

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of:)
)
Broadcast Localism) MB Docket No. 04-233
)
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RESPONSE TO NOTICE OF INQUIRY

November 1st, 2004

In response to the matters concerning Broadcast Localism and the FCC Issued Notice of Inquiry Regarding Broadcaster Service to the Needs and Interests of Their Communities.

Comes now Jack E. Rooney, an individual residing at 926 River Avenue, Indianapolis, Indiana 46221 (327) 634-9440, Responds to the Commissions NOTICE OF INQUIRY this 1st day of November 2004, alleges, and says:

My name is Jack Rooney. I am an independent (unsigned) recording artist and actor in motion pictures and television (multi-media artist). I own an independent recording and motion picture production facility in Indianapolis, Indiana. My resume and bio can be viewed here: <http://home.att.net/~jackrooney/resume.html>

I have written extensively on the subjects of the Internet, radio, and television broadcasting relating to marketing and distribution of entertainment media in a work titled "The Downfall of the Media Cartel", which I restate and reaffirm and incorporate by reference herein: <http://home.att.net/~jackrooney/cartel.html>

More and more performing artists, like myself, are choosing not to sign or partner with the major record labels for a variety of artistic, professional, business and economic reasons but choose instead to maintain control of their own business affairs, their copyrights, and their art. The Bono Copyright Term Extension Act extends the term of copyright to 95 years for corporate entities, or for the life of the original author of a work, plus an additional extension period of 50 years.
<http://www.loc.gov/copyright/legislation/s505.pdf> .

The now extended, long life of copyright make it imprudent in most cases for any artist to sign away all their copyrights to the major record labels or studios on an exclusive basis, since no one can possibly know what a work of art will be worth in 125 years, which is what the majors studios typically require in order to do business with them. So many artists are saying 'thanks but no thanks' to the major studios.

Advances in computer technology, recording, production, and manufacturing of entertainment media, combined with new marketing avenues opened by the Internet, have all served to make the major record labels increasingly irrelevant. An unsigned artist who records, manufactures, and sells 50,000 music CDs can make more money than a major record label artist who sells a million copies.

In response to all of this, the major record labels and entertainment media producers are losing market share to the independents producers, their smaller competitors who now have access to markets through the Internet. The media giants are circling their wagons, consolidating, and doing everything in their power to halt the progress of what they must consider the independent barbarians at their gates.

Although Independent artists are making some headway in the new Internet marketplace, major record label music continues to dominate radio and television. The vast majority of independent record artists receive little or no radio air play of their music, even though unsigned artists constitute the vast majority of music creators today, and many unsigned performers are equally as good as, in some cases better than their signed counterparts, the major record label artists.

I do not mean in any way to disrespect the work of any major record label artist or demean the quality of their art, but much of the work of unsigned musicians producing music today is equally as good by industry standards as anything of the major studios. Yet, commercial radio will not typically play the songs of these independent artists.

I know this from my own experience and from reports from my musician colleagues who are similarly situated and who are routinely ostracized from access to the radio airwaves in the United States. I receive more fan mail from India than from Indiana, and from France, Italy, England, Germany, Australia, Central America and much of the foreign market. Most of my CD sales and film media product sales are made to these markets as well. My work contains no obscene or offensive content. But I can not get radio airplay in my own hometown.

Hundreds of thousands, perhaps millions of musicians, bands, media artists, and small independent producers are similarly situated. Radio, television, and the commercial airways will not broadcast their art and exhibit their work to the public. The question any reasonable person should ask is why?

The standard retort is to suggest there is something wrong with their work, that it is of lesser or inferior quality. But the vast audiences on the Internet and the global audiences

who nevertheless love and embrace the work of many unsigned artists, bands and performers speak otherwise.

The major record labels have established an effective monopoly over what songs are broadcast. Banned from making direct payments for airplays to radio stations, the majors have simply found a work-around through the persona of the promoter and through direct, though seemingly unrelated, advertising purchases of radio airtime. The major studios simply orchestrate a multitude of elaborate payola schemes, either by establishing relationships with middle-men (independent promoters), who affect a disguised form of payola to the stations, to accomplish the same goal, or they use immense advertising budgets to induce the station owners to formulate play lists favorable to the interests of the corporate benefactor, to accomplish the same end, to control radio play lists to unfair advantage with money.

