenses for free, with the understanding that stations operate "in the public interest." Stations are commercial companies and are entitled to earn a profit, but just as newspapers separate their advertising and editorial departments, radio stations are expected and required to separate their advertising and programming divisions. By engaging in payola, stations are not living up to the public interest standards that are part of their responsibilities as licensees of the public airwaves.

History Of Payola

The earliest form of payola occurred in the vaudeville era of the 1920s and 1930s, when publishers paid performers such as Al Jolson and Fanny Brice to perform their songs. Some performers insisted on a cut of the publisher's sales to guarantee performance. Payola became a political issue in the United States in 1959 when a House of Representatives subcommittee investigating the quiz show scandals expanded the scope of its inquiry of corrupt broadcasting practices to include payola.⁵ At the time, payola was not illegal under federal law, but a New York District Attorney was seeking misdemeanor commercial bribery charges against popular DJ Alan Freed for taking bribes from record labels. At the conclusion of the subcommittee hearings in 1960, Congress passed anti-payola laws that prohibited the undisclosed payment of cash or gifts in exchange for airplay and held radio stations responsible for any employees who accepted such enticements. In 1962, Alan Freed pled guilty to two counts of commercial bribery. Although originally charged with 26 counts and admitting to accepting \$2,500 in bribes, Freed was fined only \$300 and given a six-month suspended sentence. The 1960 statute unwittingly laid the groundwork for a new form of payola.

During the seventies, dealmakers became the principal driving force in the music business, paralleled by the rise of the promotions man. The idea took hold that *selling* the product was just as important – perhaps more important – than the product itself. The result was great sales, but the cost of selling was

⁵ Coase, p. 288.

greater.⁶ The record industry had never imposed limits on the number of records that stores could return. This meant, in effect, that retailers had no inventory risk. They could accept orders of any size, knowing they could return any unsold albums or singles for full credit.⁷ By 1979, record labels were force-feeding millions of albums to retailers and logging them as sales. But they weren't legitimate sales, and unwanted records were returned by the ton. The subsequent industry downturn led to massive consolidation among record labels.

By the end of the seventies, six major labels had begun to emerge as the oligarchs of the record business: CBS, Warner, RCA, Capitol-EMI, PolyGram and MCA. These entities were considered "major" because they handled their own nationwide distribution. Yet they soon found they required more market share to keep their distribution pipeline filled. A share of 5 or even 10 percent of the U.S. pop market was not enough; they needed 10 to 15 percent. So they began to buy small labels, and even a few large ones.⁸ Among the majors, CBS and Warner were the superpowers, with hegemony over the business.⁹

Given the competitive nature of the music industry, securing radio airplay was crucial. Label executives knew that people did not buy music they had never heard, and no amount of advertising, publicity or positive reviews could generate the volume of sales that they needed to make a hit record. Even the best A&R (artist and repertoire) staff in the world couldn't save an artist if radio gave them the cold shoulder.¹⁰ So radio promotion – the art and science of getting songs on the air – drove the business.

Payola had always been a means to put a price on free airplay, but it had yet to be institutionalized. The large record companies had the money, but they could not allow their own staff to make payments to radio stations. It had become too risky. While the anti-payola statute of 1960 was feeble and rarely enforced, the Racketeer Influenced and Corrupt Organizations (RICO) statute enacted in 1970 could impose heavy penalties on companies engaging in bribery. The threat of RICO liability created an incentive for labels to develop a system to insulate themselves from criminal liability or complicity.¹¹

Payola also helped radio stations, and not just as an additional source of revenue; it imposed an external value on the music. Top 40 radio play alone could produce a hit record in most cases, yet Top 40 stations preferred to play records that were *already* hits.¹² Since no Top 40 station wanted to be first to debut a new song, program directors (PDs) were a tough sell.¹³ Plus, they were assaulted with hundreds of new singles every month, but each station had only a few time slots available for new releases as most of the songs on their playlists carried over from week to week.¹⁴ The continuous barrage of new product soon

⁶ Dannen, p. 162.

⁷ *Id.*, p. 176.

⁸ *Id.*, p. 111-12.

⁹ *Id.*, p. 113.

¹⁰ Dannen, p. 8-9.

¹¹ *Id.*, p. 14, citing Sidak and Kronemyer.

