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LEGITIMIZING PAY TO PLAY: MARKETIZING RADIO  
CONTENT THROUGH A RESPONSIVE  
AUCTION MECHANISM

**Alon Rotem\***

I.	INTRODUCTION.....	130
II.	RADIO REGULATION BACKGROUND / HISTORY .....	131
	A. <i>Government Enforced Public Interest Standards</i> .....	131
	B. <i>Marketization of the Public Interest Doctrine</i> .....	133
	C. <i>The Impact of the 1996 Telecommunications Act on License Renewals</i> .....	134
III.	PAYOLA RULES .....	135
	A. <i>Payola Rules Impact on the Recording Industry</i> .....	136
	B. <i>A Brief History of Payola Transgressions</i> .....	137
	C. <i>Fallout from Recent Payola Prosecution</i> .....	139
	D. <i>Modern Payola Rules Ambiguity</i> .....	139
IV.	IMPACT OF TECHNOLOGY AND AUCTIONS ON BROADCAST SCARCITY .....	140
	A. <i>The Rise and Evolution of Technology-Driven Auctions</i> .....	141
	B. <i>Applying the Auction Mechanism to Radio Content Programming</i> .....	141

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V.	MARKETIZING RADIO CONTENT THROUGH A RESPONSIVE AUCTION MECHANISM .....	142
	A. <i>Initial Concerns About Marketizing Radio Content</i> ..	142
	B. <i>Responsive Auction Radio Hypothetical</i> .....	143
VI.	THE PLAYERS: ANALYSIS OF BENEFITS AND DRAWBACKS .....	145
	A. <i>Radio Stations</i> .....	145
	B. <i>Record Labels</i> .....	148
	C. <i>Unsigned / Independent Artist Externality</i> .....	149
	D. <i>Listeners</i> .....	150
VII.	ALTERNATIVE AUCTION APPLICATIONS.....	151
	A. <i>Radio Station "Jukeboxes"</i> .....	151
	B. <i>Broadcast Television Auctions</i> .....	152
VIII.	FCC REGULATORY REDUX: FEASIBILITY .....	153
IX.	CONCLUSION .....	154

## I. INTRODUCTION

The story of federal radio content regulation has involved a gradual, but seismic, shift from paternalistically enforced public interest constraints on broadcast licensees to a market-driven philosophy which permits radio stations to freely air content with little concern for license revocation and other penalties. However, the FCC Payola Rules, which mandate financial disclosure for sponsored airtime on the air, have, in part, engendered a system where content is bifurcated into an entertainment portion which attracts listeners, and a commercially sponsored segment which accounts for most of the station's revenues.

The advent of new technologies has eliminated the scarcity of broadcast channels that originally gave rise to the public interest doctrine. As a result, radio appears ready to advance to a new stage of "marketization" with the implementation of responsive auctions to lawfully generate revenues from the entertainment portion of the radio broadcast. This development could potentially mark another seismic shift in modern radio.

As this article will explicate, responsive auctions merge the radio industry's natural progression towards marketization together with the modern interpretation of the public interest doctrine which now emphasizes consumer preferences over government predilections. Additionally, this article will focus on the newfound ambiguity within the Payola Rules as applied to new technologies as well as the array of potential benefits and drawbacks to all players in the industry created by the responsive auction mechanism.

## II. RADIO REGULATION BACKGROUND / HISTORY

Ever since the federal government formally asserted ownership of the radio spectrum, scarcity has defined the “unique characteristic” of this regulated public good.<sup>1</sup> In 1943, Supreme Court Justice Frankfurter aptly stated, “[u]nlike other modes of expression, radio inherently is not available to all.”<sup>2</sup> While early radio broadcast enabled communication across great distances with little or no cost to the end user, the government originally regarded the broadcast license as a limited privilege only to be held by those who produced content deemed suitable for public consumption. Additionally, the Radio Act of 1927 extended safeguards to limit the number of license holders, effectively minimizing interference across the finite radio spectrum band.<sup>3</sup> As operators of a scarce but powerful technological resource, radio stations were expected to function as public trustees with a special duty to subordinate their business interests to those of the broader public good.<sup>4</sup> These policies, thoroughly instilled by the federal government, came to be known as public interest doctrine.

### A. *Government Enforced Public Interest Standards*

The Communications Act of 1934 (hereinafter, “the ’34 Act”) expressly authorized the Federal Communications Commission (“FCC”), “as a public convenience, interest, or necessity,” to conduct hearings for the purpose of assigning broadcast licenses to applicants who could demonstrate a willingness and ability to broadcast content in the best interest of the public.<sup>5</sup> The ’34 Act also authorized the FCC to hold hearings on license renewals and proposed license transfers.<sup>6</sup> Accordingly, when multiple parties applied for a particular license, the FCC held comparative hearings in an attempt to grant the license to the party most likely to serve the public interest.<sup>7</sup> In addition to meeting baseline objective qualifications, applicants sought to convince regula-

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<sup>1</sup> *NBC v. United States*, 319 U.S. 190, 226 (1943).

<sup>2</sup> *Id.*

<sup>3</sup> See Public Law No. 632 § 4(f), February 23, 1927, 69th Congress (“*Radio Act of 1927*”) (“[T]he commission, from time to time, as public convenience, interest, or necessity requires, shall [m]ake such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this Act.”).

<sup>4</sup> 47 U.S.C. § 309(a) (2006) (“[T]he Commission shall determine, in the case of each application filed with it . . . whether the public interest, convenience, and necessity will be served by the granting of such application. . . .”).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 333 (1945) (holding that in view of the FCC’s sole authority to grant licenses under §309 of the ’34 Act, the FCC was required to hold a single hearing for mutually exclusive license applications. “Where two bona fide ap-

tors that their proposed broadcast station would both serve the needs of a given community and be similarly responsive to the community's desires.<sup>8</sup> Implicit in this statutory scheme was the assumption that the FCC would act as kingmaker by subjectively selecting the applicant which would best serve the public interest. By definition, this public interest criterion did not depend on listener popularity, however, but rather on the paternalistic sense of what the FCC deemed suitable for public consumption.