I see no difference between blatantly violating a law that says it is a crime to bribe a station to play a song without proper disclosure and colluding with an independent promoter operating as a middle-man to accomplish the same thing. It merely shifts the legal burden of proof from Section 507 of the Communications Act, as amended 47 U.S.C. § 508, into a different and perhaps more severe legal arena that makes it a RICO case. [Racketeer Influenced and Corrupt Organizations US Code: Title 18 : Section 1961](#). Payola is clearly defined in 47 U.S.C. § 317. The fact that some studios, promoters, and stations participate in an elaborate scheme designed to circumvent the law raises the bar to the more serious level of RICO violation. White-collar criminals, although often crafty and quite devious, are seldom very smart.

It is not possible to fully understand what an independent promoter is and does or why they exist at all without understanding their complement – a “dependent” promoter. Whether the term “dependent” is used officially, whether they exist by title or not, they are what they do and what they do is promote for the corporations they work for from within the corporation itself. Dependent promoters are the advertising and marketing department and department heads within the major studios and record labels who function to hype and promote the media products of the studios, the in-house marketing/ad agency ranging in size from a single individual, to an entire department or corporate division. The dependent promoter, typically the department head and staff, is the employee(s) of the corporation, company or studio they serve. They serve at the pleasure of the corporation, on the regular payroll, and they can be fired.

Independent promoters, in the other hand, operate outside the shelter of the corporate umbrella. They do the same thing as the dependent promoters, a mirror image, but they are not employees of the corporation, and they can not be fired. They are an independent contractor, a sort of specialized ad agency, with specialized knowledge of how the relationship between media producers and broadcasters really works, with a specialty in hyping music and obtaining radio airplay. They provide a range of promotional services designed to publicize and hype music for their clients, and anyone with a song and enough money can use them on an as-needed basis.

When independent promoters emerged on the scene, they began offering their services to anyone, Independent (unsigned) artists and labels, anyone who could feed the need of the broadcaster's appetite for revenue. Suddenly, unsigned but well-financed artists and small but well-funded record labels began climbing to the top of the charts, knocking major record label artists off the top of the play lists, and the Recording Industry Association of America (RIAA), responding to the howls of its corporate masters, cried foul, demanded an investigation, and claimed the independent promoters were cheating, manipulating the play lists <http://www.riaa.com/news/newsletter/013003.asp>

But the irony in all of this is that the large advertising budgets of the majors, Sony, Warner, Universal, EMI, comprising a vertically integrated, de facto cartel operating under the banner of the RIAA and the Motion Picture Association of America (MPAA) and its small elitist membership, have for decades kept the play lists of the radio airways packed with major studio content through a variety of advertising schemes designed to manipulate the play lists.

The ad budgets of the studios are a Sword of Damocles held over the heads of the broadcast stations and networks. Moreover, the station owners are too fearful of lost advertising revenues from these promoters to refuse to play ball. A paid commercial ad for the movie "The Lion King" might be followed by an inordinate number of spins of "Circle of Life", a song from the film's soundtrack, or other songs by artists the studio owns, tie-in sales illegal under The [Clayton Act, 15 U.S. §§ 12-27, 29 U.S. §§](#) when it works to accomplish payola in a disguised form.

The independents are merely employing tactics today that they learned from their dependent promoter counterparts, from the promoters operating within the major studios for decades. But instead of buying advertising airtime from the stations, the independents buy advance play lists, a piece of paper listing song plays, which seems superficially unrelated to the songs played by the station but always seems to cost about the same amount of money to purchase as a good size ad campaign for a new product release of the major studios.

Both pictures are a bad scene. When a small handful of the media industry giants can use their financial strength and power to suppress the business of their smaller competitors, the [Sherman Antitrust Act, 15 U.S. §§](#) should be applied to stop it. When promoters from within or from outside of the studios use covert tactics to circumvent the law, that seems a matter for the Justice Department also. It is not a question of whether independent promoters, used as middlemen to circumvent the law, or dependent promoters of large corporations with vast advertising budgets, used to manipulate the play lists of radio stations, ought to be regulated -- such white-collar crime, racketeering activities are already illegal under federal anti-trust law and the RICO statutes.

