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WHICH PUBLIC? WHOSE INTEREST? HOW THE FCC'S DEREGULATION OF RADIO STATION OWNERSHIP HAS HARMED THE PUBLIC INTEREST, AND HOW WE CAN ESCAPE FROM THE SWAMP

*Rachel M. Stilwell**

I. INTRODUCTION

The Federal Communication Commission's ("FCC") laissez-faire policies toward deregulation of radio station ownership have led to oligopolistic control over radio since 1996. In turn, consolidated corporate radio has paved the way for payola-like practices, killed off local programming, stifled viewpoint and programming diversity, and on occasion, endangered public safety. The current law governing these issues remains in disarray. This article suggests solutions to these problems. Congress should permanently freeze the maximum number of radio stations that one entity can own in a given market and augment anti-payola statutes that are currently riddled with loopholes. In addition, the FCC should promulgate further regulations requiring all radio stations to adopt and maintain infrastructures that protect public safety.

Since 1934, the FCC has had a statutory mandate to grant and renew radio licenses and promulgate regulations as the "public convenience, interest, or necessity" require.¹ By the 1940s, the FCC had promoted a policy that the promotion of diversity, competition, and localism in broadcasting was vital to protecting the public interest,² and adopted rules

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1. See Communications Act of 1934, ch. 652., Pub. L. No. 73-416, 48 Stat. 1064, §§ 301, 302a, 303, 309, 318 (codified as amended at 47 U.S.C. §§ 307-309 (2000)).

2. See *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 194, 203 (1943).

restricting radio station ownership in order to prevent monopolies.³ Over the next few decades, the FCC regulated broadcasting in order to protect the public interest in competition, localism, and several facets of diversity.⁴ Among the rules promulgated were caps on the number of radio stations that one entity could own nationally and locally.⁵ By the 1970s, the FCC had also banned "cross-ownership," forbidding any entity from owning both a newspaper and a radio or television station in any one market.⁶

In the early 1980s, the FCC's ideology radically shifted; it asserted that regulations restricting broadcasting harmed the public interest. This philosophy was based on the "marketplace theory," under which the marketplace itself is said to determine what is in the public interest.⁷ In 1984, the FCC relaxed long-standing rules that capped the number of radio and television stations that one entity could own.⁸ The FCC attempted to justify this deregulation by citing evidence that pertained largely to television rather than radio.⁹

Although the radio industry had been engulfed for several years in a widely reported payola scandal that had hampered diversity of programming,¹⁰ there was no evidence that the FCC sought information about how the effects of ownership deregulation might be different for radio than for television.¹¹ The FCC further deregulated radio station ownership in the early 1990s, asserting that the recent increased

3. See Rules Governing Standard and High Frequency Broadcast Stations: Multiple Ownership of Standard Broadcast Stations, 8 Fed. Reg. 16,065 (Nov. 27, 1943) (AM Radio); Rules Governing Standard and High Frequency Broadcast Stations, 5 Fed. Reg. 2384 (June 26, 1940) (FM Radio).

4. See Amendment of Section 73.3555 of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations, 100 F.C.C.2d 17, 18-19 (1984) (FCC-84-350) [hereinafter *1984 Multiple Ownership Order*].

5. See *id.* at 20-25.

6. See Amendment of Sections 73.34, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations, 50 F.C.C.2d 1046, 1088-89 (1975) (FCC-75-104).

7. Gregory M. Prindle, *No Competition: How Radio Consolidation Has Diminished Diversity and Sacrificed Localism*, 14 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 279, 280-82 (2003-2004).

8. See *1984 Multiple Ownership Order*, *supra* note 5, at 55.

9. See *infra* notes 171, 176-77, 180 and accompanying text.

10. See 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, 546-54 (1987); see generally, FREDRIC DANNEN, HIT MEN, 182-89, 209-15 (Vintage Books 1991).

11. See generally *1984 Multiple Ownership Order*, *supra* note 5 (containing no discussion of the differences between radio and television as broadcast media and relying on evidence in the record pertaining to television as the basis for rulemaking about radio station ownership limits.).

competition for advertisers had jeopardized the radio industry by dramatically decreasing revenue.¹² The FCC also argued that such competition led programming to become “increasingly diverse and targeted.”¹³ In actuality, programmers of commercial radio during that time had eschewed programming diversity in favor of “playing the hits.”¹⁴

By passing the Telecommunications Act of 1996 (“Act of 1996”), Congress eliminated the cap on the number of radio stations one entity could own nationwide and drastically loosened local radio station ownership restrictions.¹⁵ Massive radio consolidation followed,¹⁶ resulting in severe harm to diversity, localism, and competition in radio.¹⁷ Section 202(h) of the Act of 1996 required the FCC to periodically review the broadcast ownership rules and to “repeal or modify any regulation it determines to be no longer in the public interest.”¹⁸ In 2002, the Court of Appeals for the D.C. Circuit held that section 202(h) was presumptively deregulatory and required the FCC to either eliminate media ownership regulations or to justify its decision not to eliminate the ownership regulations.¹⁹ The FCC responded to the D.C. Circuit by “indicating that it would consider changes to the remanded rules as part of its 2002 biennial review.”²⁰

In 2003, after reviewing the broadcast ownership rules, the FCC proposed new rules that further lifted ownership restrictions.²¹ In a 3-2 split along party lines, the FCC voted to adopt rules that, if given lawful

12. See generally Robert B. Ekelund, Jr., *Market Power in Radio Markets: An Empirical Analysis of Local and National Concentration*, 43 J. LAW & ECON. 157 (2000).

13. See *In re Revision of Radio Rules and Policies*, 7 F.C.C.R. 2755, 2758 (1992) (FCC 92-97) [hereinafter 1992 Radio Revision Order].

14. See Kerri Smith, *The FCC Under Attack*, 2003 DUKE L. & TECH. REV. 19 (2003) (citing EXECUTIVE SUMMARY, RADIO DEREGULATION: HAS IT SERVED ITS CITIZENS AND MUSICIANS?, FUTURE OF MUSIC COALITION, <http://www.futureofmusic.com/images/FMCradioexecsum.pdf>).

15. Telecommunications Act of 1996, Pub. L. No. 104-104, § 202, 110 Stat. 56 (1996) (codified as amended in scattered sections of 47 U.S.C.).

16. See Kerri Smith, *The FCC Under Attack*, 2003 DUKE L. & TECH. REV. 19 (2003).

17. See generally Prindle, *supra* note 7, at 305-19.

18. Telecommunications Act of 1996, § 202(h), 110 Stat. at 111-12.

19. See *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1048-53 (D.C. Cir. 2002); *Sinclair Broad. Group, Inc. v. FCC*, 284 F.3d 148, 152, (D.C. Cir. 2002).

20. See Matthew Keller, Note, “Damn the Torpedoes! Full Speed Ahead”: The FCC’s Decision to Deregulate Media Ownership and the Threat to Viewpoint Diversity, 12 J.L. & POL’Y 891, 919 (2003-2004).

21. 2002 Biennial Regulatory Review—Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Report and Order and Notice of Proposed Rulemaking, 18 F.C.C.R. 13,620, 13,625 (2003) (FCC-03-127) [hereinafter 2003 Biennial Regulatory Review Order].

effect, would further deregulate broadcast ownership.²² While the FCC voted to keep local radio station ownership caps largely unchanged, it also voted to lift the ban on cross-ownership of newspapers and broadcast stations, raise the audience cap from 35% of the country's television households to 45%, and to maintain, rather than increase or decrease, the numbers of radio stations that an entity could own nationally.²³

On June 24, 2004, in *Prometheus Radio Project v. FCC*,²⁴ the Third Circuit remanded many of the FCC's proposed rules, including the FCC's decision to maintain local radio station ownership limits and the proposed lift of the cross-ownership ban.²⁵ The Third Circuit held that the proposed rules were arbitrary and capricious, and were not supported by reasoned analysis showing that they would further the public interest as required by section 202(h) of the Communications Act of 1934.²⁶

Today, the majority of the FCC Commissioners remain deeply committed to broadcast deregulation and to the "marketplace theory" of determining what is in the public interest: Chairman Kevin J. Martin has publicly stated his intention to continue to deregulate broadcasting ownership.²⁷

This Note argues that, in light of the post-1996 failure of radio deregulation and the marketplace model to protect the public interest in radio broadcasting, Congress should amend the Act of 1996 and enact new legislation that protects and promotes the public interest in diversity, competition, and localism in radio broadcasting. Certain aspects of the Radio and Concert Disclosure and Competition Act of 2005,²⁸ authored by Senator Russell Feingold, provide excellent conceptual foundations for the sort of legislation the public interest requires. Part II discusses the early history of radio regulation in the public interest, and introduces the important long-standing FCC policies of diversity, competition, and

22. See Keller, *supra* note 20, at 920.

23. See Broadcast Ownership Rules, Cross-Ownership of Broadcast Stations and Newspapers, Multiple Ownership of Radio Broadcast Stations in Local Markets, and Definition of Radio Markets, 68 Fed. Reg. 46,286, 46,286, 46,309 (adopted Aug. 5, 2003) (to be codified in 47 C.F.R. pt. 73) (FCC-03-127).

24. *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004).

25. See *id.* at 435.

26. *Id.* at 421, 432 (requiring the FCC to review existing ownership regulations and, where necessary in the public interest, to modify in either a regulatory or deregulatory manner).

27. David B. Wilkerson, *FCC's Martin to Stay Deregulatory Course*, MARKETWATCH.COM, Apr. 5, 2005, <http://www.marketwatch.com/News/Story/Story.aspx?guid={50039C41-9557-4310-9693-1FCE16EC94BE}>.

28. Radio and Concert Disclosure and Competition Act of 2005, S. 2058, 109th Cong. (2005).

localism in broadcasting that are vital to the public interest. Part III discusses the deregulation that has occurred since 1980, the enormous harm that has been suffered as a result of that deregulation, and the unfounded justifications for deregulating radio station ownership. Part IV analyzes the arguably conflicting recent decisions of the D.C. Circuit and the Third Circuit, and the FCC's Proposed Rules of 2002, which, if promulgated without modification, will continue to harm American radio listeners and set a dangerous precedent for continued broadcast deregulation. Part V proposes legislative and regulatory solutions aimed at halting or reversing the harm to the public interest caused by deregulation of radio station ownership.

II. REGULATION OF RADIO HAS HISTORICALLY BEEN A MEANS TO PROTECT THE PUBLIC INTEREST

The history of radio regulation and deregulation illustrates the vitality of radio regulation to the public interest. It also provides a context for recent debate about whether the mandate of the FCC is to protect the public interest in diversity, competition, and localism in communications, or whether it is to balance those interests against the economic interests of broadcasters.

A. Regulation of Radio Frequencies Developed in the Early 20th Century in Order to Protect Public Safety and Prevent Monopolies in Broadcasting

Federal regulation of radio began with the Wireless Ship Act of 1910,²⁹ which, in an effort to improve the safety of ships, forbade large steamers from leaving any American port without a radio.³⁰ In the wake of the Titanic disaster, Congress realized that if too many entities were broadcasting over airwaves, broadcasts could interfere with one another, endangering U.S. ships.³¹ This concern led Congress to enact the Radio Act of 1912,³² which prohibited the operation of a radio without a license from the Secretary of Labor and Commerce.³³

In addition to addressing concerns about radio interference, the Radio Act of 1912 was designed to prevent private companies from establishing

29. See *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 210 (1943) (citing Wireless Ship Act of June 24, 1910, Pub. L. No. 61-262, 36 Stat. 629 (1910)).

30. See *id.*

31. See Erwin G. Krasnow & Jack N. Goodman, *The "Public Interest" Standard: The Search for the Holy Grail*, 50 FED. COMM. L.J. 605, 608 (1998).

³² Radio Act of 1912, Pub. L. No. 62-264, 37 Stat. 302 (1912).

33. See *id.*

monopolies in radio communications.³⁴ Congress' concerns about monopolization in radio were well-founded. By 1919, a few corporations that controlled almost all patents necessary for manufacturing radios formed a partnership called the Radio Corporation of America ("RCA"), which profited handsomely from sales of radios and subsequently built broadcasting facilities around the nation in order to "build a nationwide audience who would buy radios."³⁵ Radio broadcasts proliferated quickly and interference among radio broadcasts grew.³⁶

Secretary of Labor and Commerce Herbert Hoover responded by "refusing to license more than one operator to broadcast on a single frequency . . . at a single time,"³⁷ despite the fact that his position had arguably not been vested with the power to deny the grant of broadcast licenses.³⁸ Legislators realized that governmental authorization was needed to exert some control over radio broadcasts, because the Secretary's inability to lawfully deny the grant of a broadcast license brought signal interference and chaos.³⁹ Officials stressed a concern for the impact of radio on public interest and maintained that radio should be regulated for the benefit of the public rather than the broadcasters.⁴⁰ This sentiment was consistent with Secretary Hoover's philosophy that radio communication was a business existing not only for private gain but also as a "public trust."⁴¹

Congress thus passed the Radio Act of 1927,⁴² which created the Federal Radio Commission ("FRC").⁴³ The FRC's charter required the agency to uphold the "public interest, convenience and necessity."⁴⁴ The

34. See Wilfrid C. Rumble, Comment, *The FCC's Reliance on Market Incentives to Provide Diverse Viewpoints on Issues of Public Importance Violates the First Amendment Right to Receive Critical Information*, 28 U.S.F.L. REV. 793, 809 n.112 (1994) (citing to H.R. REP. NO. 582, 62d Cong., 2d Sess. 6 (1912)).

35. *Id.* at 810.

36. *See id.*

37. Jonathan W. Emord, *The First Amendment Invalidity of FCC Content Regulations*, 6 NOTRE DAME J.L. ETHICS & PUB. POL'Y 93, 100 (1992).

38. *See id.*

39. See Krasnow & Goodman, *supra* note 31, at 608-09 (citing 67 CONG. REC. 5479 (1926) and 68 CONG. REC. 3031 (1927) (statement of Sen. Clarence Dill, co-author of the Radio Act of 1927)).

40. *See id.* at 609.

41. See Patricia Brosterhous, *United States v. National Association of Broadcasters: The Deregulation of Self-Regulation*, 35 FED. COMM. L.J. 313, 313 n.3 (1983) (citing *In re Deregulation of Radio*, 73 F.C.C.2d 457, 462 (1979)).

42. Radio Act of 1927, Pub. L. No. 69-632, 44 Stat. 1162 (repealed 1934).

43. *Id.* at 1162.

44. *Id.* at 1166.

statute also specified that any broadcast that was paid for must be “announced as paid for.”⁴⁵ Unfortunately, the Radio Act of 1927 provided few other clues as to what upholding the “public interest, convenience and necessity” entailed.

Congress attempted to address this question when it replaced the Radio Act of 1927 with the Communications Act of 1934,⁴⁶ (“Communications Act”), which created the FRC’s successor, the FCC.⁴⁷ The FCC’s commissioners “were appointed by the [P]resident, making it a political body.”⁴⁸ Most of the Radio Act of 1927’s content was incorporated into the Communications Act, most notably the requirement that the FCC uphold the “public convenience, interest or necessity.”⁴⁹ The Communications Act stated, in part, that the Commission grant and renew frequencies, and regulate to prevent interference among stations.⁵⁰ The Supreme Court later explained that in granting, denying, or revoking licenses for the operation of stations, “‘public convenience, interest, or necessity’ was the touchstone for the exercise of the [FCC’s] authority.”⁵¹

The FCC was authorized to change a licensee’s frequency or power without the consent of the licensee only when it determined that such changes “will promote the public convenience or interest or will serve public necessity, or the provisions of this Chapter will be more fully complied with.”⁵² Thus, each time the FCC issued or renewed a license, it created a trust: the license was given for free, but receipt of the license imposed a duty upon the licensee to act in the public interest.⁵³ By enforcing that duty, the FCC could further define “the public interest” in broadcasting.⁵⁴

The Communications Act required the FCC to “encourage the larger

45. *Id.* at 1170.

46. 47 U.S.C. 151 et seq.

47. See Keller, *supra* note 21, at 901.

48. QUINCY MCCOY, NO STATIC 18 (1999).

49. Radio Act of 1927, Ch. 169, 44 Stat. 1166 (repealed in 1934 and replaced with the Communications Act of 1934, which retained the “public convenience, interest or necessity” requirement); see also Nat’l Broad. Co., 319 U.S. at 216.

50. See *id.*

51. FCC v. Pottsville Broad. Co., 309 U.S. 134, 137–38 (1940).

52. Communications Act of 1934, Ch. 652, § 303(f), 48 Stat. 1064, 1082 (codified as amended at 47 U.S.C. 303(f) (2000)).

53. See Brosterhous, *supra* note 41, at 315.

54. See *id.* at 314 (The FCC was not allowed to censor content of programs aired; interference with the right to free speech was prohibited both by the First Amendment and the Communications Act); see also Communications Act of 1934, ch. 652, § 326 (codified as amended at 47 U.S.C. § 326) (2000)).

and more effective use of radio in the public interest”⁵⁵ and granted the FCC authority to make regulations applicable to radio stations engaged in “chain broadcasting.”⁵⁶ The term “chain broadcasting” was defined as “simultaneous broadcasting of an identical program by two or more connected stations.”⁵⁷ Since Congress feared that “the public interest might be subordinated to monopolistic domination in the broadcasting field[,] . . . [l]icenses were not to be granted for longer than three years.”⁵⁸ Licenses were renewable as required by “public convenience, interest or necessity[.]”⁵⁹ Congress’ fears were prescient—by 1940, “three national radio networks . . . controlled almost half the broadcast business in the country.”⁶⁰

B. Regulation of Broadcast Ownership to Protect the Public Interest in Competition, Localism, and Diversity

Pursuant to the sections of the Communications Act that authorized the FCC to grant and renew broadcast licenses in the public interest, the FCC has long regulated media ownership as a means of promoting diversity, competition, and localism, goals that are intimately intertwined in broadcast ownership regulation.⁶¹

The FCC has long recognized diversity, competition, and localism in broadcasting as vital to the public interest.⁶² The FCC defines “localism” as “the policy that requires licensees to respond to their communities’ local needs and interests[.]”⁶³ Historically, FCC regulations pertaining to localism have addressed either the extent to which broadcasting entities have local infrastructures or have attempted to regulate programming

55. Communications Act of 1934, ch. 652, § 303(g), Pub. L. 73-415, 48 Stat. 1064, 1082 (codified as amended at 47 U.S.C. 303(g) (2000)).

56. *See id.* at § 303(i).

57. 47 U.S.C. § 153 (9) (2000).

58. *Pottsville Broad. Co.*, 309 U.S. at 137.

59. *Id.* at 138.

60. Rumble, *supra* note 34, at 818.

61. *See* 2002 Biennial Regulatory Review—Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Report and Order on Notice of Proposed Rule Making, 17 F.C.C.R. 18503, 18504 (adopted Sep. 12, 2002) (In 2002, the FCC explained it “has long regulated media ownership as a means of promoting diversity, competition, and localism in the media without regulating the content of broadcast speech,” and that it had done so pursuant to sections of the Communications Act of 1934, which authorizes the FCC to grant and renew broadcast station licenses in the public interest.) [hereinafter 2002 Biennial Regulatory Review Order].

62. *See id.*

63. Kristine Martens, *Restoring Localism to Broadcast Communications*, 14 DEPAUL-LCA J. ART & ENT. L. & POL’Y, 285, 290 (2004).

content to reflect issues of local concern.⁶⁴

A single definition of “diversity” in the context of broadcasting has been elusive.⁶⁵ The FCC has considered several aspects of diversity.⁶⁶ “Viewpoint diversity,” according to the FCC, “ensures that the public has access to ‘a wide range of diverse and antagonistic opinions and interpretations.’”⁶⁷ The FCC defines “program diversity” in radio as variety of programming formats such as jazz, rock, and classical, as well as news and programming targeted at “ethnic groups.”⁶⁸

The methods by which the FCC has tried to attain the goals of diversity, competition, and localism have changed dramatically over recent decades, and many scholars question whether the agency has retained the public interest goals of localism and diversity.⁶⁹ Throughout most of its existence, the FCC furthered diversity, competition, and localism by regulating broadcast ownership.⁷⁰ In recent decades, however, the FCC abandoned the view that ownership regulations further these goals, and instead embraced the “marketplace theory” in which the broadcasting industry relies on market forces to define the public interest goals.⁷¹ In order to understand the magnitude of this shift in philosophy, one must have some familiarity with the history of ownership regulation until 1981 as a means of furthering diversity, competition, and localism.

Diversity in broadcasting has been an important “government concern since the inception of broadcast regulation.”⁷² Even the modern FCC recognized that much of Congress’ motivation for enacting the Communications Act of 1934 was its fear that the then-existing vertically integrated electronic “companies would completely monopolize radio broadcasting,”⁷³ sending one program out to many stations nationwide, and “forcing the little stations off the board so that the people cannot hear

64. *See id.*

65. *See FCC v. Nat’l Citizens Comm. for Broad.*, 436 U.S. 775, 796–97 (1978).

66. *See generally* En Banc Programming Inquiry, 44 F.C.C. 2303 (1960).

67. 2002 Biennial Regulatory Review Order, *supra* note 62, at 18516 (quoting 1998 Biennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 13 FCC Rcd 11276, 11278 (1998)).

68. 2003 Biennial Regulatory Review Order, *supra* note 22, at 13631–32.

69. *See* Panel Discussion, *Few Gate Keepers, Many Views: Will The New Rules Compromise The Representation Of Marginalized Voices?* 53 AM. U.L. REV. 547, 548 (2004).

70. *See* Cristian DeFrancia, *Ownership Controls in the New Entertainment Economy: A Search for Direction*, 7 VA. J.L. & TECH. 1, 2 (2002).

71. Prindle, *supra* note 7, at 293–94.

72. Review of the Commission’s Regulations Governing Television Broadcasting, Further Notice of Proposed Rule Making, 10 F.C.C.R. 3524, 3558 (1995) [hereinafter Television NPRM].

73. *Id.* at 3559.

anything but one program.”⁷⁴ The FCC has explained that while its concern about diversity in programming arose when most consumers had few programming choices available, the FCC believed, until relatively recently, that “[l]imiting ownership on a national basis would”⁷⁵ limit the ability of any entity to “propagate a single point of view to the American public.”⁷⁶

Section 307 of the Communications Act required the FCC to fairly and equitably distribute radio licenses among communities.⁷⁷ Section 307 became the statutory basis for the FCC’s policy of promoting localism in broadcasting in the public interest.⁷⁸

In 1938, the FCC adopted a “diversification of service” rationale, believing at the time that diversity would be better promoted by many owners competing to meet listeners’ needs.⁷⁹ Ten years later, Congress codified this principle—known as the fairness doctrine—requiring broadcasters to give airtime to issues of public importance and opposing viewpoints.⁸⁰

The United States Supreme Court soon made clear that the FCC had a legislative mandate to protect the public interest, and that the goals of promotion of diversity, competition, and localism were consistent with promoting the public interest.⁸¹ In 1940, the Court noted:

[I]t is highly significant that although investment in broadcasting stations may be large, a license may not be issued for more than three years; and in deciding whether to renew the license, just as in deciding whether to issue it in the first place, the Commission must judge by the standard of “public convenience, interest, or necessity.”⁸²

Responding to concerns about monopolization and chain broadcasting, the FCC imposed rules between 1940 and 1943 that were intended to curb the concentration of media in the hands of the powerful networks.⁸³ Broadcasting companies vehemently contested the “Chain

74. *Id.*

75. *Id.*

76. *Id.*

77. Communications Act of 1934, 47 U.S.C. § 307 (2006).

78. See 2002 Biennial Regulatory Review Order, *supra* note 62, at 18526.

79. Television NPRM, *supra* note 72, at 3528.

80. See 47 U.S.C. § 315(a) (1959).

81. See *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 138 (1940).

82. *Id.*

83. See Television NPRM, *supra* note 72, at 3528 (FCC prohibited local FM duopolies in 1940 and banned AM duopolies in 1943).

Broadcasting Rules” that the FCC promulgated in 1941.⁸⁴ Chain Broadcasting Rules were designed to reign in the networks’ practice of controlling local programming through contracts that required local stations to affiliate exclusively with one network for five years.⁸⁵ Many contracts drafted by networks allowed affiliates to refuse to air network programs only if the affiliate showed that the network’s program was not in the public interest.⁸⁶ This burden on affiliates caused them to air network-provided programming when they would have preferred to air locally-originated content.⁸⁷ The Chain Broadcasting Rules were designed to eradicate such impediments to competition and localism.

The networks sued, arguing that Chain Broadcasting Rules violated broadcasters’ First Amendment rights by restraining constitutionally protected speech.⁸⁸ In 1943, the Supreme Court upheld the constitutionality of the Chain Broadcasting Rules and the FCC’s authority to regulate chain broadcasting in *National Broadcasting Co. v. United States*.⁸⁹ The Court also held that “[t]he responsibility belongs to the Congress for the grant of valid legislative authority and to the [FCC] for its exercise.”⁹⁰ Moreover, the Court also affirmed that the public interest standard was the Congressionally-provided touchstone of the FCC’s authority to exercise those powers.⁹¹

Additionally, the Court explained the “scarcity” rationale for broadcast regulation: radio frequencies were not available to all who wished to use them.⁹² As one commentator explained: “Because one person’s transmission is another’s interference, Congress concluded that the federal government has the duty both to select who may . . . broadcast and to regulate the use of the electromagnetic spectrum to serve the public.”⁹³

The FCC asserted that contracts between networks and licensees,

84. See Rumble, *supra* note 35, at 818.

85. See *id.*

86. See *Nat’l Broad. Co.*, 319 U.S. at 201–06 (1943).

87. See *id.* at 203.

88. See *id.* at 209.

89. See *id.* at 224.

90. *Id.*

91. See *id.* at 216 (holding that the public interest standard was not unconstitutionally vague).

92. See *id.* at 213 (“[T]he radio spectrum simply is not large enough to accommodate everybody. There is a fixed natural limitation upon the number of stations that can operate without interfering with one another. Regulation of radio was therefore as vital to its development as traffic control was to the development of the automobile.”).

93. See Krasnow & Goodman, *supra* note 31, at 629.

which constrained licensees' use of assigned facilities, failed to serve the public interest.⁹⁴ The chains' anti-competitive behavior resulted in broadcasting at an inferior level and that the FCC could not continue to grant licenses to those persisting in anti-competitive practices while adhering to its statutorily-imposed duty to encourage the use of radio in the public interest.⁹⁵ The Court deferred to the FCC, holding that "[t]he avowed aim of the Communications Act of 1934 was to secure the maximum benefits of radio to all the people of the United States[.]" and that Congress endowed the FCC with "comprehensive powers to promote and realize the vast potentialities of radio."⁹⁶ The Court also deferred to the FCC's determination that the large public objectives of the Communications Act of 1934 comprehended concerns about the possibility of broadcasting monopolies, prompting the FCC to create the Chain Broadcasting Regulations.⁹⁷

In 1945, the Supreme Court stated in *Associated Press v. United States*⁹⁸ that diversity advances the values of the First Amendment, because "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."⁹⁹ One year later, the FCC released "The Public Service Responsibility of Licensees"—also known as the "Blue Book Report" or the "Bluebook"—which stated that broadcasters were obligated to serve the public interest and that the FCC, when granting and renewing licenses, would consider broadcasters' commitments to broadcasting live local programming and public affairs programming.¹⁰⁰

A 1949 FCC Report declared that the basic purpose of mass communication in a democracy is to develop "an informed public opinion through the public dissemination of news and ideas concerning the vital public issues of the day."¹⁰¹ The report declared that broadcasters had a responsibility to devote a reasonable amount of time to the coverage of controversial issues of public importance and to provide contrasting viewpoints.¹⁰²

94. See *Nat'l Broad. Co.*, 319 U.S. at 198–206 (outlining numerous contractual stipulations between networks and licensees as failing to serve the public interest).

95. See *id.* at 218.

96. *Id.* at 217.

97. See *id.* at 218.

98. *Assoc. Press v. United States*, 326 U.S. 1 (1945).

99. *Id.* at 20.

100. See Victoria F. Phillips, *On Media Consolidation, the Public Interest, and Angels Earning Wings*, 53 AM. U.L. REV. 613, 621–22 (2003).

101. Editorializing by Broad. Licensees, 13 F.C.C. 1246, 1249 (1949).

102. See *id.*

However, not all was fair in broadcasting. When the television quiz show scandals of the 1950s shook public confidence in broadcasting,¹⁰³ the FCC responded by issuing a policy statement listing elements “usually necessary to meet the public interest.”¹⁰⁴ Those elements included “opportunit[ies] for local self expression,” “news programs,” and “service to minority groups.”¹⁰⁵ The FCC emphasized that broadcasters should determine the needs of the community and “air programming suitable to meet those needs.”¹⁰⁶ In 1960, the FCC developed an “Ascertainment Process” by which stations were required to meet with community leaders and members of the public, assess the community’s needs and interests, and produce programming accordingly.¹⁰⁷

That same year, the FCC further articulated its “Trusteeship Theory” when “[t]he FCC’s grant of a license imposed a nondelegable duty upon the licensee to serve the public interest.”¹⁰⁸ The licensee was, thereby, responsible for everything presented to the public, bearing the duty to eliminate false and misleading announcements and to limit the frequency of advertising.¹⁰⁹ In the decade that followed, the FCC posited that “the greater the diversity of ownership in a particular area, the less chance there is that a single person or group can have an inordinate effect, in a political, editorial, or similar programming sense, on public opinion at the regional level.”¹¹⁰ In setting its licensing policies, the FCC adopted the theory that “diversification of mass media ownership serves the public interest by promoting diversity of program and service viewpoints, as well as by preventing undue concentration of economic power.”

In 1969, in *Red Lion Broadcasting v. FCC*,¹¹¹ the United States Supreme Court stated that, among First Amendment rights, “[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is

103. See Richard Kielbowicz & Linda Lawson, *Unmasking Hidden Commercials in Broadcasting: Origins of the Sponsorship Identification Regulations, 1927–1963*, 56 FED. COMM. L.J. 329, 347–55 (2004).

104. See Phillips, *supra* note 92, at 622 (quoting Report and Statement of Policy: En Banc Programming Inquiry, 44 F.C.C. 2303, 2314 (1960) (FCC-20-554)).

105. See *id.* (citing Report and Statement of Policy: En Banc Programming Inquiry, 44 F.C.C. 2303, 2314 (1960)).

106. *Id.*

107. See MCCOY, *supra* note 49, at 18.

108. Brosterhous, *supra* note 41, at 318 (citing Report and Statement of Policy: En Banc Programming Inquiry, 44 F.C.C. 2303, 2311–12 (1960) (FCC-20-554)).

109. See *id.* at 318–19.

110. Amendment of Sections 73.35, 73.240, and 73.636 of the Commission’s Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations, Report and Order, 45 F.C.C. 1476, 1477 (1964) (FCC-64-445) (internal quotation and cite omitted).

111. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969).

paramount.”¹¹² This statement was consistent with an assertion by the FCC twenty years earlier that the public’s right to be informed is the foundation of the American system of broadcasting and that any rights of individual entities to broadcast were inferior to the public’s right to be informed.¹¹³

In *Red Lion*, a broadcasting company aired a program featuring a verbal attack by a minister on an author.¹¹⁴ The author asked for equal time under the fairness doctrine, but the station refused.¹¹⁵ The FCC ordered the station to provide uncensored broadcast time to the author.¹¹⁶ The broadcasting company sued, arguing that the FCC’s order violated the station’s First Amendment rights.¹¹⁷ The Supreme Court rejected the broadcaster’s argument on the grounds that no one has a First Amendment right to a license or to monopolize a radio frequency.¹¹⁸ The Court continued, stating that the FCC does not violate a broadcaster’s right to free speech by denying a station license if the public interest requires such denial.¹¹⁹ Furthermore, the Court noted that subsections 307(a) and (d) of the Communications Act provided a statutory requirement that the public interest be served in granting and renewing licenses.¹²⁰ The Court explained that due to the scarcity of radio frequencies, the Government can restrain licensees.¹²¹ This later became known as the scarcity doctrine.¹²²

In the 1970s, the FCC adopted cross-ownership bans that prohibited a single entity from owning both the only television and only radio stations in the same market, or owning the only daily newspaper and only radio or TV station in the same community.¹²³ In 1978, in *FCC v. National Citizens Committee for Broadcasting*, the National Association of Broadcasters and

112. *Id.* at 390.

113. *See* Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1249 (1949).

114. *See Red Lion*, 395 U.S. at 371.

115. *See id.* at 371–72.

116. *See id.* at 372.

117. *See id.* at 386.

118. *See id.* at 389.