As a result, this public interest standard led to the removal of popular, but objectionable, radio personalities and programming from the radio airwaves. Most notably, in 1930, the Federal Radio Commission ("FRC," precursor to the FCC) shut down the wildly successful Dr. John R. Brinkley, better known as the Goat Gland Doctor.<sup>9</sup> On his Milford, Kansas, radio station, KFKB 1050, Dr. Brinkley entertained listeners with a mix of fundamentalist sermons, country music, and his own medical advice show. In response to listener questions, Dr. Brinkley usually recommended prescriptions from his own pharmaceutical supplies. Despite amassing an unprecedented audience size, stretching from the Midwest to the Atlantic, the FRC denied Dr. Brinkley's license renewal, citing public health and safety violations as well as fraud.<sup>10</sup>

Similarly, from 1926 to 1932, "Fighting" Bob Shuler, a pastor and political activist with strong radio ratings, used his radio station, KGEF, to rail against Jews, the Catholic Church, and what he perceived as corruption of local politicians in Southern California. These politicians promptly took notice of this controversial broadcaster's outcries and successfully lobbied the FRC to have Shuler removed from the airwaves for failure to pass the "public interest" thresholds associated with the license renewal process.<sup>11</sup> Even seemingly innocuous music stations and foreign language broadcasts felt the squeeze of the FRC's smothering public interest standard, which labeled these formats as too attenuated from mainstream public relevance.<sup>12</sup>

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plications are mutually exclusive, the grant of one without a hearing to both deprives the loser of the opportunity which Congress chose to give him.").

<sup>8</sup> 47 U.S.C. § 308(b) (1996).

<sup>9</sup> KFKB Broadcasting Ass'n v. Fed. Radio Comm'n, 47 F.2d 670, 671 (D.C. Cir. 1931).

<sup>10</sup> *Id.*

<sup>11</sup> Trinity Methodist Church S. v. Fed. Radio Comm'n, 62 F.2d 850 (D.C. Cir. 1932), *cert. denied*, 284 U.S. 685 (1932).

<sup>12</sup> Great Lakes Broadcasting Co., 3 FRC Ann. Rep. 32 (1929), *aff'd in part and rev'd in part*, 37 F.2d 993 (D.C. Cir.), *cert. dismissed*, 281 U.S. 706 (1930) ("[A] station should meet the 'tastes, needs, and desires of all substantial groups among the listening public . . . in some fair proportion, by a well-rounded program, in which entertainment, consisting of music of both classical and lighter grades, religion, education and instruction, important public events,

Despite the FRC's previously active role in promoting the public interest, the newly minted FCC initially balked at the mandate to police radio content. However, the Supreme Court rebuffed this notion in 1943, holding that the FCC was specifically entrusted with the obligation to "determin[e] the composition of [broadcast telecommunication] traffic."<sup>13</sup> For the FCC, policing content involved holding time-consuming hearings in order to filter out unworthy license applicants while subsequently ensuring that those who received licenses made good on their promises to adequately serve the public interest.

### B. *Marketization of the Public Interest Doctrine*

Fast-forwarding through the decades that followed, the Reagan Era ushered in a market-based shift in the government's approach to radio regulation.<sup>14</sup> During this period, the FCC surmised that "Congress intended to permit a licensee . . . to survive or succumb according to his ability to make his programs attractive to the public."<sup>15</sup> In other words, the public interest standard would now accede to consumer preferences in order to establish what content was appropriate and viable for public consumption. As a result of this deregulation, the FCC would no longer actively police radio content in the traditional sense and station program directors would only have to comply with minimum broadcasting standards such as indecency, defamation, and other mainstay constitutional limits.

Yet, during this adolescent flux of an evolving broadcast licensing scheme, license transferability permitted successful license applicants to morph into private auctioneers, selling their newly acquired license to the highest bidder. The bidder merely had to demonstrate adequate financial resources, agree to operate a functioning station, and be a non-felonious citizen. Effectively, the government conferred a windfall upon these original license holders, who had obtained licenses for free. In response, the government eventually co-opted this private market scheme – comprehending the pecuniary value of broadcast licenses as a significant way to fund the national treasury. By 1993, Congress had fully embraced the practice of auctioning all new radio spectrum and the original public interest hearings became all but a historical relic.<sup>16</sup>

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discussions of public questions, weather, market reports, and news, and matters of interest to all members of the family find a place.'").

<sup>13</sup> *NBC v. United States*, 319 U.S. 190, 215-16 (1943).

<sup>14</sup> *In re Deregulation of Commercial Television*, 98 FCC 2d 1076 (1984).

<sup>15</sup> *FCC v. Sanders Bros. Radio Station*, 308 U.S. 474, 475 (1940).

<sup>16</sup> Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 13-66, 107 Stat. 477.

C. *The Impact of the 1996 Telecommunications Act on License Renewals*

From the outset of broadcast regulation, the government never conferred fee ownership in radio stations. Instead, applicants received revocable licenses which expired after eight years.<sup>17</sup> Therefore, the FCC required licensees to petition for renewal. Accordingly, the specter raised by this petition process enabled the FCC to wield considerable influence over licensee behavior.

However, the Telecommunications Act of 1996 (hereinafter, “the ‘96 Act”) has since lifted the burden of proof placed on licensees. Under section 204 of the ‘96 Act, the FCC must grant the renewal application if the licensee has served the public interest, committed no “serious violations” of the Communications Act or the FCC’s rules, and has not committed any other violations “which taken together, would constitute a pattern of abuse.”<sup>18</sup> Only if the applicant fails to meet this relatively low threshold may the FCC even consider a competing license application. Furthermore, in response to the ‘96 Act, the FCC abolished the comparative hearings process for renewal applicants.<sup>19</sup> The thrust of this legislation has essentially insulated incumbent license holders from FCC influence, subject only to obvious and avoidable abuses. In the wake of progressively marketized public interest standards and waning FCC content control, the modern era has effectively neutralized the old guard of paternalistic public interest doctrine.

Currently, while radio station licenses are purchased by auction or private sale, radio content is predominantly controlled by station executives and their program directors, who are hired to install a given content format which will hopefully drive more listeners to the station, thereby increasing commercial advertising revenue. Hence, radio content has developed into a bifurcated blend of programming consisting of entertainment (music, editorial, news, etc.) selected by program directors and commercially-sponsored advertisement spots. In order to clearly partition the two components, the FCC has instituted policies, on behalf of the public, aimed at disclosing commercially-sponsored broadcast content. Collectively, these policies are known as the Payola Rules.