I see absolutely nothing wrong with media producers advertising their wares to the public and using the public airwaves to do so, as long as the public can easily discern the difference between broadcasts based on payola (a paid advertisement) and broadcasts based on artistic merit. Nevertheless, I do not believe the media giants should be allowed

to hog the public airways, to squeeze out and suppress the voice of their competition, to take more than their fair share of the radio and television bandwidths by simply buying it all up.

As a matter of case law, an analogous scenario was already tried and settled in the matter of Standard Oil v. United States, where Standard Oil was found guilty of anti trust violation when, among other violations, they prevented their smaller competitors from shipping their product to market by buying up all the oil barrels, the medium used to transport the goods. Standard's competitors had plenty of oil, but no medium of transport, and without oil barrels, they were out of business.

Broadcast airwaves are a medium of transport, the major exhibition pipeline. They carry the music product of the recording artist to the ear of the listener and the eye of the viewer. Artists can not sell their art if they can not show it to the public, to the mass audience offered by the broadcast airways.

An observation and analysis of the content of broadcast airways in the United States shows a disproportionate amount of content owned by the major record labels and the membership of the RIAA/MPAA, a cartel of vertically integrated entertainment media production studios. The MPAA/RIAA is the Standard Oil of the entertainment media industry, an Association of entertainment media producing corporations, who by rights ought to be vigorous competitors in the marketplace, carefully regulating the market in the interests of its membership.

The public is exposed to little work from competing independent artists (non-RIAA/MPAA members) over the commercial radio and television airwaves, even though unsigned artists constitute the majority of content creators today. This all leads the mind up to a conviction of a purpose and intent on the part of the RIAA/MPAA membership, the major studios, to monopolize and restrain trade which I think is so certain as practically to cause the subject not to be within the domain of reasonable contention.

Of course, much of the problems of localism in broadcasting (or the lack of it), diversity (or the lack of it) payola (either in its overt or covert forms) has to do with concentration of the broadcast bands in the hands of too few national corporations, with these corporations controlling too much of the exhibition pipeline, and with the corporate greed of these licensed corporate broadcasting conglomerates themselves. The studios are merely feeding the need of the corporate broadcaster's bottom line in their own self-interest, responding to an opportunity ripe for exploitation on a wide scale, and the independent promoters emerge to fill the legal vacuum created between the studios and the broadcasters by 47 U.S.C. § 317, the anti-payola law.

When the content of broadcasts are constructed by a narrowly focused corporate interest with eyes looking at the play list through a cloud of gold dust, the public interest becomes muddy, and the public trust implied in their radio broadcast license is often breached or completely disregarded.

I am reminded here of a warning issued by Supreme Court Justice Harlan writing in the Standard Oil V. US case regarding concentrated corporate power: "...but the conviction was universal that the country was in real danger from another kind of slavery sought to be fastened on the American people; namely the slavery that would result from aggregations of capital in the hands of a few individuals and corporations controlling, for their own profit and advantage exclusively, the entire business of the country...."

<http://www.ripon.edu/faculty/bowenj/antitrust/stdoilnj.htm> . The major media giants in the US and throughout the world pose exactly such a danger today. With an ability to control what we hear and see, and ultimately, what we are suppose to think about the world around us, our persons may be easily enslaved when our minds are captured.

Too much power concentrated in too few hands leads to a situation where abuse of the system can occur with greater economy of scale and with greater effect and efficiency by streamlining opportunities for collusion between the large broadcasting conglomerates and the large media suppliers. The independent promoter merely brings together the willing buyer and the willing seller in a market that already exists for their services. They did not create the market for payola; it existed before they arrived on the scene. It was created by the media giants themselves who now seem to want to wine about the independent promoter employing tactics they themselves developed long ago. It makes it easier to operate for those who wish to exploit a public resource to unfair advantage.