119. *See id.*

120. *Red Lion*, 395 U.S. at 379–80 (quoting 47 U.S.C. § 303 and § 303(r)) (“The statutory authority of the FCC to promulgate these regulations derives from the mandate to the ‘Commission from time to time, as public convenience, interest, or necessity requires’ to promulgate ‘such rules and regulations and prescribe such restrictions and conditions . . . as may be necessary to carry out the provisions of this chapter . . .’ The Commission is specifically directed to consider the demands of the public interest in the course of granting licenses, 47 U.S.C. §§ 307(a), 309(a); renewing them, 47 U.S.C. § 307; and modifying them.”).

121. *Id.* at 390.

122. *See* Glenn P. Harris, *Deregulation of Radio Revisited*, 55 GEO. WASH. L. REV. 882, 886 (1987).

123. *See, FCC v. Nat’l Citizens Comm. for Broad.*, 436 U.S. 775, 779 (1978).

the American Newspaper Publishers' Association argued that even if the cross-ownership bans promoted diversity, they violated the First Amendment.¹²⁴ They cited a previous Supreme Court decision, *Buckley v. Valeo*,¹²⁵ for the proposition that "government may [not] restrict the speech of some elements of our society in order to enhance the relative voice of others."¹²⁶

However, the Supreme Court upheld the cross-ownership rules, noting that "the broadcast media pose unique and special problems not present in the traditional free speech case,"¹²⁷ and that "enhanc[ing] the volume and quality of coverage of public issues" through broadcast regulation "may be permissible where similar efforts to regulate the print media would not be."¹²⁸ The Court upheld the FCC's rules because they enhanced the diversity of information¹²⁹ and were a "reasonable means of promoting the public interest in diversified mass communications."¹³⁰ The Court noted that the FCC had "long acted on the theory that diversification of mass media ownership serves the public interest by promoting diversity of program and service viewpoints" and "by preventing undue concentration of economic power."¹³¹ Stating that the FCC was not choosing among applicants based on their views, the Court noted that the agency's aim was "to enhance the diversity of information heard by the public."¹³² In conclusion, the Court held that the regulations were not content related and that the "purpose and effect [of the regulations was] to promote free speech, not to restrict it."¹³³

Until 1984, the FCC used restrictions on broadcast ownership as the primary means by which it promoted diversity, competition, and localism.¹³⁴ Since broadcast frequencies were inherently scarce and the public has a limited number of broadcast sources to view or listen, it served the public interest to ensure that broadcasters did not engage in monopolistic or anti-competitive behavior.¹³⁵ The FCC acknowledged that such behavior inhibits the audience's ability to receive diverse viewpoints

124. *Id.* at 796–97.

125. *Buckley v. Valeo*, 424 U.S. 1 (1976).

126. *Nat'l Citizens Comm. for Broad.*, 436 U.S. at 799 (citing *Buckley*, 424 U.S. at 48–49).

127. *Id.* (citing *Buckley*, 424 U.S. at 50 n.55).

128. *Id.* at 800 (citing *Buckley*, 424 U.S. at 50 n.55) (internal quotations omitted).

129. *Id.* at 801–02.

130. *Id.* at 802.

131. *Id.* at 780.

132. *See Nat'l Citizens Comm. for Broad.*, 436 U.S. at 801–02.

133. *See id.* at 801.

134. *See* 1984 Multiple Ownership Order, *supra* note 5, at 18–25.

135. *See id.* at 21.

and programming, including local programming that serves the community to which the station broadcasts.¹³⁶ To this end, from 1954 until 1984, FCC regulations prohibited any entity from owning more than seven AM, seven FM, and seven TV stations nationwide.¹³⁷ Duopolies, generally speaking, remained banned from the 1940s until 1992, when the FCC substantially increased the number of stations per market that one entity can own.¹³⁸ Between 1981 and today, however, the FCC's radio ownership rules and safeguards in the public interest have been almost entirely eviscerated.¹³⁹

III. DELETERIOUS EFFECTS OF DEREGULATION ON THE PUBLIC INTEREST

A. The FCC's Unsound Justifications for Deregulation Between 1981 and 1996 Remain in Effect

The FCC's efforts to regulate radio in the public interest came to a screeching halt in the 1980s as it moved in a drastically deregulatory direction; a direction which continues today.¹⁴⁰ While professing a commitment to the public interest through promotion of diversity, competition, and localism, the FCC allowed media consolidation by removing the national ownership cap.¹⁴¹ This hypocrisy was indoctrinated over a span of twenty years,¹⁴² and by the late 1990s, massive radio oligopolies began to form.¹⁴³ Examination of the FCC's policies behind the deregulation of media ownership does not merely show that the agency could have performed better analysis during this period; it also demonstrates that the FCC systematically created and relied upon false premises, which today continue to result in an unsound rationale favoring the deregulation of media ownership.

In the late 1970s, the country experienced an economic crisis with high unemployment and inflation. Politicians began to demand an explanation for the FCC's regulatory practices.¹⁴⁴ Soon a conservative political ideology of deregulation would dominate the executive branch and

136. 1984 Multiple Ownership Order, *supra* note 5, at 19.

137. *See id.* at 22.

138. *See* 1992 Radio Revision Order, *supra* note 14, at 2761.

139. *See infra* Part III.

140. *See* Phillips, *supra* note 101, at 625, 629.

141. *See id.*

142. *See id.* at 624–26.

143. *See* Prindle, *supra* note 8, at 305–07.

144. *See* MCCOY, *supra* note 48, at 19.

the FCC, whose commissioners were appointed by the President.¹⁴⁵ Ronald Reagan declared, during his presidential campaign leading up to the 1980 election, that “excessive and needless federal regulations were overburdening the nation’s economy.”¹⁴⁶ In a 1981 joint session of Congress, President Reagan stated, “[W]e must come to grips with inefficient and burdensome regulations, eliminate those we can and reform the others.”¹⁴⁷

1. During the 1980s, the FCC Unilaterally and Surreptitiously Changed Its Mission from Protecting the Public Interest to Protecting Broadcasters’ Economic Interests, in Contravention of the Communications Act of 1934.

In 1982, Republican-appointed FCC Chairman Mark Fowler made it clear that the FCC would follow Reagan’s mandate. Fowler said, “For a variety of reasons, the commission has traditionally refused to recognize the undeniable fact that commercial broadcasting is a business . . . not fiduciaries of the public, as regulators have historically perceived them.”¹⁴⁸ Fowler promoted a “marketplace approach to broadcast regulation,” under which the FCC “should, so far as possible, defer to a broadcaster’s judgment about how best to compete for viewers and listeners.”¹⁴⁹ “The FCC reasoned that the emergence of new video technologies and the increase in the number of television stations would create a sufficiently competitive economic environment,” such that the scarcity doctrine would no longer apply and the need for regulation of broadcast stations would become almost nonexistent.¹⁵⁰

Because of the new approach in which market forces determined what constituted the public interest, much of the FCC’s public interest regulation was repealed over the next decade.¹⁵¹ Broadcasters argued that public interest obligations and restrictions on broadcast ownership constituted a

145. *See id.*

146. *Id.*

147. Address Before a Joint Session of the Congress on the Program for Economic Recovery, 1981 PUB. PAPERS 108 (Feb. 18, 1981).

148. *See* MCCOY, *supra* note 48, at 19.

149. *See* Mark S. Fowler, *The Public’s Interest*, 56 FLA. B.J. 213, 213 (1982); In the Matter of Deregulation of Radio, 84 F.C.C.2d 968, 971–72 (1981) (interpreting the public interest standard as requiring the FCC to “regulate where necessary, to deregulate where warranted, and above all, to assure the maximum service to the public at the lowest cost and with the least amount of regulation and paperwork.”).

150. *See* Rumble, *supra* note 34, at 833 (citing In the Matter of The Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, 98 F.C.C.2d 1076, 1086 (1984)).

151. *See* Phillips, *supra* note 101, at 624.

threat to their First Amendment rights.¹⁵² The FCC agreed.¹⁵³ The agency vociferously began deregulating radio, couching explanations for its actions in terms of purporting to promote the public interest.¹⁵⁴ Among the regulations eliminated were programming requirements, formal ascertainment of community needs, and the fairness doctrine.¹⁵⁵ At the same time, the FCC replaced broadcast applications with postcard renewal forms.¹⁵⁶

Commentators in favor of deregulation described the repealed public interest regulations of content as resting on an uncertain constitutional foundation due in part to the demise of the scarcity doctrine.¹⁵⁷ The FCC also considered evidence presented by broadcasters that restricting group ownership hindered First Amendment freedoms.¹⁵⁸

The new model, in which the use of market incentives was deemed the best method for regulating broadcasts in light of First Amendment concerns, relied on self-regulation by broadcasters.¹⁵⁹ Though licensees were still required to act in accordance with their duty to act in the public interest, their duty was undefined.¹⁶⁰ Broadcasters' obligations were decided through cooperation between the industry and the FCC in informal discussions. This process was referred to as "regulation by 'raised eyebrow.'"¹⁶¹ The National Association of Broadcasters ("NAB"), provided broadcasters with ethical guidelines influenced by the "raised eyebrow."¹⁶²

152. *See id.*

153. *See Rumble, supra* note 34, at 833; Krasnow & Goodman, *supra* note 31, at 617, 629.

154. *See Phillips, supra* note 101, at 624-25.

155. *See MCCOY, supra* note 48, at 19; Krasnow & Goodman, *supra* note 31, at 616-17.

156. *See MCCOY, supra* note 49, at 19; *see also* Krasnow & Goodman, *supra* note 31, at 618 ("The FCC's decision to issue a shortened renewal form . . . was challenged by Black Citizens for a Fair Media on the ground that the abbreviated renewal form violated the FCC's mandate to determine that the public interest . . . would be served by granting a license. The Court of Appeals affirmed the simplified renewal process, holding that the Communications Act did not require the FCC to ask [questions related to programming] . . ." (citing *Black Citizens for a Fair Media v. FCC*, 719 F.2d 407, 409 (1983), *cert. denied*, 467 U.S. 1255 (1984))).

157. *See* Krasnow & Goodman, *supra* note 31, at 632-34 (discussing several academic and judicial analyses of the constitutionality of broadcast content regulation).

158. *See* 1984 Multiple Ownership Order, *supra* note 5, at 34-35 (considering evidence that "group-owned stations [were] more likely than independents to editorialize", and concluding that rules restricting group ownership of broadcast stations "reduc[ed] the amount of the news or public affairs programming that foster[ed] an informed electorate").

159. *See Rumble, supra* note 34, at 833.

160. *See* Brosterhous, *supra* note 41, at 314.

161. *Id.*

162. *Id.* at 315; *see also* Les Brown, *Self-Regulation In American Television In Areas Aside From Program Content*, 13 CARDOZO ARTS & ENT. L.J. 705, 706 n.7 (1995) (describing some

The FCC relaxed national broadcast ownership limits that had been in place for decades in its 1984 Multiple Ownership Order.¹⁶³ Prior to 1984, one entity was permitted to own only seven AM stations, seven FM stations, and seven television stations nationwide.¹⁶⁴ In its 1984 Multiple Ownership Order, the FCC intended for all caps on radio ownership to eventually disappear,¹⁶⁵ but provided for a transitional period in which it relaxed the national limits such that an entity could own up to twelve AM stations, twelve FM stations, and twelve television stations nationwide.¹⁶⁶

The 1984 Multiple Ownership Order reflected the FCC's view that competition in the marketplace would sufficiently serve the needs of listeners.¹⁶⁷ The theory behind this new model was that competition with other radio and television stations had increased significantly,¹⁶⁸ such that the economic interests of each licensee were sufficient to make broadcasters responsive to public interest and the needs of the community.¹⁶⁹ The FCC, relying in part on a radio-specific report written for the NAB, concluded that the concentration of radio station group-ownership was so diluted that any increase in national concentration of radio station group-ownership caused by a relaxation of national ownership caps would be negligible, while competition in local markets would be completely unaffected.¹⁷⁰

The 1984 Multiple Ownership Order further asserted that greater consolidation could *enhance* the diversity of programming and viewpoints available to the public through radio and television.¹⁷¹ The one piece of supporting evidence pertaining to radio cited by the FCC was an increase in the number of radio stations in prior decades.¹⁷² The remaining evidence

specific ethical guidelines administered by the NAB, including commercial limits, advertising bans, prohibition of smut and vulgarity, gratuitous violence, and that violations "were punishable only by denying the station the right to post the Seal of Good Practice on the screen").

163. See 1984 Multiple Ownership Order, *supra* note 5, at 18, 56.

164. See Anastasia Bednarski, *From Diversity to Duplication: Mega-Mergers and the Failure of the Marketplace Model Under the Telecommunications Act of 1996*, 55 FED. COMM. L.J. 273, 284–85 (2003); In the Matter of Amendment of § 73.3555 of the Comm'n's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations, 100 F.C.C. 2d 74, 75–76 (1985) [hereinafter 1985 Amended Multiple Ownership Order].

165. See *id.* at 55.

166. See 1984 Multiple Ownership Order, *supra* note 5, at 18 (heeding commentators' beliefs that the industry would restructure too rapidly if the caps were immediately removed).

167. See Phillips, *supra* note 101, at 624 n.58.

168. See 1984 Multiple Ownership Order, *supra* note 5, at 27–28.

169. See Phillips, *supra* note 101, at 625.

170. See 1984 Multiple Ownership Order, *supra* note 5, at 41–43.

171. See *id.* at 33–34.

172. See *id.* at 19, 30.

pertained only to television.¹⁷³ The FCC accepted broadcasters' assertions that group-owned radio stations were no more likely to present "monolithic viewpoint[s]" than independent radio stations.¹⁷⁴ Much of the evidence cited by the FCC consisted of comments by two major television networks, CBS and NBC.¹⁷⁵ Those networks asserted that each of their group-owned television stations editorialized and reported news autonomously and often.¹⁷⁶ Other evidence consisted of a study¹⁷⁷ cited by the NAB that purported to show that decisions regarding news, public affairs, and editorial areas were "under the local control of group-owned stations."¹⁷⁸ However, the 1984 Multiple Ownership Order failed to disclose that the subject of that study was limited to television and did not include radio at all.¹⁷⁹

Since the number of radio and television stations had grown, and since television networks and the NAB asserted that group-owned television stations programmed news and editorial reports autonomously, the FCC somehow concluded that the broadcasters had shown that deregulation of radio ownership, as well as deregulation of television ownership, would enable consumers to get the desired variety of information.¹⁸⁰

The FCC asserted that group-owned stations provided deeper news coverage, better quality programs, and more public service programming than independently-owned stations,¹⁸¹ which implies that an increase in group-owned stations could increase programming diversity nationwide. The 1984 Multiple Ownership Order cited a study prepared for the NAB in 1969 that compared group-owned and individually-owned television stations in six markets.¹⁸² The cited portion of that study consisted of interviews with "media personnel, owners, managers, staff and business

173. *See id.* at 24-38.

174. *See id.* at 34 (noting that it had solicited, but not received, comments providing evidence that "news which is locally originated by group-owned stations represents the group's 'monolithic viewpoint,'" the FCC deemed the evidence presented by the networks "not controverted").

175. *See id.* at 31-35 ns.47, 51-56 (citing evidence from CBS and NBC comments).

176. 1984 Multiple Ownership Order, *supra* note 5, at 34.

177. W. Lawrence Patrick & Herbert H. Howard, *Decision Making by Group Broadcasters*, J. BROADCAST., 18:4 (Fall 1974) at 467-71 (on file with the author).

178. *See* 1984 Multiple Ownership Order, *supra* note 5, at 34.

179. *See generally* Patrick & Howard, *supra* note 177.

180. *See* 1984 Multiple Ownership Order, *supra* note 5, at 38.

181. *See id.* at 31-32 (citing GEORGE H. LITWIN & WILLIAM H. WROTH, *THE EFFECTS OF COMMON OWNERSHIP ON MEDIA CONTENT AND INFLUENCE: A RESEARCH EVALUATION OF MEDIA OWNERSHIP AND THE PUBLIC INTEREST*) (1969)).

182. *See id.*

and community leaders” regarding *television* in those six markets.¹⁸³ “The study concluded [in part] that . . . [c]ommonly-owned media are perceived by business and community leaders as providing greater validity and depth of news coverage, better quality programs, [and] more public service[.]”¹⁸⁴

The FCC did not explain how the evidence it cited regarding viewpoint diversity and programming diversity in television might apply to radio. It simply asserted that the evidence regarding television showed that national caps on broadcast station ownership inhibited the development of “new programming” and “public affairs programming” in both radio and television.¹⁸⁵ The FCC concluded that the public interest, as it related to encouraging viewpoint diversity, would be well served by eliminating national ownership caps on both radio and television.¹⁸⁶

Relying on a NBC report that demonstrated that network television stations offered viewers more public affairs and news programming than independent television stations, the 1984 Multiple Ownership Order concluded that allowing radio station owners to buy more stations would advance radio listeners’ First Amendment rights.¹⁸⁷ The 1984 Multiple Ownership Order also professed the FCC’s commitment to pursuing diversity and localism in programming and viewpoints.¹⁸⁸ This assertion appears earnest: the FCC promised to scrutinize each new media acquisition in order to ensure that it did not contravene “public interest concerns, particularly those related to diversity and competition.”¹⁸⁹ Earnest or not, the FCC failed to take adequate steps to protect the public interest when it accepted the bold assertions about the effects of consolidation in television and applied those assertions to radio without examination or explanation.

A handful of non-profit organizations advocating minority and consumer rights challenged the FCC’s hypothesis, arguing that the increase in the number of media outlets had not resulted in a commensurate increase in diverse viewpoints.¹⁹⁰ The non-profit organizations argued that

183. *Id.* at 31. (citing LITWIN & WROTH).

184. *Id.* at 32.

185. *See id.* at 38.

186. *See id.*

187. *See* 1984 Multiple Ownership Order, *supra* note 5, at 37–38.

188. *See id.* at 50–56.

189. *See id.* at 55.

190. *See id.* at 29 n.38 (discussing that groups who filed comments to the FCC included: Black Citizens for a Fair Media, League of United Latin American Citizens, National Association for the Advancement of Colored People, National Association for Better Broadcasting, National Conference of Black Lawyers Communications Task Force, and the Telecommunications Research and Action Center.).

increasing the number of stations that each entity could own would inflate sale prices of media outlets, thereby inhibiting minority ownership of media.¹⁹¹ The FCC rejected these arguments, citing a lack of sufficient evidence on the part of the non-profit organizations.¹⁹²

The 1984 Multiple Ownership Order overwhelmingly favored the broadcasters' comments, explaining why it was a good idea to relax the national ownership caps.¹⁹³ The FCC rejected arguments raised by non-profit groups that relaxing national ownership caps would impair the interests of minorities.¹⁹⁴

A close reading of evidence cited in the 1984 Multiple Ownership Order indicates that the FCC was probably correct that these non-profit groups did not show that stringent caps on ownership were a legally justifiable means of regulating station prices.¹⁹⁵ The concerns of these non-profit groups were not solely restricted to the interests of potential minority broadcast owners but were also concerned that media concentration would affect viewpoint diversity in their communities.¹⁹⁶ According to the 1984 Multiple Ownership Order, the non-profit groups argued that the relaxation of national ownership caps would lead to higher station prices, which would then lead to decreased minority ownership and thereby diminish programming diversity.¹⁹⁷ When the FCC rejected these critics' arguments that stringent caps were a lawful means of regulating station prices, the agency quickly ended the inquiry about the effects of consolidation on programming diversity.¹⁹⁸ There is no evidence that the FCC either invited these groups back to comment on the broader aspects of the effects on programming diversity or held further hearings on the matter. The FCC simply dismissed arguments about ownership caps being a lawful means of regulating station prices.¹⁹⁹ The FCC then proceeded to raise the national ownership caps, accepting the broadcasters' assertions that relaxing the

191. *See id.* at 48-49.

192. *See id.*

193. *See generally* 1984 Multiple Ownership Order, *supra* note 5. The 1984 Amendment refers the NAB twenty times, CBS thirty-six times, Metromedia twenty-one times and NBC eight times. The primary groups commenting against raising the ownership caps were Turner Broadcasting, mentioned twice, the Association of Independent Television Stations, Inc., mentioned once, and the non-profit groups advocating minority station ownership. These groups were referred to collectively in the report on three occasions.

194. *See id.* at 46-49.

195. *See* 1984 Multiple Ownership Order, *supra* note 5, at 46-49.

196. *See id.* at 29.

197. *See id.* at 48-49.

198. *See id.* at 51.

199. *See id.*, *supra* note 5, at 49.

caps would increase diversity on the airwaves.²⁰⁰

Viewed in light of other deregulatory measures made throughout the 1980s and Chairman Fowler's statement that commercial broadcasters are businesses rather than fiduciaries of the public,²⁰¹ it is reasonable to question whether the 1984 increase in national radio ownership caps was truly aimed at promoting either diversity or localism. The FCC's mission had shifted from a singular focus on protecting the public interest to balancing the economic needs of commercial broadcasters against furthering the public interest. The FCC professed its attempt to increase competition in radio to be commensurate with both goals, yet wrote as though the protection of the economic interests of broadcasters was merely a byproduct of protecting the public interest through the promotion of diversity and localism.²⁰² Apparently, the economic welfare of broadcasters was so important that the FCC saw it fit to deregulate radio station ownership without investigating the state of radio. Not until 1989 would the FCC explicitly state that its media ownership goal was to strike a balance between concerns for programming and viewpoint diversity and group broadcasters.²⁰³

After the new Ownership Rules of 1984 were promulgated, the number of stations that a broadcasting company could own nearly doubled.²⁰⁴ The most disturbing aspect of 1984 change in national radio ownership caps is that the FCC's justifications for those changes were unexamined apologetics for a political and economic agenda, and these justifications failed to take into account the many ways in which radio is distinct from television.

One way in which radio is distinct from television is that the signal strengths of radio stations in a given market can vary wildly,²⁰⁵ significantly affecting the ability of each radio station to reach a large

200. *See id.* at 54–56.

201. *See* MCCOY, *supra* note 49, at 19.

202. *See* 1984 Multiple Ownership Order, *supra* note 5, at 54–55.

203. *See* Amendment of Section 73.3555 of the Commission's Rules, the Broadcast Multiple Ownership Rules, First Report and Order, 4 F.C.C.R. 1723, 1730 (1989) [hereinafter 1989 Contour Overlap Order].

204. *See generally* 1984 Multiple Ownership Order, *supra* note 5, at 54–56.

205. *See, e.g.,* Dan Caesar, *Signals Are Mixed Big Red Lovers, Haters Bring Big Ratings*, ST. LOUIS POST-DISPATCH, Aug. 31, 1990, at 2D (comparing radio stations in the St. Louis market—WRYT was handicapped by a signal strength of a mere 500 watts, while cross-town KMOX enjoyed 50,000 watt signal); Eileen Davis Hudson, *Market Profile: Grand Rapids, Mich.*, MEDIAWEEK, July 30, 2001, at 20 (noting that Clear Channel-owned Grand Rapids country radio station, WBCT, boasted a 330,000 watt signal, the most powerful in the country at the time).

number of listeners.²⁰⁶ In contrast, variances in signal strengths of commercial television are far less of an issue in the modern cable-TV era.²⁰⁷ Radio and television stations also serve different audiences at different times. Radio audiences are at their greatest during morning and late afternoon when commuters tune into their car radios, while the peak viewing audience for television is found during evening prime time.²⁰⁸ Radio stations also tend to target specific demographics for their audiences.²⁰⁹ These radio stations include: Urban Contemporary, Urban Adult Contemporary, Urban Contemporary Hits Radio, and Urban Religious, all of which capture a whopping 45% of the African American demographic.²¹⁰ Radio is also a far less expensive means of advertising than television, and thus an important marketing vehicle through which local-based businesses reach target consumers.²¹¹

For decades, radio has been listeners' primary source for learning about new music; this fact remains true even today despite the recent proliferation of music services provided by the Internet, iPods, and satellite radio.²¹² A 2005 study by Paragon Media Strategies revealed that 48% of those surveyed consider terrestrial (*i.e.*, non-satellite, non-Internet) radio their primary source of learning about new music, while only 18% considered television their primary source for learning about new music.²¹³ In addition, while television has long been the primary source of news for most people in the United States, audiences now switch to radio for news when a natural disaster has descended upon their communities.²¹⁴

206. See Alexander Reid, *Change Is In The Airwaves: Small Stations Shift to Survive in Tight Market*, BOSTON GLOBE, Aug. 7, 2005, at 1; Beth Bargar, *Lake Wylie to Lose Its Radio Station*, THE HERALD (Rock Hill, S.C.), Mar. 24, 2005, at 4B.

207. See Bob Keefe, *Digital Radio Is Beaming Your Way*, COX NEWS SERVICE, May 2, 2004.

208. See Sarah Elizabeth Leeper, "The Game of Radiopoly: An Antitrust Perspective of Consolidation in the Radio Industry," 52 FED. COMM. L.J. 473, 483 (2000) (citation omitted); ARBITRON INC., BLACK RADIO TODAY: HOW AMERICA LISTENS TO RADIO 6 (2005), 10-11 (2005), available at <http://www.arbitron.com/downloads/radiotoday05.pdf>.

209. See Leeper, *supra* note 209 (citation omitted).

210. BLACK RADIO TODAY: HOW AMERICA LISTENS TO RADIO, *supra* note 209, at 13.

211. See Leeper, *supra* note 209.

212. PARAGON MEDIA STRATEGIES, RADIO STILL STRONG DESPITE NEW MEDIA'S GROWTH, PART 3 36 (2005), available at <http://www.paragonmediastrategies.com>.

213. *Id.*

214. See ARBITRON INC., RIDING OUT THE STORM: THE VITAL ROLE OF LOCAL RADIO IN TIMES OF CRISIS 4-5 (2005), available at http://www.arbitron.com/downloads/hurricane_summary.pdf [hereinafter RIDING OUT THE STORM]. (The reasons for this include the ability of listeners to get radio signals during power outages and the mobility of radio during evacuation situations. For example, during the hurricane season of 2004, after people in the afflicted cities lost power during the storms, radio became the number one source of news and

Despite these important distinctions between radio and television, the FCC's Ownership Rules of 1984 relaxed limits on national radio ownership without considering evidence pertaining to how such changes might affect the public interest in radio listenership. Amazingly, the FCC took these actions at the same time an economically substantial scandal had developed in radio: the "Independent Radio Promotion" scandal.²¹⁵ Nevertheless, the FCC's 1984 Multiple Ownership Order focused primarily on diversity of news and public affairs programming as a means of promoting the public interest, yet relied solely on evidence regarding television. There is no reason why the FCC could not have requested and considered evidence pertaining to programming diversity and format diversity in radio, and yet the FCC failed to do so before relaxing its long-held national radio ownership caps.

Had the FCC bothered to inquire about the efficacy of market forces in ensuring programming diversity in radio in the early 1980s, the agency would have been unable to plausibly deem the marketplace theory a sufficient basis upon which to justify deregulation as being in the public interest. Moreover, the faulty conclusions made in the 1984 Report became the fundamental building blocks upon which drastic deregulation of radio station ownership took place over the next twenty years. That deregulation, if not halted, will continue in the future.

2. In the 1980s, the FCC Ignored Payola to the Detriment of the Public While Encouraging Consolidation of Radio Ownership

By the 1980s, music-driven radio had a long history of making programming decisions based on factors far removed from listeners' preferences, influenced by record companies and independent promoters

information among those surveyed in the hurricane-stricken markets, with 58% of listeners listening to their usual favorite radio stations.).

215. FCC could not or should not have been unaware of this new payola scandal. Between 1981 and 1983, this scandal was the subject of several articles in the *Los Angeles Times* and led to a call by then-Representative Al Gore, Jr. for an investigation into "payola." See Penny Pagano and Wm. Knoedelseder Jr., *Senate Plans Record Industry Payola Probe*, L.A. TIMES, Apr. 3, 1986, at A1; see also DANNEN, *supra* note 10, at 289-90; Sidak & Kronemyer, *supra* note 10, at 550-51 ("No hearings were ever held, however, because potential witnesses refused to testify. Some witnesses, Senator Gore subsequently said in 1986, refused to testify because of the fear of physical retaliation, and others refused because of a 'conspiracy of silence' in the record industry."). Eight weeks after the 1984 Rules were promulgated, the Senate Subcommittee on Oversight and Investigations conducted a three-month-long preliminary investigation into the practice of independent radio promotion. See Eric Zorn, *For the Record: Money Still Talks in Radioland*, CHI. TRIB., Feb. 20, 1985, at C1; Sidak & Kronemyer, *supra* note 10, at 530 n.35; DANNEN, *supra* note 10, at 266.

who acted as middlemen between radio stations and record labels.²¹⁶ In the recording industry, “promotion” is the term used to connote “the securing of radio airplay for new releases.”²¹⁷ Radio airplay is a form of marketing for music.²¹⁸ It notifies consumers of the availability of a new product and enables them to sample that product before purchase.²¹⁹ Today, radio airplay remains the greatest stimulant to sales of most recordings.²²⁰ Airplay by a highly rated radio station “may stimulate airplay at radio stations in other geographic.”²²¹

Gregory Sidak and David Kronemyer elegantly described the historic influence of record companies and independent promoters on which songs are played by radio stations:

The magnitude of consumer demand for a specific record cannot be readily quantified when a radio station must make the timely decision of whether or not to add that record to its playlist; yet most records effectively stop selling within three months after release. Consequently, a primary objective of record company promotion efforts is to induce some minimum sufficient number of highly rated radio stations to add a record to their playlists so that the record is reported in the hit singles charts of weekly trade publications like *Billboard* and *Radio & Records* . . . [A] team of record promoters must act with relative simultaneity to inform program directors at radio stations in geographically disperse markets that a particular artist has a new record well suited to those stations’ respective audiences. For temporal and geographic efficiency, therefore, a promotional staff must be of a certain minimum scale. A record company that has relatively few releases . . . frequently would have excess capacity if it were vertically integrated into record promotion to the extent necessary to accommodate peak loads. Not surprisingly, record companies subcontract part of the promotion function to

216. See Sidak & Kronemyer, *supra* note 11, at 523–24.

217. *Id.* at 526.

218. See *id.*

219. *Id.*

220. See *id.*; see also Dana Hall, *How to Break an Artist: Seasoned Promo Execs Tell All*, RADIO & RECORDS, Mar. 18, 2005, at 30 (quoting Noah Sheer, Senior Director of Rhythm & Crossover Promotion, Island Def Jam Music Group); see also *Media Ownership: Radio Industry: Hearing Before the S. Comm. on Commerce, Sci. & Transport.*, 108th Cong. 12 (2003) (statements of Don Henley on Behalf of the Recording Artists Coalition); see also Lorne Manly, *How Payola Went Corporate*, N. Y. TIMES, July 31, 2005, Section 4.

221. Sidak & Kronemyer, *supra* note 10, at 526.

independent contractors known as “independent promoters.”²²²

Promotion practices that involved illegal violations of federal anti-payola statutes thrived in the early 1980s.²²³ Payola is the practice of accepting or receiving valuable consideration “for the inclusion of material in a broadcast *without* disclosing that fact to the audience.”²²⁴ The most significant constraint on payola is located in Section 317 of the Communications Act.²²⁵ This provision provides that “any radio station that has received consideration for broadcasting certain material must disclose this fact along with the identity of the person furnishing such consideration, at the time of broadcast.”²²⁶ The FCC has also promulgated parallel detailed sponsorship identification rules.²²⁷ Section 508(a) of the Communications Act requires an employee of a radio station that accepts consideration, or any person who willingly supplies consideration to an employee of a radio station for the broadcast of any particular content, to disclose this fact to the station.²²⁸

During the early 1980s, the FCC should have been aware that payola thrived and that the power of independent promoters was a growing concern of the recording industry. From 1981 to 1983, the *Los Angeles Times* and *Billboard* repeatedly reported about record labels’ efforts to rein in wildly escalating costs of independent promotion, culminating in a short-lived boycott of independent promoters by several major record companies and a preliminary investigation in 1984 by the House Subcommittee on Oversight and Investigations.²²⁹

Although many people were engaged “in the independent promotion business throughout the United States in 1986,” less than 30 people “dominate[d] the field and operate[d] in an informal cooperative known as ‘The Network.’”²³⁰ The Network’s the most notorious and powerful

222. *Id.* at 527–28.

223. See generally, DANNEN, *supra* note 10, at 182–89, 209–215.

224. Charles W. Logan, Jr., *Getting Beyond Scarcity: A New Paradigm for Assessing the Constitutionality of Broadcast Regulation*, 85 CAL. L. REV. 1687, 1696 n.47 (1997).

225. See 47 U.S.C. § 317 (2000).

226. 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, 647 (2002) (citing 47 U.S.C. § 317).