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<sup>17</sup> 47 U.S.C. § 307(c)(1) (2004).

<sup>18</sup> 47 U.S.C. § 309(k) (2006).

<sup>19</sup> Broadcast License Renewal Procedures, 11 FCC Rcd. 6363 (1996).

### III. PAYOLA RULES

The FCC Payola Rules, which originated in the Radio Act of 1927,<sup>20</sup> are as follows:

When a broadcast licensee has received or been promised payment for the airing of program material, then, at the time of the airing, the station must disclose that fact and identify who paid for or promised to pay for the material. All sponsored material must be explicitly identified at the time of broadcast as paid for and by whom, except when it is clear that the mention of a product or service constitutes sponsorship identification.

Any broadcast station employee who has accepted or agreed to accept payment for the airing of program material, or the person making or promising to make the payment, must disclose this information to the station prior to the airing of the program.

Any person involved in the production or preparation of a program who receives or agrees to receive payment for the airing of program material must disclose this information. Broadcast licensees must make reasonable efforts to obtain from their employees and others they deal with for program material the information necessary to make the required sponsorship identification announcements.

The information must be provided up the chain of production and distribution before the time of broadcast, so the station can air the required disclosure.

These rules apply to all kinds of program material aired over radio and television stations. Some may also apply to cablecasts.<sup>21</sup>

Congress designed the Payola Rules to compel comprehensive disclosure of the financial sources that sponsor aired material in order to educate station listeners that this material has indeed been paid for – and not chosen for its artistic merit. Radio stations and all of their employees are expressly directed to disclose this information up the chain of command at the time of broadcast, thereby minimizing any potential confusion on behalf of the listener.

Notably, the Payola Rules exempt commercials from disclosure “when it is clear that mention of a product of service constitutes sponsorship identification.”<sup>22</sup> Radio, in its current incarnation, relies almost

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<sup>20</sup> Radio Act of 1927, §19.

All matter broadcast by any radio station for which service, money, or any other valuable consideration is directly paid, or promised to, or charged to, or accepted by, the station so broadcasting, from any person, firm, company, or corporation, shall at the time the same is so broadcast, be announced as paid for or furnished as the case may be, by such person, firm, company, or corporation.

*Id.*

<sup>21</sup> The FCC’s Payola Rules, available at <http://www.fcc.gov/cgb/consumerfacts/PayolaRules.html> (last visited Apr. 13, 2006); see 47 U.S.C. § 317; 47 U.S.C. §§ 507-08.

<sup>22</sup> *Id.*

exclusively on product and service advertisements as its source of revenue. These advertisers, in turn, expect to see their sales increased in correlation with the airing of their radio spots. In effect, this payola exemption avoids the undesirable chilling effect that disclosure rules (which otherwise require immediate accompanying financial source disclosure on-air) would have on radio advertisement revenue.

#### A. *Payola Rules Impact on the Recording Industry*

In a close analogue to these commercial advertisers, the recording industry has also long understood that widespread radio airplay functions as a critical driver of record sales. Not surprisingly, in the hopes of substantially increasing sales, record labels have a vested interest in promoting their product to radio outlets with the prospect of receiving maximum airtime.

Conventionally speaking, music-format radio stations operate by playing entertaining music in order to attract a strong listener base, thereby earning an advertisement rate based on the size and demographics of their audience. Presumably, the station will play the music that helps it achieve the highest advertising revenue. Theoretically then, music can be broadcast under two scenarios. Under the first, the radio station can play music from a playlist which has been created to draw in the maximum number of listeners, thus increasing advertising revenue. Alternatively, a record label (or any content provider) could simply pay the radio station to play its music and subject the station to Payola Rules jurisdiction.

For a variety of reasons, the latter scenario does not occur frequently. To begin, the historical public interest standard initially frowned upon the proliferation of paid advertisements until the 1980's era of deregulation uprooted a swath of constricting broadcast guidelines. The FCC's shift towards market deference concluded that listeners would tune out stations which bombarded them with too many commercials.<sup>23</sup> Thus, market forces would reasonably restrain commercially derived revenues while the added income might subsequently improve the quality of future entertainment content. Second, paying to play the entertainment component of the broadcast in addition to the commercial spots might spawn a campaign of political demagoguery where radio stations are accused of invidiously placing corporate greed above the public's content preferences. Third, since most content is believed to be chosen for its artistic merit or listener popularity, the negative public relations implications associated with the idea that re-

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<sup>23</sup> *In re Deregulation of Commercial Television*, 98 FCC 2d 1076 (1984).

cord labels need only to bankroll their music to get on the air depreciates a station's artistic credibility, leaving it less valuable from a consumer preference perspective. Fourth, the Payola Rules requirement of immediate on-air disclosure would mandate the unsavory and costly practice of devoting airtime to monotonous financial disclosures. Finally, the negative publicity associated with past payola scandals has engendered a bitter sentiment among the public which transcends the contempt for the mere secretive quality of these transactions and extends into the disdain for the general concept of sponsored content.

### B. *A Brief History of Payola Transgressions*

More than a few disc jockeys have fallen prey to the temptation to subvert the Payola Rules and accept undisclosed compensation to play music on the radio. In 1960, rock and roll disc jockey Alan Freed was fired from ABC-radio and indicted for accepting a \$2,500 bribe. Freed ended up pleading guilty to two counts of bribery.<sup>24</sup> Although he received a mere \$300 fine and six-month suspended sentence, the scandal effectively ended his career.<sup>25</sup> Even world famous disc jockey Dick Clark has been embroiled in a payola scandal. In 1959, the same Congressional subcommittee that had indicted Freed found that Clark, the host of American Bandstand, had partial copyrights to one hundred and fifty songs, many of which were played on his show.<sup>26</sup> Clark also held financial ties to publishers, recording companies, and pressing plants. Responding to this pressure, Clark relinquished his conflicting financial interests and managed to emerge relatively unscathed.