¹² *Id.*, p. 7.

¹³ *Id.*

¹⁴ *Id.*

became too much for Top 40 PDs.¹⁵ They wanted to be assured that a single was a priority, and the record company was going to be behind the artist. Demonstrations of support included (and in many cases still include) major backing for a concert tour, displays in record store windows and full-page ads in prominent music magazines. But even if a label's local rep made such assurances about the records he was promoting, the PD needed more proof of support.¹⁶

With this logjam between record labels and radio stations, a new and much more organized system developed called "independent promotion." This new breed of "indie promoter" had no loyalty to any particular label or station, but instead develop strategic relationships on both sides. With radio stations, the indie promoter guaranteed to pay them a fixed annual or monthly sum of money. In exchange for this payment, the radio station group agreed to give the indie promoter first notice of new songs added to its playlists each week. Record labels then hired an indie promoter who had existing (and sometimes exclusive) relationships with radio stations to hype their latest releases. It was now the indie promoter who went to the PD with only one or two singles from each label, signaling that those records were indeed priorities – if only because the label paid the indie promoter to "push" the singles for them. The indie promoter would subsequently pay radio stations a flat rate (often in the six figures annually) to be the conduit between the station and record labels.¹⁷ Then, to receive payment, the indie promoter would report back to the record label the number of "spins" for each single – the number of times each station had played it – with promotion costs typically charged back to the individual artists to be recouped against their royalties.¹⁸ Such arrangements were arguably payola, managed by a middleman.

By the mid-1990s, the indie promoter system was fully entrenched. "Drugs and hookers are out; detailed invoices are in," wrote Eric Boehlert in his payola series in *Salon* in 2001.¹⁹ The institutionalization of the practice was in large part facilitated by the passage of the 1996 Telecommunications Act, which eliminated the national ownership caps and allowed radio station ownership to consolidate on a massive scale. "Where indies were once scattered across the country, claiming a few dozen stations within a geographic territory, today's big firms stretch coast to coast, with hundreds of exclusive stations in every major format."²⁰ Radio station groups and indie promoters used their new, national leverage to raise the stakes. "Labels would pay \$100,000 or \$200,000 to get a single added to all the Clear Channel format stations one week,' suggests one radio source. 'And if they don't pay, there is no chance in hell they're getting that song on the radio without [indie promoter] Tri State. If it's not on the list, it's not on stations.'"²¹ The indie promoter system had turned into an inescapable part of the radio airplay quest, and labels or artists that didn't want to – or couldn't afford to – play the game found themselves with no access to radio. It was bordering on extortion.

¹⁵ *Id.*, p. 8.

¹⁶ *Id.*

¹⁷ Wolk, Douglas. August 16th, 2005. "The FCC sweeps Eliot Spitzer's payola findings under the rug." *The Village Voice*. <http://www.villagevoice.com/music/0534,soti,67086,22.html>

¹⁸ Dannen, p. 292.

¹⁹ Boehlert, Eric. March 14, 2001, "Pay for Play." *Salon*. <http://archive.salon.com/ent/feature/2001/03/14/payola/index.html>

²⁰ Boehlert. "Pay for Play".

²¹ Boehlert. "Pay for Play".

Payola also existed in another form. Throughout the 1980s and 1990s, many radio stations organized free concerts to promote their stations and attract listeners. Usually these station shows were jammed full of powerful headlining acts, but what was disclosed in documents in 2001-2003 was the *quid pro quo* relationship behind the scenes: the artists played for free, or at a steep discount, and in exchange the station played the label's songs. It's possible the labels absorbed travel and performance expenses, recoupable to the label against the artist's album sales, but in reality the artists were giving up something of value – their typical guarantees for a live performance – in order for the artist, or another one of the label's acts, to receive airplay.