227. See Radio Broadcast Services—Rules applicable to All Broadcast Stations, 47 C.F.R. § 73.1212 (2005).

228. See 47 U.S.C. § 508(a) (2000).

229. Jacqueline Trescott & Richard Harrington, *Pay-To-Play Record Scandal?*, WASH. POST, Mar. 5, 1986, at D1; Sidak & Kronemyer, *supra* note 10, at 552; DANNEN, *supra* note 10, at 213–14.

230. Sidak & Kronemyer, *supra* note 10, at 528–29.

member, Joe Isgro, was later accused by the FBI as being a “soldier” for the Gambino organized crime family.²³¹ Isgro also pled guilty to loan-sharking charges in 2000.²³²

By 1980, Warner Bros. and CBS Records were begrudgingly spending millions of dollars per year on independent promoters and were looking to change this costly practice.²³³ *Billboard* and the *Los Angeles Times* soon reported that Warner Bros. had decided to boycott the use of independent promoters.²³⁴ After *Billboard* wrote several front-page articles speculating whether other labels would join the boycott, CBS Records stopped making payments to independent promoters.²³⁵ The Network retaliated against those labels by arranging for radio stations to abruptly stop playing singles by popular music groups Loverboy and The Who after their songs had started skyrocketing up the music charts.²³⁶ Dick Asher, a CBS Records executive who had supported the boycott later reported that when CBS stopped using independent promoters, Maurice White, leader of the acclaimed and popular band Earth, Wind & Fire, begged Asher to lift the boycott so that his band’s records would again be played.²³⁷ Asher said, “You’re such a huge talent. Isn’t it demeaning to you that [an independent promoter] has to get paid off to get your records played on the air?”²³⁸ White replied, “I only have one career. So don’t make me your crusade.”²³⁹ Ultimately, the boycott did not last: in 1981, Warner Bros. returned to using independent promoters and CBS’s boycott ended mere weeks after it began.²⁴⁰

The Network exercised its market power to harm record companies that chose to terminate their contracts with Network members.²⁴¹ By 1982, the amounts that these independent promoters charged were higher than ever, and The Network’s grip on station playlists tightened.²⁴² During the

231. Chuck Philips, *Extortion Ring Linked to Gambinos, Prosecutors Say*, L.A. TIMES, Apr. 1, 2000, at B1; David Rosenzweig, *Three Agree to Plead Guilty to Loan-Sharking Charges*, L.A. TIMES, June 1, 2000, at B3.

232. See Rosenzweig, *supra* note 231, at B3.

233. Notably, CBS Records’ expenditures on independent promotion prior to 1980 had been less than \$1,000 annually. Sidak & Kronemyer, *supra* note 10, at 535; DANNEN, *supra* note 10, at 209–11.

234. See Sidak & Kronemyer, *supra* note 10, at 549; DANNEN, *supra* note 10, at 209.

235. See DANNEN, *supra* note 10, at 209–10.

236. See *id.* at 210–12.

237. See *id.* at 215.

238. See *id.*

239. See *id.*

240. Sidak & Kronemyer, *supra* note 10, at 549–50; DANNEN, *supra* note 10, at 213–14.

241. Sidak & Kronemyer, *supra* note 10, at 550.

242. DANNEN, *supra* note 10, at 214.

same time period, CBS Records fired 300 employees and closed nine sales branches, while the label spent at least \$10 million on independent promotion.²⁴³

In July 1984, the FCC published its Rules Relating to Multiple Ownership of AM, FM, and Television Broadcast Stations. At that time, the Senate Subcommittee on Oversight and Investigations was in the midst of "a three-month long preliminary investigation of independent promotion."²⁴⁴ In September 1984, the Subcommittee concluded that "because of the enormous sums of money involved and the manner in which record promotion and the charting of records operate, there are ample opportunities and incentives for improper or illegal activities," although the inquiry failed to "uncover credible evidence of specific incidents of improper or illegal activity"; and consequently deemed a full Senate inquiry unjustifiable.²⁴⁵ Even this weak (but suspicion-arousing) statement should have tipped off the FCC that perhaps this was not the best time to deregulate radio station ownership.

Had either the Subcommittee or the FCC conducted a full investigation, they may have discovered what was then common knowledge in the industry: independent promoters had a stranglehold on the nation's playlists. By July 1985, Motown Records' president wrote to the president of the Recording Industry Association of America ("RIAA"), a trade association that represents record labels in America, and stated, "We should be meeting about the high cost of trying to get our records played on radio, which, to a great extent, has nothing to do with the record's quality but rather with who pays the most."²⁴⁶ Motown and other labels urged the RIAA to investigate independent promoters, but other labels quashed the investigation by refusing to participate.²⁴⁷

An example of how independent promotion operated during this era is evident in the relationship between independent promoters Ben and Tony Scotti ("Scotti Brothers") and Bill Tanner, Vice President of Metroplex Communications. When Tanner left Metroplex in 1984, competitors of the Scotti Brothers, Bruce and Gary Bird, claimed Metroplex's Miami radio stations as *their* territory.²⁴⁸ This led to a fierce dispute between the two promoters and allegedly involved a physical altercation resulting in serious

243. *Id.* at 224.

244. Sidak & Kronemyer, *supra* note 10, at 552.

245. *Id.*

246. *Id.* at 554.

247. *See Id.* at 554–56.

248. DANNEN, *supra* note 10, at 195.

injury to Bruce Bird.²⁴⁹ Since the impetus for this confrontation was Tanner's departure, this suggests that in the same year in which the FCC's national ownership rules were relaxed, some radio group owners knew of and tolerated exclusive arrangements between their radio stations and independent promotion representatives.

This author knows of no evidence that the FCC Commissioners had actual knowledge of the payola scandals going on at the time the 1984 Rules were being written, but the FCC *did* have a statutorily-imposed mandate to protect the public interest in radio station practices. This mandate required the FCC to investigate whether there existed connections between radio station group owners and independent promotion representatives who were engaging in anti-competitive and payola-like practices. At the very least, the agency had a duty to find out whether any other government entity was investigating current practices in radio promotion and await the outcome of such investigations before promulgating its rules deregulating radio station ownership.

The influence of independent promoters on radio station playlists in the 1980s calls into question the validity of the FCC's marketplace theory as it applies to radio. The marketplace theory "assumes that broadcasters will inherently act in the public interest by adjusting their content to satisfy their audience's preferences" for diverse programming; any stations failing to do so would lose profits.²⁵⁰ At group-owned stations whose playlists were controlled via exclusive deals with independent promoters, diversity of programming and the public interest were curtailed. The fact that the marketplace theory was not working in radio should have been of interest to the FCC. Instead, the FCC failed to examine the state of radio before deciding to deregulate radio ownership. It never looked back.

A portion of the FCC's 1984 Multiple Ownership Order addressed effects of group ownership on diversity. That portion stressed that no "commenter[s]" had provided evidence of "group owners suppressing independent viewpoints" despite the FCC's request for examples of such conduct.²⁵¹ Although some record executives requested a government inquiry into independent promotion in 1984 as promotion costs escalated and it became increasingly difficult to get records played on the basis of

249. *Id.* at 194–96 (noting that according to Dannen, in February 1985 a brawl erupted between Bruce Bird, Tony Scotti and Scotti's bodyguard over rights to promote to the Miami station. The brawl allegedly resulted in Bird's having a broken leg.).

250. Bednarski, *supra* note 164, at 280.

251. 1984 *Multiple Ownership Order*, *supra* note 5, at 34–35.

merit,²⁵² comments by record companies were nowhere to be found in the 1984 Multiple Ownership Order record. This may be explained, in part, by the fact that the FCC did not discuss or solicit specific comments on the potential effects of media consolidation on programming diversity in music-driven radio. Rather, the FCC focused its inquiry on potential effects of consolidation on viewpoint diversity specifically related to national political discourse.²⁵³

There is no reason to believe that record executives, who were preoccupied with extortion by independent promoters and trying to make hit records, knew about the FCC's call for comments on the potential effects of deregulation on *viewpoint* diversity. Ironically, twenty years later, viewpoint-suppressing conduct by radio conglomerates would become the subject of national headlines and a Senate Commerce Committee hearing after further deregulation in the 1990s led to widespread consolidation and more sophisticated corruption in radio.²⁵⁴

3. In 1992, the FCC Further Deregulated Radio Ownership Without Justification, Despite Evidence that the Public Interest in Programming Diversity Was Harmed by Radio Programmers Accepting Money, Sex, and Drugs

The *New York Times* reported in 1990 and 1991 that it was common practice for money, sex, drugs, and vacations to be regularly offered to and

252. See DANNEN, *supra* note 10, at 264–67.

253. See Multiple Ownership of AM, FM, Television Broadcast Stations, 48 Fed. Reg. 49438, 49450 (1983) (FCC-83-440) (to be codified as 47 C.F.R. pt. 73). Only one small paragraph in the 1983 Notice of Proposed Rulemaking notes that “if entertainment is considered as part of the information as to which the Commission actively has diversity concerns, the market likely should be viewed to include information from . . . records and tapes . . . [t]he Commission solicits comment on this point.” Nowhere in the 1983 Notice of Proposed Rulemaking or in the Multiple Ownership Order did the FCC specifically address issues pertaining to programming diversity as related to music on the radio airwaves; see generally, In the Matter of Amendment of Section 73.3555 of the Commission’s Rules relating to Multiple Ownership of AM, FM and Television Broadcast Stations, 100 F.C.C.2d 17, 34 (FCC-84-638) (1984) [hereinafter 1985 Amended Multiple Ownership Order].

254. See, e.g., Jennifer Lee, *Musicians Protesting Monopoly In Media*, N.Y. TIMES, Dec. 18, 2003, at E1 (reporting that Cumulus Broadcasting had issued a temporary moratorium on playing music by the Dixie Chicks “after Natalie Maines, a member of the group, said she was ashamed to be from the same state as President Bush”); Anne Hull, *Uncowed Cowgirls*, WASH. POST, Aug. 8, 2003, at C1 (reporting that the corporately-issued Cumulus ban of the Dixie Chicks’ music was the topic of a Senate Commerce Committee meeting in July, 2003.). Chairman John McCain (R-Ariz.) told Lewis Dickey, CEO of Cumulus Media, “I was as offended as anyone by the statement of the Dixie Chicks, but to restrain their trade because they exercised their right of free speech is remarkable.”).

accepted by radio program directors.²⁵⁵ It added that those transactions influenced decisions about what records would be added to playlists and the extent to which certain records were played.²⁵⁶ At the same time, Top 40 radio was suffering from declining ratings on a national basis.²⁵⁷

In 1991, the FCC again initiated proceedings to relax the national caps on radio station ownership, ultimately resulting in rules permitting one company to own twenty AM and twenty FM stations.²⁵⁸ The FCC also increased the number of stations per market that one entity could own.²⁵⁹ Eliminating its prohibition on duopolies, the 1992 Radio Revision Order allowed one entity to own up to six radio stations in large markets, or up to four radio stations in medium markets.²⁶⁰ One entity could own up to three stations in small markets.²⁶¹

The FCC asserted in 1992, and continues to assert today, that the scarcity doctrine no longer applies to radio because the number of radio stations in most markets has increased dramatically, as has the number of non-radio media outlets that compete with radio for audience and advertising dollars.²⁶² The FCC further claimed that because of increased competition for advertisers, revenue in the radio industry decreased dramatically while "radio station programming ha[d] become increasingly diverse and targeted."²⁶³ The FCC based its conclusion based on the fact that industry trade publications kept track of more named formats than they had in previous years.²⁶⁴

The 1992 Radio Revision Order did not mention that between 1988 and 1992, countless interviews with top radio programmers underscored the axiom that successful programming in commercial radio formats required "playing the hits" and exclusion of less familiar material.²⁶⁵ It can

255. David Browne, *Pop Radio Suffers a Midlife Crisis*, N.Y. TIMES, July 28, 1991, at Section 2; Larry Rohter, *At Payola Trial, Primer on Forms and Mechanics*, N.Y. TIMES, Aug. 25, 1990, at L11.

256. Rohter, *supra* note 256, at L11.

257. Browne, *supra* note 256, at Section 2.

258. Martens, *supra* note 63, at 308.

259. 1992 Radio Revision Order, *supra* note 14, at 2761.

260. *See id.* at 2776.

261. *Id.*

262. *Id.* at 2757-58, 2765.

263. *Id.* at 2758.

264. *See id.*

265. *See, e.g.*, Dan Kening, *WNUA Finds a Lite Diet Can Make a Station Grow*, CHI. TRIB., July 5, 1992, at 5 (quoting John Gehron, General Manager of Chicago Smooth Jazz station WNUA); Phyllis Stark, *Billboard's PD of the Week*, BILLBOARD, June 15, 1992 at 67 (quoting Suzy Mayzel, Program Director of San Francisco AC station KOIT); Sean Ross, *Country Music Riding High, Multiple Country Radio Stations Proliferating In Many Markets*, BILLBOARD, Oct.

be argued that hits were far more important to radio stations than programming diversity. This was especially true at “urban” or “black music” stations. Cliff Winston, Program Director of Los Angeles urban station KJLH in 1989, lamented, “A Motown record would come in and you’d want to play it; you’d want to support black business, but radio is a business too and you have to play the hits.”²⁶⁶ Similarly, Michael Saunders, Program Director of Charlotte urban station WPEG, explained in 1988 how he substantially increased WPEG’s ratings:

We played only the hits instead of anything and everything that’s black music We listened to what other radio stations in other markets were doing. When I was calling around, it wasn’t enough for a song to be doing OK. It had to be kicking—a guaranteed hit—before we added it We’re better now.²⁶⁷

The FCC’s 1992 Radio Revision Order asserted that radio stations could not serve the public interest if they could not profit, or worse yet, if they could not stay on the air.²⁶⁸ The FCC further concluded that prior limits on ownership hampered competition and diversity by denying stations economies of scale associated with consolidation, to the extent that some stations had to decrease news programming in order to cut costs.²⁶⁹

In the 1992 Radio Revision Order, the FCC stated that “relaxation of national caps [on radio station ownership] may actually enhance viewpoint diversity.”²⁷⁰ The FCC first attempted to support this assertion by citing evidence in the record of the 1984 Ownership Report and Order,²⁷¹ despite the fact that almost all evidence cited therein did not pertain to radio. The 1992 Radio Revision Order then cited the FCC’s 1989 Contour Overlap Order, which gave no support whatsoever for the view that relaxation of national ownership caps may enhance viewpoint diversity.²⁷² Rather, the 1989 Contour Overlap Order included a perfunctory statement that the FCC did not “believe that scarcity was a reliable indicator of the degree of viewpoint diversity or programming diversity.”²⁷³

12, 1991, at 1 (quoting Moon Mullins, country radio programming consultant).

266. Paul Grein, *Pop Eye: Motown on the Road to a Comeback*, L.A. TIMES, July 30, 1989, at E 70.

267. Jeff Borden, *Anatomy of an FM Turnaround*, ELECTRONIC MEDIA, Dec. 19, 1988 at 22.

268. See 1992 Radio Revision Order, *supra* note 14, 2760.

269. *Id.* at 2774.

270. *Id.* at 2766.

271. *Id.*

272. See 1989 Contour Overlap Order, *supra* note 204, at 1727, 1729.

273. *Id.* at 1727.

The 1992 Radio Revision Order would have been honest if it had stressed the following: (1) even if national media ownership caps somehow still promote diversity, competition, and localism, the viability of the scarcity doctrine as the rationale behind the caps is now questionable such that both the caps and their justifications must be re-examined from head to toe; and (2) although the FCC did not know how national ownership caps might protect the public interest, it understood that broadcasters have substantial economic interests in cost-savings through consolidation.

Instead, having relied so long on the scarcity doctrine as a justification for national media ownership caps, the FCC took aim at the caps themselves rather than considering whether there might be other good reasons to keep the caps at the status quo. The FCC assumed that the scarcity doctrine was the strongest justification for regulation of media ownership.²⁷⁴ The 1992 Radio Revision Order showed that the FCC assumed that every possible rationale for limiting media ownership was obliterated solely because the scarcity doctrine was subject to new legitimate criticisms.²⁷⁵ The 1992 Radio Revision Order failed to recognize that the applicability of the FCC's marketplace theory to radio was *also* subject to new legitimate criticisms in light of the independent promotion scandal and the increasingly prevalent trend to "play the hits," all of which acted to the detriment of program diversity. Worse yet, the FCC acted as if there was compelling evidence in the record to support the conclusion that relaxing national radio station ownership limits could actually *enhance* viewpoint diversity, when in fact the FCC relied solely on comments of broadcasting lobbyists and reports on the effects of consolidation about television.

B. The Telecommunications Act of 1996

Congress enacted the Telecommunications Act of 1996 ("1996 Act"),²⁷⁶ which dramatically exacerbated harms to diversity, competition, and localism that had occurred since 1980. The 1996 Act relaxed broadcast ownership limits, forsaking localism and diversity in favor of economic

274. See generally 1992 Radio Revision Order, *supra* note 14, at 2756–57 (arguing that since the number of radio stations had increased significantly *In recent years*, as had non-radio entities competing with radio for audience and advertising dollars, those findings were a sufficient basis upon which the FCC relaxed its radio ownership caps.).

275. See *id.*

276. Telecommunication Act of 1996, Pub. L. No. 104–104, 110 Stat. 56 (1996) (codified as amended in scattered sections of 47 U.S.C.).

efficiency for broadcasters.²⁷⁷ While consumer advocates warned that the 1996 Act would result in less diversity, inferior programming, and fewer checks on political power,²⁷⁸ the NAB lobbied fiercely, arguing that it would increase competition and investments, and create millions of jobs.²⁷⁹ At the height of deliberations on the 1996 Act, broadcasters contributed over \$735,000 to the campaigns of the chairmen of the Senate and House Telecommunications Subcommittees.²⁸⁰

Section 202(a) of the 1996 Act removed the national radio station ownership caps entirely, such that broadcasters were free to acquire as many stations nationwide as they wished.²⁸¹ The 1996 Act further expanded the number of radio stations an entity could own locally: eight stations in large markets, six or seven stations in medium markets, and up to five stations in small markets, as long as that entity did not control more than 50% of stations in the market.²⁸² Each cap restricted the number of stations that an entity could own on either the FM or AM dial. These “subcaps” required any owner who wanted to maximize the number of stations owned in a market to own some AM and some FM stations, rather than all FM or all AM.²⁸³ The 1996 Act further streamlined the license renewal process, “making it even harder for new entrants to break in.”²⁸⁴

The 1996 Act also changed television ownership rules dramatically in favor of broadcasting companies who wished to further consolidate. The 1996 Act extended the length of television licenses from three to eight years and also increased the proportion of the national television audience that could be reached by a single owner from 25% to 35%.²⁸⁵

Section 202(h) of the 1996 Act also imposed an obligation upon the FCC to periodically review the rules promulgated by the 1996 Act.²⁸⁶ The section states:

277. See Prindle, *supra* note 7, at 305–19.

278. See MCCOY, *supra* note 48, at 20; See Phillips *supra* note 101, at 624–25.

279. MCCOY, *supra* note 48, at 23–24.

280. Those chairmen were Sen. Larry Pressler (R-S.D.) and Rep. Jack Fields (R-Tex.). See Anthony E. Verona, *Changing Channels and Bridging Divides: The Failure and Redemption of American Broadcast Television Regulation*, 6 MINN. J.L. SCI. & TECH. 1, 83 (2004) (citing Arthur E. Rowse, *A Lobby the Media Won't Touch*, WASH. MONTHLY, May 1998, at 8, 11).

281. Telecommunication Act of 1996, Pub. L. 104–104, 110 Stat. 56, 47 U.S.C. § 202(a).

282. See *id.* 47 U.S.C. § 202(b)(1)(D).

283. See *Prometheus Radio Project v. FCC*, 373 F.3d 372, 434 (3d Cir. 2004) (referring to the AM/FM restrictions as “subcaps”).

284. See Phillips, *supra* note 101, at 625.

285. Telecommunication Act of 1996, Pub. L. 104–104, 110 Stat. 56, 47 U.S.C. § 202(c)(1)(B).

286. See *id.* 47 U.S.C. § 202(h).

The Commission shall review its rules adopted pursuant to this section and all of its ownership rules biennially as part of its regulatory reform review under Section 11 of the Communications Act of 1934 and shall determine whether any of such rules are necessary in the public interest as the result of competition. The Commission shall repeal or modify any regulation it determines to be no longer in the public interest.²⁸⁷

Section 202(h) of the 1996 Act creates and applies a timetable to the periodic review requirement of the Communications Act of 1934.²⁸⁸

After the 1996 Act was promulgated, broadcasters, consumer groups, and the FCC all had different ideas of what section 202(h) required of the FCC in its periodic review process.²⁸⁹ Media companies, the Republican majority of the FCC commissioners, and many commentators believed that Section 202(h) erected a “deregulatory presumption” in favor of repealing, rather than *repealing or modifying* the ownership rules.²⁹⁰ Consumer groups, many members of Congress (both Republican and Democrat), and the two Democrat FCC Commissioners believed that the plain meaning of Section 202(h) compelled the FCC to periodically review and either repeal *or modify* ownership rules that were no longer in the public interest, and that the statute was not presumptively deregulatory.²⁹¹ This debate continues today and has been the subject of several important, arguably conflicting, decisions of the Courts of Appeal for the D.C. and Third Circuits.²⁹²

C. The Harmful Effects of the 1996 Telecommunications Act on Radio Listeners

The 1996 Act radically changed the broadcasting marketplace,

287. *Id.*; In January 2004 Congress amended § 202(h) by making the Commission’s biennial review obligation quadrennial, and insulating from §202(h) review rules relating to the 39 percent national audience reach limitation. See Consolidated Appropriations Act, 2004, Pub. L. No. 108–199, 118 Stat. 3, 100 (2004).

288. *See id.*

289. *See id.* at 390–95.

290. *See, e.g., Media Ownership Rules: Hearing of the S. Commerce, Sci., and Transp. Comm.*, 108th Cong. 5 (2003) (statement of Sen. John McCain (R-AZ), stating that he believed that § 202(h) allowed the FCC to tighten its ownership restrictions as well as loosen them, but that it was not clear that the courts agreed. He cited the D.C. Circuit’s statement that § 202(h) “carries with it a presumption in favor of repealing or modifying ownership rules,” and that Congress had set in place a “process of deregulation by enacting § 202(h).”).

291. *See id.*

292. *See id.*

causing rapid consolidation of radio station ownership.²⁹³ In 1997, “4,000 of the country’s 11,000 radio stations changed hands.”²⁹⁴ Between 1996 and 2002, the number of radio owners in the U.S. decreased by 34%.²⁹⁵ In 1996, the two largest radio group owners owned fewer than sixty-five radio stations each.²⁹⁶ By 2002, the two largest radio group owners owned a combined 1,407 stations, while the third, fourth and fifth largest owned a combined 490 stations nationwide.²⁹⁷ In the fifty largest markets, the four largest radio groups reaped 86% of the radio industry’s total revenue.²⁹⁸ The effect of consolidation on revenue in small markets was even more pronounced: in 2002, in the smallest 100 markets, the four largest radio conglomerates collectively earned 96% of all revenues in radio.²⁹⁹

However, the power that radio group owners exert cannot be measured merely by percentages of radio stations owned or advertising revenue. One must also consider factors such as geographic markets represented, signal strengths, and audience market shares of stations owned. Many radio stations owned by large radio groups enjoy high market shares relative to radio stations in their market that are not group-owned,³⁰⁰ yet large audience market shares do not necessarily indicate that a station serves its audience well. Alternatives to music-driven terrestrial radio are still scarce. Terrestrial radio stations are still finite in number, and not every consumer has the financial and technological resources to listen to satellite radio or a portable digital audio device. A high market share simply indicates a terrestrial radio station’s relative power to reach listeners in any given marketplace compared to other terrestrial radio stations in that market.³⁰¹ Radio stations with high market shares often have a higher wattage signal that reaches larger geographic areas than those

293. See Bednarski, *supra* note 164, at 287.

294. See Adam J. Van Alstyne, *Clear Control: An Antitrust Analysis of Clear Channel’s Radio and Concert Empire*, 88 MINN. L. REV. 627, 639 (2004) (quoting Jeff Leeds, *Clear Channel’s Dominance Obscures Promotions Conduit*, L.A. TIMES, Aug. 3, 2001, at C4).

295. See GEORGE WILLIAMS & SCOTT ROBERTS, FCC MEDIA OWNERSHIP WORKING GROUP, RADIO INDUSTRY REVIEW 2002: TRENDS IN OWNERSHIP, FORMAT, AND FINANCE 3 (2002), http://hraunfross.fcc.gov/edocs_public/attachmatch/DOC-226838A20.doc.

296. See *id.* at 3.

297. See *id.* at 4.

298. See *id.* at 6.

299. See *id.*

300. See generally, PETER DICOLA & KRISTEN THOMSON, FUTURE OF MUSIC COALITION, THE FUTURE OF MUSIC COALITION, RADIO DEREGULATION: HAS IT SERVED CITIZENS AND MUSICIANS? (2002), <http://www.futureofmusic.org/images/FMCradiostudy.pdf> [hereinafter FMC REPORT].

301. See *Arbitron Radio Market Reference Guide*, Feb. 2002, at 2.1, <http://www.arbitron.com/downloads/purplebook.pdf>.

without this technological advantage. Large media conglomerates have ample financial resources to purchase radio stations whose assets include strong wattage signals.³⁰² Consequently, these conglomerates, at least to some extent, buy, rather than earn, local market share.³⁰³

1. Since 1996, National Radio Consolidation Combined With Local Radio Consolidation Has Resulted in Decreased Programming Diversity at Music-Driven Radio

The result of the 1996 Act was commensurate with the predictions of consumer advocate Ralph Nader: "less diversity, more prepackaged programming, and fewer checks on political power."³⁰⁴ Dave Marsh, a longtime editor at *Rolling Stone* magazine, explained that one must be careful not to confuse what is ubiquitous on the radio with what people like in music.³⁰⁵ Programmers' decisions about music are driven by financial considerations, aimed at particular demographics for purposes of selling advertising.³⁰⁶ According to Marsh, radio owners are now considering art less than ever due to debt incurred from consolidation and increased pressure by shareholders to maximize cash flow.³⁰⁷

Radio group owners often target a relatively high proportion of their radio stations at listeners aged twenty-five to fifty-four years old because those demographics have relatively high disposable incomes and are therefore desirable to advertisers.³⁰⁸ For example, an all-sports AM station that reaches the male twenty-five to fifty-four year-old demographic in New York can charge significantly more for its advertising than another New York station that actually reaches more listeners across varying demographics.³⁰⁹ Although the owner of multiple stations may appear to have incentives to prevent its stations from competing with each other for

302. See 2003 Biennial Regulatory Review Order, *supra* note 22, at 13,719 ("[R]adio stations with larger signal contours are more likely to reach a wider audience.").

303. See, e.g., Event Brief of Q4 2004, Spanish Broadcasting System Earnings Conference Call-Final, FAIR DISCLOSURE WIRE, Mar. 10, 2005.

304. See MCCOY, *supra* note 48, at 20.

305. See Jeanne Anne Naujeck, *Money Behind No. 1 Hits Raises Crucial Eyebrows*, TENNESSEAN, Jan. 30, 2005, at 1A.

306. See *id.*

307. See *id.*

308. See Randy Dotinga, *Radio Stations Nudge Oldies Format Off the Air*, CHRISTIAN SCIENCE MONITOR, June 9, 2005, at 11; see also Brad Kava, *Station Jilts Young Fans, Saying Rock Didn't Pay 104.9-FM has Switched to Music in Spanish*, SAN JOSE MERCURY NEWS, Jan. 4, 2006, at B1.

309. See Chandrani Ghosh, *A Guy Thing*, FORBES, Feb. 22, 1999, at 55.

specific demographics,³¹⁰ station owners often program their local stations to target the same demographic to corner that market, which prevents new entrants from targeting that demographic and drives up advertising rates.³¹¹ Many radio group owners try to “superserve” the demographics most attractive to advertisers while abandoning audiences that represent “less desirable” demographics.³¹²

Nowhere has this trend been more evident than in New York City. Post-1996 consolidation allowed Chancellor Media to corner the market on female listeners in New York.³¹³ After acquiring five radio stations in that city, the company built what it called its “Wall of Women” by devoting four of those stations to women of different ages.³¹⁴ At the same time, CBS Radio³¹⁵ acquired 35% of the New York City market by targeting male listeners with its sports and rock stations.³¹⁶

More recently, Emmis-owned WQCD, a heritage “Smooth Jazz” station that had long played a mixture of instrumental pop and vocals, changed its sound in late 2004 to decrease the median age of its listeners *In* response to research that showed advertisers in New York now targeted consumers aged eighteen to forty-nine rather than twenty-five to fifty-four.³¹⁷ WQCD swapped about 30% of its playlist for a developing genre of music known as “Chill,” which has long been popular among younger adults in Europe.³¹⁸ WQCD’s decision reflected the fact that “chill” music was being heard ubiquitously in Manhattan clubs, trendy restaurants, stores, and coffee bars.³¹⁹ WQCD’s programming shift was an innovative way to try to superserve younger listeners, but it left open the following question: which radio stations will serve New Yorkers who are over fifty years old?

One who asserts to a New Yorker over fifty years old that the radio

310. See Prindle, *supra* note 7, at 299–300.

311. See Matthew Schiffrin, *Radio-active Men*, FORBES, June 1, 1998, at 130–34.

312. See Dotinga, *supra* note 309, at 11; Kava, *supra* note 309, at B1; Frank Green, *Fading Out*, SAN DIEGO UNION-TRIB., Sept. 17, 2005, at C1.

313. See Schiffrin, *supra* note 312, at 134.

314. *Id.*

315. Media giant Viacom owns CBS and merged with Infinity Broadcasting in 2001. See *CBS Broadcasting, Inc.*, HOOVER’S IN-DEPTH COMPANY RECORDS, 2005 WLNR 14446607, Sep. 14, 2005; David Lieberman, *Karmazin Joins Stern to Pump Up the Volume at Sirius*, USA TODAY, Nov. 19, 2004, at 1B.

316. See Schiffrin, *supra* note 311, at 134.

317. See Carol Archer, *CD101.9’s New Position: New York Chill*, RADIO & RECORDS, Dec. 3, 2004, at 51.

318. See *id.*

319. See Archer, *supra* note 318, at 51.

marketplace today adequately serves the public's interest in programming diversity is likely to be met with a blank stare. Although the owners of WQCD and WCBS do not bear all responsibility to serve the public interest in programming diversity, the recent changes at these stations illustrate how the FCC's marketplace model for serving the public interest is flawed. As Sean Ross, radio consultant with Edison Media Research, put it, "The day you turn [forty-five], there is not necessarily a radio station concerned with serving you unless you can bring your [twenty-five year old] daughter along."³²⁰

Since WQCD and WCBS made their programming shifts, both stations suffered a decline in overall ratings but have enjoyed some improvements among target demographics.³²¹ WQCD has since reduced the amount of "chill" in its playlist in hopes of enticing back core listeners, while keeping enough "chill" to maintain an edgier image.³²²

Advocates of deregulation point to an "increase in number of [music] formats as proof that relaxed ownership restrictions result in *increased* programming diversity."³²³ NAB has argued that programming diversity has increased, citing a Bear, Stearns & Co. study which showed that the number of formats has increased since 1996.³²⁴

Opponents of deregulation argue that music format categories are inadequate measures of programming diversity since there is substantial overlap in playlists among music formats.³²⁵ In 2002, the Future of Music Coalition ("FMC") found that many formats purporting to be distinct from each other have many songs common to their playlists.³²⁶ Seventy-six percent of the songs played on "Rhythmic Contemporary Hits" radio were also played on "Urban" radio stations.³²⁷ Of songs played by "Active Rock" and "Alternative" stations, 58% were common to both formats.³²⁸

NAB spokesman Dennis Wharton tried to discredit the FMC's

320. See Dotinga, *supra* note 309, at 11.

321. See Carol Archer, *Chill With Chris Botti Earns Impressive Ratings*, RADIO & RECORDS, Sept. 2, 2005, at 47; Claudia Perry, *Switch Fails to Jack Up 101's Ratings*, NEWARK STAR-LEDGER, July 19, 2005, available at <http://www.starledger.com/> (search title); Ed. Valerie Block, *New York, New York*, CRAIN'S N. Y. BUS., July 25, 2005.

322. See Carol Archer, *Programming Adjustment at CD 101.9*, RADIO & RECORDS ONLINE, Aug. 19, 2005 (on file with the author).

323. Prindle, *supra* note 7, at 313 (emphasis added).

324. See *id.*; see also Response to National Association of Broadcasters' "Fact Sheet," <http://www.futureofmusic.org/research/nabresponse.cfm> (last visited Mar. 25, 2005).