Most recently, in July of 2005, record label powerhouse Sony BMG agreed to a \$10 million payola settlement after New York State Attorney General Eliot Spitzer investigated claims that Sony BMG had "paid for vacation packages and electronics for radio programmers, paid for contest giveaways for listeners, paid some operational expenses of radio stations and hired middlemen known as independent promoters to provide illegal payments to radio stations to get more air-play for its artists."<sup>27</sup> Spitzer echoed traditional concerns that "contrary to listener expectations that songs are selected for air play based on artistic merit and popularity, air time is often determined by undis-

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<sup>24</sup> Bernard Weinraub, *The Man Who Knew It Wasn't Only Rock 'n' Roll*, N.Y. TIMES, Oct. 14, 1999, at E1.

<sup>25</sup> *Id.*

<sup>26</sup> Michael Osborn, *A long history of "pay-for-play,"* BBC NEWS, March 9, 2006, available at <http://news.bbc.co.uk/go/pr/fr/-/1/hi/entertainment/4789816.stm>.

<sup>27</sup> *Sony BMG Agrees to \$10M "Payola" Settlement*, ASSOCIATED PRESS, July 25, 2005.

closed payoffs to radio stations and their employees.”<sup>28</sup> Later that year, Warner Music settled similar claims for \$5 million.<sup>29</sup> The other two major record labels, Universal Music Group and EMI, remain under investigation.<sup>30</sup>

In fact, the use of the above-mentioned independent promoters (also known as “indies”) has become the preferred method of Payola Rules subversion. Using independent intermediaries allows the record company to avoid directly paying the radio station, thus the radio station does not need to report it under current Payola Rules. As music journalist Eric Boehlert explains:

The indies are the shadowy middlemen record companies who will pay hundreds of millions of dollars this year to get songs played on the radio. Indies align themselves with certain radio stations by promising the stations “promotional payments” in the six figures. Then, every time the radio station adds a . . . song to its playlist, the indie gets paid by the record label.”<sup>31</sup>

The FCC has since joined in Attorney General Spitzer’s crusade against this new strain of payola practice. Speaking to Capitol Hill on September 7, 2005 (officially designated as Recording Arts Day), FCC Commissioner Jonathan Adelstein stated:

The settlement with Warner Music Group adds more dirt to the mountain of evidence that payola is pervasive in the music business. This agreement once again raises serious concerns that not only has New York state law been violated, but federal law under the FCC’s jurisdiction, as well. The FCC needs to act on this evidence and conclude [the investigation] as soon as possible.<sup>32</sup>

At the same engagement, Commissioner Adelstein called the payola scandal “the widest and most flagrant abuse of our rules in the history of American broadcasting,” and that he planned “to put the fear of God” into broadcasters to comply with the Payola Rules.<sup>33</sup> All

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<sup>28</sup> *Id.*

<sup>29</sup> *Warner Settles for \$5M in Spitzer “Payola” Probe*, ASSOCIATED PRESS, Nov. 22, 2005, available at [http://www.usatoday.com/money/media/2005-11-22-warner\\_x.htm?POEMONISVA](http://www.usatoday.com/money/media/2005-11-22-warner_x.htm?POEMONISVA).

<sup>30</sup> Jeff Leeds, *Music Promoter to Abandon a Radio Policy He Developed*, N.Y. TIMES, Nov. 3, 2005, at C18.

<sup>31</sup> Eric Boehlert, *Pay for play*, SALON.COM, Mar. 14, 2001, available at <http://archive.salon.com/ent/feature/2001/03/14/payola/index.html> (Eric Boehlert is also a contributing editor to Rolling Stone magazine).

<sup>32</sup> Press Release, Federal Communications Commission, Commissioner Adelstein Applauds New York Attorney General Payola Settlement With Warner Music (Nov. 22, 2005), available at [http://www.fcc.gov/Daily\\_Releases/Daily\\_Digest/2005/dd051122.html](http://www.fcc.gov/Daily_Releases/Daily_Digest/2005/dd051122.html).

<sup>33</sup> Bill Holland, *Adelstein Plans To “Put The Fear Of God” Into Broadcasters*, BILLBOARD.COM, Sep. 8, 2005, available at [http://www.billboardradiomonitor.com/radiomonitor/news/business/leg\\_reg/article\\_display.jsp?vnu\\_content\\_id=1001095175](http://www.billboardradiomonitor.com/radiomonitor/news/business/leg_reg/article_display.jsp?vnu_content_id=1001095175).

threats aside, although undisclosed payments will remain prohibited, the distinction of what constitutes actual disclosure may soon require clarification as radio stations continue to expand their presence in cyberspace. As such, the FCC may need to rework the express application of the rules in order to acclimate to the evolving disposition of mass market radio stations in the modern technological age.

### C. *Fallout from Recent Payola Prosecution*

The fallout from the recent payola settlements has also detrimentally impacted those program directors who still choose songs without “input” from independent promoters. According to Los Angeles radio station KKBT’s program director, Tom Calococci, “No programmer wants to draw attention by choosing songs too far outside the mainstream.”<sup>34</sup> Moreover, “many programmers say that fear of regulatory scrutiny has scared them into airing fewer new songs. Instead, many stations are sticking to older, more tried-and-true tunes that seem less likely to prompt speculation that money changed hands.”<sup>35</sup>

Recent statistics across musical genres back up this trend. During the first quarter of 2006, pop radio stations added 14% fewer songs to their playlists than the same period in the preceding year.<sup>36</sup> Following suit, urban/hip-hop stations declined by 16% and adult contemporary stations fell by 17%.<sup>37</sup> In fact, the most dramatic decline occurred on so-called “active rock” stations, which experienced a 23% reduction in new song additions.<sup>38</sup> This fear-driven backlash presents further proof that in this current climate, playlist decision-making might no longer be suitable in the hands of many program directors.

### D. *Modern Payola Rules Ambiguity*

Currently, most, if not all, major-market radio stations deploy a companion website where listeners can learn more about on-air personalities, current playlists, and ongoing promotions. Furthermore, many stations have added online streamcasts so that listeners in other markets can tune in to a station’s broadcast programming from anywhere in the world, provided they have an Internet connection.<sup>39</sup> Consequently,

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<sup>34</sup> Charles Duhigg, *Radio Stations Play It Safe Amid Legal Probe*, L.A. TIMES, Apr. 8, 2006, at A1.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> In the San Francisco market alone, mass market radio stations 106.1 KMEL, 97.3 KLLC, 105.3 KITS and 94.9 KYLD all offer free streaming online of their broadcasts.

radio stations no longer exist in a single format; rather they reside in both analog and digital broadcast radio spectrum,<sup>40</sup> a supplementary website, and even a simultaneous streamcast.