The broadcast networks become the propaganda machines serving the interests of the major studios who feed the networks. The independent promoter arises as a response to broker services society has ruled are illegal to overtly sell but which nevertheless exist in the marketplace already, so they use covert methods to accomplish the same thing the studios also do covertly that accomplish the same goal with the buying power of their immense advertising purchases, and the stations and the studios and the independent promoters are all willing accomplices in a scheme designed to consummate the dirty deal. Concentrated corporate power yields corruption concentrate. The corporate heads water it down a bit and have it every morning with their corn flakes. Its part of their regular diet, just business as usual.

Young recording artists and small start-up recording studios and media producers have a difficult if not impossible time competing in the marketplace under these conditions. Young artists are often duped and victimized by a variety of scams run by live event promoters, con artists and sharks who also often own the commercial airways they use to hype their own events, pay to pay concerts, gambling-to-win events with prizes that include recording contracts, access to industry executives, and public exposure.

Because so many bands, musicians, and artists are available and willing to perform, indeed, the market is flooded with good, high quality performers, the supply-and-demand economics of the marketplace for live performers has driven the cost of performer's wages down to almost nothing. In many cases, artists are required to pay to play. Whenever an overabundance of willing workers exists, in this case the bands and musician, the supply becomes too much for the market to absorb, and this opens the door

for exploitation by a variety of cons, flim-flamers, charlatans, huxters and frauds who prey on the hopes and ambitions of aspiring artists.

But the pay to play scenario, where artists are asked to pay the concert promoter a fee to participate in the publicly staged event, raises several important legal questions: Is the artist paying for advertising or are they paying to work, to get a job?

If the artist is paying for advertising, and the show is merely a publicly staged advertisement for the band, FTC regulations apply, and the public has a right to know they are buying tickets to see a paid commercial advertisement, truth in advertising. Deceptive advertising can occur not only when the promoter makes false claims about and event, but also when they fail to tell the public the truth about the event, not by what they say, but by what they fail to say when they tout it to the public.

<http://www.ftc.gov/bcp/bcpap.htm>

If the artists are working, federal labor law applies. Traditionally, bands are hired to perform and paid a performance fee. A gig is a job no matter what term one uses to describe it. It is work. Workers hired below minimum wage or for nothing or who actually end up owing the boss more than they make would seem to be involved in, victims of a per se violation of federal labor law.

<http://www.dol.gov/dol/topic/wages/minimumwage.htm>

Even if the relationship between the event organizer and the artist is considered some sort of “partnership”, as the term is generally defined in the Uniform Limited Partnership Act and its associated case law

<http://www.law.upenn.edu/bll/ulc/fnact99/1980s/ulpa7685.htm>, as a sub-contractor, or “other” hybrid type of worker the fictions of contract law might fabricate to describe them, like “volunteer” or “work study”, the truth in advertising issue still remains.

Either way, whether the artist is considered to be advertising or working, neither scenario appears to meet legal muster regarding federal labor law or federal consumer protection law as far as the way these pay to play concert events are typically organized. So clearly, pay to play music concerts are designed either to exploit the artist to the unfair advantage of the promoter, or to deceive the public.

Furthermore, these pay to play concerts are typically coupled with awards, prizes, and a variety of opportunities for the participating artist to win something of alleged value, typically a recording contract or studio time or equipment and such. The event promoters almost always suggest or strongly imply recording industry executives of great renown and power will attend the event and provide the artist a chance to win the Holy Grail, a contract with a major record label, the keeper of the keys to the inner sanctum of the broadcast temple, the sacred airways. Radio stations and television often cover the event.

The implication is always that the event will result in increased name recognition, which will result in increased national and/or local radio play, which will result in increased CD

sales, more gigs for the artist, and more money. Radio play is always at the heart of the issue, or the “chance” of it.

As such, pay to play music concert events are also a form of gambling (gaming). The gambler musician puts down money for a chance to win radio play and perhaps a few moments of broadcast television airtime and other items of value.

The most common pay to play music concert gambling event takes the form of the classic tip board or numbers board (sometimes called a “pull card”) where a board is set up with a series of numbers hidden inside a folded paper “pull” attached to the board and one of the pulls is printed with a red dot or some other marking to distinguish it as the “winner” from all others on the board. Gamblers buy a pull and the person who pulls the red dot wins the booby prize. Depending on how many pulls are on the board, the sale price of each individual pull, and the value of the prize, the house can take in a bundle on these illegal gambling devices. These things are illegal (or heavily regulated) almost everywhere in the US

<http://www.irs.gov/businesses/small/industries/article/0,,id=99529,00.html> .