325. See Prindle, *supra* note 7, at 314.

326. See FMC Report, *supra* note 301, at 56.

327. See *id.*

328. See *id.*

conclusion that program diversity had decreased, again citing increases in the number of radio formats, explaining that “[r]adio stations stay in business by giving listeners what they want.”³²⁹ Wharton stated, “If there is a viable market for a format, someone will provide it.”³³⁰ Wharton failed to address the fact that the FMC study undermined NAB’s assertions that programming diversity had increased.

In 2004, the *Chicago Tribune* did its own analysis of playlists of commercial radio stations across the country, comparing other stations’ playlists to those of similarly-formatted Chicago-area stations.³³¹ The publication found that the lists of top-ranked songs in small and large stations across the country were remarkably similar to the playlists of Chicago’s pop, urban, and “alternative” rock stations.³³² Markets whose playlists were analyzed included diverse communities such as Little Rock, Anchorage, Honolulu, and Los Angeles.³³³

In 2002, the FMC also conducted a survey of 500 listeners that showed that the respondents that listen to multiple stations each week do so primarily to seek variety.³³⁴ By 2005, consultants and analysts of radio acknowledge that research showed that listeners were becoming dissatisfied with the predictability and amount of repetition of music on radio.³³⁵

Critics of consolidation claim that the “centralization of control has homogenized the industry, creating cookie-cutter formats driven too much by audience research and focus groups.”³³⁶ Broadcasters have relied more heavily on research since 1996,³³⁷ in part because consolidation eliminated

329. David Hinckley, *Report Says Format Choice Is Too Limited*, DAILY NEWS (N.Y.), Nov. 19, 2002, at 108; see also Jeff Leeds, *Study Shows an Increase in Overlap of Radio Playlists*, L.A. TIMES, Nov. 15, 2002, at C5 [hereafter *Study Shows Playlist Overlap*].

330. Hinckley, *supra* note 329, at 108.

331. See Bob Gendron, *Radio Zzzzzz America: Across The Country, Most Stations Have Abandoned Regional Flavors For Fast-Food Style Uniformity*, CHI. TRIB., June 6, 2004, available at <http://pqasb.pqarchiver.com/chicagotribune/access> (perform archive search).

332. See *id.*

333. See *id.*

334. See FMC Report, *supra* note 301, at 68, 72.

335. Ken Anthony, *The State of Rock 2005*, RADIO & RECORDS, Feb. 4, 2005, at 58 (quoting Fred Jacobs, President of Jacobs Média when he said, “for years we’ve heard a cacophony of complaints from listeners about the predictability, repetition and lack of surprises at Rock radio.”); see also Heather Green et. al., *The New Radio Revolution: From Satellite To Podcasts, Programming Is Exploding—But The Fight For Profits Will Be Ferocious*, BUS. WK., Mar. 14, 2005, at 34.

336. Jim Abbott, *Internet Competition in the Radio Industry Could Reshape Long-Range Planning in Other Businesses As Well*, ORLANDO SENTINEL, Mar. 19, 2000, at G1.

337. See, e.g., Jeff Sharlett, *Big World: How Clear Channel Programs America*, HARPER’S MAG., Dec. 1, 2003, at 41 (describing Clear Channel’s increased dependence on research).

entire layers of local radio station management who were familiar with the local market.³³⁸ Research is a valuable tool used by stations to help local programmers determine what their listeners want to hear and how listeners perceive their station.³³⁹ As reputable radio veterans admit, however, radio research provides benefits to listeners only when programmers who are in tune with their communities understand the limitations of research and judiciously apply its conclusions.³⁴⁰ One reason for this is that listeners who participate in research studies generally rate new songs lower than familiar songs.³⁴¹ Thus, any programmer who chooses to play only songs that “test well” is likely to play little new music.³⁴²

The 1996 expansion of the local radio station ownership caps resulted in local radio consolidation that led programmers to increasingly rely on market research to determine which songs get played.³⁴³ As veteran radio programmer Quincy McCoy points out, “At the 1997 NAB convention . . . six radio group heads sat on a panel and agreed that consolidation necessarily meant downsizing and added workloads for managers and employees.”³⁴⁴ Not surprisingly, radio playlists in recent years have been controlled by progressively fewer programmers.³⁴⁵

As a direct result of consolidation following the 1996 expansion of the Local Radio Station Ownership Caps, sales and promotions staffs and back-office operations are now often consolidated into one group working for a local cluster.³⁴⁶ Now, many local radio “clusters” are managed by a single director who oversees operations and programming at all locally-

338. See MCCOY, *supra* note 48, at 25; see also Telephone Interview with Ralph Stewart, Vice President of Programming for All Comedy Radio and former Assistant Program Director/Music Director at Los Angeles Smooth Jazz station KTWV in L.A., Cal. (Feb. 4 2004) (When asked how post-1996 consolidation has affected the development of radio programming management, Stewart replied, “It has definitely thinned out the gene pool.”) (on file with author).

339. See Paragon Media Strategies, *What Do Our Clients Think?*, <http://www.paragonmediastrategies.com/radio/endorsements.html>, (last visited Aug. 30, 2005) (listing endorsements from client radio stations).

340. See Bram Teitelman, *Schock Knows ‘Jack,’ But Will The Rest Of America?* ROCK AIRPLAY MONITOR, Apr. 30, 2004 (statements of Mike Henry, CEO of radio consulting company Paragon Media Strategies).

341. See *What’s Making your Listeners Tune Out?*, PD NEWS, Fall 2004, http://www.arbitron.com/radio_stations/pdnews_fa04_stay.htm (last visited Mar. 23, 2006).

342. MCCOY, *supra* note 49, at 42.

343. See Robert J. Delchin, *Musical Copyright Law: Past, Present and Future of Online Music Distribution*, 22 CARDOZO ARTS & ENT. L.J. 343, 360–361 (2004).

344. MCCOY, *supra* note 48, at 24.

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

346. See Walter Dawkins & Matthew S. Scott, *Battle for the Airwaves!*, BLACK ENTERPRISE, May 2003, at 70–71.

owned stations.³⁴⁷ Day-to-day decisions about music are made by each station's local head of programming who often must also do an on-air shift and who is expected to consider input from consultants.³⁴⁸ Local programmers, when overburdened and understaffed, may rely on charts in trade publications that compile playlists of similarly formatted stations across the country.³⁴⁹ Market forces encourage programmers to make conservative music programming decisions,³⁵⁰ since stations' ratings are published periodically and such ratings greatly affect radio stations' ability to generate advertising.³⁵¹ Another byproduct of local consolidation is that many radio stations who have served minority audiences for decades are now neither minority-owned nor minority-staffed.³⁵²

Group owners are fond of reporting that all programming decisions at their stations are made at the local level and that each station decides its playlists autonomously.³⁵³ Recent events belie such claims. Some local programmers are required by their corporate offices to play certain songs. For example, exhibits supporting New York Attorney General Eliot Spitzer's recent complaint against Entercom for systematic and widespread payola violations included an e-mail from Pat Paxton, Entercom's Senior Vice President of Programming, to all Program Directors and General Managers explaining that Entercom's company-wide CD Preview program *required* local stations to play certain songs at certain times of the day.³⁵⁴

347. See, e.g., *Clear Channel Taps Top Execs in Philly*, RADIO & RECORDS, Feb. 17, 2006, at 3 (announcing the appointment of Manuel Rodriguez to the position of Regional VP of Clear Channel's Philadelphia Trading Area, overseeing the company's six radio stations in that market); *Schumacher to Lead Cox/Louisville as VP/Market Mgr.*, RADIO & RECORDS, Jan. 27, 2006, at 3 (announcing Cox Radio's appointment of Todd Schumacher to a position that oversees all four of the stations that comprise the company's cluster of stations in Louisville, KY.).

348. See Julie Kertes, *On-Air PDs: The Challenges and Triumphs*, RADIO & RECORDS, Aug. 5, 2005, at 49.

349. See Frank Ahrens, *Can XM Put Radio Back Together Again?*, WASH. POST, Jan. 19, 2003, at W12; see also, Sidak & Kronmeyer, *supra* note 11, at 526.

350. See generally *id.* at 13.

351. See Jonathon M. Grech, "Opting Out": *Defining The Material Adverse Change Clause In A Volatile Economy*, 52 EMORY L.J. 1489, 1499 n.134 (2003).

352. See Statement of Commissioner Michael J. Copps, Before the Senate Committee on Commerce, Science, and Transportation, June 4, 2003; see Dawkins & Scott, *supra* note 347, at 66.

353. See, e.g., Clear Channel, Know the Facts, <http://www.clearchannel.com/Corporate/PressRelease.aspx?ID=1167&p=hidden> (last visited Oct. 30, 2005). ("MYTH: Clear Channel Radio restricts playlists and issues corporate mandates. FACT: Clear Channel does not issue mandates with regard to individual artists, songs or playlists. Clear Channel Radio stations are managed and programmed locally based on extensive audience research."); see also Marc Schiffman & Gail Mitchell, *Amid Changes, Local PDs Still Call Shots On Music*, BILLBOARD, Nov. 16, 2002, at 1.

354. Complaint at Exhibit H1, *Spitzer v. Entercom Communications Corp.* (N.Y. Sup. Ct.

Alarmingly, a price list with Entercom's logo shows that slots in the "CD Preview" program were for sale.³⁵⁵ Another e-mail from an Entercom regional vice president to a local program director explained that Entercom directives to play the songs in the CD Preview program are "not optional," and that "[t]hey come from corporate, and generate millions of dollars for Entercom."³⁵⁶ While Cox Radio CEO Bob Neil claimed in 2002 that each of his local program directors "makes the calls on individual records,"³⁵⁷ Cox subsequently forbade all of its stations from playing songs by an artist whose views were considered controversial.³⁵⁸

Assuming, however, that the vast majority of local programmers make autonomous programming decisions, the post-1996 consolidation of local radio program management ensures limited variation between playlists at similarly formatted radio stations nationwide.³⁵⁹ Programming expert Quincy McCoy reminds programmers that they must insist on having final approval for each song that the programmer's station plays, even in the face of pressure to accept consultants' advice.³⁶⁰

The *Yale Daily News* reported in 2002 that radio consolidation after passage of the 1996 Act had resulted in "less diversity, shorter playlists, and a staggering amount of repetition" in the community of New Haven, Connecticut.³⁶¹ The article pointed out that Clear Channel controlled "more than half of all popular music stations" and "almost two-thirds of rock stations across the country", and that "[t]en Clear Channel stations can be received in New Haven alone."³⁶² The paper compared the playlists of three of those New Haven stations, finding that the three stations shared seven of the same songs in their respective top ten most frequently played singles.³⁶³

New Haven is not the only place where local oligopolies thrive. The FMC analyzed ownership status and ratings of radio stations in 289

Marc. 7, 2006), <http://www.oag.state.ny.us/press/2006/mar/payola.pdf> (e-mail by Pat Paxton dated Mar. 4, 2003).

355. See *id.* ("Entercom: CD Preview Music Program").

356. *Id.* (e-mail from Michael Doyle, Vice President/Market Manager Entercom Rochester, to WBEE Program Director Billy Kidd, June 21, 2004).

357. See Schiffman & Mitchell, *supra* note 354, at 119.

358. See, e.g., Lee, *supra* note 255, at E1.

359. *Can XM Put Radio Back Together Again?*, *supra* note 350, at 13.

360. See *id.* at 37.

361. David Grimm, *Clear Channel Killed the Radio Star*, *YALE DAILY NEWS*, Sept. 16, 2002, at <http://www.yaledailynews.com/article.asp?AID=19664> (last visited Feb. 22, 2006).

362. *Id.*

363. See *id.*

markets.³⁶⁴ The FMC analysis showed that the 1996 expansion of the Local Radio Station Ownership caps led to the creation of local oligopolies.³⁶⁵ In large markets, the combined average audience share (the percentage of radio listeners aged twelve years and older) held by the four largest group owners present in each market was 77.1%.³⁶⁶ In the smallest markets, the combined average audience share held by the four largest group owners present was 93.9%.³⁶⁷ The FMC's report attributed the homogenization of music radio to the rise of local radio oligopolies.³⁶⁸

One radio consultant commented on the FMC's conclusions about programming diversity: "The concept of these oligopolies agreeing that they're all going to not serve listeners is the most ridiculous thing I've ever heard."³⁶⁹ That statement has appeal, but few would actually accuse group owners of intentionally trying to exclude listeners. Rather, long before the FMC's 2002 study, critics pointed out that "clustering," a result of the 1996 relaxed local ownership caps, allowed one "company to dominate a desired demographic within a specific market by programming overlapping formats."³⁷⁰ The FMC reiterated this criticism and demonstrated that program diversity has declined since the rise of local oligopolies.³⁷¹

Within three years of the FMC study (and the NAB's refutations of its results), the largest radio group owners would be forced to reassess the value of their radio group assets in large part because "[l]isteners, increasingly bored by the homogeneous programming and ever-more-intrusive advertising on commercial airwaves, are simply tuning out and finding alternatives."³⁷² In February 2005, Viacom took a \$10.9 billion writedown on the value of its radio holdings, while Clear Channel "took a \$4.9 billion writedown on its radio licenses."³⁷³ Around the same time, radio broadcasters donated \$28 million in airtime to an NAB-sponsored advertising campaign designed to combat the growing defection of its audience to variety-driven satellite radio, Internet radio, and portable audio devices.³⁷⁴

364. See FMC REPORT, *supra* note 300, at 33.

365. See *id.* at 34.

366. See *id.* at 33.

367. See *id.*

368. See *id.* at 35.

369. *Study Shows Playlist Overlap*, *supra* note 329, at C5.

370. MCCOY, *supra* note 48, at 24.

371. See generally FMC Report, *supra* note 300, at 31–61.

372. See Green, *supra* note 336, at 34.

373. *Id.* at 32.

374. See Frank Ahrens, *AM-FM Radio Touts Strengths in Ad Campaign*, WASH. POST, Jan. 11, 2005, at E5 [hereinafter *AM-FM Radio Touts Strengths*].

When the two satellite radio services, XM and Sirius, were launched in 2001 and 2002,³⁷⁵ few analysts thought that consumers would pay for a service that was similar to free radio.³⁷⁶ However, satellite radio's "high-quality programming and minimal commercial interruptions have been a strong lure."³⁷⁷ Each service charges a monthly fee to beam over 100 channels of largely commercial-free radio to customers.³⁷⁸ By March 2005, the services combined had acquired approximately 4.4 million subscribers.³⁷⁹ That number is small compared with 229 million total listeners in the United States as measured by Arbitron, but it is double the number of subscribers compared to one year earlier.³⁸⁰ XM's chief executive, Hugh Panero, attributes a substantial portion of XM's rapid growth to terrestrial radio's repetitious playlists, dearth of new music, and abundance of commercials.³⁸¹

The NAB successfully lobbied for years to erect barriers to entry into satellite radio, because it offers listeners plenty of variety and fewer commercials than terrestrial radio.³⁸² Nevertheless, terrestrial radio programmers have been defensive about their own programming philosophies and have been largely unwilling to play music that differs substantially from similarly formatted stations in other markets. This mindset is evident in a letter that the Production Director of a New Hampshire Clear Channel station wrote to Entertainment Weekly:

Satellite radio is not the answer to good radio, much like cable TV is not the answer to good TV. Both just give you more choices of crap. Radio is categorized, and it ought to be. Only a slim number of people would like to hear Ja Rule, Rusted Root, Barry Manilow, and Dwight Yoakam on the same radio station. If you are actually looking for a station that will play Norah Jones, B-Tribe, Ned Otter, etc., then look for your closest college radio station. Give them a good listen. I guarantee you that after 30 minutes of pure hell, you will switch back to a Clear Channel Radio station because we play the hits.³⁸³

375. See Sarah McBride, *Two Upstarts Vie for Dominance in Satellite Radio*, WALL ST. J., Mar. 30, 2005, at A1.

376. *Id.*

377. *Id.*

378. *Id.*

379. *See id.*

380. *See id.*

381. See Scott Woolley, *Broadcast Bullies*, FORBES, Sept. 6, 2004, at 134.

382. *See id.* at 136.

383. Editorial, ENT. WKLY., July 12, 2005, *available at*

<http://www.fakejazz.com/issue29.shtml> (letter from Steve Smith, Production Director/Imaging

Playing the hits, to the exclusion of other songs, is what many successful radio consultants have taught their radio clients to do.³⁸⁴ Consolidation has led to radio stations that “systematically exclude music that [research shows] provokes the strongest reaction—positive or negative—resulting in a music mix” at terrestrial radio that is homogenized and predictable.³⁸⁵ Satellite radio provides listeners with many choices of commercial-free stations that play a wide variety of music that is rarely played on terrestrial radio.³⁸⁶ Not surprisingly, while satellite radio has grown,³⁸⁷ terrestrial radio has settled into single-digit revenue growth and suffered a decrease in the amount of time per week its audience listened.³⁸⁸ Moreover, a survey of 1,855 U.S. residents, revealed that one in five said they were likely to subscribe to one of the two satellite services in the next year, while 30% said they were interested in satellite radio.³⁸⁹ Eight percent of respondents had listened to Internet radio in the prior week.³⁹⁰ The top reason listed for listening to Internet radio was to access audio that is not found on terrestrial radio.³⁹¹

To combat its fast-growing competitors, the terrestrial radio industry launched an advertising campaign, designed to portray AM and FM radio as the medium that exposes listeners to new music.³⁹² The ads used the tagline, “Radio. You Hear it here first,” and included testimonials from music stars reminding listeners that they heard the star’s music on radio before they heard it elsewhere.³⁹³ Almost every radio chain donated valuable airtime to play the ads on thousands of radio stations

Director, Clear Channel).

384. See Chuck Philips, *Clear Channel’s Radio Pacts Irk Labels*, L.A. TIMES, Sept. 5, 2002, at C11 [hereinafter *Radio Pacts*]; See, e.g. Daniel Anstandig, VP/Adult Formats, McVay Media, Adult Contemporary: Station Health Check-Up, at http://www.mcvaymedia.com/adltcontmp/05/preparing_springbook.htm (advising programmers: “Are there any renegade songs in your music library? Have you checked and double checked to ensure that you’re playing the hits and playing them often? If you are unsure of the hits, have you considered purchasing a ‘safelist’ of music from a consultant or research firm?”)

385. MCCOY *supra* note 49, at 42; see *Can XM Put Radio Back Together Again?*, *supra* note 350, at 14 (“[T]he response FM increasingly engenders is, ‘I’m so sick of that song.’”).

386. See *Can XM Put Radio Back Together Again?*, *supra* note 350, at 25, 27.

387. ARBITRON INC. & EDISON MEDIA RESEARCH, INTERNET AND MULTI MEDIA 2005: THE ON-DEMAND MEDIA CONSUMER, 25 (2005), <http://www.arbitron.com/downloads/IM2005Study.pdf>.

388. *AM-FM Radio Touts Strengths*, *supra* note 375, at E5.

389. ARBITRON INC. & EDISON MEDIA RESEARCH, *supra* note 389, at 3, 25.

390. *Id.* at 5.

391. See *id.* at 20.

392. *AM-FM Radio Touts Strengths*, *supra* note 375, at E5.

393. *Id.* (quoting an advertisement in which a pop star professed to her listeners: “[B]efore I toured the world at 19 . . . you heard me—Avril Lavigne—on the radio.”).

nationwide.³⁹⁴ Meanwhile, at least one radio group executive continued to deny that their stations were homogenized and lacked innovation.³⁹⁵

Months after the launch of their defensive advertising campaign, executives at radio companies started to acknowledge that listeners had become increasingly unhappy with the repetition and lack of variety on most radio stations.³⁹⁶ As of August 2005, seventeen stations nationwide had switched to variety-driven “Jack” formats *In response*, as well as many “Jack” clones referred to by their owners as “Bob FM” or “Dave FM.”³⁹⁷ Although these formats have much larger playlists than other commercial radio stations, listeners will not hear new-artists debut on these stations.³⁹⁸

2. Consolidation of Radio Since 1996 Has Encouraged Payola-like Practices, Which Are Impediments to Diverse and Merit-Based Music Programming.

Media critics often mistakenly use the term “payola” to describe behaviors by radio stations and record promoters that are arguably deceitful but not currently illegal.³⁹⁹

True forms of payola, as well as payola-like practices, have evolved substantially over recent years due to the consolidation of power in radio and increased scrutiny by media and politicians.⁴⁰⁰ Some media reports regarding transactions between radio, record companies, and independent promoters imply that all such practices are indistinguishable.⁴⁰¹ Meanwhile, executives at several radio group owners have disingenuously asserted that they have no tolerance for their programmers’ accepting consideration for airplay and that independent promoters are still to blame for extorting exorbitant fees from record companies to pay for their services.⁴⁰²

394. *See id.* (noting that broadcasters also poured money into a print advertising campaign in high-circulation magazines).

395. *See id.*

396. Lisa Kovach, *Radio, Ad Execs Wonder Why Star Fell So Abruptly*, 1 SAN DIEGO BUS. J., Apr. 18–24, 2005, at 1.

397. Joel Stein, *You Don’t Know Jack*, TIME, Aug. 15, 2005, at 62; *see also id.*

398. Chris Riemenschneider, *104.1 FM Adds Jack to the Mix*, MINN. STAR-TRIB., Apr. 23, 2005, at B9.

399. *See generally* Jeff Leeds, *Middlemen Put Price on Airplay*, L.A. TIMES, Dec. 27, 2001, at C1 [hereinafter *Middlemen Put Price*].

400. *See id.*

401. *See id.*

402. *See, e.g.,* Jeff Leeds, *Executive Fired Amid Charges of Payoffs*, N.Y. TIMES, Jun. 12, 2005, at E1 [hereinafter *Executive Fired*] (quoting Pat Paxton, Entercom Senior Vice President for Programming, “[W]e do have policies in place that prohibit Entercom employees from

"Payola" is a term of art. Until legislation passes expanding the scope of what constitutes illegal payola, it is best to use that term to describe only situations in which there is an undisclosed promise or an exchange of consideration for broadcast time.⁴⁰³ Radio entities have become more sophisticated at extracting consideration from record companies while denying that what they receive is consideration for airplay.⁴⁰⁴ Since this exchange of consideration is not disclosed at the time the paid-for airplay is broadcast, such exchanges are indeed payola but are difficult to prove since payment to the radio entity is ostensibly for something other than airplay.⁴⁰⁵

The current anti-payola statutes, by simply requiring disclosure of payments *In return* for airplay prior to broadcasting, do not contemplate a rampant practice in radio that harms programming diversity.⁴⁰⁶ For example, many industry insiders claim that radio stations withhold airplay that would otherwise occur when either that radio station or an affiliate does not get the consideration that it seeks.⁴⁰⁷

Consolidation shifted the power in the pay-for-play relationship to radio station owners.⁴⁰⁸ The huge media conglomerates created by the wave of mergers required new revenue streams to offset debt caused by the expensive expansions.⁴⁰⁹ At the same time, radio groups know that "[e]ach year, thousands of new songs are released by record labels, but only 250 or so tunes are added per station,"⁴¹⁰ making airplay very valuable to record labels. The radio groups began to consider record marketing campaigns

accepting gifts that exceed \$25 in value, not just from record companies, but all vendors that we work with."); see also Douglas Wolk, *The Other Foot*, VILLAGE VOICE, Aug. 24, 2005, at 82 ("Clear Channel, Cox Radio, and Infinity have all made a show of severing their ties with independent promoters.").

403. See *Executive Fired*, *supra* note 402, at E1.

404. See *Middlemen Put Price*, *supra* note 399, at C1.

405. Monty Phan, *To The Tune of \$10M: Sony BMG Settles Pay-to-Play Case that Offered Perks to Radio Stations in Return for Playing Certain Artists*, NEWSDAY (New York), July 26, 2005, at A8.

406. See generally 47 U.S.C. § 317 (2005); 47 U.S.C. § 508 (2005).

407. See, e.g., *Nobody in Particular Presents, Inc. v. Clear Channel Comm'ns, Inc.*, 311 F. Supp. 2d 1048, 1062 (D. Colo. 2004) ("Sabrina Saunders, the music director at KTCL, testified that, when record labels made [Denver Clear Channel Rock Program Director] O'Connor unhappy, O'Connor punished labels by withholding spins of their artists' records."); Chuck Philips, *Radio Exec's Claims of Payola Draw Fire*, L.A. TIMES, Mar. 7, 2002, at C1 (reporting that record executives privately claimed that stations owned by Radio One withheld airplay from labels that did not pay Radio One's exclusive promotion agent).

408. Van Alstyne, *supra* note 294, at 644.

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

410. *Middlemen Put Price*, *supra* note 399, at C1.

and live concerts as potential sources⁴¹¹ of what insiders call “nontraditional revenue.”⁴¹²

In 1998, the FCC investigated reports that AMFM/Chancellor Media (now owned by Clear Channel) billed A&M Records \$237,000 to promote a single by recording artist Bryan Adams on ten stations.⁴¹³ The campaign, built around commercials and contests, required Adams to perform for free at the conglomerate’s charity concerts in several cities.⁴¹⁴ After examining paperwork provided by AMFM, the FCC determined that two of the ten stations involved had broken the law.⁴¹⁵ The FCC found that the two AMFM stations had “willfully and repeatedly” violated the law by increasing Adams’ airplay *In return* for money and a guarantee of free concert performances.⁴¹⁶ The FCC also discovered a direct quid pro quo relationship between the consideration given and airplay received on the two stations.⁴¹⁷ However, the FCC was unable to prove a quid pro quo relationship between the payments to the radio group and the airplay that Adams’ record received on the remaining eight stations.⁴¹⁸ The agency imposed a mere \$8,000 fine upon Clear Channel for the violations.⁴¹⁹ In such multi-faceted transactions, it is often difficult to show that money given to radio stations was for airplay rather than for other aspects of a promotion, such as advertising or defraying tour expenses.⁴²⁰

In 2001, Clear Channel, in an effort to increase “nontraditional revenue,” granted exclusive contracts with certain independent promoters. In exchange for \$20 million, Clear Channel granted those promoters exclusive rights to represent Clear Channel’s radio stations.⁴²¹ This was a major shift in how independent promoters had been utilized *In recent* years.⁴²²

411. *Clear Channel Fined*, *supra* note 409, at C1.

412. Bill Werde, *Payola Probe Heating Up*, ROLLING STONE, Nov. 1, 2004, http://www.rollingstone.com/news/story/6590977/payola_probe_heating_up.

413. *Clear Channel Fined*, *supra* note 409, at C1.

414. *Id.*

415. *Id.*

416. *Id.*

417. *Id.*

418. *Id.*

419. *Clear Channel Fined*, *supra* note 409, at C1.

420. See Phan, *supra* note 406, at A8; see Chuck Philips, *Logs Link Payments With Radio Airplay*, L.A. TIMES, May 29, 2001, at A1 [hereinafter *Logs Link Payments*].

421. See Frank Saxe, *CC Sees Labels as Revenue Source*, BILLBOARD, Mar. 24, 2001, at 10.

422. See *id.*; Justin Oppelaar and Michael Schneider, *Clear Cues Radio Daze*, VARIETY, Aug. 27, 2001, at 1; see, e.g., Transcript of Radio One Q2 2003 Earnings Conference Call, Fair Disclosure Wire, Aug. 7, 2003 (Statements of Scott R. Royster, EVP & CFO, Radio One, describing the “several million dollars spread over the year” that was received from independent

Although many record companies had briefly stopped using independent promoters altogether in the 1980s after payola scandals hit the news,⁴²³ industry insiders have long recognized that many independent record promoters provided valuable and legitimate services,⁴²⁴ and had long-standing relationships with programmers.⁴²⁵ Moreover, record companies knew that overwhelmed programmers would accept many of these independent promoters' telephone calls.⁴²⁶ Hiring independent promoters was a cost-effective way for many record labels to augment their promotion staffs, ensuring that programmers reviewed their records in a timely fashion, thus maximizing influential chart positions.⁴²⁷ Fledgling record companies, with small or inexperienced promotion staffs, used independent promoters to gain access to programmers who would otherwise focus on more familiar product.⁴²⁸ As radio groups became more consolidated, however, the balance of power between radio and records shifted from the record labels to the radio group owners.⁴²⁹ Radio executives re-examined what they could get out of record companies by using the most ruthless of the independent promoters as middlemen for financial transactions.⁴³⁰

By 2001, industry mergers had fully shifted the balance of power to radio groups, which today have the clout to launch a song simultaneously in scores of markets across the country—or consign it to oblivion.⁴³¹ As the power of the radio groups increased, so did their debt.⁴³² Stations continued to sell advertising time, but also felt pressured to find new

record promotion representatives as being in a subcategory of "NTR.").

423. See, e.g., Sidak & Kronemyer, *supra* note 10, at 557; DANNEN, *supra* note 11, at 209–10.

424. See Katunich, *supra* note 226, at 657 & n.124 ("Without independent promoters, you would have everyone calling the radio stations to try to get a song added.").

425. John Schoenberger, *In Their Own Words: In Defense of Independent Promotion*, RADIO & RECORDS, Nov. 11, 2005, at 96.

426. See generally Katunich, *supra* note 227, at 657 n.124.

427. See Schoenberger, *supra* note 426, at 96.

428. See *id.*

429. Van Alstyne, *supra* note 294, at 644.

430. See Saxe, *supra* note 422, at 10; *Logs Link Payments*, *supra* note 421, at A1, (describing payments and fees given by promoters to broadcasters and logs kept by independent promoter Michele Clark listing the date a station airs a song followed by a dollar amount collected from the artist's label); Greg Kot, *Arranged By Jeff McClusky; As An Independent Record Promoter, He Makes Friends So He Can Make Hits*, CHI. TRIB., Nov. 28, 1999, at C10 (describing Jeff McClusky's 1999 exclusive contract with Cumulus Broadcasting).

431. See Chuck Philips, *Clear Channel Seeks Direct Connection To Record Labels*, L.A. TIMES, Mar. 9, 2001, at C1; see also *Radio Pacts*, *supra* note 385, at C11.

432. Katunich, *supra* note 226, at 654.

revenue streams beyond advertising.⁴³³ Consequently, stations entered contracts with a handful of independent promoters under which the promoters would pay up to \$200,000 to the radio stations "to defray expenses for contest giveaways, vacation fly-aways, concerts, conventions, and other promotions"⁴³⁴ The terms of the contracts guaranteed the promoters the right "to pitch songs to programmers, then bill record labels up to \$4,000 a song when it is added to a station's playlist."⁴³⁵ By 2001, these arrangements were costing the record industry an estimated \$100 million a year.⁴³⁶ The promoters sidestepped the anti-payola laws by saying the annual fees paid under contract to stations were not tied to airplay of specific songs.⁴³⁷ The fee paid for access to programmers to pitch songs and disclosure of the songs that the stations planned to add to their weekly playlists. As a result, "the broadcasters [we]re not obligated to add any song to their playlists,"⁴³⁸ and promoters could use the advance notice to charge record labels for the addition of their songs.⁴³⁹

By 2002, major independent promoters had exclusive arrangements to pitch songs to the stations.⁴⁴⁰ Jeff McClusky Promotions, for example, had exclusive deals with more than 300 stations nationwide after a \$1 million deal in 2001 with Cumulus Media, which owned 210 stations.⁴⁴¹ Clear Channel entered into contracts with three independent promoters granting exclusive rights to pitch songs to program directors at its top "urban" stations,⁴⁴² in exchange for \$100,000 per year per station.⁴⁴³ Clear Channel

433. See Saxe, *supra* note 422, at 79.

434. *Logs Link Payments*, *supra* note 421, at A12; see Jeff Leeds, *Radio Industry's Discomfort Grows Over Payola-Like Practice*, L.A. TIMES, Oct. 21, 2002, at C1 [hereinafter *Payola-Like Practice*].

435. *Middlemen Put Price*, *supra* note 399, at C12.

436. *See id.*

437. *See Logs Link Payments*, *supra* note 421, at A12. (Independent promoter Michele Clark had such an arrangement with a Portland adult rock station, Infinity-owned KINK. Documents obtained by the *Los Angeles Times* showed that in 2000, Clark earned nearly \$50,000 from labels for songs added to KINK's playlist. One document listed every time KINK began airing a song followed by a specific dollar amount and the name of the label billed. The document also included a running tally of withdrawals for Clark-financed prizes given to listeners and travel fees paid by Clark to send KINK employees to trade conventions. Another document showed a list of songs played by KINK and a list of corresponding products and services, including concert tickets and a promise that certain acts would appear at a station benefit. Clark stated that the "support" received from the labels had "no effect whatsoever on the musical decisions of the program directors at my stations.")

438. *See Logs Link Payments*, *supra* note 421, at A12.

439. *See id.*

440. *See Payola-Like Practice*, *supra* note 434, at C1.

441. *See Logs Link Payments*, *supra* note 421, at A12.