As such, the radio industry's technological advancements have necessarily muddled Payola Rules disclosure to the verge of profound ambiguity. For example, legitimate legal compliance questions naturally arise: can a radio station satisfy the spirit of the disclosure laws by conspicuously publishing the relevant information on their websites and simply directing listeners to the site on air? What about publishing the information on the FCC's website? While the FCC will likely address these questions in future rule revisions, it is certainly plausible to imagine that future payola disclosure may be sufficiently achieved without the long-standing requirement of "on-air" broadcast.

#### IV. IMPACT OF TECHNOLOGY AND AUCTIONS ON BROADCAST SCARCITY

Unquestionably, the rationale that underscores Payola Rules disclosure still remains of great import to the FCC. However, the scarcity-fueled public interest standards which led to federal content regulation have clearly lost all relevance. The advent of cable and satellite, and the Internet for that matter, has virtually eliminated broadcast scarcity by offering a myriad of alternative means to transmit content to the masses.<sup>41</sup> Specifically, cable and satellite providers now offer hundreds of digital music stations in national markets.<sup>42</sup> Publishing content is cheap, ubiquitous, and available to almost everyone with a computer. For example, Yahoo!'s *LAUNCHcast RADIO* website<sup>43</sup> contains hun-

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<sup>40</sup> The radio stations referenced in the preceding footnote, among many others, also offer HD digital transmissions of their analog broadcasts. The digital spectrum became available through the licensing of additional spectrum by the Federal government. For similar reasons to the proliferation of radio websites, this advent presents yet another potential payola ambiguity.

<sup>41</sup> In the landmark, but subsequently overruled, case of *Red Lion v. FCC*, 395 U.S. 367 (1969), Justice White summed up the majority's rationale: "In view of the scarcity of broadcast frequencies, the Government's role in allocating those frequencies, and the legitimate claims of those unable without governmental assistance to gain access to those frequencies. . .we hold that the [fairness doctrine is] both authorized by statute and constitutional." *Red Lion*, 395 U.S. at 400-01. The fairness doctrine, among other public trustee obligations imposed on broadcasters, required a broadcaster to provide equal airtime to opposing viewpoints. Notably, the Supreme Court did not impose these obligations upon newspapers primarily because the ability to publish in print was not considered to be scarce.

<sup>42</sup> XM and Sirius satellite radio companies offer hundreds of digital music channels through direct subscriptions to their service as well as via partnerships with television service providers such as DirecTV, Dish and Comcast.

<sup>43</sup> <http://music.yahoo.com/launchcast>.

dreds of radio stations and even allows users to create their own radio stations by pre-selecting their favorite artists and genres.

Additionally, with the rising popularity of personal websites and weblogs, delivering content to the masses is no longer limited to those privileged few with FCC spectrum licenses. Naturally, broadcast radio licensees should feel even freer to provide content based on whatever criteria they desire – be it for public interest or revenue maximizing reasons. In the absence of broadcast scarcity and the recent proliferation of ancillary websites which could plausibly satisfy payola mandates off-air, radio stations might expect market-friendly mechanisms to arise with respect to how they choose content.

#### A. *The Rise and Evolution of Technology-Driven Auctions*

While radio stations have incorporated these relatively modest on-line innovations to their product, other industries have progressed further—merging auctions, the most basic of supply-and-demand marketplace tools, with the Internet’s undeniable ubiquity. Most prominently, eBay’s consumer auction business model has engendered a widespread familiarity with the market-driven concept of bidding for merchandise and services.<sup>44</sup> Consumers and businesses alike have come to appreciate the significantly lower transaction costs and price flexibility that auction mechanisms possess. Similarly, a host of travel websites (*Orbitz*, *Hotwire*, and *Priceline*, to name a few)<sup>45</sup> have successfully employed similar dynamic price business models to increase market efficiencies for buyers and sellers.

#### B. *Applying the Auction Mechanism to Radio Content Programming*

As we have seen, the FCC has already experienced a paradigm shift with its adoption of auctions to disperse and distribute new spectrum licenses. In parallel fashion, the FCC has also largely retreated from radio content supervision and, by implication, has acknowledged the dramatically fading relevance of the public interest standard in light of technological advancements.

Thus, radio stations are now left to their own devices to determine content programming. Assuming *arguendo* that the Payola Rules will

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<sup>44</sup> According to eBay’s company overview: “eBay cumulative confirmed registered users at the end of Q1-06 totaled 192.9 million, representing a 31% increase over the 147.1 million users reported at the end of Q1-05.” Press Release, eBay Inc., eBay Inc. Announces First Quarter 2006 Financial Results (Apr. 19, 2006), available at [http://files.shareholder.com/downloads/eBay/83013951x0x40065/482c270b-9d15-49e9-b04d-27e2cce7c73a/EBAY\\_News\\_2006\\_4\\_19\\_Earnings.pdf](http://files.shareholder.com/downloads/eBay/83013951x0x40065/482c270b-9d15-49e9-b04d-27e2cce7c73a/EBAY_News_2006_4_19_Earnings.pdf) (last visited Jan. 9, 2007).

<sup>45</sup> <http://www.orbitz.com>; <http://www.hotwire.com>; <http://www.priceline.com>.

likely adopt a more lenient compliance standard of off-air disclosure via the Internet, perhaps the current content programming model employed by mass market radio stations stands ready to shift gears towards the modern trend of technologically-driven auction business models. In order to assess how this shift will affect the different players in the radio industry, this article will analyze the benefits and drawbacks of such a system for radio stations, record labels (including other content providers), and listeners. In the process, this article will also briefly apply the content auction concept to the broadcast television format as well as explore a “jukebox” format.

While several key cultural, regulatory, and technological advancements now beg the question of whether radio can effectively employ the auction model, the marketplace remains the ultimate arbiter of success for this potential paradigm shift.

