PAYOLA: SHOULD INTERNET RADIO STATIONS BE ABLE TO ACCEPT PAY FOR PLAY WHILE OVER-THE-AIR STATIONS ARE STATUTORILY PRECLUDED?

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I. INTRODUCTION

In a day and age that is technology-driven, the entertainment industry has grown in directions that were never considered years ago. People of all ages are now learning to play instruments through the use of video games; social Internet communities are launching successful music careers; and radio stations are no longer only transmitted via use of radio waves—they are now transmitted to an Internet audience as well. Streaming broadcast radio stations through means of the Internet has led to the creation of “radio” stations that are solely accessible online.

While both types of radio programming consist of a similar format, the difference rests in the means of transmission: One uses radio waves while the other relies on a connection through phone line, wireless technology, cellular technology, or other similar means. Does this distinction result in Internet radio stations’ immunity from the same laws to which over-the-air radio stations must adhere?

II. WHAT IS PAYOLA?

The word “payola” combines the words “pay” and “Victrola”—an “old wind-up record player” and refers to “[t]he paying of cash or gifts in exchange for airplay.” Before payola was an illegal act, record labels sought to expose their artists and sell records mostly through the use of radio airplay. Record labels would hire promoters to pay disc jockeys to play songs by artists the label represented. When a scandal surfaced about the rigging of quiz shows, “Congress announced that it would hold hearings on payola.” Radio stations heard the buzz and began to fire many of their employees to avoid scandalous attention aimed in their direction. The magnitude of this payola “scandal” was suggestively contributed to racial animus, power, and money.

3. Id.
4. Id.
5. Id.
6. Id.
III. THE LEGAL HISTORY OF PAYOLA

The first introduction of legal retribution for accepting payola was in the sixties when a man was indicted for accepting money to play an artist’s music. Subsequent to his indictment, a statute was passed making it a misdemeanor to engage in the activity of accepting payola, punishable “by up to $10,000 in fines and one year in prison.”

Section 317 of the Communications Act was enacted in 1934 and was amended to include a requirement for broadcasters to disclose whether they exchanged “money, services or other valuable consideration” for the act of airing particular content. Thus, in and of itself, it is not illegal for a radio station to accept a payment from a record label or management company. It is only illegal if both parties involved in the agreement do not disclose that an agreement has been made, in accordance with the Communications Act.

A. Statutory Language

All matter broadcast by any radio station for which any money, service or other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting, from any person, shall, at the time the same is so broadcast, be announced as paid for or furnished, as the case may be, by such person: Provided, That “service or other valuable consideration” shall not include any service or property furnished without charge or at a nominal charge for use on, or in connection with, a broadcast unless it is so furnished in consideration for an identification in a broadcast of any person, product, service, trademark, or brand name beyond an identification which is reasonably related to the use of such service or property on the broadcast.

Section 508 of the United States Code also requires any radio station employees who accept payment for the broadcasting of particular content to report the agreement to the station at which they are employed. Further, if any person involved in the production of a program partakes in such an agreement, that person is required to disclose the details to the station at which he or she is employed.

Based on a literal reading of the above statutory language, the law applies to radio stations and employees of those stations. However, the ambiguities created by the language in the statute have led to questions about whether the terms of the law should apply to Internet radio. In response, attorneys have argued that, though the federal statute can be interpreted as excluding other businesses, state law...
commercial bribery statutes have been relied on in the past to prosecute those involved in payola scandals.\textsuperscript{17}

\textbf{B. Royalty Exemptions}

While the law forbids radio stations from accepting money without disclosing the agreement to listeners, the stations were given “an exemption on paying performance royalties to artists.”\textsuperscript{18} In other words, the radio stations were granted the ability to promote artists for free, and in exchange, the radio stations could use the artists’ material at no cost.\textsuperscript{19} On the other hand, Internet radio stations and satellite stations are required to pay a royalty fee per song, which causes a negative affect on their profits.\textsuperscript{20}

To rectify this problem, by relying on the language of the statutory law, as previously discussed, the stations that do not utilize radio waves to broadcast their programs—such as Internet stations—should be able to request money to play songs.\textsuperscript{21} At least that is what Perlson suggested in his September 2008 blog.\textsuperscript{22} However, Perlson did not consider the legal implications involved in his suggestion, and he failed to recognize that the activity of taking bribes to play music can be punished under state law, as mentioned above.\textsuperscript{23} “Moreover, the [Federal Trade Commission (FTC) has] expressed concerns about viral marketing and other advertising schemes where the consumer is not aware that he or she is being subjected to advertising.”\textsuperscript{24} The FTC’s concern is that such behavior can be construed as “false and deceptive trade practices” and a station that relies on payola as a means of profit would activate those concerns.\textsuperscript{25}