Renewed Focus on Payola

Despite the music and radio industries' efforts to obscure the manner in which money and power were influencing what got played on commercial radio, a number of individuals and groups started to question the indie promoter system. One of those people was investigative journalist Eric Boehlert, whose 12-part series in *Salon* about payola, commercial radio consolidation and the music industry provided some of the most salacious and illustrative examples how the indie promotion system worked.²²

Advocates for musicians, independent broadcasters and labels began to demand that policymakers pay attention. In May 2002, groups including the Future of Music Coalition, AFM, AFTRA, Recording Artists' Coalition, Just Plain Folks, Nashville Songwriters Association International, the Recording Academy, National Federation of Community Broadcasters and the RIAA sent a "Current Issues in Radio" letter to the FCC and Congress. In it, the groups requested that [...] "payments made to radio stations which are designed to influence playlists (other than legitimate and reasonable promotional expenses) be prohibited, unless such payments are announced over the air, even when such intent is subtle and disguised. This includes payments made through independent radio promoters."²³

Some policymakers began to take notice. In January 2003, Senator Russ Feingold (D-WI) introduced the "Competition in Radio and Concert Industries Act" which – among many things – would have "closed a loophole in the FCC regulations covering 'payola' – pay-for-play – to ensure that radio station broadcasts are not improperly influenced by the payment, whether directly or indirectly, to the licensee of any radio station unless an appropriate sponsorship identification announcement is made."²⁴ In addition, FCC Commissioner Jonathan Adelstein called on the Commission to focus its attention on the issue. "There is a real need for the FCC to review its sponsorship identification rules to make sure we are addressing modern-day pay-for-play practices in the most effective way possible given our clear responsibility under the law," he said during a speech in front of the Federal Communications Bar Association in November 2003.²⁵

²² See http://archive.salon.com/ent/clear_channel/.

²³ See <http://www.futureofmusic.org/news/radioissuesstatement.cfm>. The statement was revised and re-sent to the FCC and Congress in 2003, with continued insistence that the FCC and Congress take action on payola. <http://www.futureofmusic.org/news/radioissuesstatement03.cfm>

²⁴ Feingold Introduces "Competition in Radio and Concert Industries Act" Senate Commerce Committee to Hold Hearings On Thursday, Feingold to Testify, January 28, 2003. <http://www.senate.gov/~feingold/releases/03/01/2003128910.html>

²⁵ Boliek, Brooks. November 23, 2003. "FCC's Adelstein Calls for Payola Probe", *Hollywood Reporter*. http://www.hollywoodreporter.com/hr/search/article_display.jsp?vnu_content_id=2018119

The New York Attorney General's Investigation

During his tenure as New York State Attorney General (1999-2006), Eliot Spitzer established a reputation for weeding out corporate fraud. Part of his success in doing so was due to a state statute giving his office the power to subpoena witnesses and company documents pertaining to investigations of fraud or illegal activity by corporations. In 2003, after receiving tips from music and radio industry insiders, the Attorney General subpoenaed hundreds of files and emails from all four of the major record companies (EMI, Sony, Universal and Warner Bros.) and nine major radio companies (Clear Channel, Infinity (now CBS Radio), Entercom, Emmis, Citadel, Cumulus, Cox, Pamal and ABC).²⁶ The labels investigated controlled more than 80 percent of the \$12 billion in annual music sales.²⁷ The radio companies investigated controlled several thousand stations across the country.²⁸

Feeling the heat from the ongoing investigation, some labels and radio station owners began to change their ways. Clear Channel, Cox Radio and Infinity all made a show of severing their ties with their exclusive independent promoters. A 2003 Clear Channel press release declared that the company would “begin working directly with the recording industry on specific group-wide contesting, promotions and marketing opportunities,” and quoted radio division CEO John Hogan: “Strong relationships with artists and record labels are a priority for our business.”²⁹

However, the radio station owners' efforts to distance themselves from the indie promoter system could only protect them so much. The collected documents demonstrated that the companies had systematically – and blatantly – engaged in payola. But unlike previous payola scandals in which DJs pocketed the bribes, much of the money went directly to the bottom lines of stations' corporate owners.³⁰ For example, Spitzer's office determined that Sony BMG and its subsidiary labels had offered a series of inducements to radio stations and their employees to obtain airplay for the recordings by the company's artists. The inducements took several forms:

- Outright bribes to radio programmers, including expensive vacation packages, electronics and other valuable items;
- Contest giveaways for stations' listening audiences;
- Payments to radio stations to cover operational expenses;
- Retention of middlemen, known as independent promoters, as conduits for illegal payments to radio stations;
- Payments for “spin programs” – airplay under the guise of advertising.