## V. MARKETIZING RADIO CONTENT THROUGH A RESPONSIVE AUCTION MECHANISM

### A. *Initial Concerns About Marketizing Radio Content*

At first blush, several drawbacks, primarily concerning the listener, quickly surface when envisioning an auction mechanism which controls what entertainment content will be aired by a radio station. To begin, the music radio format might lose listener credibility if musical artistry takes a back seat to money. In other words, public perception of a radio station program director choosing his playlist through a subjective methodology (artistic merit, popularity, etc.) might be intuitively more favorable to that of a radio station which simply airs sponsored music without employing a means to filter out subjectively undesirable content. Additionally, one might worry that a record label with a hefty purse might be able to buy out an entire auction playlist, effectively saturating the market with its product and thereby eliminating any prospect of musical diversity on the airwaves. While both of these concerns remain valid in the abstract, a “responsive auction mechanism” can effectively solve both issues and actually benefit listeners in practice. Furthermore, a comprehensive analysis of market forces on the industry elucidates how a market approach might significantly benefit *all* players involved.

Responsive auctions differ from traditional auctions by impacting the bid price with ancillary factors to achieve increased efficiency for all players. Specifically, a responsive auction may be tailored to the radio industry by impacting the bid price with subjective listener impressions. For example, the following hypothetical radio station serves as a proto-

typical model employing a responsive auction mechanism as conceived by this article.

### B. *Responsive Auction Radio Hypothetical*

AUCTION FM (“AFM”) is a large market FM radio station that is currently #1 in its market, primarily playing major record label pop music such as Kelly Clarkson, Mariah Carey, and others. Naturally, the major record labels are anxious to get their music into AFM’s regular playlist because its large listener base serves as an ideal platform to promote record sales. AFM and its disc jockeys abide by the FCC Payola Rules and resist temptation to play music in exchange for under-the-table compensation from record labels or via independent promoters. However, AFM rightfully recognizes that record labels still place a quantifiable market value on AFM airplay.

For the most part, AFM operates like a conventional radio station, except that it employs a responsive auction mechanism for five hours a day – during the peak listening times of 3 P.M. to 8 P.M. As such, it derives income from both conventional advertisers who pay according to an audience size and demographics schedule, as well as responsive auction-generated revenue.

During auction radio hours, AFM plays songs from a weekly playlist. The playlist features thirty slots in which a song featured in slot one receives the most spins per week, a song featured in slot two receives the second most spins per week and so forth. Correspondingly, record labels and/or musicians who wish to gain airplay for their pop songs<sup>46</sup> bid electronically for a playlist slot each week. In a simple auction such as eBay’s Dutch auction mechanism,<sup>47</sup> the bidder would designate the maximum amount she is willing to pay, but only pay the marginal increment above the closest bidder. In accordance, the playlist would populate with songs ordered by the final bid price at the auction’s closing. Thus far, the above-referenced listener-oriented concerns would still remain.

However, AFM’s Dutch auction mechanism incorporates third party research data from firms like Nielsen Broadcast Data Systems

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<sup>46</sup> A radio station would presumably retain any desired genre format and could require bidders to confine their musical offerings to the designated format.

<sup>47</sup> According to eBay, “eBay’s bidding system is based on increments. A bid increment is the amount by which a bid will be raised each time the current bid is outdone.” <http://pages.ebay.com/help/buy/bidding-ov.html#about> (last visited Jan. 9, 2007). For a more detailed explanation about eBay’s bidding system, see <http://pages.ebay.com/help/buy/bid-increments.html> (last visited Jan. 9, 2007).

(“BDS”) and Premier Radio Networks,<sup>48</sup> as well as its own audience’s feedback from the AFM request phone lines and website. BDS, a subsidiary of Billboard,<sup>49</sup> compiles national sales and weighted airplay information<sup>50</sup> to determine “audience impressions” for use in Billboard’s singles charts. In its online explanation of chart methodology, Billboard suggests, “radio programmers do not make music decisions lightly, but rather use extensive research to play songs their audiences want to hear.”<sup>51</sup>

Armed with valuable empirical data from firms like BDS as well station-specific listener feedback, AFM utilizes a mathematical formula to discount playlist bid prices for higher rated songs and place a premium on lower and unrated songs. This aspect of the mechanism accounts for the responsiveness of the auction and thus incorporates listener impressions and feedback into the overall pricing scheme. As a corollary, this information impacts the market by financially rewarding record labels that produce music that AFM’s listeners want to hear and vice versa.

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<sup>48</sup> Premier Radio Networks, a subsidiary of Clear Channel Communications, Inc., owns and operates a website, [www.ratethemusic.com](http://www.ratethemusic.com), which boasts its status as “The Internet’s First Music Rating Website.” The website invites users to participate in a “music advisory panel” by submitting their opinions on currently played songs. Clear Channel Communications, Inc. has boasted about the next generation of rating systems which will provide even more accurate data. Press Release, Clear Channel Communications, Inc., Cross-Industry Evaluation Team Will Move Forward with Three Contenders for Radio’s Next-Generation, Electronic Ratings System (Mar. 9, 2006), available at, <http://www.clearchannel.com/Corporate/PressRelease.aspx?PressReleaseID=1571>.

<sup>49</sup> Billboard is a weekly American magazine devoted to the music industry. It maintains several internationally recognized music charts that track the most popular songs and albums in various categories on a weekly basis. Its most famous chart, the “Billboard Hot 100,” ranks the top 100 songs regardless of genre and is frequently used as the standard measure for ranking songs in the United States..

*Billboard (magazine)*, WIKIPEDIA, at [http://en.wikipedia.org/wiki/Billboard\\_magazine](http://en.wikipedia.org/wiki/Billboard_magazine) (last visited Apr. 13, 2006).

<sup>50</sup> Billboard’s radio charts are compiled using information tracked by from Nielsen Broadcast Data Systems (BDS), which electronically monitors radio stations in more than 120 markets across the United States. The BDS system looks for an audio fingerprint—a characteristic that differentiates a song from all of the other ones that it tracks—using the same technology that was once used to track submarines. The audience charts cross-reference BDS data with listener information compiled by the Arbitron ratings system to determine the approximate number of audience impressions made for plays in each daypart. Thus, a song that plays at 4:00 a.m. does not count as much as one played at 4:00 p.m., and a station with a large audience will influence the chart more than either a station in a smaller market or one with a specialized format that attracts less audience.

BILLBOARD.COM, [http://www.billboard.com/bbcom/about\\_us/bbmethodology.jsp](http://www.billboard.com/bbcom/about_us/bbmethodology.jsp) (last visited Apr. 13, 2006).