442. *See Radio Pacts*, *supra* note 385, at C1.

had even more lucrative contracts with a handful of independent promoters who specialized in pop and rock promotion.⁴⁴⁴ Other radio groups who previously had, or still have exclusive contracts with independent promoters included Emmis Communications Corp. and Cox Radio, Inc.⁴⁴⁵ Not every music format engaged in such practices. For example, as of April 2006, this author found no press reports citing Christian or Smooth Jazz stations as having engaged in such financial transactions.

Many record executives believed that the independent promoters who had these financial arrangements with radio stations wielded power to influence a song's success "either by getting them added to a station's playlist or by keeping them off the air."⁴⁴⁶ When asked by the *Los Angeles Times* to comment on Clear Channel's contracts with independent promoters, record executives declined, fearing that "Clear Channel might retaliate by withholding airplay of their artists' music."⁴⁴⁷

The consolidated power of radio groups resulted *In record* labels paying much higher fees to give their records a chance to be heard on the radio.⁴⁴⁸ Those price hikes contradicted statements by Clear Channel's then-Chief Executive, Mark Mays, who claimed he asked labels not to pay record promoters.⁴⁴⁹ Clear Channel also claimed it had "no control over what prices the promoters charged" and stressed that they "receive[d] no percentage of [the promoters'] per-song rates."⁴⁵⁰ Independent promoters in turn denied that labels were forced to pay their fees, asserting that radio stations would continue to play "hit records" regardless of any contractual relationships.⁴⁵¹ However, labels that lacked the resources to pay fees that allowed access to radio stations also lacked the capability to generate "hit records."⁴⁵² Small record labels without such resources had limited opportunities to get their records played.⁴⁵³

One small record label sent a new release to KCDU, a rock station located in Monterey, CA, which was owned by a regional broadcasting chain.⁴⁵⁴ When the label owner, a former radio programmer, called

443. See *id.* at C11.

444. See *id.*

445. See *Payola-Like Practice*, *supra* note 434, at C1, C4.

446. See *Logs Link Payments*, *supra* note 421, at A12.

447. See *Radio Pacts*, *supra* note 385, at C11.

448. See *id.* at C1.

449. See *id.*

450. See *id.*

451. See *Saxe*, *supra* note 422, at 79.

452. See *generally Small Record Labels*, *supra* note 346, at C1.

453. See *id.*

454. *Id.*

KCDU's Program Director, he was asked whether his label could afford to hire National Music Marketing ("National"), an independent promotion firm.⁴⁵⁵ The label owner stated that the KCDU programmer told him, "National had a contract guaranteeing it the exclusive right to discuss records with [the broadcasting chain's] radio programmers."⁴⁵⁶ As a result, KCDU was not allowed to add songs to its playlist that were not on National's list of approved songs.⁴⁵⁷ National denied the allegations, asserting that the station was free to add whatever songs it pleased.⁴⁵⁸

By 2002, as contracts between radio groups and exclusive promoters became scrutinized by the FCC, Congress, and the media,⁴⁵⁹ record labels decreased their payments to independent promoters.⁴⁶⁰ By 2004, Clear Channel, Infinity, Entercom, and Cox publicly barred their employees from doing business with any independent promoters,⁴⁶¹ in part because of the ongoing scrutiny, but also because New York State Attorney General Eliot Spitzer had begun a meticulous probe of independent promotions activity related to airplay on New York radio stations.⁴⁶²

Additionally, the radio groups may have chosen to sever ties with independent promoters based on the belief that the promoters had been taking a cut from what the radio groups believed rightly belonged to them: payment for the service of marketing records to consumers, which might coincidentally involve increased airplay. When Entercom declared in 2004 that it would sever ties to independent promoters, Entercom's Executive Vice President, Jack Donlevie, stated that the decision was because the company's business transactions with independents were based on "a business model that doesn't work anymore."⁴⁶³ Mr. Donlevie added,

455. *See id.*

456. *Id.*

457. *See id.*

458. *See Small Record Labels*, *supra* note 346, at C6.

459. *See Payola-Like Practice*, *supra* note 434, at C1; L.A. Lorek, *Clear Channel Listens to Its Critics; Radio Company Will End Controversial Ties with Independent Music Promoters*, SAN ANTONIO EXPRESS-NEWS, Apr. 10, 2003; Ralph Blumenthal, *Charges of Payola Over Radio Music*, N.Y. TIMES, May 25, 2002 at B7.

460. *See Payola-Like Practice*, *supra* note 434, at C1.

461. *See* Phyllis Stark, *Five In '05: Country Countdown*, BILLBOARD RADIO MONITOR, Jan. 14, 2005; Bill Werde, *Payola Probe Heating Up*, ROLLING STONE, Nov. 1, 2004, http://www.rollingstone.com/news/story/6590977/payola_probe_heating_up; *see also* *Clear Channel Reports Second Quarter 2003 Results*, BUS. WIRE, July 29, 2003 (Clear Channel Communications attributed recent decreases in its radio division's revenue to, in part, a decrease in "non-traditional revenues, which includes the loss of revenue resulting from its cessation of business with independent promoters.").

462. *See* Phyllis Stark, *Indies: We've Got Legit Role*, BILLBOARD, Dec. 18, 2004, at 6 [hereinafter *Indies*].

463. *Id.*

"We're focusing more on direct relationships with the record companies."⁴⁶⁴ Meanwhile, Clear Channel promised a "new, restructured relationship with the recording industry... on specific group-wide contesting, promotions and marketing opportunities."⁴⁶⁵

Since the radio groups' boycotts of independent promoters were borne partly out of public relations concerns, the bans extended not only to the independent promoters who had financial arrangements with stations, but also to those who had not provided financial incentives to the stations.⁴⁶⁶ Until the 2004 bans, many independent promoters helped their clients (often small labels) get their artists' songs reviewed by programmers without an exclusive contract with the radio stations.⁴⁶⁷ However, once the radio groups had banned all independent record promoters, smaller record labels without the resources to employ experienced promotion executives were threatened with a lack of access to programmers of group-owned radio stations.⁴⁶⁸

Even programmers of smooth jazz, a format that had never been reported to involve exclusive contracts, could no longer accept calls by independent promoters, on whom many independent record labels depended.⁴⁶⁹ Mark Wexler, Executive Vice President of the independent label Peak Records, believed that the overinclusive ban on independent promotion directly affected the ability of The Rippingtons, one of Peak's artists, to get airplay.⁴⁷⁰ The Rippingtons had recently enjoyed strong retail sales; however, the radio group owners' bans limited the label's access to radio stations, thereby depriving listeners of the chance to hear the band's record on the radio.⁴⁷¹

By early 2005, the four radio groups that had banned independent promotion received subpoenas in an investigation into practices of their New York radio stations by New York Attorney General Eliot Spitzer.⁴⁷²

464. See *Executive Fired*, *supra* note 402, at E6.

465. See Greg Kot, *We Haven't Seen the Last of Pay-for-Play*, CHI. TRIB., Apr. 13, 2003, at C1.

466. See *Indies*, *supra* note 463, at 6.

467. See *id.*

468. *Id.*; Telephone Interview with Paul Brown, President, Red Hat 22, in N.Y. (Jan. 16, 2005) (on file with author); see Eric Boehlert, *Payola Is Dead! Now What Will We Listen To?*, SALON, Jan. 5, 2005, <http://www.salon.com/news/feature/2005/01/05/payola/print.html>.

469. Telephone Interview with Mark Wexler, President, Peak Records, in N.Y. (Jan. 16, 2005) (on file with author).

470. *Id.*

471. *Id.*

472. See Paul Heine & Bill Holland, *Spitzer Still Looking*, BILLBOARD, Mar. 5, 2005, at 6.

Each of the major record conglomerates also received subpoenas.⁴⁷³ In March 2006, Spitzer sued Entercom for allegedly "trad[ing] airplay for revenue, with the knowledge and encouragement of Entercom's corporate leadership" at both the local and corporate level.⁴⁷⁴ Evidence offered by Spitzer against Entercom included an email by Pat Paxton, Entercom Vice President of Programming, to company program directors and general managers, which required designated stations to play songs in Entercom's CD Preview program.⁴⁷⁵ The email chastised participating stations for noncompliance: "Record companies are paying for extra exposure Sometimes a label will buy 2 slots, meaning that particular CD Preview needs to get 14 plays per station."⁴⁷⁶ Spitzer also offered into evidence a price list for slots in Entercom's CD Preview program, which lists prices for quantities of BDS detections.⁴⁷⁷ According to Spitzer's complaint, BDS detections occur only when songs are played on the radio.⁴⁷⁸

In a 2005 settlement with Spitzer, Sony BMG agreed to "pay \$10 million and stop giving payments and awarding expensive gifts" to radio programmers for airplay.⁴⁷⁹ The settlement disclosed that, among other exchanges, Sony BMG's Epic Records agreed to pay for certain Infinity Broadcasting station listeners to see Celine Dion perform in Las Vegas so the radio group would add a new Celine Dion single to its playlists.⁴⁸⁰ Soon after—at the urging of Commissioner Adelstein—the FCC announced that it would launch an investigation into the many allegations described in the Sony BMG settlement.⁴⁸¹

At the time the Sony BMG settlement was announced, however, the radio groups' bans on independent promoters appeared to have had its intended public relations effect; watchdog website Salon.com, a staunch payola critic, declared in early 2005, "Payola is dead! Now what will we

473. *See id.*

474. *See* Complaint at 2, *Spitzer v. Entercom Comm'n's Corp.* (N.Y. Sup. Ct. Mar. 7, 2006), <http://www.oag.state.ny.us/press/2006/mar/Entercom.pdf>.

475. Complaint at Ex. H.1, *Spitzer v. Entercom Comm'n's Corp.* (N.Y. Sup. Ct. Mar. 7, 2006), <http://www.oag.state.ny.us/press/2006/mar/payola.pdf>.

476. *Id.*

477. *See id.* at Ex. B.

478. *Id.* at 9.

479. *See* Marc Fisher, *Paying for Airplay: The Beat Goes On*, WASH. POST, Aug. 7, 2005, at N6; Paul Heine et. al., *Eliot Spitzer Goes Behind the Spin Zone*, BILLBOARD RADIO MONITOR, July 29, 2005.

480. *See* Phil Rosenthal, *FCC's 'Swift' Action a Bit Late to the Payola Party*, CHI. TRIB., Aug. 10, 2005 at C3; Manly, *supra* note 221, at Section 4.

481. *See id.*

listen to?"⁴⁸² One week later, the *New York Times* reported that Entercom had fired Dave Universal, Program Director at WKSE, Entercom's pop station in Buffalo, New York, for accepting improper vacations and other gifts from record label executives.⁴⁸³

At the time of his dismissal, Universal had worked at WKSE for seventeen years.⁴⁸⁴ He admitted that different record labels covered his expenses to attend sporting events and a personal trip to Miami.⁴⁸⁵ He stated that during his tenure at the station, his superiors both knew and approved of his actions: "I was allowed to do whatever I had to do to foster relationships."⁴⁸⁶ He further asserted that the gifts never affected his programming decisions.⁴⁸⁷

Notably, Entercom's dismissal of Universal arose from suspicions regarding a direct relationship with record company personnel, without the involvement of independent promoters.⁴⁸⁸ While written accounts of gifts by labels to named programmers are rare, it is well-known in the radio industry that record labels often curry favor with programmers by sending them on junkets.⁴⁸⁹

On at least one occasion *In recent years*, a radio station was accused of 1980s-style payola, involving a cash payment directly from a record label to a programmer.⁴⁹⁰ In September of 2004, Los Angeles disc jockey Bill Dirks filed a wrongful termination suit after his employer, radio station KLJH, allegedly fired him for reporting to his superiors evidence of payments in exchange for airplay.⁴⁹¹ KLJH is an independently-owned Urban Adult Contemporary (a.k.a. Adult Rhythm & Blues) station.⁴⁹² KJLH is owned by Taxi Productions, Inc., Steveland Morris Productions, and recording artist Stevie Wonder.⁴⁹³

Dirks (a.k.a. "Frankie Ross") alleged that a representative of a record company who was promoting a release by Earth, Wind & Fire contacted

482. See Boehlert, *supra* note 468.

483. See *Executive Fired*, *supra* note 402, at E1.

484. See *id.*

485. See *id.*

486. See *id.*

487. See Jeff Leeds, *FCC Investigates WKSE FM*, N.Y. TIMES, Jan. 18, 2005, at E 2.

488. See *Executive Fired*, *supra* note 402, at E1.

489. See *id.*

490. See generally Complaint, *Dirks v. Taxi Prod., Inc.*, L.A. Sup. Ct. #BC321897, filed Sept. 22, 2004.

491. *Id.* at 1-2.

492. See *id.* at 1.

493. See *id.*

him.⁴⁹⁴ The representative informed Dirks that the station's Program Director, Andrae Russell, instructed him to contact KJLH's music director, Levi Booker, if he wanted the song added to the station's playlist.⁴⁹⁵ Booker allegedly told the record company representative that the airplay would cost \$3500.⁴⁹⁶ The record representative allegedly gave \$3500 to Booker, but later complained to Dirks that KJLH was not giving the song enough play.⁴⁹⁷

When Dirks reported the conversation to Russell, Russell allegedly became angry that the disc jockey had become privy to this information.⁴⁹⁸ Two to three weeks later, KJLH conducted a promotional event spotlighting Earth, Wind & Fire for a full day, which was an unusual occurrence at the station.⁴⁹⁹ Russell then fired Dirks in October 2003 without offering a reason for the dismissal,⁵⁰⁰ though Dirks asserted that the dismissal was retaliatory.⁵⁰¹ In support of the complaint, Dirks offered a declaration by an independent record promoter who stated that in 2003, he also paid Booker \$600 to play the record he was promoting.⁵⁰² The case settled out of court for an undisclosed sum.⁵⁰³

If the alleged facts are true, the transaction constituted illegal payola unless the radio station disclosed the payment to the audience each time it played the agreed-upon song.⁵⁰⁴ In addition, if the allegations are true, they illustrate the power of one independently owned radio station to extract payments from a record company that represented one of that station's "core" artists. Earth, Wind & Fire's many prior hits have been played on urban adult contemporary radio for many years.⁵⁰⁵ Recall that the band's

494. *Id.* at 2.

495. *Id.*

496. See Complaint at 3, *Dirks v. Taxi Prod., Inc.*, L.A. Sup. Ct. #BC321897, filed Sept. 22, 2004.

497. *Id.*

498. See *id.*

499. See Complaint at 3, *Spitzer v. Entercom Comm'ns Corp.*, (N.Y. Sup. Ct. Mar. 7, 2006), <http://www.oag.state.ny.us/press/2006/mar/payola.pdf>.

500. *Id.* at 4.

501. *Id.*

502. Revised Declaration of Eddie Jorge at 2, *Dirks v. Taxi Prods., Inc.*, L.A. Sup. Ct. #BC321897, filed Dec. 15, 2004 (on file with the author).

503. See E-mail from Dwight Stirling, Attorney for Mr. Dirks (June 30, 2005) (on file with the author).

504. *Executive Fired*, *supra* note 402, at E1.

505. See Gail Mitchell, *Rhythm & Blues: A Diverse Rebirth*, *Billboard*, Oct. 29, 2005, at 64; "Urban AC Top 30," *RADIO & RECORDS*, Mar. 31, 2006 (showing that the song "To You," by Earth, Wind & Fire, featuring Brian McKnight, was #29 on the Urban AC Top 30 chart) (on file with author).

leader, Maurice White, had expressed his concern in the 1980s to CBS Records executive Dick Asher that if part of the cost of doing business in the recording industry was paying for airplay, White did not want to be the one artist whose career was jeopardized because of a label's refusal to make such payments on principle.⁵⁰⁶

The transaction alleged by Dirks is unusual in two respects. First, the allegations did not involve contact with an independent promoter—rather, cash went directly from the record company to KJLH personnel. Second, the alleged facts involve an independently owned radio station rather than a group-owned station. Still, the KJLH case demonstrates that radio stations hold enormous power over artists and record companies, and that contrary to conventional wisdom, independent promoters are not the sole source of payola.

As radio group owners rebuild business models to focus on direct relationships with record labels, potential exists for continued harm to recording artists and radio listeners. This is due in part to the narrow scope of existing payola laws. At the corporate level, group owners may exploit loopholes in payola laws to extort consideration out of record labels and artists, neglecting artists whose labels do not provide marketing support to the group owner. Record labels often pay for the privilege of airplay if they think they cannot otherwise get that airplay. As a result, radio group owners can reap even more “nontraditional revenue” if they cut the middleman-promoters out of the picture. Although radio group owners deny that the consideration received from record labels influences the selection of songs played on the radio and the frequency with which those songs are played, such assertions are disingenuous. Programming diversity is deleteriously affected by financial relationships between group owners and record companies, just as it was in the Bryan Adams' case in 1998.⁵⁰⁷

Although Sony BMG's settlement with Spitzer incorporated a promise by the conglomerate to refrain from providing payments or substantial gifts to radio entities, Spitzer's jurisdiction to enforce this agreement was limited to the State of New York.⁵⁰⁸ Although the FCC has federal jurisdiction to enforce payola laws,⁵⁰⁹ those laws only prohibit exchanges of undisclosed consideration for airplay.⁵¹⁰ No current laws prevent radio programmers from accepting largesse from record companies

506. DANNEN, *supra* note 10, at 215.

507. *Clear Channel Fined*, *supra* 410, at C1.

508. See Charles Duhigg & Walter Hamilton, *Sony BMG Is Expected to Settle Probe*, L.A. TIMES, July 23, 2005, at C1.

509. See *id.*

510. See 47 U.S.C. §§ 317, 508 (2005).

while denying that such payments influence programming.⁵¹¹ Furthermore, current federal laws do not prohibit stations from withholding airplay in the absence of consideration.⁵¹²

Executives at radio conglomerates who espoused no-tolerance policies regarding gifts and travel did little to enforce such policies until Spitzer began investigating the practices of their stations; only then did they fire people.⁵¹³ Programming diversity cannot thrive in a market where some radio programmers (or, worse yet, directors of radio clusters) expect to be “spoiled” by record company promotion representatives who enjoy unfettered use of expense accounts. On the other hand, if radio group owners maintain their bans on independent promotion, artists on small labels may suffer limited access to radio.⁵¹⁴ Smaller independent labels may not have the resources to hire experienced promotion staffs. The artists on those record labels will face increasingly significant hurdles to airplay.⁵¹⁵

3. Programming Diversity, Localism and Viewpoint Diversity in Radio are Intimately Intertwined and Have Been Harmed by Radio Consolidation Since 1996.

Viewpoint diversity and programming diversity are intimately connected. During the war in Iraq, Cox Radio and Cumulus Broadcasting issued corporate-level bans on music by country-pop group the Dixie Chicks “after Natalie Maines, a member of the group, said she was ashamed to be from the same state as President Bush.”⁵¹⁶ The Dixie Chicks’ manager, Simon Renshaw, testified at a Senate committee hearing in 2003: “What happened to my clients is perhaps the most compelling evidence that radio ownership consolidation has a direct negative impact on diversity of programming and political discourse over the public airwaves.”⁵¹⁷ “At the same hearing, Cumulus’s [C]hief [E]xecutive, Lewis Dickey, said the company’s stations had merely been responding to listener demands.”⁵¹⁸ Some Clear Channel stations also banned Dixie Chicks’

511. *See id.*

512. *See id.*

513. *See* Duhigg & Hamilton, *supra* note 509, at C1; Jeff Leeds, *Payola Or No, Edge Still To the Big*, N. Y. TIMES, July 28, 2005, at E1; *Executive Fired*, *supra* note 403, at E1.

514. *See* Boehlert, *supra* note 469.

515. *See id.*; Sidak & Kronemyer, *supra* note 10, at 527–28 (citing both temporal and geographic difficulties associated with promoting a hit record to dispersed radio stations).

516. Lee, *supra* note 255 at E1.

517. *Id.*

518. *Id.*

music, but Clear Channel asserted that local programmers made such decisions because of “negative reaction from our listeners.”⁵¹⁹ It is true that stations in Dallas, Kansas City, and Nashville reported getting hundreds of calls, many in support of a ban.⁵²⁰ Mr. Renshaw had a different point of view than the radio executives, however: “Consider a radio station that receives 1,000 calls and e-mails from listeners demanding that they boycott the Chicks’ music They ignore the fact that 17,500 fans have bought tickets to a show [happening] in a couple of months and seem to think that those 1,000 calls/e-mails are somehow reflective of their audiences’ wishes.”⁵²¹

As media mogul Ted Turner pointed out, the ban on Dixie Chicks’ music illustrates that “consolidation has given big media companies new power over what is said not just on the air, but off it as well.”⁵²² Commenting on Cumulus’ decision to ban the band from its forty-two country-format radio stations, he noted:

It’s hard to imagine Cumulus would have been so bold if its listeners had more of a choice in country music stations Naturally, corporations say they would never suppress speech. But it’s not their intentions that matter; it’s their capabilities. Consolidation gives them more power to tilt the news and cut important ideas out of the public debate. And it’s precisely that power that the rules should prevent.⁵²³

The corporate-level bans instituted by Cumulus and Cox deprived the Dixie Chicks of airplay and conveyed a message to recording artists that radio companies are willing to censor an artist because of political disagreement.⁵²⁴ Since these bans were executed at the corporate level, censorship was not limited to markets where substantial numbers of listeners had expressed that they did not want to hear the band’s music. For example, local programmers who believed that their audiences still wanted to hear the Dixie Chicks were not permitted to play the band’s music because corporate executives either disagreed with Maines’ statements or speculated that their audiences might disagree with the band’s

519. Spokesman for Clear Channel, *Clear Channel Defends Its Localism Efforts*, COMM. DAILY, Jan. 7, 2005.

520. See Jennifer Harper, *Jab at Bush a Flop for Dixie Chicks; Lead Singer Apologizes for Comment*, WASH. TIMES, Mar. 16, 2003, at A3.

521. Phyllis Stark, *Dixie Chicks Comments Spark Country Radio Boycotts*, BILLBOARD, Mar. 29, 2003, at 7 [hereinafter *Dixie Chicks*].

522. Ted Turner, *Break Up This Band! How Government Protects Big Media—And Shuts Out Upstarts Like Me*, WASH. MONTHLY, July 1, 2004, at 36.

523. *Id.*

524. Opinion, *A Free and Open Dialogue*, BILLBOARD, May 22, 2004, at 10.

statements.⁵²⁵ Because of the magnitude of radio groups' power, directly attributable to the relaxation of ownership caps in 1996, incidents such as the Dixie Chicks ban now have potential to chill speech.⁵²⁶

Programming diversity, viewpoint diversity, and localism have become casualties of the 1996 Act by another means as well: syndicated radio programming has moved the content that local programmers would otherwise provide away from local airwaves.⁵²⁷ Growth of syndicated radio programming is generally attributable to the economies of scale involved in simultaneously broadcasting a syndicated personality on many staff-starved local stations.⁵²⁸ This allows group owners to sell national advertising, create an appealing product that many listeners want to hear, and reduce costs associated with employing local talent.⁵²⁹ After the passage of the 1996 Act, vertically integrating media companies deliberately acquired companies that produced syndicated radio shows.⁵³⁰ Then they replaced a great deal of local radio programming with programming identical to that heard in up to 200 other stations.⁵³¹ Consequently, even in markets where local programmers choose songs autonomously, listeners hear the results of local music programming decisions only to the extent that a station airs locally-originated programming. The ratio of locally-originated programming to nationally syndicated programming has decreased rapidly *In recent years*.⁵³²

Similarly, consolidation allowed radio group owners to centralize broadcasts, cut costs, and utilize experienced voice talent through a process called "voice-tracking." "A listener in Atlanta might think the morning DJ is a local guy--he peppers his spiel with references to local happenings and hot spots--but in fact he's broadcasting from a booth in Cincinnati."⁵³³ Critics assert that "there's an ethical breach when a radio personality

525. *Dixie Chicks*, *supra* note 521 (stating that Cox canceled a syndicated evening show, *Lia*, on Jones Radio Network because it initially refused to cease airing the Dixie Chicks' songs after the ban).

526. Opinion, *supra* note 525, at 10.

527. See Michael Ortner, *Current Public Law and Policy Issues: Serving a Different Master-The Decline of Diversity and the Public Interest in American Radio in the Wake of the Telecommunications Act of 1996*, 22 HAMLINE J. PUB. L. & POL'Y 139, 155 (2000).

528. See *id.* at 157.

529. See *id.*

530. See *id.* at 161.

531. See *id.*; see also Katy Bachman, *Radio Host Delilah Jumps to Premiere From Jones*, MEDIAWEEK, May 26, 2004.

532. See Neal Conan, *Effects of Corporate Ownership on the Radio Industry*, TALK OF THE NATION, NATIONAL PUBLIC RADIO, May 27, 2003; Dawkins & Scott, *supra* note 347, at 70-71.

533. See Christine Y. Chen, *The Bad Boys of Radio*, FORTUNE, Mar. 3, 2003.

purports to be somewhere he is not, but John Hogan, who heads up Clear Channel Radio, defends the practice. 'At the risk of sounding flippant, it's entertainment[.]'"⁵³⁴ According to Rick McDonald, Senior Vice President of Programming for Susquehanna Radio Corporation, "[A]rguing that voice-tracking per se diminishes local service is like arguing that cars cause unsafe driving."⁵³⁵ Other broadcasters argue that voice-tracking is not inherently evil, but that voice-tracking that is particularly deceptive or ubiquitous injures broadcasters' products. John Christian, programming director for Citadel's KWIN/KJOY Stockton, California, points out: "Voice-tracking abuse is the biggest example of why an industry that I grew up dying to be a part of is dying," he says.⁵³⁶ If a show is voice-tracked from a distant location, the disc jockey is unable to converse with listeners or make many local personal appearances.⁵³⁷ Although a remote disc jockey may have been fed snippets of information pertaining to local events, he generally will not be able to go into detail about local issues affecting the city that hears his voice, and certainly will not be able to discuss such issues with listeners live.⁵³⁸

Paragon Media Strategies conducted studies in 2004 that confirm listeners' opinions that voice-tracking worsens radio: forty-six percent responded that they would find a station less appealing if it used voice-tracked disk jockeys, fifty-one percent responded that it would have no effect, and less than one percent responded that they would find the station more appealing.⁵³⁹ Another survey showed that twenty-five percent of those surveyed would listen to a station more often if that station's disc jockey made public appearances, and thirty-two percent would listen more to a station that regularly discusses local issues on air.⁵⁴⁰ Since long-distance voice-tracking precludes regular local disc jockey appearances and substantial discussion of local issues, group owners who use voice-tracking

534. *See id.*

535. Sean Ross, *FCC Rules Get New Scrutiny: Groups: Radio Pay for Play, Artist Abuse Must Be Eyed*, BILLBOARD AIRPLAY MONITOR, Aug. 29, 2003.

536. *See id.*

537. *See* Paul Cowling, *An Earthy Enigma: The Role of Localism in the Political, Cultural and Economic Dimensions of Media Ownership Regulation*, 27 HASTINGS COMM. & ENT. L.J. 257, 334 (2005).

538. Conan, *supra* note 532.

539. *See* Larry Johnson, *Live and Local Matters*, Paragon Media Strategies Research Summary, FRIDAY MORNING QUARTERBACK, Nov. 4, 2002.

540. PARAGON MEDIA STRATEGIES, LISTENERS FEEL AT HOME WITH LOCAL RADIO, (2004), http://www.paragonmediastategies.com/cfi-bin/rfax/db.cgi?db=rfax&uid=default&view_records=1&rfaxID=*&sb1=6&so1=descend&sb2=4&so2=descend&sb3=5&so3=descend&nh=3.

fail to satisfy many listeners.

Although voice-tracking can both deceive and displease listeners, the problems associated with it are attributable to the manner in which the technology is used, rather than to the technology itself. Ken Payne, Program Director of Clear Channel's WMGF Orlando, FL, noted that his remotely located midday disc jockey "heard about a massive interstate tie-up in one of her voice-tracked markets . . . Minutes after the news hit, the station had the information on the air."⁵⁴¹ Payne asserts: "It's this sort of commitment and dedication that is necessary, not more legislation."⁵⁴² Payne has a point. Although voice-tracking can be used in a manner that diminishes listeners' ability to get local information, and that can contribute to the homogenization of viewpoints and music on the air, it is possible that voice-tracking technology can be used judiciously, with integrity, and in a way that meets listeners' needs. However, many watchdog groups, legislators, and columnists assert that voice-tracking inhibits localism and should be regulated through legislation or FCC rules.⁵⁴³ If voice-tracking regulation is needed, it should merely require radio station owners to establish local infrastructures sufficient to ensure listener safety.

A brief discussion of one particularly tragic event illustrates the risks to public safety caused by radio consolidation and the resulting ubiquity of voice-tracking and syndicated programming. Unfortunately, the facts also indicate the extent to which radio group owners can deceptively deny responsibility for protecting the safety of their listeners.

On January 18, 2002, at 1:37 A.M., a freight train derailed near Minot, North Dakota.⁵⁴⁴ Five tank cars carrying anhydrous ammonia catastrophically ruptured and a vapor plume covered the surrounding area. One resident was killed and eleven people sustained serious injuries.⁵⁴⁵ By

541. Ross, *supra* note 536.

542. *Id.*

543. See *Media Ownership Rules: Hearing Before S. Comm. On Commerce, Science & Transportation*, 108th Cong. (2003) (noting statements of Sen. Byron L. Dorgan (D-ND who was lamenting the fact that rural farmers who had long depended on local radio stations for local information and music must, if they want to continue to listen to terrestrial radio, listen to stations "owned by a company 1,000 miles away [that wants] to do voice tracking and pour homogenized music over that radio station"); see also Anna Wilde Mathews, *From a Distance: A Giant Radio Chain Is Perfecting the Art of Seeming Local*, WALL ST. J., Feb. 25, 2002, at A1; David Hinckley, *It's Coming: Night of the Unliving DeeJays*, DAILY NEWS (N.Y.), May 14, 2003; Brandon Griggs, *Turning to McRadio; Dialing McRadio*, SALT LAKE TRIB., Mar. 2, 2003, at A1.

544. NAT'L TRANSP. SAFETY BD., *DERAILMENT OF CANADIAN PACIFIC RAILWAY FREIGHT TRAIN 292-16 AND SUBSEQUENT RELEASE OF ANHYDROUS AMMONIA NEAR MINOT, NORTH DAKOTA, JANUARY 18, 2002, RAILROAD ACCIDENT REPORT NTSB/RAR-04/01*, at 17-18 (2004), <http://www.nts.gov/publictn/2004/rar0401.pdf> [hereinafter *NTSB Derailment Report*].

545. See *id.*

many accounts, emergency response personnel tried to engage local radio stations to broadcast warnings but had little success.⁵⁴⁶ All six commercial radio stations in Minot were owned by Clear Channel and were reportedly operating “remotely” by airing satellite feeds from corporate headquarters.⁵⁴⁷ Clear Channel fiercely denied any wrongdoing in a document debunking “myths,” titled “Know the Facts”.⁵⁴⁸

MYTH: Clear Channel endangered the public in Minot, N.D. because it didn’t have anyone at its stations in the overnight hours.

FACT: The public-notification failures connected with the Minot train derailment were a direct result of the local authorities’ failure to install their Emergency Alert System equipment. Clear Channel absolutely had staff working that night and Clear Channel employees went above and beyond their professional responsibilities *In responding* to this serious situation, during and after the incident occurred.⁵⁴⁹

This carefully-worded denial is technically true: it would lead a reasonable reader to believe that Clear Channel had plenty of local staff on hand, and that any and all blame for the failure belonged to local authorities. What Clear Channel’s denial fails to disclose is that, “[a]t the time of the accident, only one person was working at the designated local emergency broadcast radio station . . . and the police department’s calls to the station went unanswered.”⁵⁵⁰

Even if the only on-duty staff member at KCJB and other employees at Clear Channel’s San Antonio headquarters worked diligently during this crisis, it hardly means that Clear Channel met its duty to protect its listeners’ safety. Clear Channel refused to acknowledge that it had much to learn from the event. The conglomerate could have admitted that it was experiencing unique growing pains when the disaster occurred, and could have then examined how it could better serve its audience and meet its public service obligations in the future. Instead, Clear Channel deceptively denied all responsibility, pointed fingers elsewhere, and acted victimized

546. See Anthony E. Varona, *Changing Channels and Bridging Divides: The Failure and Redemption of American Broadcast Television Regulation*, 6 MINN. J. L. SCI. & TECH. 1, 74 (2004).

547. See *id.*

548. See ClearChannel.com, Know the Facts,

<http://www.clearchannel.com/Corporate/PressRelease.aspx?PressReleaseID=1167&P=hidden> (last visited Mar. 22, 2006).

549. See *id.*

550. See *NTSB Derailment Report*, *supra* note 545, at 9.

by reports of its wrongdoing.