E-mail correspondence obtained during the investigation showed that label executives were well aware of such payoffs and made sure that the company received sufficient airplay to justify these expenditures.³¹

²⁶ Ross, Brian, Richard Esposito and Vic Walter. Feb. 8, 2006. “Pay to Play: Music Industry's Dirty Little Secret” ABC News. <http://abcnews.go.com/Primetime/Story?id=1591155&page=2> (Ross 2006(a)).

²⁷ Free Press. “Ten Things You Need to Know about Payola.” <http://www.freepress.net/payola/=faqs>

²⁸ Ross 2006(a).

²⁹ Wolk 2005.

³⁰ Ross 2006(a).

³¹ New York State Attorney General's Office. July 25, 2005. “Sony Settles Payola Investigation.” http://www.oag.state.ny.us/press/2005/jul/jul25a_05.html

In July 2005, after months of investigation, the attorney general's office settled with Sony BMG for \$10 million.

Similar evidence was collected from the other record labels. A \$5 million settlement with Warner Bros. was reached in November 2005, with Universal for \$12 million in May 2006, and EMI for \$3.75 million in June 2006. The Universal and Sony BMG settlements were roughly in proportion to the companies' share of the recording industry market where Sony, at the time, held a 23.3 percent share and Universal a 31.6 percent share. Warner Music's penalty was disproportionately low when based on its market share of 18.1 percent, because it was the first recording company to settle. Proportionate to market share, EMI's penalty appears slightly higher than either Sony BMG's or Universal's because it was the final holdout.³² Although the labels did not acknowledge any wrongdoing, they sometimes admitted that individual employees had engaged in illegal business practices.³³

The settlements with the four major record labels totaled \$30.1 million. An additional \$6.25 million settlement was reached with broadcasters CBS and Entercom.³⁴ In addition to the monetary settlements, the attorney general's office extracted a series of consent decrees that in effect established a new regulatory regime. The consent decrees prohibit labels from offering – and stations from accepting – anything of value beyond compensation for advertising. The exception is that labels may give each station promotional items worth less than \$25,³⁵ up to 20 copies of a CD, 20 tickets to a concert, and station staff can accept gifts worth less than \$150 for “life events and holidays” and reimbursements not to exceed \$150 for meals and entertainment. To prevent labels from skewing charts by paying for overnight spins, stations must announce any such airtime purchases to radio monitoring services beforehand (and presumably the monitoring services will exclude these plays from their charts). And, of course, under existing payola law they need to make an “appropriate announcement” on the air. Finally, stations must appoint a compliance officer to maintain logs of all items of value received in a database that the settlement requires them to create. The compliance officer must submit annual reports to the New York Attorney General's office for five years.

FCC Response

Upon completion of its investigation, the New York Attorney General's office sent mounds of evidence to the FCC so that the agency could complete the work and determine the appropriate penalties to be exacted on the radio station group owners, which operate on spectrum licensed by the FCC. In July 2005 – on the day Spitzer announced the settlement with Sony BMG – FCC Commissioner Jonathan Adelstein called for a FCC investigation into payola.³⁶ Despite Adelstein's strong interest in completing the investigation, there was very little action at the agency at the time. Spitzer expressed frustration about the

³² Ross, Brian, Vic Walter & Richard Esposito. June 15, 2006. “Payola Probe Settlement,” ABC News. <http://blogs.abcnews.com/theblotter/payola/index.html> (Ross 2006(b)).

³³ *Id.*

³⁴ Dunbar, Josh. March 5, 2005. “Stations Agree on Anti-Payola Settlement.” Associated Press. http://web.archive.org/web/20070320200821/http://biz.yahoo.com/ap/070305/payola_settlements.html?.v=8

³⁵ It isn't clear if the \$25 limit was meant to apply to each item or the total for all items. For example, if the limit applied to each item, a label could provide 100 t-shirts worth \$25 each, for a total of \$2,500.