<sup>51</sup> *Id.*

Moreover, to ensure that a playlist cannot be monopolized by a single content provider, AFM's auction model contains automated controls to ensure that a record label and particular song cannot successfully occupy more than a pre-designated number of slots in the playlist. Theoretically, AFM could implement a host of other similar control mechanisms to manipulate its playlist in order to better serve its listener base and prevent the economic hijacking of its playlist.

In conjunction, AFM satisfies the FCC Payola Rules requirements by conspicuously posting the final playlist bid sheet for each week on their website (on a standardized form, which includes the requisite Payola Rules information, provided by the FCC) as well as on the FCC's online Auction Radio bid sheet portal.<sup>52</sup> Additionally, in between song breaks, AFM disc jockeys direct listeners to learn more about auction radio as well as encourage them to provide subjective feedback about the songs on the playlist at their website.

As a result, AFM is not only the highest rated station in their market, but they have also raised their audience share while revenues have increased by an even faster margin. They also encourage their audience to interactively participate in the ratings system and thus enjoy the positive externality of a nurtured community of listeners who feel vested in the station's content. Moreover, during auction hours, AFM actually airs fewer commercials because the auction boosts revenues sufficiently.

To be sure, the effects of the responsive auction mechanism upon the radio industry cannot solely focus on the benefits to the participating radio station. Therefore, this article undertakes a more comprehensive analysis of all players impacted by the responsive auction, namely: the radio stations, the record labels, the listeners, and even independent content providers.

## VI. THE PLAYERS: ANALYSIS OF BENEFITS AND DRAWBACKS

### A. *Radio Stations*

As detailed in the above hypothetical, the benefits of responsive auctions for radio stations are readily apparent. With the rise of new media technologies, television networks have "had to explore new revenue models as TiVo and similar digital video recorders threaten conventional advertising by allowing viewers to fast-forward through commercials on the shows they record."<sup>53</sup> Logically, the advent of

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<sup>52</sup> The FCC does not currently supply this form, nor does it operate a similar portal.

<sup>53</sup> Richard Siklos, *Outlook on New Media: Looking for the Proceeds in TV-on-Demand*, N.Y. TIMES, Dec. 5, 2005, at C1.

TiVo and other similar technologies present the prospect of reduced advertising revenues for radio in the same fashion. Additionally, the proliferation of music stations via cable, satellite, and Internet outlets has further exerted pressure on broadcast radio stations to develop new ways to retain listeners and maintain revenues.

Consequently, radio stations would greatly benefit from additional revenue streams such as those presented by responsive auction playlists. They would also benefit from the flexible economic permutations resulting from the interplay between advertising and auction revenue. For example, a measured reduction in the amount of time devoted to advertising would increase the audience share because listeners prefer fewer commercials. Correspondingly, a larger audience share would command a higher playlist bid price. The responsive auction might also encourage a relatively larger playlist because each slot would present an additional tender from a bidder. Listeners would, in turn, become more attracted to the greater variety of music played on the radio station.

However, the actual spread between prices for each playlist slot might not result in a sufficiently linear pattern. For example, if the first five slots on the playlist were the only ones coveted by the major record labels and the vast bulk of the revenues came from bids for these five slots, the variety of music could shrink dramatically if spun from a top-heavy playlist. Through trial and error, a radio station paying attention to economic and marketing data could successfully work to achieve the optimal blend of auction and advertising revenues as well as the optimal size of its auction playlist.

Additionally, conglomerate-owned radio stations would not need to employ as many experienced program directors to create playlists, manually sort through research data, and maintain relationships with record labels. Instead, they could reduce employment overhead by streamlining their business processes through the automation of the auction mechanism, which would only require limited monitoring.

However, substituting an automated auction for human capital necessarily results in reduced programming control. Radio stations would have to honor the results of the bid process and consistently fulfill the expectations of their paying content providers regardless of their subjective music opinions. In order to retain the radio station's music format identity, however, the auction mechanism could still employ filters to disqualify bids that fail to conform to the requisite station format. Additionally, the automated controls referenced in the AFM hypothetical would alleviate any fears of playlist monopolization by a single record label.

Without these baseline controls, the radio station would become vulnerable to a loss of music format and audience demographic cohesiveness. The outcome would likely impact both advertising rates and bid prices. Axiomatically speaking, demographic cohesion drives up advertising revenues for products and services that cater to specific groups because the targeted customer is found in greater proportion within the audience. Likewise, music format cohesion creates value for the record label as they promote their artists to an amenable audience. As a result, the value of radio airtime for both music and conventional commercials increases as audience preferences become more cohesive.

Another distinct benefit of the responsive auction mechanism involves the curtailing of fiduciary duty violations amongs radio station personnel. When a disc jockey or any radio station employee accepts undisclosed consideration in exchange for promising airplay, he or she unquestionably violates the duty of loyalty owed to his or her employer. By implementing the responsive auction mechanism, a radio station can effectively liberate record labels from the temptation to illegally bribe station employees. Rather, the responsive auction encourages record labels to engage in above-board transactions while concurrently stripping disc jockeys of corruptible dominion over the station's playlist. Moreover, auctions generally produce significantly lower transaction costs than conventional private agreements because the price is determined by actual market forces rather than negotiations.

On the flipside, the drawbacks of the responsive auction mechanism clearly include the initial auction implementation investment. The station would have to hire a technology firm in order to develop the auction intranet site where content providers could bid for slots, as well as the algorithm which would incorporate research data and listener feedback into the auction. Correspondingly, radio stations would also have to invest in their websites in order to provide attractive and user-friendly interfaces to encourage broad-based audience interaction to help supply their algorithm with the necessary listener preference data. Additionally, the station would have to pay firms like BDS for the use of proprietary data on listener impressions. However, as in other investments, initial costs would eventually be recouped by income from newfound auction revenues as well as website advertising – which would rise in conjunction with the development of an online radio community.

Moreover, smaller market radio stations might not find the responsive auction as useful as the major market stations. To begin, the demand for airplay on these stations might not drive auction revenues

sufficiently high enough to offset implementation costs. Also, record labels might skip over airplay investments in smaller markets as a part of their marketing strategy – especially if bid prices unexpectedly rise in the larger markets in the same weeks.