\textbf{C. Payola in the Courts}

In \textit{United States v. Goodman},\textsuperscript{26} the defendant argued that in order to be convicted for a payola violation, the government has a burden of showing that the material that was exchanged for payment was actually broadcast.\textsuperscript{27} However, after a reading of Section 508, the court determined that an agreement to play in exchange for pay is sufficient for a violation of the payola statute.\textsuperscript{28} Violation of the payola statute simply requires proof that money was paid for a specific message to be broadcast, not actual broadcast of that message.\textsuperscript{29} The court further states that payment to the radio station to have a record played on the air is evidence enough that there was intent to play the record, thus the requirements of the statute are met.\textsuperscript{30}

The \textit{Goodman} court read Section 508, analyzed it based on the plain language of the statute, and held in accordance with its reading.\textsuperscript{31} Following the \textit{Goodman} court’s lead, the law would be inapplicable to Internet radio based on the intent demonstrated by the words used to construct the

\begin{footnotes}
\item[17] \textit{Id.} Oxenford’s blog specifically mentions Eliot Spitzer’s recent prosecution and “the prosecution of legendary disc jockey Alan Fried . . .” The state statutes for commercial bribery that those prosecutions were brought under should force Internet radio stations to be cautious. \textit{Id.}
\item[18] \textit{Id.}
\item[19] \textit{Id.}
\item[21] \textit{Id.}
\item[22] \textit{Id.}
\item[23] \textit{Id.}
\item[25] \textit{Id.}
\item[26] \textit{Id.}
\item[27] 945 F.2d 125 (6th Cir. 1991).
\item[28] \textit{Id.} at 128–29.
\item[29] \textit{Id.} at 129.
\item[30] \textit{Id.}
\item[31] \textit{Goodman}, 945 F.2d at 129.
\end{footnotes}
statute. If the statute does not allow room for interpretation, Perlson’s much scrutinized theory that Internet radio is free to accept money in return for a promise to spin a record would be a reality.

IV. THE LEGAL PRESENT OF PAYOLA

Recently, New York state Attorney General, Eliot Spitzer, accused several major recording companies of accepting payola after finding traces of payola in their records. While the 1960 federal law, followed by state laws, barred companies from paying undisclosed amounts of money for airplay in return, the times have changed and attempts at obtaining more airplay have advanced. Instead of just offering cash for airplay—the act the statute originally intended to prevent—labels are now also offering “electronics to radio stations and paying for contest giveaways for listeners.”

After Spitzer raised the eyebrows of executives at the Federal Communications Commission (FCC), they began to investigate some of the largest radio broadcasters. The FCC and the broadcasters settled, considering that "[p]ayola hurts musicians, the radio industry and the free flow of creative talent because music is chosen on the basis of who can pay the most - not who sounds the best.”

The settlement includes voluntary payments by the broadcasters; agreements to establish staff positions charged with overseeing compliance with the settlement; and the establishment of a database that tracks all money and other contributions from labels. Under a separate agreement, the broadcasters have also volunteered to collectively air 4,200 hours per year of music by local and independent musicians.

While this settlement largely affects radio stations and their ability to accept money for airplay from record labels and artists, the question remains—can Internet radio stations be subsequently affected by the settlement agreement the FCC reached with major radio broadcasters? If the FCC’s website is fully comprehensive and explicitly states all of its involvements with broadcast media, the answer is no.

The FCC represents itself as regulating communications that occur by wire, radio, television, satellite, and cable. The Commission separates itself into seven different bureaus, each responsible for a unique function. Examples of these bureaus are the: Media Bureau, Wireless Telecommunications, Wireline Competition Bureau, and Enforcement Bureau. None of these bureaus, in their descriptions, include regulation of Internet communications. Thus, none of these bureaus are responsible for regulating the content that is played over Internet radio stations, nor are they responsible for the means by which the stations choose their content.

33. See 47 U.S.C. § 508; see also Perlson, supra note 15.
34. Sony BMG Music Settles, supra note 1.
35. Id.
36. Id.
39. Ulaby, supra note 37.
40. Id.
42. Id.
43. Id.
44. Id.
45. Id.
46. See About the FCC, supra note 41.
Between the language of statutory law and the language of the description of the FCC that is in place to regulate communications, it can be inferred that there are no guidelines by which Internet radio stations must abide. If “[p]ayola [was] banned in radio because the airwaves are publicly licensed, which makes them subject to government regulation,” the Internet is exempt from the ban because it does not rely on the publicly licensed airwaves. The government intended for radio stations to be independent from the industry and choose their own content without a conspiracy to push mediocre bands “while preventing artistically worthy groups from being heard.” Perhaps that motive was purposeful back when the payola scandal surfaced, but in these advanced times, the likelihood of the economy or musical creativity being affected by such a conspiracy is rather low.