³⁶ Federal Communications Commission. July 25, 2005. “Commissioner Adelstein Calls For FCC Investigation Based On Spitzer Payola Settlement” http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-260158A1.pdf

lack of progress at the FCC, claiming to the press that the agency was “undercutting” his investigation by negotiating with radio companies at the center of the probe. On August 8, 2005, FCC Chairman Kevin J. Martin announced that he had directed the Enforcement Bureau to review the settlement agreement reached by Sony BMG and Spitzer to examine any incidents in which the agreement discloses evidence of payola rule violations. Ultimately, however, the FCC chose to settle with broadcasters instead of continuing the investigation.³⁷

In April 2007, Clear Channel, CBS Radio, Citadel Broadcasting Corp, and Entercom Communications Corp. each entered into consent decrees with the FCC, which terminated the FCC’s investigation. In exchange for immunity from prosecution for any previous payola violations, the companies each paid a small fine, and promised to implement new internal reforms.³⁸

The Voluntary Agreement

In conjunction with the FCC’s settlement, a separate voluntary radio accord was negotiated between the four radio station groups and the independent music community. Led by the American Association of Independent Music’s (A2IM) acting president, with input from artist advocates, music companies, radio programmers and promotion executives, the negotiations were designed to open a new dialog between commercial radio and the independent music community.

The core outcome of these negotiations was a set of best business practices codified in March 2007 as the “Rules of Engagement.” Underscoring the principles of access and transparency, these Rules were disseminated by the four radio groups from the top down, so all that employees of the radio stations would be aware of the agreed-upon code of behavior. Prior to these Rules, there had been no standardized code of ethics for radio station employees.

The four radio station groups also agreed to dedicate 4,200 hours of programming to independent music, and to feature “the recordings of local, regional and unsigned artists and artists affiliated with independent labels.”

The four radio groups officially acknowledged this new effort in a letter to the FCC commissioners on April 6, 2007, demonstrating their intent to turn over a new leaf in the wake of concerns about payola, and a willingness to engage with the independent music community. This letter played an important part in negotiations as it carried the tacit blessing from the FCC, which was encouraging the marketplace to actively rebalance itself through mutually agreed-upon measures.

The Rules of Engagement are reprinted below.

³⁷ Ulaby, Neda. Jan. 22, 2007. “Rumored FCC Payola Settlement Angers Critics.” NPR. <http://www.npr.org/templates/story/story.php?storyId=6944954>

³⁸ The fines paid to the FCC were separate from the fines that CBS and Entercom paid as a result of their settlements with Spitzer.

Rules of Engagement

1. Radio [stations] should establish, and appropriately publicize, clear and non-discriminatory procedures for music submissions and access to radio station music programmers (to the extent any such access is provided).
2. Radio [stations] should not be allowed to sell or barter access to its music programmers.
3. Radio [stations] should not form relationships with any music companies, independent promotion companies, or other parties which provide for exclusive access to radio station music programmers, nor should Radio [stations] restrict access to its music programmers to those who contribute promotional consideration.
4. Radio [stations] should not exclude independent promotion companies, as a class, from gaining access to music programmers except for independent promotion companies which are compensated based upon playlist additions or increased spins.
5. Radio [stations] shall not ask for or expect, either directly or indirectly, any quid pro quo to play music, including but not limited to: (a) Any promotional considerations including cash and prizes (b) Local concert appearances (c) Exclusive relationships with recording artists.
6. Radio (individual stations or their parent companies) shall not act in a coercive manner, make or imply threats to withhold or reduce airplay or make or imply promises to commence or increase airplay, in connection with the solicitation of any promotional consideration, or any promotional consideration promised or given to competitor stations, including concert appearances and artist "exclusives."
7. Disclosure: All cash and non-cash consideration (above a reasonable threshold) made by labels, artists, or their agents shall be confirmed in writing and shall be subject to internal tracking controls, with the information gathered as a result of these controls available to the FCC upon its request.
8. Contest prize recipients to the extent permitted by applicable law must be identified publicly, and confirmed as not employees of the radio station or members of their immediate families or households.

March 6, 2007

An important part of the Rules is that they require stations to establish and publicize clear and non-discriminatory procedures for independent artists to submit music for radio play and prohibit stations from restricting access to its PDs and music programmers to only those who provide promotional consideration or had other embedded relationships with the radio stations. The Rules also prohibit stations from establishing an exclusive relationship with a single outside promotion company. The other items reiterate the rules already embodied in the payola statute or impose some additional reporting requirements on stations.