Group owners argue that any failures on the part of broadcasters during this incident were anecdotal and do not reflect the state of the industry.⁵⁵¹ Arbitron conducted a survey of residents of markets most directly impacted by the hurricanes of 2004.⁵⁵² The survey indicated that eighty-five percent of those surveyed felt “satisfied” or “very satisfied” with their local radio stations’ programming during the hurricanes.⁵⁵³ Nevertheless, the event in Minot and Clear Channel’s denial of culpability illustrate that as long as some group owners refuse to take their fundamental public interest obligations as seriously as they take their obligations to their shareholders, further local radio station regulations are required to maintain infrastructures and mechanisms that ensure public safety.

The 2004 Arbitron survey showed the magnitude of responsibility that music-driven radio stations and their owners carry in times of a national disaster. While those surveyed preferred to get information from television during preparation stages of the storms, fifty-one percent of respondents said that “radio was their medium of choice during the storm,” largely because radio can be battery powered and portable.⁵⁵⁴ Almost half of those using radio for storm information “used music stations to get hurricane information.”⁵⁵⁵ Moreover, almost sixty percent tuned into their “usual” station.⁵⁵⁶ Since not all radio listeners switch to news/talk broadcasts during emergencies,⁵⁵⁷ music-formatted stations must be required to maintain mechanisms to ensure public safety, and must not be allowed to just point fingers at local authorities when the lives of listeners are at risk.

Assuming, for the sake of argument, that radio group owners will do what is necessary to protect public safety despite severe financial pressure to downsize local operations, it is still difficult to grasp from abstract studies the extent to which post-1996 consolidation has deteriorated localism and diversity in radio. A snapshot of radio stations in Anchorage,

551. See, e.g., *Media Ownership (Radio Consolidation): Hearing on S.R. 253 Before the S. Comm. On Commerce, Science & Transportation*, 108th Cong. (2003) (including statement of Lewis W. Dickey, Jr., Chairman and CEO, Cumulus Broadcasting, Inc., who referred to the incident as the “now famous Minot anomaly”), http://commerce.senate.gov/hearings/testimony.cfm?id=831&wit_id=2338.

552. See RIDING OUT THE STORM, *supra* note 215, at 3.

553. See *id.* at 24.

554. *Id.* at 4.

555. *Id.* at 18.

556. See *id.* at 19.

557. See *id.*

Alaska, illustrates the effects of the 1996 Act. Anchorage is the largest city in Alaska and the home state of Senator Ted Stevens, who is the Chairman of the Senate Commerce, Science, and Transportation Committee which oversees telecommunications issues for the Senate.⁵⁵⁸ Senator Stevens stated that he plans to lead a re-write of the Act of 1996, but does not believe that media ownership is an issue that needs to be revisited.⁵⁵⁹ Although the Senator had already made up his mind, he acknowledged that other members of the Commerce Committee feel differently.⁵⁶⁰ Deeply committed to the welfare of the citizens of his home state,⁵⁶¹ Senator Stevens might be surprised to discover the state of post-consolidation radio "back home" in Anchorage.

Out of 299 markets nationwide, Arbitron ranks Anchorage as the 172nd largest radio market in the United States.⁵⁶² In 1996, seven local companies ran seventeen commercial radio stations in Anchorage.⁵⁶³ Less than a decade later, Anchorage had twenty-one commercial radio stations, but sixteen were owned by three non-local companies: AM-FM, Inc., now owned by Clear Channel, Morris Communications, and New Northwest.⁵⁶⁴ Each of the top five stations is owned by either Clear Channel or Morris Communications.⁵⁶⁵ Although five commercial stations are still locally-owned, those stations command only a tiny share of the local ratings.⁵⁶⁶

Assuming that programmers of group-owned stations operate autonomously, a reasonable listener would expect Clear Channel's Anchorage Adult Contemporary ("AC") station to sound different from Clear Channel's Augusta, Georgia's AC station. In fact, the March 2006 playlists of these stations showed that twenty of the top thirty songs on each station were common to both stations.⁵⁶⁷ Both stations feature

558. Bill Holland et al., *Pay Media Could Face New Rules*, BILLBOARD, Mar. 12, 2005 at 1.

559. Adam Jacobson, *Senate Gearing Up for Rewrite of Telecommunications Act*, R&R TODAY, Mar. 2, 2005, at 1.

560. *Id.*

561. See Peter Cohn, *In Defense of Earmarks*, CONGR. DAILY, Mar. 11, 2005 (reporting that Senator Stevens "has led the way for years in earmarks for his home state and has become an industry unto himself for his constituents.").

562. Anchorage, AK Market Ratings, <http://www.radioandrecords.com/RRRatings/DetailsPage.aspx?MID=10&RY=2005&RQ=4&MP=0&OTHER=2&MN=Anchorage&MS=AK&MR=172&12P=228900&UP=2/2/2006%2012:00:00%20AM&SU=S&CE=0> (last visited Mar. 8, 2006) [hereinafter Anchorage, AK Market Ratings].

563. Sonya Senkowsky, *Making Radio Waves; Outside Companies Shake Up Local Broadcast Scene*, ANCHORAGE DAILY NEWS, Apr. 27, 2000, at 1D.

564. *Id.*

565. See Anchorage, AK Market Ratings, *supra* note 563.

566. *Id.*

567. See KYMG Playlist Reflecting Airplay week ending 3/18/06, published on Radio &

Premiere Radio Networks' syndicated "Delilah" show five nights per week.⁵⁶⁸ This show, aired on more than 200 radio stations nationwide, features Delilah's "emotionally-charged mix of ballads, love songs and heart-felt discussions of relationships with her listeners."⁵⁶⁹

In 2004, the *Anchorage Daily News* interviewed a 28-year-old Anchorage resident, Andra Hammond, about her radio-listening habits.⁵⁷⁰ Hammond said that her favorite type of radio station was country, in part, because she related to the messages conveyed in country songs.⁵⁷¹ Hammond is not alone; a large proportion of Anchorage women enjoy country radio.⁵⁷² Suppose during her weekend, Hammond wants to hear her favorite country songs on the radio. She has a choice of two stations: KASH (owned by Clear Channel) and KBRJ (owned by Morris). If she tunes into either station, she is likely to hear the music and viewpoints conveyed on a syndicated show. The two country stations broadcast nine different syndicated shows each weekend; KASH and KBRJ each have only one local air talent that works on the weekends.⁵⁷³

Suppose, after a weekday shift at her job, Hammond wants to spend her evening listening to soft hits on an Adult Contemporary station. Unless she wants to spend the money for a subscription to satellite radio, she has two choices: Clear Channel-owned KYMG or Morris-owned KMXS. If she tunes to KYMG, she will hear Delilah provide the same songs and advice that up to six million other women will hear that week.⁵⁷⁴ If she tunes into KMXS, she can hear the "mix of music and advice" provided by the John Tesh Radio Show,⁵⁷⁵ which is heard on scores of stations nationwide.⁵⁷⁶

Records website, <http://www.radioandrecords.com/Formats/AC.asp> (last visited Mar. 24, 2006); see also WBBQ Playlist Reflecting Airplay week ending 3/18/06, published on Radio & Records website, <http://www.radioandrecords.com/Formats/AC.asp> (last visited Mar. 24, 2006).

568. See Radio Delilah Stations, <http://www.radiodelilah.com/affiliates/affiliates.html> (listing Delilah's affiliates and air times).

569. See Bachman, *supra* note 531.

570. See Melissa Devaughn, *Mama's Got Cowboy Boots: Country Music Strikes a Chord with Female Listeners with Themes of Home, Love and Family*, ANCHORAGE DAILY NEWS, April 23, 2004, at F1.

571. See *id.*

572. See generally *id.*

573. See KASH FM website, <http://www.kash1075.com/main.html> (last visited Oct 30, 2005); KBRJ FM website, <http://www.kbearcountry.com/livepages/10.shtml> (last visited Oct. 30, 2005); Jones Radio Networks, <http://www.jonesradio.com/Dayparts/Country.html> (last visited Oct 30, 2005).

574. See Bachman, *supra* note 531.

575. See Ann Pinson, *Anchor for the Night Former 'ET' Co-host Tesh Now Offers a Radio Blend of Music and Advice*, DALLAS MORNING NEWS, June 28, 2005, at 12E.

576. See John Tesh Radio Show, <http://www.tesh.com/itrium/visit?path=>

If Hammond wants to hear rock music on her radio, she again has a choice between a Clear Channel station (KBFX "The Fox") and a Morris-owned station (KWHL "KWhale"). If she tunes into The Fox, she is likely to have an opportunity to hear a local live disc jockey unless she tunes in early in the morning. Of the local and syndicated disc jockeys on The Fox, none are female.⁵⁷⁷ Unfortunately for Hammond, rock stations focus on attracting male listeners aged 18-34.⁵⁷⁸ Thus, if Ms. Hammond decides that she likes the songs she hears on The Fox and decides to visit the station's website, she will find that its home page features a link to a photograph of a bikini-wearing model captioned: "R-Rated Fox of the Day," complete with a rearview photo of a woman wearing a thong.⁵⁷⁹ If she scrolls down on the station's website, she will have an opportunity to rate photographs of women in the station's "Hump or Dump" contest. The link to that contest shows a primly dressed woman next to a rearview photograph of yet another thong-wearing model bent over a railing.⁵⁸⁰

At the very top of the website is an inviting advertisement: "Buy U2 Tickets!"⁵⁸¹ Unfortunately, if Ms. Hammond clicks on it, she will discover that the closest venue to Anchorage on the U2 itinerary is Vancouver.⁵⁸² If she was curious about sports, she could scroll down to the sports highlights to view a discussion about the playoff prospects of the Los Angeles Lakers, but she would find no information about sports in Alaska.⁵⁸³

Clear Channel executives are proud of the efficiency with which their radio stations' websites "connect with" local listeners.⁵⁸⁴ A quick look at several websites of Clear Channel-owned rock stations in Anchorage and several other markets shows that Clear Channel connects with many listeners by encouraging them to "Hump or Dump."⁵⁸⁵ Each rock website

A1x97x1y1xa5x1x76y1x3e70x1x65y1x39ex1x65 (last visited March 26, 2006).

577. See KBFX The Fox Website, <http://www.1005thefox.com/main.html#> (last visited April 7, 2005) (displaying only male on-air staff under the "Fox Jox" tab).

578. See generally Clea Simon, *Women Rockers in Hard Place*, BOSTON GLOBE, Aug. 17, 2001, at C12; Dale Smith, *Airwave Turnover: Sara Trexler Signs Off 101.C After 4-year Stint*, AUSTIN AM.-STATESMAN, Dec. 16, 1999, at XLEnt10.

579. See KBFX The Fox Website "R-Rated Babes", http://www.1005thefox.com/cc-common/otd_pages/Rbabe_otd.html (last visited Feb 2, 2005).

580. See *id.*

581. See *id.*

582. See U2 Website, http://www.u2.com/tour/past_tours.php.

583. See KBFX The Fox Website, <http://www.1005thefox.com/main.html> (last visited Feb. 2, 2005).

584. See [http://www.clearchannel.com/Radio/PressRelease.aspx?](http://www.clearchannel.com/Radio/PressRelease.aspx?PressReleaseID=631)

PressReleaseID=631 (statement of Kim Johnson) ("Stations on a local level via the web already do a tremendous job of connecting with both listeners and advertisers.").

585. WFBQ Indianapolis, <http://www.wfbq.com/main.html> (last visited Feb. 22, 2006);

exhibits the same national news, advertising, and thongs an Anchorage listener would see when surfing The Fox's website.⁵⁸⁶

The Morris-owned rock station KWhale, is home to Anchorage's highly-rated, locally-based morning broadcast team, Bob and Mark.⁵⁸⁷ The "Bob and Mark Show" has often been called "edgy, comical, dim," and "offensive," but has always been popular.⁵⁸⁸ The show joined KWhale in the mid-1990s, but later defected to KWhale's competitor, The Fox, owned by Clear Channel.⁵⁸⁹ In April 2004, the duo abruptly left The Fox and soon returned to KWhale.⁵⁹⁰ The Fox's Program Director, believing that a local replacement could not match the popularity of "Bob and Mark,"⁵⁹¹ replaced the local show with the similarly-named "Bob and Tom" show, an Indianapolis-based syndicated show broadcast by Clear Channel's Premiere Radio Networks to 140 stations.⁵⁹² The Fox's ratings during this period demonstrate that Alaskans strongly believed that a local morning team served their needs better than Clear Channel's syndicated program. The Fox enjoyed a healthy 7.1 share of the Anchorage radio listening market prior to the departure of the local "Bob and Mark Show" in fall 2003.⁵⁹³ However, by the fall of 2004, The Fox's ratings had plummeted to a mere 1.7 share.⁵⁹⁴ During the same period, KWhale's ratings rose from 4.7 to 5.0.⁵⁹⁵

Although much of Bob and Mark's popularity is attributable to their talent for comedy, frequent public appearances, and attention to local issues

KJ108 Grand Forks, http://www.kjrj.com/cc-common/rateapic/big_dog2_hump_or_dump.html (last visited Feb. 28, 2006); 105.9 The Rock, Nashville, http://www.1059.com/cc-common/rateapic/hump_or_dump.html (last visited Feb. 28, 2006).

586. Compare KBFX Anchorage, <http://www.1005thefox.com/main.html>, and 99X Shreveport, http://www.rock99.com/news_entertainment.html, with WFBQ Indianapolis, <http://www.wfbq.com/main.html> (last visited Apr. 2, 2005).

587. See Sheila Toomey, *Alaska Ear*, ANCHORAGE DAILY NEWS, Apr. 18, 2004, at B2.

588. See Josh Niva, *Bob & Mark Sign Off: Popular Duo Depart Radio At The Top Of Their Game*, ANCHORAGE DAILY NEWS, Apr. 16, 2004, at G1.

589. *Id.*

590. *Id.*

591. *See id.*

592. *See id.*

593. *See* Radio & Records, <http://www.radioandrecords.com/RRRatings/DetailsPage.aspx?MID=10&RY=2004&RQ=4&MP=0&OTHER=2&MN=Anchorage&MS=AK&MR=171&12P=226600&UP=2/8/2005%2012:00:00%20AM&SU=S&BPER=&HPER=&OPE R=&NSD=&CE=0> (last visited Jan. 30, 2005) (showing that Arbitration numbers represent the ratings of The Fox overall for listeners aged 12 years and older, not just for listeners during the morning show).

594. *See id.*

595. *See id.*

(such as hockey),⁵⁹⁶ part of their success with young male listeners may be attributable to the fact that their website offers downloadable photos and videos of naked women. For example, the top downloaded video from Bob and Mark's website is of naked women "oil-wrestling," which is not password protected, so viewers of all ages may enter the site at will.⁵⁹⁷ Although the Bob and Mark Show provides listeners with local information about The Aces, Anchorage's professional hockey team, and spurs debate about the upcoming Anchorage mayoral race,⁵⁹⁸ their sexist antics are an affront to Alaska's women. Although the case study of Anchorage's Bob and Mark Show illustrates local radio is better-received by listeners than homogenized syndicated programming, it also shows that in small markets where radio listeners have few choices in terrestrial radio, indecency and lowest common denominator programming exist. In these situations, some potential listeners are alienated and therefore deprived of program diversity in their communities.

4. Post-1996 Consolidation and Vertical Integration of Media Companies Have Led to Anticompetitive Programming Behaviors at Local Radio Clusters

As radio groups consolidated after 1996, they bought diverse types of media ventures. Many radio group owners went on ambitious spending sprees to become vertically integrated multi-media companies.⁵⁹⁹ "Vertical integration is the 'combining of two or more vertically related production processes under the auspices of one ownership-and-control entity.'"⁶⁰⁰ Vertically integrated companies have the ability to leverage the power of one division to increase the power of their other wholly-owned subsidiaries. Some of the largest vertically-integrated radio conglomerates

596. See generally Bob and Mark, <http://www.bobandmark.com/forum/index.php?topic=598.0>; Bob and Mark, <http://www.bobandmark.com/forum/index.php?topic=581.0> (last visited Feb. 23, 2006).

597. See Bob and Mark Suck, <http://www.bobandmarksuck.com/dir.php?dir=/Video%20Archive> (last visited Mar. 4, 2006).

598. See Bob and Mark, <http://www.bobandmark.com/main.htm> (last visited April 7, 2006) (providing links to Aces website and a K-Whale poll regarding Anchorage mayoral candidates).

599. See Maureen Dezell, *Is Bigger Better? In The Entertainment Business Clear Channel Is Everywhere, And Critics Say That Is the Problem*, BOSTON GLOBE, Jan. 27, 2002, at L1; Roy Bragg, *Radio Fight Pits Old Against New*; see generally *San Antonio-Based Clear Channel's Business Practices Are Under Fire*, SAN ANTONIO EXPRESS-NEWS, Feb. 4, 2003; Stephen Lynch, *End Note for O.C.'s Cool 94.3*, ORANGE COUNTY REGISTER, Jan. 7, 2003, at Local 2.

600. See Van Alstyne, *supra* note 294, at 636 (citing THE ANTITRUST REVOLUTION: ECONOMICS, COMPETITION, AND POLICY 328-29 (John E. Kwoka, Jr. & Lawrence J. White eds., 1999)).

include Clear Channel and Infinity Broadcasting (“Infinity”).⁶⁰¹

For example, in 2004, Clear Channel reported \$9.4 billion *In revenue*, but only \$3.7 billion of that sum was attributable to radio.⁶⁰² Clear Channel derives a substantial portion of its radio revenue from its Premiere Radio Networks, which provides seventy syndicated radio programs to 5,000 radio affiliates, with annual billings over \$330 million.⁶⁰³ In 2000, Clear Channel “purchased SFX [Entertainment], the largest concert promoter conglomerate.”⁶⁰⁴ By 2004, Clear Channel’s Live Entertainment division reported annual revenues of \$2.7 billion,⁶⁰⁵ while the company’s Outdoor Advertising division reported revenues of \$ 2.4 billion.⁶⁰⁶

Infinity Broadcasting, now CBS Radio, operates 179 radio stations, most of which are in the nation’s large and medium markets.⁶⁰⁷ CBS Corporation, Infinity’s parent, has vast holdings that include CBS, Showtime, UPN, Paramount Pictures, and Simon & Schuster.⁶⁰⁸

“Tying” is the “practice that occurs in vertically integrated companies . . . when one product . . . is sold on the condition that the buyer will purchase . . . another product from the seller,”⁶⁰⁹ “or agree not to purchase [a similar product] from a competitor.”⁶¹⁰ “Tying is harmful to the market when it allows a firm to leverage its market power in one industry to foreclose competition in another industry.”⁶¹¹ Concert promoters have accused Clear Channel of unlawfully tying its radio and concert promotions businesses to the disadvantage of other concert promoters. Clear Channel vehemently denies the charge.⁶¹²

601. See Clear Channel, <http://www.clearchannel.com/corporate/> (last visited Mar. 1, 2006); CBS Corporation, *Our Company*, http://cbscorporation.com/our_company/overview/index.php (last visited Mar. 1, 2006) (showing that CBS Corporation re-brands Infinity Broadcasting as CBS Radio).

602. Press Release, Clear Channel Communications, Inc., *Clear Channel Reports Fourth Quarter and Full Year 2004 Results*, <http://www.clearchannel.com/Corporate/PressRelease.aspx?PressReleaseID=1074&KeyWord=Clear+Channel+Reports+Fourth+Quarter+and+Full+Year+2004+Results> (last visited Mar. 28, 2005) [hereinafter *Clear Channel Q4 2004*].

603. See Premier Radio Networks, <http://www.premiereradio.com/pages/corporate/about.html> (last visited Mar. 25, 2005).

604. Van Alstyne, *supra* note 294, at 627.

605. See *Clear Channel Q4 2004*, *supra* note 603.

606. See *id.*

607. CBS Radio, About Us, <http://cbsradio.com/about/index.php> (last visited March 1, 2006).

608. CBS Corporation, *CBS Corporation Re-brands Infinity Broadcasting “CBS Radio,”* Dec. 14, 2005, <http://170.20.0.38/news/prdetails.php?id=131>.

609. Van Alstyne, *supra* note 295, at 637.

610. *Id.*

611. *Id.*

612. See Clear Channel Communications, *Know the Facts*, <http://www.clearchannel.com/>

In *Nobody in Particular Presents v. Clear Channel Communications*, Denver concert promoter Nobody in Particular Presents ("NIPP") alleged that Clear Channel's Denver rock stations "create[d] a monopoly over rock radio airplay in the region," allowing Clear Channel to unfairly utilize its "market leverage in concert promotions."⁶¹³ NIPP accused Clear Channel of unlawfully tying its radio airplay and concert practices, "forc[ing] musicians to select its concert promotions through threats of losing radio airplay."⁶¹⁴ Clear Channel and NIPP settled the case after Clear Channel's motion for summary judgment was denied.⁶¹⁵ The court held that NIPP had provided sufficient evidence for trial on its claims.⁶¹⁶ The district court noted that Denver had approximately fifty radio stations, and five of those stations were categorized by Arbitron as "rock."⁶¹⁷ Clear Channel owned four of the five rock stations.⁶¹⁸ NIPP claimed that rock artists and record labels had reason to fear that if they used a competing concert promoter then Clear Channel's Denver radio stations would refuse to give artists' songs as much airplay as they would if the artist contracted with Clear Channel's concert promoters.⁶¹⁹

Michael O'Connor was Clear Channel's Director of Programming for the company's FM radio stations in Denver.⁶²⁰ Sabrina Saunders, a music director at one of Clear Channel's Denver stations testified that "when record labels made O'Connor unhappy, O'Connor punished labels by withholding spins of their artists' records."⁶²¹ One record company representative testified that *In response to O'Connor's demand, the representative sent emails to artists' managers "suggesting they avoid using NIPP as their concert promoter in Denver to avoid losing airplay."*⁶²²

O'Connor himself sent an e-mail to programmers at all five Denver stations, encouraging them to advise record labels to influence their artists'

Corporate/PressRelease.aspx?PressReleaseID=1167&p=hidden (last visited Oct. 30, 2005).

613. Van Alstyne, *supra* note 294, at 649.

614. *Id.*

615. See Will Shanely, *Clear Channel Dials Back a Bit Radio Giant Will Spin Off Concert-promotions Unit To Appease Investors*, DENVER POST, May 1, 2005, at K13.

616. *Nobody in Particular Presents v. Clear Channel Comm.*, 311 F. Supp. 2d 1048, 1096 (D. Colo. 2004).

617. *Id.* at 1059 (noting that the parties disputed whether all four Clear Channel stations were accurately described as "rock").

618. *Id.*

619. *Id.* at 1061.

620. *Id.*

621. *Id.* at 1062.

622. See *Nobody in Particular Presents*, 311 F. Supp. 2d at 1062.

choice of concert promoters.⁶²³ O'Connor indicated that if artists chose to use a competing promoter, Clear Channel's stations might ignore an artist's local appearance that would otherwise interest its station's listeners.⁶²⁴ When rock bands Styx and Bad Company chose a competing concert promoter and a non-Clear Channel station ("the Hawk") to promote their show, O'Connor wrote an email to the Denver program directors stating, "Let's crush the Hawk and [promoter] HOB on this show . . . let's get our f*cksticks out."⁶²⁵ O'Connor also sent an email to Clear Channel's Vice President of Programming admitting it was common practice in Denver to threaten decreased airplay in order to take shows away from competing promoters.⁶²⁶ O'Connor reported to his superior that he was "collecting letters of denial every time this comes up."⁶²⁷

The record showed that programming decisions were made at the cluster level rather than at the individual station level, and that those decisions were not based on listeners' preferences. Moreover, the evidence suggested that Clear Channel had engaged in anti-competitive behavior at the cluster level, and at least one corporate executive knew about these activities. Clear Channel denied all wrongdoing.⁶²⁸

The power these Denver rock stations exerted provides an example of how consolidation and vertical integration have led to anticompetitive practices among some radio programmers. Critics have long said that arrangements conditioning levels of airplay with pledges by artists to use allied concert promoters "have become common as radio industry mergers force record companies . . . to deal with fewer and more powerful radio groups."⁶²⁹ Clear Channel now plans to sell off its underperforming live entertainment division,⁶³⁰ relieving fears about the dubious relationship between these two particular divisions of Clear Channel. Such a sale, however, would not change the fact that the largest media companies remain heavily vertically integrated. Radio group owners know that concert promoters and music retailers often purchase radio advertising, while record companies can often deliver free live concerts for radio

623. *Id.* at 1063.

624. *See id.*

625. *See id.* at 1064.

626. *Id.* at 1063.

627. *Id.*

628. Will Shanley, *Clear Channel Dials Back a Bit Radio Giant Will Spin Off Concert-Promotions Unit To Appease Investors*, DENVER POST, May 1, 2005, at K13.

629. *See Clear Channel Fined*, *supra* note 410, at C1.

630. *See* Helen Coster et al., *Getting Clear*, FORBES, Oct. 18, 2005, at 46.

station-sponsored shows.⁶³¹ Since such music providers, including record labels and independent promoters, need airplay to thrive, radio owners with local format monopolies have incentives to decrease airplay benefiting “music providers” who refuse to give consideration to the monopolistic radio group.⁶³²

Where local format monopolies thrive, music providers who need airplay on a particular radio format may have no other recourse than to provide benefits to the powerful radio station owner, or risk oblivion in that market. This is true regardless of the extent of vertical integration within the media conglomerate, although as NIPP shows, the potential for cluster-wide abuse of power is exacerbated where radio owners enjoy vertical integration.

IV. DEVELOPMENTS IN RELEVANT POST 1996 CASE LAW AND THE PROPOSED RULES OF 2003

A. *The Fox and Sinclair Cases*

The new millennium brought an increase in broadcast-related activity in Washington D.C. In 2000, the FCC published the results of its first biennial review of the Broadcast Ownership Rules pursuant to § 202 of the Telecommunications Act of 1996.⁶³³ By 2002, broadcasters were spending \$ 7 million per year in Washington lobbying expenses.⁶³⁴ Meanwhile, in *Fox Television Stations, Inc. v. FCC*, and *Sinclair Broadcast Group v. FCC*, the Court of Appeals for the D.C. Circuit interpreted the review requirement of § 202(h) as carrying a “presumption in favor of repealing or modifying the [media] ownership rules.”⁶³⁵ In the view of the D.C. Circuit Court of Appeals, ownership rules should be repealed unless “justifiable as necessary for the public interest.”⁶³⁶

In *Fox*, television broadcasters challenged the FCC’s decision not to repeal or modify its National Television Station Ownership Rule (“NTSO

631. See generally Sylvia Adcock, *Warner Fined \$5M in Payola Scheme*, *NEWSDAY*, Nov. 23, 2005, at A44.

632. See *id.*

633. 1998 Biennial Regulatory Review-Review of the Commissions Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Report and Order and Notice of Proposed Rulemaking, 15 F.C.C.R. 11,058 (adopted May 26, 2000).

634. See Varona, *supra* note 547, at 82–83.

635. *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1048 (D.C. Cir. 2002); *Sinclair Broad. Group Inc. v. FCC*, 284 F.3d 148, 152 (D.C. Cir. 2002) (quoting *Fox*, 280 F.3d at 1048.).

636. Cowling, *supra* note 538, at 270.

Rule”), which limits the national audience reach of commonly owned television stations.⁶³⁷ Holding that the FCC had not sufficiently explained why its NTSS Rule should be retained under § 202(h) in light of current television competition, the court stated that § 202(h) imposed upon the FCC a duty to examine the NTSS Rule and “retain it only if it continued to be necessary.”⁶³⁸ The court vacated the FCC’s decision to neither rescind nor amend the NTSS Rule and remanded the case back to the Commission for further proceedings.⁶³⁹ According to the court, the FCC had not provided sufficient evidence that television “broadcasters ha[d] undue market power” in any relevant market and, therefore, had “no valid reason to think the NTSS Rule is necessary to safeguard competition.”⁶⁴⁰

In *Sinclair*, the D.C. Circuit remanded the FCC’s Local Television Station Ownership Rule (“LTSS Rule”), citing a failure by the FCC to justify its relaxation of local television ownership rules as being in the public interest.⁶⁴¹ The court ruled that despite substantial deference accorded by courts to FCC rule-making decisions, the FCC is required to provide evidence and a reasoned explanation supporting its decisions about ownership restrictions.⁶⁴²

After the *Fox* and *Sinclair* decisions, the FCC again reviewed the broadcast ownership rules set forth in the Act of 1996, this time, with Chairman Michael K. Powell at the helm of the FCC. Mr. Powell, upon his appointment as Chairman, vowed to erase scores of regulations restricting the size of media companies, which earned him significant support among the largest broadcasting companies.⁶⁴³ During his tenure as Chairman, the media reported wide criticism of Powell as being too close of a friend to big business.⁶⁴⁴

B. *The FCC’s Proposed Media Ownership’s Rules of 2003*

In its 2003 Biennial Review Order, the FCC voted in favor of a

637. See *Fox*, 280 F.3d at 1033.

638. *Id.* at 1043.

639. *Id.* at 1053.

640. *Id.* at 1041–42.

641. *Sinclair Broad.*, 284 F.3d at 165.

642. *Id.* at 167–68.

643. See Stephen Labaton, *Powell to Step Down at F.C.C. After Pushing for Deregulation*, N.Y. TIMES, Jan. 22, 2005, at A1.

644. See Roger O. Crockett, *At the FCC, Powell Hangs Up*, BUS. WK., Jan. 24, 2005; Frank Ahrens, *FCC Chairman Powell to Step Down: Deregulation, Battles Against Broadcast Indecency Have Marked His Term*, WASH. POST, Jan. 23, 2005, at A11; Labaton, *supra* note 643, at A1.

comprehensive overhaul of its broadcast media ownership rules..⁶⁴⁵ Of the five Commissioners, the three Republican commissioners voted in favor of the changes while two Democratic commissioners vehemently opposed the changes.⁶⁴⁶ Chairman Powell attended only one public hearing on the matter, but held thirty-four meetings regarding media ownership rules with the most powerful broadcasting lobbyists.⁶⁴⁷

The FCC's proposed rules, if promulgated without modification, would increase the number of television stations a single entity may own locally and nationally, revise certain provisions of the Local Radio Station Ownership Rule ("LRSO Rule"), and replace the ban on common ownership among newspapers and broadcast stations with a complex set of "Cross-Media Limits."⁶⁴⁸ The proposed Cross-Media Limits would entirely lift the restriction against cross-ownership between newspapers and broadcasters in the largest markets. The only restrictions on media ownership in the largest markets would be local ownership caps on each type of media.⁶⁴⁹ In the largest markets, one entity could own up to three television stations, eight radio stations, the dominant newspaper, and the cable system.⁶⁵⁰ In medium markets, the following combination maximums replaced the ban on cross ownership: (a) one newspaper, one television station and up to 50% of the local radio station limit; (b) one newspaper and the maximum number of radio stations allowed by the LRSO Rule for that sized market, but no television stations; or (c) two television stations and the maximum number of radio stations allowed by the LRSO Rule for that sized market, but no daily newspapers.⁶⁵¹ In small markets, the rules prohibited cross-ownership of TV, radio, and newspapers.⁶⁵²

The Cross-Media Limits were calculated using the FCC's new "Diversity Index," which was designed to provide empirical evidence

645. See 2003 Biennial Regulatory Review Order, *supra* note 22, at 13,624.

646. See Ben Scott, *The Politics And Policy Of Media Ownership*, 53 AM. U.L. REV. 645, 645 (2004); Stephen Labaton, *Regulators Ease Rules Governing Media Ownership*, N.Y. TIMES, June 3, 2003, at A1.

647. See Stephen Labaton, *Behind Media Rule and Its End, One Man*, N.Y. TIMES, June 2, 2003, at C1; Ron Orol, *Bill Targets Media Regs*, DAILY DEAL, Mar. 30, 2004, available at <http://www.thedeal.com> (search title).

648. See *Prometheus Radio Project v. FCC*, 373 F.3d 372, 381 (3d Cir. 2004).

649. *Id.* at 384.