Compare this to typical pay to play concert event where hundreds, perhaps thousands of aspiring musicians pay a non-refundable entry fee for a chance to be selected to perform before a live audience where plenty of recording industry executives (the red dot, the bait) are allegedly present. Most often, their entry fees do not guarantee any right to perform, but only “the chance to be selected”. The majority who applies will never even get the opportunity to perform. The prize, typically a recording contract with some obscure recording studio or record label, is rigged in favor of the subjective impressions of the industry executive “associates” of the promoters who set up the event in the first place. The red dot is not even on the board at all, but in the pocket of the promoter or associates who hold the dot and dole it out on a subjective basis. Once in the prize studio, the artists are typically hit up with high pressure sales tactics to purchase additional, “premium” services from the studio (bait & switch) to help further promote and market their lovely new recording, or exceeding the scope of this expose, evolving into any of numerous song-sharking ruses designed to pick the pocket of the artist.

Gaming does not become a federal issue unless it involves deceptive advertising used in interstate commerce to promote the game, which is usually the case because they involve misleading the artist from the outset, and artists may be drawn into the game from all over the country, when it then becomes an issue for the FTC. By and large, pay to play concert events can be defined as an elaborate and sophisticated confidence scam or confidence game set up by shark promoters who gain the confidence and trust of naïve musicians and artists with vaguely defined promises, exaggerated and puffed up claims about the value of the event to the artist’s career, or outright lies, then the sharks rip them off. Losers who walk away with nothing, the vast majority, seldom talk about their loss because they are embarrassed at losing. Pay to play concerts and showcases are little more than a sophisticated, and in most cases illegal gambling event designed to line the pocket of the house and the house’s co-conspirator associates.

The types of con games played against entertainment industry talent and performers are far too numerous to list here. I have covered only a few of the most pervasive problems and those not subject to much doubt regarding their actual existence. They occur, in varying forms, at all levels of the industry, from the board rooms of giant corporations to the back alley in small towns, limited only by the imagination and resourcefulness of the sharks who run the con games. Most of these problems arise directly from, or hearken back to abuse and misuse of the broadcast airways, the commercial airwaves that hold so much power over access to markets for entertainment media product.

The problems within the broadcast industry have a multi factorial etymology. Many of the factors, conditions, and activities that give rise to these problems reside outside the FCC domain, such as labor and trade issues, white collar, and organized crime and need to be addressed by those respective governing regulatory and enforcement bodies who have oversight in these matters. We already have sufficient law on the books to stop anti-competitive behavior, racketeering, extortion, graft, and the rampant white collar-crime that presently rules over the entertainment, radio, and broadcast industries. We need enforcement of existing law.

Consolidation of the broadcast airways in the hands of too few industry players has lead to a situation where the media giants can routinely circumvent the law with impunity, and FCC oversight is required to enforce both the letter and spirit of the law in the best interests of the people. Issues, for example, like whether broadcasters should be allowed to thwart the spirit of the FCC advertising disclosure regulations by burying required notices in small type at the end of broadcasts require attention. Those who do not like what the law requires of them will always look for ways to circumvent it to their own advantage. But one would also think that the legal departments of the broadcasters who engage in this sort of behavior should understand what the law was intended to achieve and comply not only with the letter of the law, but also with its spirit.

If the FCC, the Justice Department, the Federal Trade Commission, and the Department of Labor would enforce the laws we already have that serve to prevent these conditions from arising in the first place, conditions which give rises to the censorship of small independent artists, monopoly control of the broadcast industry, restraint of trade by the major media producers, and the multitude of peripheral problems (rackets) that arise in relation to all of the above, these issues could be greatly reduced.

Thank you for your time and consideration of these matters, and I pray the FCC will provide all just and proper relief in the premises for recording artists, musicians, performers and media producers everywhere.

Respectfully,

Jack E. Rooney

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