Concerns About the Rules of Engagement

Despite the efforts made on behalf the parties to craft a meaningful set of guidelines, the Rules of Engagement do pose a number of questions.

First, the station owners claim that the voluntary agreement is separate from the consent decrees made with the FCC. They do this so that if they violate the voluntary agreement, it is not a violation of the more formal consent decrees. And since the Rules of Engagement are strictly voluntary, any violation of restrictions set forth in the agreement that go beyond what the law requires will incur no penalty. As Senator Feingold put it in an open letter to radio companies, “The weakness of the voluntary reforms is that there is no impartial arbiter like the FCC to determine the meaning of the rules, so they can be parsed or ignored with only public opinion as a partial check.”³⁹ A much better solution would have been for the FCC to create a designated payola investigator in the Enforcement Bureau whose regular scrutiny would permanently suppress payola.

The Rules of Engagement also contain no system to oversee the stations’ compliance with the agreement. The closest it comes is a note that the FCC can request information tracked by stations on consideration paid/made by artists and labels. And stations only need to track consideration that is “above a reasonable threshold.” There is no guidance given about where that threshold is set. If stations have not been following payola laws in the past, a voluntary agreement to provide information to the FCC, if and when requested, is not much oversight. To succeed, these new operating procedures call for constant vigilance on the part of all cooperating parties.

Even if stations do collect useful information and it is given to the FCC, the agreement does not state whether the FCC can (or must) release this information to the public. The FCC has a very bad track record at overseeing stations for payola violations – it likely would have done nothing if not for Eliot Spitzer and a few members of Congress pushing it to act. The last payola violation the FCC pursued before Spitzer was in 1984. Without public oversight, stations are given free reign to obfuscate while continuing to engage in illegal practices.

The “Indie Set-Aside”

The four station groups also signed a separate voluntary document that is commonly referred to as the “indie set-aside.” In it, CBS, Citadel, Clear Channel and Entercom agree, on a purely voluntary basis, to collectively air 4,200 hours of programming between 6 AM and midnight, which will feature “the recordings of local, regional and unsigned artists affiliated with independent labels.”

While the intentions behind the indie set-aside are clear – to encourage radio station group owners to play more independent content – the vague language in the agreement makes it very easy for radio stations to claim that their current programming methods are in compliance. Of course, there would be no need for this agreement if independent music was already in rotation. Further clarification among the negotiating parties may be needed to ensure the station groups live up to the accord rather than reinterpret it for the purpose of avoidance.

³⁹ Senator Russell D. Feingold. July 11, 2007. Letter to radio companies. <http://feingold.senate.gov/~feingold/releases/07/07/20070711.html>

Specifically, the reference to local and regional artists may cause confusion, as a local or regional performer may indeed be signed to a major label. There is also no definition for the term “regional” included in the document. What factors determine where an artist is based? Is it the city in which the band was first formed, or where the members currently reside? Do the Red Hot Chili Peppers qualify as a local band for Los Angeles stations? If the set-aside was written to apply only to independent and independent label-affiliated artists, it would be far more significant.

Second, the companies can choose which of their stations will provide the indie music set-aside. The set-aside states: “These programs will air on appropriately-formatted stations selected by the Radio Companies ...” This was intended to exclude stations with no music programming (e.g. talk radio) and those stations that do not play new music (e.g. Classic Rock), but companies could try to claim that only stations in smaller markets are “appropriately formatted.”

Third, there’s no timeline associated with the promises of airing 4,200 hours of programming. Is that 4,200 hours a week? A year? Even if each station plays just one song by an unsigned artist each week, can they claim they’re in compliance with the Agreement because they’re making steady progress towards the goal of 4,200 hours? While this clause was meant to respect individual marketplace conditions and allow a reasonable rotation scheme that reflected a station’s position in its community, the radio stations could, either intentionally or not, misconstrue it. This lack of clarity makes measurement of compliance difficult.

Even if the station groups comply with the agreement, the actual number of hours in the indie set-aside is actually quite low. As of January 2008, Clear Channel owned 1,005 radio stations. If it applies the indie set-aside to all of those stations, each station would have to play just over an hour and a half of music by independent artists to comply with its 1,600 hour share of the set-aside. If it applies the set-aside to only the 275 Clear Channel stations in the top fifty markets, each would have to play less than six hours of music by independent artists to meet its share. Spread out across a year (as an example), six hours works out to just two songs per week. The other station groups would have to play even less to fulfill their share of the set-aside. Any of these figures is in contrast to the actual market share of independent music, which accounts for 80 percent of all releases worldwide and represents 30 percent of all music sold.