650. See 149 Cong. Rec. S11383, 11385 108th Cong. (daily ed. Sept. 11, 2003) (statement of Senator Dorgan).

651. See 2003 Biennial Regulatory Review Order, *supra* note 22, at 13,803.

652. *Id.*

justifying the FCC's ownership rules.⁶⁵³ The 2003 Biennial Review Order purported that the Diversity Index measured viewpoint diversity in local markets and identified markets where consolidation could be expected to have a deleterious effect.⁶⁵⁴ The FCC determined that broadcast television, daily and weekly newspapers, radio, and Internet connections were relevant contributors to viewpoint diversity in local markets and assigned weights to each of these categories based on what the FCC determined to be the relative popularity of each type of media for obtaining news.⁶⁵⁵ The proposed rules relaxed local and national caps on the number of television stations that one entity could own, permitting a network to reach up to 45% of the national audience.⁶⁵⁶

The proposed rules did not alter the fact that the Telecommunications Act of 1996 had completely eliminated restrictions on the number of radio stations that one entity can own nationwide.⁶⁵⁷ Existing numerical limits and AM/FM subcaps on radio station ownership were also retained under the LRSO Rules.⁶⁵⁸ Modifications of other aspects of the LRSO Rules were proposed, including changing the method for determining radio markets to the geography-based market delineations created by Arbitron.⁶⁵⁹ The 2003 Order proposed that existing radio station combinations that were rendered noncompliant under Arbitron-defined markets would be grandfathered in, but transfer of these combinations was prohibited except when transferred to qualifying small businesses.⁶⁶⁰ The proposed rules now also included noncommercial stations among the station count for each market.⁶⁶¹

The 2003 Order also proposed including any radio station whose advertising is brokered to another station in a "joint sales agreement" in the numerical limits of the brokering station's owner.⁶⁶² Joint sales agreements have long been viewed as a means by which radio entities get around local ownership rules, controlling and profiting from radio stations that they do

653. *See id.*

654. *See Prometheus Radio Project*, 373 F.3d at 382, 388 (citing 2003 Biennial Regulatory Review Order, *supra* note 22, at 13,775, 13,793–94).

655. *See* 2003 Biennial Regulatory Review Order, *supra* note 22, at 13,782–83, 13,784, 13,788.

656. *See Prometheus Radio Project*, 373 F.3d 372 at 382, 386–88.

657. *See* 2003 Biennial Regulatory Review Order, *supra* note 22, at 13,738; Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(a), 110 Stat. 56 (1996).

658. *See* 2003 Biennial Regulatory Review Order, *supra* note 22, at 13,733–34.

659. *See Prometheus Radio Project*, 373 F.3d at 387.

660. 2003 Biennial Regulatory Review Order, *supra* note 22, at 13,810–11.

661. *Id.* at 13,734.

662. *See id.* at 13,712–13.

not own.⁶⁶³

The FCC's Republican majority justified its proposed rule changes on legal and policy-based grounds: § 202 of the 1996 Act required the FCC to periodically determine whether its media ownership rules remain "necessary in the public interest."⁶⁶⁴ The Republican Commissioners argued that § 202(h) upended the traditional administrative law principle that agencies must justify any modifications or eliminations of existing rules, and instead required the agency to justify any decision to *not* modify or eliminate existing rules.⁶⁶⁵ The rationale behind this argument was that the courts had held that "Section 202(h) carries with it a presumption in favor of repealing or modifying the ownership rules."⁶⁶⁶ Chairman Powell's separate Concurring Statement cited the *Fox* decision for the proposition that "Congress set in motion a process to deregulate the structure of the broadcast and cable television industries" and therefore, the FCC was required by Congress "to continue the process of deregulation."⁶⁶⁷ In other words, under Chairman Powell's view, the D.C. Circuit held that § 202(h) carries a presumption of "repealing," rather than "repealing or modifying" the broadcast ownership rules. Commissioner Kevin J. Martin, who succeeded Powell as Chairman, agreed that the D.C. Circuit had interpreted § 202(h) as creating a presumption in favor of deregulation.⁶⁶⁸

Commissioner Copps argued in his dissent that the *Fox* and *Sinclair* decisions held that the FCC was obligated "to present reasoned rationales with more compelling explanations than we have thus far presented. But we are not instructed to radically restructure the rules."⁶⁶⁹ Commissioner Adelstein, in his impassioned dissent, explained succinctly that the *Fox* and *Sinclair* courts "sent the rules back to us for justification, not for evisceration."⁶⁷⁰ Copps and Adelstein explained that while the statutory

663. See Mark K. Miller, *On Hold: Rankings Change Little As Regulatory Uncertainty Keeps Station Trading In Neutral*, BROADCASTING & CABLE, Apr. 19, 2004 at 50, 53; see, e.g., Tom Walter, *Clear Channel is Raising its Voice*, COMMERCIAL APPEAL (Memphis) Apr. 13, 2003, at B3 (explaining that Clear Channel controlled, but did not own, a Memphis news station through a joint sales agreement).

664. Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56 (1996).

665. See 2003 Biennial Regulatory Review Order, *supra* note 22, at 13,624-25.

666. See *id.*

667. *Id.* at 13,933 (statement of Chairman Michael K. Powell).

668. See, e.g., Statement of Republican Commissioner Kevin J. Martin, at 13,948.

669. See 2003 Biennial Regulatory Review Order, *supra* note 22, at 13,958 (statement of Michael J. Copps, dissenting).

670. Statement of Commissioner Jonathan S. Adelstein, Dissenting, 18 F.C.C.R. 13,620 (July 2, 2003).

mandate of the FCC made clear by the Communications Act of 1934 was protecting the public interest, the interests protected by the proposed rules were obviously those of media companies rather than the public.⁶⁷¹ Commissioner Adelstein characterized the proposed rules as a capitulation to “longstanding demands of the media giants we oversee,” that shattered “many of the vestiges of the consumer protections that weren’t eliminated in the 1980s.”⁶⁷² Even Republican Senator John McCain, then Chairman of the Senate Commerce Committee, commented on the proposed rules: “Whether we agree with them or not, the FCC’s actions are a direct result of the direction given to it by Congress in the Telecommunications Act of 1996, which should have been called ‘Leave No Lobbyist Behind Act of 1996.’”⁶⁷³

The FCC attempted to justify its deregulatory broadcast ownership rules by debunking the scarcity doctrine: in light of the vast increase in the number of competing media voices in the modern marketplace, the scarcity rationale no longer applied to the media that the ownership restrictions had been designed to protect. The world was now “characterized . . . by media abundance.”⁶⁷⁴ Commissioner Copps responded:

Will the vaunted 500-channel universe of cable TV save us? Well, 90 percent of the top cable channels are owned by the same giants that own the TV networks and the cable systems. More channels are great. But when they’re all owned by the same people, cable doesn’t advance localism, editorial diversity, or competition . . . the dominating Internet news sources are controlled by the same media giants who control radio, TV, newspapers, and cable.⁶⁷⁵

C. The Proposed Rules Would Have More Far Reaching Effects on Listeners of Radio Than Appears at First Glance

Since the proposed rules did not change the numerical caps on local radio station ownership, or limit national radio ownership, on its face, they

671. See 2003 Biennial Regulatory Review Order, *supra* note 22, at 13,951–55, 13974.

672. Statement of Commissioner Jonathan S. Adelstein, Dissenting, 18 F.C.C.R. 13,620, 13,974 (July 2, 2003).

673. 149 CONG. REC. S11383, 11385 108th Cong. (daily ed. Sept. 11, 2003) (statement of Senator McCain).

674. See 2003 Biennial Regulatory Review Order, *supra* note 22, at 13,649.

675. *Media Ownership Rules: Hearing Before S. Comm. on Commerce, Science & Transportation*, 108th Cong. (2003) (testimony of Commissioner Michael J. Copps, Commissioner, FCC), available at http://commerce.senate.gov/hearings/testimony.cfm?id=796&wit_id=2155 (last visited Oct. 30, 2005).

appear unlikely to affect the public interest in radio broadcasting.⁶⁷⁶ The problem with the proposed rules as they pertain to the public interest in radio is that the FCC's legal and policy justifications for keeping the status quo would also be applicable to future eviscerations of the local caps on radio station ownership.⁶⁷⁷ If the FCC majority is to be believed, there is little or no reason to regulate ownership of broadcast media, including radio, because media is "abundant," and because courts have held that the FCC has a statutory mandate to deregulate.⁶⁷⁸

Despite terrestrial radio broadcasters' complaints about competition, terrestrial radio licenses remain scarce. Entrepreneurs cannot just buy radio station licenses in order to fulfill unmet needs of listeners; licenses can only be obtained from the FCC. People turn to local radio when they want information about what is happening in their community, especially during emergencies. Not all Americans have the financial and technological resources to gain access to the forms of broadcasting that the NAB sees as a present threat.

If the FCC successfully puts its new rules into effect, including § 202(h), which requires the FCC to "continue the process of deregulation," there is reason to believe that the FCC will further relax local radio station ownership caps in subsequent quadrennial reviews. Such relaxation would be promulgated despite compelling evidence that radio deregulation has resulted in great harm to public interest, such as lack of diversity, localism and competition in radio.

What is at stake is larger than the potential effects of particular changes proposed in the 2003 Order. The key issue is whether the FCC has judicial and statutory mandates to deregulate media ownership on an ongoing basis. Many lawmakers, including a number of Republicans, have long believed that § 202(h) is not presumptively deregulatory. For example, Republican Senator John McCain, former Chairman of the Senate Commerce Committee, stated publicly that he believed that § 202(h) allowed the Commission to both tighten and loosen its media ownership rules, despite the FCC's interpretations of the D.C. Circuit's holdings on the matter.⁶⁷⁹

676. 2003 Biennial Regulatory Review Order, *supra* note 22, at 13,731–33.

677. *Media Ownership Rules: Hearing Before S. Comm. on Commerce, Science & Transportation*, 108th Cong. (2003) (statement of Commissioner Adelstein).

678. *See, e.g., Media Ownership Rules: Hearing Before S. Comm. on Commerce, Science & Transportation*, 108th Cong. (2003) (statement of Chairman, FCC Michael K. Powell, "There's no question that the court insisted that there is a presumption of deregulation. It discussed the history of the Congress's deregulation.").

679. *See* Scott, *supra* note 647, at 662–63.

D. The Public and Congressional Outcry Against the 2003 Order

The release of the 2003 Order was followed by an enormous public outcry and the largely symbolic, yet newsworthy, passage in the Republican-controlled Senate of a resolution of disapproval of the rules as a whole. That resolution, which moved to overturn the 2003 Order in its entirety, was also seen as a symbolic no-confidence vote in Chairman Powell, since sponsors of the resolution acknowledged that it was likely to be blocked by the House from becoming law.⁶⁸⁰ The vote demonstrated broad bipartisan hostility to the proposed rules, and was only the second time in history that the Senate used a resolution of disapproval to attempt to veto an action by a regulator.⁶⁸¹

Although the resolution was blocked by the House, Congress successfully executed a partial rollback of the NTSO.⁶⁸² In January 2004, Congress intervened by setting a permanent cap “on the percentage of TV households one company can reach, from the FCC’s new 45% down to 39%.”⁶⁸³ Congress removed the 39% cap from the § 202(h) review requirement, freezing the NTSO Rule at 39% and removing it from the FCC’s workload.⁶⁸⁴

A sizeable bipartisan group of lawmakers wanted to tighten limits on television ownership to the 35% cap that existed prior to 2003.⁶⁸⁵ This bipartisan reaction was attributable to a pronounced public outrage towards the ownership rules.⁶⁸⁶ Media scholar Ben Scott’s chronicle of this period describes occasions on which “offices received dozens of calls on the topic in a given day, an enormous number for most congressional offices; particularly on an issue that had never before resonated in popular politics.”⁶⁸⁷ Senator McCain held eight committee hearings on the subject of media ownership.⁶⁸⁸ Democrats succeeded in attaching language that restored the 35% cap to appropriations bills that passed both houses of Congress, but the White House was determined to not allow lawmakers to undermine media ownership deregulation and threatened to veto any bill

680. See *id.* at 664–65, 671–73; Steven Labaton, *F.C.C. Plan To Ease Curbs On Big Media Hits Senate Snag*, N.Y. TIMES, Sept. 16, 2003, at A6.

681. See Scott, *supra* note 647, at 664.

682. See *id.* at 672–73.

683. Susan Crabtree, *GOP Turns Aside Effort to Roll Back FCC Regs*, VARIETY, Jan. 22, 2004, at 8.

684. See Cowling, *supra* note 538, at 272.

685. See Crabtree, *supra* note 684, at 8.

686. See Scott, *supra* note 646, at 663.

687. *Id.*

688. See *id.* at 654.

that tried to do so.⁶⁸⁹ In late 2004, however, GOP leaders, including Alaskan Senator Ted Stevens,⁶⁹⁰ struck a deal with the White House, which changed the language in the final version of the bill to 39%.⁶⁹¹ This “compromise” position conveniently freed Viacom and News Corp./Fox from being forced to divest any television stations.⁶⁹² Rupert Murdoch, leader of News Corp., acknowledged that the deal “suits us just fine.”⁶⁹³

The lifting of the ban on newspaper-broadcast cross-ownership and the relaxation of television ownership rules prompted an enormous public outcry. As a result, “over two million citizens from a broad cross-section of society contacted Washington regulators and lawmakers to voice their protest.”⁶⁹⁴

E. Demanding a Justification for Deregulation: Prometheus Radio Project v. FCC

A coalition of grassroots consumer advocacy groups, labor groups, media activist groups, and civil rights organizations petitioned for judicial review of the new rules.⁶⁹⁵ In September 2003—one day before the 2003 Order was set to take effect—the United States Court of Appeals for the Third Circuit issued a stay, blocking the 2003 Order.⁶⁹⁶ The Court explained that the changes adopted by the FCC would significantly alter media ownership rules⁶⁹⁷ and that absent a stay, “petitioners would lose an adequate remedy” if parts of the 2003 Order were ultimately declared invalid.⁶⁹⁸

On June 24, 2004, the Third Circuit issued a two-to-one decision, *Prometheus Radio Project v. FCC*,⁶⁹⁹ remanding several of the 2003 Order’s ownership rules back to the FCC and pronounced that the stay it

689. See Crabtree, *supra* note 683, at 8.

690. See Scott, *supra* note 646, at 673.

691. See Crabtree, *supra* note 683, at 8.

692. See *id.*

693. See Scott, *supra* note 646, at 674 (citing Frank Ahrens, *Democrats Decry “Compromise” on FCC Rule*, WASH. POST, Nov. 26, 2003, at E1).

694. *Id.* at 671.

695. See *Prometheus Radio Project v. F.C.C.*, 373 F.3d 372, 379, 381 (3d Cir. 2004).

696. See *Prometheus Radio Project v. F.C.C.*, No. 03-3388, 2003 U.S. App. LEXIS 18390, at *3–4 (3d Cir. Sept. 3, 2003).

697. See *id.* at *2.

698. 3d Cir. *Overturns FCC Media Ownership Rules*, 8 No. 4 ANDREWS TELECOMM. INDUS. LITIG. REP. 2, July 15, 2004.

699. See generally *Prometheus Radio Project*, 373 F.3d 372.

had previously issued would remain in effect until the court reviewed the FCC's action on remand.⁷⁰⁰ Specifically, the court remanded the numerical limits put forth in the Cross-Media Limits, the LRSO Rules, and the NTSO Rules for either justification or modification of its approach to setting numerical limits.⁷⁰¹ The reason given for the remand was that the FCC had derived each set of rules by relying on the "unjustified assumption that media outlets of the same type make an equal contribution to diversity and competition in local markets."⁷⁰²

First, the court's decision made clear its standard of review; the court's review of administrative decisions, including the FCC's 2003 Order, is governed by the Administrative Procedure Act, 5 U.S.C. § 706 under which the court must "hold unlawful and set aside agency action, findings, and conclusions" that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."⁷⁰³ The standard of review was also informed by § 202(h) of the 1996 Act, since the 2003 Order was promulgated as part of that section's periodic review requirements.⁷⁰⁴ The court noted that this section, as amended by Congress, mandated that the FCC review all of its ownership rules quadrennially:

[A]s part of its regulatory reform review under section 11 of the Communications Act of 1934 [the Commission] shall determine whether any of such rules are necessary in the public interest as the result of competition. The Commission shall repeal or modify any regulation it determines to be no longer in the public interest.⁷⁰⁵

The court stated that Section 11 of the Communications Act, to which § 202(h) refers, was added by the 1996 Act to ensure that the Commission periodically reviewed its telecommunications regulations to "determine whether any such regulation is no longer necessary in the public interest as a result of meaningful economic competition between providers of such service" and "repeal or modify any regulation it determines to be no longer necessary in the public interest."⁷⁰⁶

The court agreed with the FCC's interpretation of § 202(h) insofar as the agency stated that the term "necessary" did not mean "indispensable" or

700. See *Prometheus Radio Project*, 373 F.3d at 435.

701. See *id.*

702. *Id.*

703. See *id.* at 389.

704. See *id.* at 390.

705. *Id.* at 390–91.

706. *Prometheus Radio Project*, 373 F.3d at 391 (citing 47 U.S.C. § 161).

“required,” but meant “useful” or “appropriate.”⁷⁰⁷ However, the court rejected the notion that the “repeal or modify” instruction allowed the FCC to use the review process only to eliminate regulations, because such an interpretation ignores both the language “or modify,” and the requirement that the FCC act “in the public interest.”⁷⁰⁸ The court noted that if the FCC were to reasonably determine that the public interest calls for a more *stringent* regulation, Congress obviously had not stripped the agency of the power to implement that determination and that this would continue to be the case absent clear congressional direction otherwise.⁷⁰⁹ According to the court, what makes § 202(h) “deregulatory” is the fact that it requires the FCC to periodically “justify its existing regulations, an obligation it would not otherwise have,”⁷¹⁰ and that the FCC is also required to monitor the effect of competition in the media to make appropriate adjustments to its regulations.⁷¹¹ The court held that when the FCC changes regulations, those changes are allowable only if supported by “reasoned analysis.”⁷¹²

The court agreed that the FCC was justified in eliminating the blanket ban on newspaper-broadcast cross-ownership.⁷¹³ However, the court remanded the specific Cross-Media Limits that replaced the ban finding that the FCC’s decision lacked reasoned analysis.⁷¹⁴ This was partly due to the fact that the FCC justified neither its choice and weight of specific media outlets used in its Diversity Index, nor its assumption that all outlets within the same media type (e.g., all radio stations) should be assigned equal market shares for purposes of calculating the Diversity Index.⁷¹⁵

The court also pointed out that the current Diversity Index, when used to analyze the New York metropolitan area, assigned equal weight within the television category to the ABC television station and the Dutchess County Community College station.⁷¹⁶ The college TV station was also accorded more weight than the combination of the New York Times Company’s co-owned daily newspaper and radio station.⁷¹⁷ Of course, the court found such assumptions implausible, also finding that the Diversity

707. *Id.* at 391, 393.

708. *Id.* at 394.

709. *Id.* at 394–95.

710. *Id.* at 395.

711. *Id.* at 391 ((citing 2003 Biennial Regulatory Review, *supra* note 22, at 4727) (citing preamble to the 1996 Act; H.R. Conf. Rep. No. 104-458 (1996))).

712. *Prometheus Radio Project*, 373 F.3d at 380.

713. *See id.* 398.

714. *See id.* at 402–11.

715. *See id.*

716. *Id.* at 408.

717. *See id.*

Index required the court “to abandon both logic and reality.”⁷¹⁸

The Court then remanded the specific LTSSO Limits that the Commission had chosen. It noted that the formulas used by the FCC to determine local competition among television stations assumed that each station had identical market shares, and that the agency assumed the new numerical limits would result in most markets having six equal-sized competitors.⁷¹⁹ The Court found that no evidence supported the FCC’s equal market share assumption, and that there was no reasonable explanation underlying the FCC’s decision to disregard the actual market share.⁷²⁰

The Court held that the FCC’s decision to retain the specific numerical limits on local radio station ownership was “arbitrary and capricious,”⁷²¹ and remanded the decision for justification or modification.⁷²² The FCC, citing economic literature, “suggested that a market with five equal-sized competitors is a sufficiently competitive market,”⁷²³ concluding that “the existing limits ensure[d] sufficiently competitive local markets.”⁷²⁴

The court accepted the FCC’s decision that numerical limits were an appropriate method of regulating radio station ownership⁷²⁵ to prevent radio markets “from being ‘locked up’ in the hands of a few owners.”⁷²⁶ However, the court concluded that the FCC’s decision to retain the particular caps on local radio station ownership that had been set by the Act of 1996 was “not supported by a reasoned analysis.”⁷²⁷ The Commission neither sufficiently justified “five equal-sized competitors” as the right benchmark for ownership regulation, nor its assertion that the existing numerical limits actually ensure that markets will have five equal-sized competitors.⁷²⁸

The court upheld the FCC’s decision to modify its method for determining local market size in order to coincide with Arbitron Metro markets⁷²⁹ and deferred to the FCC’s decision to restrict transfers of radio

718. *Prometheus Radio Project*, 373 F.3d at 408.

719. *Id.* at 418.

720. *See id.* at 420.

721. *Id.* at 421.

722. *Id.*

723. *Prometheus Radio Project*, 373 F.3d at 431.

724. *Id.*

725. *Id.* at 422.

726. *Id.* at 431.

727. *Id.*

728. *Id.* at 431–34.

729. *Prometheus Radio Project*, 373 F.3d at 423–24.

stations that had been rendered noncompliant by the new market definitions.⁷³⁰ Finding that noncommercial radio stations compete with commercial stations for the same listeners, the court once again deferred to the FCC's decision to take account of noncommercial radio stations in determining radio ownership limits.⁷³¹ Finally, the court deferred to the FCC's decision to attribute "joint sales agreements" toward the numerical limit of the owner of the brokering station.⁷³² The court agreed that attribution of joint sales agreements is "necessary in the public interest."⁷³³

The fact that the Justice Department declined to seek review of the Third Circuit's decision was widely viewed as a "final slap" to Michael K. Powell, the departing chairman of the FCC, who had advocated the changes.⁷³⁴ Although the FCC and large media groups petitioned for certiorari to the United States Supreme Court, the Court denied the request, allowing the Third Circuit's remands to remain in force.⁷³⁵

While it is theoretically possible for the FCC to fashion new rules that are less deregulatory than the 2003 Order, and easier to justify, FCC Chairman Martin has publicly stated that he intends to continue to "try to establish a level playing field in a deregulatory, not a regulatory environment."⁷³⁶ It appears that the Republican-led FCC has no intention of slowing down its attempts to deregulate the media it oversees. Instead, the Republican FCC Commissioners are expected to provide plausible justifications for the deregulatory rules they intend to promulgate.

The mindset of at least some FCC proponents of deregulation is evident from a candid statement by former FCC Media Bureau Chief Kenneth Ferree, the chief architect of the media ownership rules.⁷³⁷ In response to suggestions to seek public comment regarding what rules

730. *See id.* at 422, 426–27.

731. *See id.* at 426.

732. *See id.* at 429.

733. *See id.*

734. *See* Stephen Labaton, *U.S. Backs Off Relaxing Rules for Big Media*, N.Y. TIMES, Jan. 27, 2005, at C1.

735. *See* FCC v. Prometheus Radio Project, 125 S. Ct. 2904, (June 13, 2005); Tribune Co. v. FCC, 125 S. Ct. 2903, (June 13, 2005); Nat'l Ass'n of Broadcasters v. FCC, 125 S. Ct. 2903, (June 13, 2005); Sinclair Broad. Group, Inc. v. FCC, 125 S. Ct. 2903, (June 13, 2005); Media Gen., Inc. v. FCC, 125 S. Ct. 2902, (June 13, 2005); Newspaper Ass'n of Am. v. FCC, 125 S. Ct. 2902, (June 13, 2005).

736. David B. Wilkerson, *FCC's Martin to Stay on Deregulatory Course*, CBS MARKETWATCH, Apr. 5, 2005, <http://www.marketwatch.com/News/Story/Story.aspx?guid=%7B5D039C41%2D9557%2D4310%2D9693%2D1FCE16EC94BE%7D&siteid=mktw>.

737. *See* Frank Ahrens, *Court Rejects Rules On Media Ownership*, WASH. POST, June 25, 2004, at E5.

would serve the public interest, Ferree replied that hearings and comments in which people say they do not want media consolidation were “not the kind of help we need,” since such public commentary would not help the agency justify rules restricting ownership.⁷³⁸ Thus, since 2004, faced with a judicial order to justify or modify rules deemed arbitrary and capricious, Ferree espoused apologetics for the media ownership rules, expressing no interest in examining what was actually in the public interest.

In March 2005, at around the same time as former Chairman Powell, a wizened Ferree left the FCC.⁷³⁹ Soon after his departure, Ferree, pointing to Congress’ permanent freeze on the National Television Ownership Caps, made another statement showing that he may have matured: “Maybe there’s a lesson in that, that they ought to step in and say, ‘OK, here are the rules[.]’”⁷⁴⁰ Ferree continued, “If it doesn’t happen, the reality of this will continue to percolate along, it will be at the agency, we’ll be back in court.”⁷⁴¹

V. LEGISLATIVE AND REGULATORY SOLUTIONS

A. Congress Must Amend and Clarify § 202 (h).

Both Republican and Democratic lawmakers agree with Mr. Ferree that Congress should enact legislation that provides clarity and certainty regarding media ownership issues.⁷⁴²

Republican Senator John McCain, while presiding over Senate Commerce Committee Hearings on Media Ownership, stated: “[I]f the Congress is unsatisfied with the result of the FCC review, it should step in to provide new direction. Simply saying, ‘You got it wrong, try again,’ in my view, is not an appropriate response.”⁷⁴³ Senator McCain suggested that Congress should enact legislation that includes specific language clarifying that the FCC “may and should reimpose ownership restrictions as part of its [periodic] review where it finds such action would be in the public interest,” and that the review process should provide “an opportunity

738. See *Ferree Sees Issues That Could Interest The Supreme Court*, COMM. DAILY, July 1, 2004, at 3.

739. See *Ferree to Step Down as Chief of Media Bureau*, BROAD. ENGINEERING, Feb. 4, 2005; *Public TV Hires Former Official*, N. Y. TIMES, Mar. 15, 2005, at C6.

740. See *Briefs*, NEWS INC., Mar. 7, 2005.

741. *Id.*

742. See generally, Scott, *supra* note 646.

743. 149 CONG. REC. S11383, 11385 108th Cong. (daily ed. Sept. 11, 2003) (statement of Sen. John McCain).

to ensure that our media ownership restrictions are effective in preserving the goals of competition, diversity and localism.”⁷⁴⁴

While the majority of the FCC is unlikely to voluntarily choose to re-regulate media ownership any time soon, Congress nevertheless has an obligation to put an end to the arguments regarding what Congress envisions as the purpose of the § 202(h) requirement. Since the D.C. Circuit and the Third Circuit (not to mention the majority and minority of FCC Commissioners) have such vastly differing views of what § 202(h) requires, it is time for Congress to step in and clarify that, to the extent the FCC modifies ownership rules, it must do so in a manner that serves the public interest, whether that entails regulation or deregulation.

Suppose the FCC rewrites its media ownership rules. Furthermore, suppose that upon reviewing the rewritten rules, the Third Circuit holds that the rewritten rules no longer fail the “arbitrary and capricious” standard. Even under such circumstances, Congress should step in and clarify § 202(h). The Third Circuit and D.C. Circuit have expressed markedly different views regarding what § 202(h) requires of the FCC when it undertakes its mandatory quadrennial review of the media ownership rules. Certainly the views of Republican Commissioners of the FCC and the media conglomerates differ greatly from those of the Democratic Commissioners of the FCC and public interest groups regarding the requirements of § 202(h). Consequently, even if the courts eventually uphold a set of the FCC’s media ownership rules, until § 202(h) is clarified, rules proposed in subsequent reviews are likely to clash in the courts.

In order to protect the public interest in diversity, competition, and localism in radio, Congress must do more than just clarify § 202(h). Congress must enact legislation that halts the ability of the largest radio group owners to further consolidate. Additionally, it must address the fact that some radio entities will likely continue to abuse their power (notwithstanding promises to the contrary) by accepting consideration for airplay, hindering airplay *In retaliation* for not providing consideration, and hindering airplay by means of tying arrangements with other departments of their vertically integrated companies.

B. Congress Must Freeze the Local Radio Station Ownership Caps

In a perfect world, the public interest is fully served and Congress

744. *Media Ownership Rules: Hearing Before the S. Comm. on Commerce, Science and Transportation*, 108th Cong. (June 4, 2003) (statements of Sen. John McCain, Chairman, S. Comm. on Commerce, Science and Transportation).

would impose restrictions on the number of radio stations nationwide that one entity may own. Many irate citizens have called for Congress to re-regulate national radio ownership.⁷⁴⁵ Unfortunately, re-regulating an entire industry after it has already been deregulated is extraordinarily difficult, both practically and politically. It is quite unlikely that any bill proposing to re-regulate national radio station ownership will become law.⁷⁴⁶ For example, Representative Maurice Hinchey (D-NY) introduced the Media Ownership Reform Act of 2005, which would invalidate the FCC's entire 2003 rewrite of its media-ownership rules, including those rules that the Third Circuit chose not to remand in *Prometheus Radio Project*.⁷⁴⁷ This bill would, among other regulatory reforms of media, reinstate national radio station ownership caps and reduce (rather than merely freeze) the local radio station ownership caps.⁷⁴⁸ This bill is viewed in Washington D.C. as having virtually no chance of passing.⁷⁴⁹

However, Congress has demonstrated that it is willing to curtail further media deregulation. Recall that in early 2004, Congress enacted legislation that permanently froze the national maximum number of television households that one entity can reach, setting the cap lower than what the Republican FCC majority desired.⁷⁵⁰ Congress should now step in and protect the public interest in diversity, competition, and localism in radio by permanently freezing numerical limits on local radio station ownership at their current levels.

Senator Russell D. Feingold (D-WI) introduced a bill in 2003 that, had it passed, would have permanently frozen local radio station ownership caps.⁷⁵¹ That bill, introduced not long after the D.C. Circuit held that §

745. See, e.g., Frank A. Blethen, *Stop the Media Mergers*, WASH. POST, Sept. 19, 2004, at B7 (suggesting that Congress re-regulate radio and halt media consolidation generally).

746. See Q2 2002 Clear Channel Communications Earnings Conference Call - Final FD (Fair Disclosure), BUSINESS WIRE, July 24, 2002 (statements of Randall Mays, Chief Financial Officer, Clear Channel Communications, Inc.) ("[W]e have no chances of reregulation. It's a [sic] very difficult, if not impossible for Congress to reregulate those things that they have opened up.").

747. H.R. 3302, 109th Cong. § 5 (2005).

748. *Id.* § 4(a).

749. See John Eggerton, *Massive Rereg Bill Introduced*, BROADCAST & CABLE, July 25, 2005 at 8; Roger Armbrust, *Unsticking Consolidation: Bill Would Undo Media Mergers*, BACK STAGE WEST, July 21, 2005.

750. See Crabtree, *supra* note 684, at 8; Cowling, *supra* note 538, at 271-72.

751. Competition in Radio and Concert Industries Act, S. 221, 108th Cong. § 4 (2003). (noting that the permanency of the current local radio station ownership limits would have been derived, under this 2003 legislation, by immunizing the local radio ownership caps from the 202(h) review requirement).

202(h) was presumptively deregulatory⁷⁵² and before the Third Circuit's decision in *Prometheus Radio Project*, understandably could not gather momentum.⁷⁵³ Despite the fact that the FCC received hundreds of thousands of comments from the public, most of which were against allowing further media consolidation,⁷⁵⁴ and despite a lengthy and spirited series of hearings on media ownership by the Senate Commerce Committee,⁷⁵⁵ the bill never made it to the floor of the House or the Senate.⁷⁵⁶

Things have changed since 2003 when Senator Feingold unsuccessfully tried to persuade Congress to freeze the local radio station ownership caps. For example, lawmakers are now familiar with the Third Circuit's holding that §202(h) is not a "one-way ratchet" that must be used to deregulate the media,⁷⁵⁷ and with the United States Supreme Court's refusal to review the Third Circuit's decision on that matter.⁷⁵⁸ In light of the outcome of the presidential election of 2004, lawmakers also know that a Republican majority of the FCC's Commissioners likely will remain staunch advocates of deregulation of media ownership.⁷⁵⁹ Deregulation and consolidation in radio, long proven to be harmful to the public interest, will not go away by themselves. The time is right to introduce and pass legislation that freezes local radio station ownership caps.

A permanent freeze on current local radio station ownership limits is needed to halt further harmful consolidation of radio. Such a freeze will be enormously important in the coming years as lobbyists for terrestrial radio argue vociferously to the FCC that, due to satellite radio and other competitors, terrestrial radio can only remain viable if all remaining regulations on terrestrial radio are eliminated. While such arguments appeal to the FCC majority that relies on the inapplicable marketplace theory, the American public has stated clearly that it strongly objects to

752. See *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1048–53 (D.C. Cir. 2002); *Sinclair Broad. Group, Inc. v. FCC*, 284 F.3d 148, 152, 164–65 (D.C. Cir. 2002).

753. See Robert J. Delchin, *Musical Copyright Law: Past, Present and Future of Online Music Distribution*, 22 CARDOZO ARTS & ENT. L.J. 343, 362 (2004).