In the twenty-first century, radio stations and record companies are being replaced by “Internet and satellite radio . . . iTunes, iPods, and podcasting.” Contrary to how payola first started, it is now the less than stellar business people who are exchanging money with unpopular disc jockeys to get them to spin music that the public would not otherwise be interested in hearing. While over-the-air radio controlled the success of artists in the past, technology has shifted that control to the hands of the consumers who now have a plethora of alternate options to tuning into a local broadcast. Now, bands can gain international exposure instantly, primarily through the use of Internet, without relying on radio stations’ support.

V. The Future of Payola—Should Internet Radio Stations Be Subjected to Payola Laws?

The twenty-first century is upon us, compared to the mid-twentieth century when payola laws were established. The laws were created to protect the public from being coerced to listen to a genre of music they normally would not choose. The laws were created to eliminate unfair practice and trade between radio stations’ employees and record label executives or artists. The laws intended to protect the people and prohibit the businessmen, but were the laws intended to be specifically focused on one particular form of transmitting the content from which the people were to be protected? Respectfully, the answer is no.

While statutory language is meant to be interpreted beginning with its plain language, ambiguities cause the reader to consider the framer’s intent. The statutory language in question here plainly provides that secretly exchanging money for radio airplay is illegal, but the language has not been amended since before the Internet’s prominence. The question to ask is whether those who created the statute would have intended for another means of transmission to come into fruition and bypass the laws they enacted. Most likely, this was not the intent.

Constitutional Law speaks of the originalists and the non-originalists. The originalists interpret the Constitution as stating, on its face, what the framers intended for it to state. Non-originalists consider that times change, and as the country and the world evolve, the Constitution’s governance will expand. The same classifications of interpreters could be applied to the instant issue. The “originalists” may read the statute and say that the Communications Act of 1934 was amended without concern for what the future might hold, and instead, the amendment’s use of the words “radio station” and “broadcast” shows intent to only regulate transmissions using radio waves. The “non-originalists” might read the language and delve deeper into it and say that a “radio station” in this century is not limited to those that transmit via radio wave, but extends to those that transmit through wireless, cellular, phone lines, and more.

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47. See 47 U.S.C. §§ 317, 508 (2008); see About the FCC, supra note 41.
49. Id.
50. See id.
51. Id.
52. Id.
54. Id.
Because interpretations will vary, the easiest proposed solution to make is to simply amend the statute to include the words “by use of any method of transmission” so Internet stations cannot escape the ties that bind traditional radio stations, and so those who read the language literally cannot argue that anything excluded from an enumerated list of methods was intentionally left out. However, amending a statute is not conducive to a time-sensitive issue.

The reality is that the Internet stations are representing themselves as radio stations. They are listed as radio stations on Internet search engines; their websites refer to them as radio stations. If the people behind the technologically advanced radio station are admitting to the classification of “radio station,” the statute that specifically addresses “radio stations” should apply. Section 317 does not discuss the means of transmission that said “radio stations” must use in order for the ban on pay for play to be effected. The word “broadcast” does not assume use of radio waves, as broadcasting is the act of transmitting from a radio or television station; not the act of transmitting via radio waves. If these Internet radio stations are voluntarily tagging themselves with the title “radio station,” they are also voluntarily subjecting themselves to the laws that govern those radio stations. If Internet radio stations want to be excluded from the reach of statutory law prohibiting the acceptance of payola, they should separate themselves from the “radio station” family. And even if it is determined that the statutory language of Sections 317 and 508 does not pertain to Internet radio stations, state commercial bribery laws shall undoubtedly forbid these stations from accepting money in exchange for airplay.

Therefore, the answer to the instant issue is simple: No, Internet radio stations are not precluded from abiding by the statutory provisions that bar over-the-air radio stations from accepting money in return for airplay. As a means of communication, the FCC should expand its bureaus to embrace the technological advancements of today. Expansion of one of its bureaus or an addition of a bureau assigned to regulate communication through the Internet would place Internet radio stations under the same scrutiny as over-the-air radio stations. The Internet should not be an outlet that allows unbridled freedom of speech and ignorance of the law. Instead, the Internet should be regulated as is any other means of communication. Though musicians are not solely relying on radio play to achieve successful music careers, the charts and industry awards still consider the number of “spins” a song acquires when considering chart placement, nominees, and winners. As long as radio is holding any bearing on an artist’s career, payola should be banned by all radio-like entities.