Heavy rotation is the key to market penetration, and 4,200 hours spread across all stations represents a small amount of time. A better approach might be to work with a smaller number of stations that are willing to engage with the independent community and expand programming. It’s important not to lose sight of the fact that independent music belongs on commercial radio and is just as vital as the music currently receiving heavy airplay. Changing the prevailing culture at commercial radio will take a concentrated effort with all parties working on a good faith basis.

What Can Artists Do?

Do Research, Establish Relationships

A2IM suggests that artists be strategic when approaching stations. An essential part of working with radio – commercial and noncommercial – is doing the necessary research to develop a list of stations that would be most likely to play your music.

Start with local stations that play the format of music that you play. Look on websites to figure out the program directors' names and the station mailing addresses. See if any of the stations have any specialty shows and address the package to the right person. Then, use the web and internet radio to find more stations like that in other cities.

When you have CDs ready to send out for promotion, determine how many you'd like to send to radio and prioritize your list. Artists need to have a simple package with a promo CD and a "one sheet" with very little verbiage, other than a description of musical genre and one "hook". The promo CD should have the best song first, second best second, etc. The MD/PD/intern who listens to the CD will listen for only a minute or two at most, so lead with your best song. Worry about the track order when you release the CD for sales.

Once you've sent out the packages, start establishing relationships by putting in a call to the station's program director. Let them know the release date, or about upcoming shows. Note that PDs often have specific times slotted to take music calls. Determining the most appropriate time to call may affect your chances of getting through. If you don't actually talk to the person, just leave a brief voicemail.

Radio professionals are busy people; be sure to follow-up on your promotional efforts. And if you do get some airplay, be sure to place calls to track spins and encourage further airplay.

Note that this kind of relationship-building doesn't happen overnight. If getting radio airplay is something you want to achieve, do your research, build your lists, and make your phone calls for every release. If you don't service your music and consistently update PDs/MDs about your artists, they won't be familiar with you when you do have a "hit", which will make it that much more difficult for you to get the airplay you deserve.

How the Set-Aside Could Help You Get on Commercial Radio

Start with stations in your local area. You can then describe your band as both independent *and* local.

Find out if any of the stations in your area are owned by one of the four companies which signed the voluntary agreement. First go to Radio-Locator, <http://www.radio-locator.com>, and find the stations you're interested in contacting based on their format. Write down the call sign for each station and then check the websites below to find out the station's parent company.

Clear Channel	http://www.clearchannel.com/Radio/StationSearch.aspx
CBS Radio	http://www.cbsradio.com/stations/index.html
Citadel	http://www.citadelbroadcasting.com/citadel_broadcasting.aspx?id=2635
Entercom	http://www.entercom.com/markets.php

If a company that signed the voluntary agreement owns the station, the Rules of Engagement state that each station should establish and publicize the procedures for submitting music and contacting the station's programmers. If you can't find these procedures on the station's website, check the parent company's website. If you don't find anything, call the station and ask. If they don't know what you're talking about, confirm they're still owned by a company that signed the voluntary agreement and then politely explain the Rules of Engagement – offer to email them a link to the Rules.

www.futureofmusic.org/images/FCCrulesofengagement.pdf

If a station is not owned by company that signed the voluntary agreement, it is under no obligation to play your music, but you can use the same tactics. Furthermore, you should point out that other stations will be playing a lot more local and independent bands, and they should too.

What To Look Out For

The recent settlement agreements do not mean that artists should drop their guard. Clear Channel responded to the settlement agreements with a pay-for-play scheme aimed at indie artists. In May 2007, Clear Channel set up an online application for local and independent artists to submit their music for airplay on each of its stations. But A2IM and FMC found some troubling language in the license agreement: Artists had to agree to grant “Clear Channel the royalty-free non-exclusive right and license, in perpetuity [...] to use, copy, modify, adapt, translate, publicly perform, digitally perform [...]” the content submitted via their website. In other words, Clear Channel was asking artists to waive their performance royalties as a consideration for airplay.