754. See Greg Gatlin, *Court Blocks FCC's Media Rules*, BOSTON HERALD, June 25, 2004, at 29.

755. See Scott, *supra* note 646, at 654.

756. See generally *id.*

757. See *Prometheus Radio Project*, 373 F.3d at 394.

758. See *FCC v. Prometheus Radio Project*, 125 S. Ct. 2904 (2005); *Tribune Co. v. FCC*, 125 S. Ct. 2903, (June 13, 2005); *Nat'l Ass'n of Broadcasters v. FCC*, 125 S. Ct. 2903 (2005); *Sinclair Broad. Group, Inc. v. FCC*, 125 S. Ct. 2903 (2005); *Media Gen., Inc. v. FCC*, 125 S. Ct. 2902 (June 13, 2005); *Newspaper Ass'n of Am. v. FCC*, 125 S. Ct. 2920 (2005).

759. See Drew Clark, *Executive Branch: FCC Faces Uncertain Agenda With Agency Vacancies*, NAT'L J. TECH. DAILY, Nov. 21, 2005.

further consolidation of radio.

The American people rely uniquely on terrestrial radio rather than other audio broadcast forms for information about their communities and safety. While the paternalistic FCC majority believes that it knows better than the American people what is in the public interest, Congress must consider actions that the American public has demonstrated an interest in taking. The innumerable quantity of comments received by the FCC objecting to radio consolidation has demonstrated that Americans want to halt the deregulation process. The promotion of the public interest in radio may be preserved only if Congress permanently freezes the local radio stations ownership limits.

C. Congress Must Amend 47 U.S.C. §§ 317 and 508 to Outlaw Payola-Like Practices and Increase Transparency in Transactions between Radio and Music Providers

Senator Feingold demonstrated his continuing commitment to serving the public interest in diversity, competition, and localism on terrestrial radio airwaves in 2005 by introducing the "Radio and Concert Disclosure and Competition Act of 2005"⁷⁶⁰ ("Radio and Concert Act of 2005"). The Radio and Concert Act of 2005 admirably attempts to address the often intertwined issues of payola-like practices that currently evade sanctions and collusion between the radio and record companies.

Senator Feingold recognizes that these issues have not been adequately addressed by Sections 317 and 508, which now only require disclosure of consideration received by station employees in exchange for airplay at the time of broadcast. Sections 317 and 508 also currently impose paltry maximum fines of \$10,000 and/or one year of imprisonment for violations.⁷⁶¹ Senator Feingold's proposed bill, however, features both high and low points. Some provisions in the Radio and Concert Act of 2005 could not have been better drafted. In contrast, while other provisions of the bill provide great ideas about how transactions between radio and music providers could be made more transparent, they fail to create statutory mandates. They merely call on the FCC to modify its own regulations.

Other provisions of the bill inappropriately increase, rather than decrease, the FCC's burden to find and punish those who engage in disguised payola transactions. Thus, Congress should not pass the Radio

760. Radio and Concert Disclosure and Competition Act of 2005, S. 2058, 109th Cong. (2005); 151 CONG. REC. S13367-68 (2005) (statement of Sen. Russell D. Feingold).

761. 47 U.S.C. §§ 317, 508 (2005).

and Concert Act of 2005, despite the fact that much of that bill has great merit. Rather, Congress should enact legislation that (1) puts a statutorily-imposed burden on the radio industry to justify its financial transactions with music providers; (2) uses statutory mechanisms for increasing the transparency of such transactions; and (3) increases penalties for payola violations.

1. Sections 8 and 9 of Senator Feingold's Radio and Concert Act of 2005
Are Excellent Models for Legislation That Is Necessary in the Public
Interest.

To make new anti-payola rules permanent and ensure the promotion of the public interest, it is important that Congress amend federal anti-payola statutes rather than leave the promulgation of new anti-payola regulations to the FCC. Because the FCC has been deeply divided along party lines on issues balancing the interests of listeners and broadcasters, if Congress wants more payola-like practices to be outlawed, it should just go ahead and outlaw them. Sections 8 and 9 of the Radio and Concert Act of 2005 are among the few provisions that amend existing statutes rather than impose a burden on the FCC to promulgate new regulations. Although other provisions of the Radio and Concert Act of 2005 are off-base such that the bill should not be passed, Congress should pass legislation that includes provisions closely modeled after Sections 8 and 9 of the Radio and Concert Act of 2005.

Section 8 would amend §312(a) of the Communications Act of 1934⁷⁶² to allow for the revocation of a radio station's license for violations of regulations promulgated or modified under the Radio and Concert Act of 2005.⁷⁶³ Section 9 would increase maximum penalties for violations of the Radio and Concert Act of 2005 for existing payola statutes from \$10,000 to \$50,000 per violation.⁷⁶⁴ Laws such as these have been needed for a long time. In today's \$21 billion radio industry,⁷⁶⁵ a fine of \$10,000 per violation is negligible to all but the smallest or noncommercial radio stations.

Congress must enact legislation that specifically authorizes the FCC to revoke the license of any station that violates §§ 317 and 508 as amended. While the FCC is vested with the authority to revoke licenses as

762. 47 U.S.C. § 312 (2005).

763. See Radio and Concert Disclosure and Competition Act of 2005, S. 2058 § 8.

764. See *id.* § 9.

765. See Katy Bachman, *Ad Spending on Radio Topped \$20 Billion in 2004*, *MEDIAWEEK*, Feb. 1, 2005.

necessary in the public interest, the last few decades have shown that the FCC is generally unwilling to exact this punishment against even the worst transgressors. If Congress enacts legislation to clarify that license revocation is an appropriate remedy when a radio entity willfully and repeatedly exerts control over airplay to extract consideration, the FCC may be more likely to consider such a remedy to be viable.

2. Laws Analogous to Sections 3 Through 6 of the Radio and Concert Act of 2005, if Written as Amendments to §§ 317 and 508, Could Help Improve Transparency in Transactions Between Radio Entities and Music Providers.

Sections 3 through 6 of the Radio and Concert Act of 2005 would require the FCC to modify its regulations under §§ 317 and 508 to increase radio licensees' disclosure requirements.⁷⁶⁶ While these provisions could potentially decrease payola-like transactions and increase transparency of transactions between radio and music providers, the public would likely be better served by actually amending §§ 317 and 508.

Section 3 of the Radio and Concert Act of 2005 would additionally require the FCC to modify its regulations to mandate arm's length transactions between music providers and radio stations consistent with similar transactions conducted between completely unrelated entities. Section 3 would also require the FCC to modify its regulations to mandate that such transactions be in writing, kept on record by the licensee for five years, and subject such records to random audits by the FCC.⁷⁶⁷ The substance of § 3 is undoubtedly sound; eradicating payola requires that transactions between radio entities and music providers be conducted at arm's length. Requiring licensees to keep records of transactions with music providers places an appropriate burden upon radio entities that want to conduct transactions with the entities that provide content.

Sections 4(1) and 4(2) would require the FCC to modify its regulations to generally prohibit radio entities from leveraging airplay decisions for consideration (including concerts at less than fair market value) from record companies, artists, independent promoters, and other music providers.⁷⁶⁸ A prohibition against leveraging airplay for consideration is unquestionably in the public interest; the spirit of anti-payola laws is that the people are entitled to hear content based on merit rather than money paid.

766. See Radio and Concert Disclosure and Competition Act of 2005, S. 2058 § 2.

767. See *id.* § 3.

768. See *id.* § 4(1), (2).

Section 4(3) would require the FCC to modify its regulations to generally prohibit licensees from owning or controlling a concert promoter or concert venue. However, the FCC would be empowered to waive the ban if it would cause undue economic distress and the cross-ownership was in the public interest.⁷⁶⁹ Section 4(3) might be an overarching response to vertical integration. Past problems associated with affiliated radio and concert entities have arisen where those entities engaged in tying and where the radio entities owned format monopolies in a marketplace.⁷⁷⁰

While vertical integration is potentially dangerous to the public interest, it cannot be plausibly argued that all vertical integration is necessarily dangerous to the public interest. If vertical integration was necessarily dangerous to the public interest, cross-ownership of all forms of media would be banned completely; however, such is not the case. This article withholds judgment about whether prohibiting cross-ownership between radio and concert entities is the appropriate means for promoting the public interest in preventing tying between these businesses.

Section 5 would require the FCC, upon petition by any interested party, to review any transaction covered by §§ 3 or 4.⁷⁷¹ Section 6 would require the FCC to set forth appropriate penalties for violations under §§ 2, 3, and 4.⁷⁷² It makes sense to require the FCC to review transactions about which people have formally complained, along with setting forth penalties for violations of rules that seek to eradicate payola-like practices. Overall, §§ 3 through 6 (with the possible exception of § 4(3)), appear sound, but they could be improved if proposed as amendments to §§ 317 and 508 rather than as requirements that the FCC modify its own rules.

3. Section 2 and Section 7 of the Radio and Concert Act of 2005 Would Create an Untenable Administrative Burden on the FCC While Failing to Thwart the Current Biggest Obstacle to Payola: Lies.

Sections 2 and 7, rather than amending §§ 317 and 508, would also require the FCC to modify its regulations under §§ 317 and 508 to increase radio licensees' disclosure requirements.⁷⁷³ Section 2 would require the FCC to modify its regulations to generally prohibit radio licensees (including, but not limited to, employees and "affiliates") from receiving

769. *See id.* § 4(3).

770. *See, e.g.,* *Nobody in Particular Presents v. Clear Channel Communications, Inc.*, 311 F. Supp. 2d 1048 (D. Colo. 2004).

771. *See* Radio and Concert Disclosure and Competition Act of 2005, S. 2058 § 5.

772. *See id.* § 5.

773. *See id.* §§ 2, 7.

consideration from a music provider unless that radio entity discloses such consideration to the FCC on a monthly basis.⁷⁷⁴ In addition, § 2 would compel the FCC to modify its provisions to require that each radio licensee or permittee who receives such consideration to disclose its playlist to the FCC on a monthly basis.⁷⁷⁵

Section 7 would require the FCC to biennially report vast findings to Congress and the public, which include: summaries of disclosures made by radio entities, audits of transactions, FCC waivers of cross-ownership of radio and concert entities, penalty proceedings under the Radio and Concert Act of 2005, evaluations and reports on radio station ownership, concentration, and market power.⁷⁷⁶

The Radio and Concert Act of 2005 acknowledges that the consideration extracted by radio entities is not limited to cash payments.⁷⁷⁷ The bill also acknowledges that the practice of extracting consideration for programming decisions is harmful to the public interest and should be punished, whether that consideration is extracted from record companies, artists, or managers.⁷⁷⁸ Finally, the bill recognizes that if *any* representative of a radio group uses its control over airplay to extract consideration (including, but not limited to, cash payments and concert performances), that station should be at risk for punishment.⁷⁷⁹

While the policy behind §§ 2 and 7 is noble, the disclosure requirements would create an untenable administrative burden on the FCC. As of September 2005, there were 13,599 licensed AM and FM radio stations in the United States.⁷⁸⁰ The amount of information the FCC would be expected to interpret under § 2 is vast. Section 2 would generally require each station receiving more than nominal consideration from a music provider to disclose such consideration along with a detailed log of its monthly playlist on a monthly basis.⁷⁸¹ While § 2 implies that the FCC would have a duty to scour such disclosures for violations, § 7 would explicitly impose upon the FCC an obligation to summarize such

774. *See id.* § 2(a).

775. *See id.* §§ 2(b), 2(a)(2) (stating that exceptions would be made for transactions “provided at nominal cost” and paid broadcasting that is disclosed as such at the time of broadcast).

776. *See id.* § 7.

777. *See generally* Radio and Concert Disclosure and Competition Act of 2005, S. 2058.

778. *See generally id.*

779. *See generally id.*

780. *See* FCC, *Broadcast Station Totals* (Sept. 30, 2005), *available at* <http://www.fcc.gov/mb/audio/totals/bt050930.html> (last visited Mar. 3, 2006).

781. *See* Radio and Concert Disclosure and Competition Act of 2005, S. 2058, § 2.

disclosures biennially.⁷⁸²

Even if the FCC carefully analyzed every disclosure statement it received, it would be difficult to discover payola violations, which are easily disguised. Consequently, perfunctory reviews of multitudes of disclosure statements would be of little value to the public interest. Radio executives and programmers have repeatedly denied that the consideration their stations receive from music providers is a quid pro quo for airplay. For example, radio executives have regularly claimed that what they provide to certain independent promoters in exchange for cash payments was merely information about what songs would be added to their playlists.⁷⁸³

Airplay sells records; information about adds to playlists does not. The only reason why a record company would pay large sums of money to an independent promoter is if that promoter had the power to influence airplay in either a positive or negative fashion. This suggests that either such radio executives have been lying or record companies have irrationally been paying large amounts of money to radio stations—through those independent promoters determined to exploit loopholes in existing payola laws—for information that is worthless.

Independent promoter Michele Clark admitted in 2004 to making large annual payments to many radio stations.⁷⁸⁴ After making those payments, her clients' records were added to those radio stations' playlists.⁷⁸⁵ However, Clark asserted that the payments her company made had no influence on the programming decisions that the recipient radio stations made.⁷⁸⁶ Clark's assertion that payments do not influence playlists was contradicted by evidence offered by Attorney General Spitzer against Entercom. For instance, Tom Teuber, Program Director of Entercom's WMMM Madison, WI, complained in an email to Pat Paxton, an Entercom executive, that his station had not received an order to play songs in the CD Preview program in a timely fashion.⁷⁸⁷ Teuber wrote: "Michele Clark ordered these spins before Christmas, and expected them to start on Monday She noticed the spins weren't there, and asked me what

782. *See id.* § 7.

783. *See* Jeff Leeds & Louise Story, *Radio Payoffs Are Described As Sony Settles*, N. Y. TIMES, July 26, 2005, at A1; *Radio Pacts*, *supra* note 385, at C11.

784. *See* *Logs Link Payments*, *supra* note 421, at A1.

785. *Id.*

786. *Id.*

787. Complaint at Exhibit H., *Spitzer v. Entercom Comm'ns Corp.* (N.Y. Sup. Ct. Mar. 7, 2006), <http://www.oag.state.ny.us/press/2006/mar/payola.pdf> (email from Tom Teuber to Pat Paxton, Dec. 31, 2003).

happened.”⁷⁸⁸ Tueber’s statements demonstrate that he felt accountable to Clark for spins that *she* ordered.

Under §§ 2 and 7 of the Recording and Concert Act of 2005, the FCC would retain the burden to prove that a radio entity used its ability to control airplay in order to extract consideration. This burden is heavy, considering that it is relatively easy for the station to show that it gave something other than airplay. For instance, in the context of a complex deal with a music provider, a radio entity could likely defeat a payola prosecution by claiming that the consideration it received was for one of the other services it was providing, such as advertising time, information about adds to playlists, or other forms of “promotional support.” It is true that the disclosure requirements under § 2 could potentially facilitate detection of some quid pro quo airplay transactions. There is no reason to believe, however, that the same radio entities that have surreptitiously extracted consideration for airplay in the past will not find new, less detectable means of accomplishing their nontraditional revenue goals.

In the wake of recent subpoenas by Attorney General Spitzer, radio entities and music providers are likely to be more clever than before in structuring deals and avoiding paper trails. Moreover, since radio and record entities now enjoy enormous market shares and complex structures, they are able to hide pay-for-play transactions within complex multi-tiered “marketing partnerships.”

Recall the 1998 FCC investigation in which Clear Channel billed A&M Records for a Bryan Adams promotional campaign that involved on-air commercials and required live performances by Adams at Clear Channel charity events.⁷⁸⁹ While the FCC found payola at two Clear Channel stations, the FCC was unable to prove a direct quid pro quo relationship between the payments to the radio group and the airplay that Adams’ record received on the other eight stations involved.⁷⁹⁰ Since the burden remained on the FCC to prove the connection between the amount of money transferred and airplay given to the Adams single (regardless of the fact that the payments were suspicious), AMFM/Clear Channel was fined a mere \$8000 after reaping \$237,000 from the record company for promotions that undoubtedly included an increase in airplay.⁷⁹¹ If the burden had been on AMFM/Clear Channel to prove the propriety of its deal with A&M Records, the radio group’s cost-benefit analysis of that deal

788. *Id.*

789. See *Clear Channel Fined*, *supra* note 410, at C1.

790. See *id.*

791. See *id.*

might have come out differently, deterring surreptitiously paid-for airplay.

In today's world of consolidated radio and record companies, it is easy for radio entities to disguise quid pro quo transactions by extracting consideration given to one radio subsidiary in exchange for airplay on another radio subsidiary. It is also easy to extract consideration from a record label that is ostensibly related to one recording artist in exchange for airplay for another recording artist who signed with any of the recording conglomerate's many labels. As long as the prosecutors and the FCC, as enforcers of law, retain the burden to prove payola violations, radio entities starving for revenue sources will continue to evade liability for violations that they commit. The Radio and Concert Disclosure Act of 2005 provides no solutions to this particular problem.

D. Congress Must Shift the Burden to Radio and Music Providers to Prove That Transactions Between Them Are in the "Ordinary Course of Business."

Recall that § 3 of Senator Feingold's Radio and Concert Act of 2005 mandates all transactions between music providers and radio stations be at arm's length. This proposal has tremendous merit, but the problem remains that radio entities (and to a lesser extent, independent promoters) have increased the sophistication of payola-like transactions. Under § 3, it remains difficult for the FCC to detect violations.

While the goals of the Radio and Concert Act of 2005 are admirable, the public interest now requires legislation with sharper teeth. As the settlements garnered by Attorney General Spitzer have shown, radio entities, record companies, and some independent promoters have been evading the truth about these sophisticated transactions for quite some time.⁷⁹² Thus, Congress must shift the burden from the FCC to radio, record, and independent promotion entities that exchange consideration to show that those transactions are actually at arm's length.

An elegant model for such legislation can be found in the "Preferences" statute of the Bankruptcy Code,⁷⁹³ which provides a burden-shifting device. Generally speaking, a bankruptcy estate (i.e., the assets potentially available to the bankrupt debtor's pre-existing creditors) consists only of property that the debtor owes at the time he files a bankruptcy petition.⁷⁹⁴ This encourages creditors to collect debts quickly,

792. See Dean Starkman, *Sony BMG Settles Radio Payola Probe; Firm to Pay \$10 Million to End Role in Spitzer's Ongoing Inquiry*, WASH. POST, July 26, 2005, at D3.

793. 11 U.S.C. § 547(b) (2000).

794. See David G. Epstein, Steve H. Nickles & James J. White, *BANKRUPTCY* 331

before their financially-troubled debtor ends up in bankruptcy. The "Preferences" statute softens this effect by allowing a trustee, who is charged with managing the debtor's estate, to invalidate and recover payments a debtor made to "preferred" creditors just before he filed for bankruptcy.⁷⁹⁵ The trustee then has the burden of establishing that the transfer met all elements of § 547(b).⁷⁹⁶

Once the trustee accomplishes this, the transfer is deemed "preferential" over other equally-deserving creditors, and the amount transferred to the preferred creditor is presumed to be recoverable by the trustee.⁷⁹⁷ The burden then shifts to the person defending the transaction to show that the transfer meets the elements of an affirmative defense.⁷⁹⁸ One valid affirmative defense for preferential transfers prior to filing bankruptcy is that the transfer was done "in the ordinary course of . . . business," as described in § 547(c).⁷⁹⁹

If a preferential pre-bankruptcy transfer meets the elements of the § 547(c) affirmative defense, the creditor who received the pre-bankruptcy payment can keep the money transferred, since the presumption of preferential treatment has been rebutted.⁸⁰⁰ Section 547(c)(2) reflects the congressional view that payments that are preferential to a particular creditor, but are part of normal financial or business relations, do not offend the objectives of the "Preferences" statute.⁸⁰¹ For example, if a debtor pays their utility bill the month prior to their bankruptcy filing in the same general manner they have always paid that utility bill, then there is no reason to believe that the payment was the result of undue influence or harassment by the utility company creditor. Moreover, nullifying payments that are part of normal business relations would discourage creditors from

(Hornbook ed., 1993).

795. See Elizabeth A. Orelup, *Avoidance of Preferential Transfers Under the Bankruptcy Reform Act of 1978*, 65 IOWA L. REV. 209, 214–15 (1979).

796. See Epstein et al., *supra* note 795, at 281; see also 11 U.S.C. § 547(b). "Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property—to or for the benefit of a creditor; for or an account of an antecedent debt owed by the debtor before such transfer was made; made while the debtor was insolvent; made—(A) on or within 90 days before the date of the filing of the petition; [or within one year of the filing if the creditor is an insider]; and (5) that enables such creditor to receive more than such creditor would receive [in a Chapter 7 distribution of the bankruptcy estate had the transfer not been made.]"

797. See Orelup, *supra* note 796.

798. See *id.*

799. WILLIAM L. NORTON, JR., 2 NORTON BANKR. L. & PRAC. 2D § 57:14 (2005).

800. See *id.*

801. See Epstein et al., *supra* note 795, at 329.

extending even short-term credit to financially-troubled debtors.⁸⁰²

Congress should enact a statute that employs a burden-shifting device analogous to § 547(b) of the Bankruptcy Code. Such a provision would stipulate that if a record company, artist, concert promoter, or any agent or representative thereof makes a transfer of any kind of consideration to a radio licensee, group, cluster, station, employee or affiliate, it would be in violation of the anti-payola statute, unless the radio station, as the party wanting to prevent the recovery of payments it received, meets its burden to show that the consideration was given and received in the ordinary course of business.

Section 547(c)(2) of the Bankruptcy Code provides that:

[t]he trustee may not [nullify or] avoid . . . a transfer . . . to the extent that such transfer was—(A) in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee; (B) made in the ordinary course of business or financial affairs of the debtor and the transferee; and (C) made according to ordinary business terms.⁸⁰³

Therefore, even if a payment made by the debtor to a creditor before filing bankruptcy were deemed preferential, as long as the creditor can prove all elements of § 547(c)(2), the transfer in question should not be nullified, and the creditor may keep the money that was transferred by the debtor.

For a pre-bankruptcy transfer to a creditor to be “in the ordinary course of business,” the relevant obligation to the creditor must have been normal or routine in the individual business affairs of both the debtor and the creditor.⁸⁰⁴ The payments must also be ordinary or routine in the context of the relationship between the creditor and debtor.⁸⁰⁵ Payments made earlier or later than normal, or that are in an amount different than what had been paid to the creditor in prior billing cycles may be deemed extraordinary and therefore not protected by § 547(c)(2).⁸⁰⁶

Satisfaction of § 547(c)(2) requires that the debt in question must have been ordinary in the overall business or financial affairs of both the debtor and the creditor.⁸⁰⁷ Satisfaction of an analogous anti-payola statute

802. See *id.*

803. 11 U.S.C. § 547(c) (2) (2000).

804. See Epstein et al., *supra* note 795, at 331.

805. See *id.*

806. See *id.* at 331–32.

807. See *id.* at 331.

would require the radio entity to produce evidence establishing that the deal, at the time it was made between the radio entity and music provider, was ordinary in the overall business or financial affairs of both parties.

An analogy can be drawn between preference payments in a bankruptcy scenario and payments by providers of musical content to radio group owners, their affiliates, or employees. Both types of payments arouse suspicion. "Preference" payments examined in a bankruptcy proceeding may show that a specific creditor of a financially-troubled debtor exerted pressure on the debtor to prioritize himself over other creditors in an effort to avert the risk of substantially reduced recovery. Payments to radio stations by those who market music may be evidence that what is being received in exchange is, in whole or in part, airplay.

For example, if a music provider buys advertising time from a radio station to promote a new release, and the terms of the arrangement are similar to those of deals made *In recent years* with the radio station's other advertising clients, then the radio station would have no trouble showing that the deal was made in the ordinary course of its business. The radio station should also be required to produce evidence establishing that the deal was in the ordinary course of business of the music provider. Suppose, for example, that a record label wants to promote a new recording to young male consumers and therefore advertises the new record in appropriately targeted magazines and Internet sites. Suppose also that the record label allocates some reasonably proportionate amount of its marketing budget for that recording toward advertising on radio stations that target young males, and that not all radio stations receiving advertising dollars are expected to play the advertised recording. Finally, assume that the per-spot rate paid by the record label for advertising on radio stations is commensurate with rates previously paid by record labels for advertising on those same radio stations. Under such circumstances, the advertising dollars paid by the record label to the radio stations, which would otherwise be grounds for suspicion, could be properly characterized as being in the ordinary course of business of the record label.

Another typical scenario is where a radio station and music provider arrange a multi-faceted promotion that includes a large payment for multi-station exposure, on-air advertising, website advertising, concert ticket giveaways, CD giveaways, live remote broadcasts, and music sampler distribution. Under this scenario, the deal should withstand scrutiny as an ordinary course of business ("OCB") transaction only if the radio station shows that it often provides similar services to non-music clients under similar terms. Even if the deal is in the OCB, the deal may still fail OCB scrutiny if the music provider had never considered similar marketing

opportunities to media sources other than the particular radio stations it targets for airplay.

In deals between radio entities and music providers, if the station airs music or interviews that promote the product the music provider is marketing, these broadcasts should survive OCB scrutiny only if the radio station can establish that the deal involved terms similar to those it would provide to a non-music client. For example, if a music provider pays the same prices for the same marketing opportunities that a car dealership has purchased, then a coincidence of airplay or promotional artist interviews should not defeat the radio station's claim that the deal was made in the OCB. If the radio station can establish that the music provider made deals on similar terms with marketing partners other than radio stations it targeted for airplay, then even if the station happens to be playing the music provider's products, such airplay should not defeat the claim that the deal was within the music provider's OCB. Where the deal is in the OCB of the radio station and the music provider, there is no reason to suspect airplay is part of the consideration given by the radio station to the music provider.

Since the OCB defense is based on comparing a particular transaction to other transactions in the entity's track record, one possible problem arises in the context of deals involving small independent music providers or radio stations that have little or no track record. Consequently, the ideal anti-payola OCB statute should address cases where a smaller or newly-formed entity engages in a radio/music-provider transaction. Such deals should be compared to deals between radio and other businesses that do have track records. For example, if a new, small, or independent label wants to pay a radio station to distribute CD samplers at its outdoor festival, the transaction should not fail OCB scrutiny, because its terms are similar to those of other product-sampling deals made between similarly situated radio stations and non-music providers.

E. Congress Must Impose Harsh Penalties upon Radio Stations That Hinder, or Threaten to Hinder Airplay for Lack of Consideration.

Radio broadcasters sometimes hinder airplay of songs *In retaliation* against music providers who refuse to give illegal consideration in exchange.⁸⁰⁸ Current anti-payola statutes fail to address this problem.⁸⁰⁹ Sometimes such hindering of airplay occurs when different subsidiaries of

808. See *Logs Link Payments*, *supra* note 421, at A1.

809. See, e.g., 47 U.S.C. §§ 317, 508 (2005) (providing disclosure of payments to the radio station only).

one vertically-integrated company engage in tying practices.⁸¹⁰ Other times, such hindering happens when a station does not receive “nontraditional revenue” that it desires from a music provider.⁸¹¹

A statute that explicitly permits the FCC to address this problem by imposing harsh penalties, including substantial fines or license revocation, would advance the public interest in diversity of programming.

F. The FCC Must Require Radio Stations to Adopt and Maintain Infrastructures That Help to Ensure Public Safety

During large-scale emergencies, Americans rely heavily on local terrestrial radio stations for vital safety information.⁸¹² Increasingly ubiquitous practices of voice-tracking and syndicated programming have enabled radio station owners to operate stations with skeleton crews of inexperienced staffers.⁸¹³ Although recent research shows that terrestrial radio stations are generally keeping their listeners well-informed in times of disaster,⁸¹⁴ the most powerful radio group owner renounced all responsibility for failing to convey vital safety information to its listeners in Minot, North Dakota.⁸¹⁵

Unfortunately, because one owner of over 1200 radio stations nationwide has refused to take its duty to keep its listeners informed and safe seriously, it is imperative that the FCC conduct its own research to determine whether radio station infrastructures have the capacity to alert and instruct the public in times of emergency. Further, it is the duty of the FCC to promulgate regulations that impose a duty on radio owners to adopt, maintain, and pay for adequate infrastructures to protect the public safety in times of emergency. This is not to suggest that radio owners are expected to further subsidize the emergency broadcasting infrastructure, but rather, part of the cost of business must include maintaining adequate staff and systems capable of informing listeners about emergencies that affect their safety.

810. See, e.g., *Nobody in Particular Presents v. Clear Channel Commc'ns, Inc.*, 311 F. Supp. 2d 1048, 1061–65 (D. Colo. 2004). Senator Feingold's bill, the Competition in Radio and Concert Industries Act, S. 221, 108th Cong. § 3 (2003), included a provision that would have prohibited this sort of unfair business practice, but no such provision was included in the Radio and Concert Disclosure and Competition Act of 2005 S. 2058, 109th Cong. § 3 (2005).

811. See *Logs Link Payments*, *supra* note 421, at A1.

812. See generally *RIDING OUT THE STORM*, *supra* note 215, at 4.

813. See Brandon Griggs, *Voicetracking Attracts Big Share of Criticism*, SALT LAKE TRIB., Mar. 2, 2003, at A6.

814. See *RIDING OUT THE STORM*, *supra* note 215, at 24.

815. See Eric Magnuson, *Anyone Listening?*, NATION, May 23, 2003, at 32.

The FCC is the appropriate body to impose such duties on radio broadcasters.⁸¹⁶ While the Democrat and Republican FCC Commissioners have had their differences, it is plausible that the committee would debate the public necessity of safety regulations. Indeed, the Commission has recently been working diligently to evaluate and identify threats to emergency broadcast communications.⁸¹⁷ Former Republican Commissioner Kathleen Abernathy stated that since the terrorist attacks of September 11, 2001, the FCC evaluated and found serious problems with both emergency communications and service restoration.⁸¹⁸ While Abernathy reported that improvements have been made since 2001, in part because the FCC “strengthened industry partnerships” to improve emergency communications, she emphasized that much more needed to be done to improve emergency communications in radio and television.⁸¹⁹ Commissioner Abernathy also noted that the national radio/TV emergency broadcast system was designed for Cold War threats to the entire nation, not to address localized emergencies.⁸²⁰

Currently, the FCC is researching various approaches using commercial and government radio services to broadcast localized emergency information to the affected area only.⁸²¹ Based on Commissioner Abernathy’s report, it appears that the FCC is diligently working to improve emergency communications systems.

Despite the FCC’s valiant efforts on emergency broadcast issues, it is plausible that the Republican majority of the FCC will maintain the view of former FCC Chairman Powell, who believed that the events in Minot, North Dakota constituted an anomaly blown out of proportion by opponents of deregulation.⁸²²

While the events that transpired in Minot were undeniably rare, Clear Channel continues to deny all responsibility for failing to protect its listeners, even though a reasonable observer would find that it had made mistakes in managing its local infrastructures. While it is promising that the FCC is committed to strengthening industry partnerships with radio broadcasters in order to protect listeners’ safety, the unfortunate reality

816. See Brosterhous, *supra* note 41, at 315 (stating that receipt of license imposed a duty on the licensee to serve the public’s interest); *see id.*

817. See *More Needs To Be Done To Secure Telecom Infrastructure Against Threats*, STATE TELEPHONE REGULATION REPORT, Vol.23, No.4, Feb. 25, 2005.

818. *See id.*

819. *See id.*

820. *See id.*

821. *See id.*

822. See Media Ownership Rules, *Hearing Before S. Comm. on Commerce, Science & Transportation*, 108th Cong. § 8 (2003) (statement of Chairman Powell).

remains that Clear Channel denies any responsibility for notifying the public of substantial threats to safety at the local level.⁸²³ Consequently, in order to protect the safety of the American people, the FCC needs to determine what infrastructures must be maintained at the corporate, cluster, and local levels of radio. Furthermore, the FCC must impose legal obligations on radio entities to pay for and maintain such infrastructures.

VI. CONCLUSION

The FCC majority has long demonstrated its assumption that deregulation of broadcast ownership is in the public interest, and that it has not felt the need to examine whether this assumption is true as it applies specifically to radio. The elimination of the national caps on radio station ownership and the increase in local radio station ownership caps that were enacted as part of the Telecommunications Act of 1996 caused tremendous harm to the public interest in diversity, competition, and localism in radio.

The public interest requires that radio ownership deregulation must come to a halt. Since the current FCC majority intends to continue radio deregulation, Congress must protect the public interest by amending the Telecommunications Act of 1996 to halt deregulation of radio ownership. Congress must make it clear that the FCC's periodic review process under Section 202 (h) is not presumptively deregulatory.

In addition, Congress must also outlaw behaviors by radio stations and radio group owners that are harmful to the public interest and that have been exacerbated by post-1996 consolidation. Such behavior includes extorting consideration from music providers in exchange for either granting or not withholding airplay. Such behavior also includes cutting local radio station staff and infrastructures to such an extent that public safety is endangered.

823. See Clear Channel, *Know the Facts*, http://www.clearchannel.com/Corporate/corporate_ktf.aspx (last visited Apr. 18, 2005).