On July 12, 2007, Senator Russ Feingold (D-WI) sent a letter to each of the major radio station groups, questioning their intent to honor the conditions of the payola consent decree. Feingold referenced the Clear Channel royalty issue in the letter, saying that the “required royalty waiver seems to violate the April commitment not to barter access to music programmers. I encourage you all, and Clear Channel in particular, to clarify this issue.” On July 13, FMC filed a Request for a Declaratory Ruling at the FCC over Clear Channel's actions. By the end of the week, Clear Channel had had enough. By July 16, 2007 Clear Channel had revised the language in the licensing agreement. The new language removed the words “royalty-free” from the agreement, which ensures that artists retain their rights to their public performance royalties.

When reviewing any future submission agreements, be wary of anything that seems like a backhanded way to get around the payola laws and the new Rules of Engagement. Also be on the lookout for both terrestrial as well as non-terrestrial royalty waivers, which apply to online streaming simulcasts. If you have a question about terms you must agree to as a condition for having your promo considered for airplay, contact the Future of Music Coalition at payola@futureofmusic.org or Jim Mahoney at A2IM at jim.mahoney@a2im.org

Is It Possible To Hire An Indie Promoter?

This depends on the practices of each radio ownership group. CBS has a list of registered independent promoters who have signed on to the FCC ruling and Rules of Engagement who are supposed to get access. A2IM does not believe anyone on this list has been denied access to radio stations, so if someone is on that list, he or she may be worth hiring. On the other hand, as of January 2008, Clear Channel's West Coast region was not taking any calls from independent promoters, and since most indie artists and labels do not have regional promotion staff, this puts them at a great disadvantage.

It's probably better to learn the marketplace and focus on public radio and regional shows to start. Major radio station ownership groups don't like to play artists that are not already established, especially indie artists and indie labels. We suggest avoiding this expense until a buzz develops.

What To Do If You Suspect or Have Evidence That a Station Is Engaging In Payola

Technically, payola violations should be reported to the FCC. The Commission's website at www.fcc.gov includes instructions about how to file a complaint using their online forms. They ask you to include:

- Your name, address, email address, and phone number where you can be reached;
- Name and phone number of the company that you are complaining about and location (city and state) if the company is a cable or satellite operator;
- Station call sign (e.g. KDIU-FM or WZUE TV), radio station frequency (1020 AM or 88.5 FM) or TV channel (13), and station location (city and state);
- Network, program name, date, and time of program if you are complaining about a particular program; and
- Any additional details of your complaint, including time, date, and nature of the conduct or activity you are complaining about and identifying information for any companies, organizations, or individuals involved.

Working With Noncommercial and Low-Power Stations

Although the voluntary agreement only applies to the four station ownership groups listed above, noncommercial and low-power stations are generally more approachable and willing to take chances with independent artists. But some noncommercial stations can be *worse* than the major station groups, using the guise of being a friend to independent artists. Don't always believe a noncommercial station representative when they claim they can't afford to pay royalties, and be cautious before signing anything.

Share Information

FMC and A2IM are in the process of working with large station groups to monitor what is happening in the marketplace and ensure changes in access for independents. This means we are looking for independent artists and labels to share their experiences, both good and bad, as they relate to radio access. The goal is to use these stories to build a set of best practices which can be circulated across all radio station groups. If you'd like to tell us about your experiences, write to payola@futureofmusic.org and jim.mahoney@a2im.org.

Links and Resources

Reviewing the websites below is a great next step. You can also check out the documents referred to in the footnotes above.

- **The FCC's Payola Rules** <http://www.fcc.gov/cgb/consumerfacts/PayolaRules.html>
- **Future of Music Coalition's** website, which contains lots of information about payola and other issues of importance for independent artists. The best way to stay up-to-date on these issues is to subscribe to the monthly FMC newsletter. <http://www.futureofmusic.org>
- If you want even more frequent FMC updates, check out the **FMC blog**. <http://futureofmusiccoalition.blogspot.com/>
- **The American Association of Independent Music (A2IM)** represents a broad coalition of music labels to promote sector opportunity and enhance the market share of its combined membership. <http://www.a2im.org>