As an added drawback, the auctionized radio station would have to cope with potential public relations issues associated with marketizing their programming content. Listeners might initially balk at a radio station that encourages a record label to seize the public airwaves with its pocketbook. The fact remains, however, that the current radio paradigm has fostered an atmosphere where independent promoters have outmaneuvered the Payola Rules allowing undisclosed payments to drive a significant portion of radio airplay.<sup>54</sup> Responsive auctions simply increase the transparency of such transactions, which ultimately benefits the audience.

### B. *Record Labels*

As Attorney General Spitzer's payola battle against the four major record labels demonstrates, the willingness to pay for radio airplay has sprouted a multi-million dollar gray market. In other words, record labels have shown an unrepentant desire to pay for airtime and are currently doing so despite payola prosecution, which is now dispatched as merely a cost of doing business. As businesses that rely heavily on mass marketing to drive sales, their actions present quantifiable proof for the market viability of sponsored content programming.

As a general rule, when record labels invest in artist development, they are implicitly engaging in a risky endeavor because they cannot consistently predict which artists will go on to sell the most records and provide the highest return on investment. In fact, most artists end up costing the record labels millions of dollars, while the few who achieve platinum sales and beyond account for the vast majority of the label's revenues.<sup>55</sup>

Naturally, record labels seek to hedge these risks through mass marketing campaigns which include magazine and billboard pictorials, music videos, and a host of other mediums. However, radio airplay

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<sup>54</sup> See generally, Press Release, Federal Communications Commission, Commissioner Adelstein Applauds New York Attorney General Payola Settlement with Warner Music (Nov. 22, 2005) available at <http://www.fcc.gov/commissioners/adelstein/pressreleases.html>. According to FCC Commissioner Jonathan Adelstein, "payola is pervasive in the music business." *Id.*

<sup>55</sup> Telephone Interview with Zach Katz, Entertainment Attorney and Recording Artist Manager (Apr. 11, 2006) (platinum sales are domestic record sales above 1 million, denoting a benchmark for success in the music industry).

remains the crown jewel of music marketing and artist exposure.<sup>56</sup> Not surprisingly, record labels would much prefer to have more control over the amount of radio airplay their artists receive. Conversely, if record labels simply left the programming control to the radio stations, they would essentially have to cross their fingers and hope that their offering gradually gained favor with program directors and their listeners. However, with the vast profusion of music created these days, it is doubtful that a program director or disc jockey has even had an opportunity to evaluate their product, much less reject it. It is this precise anxiety that has provoked the use of unlawful payola practices and raised the ire of Attorney General Spitzer and the FCC.

Responsive auctions, as a legitimate marketing tool, provide an efficient and flexible alternative to these illegal private agreements. In addition to optimizing supply and demand for radio airplay, a responsive auction further reduces transaction costs by eliminating the investigation and prosecution costs associated with shady payola practices. Furthermore, since disclosed bid payments would theoretically comply with all laws and regulations, record labels would be able to rightfully deduct these costs as operational expenses – a significant tax savings.

Lastly, responsive auctions would assist Attorney General Spitzer and the FCC in rooting out independent promoters because their services would no longer provide any significant value. If record labels were able to efficiently spend money on guaranteed radio airplay without 1) breaking the law and risking later fines; 2) paying for on-air disclosure time; and 3) foregoing deductible expenses, then the temptation to use the “shadowy middlemen” would cease to exist.

### C. *Unsigned / Independent Artist Externality*

Because responsive auctions eliminate the need for independent promoters while severing the exclusive relationships that exist between major record labels and radio stations, music industry outsiders would correspondingly gain unprecedented access to the broadcast airwaves. It is foreseeable that any unsigned or independent artist with adequate financial backing could utilize the radio airplay marketing scheme which has previously only been available to the major label music industry. The benefits of this externality are manifold.

First, this newfound access to the radio would benefit all musicians by creating an avenue for independent record labels and unsigned art-

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<sup>56</sup> Telephone Interview with Jonathan “J.R.” Rotem, Record Producer, Beluga Heights (Mar. 15, 2006) (whose recent effort, “SOS” by Rihanna, reached #1 on the Billboard Hot 100 in May 2006). According to J.R. Rotem, “To sell records in this industry, you have to be visible. To be visible, you have to be heard on radio.” *Id.*

ists to reach a larger audience. Responsive auctions open the door to major market radio airplay without forcing artists to compromise their music to conform to major record label expectations. Second, consistent radio airplay would yield useful data for these artists and their record labels should they desire to approach a major record label in hopes of signing a recording contract. Positive data would likely serve as critical leverage in record deal negotiations. Furthermore, independent record labels could choose to retain creative control and simply negotiate a distribution deal with the majors. Conceivably, auction radio could galvanize a new music venture capital industry to compete with the existing record industry players. Furthermore, as discussed below, other benefits of the independent artist externality also accrue to the audience.

#### D. *Listeners*

The responsive auction's impact on listeners represents the most sensitive of transformations in this new radio paradigm. Since the current climate of radio airplay has been spoiled by the relationships found among the inner triad of record labels, independent promoters, and program directors, the public does not stand to lose much ground from the implementation of auction playlists. Rather, listeners may actually benefit in a variety of ways. To begin, if radio stations can earn profits from the entertainment component of their broadcast, they would be able to offer their audience a format that includes fewer commercial spots. This advantage has already been touted by satellite radio, which charges a subscription fee, as a major advantage over conventional radio. Moreover, fewer commercials coupled with the rising popularity of HD radio spectrum,<sup>57</sup> which utilizes a CD-quality digital broadcast feed, would provide listeners with a viable and free alternative to costly satellite radio.

Additionally, since the responsive auction mechanism populates with listener feedback, audience participation would be encouraged by the radio station in order to incorporate their impressions in the music ratings system to ultimately impact bid prices. In this manner, respon-

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<sup>57</sup> Wilson Rothman, *Smart Sound: The Future of Music Technology*, TIME.COM (Apr. 7, 2003), available at <http://www.time.com/time/techtme/200304/systems4.html>.

Much like HDTV, HD Radio is blasted onto the airwaves using the same towers that analog radio broadcasters use. The difference is AM radio will now have the clearer stereo properties of FM radio, while FM will have CD-quality sound. Static will go away (although, as in all radio technology, dead spots will remain). Since the signal is digital, text and image metadata could also be stored in the broadcast for a more interactive experience — not just track information, but local weather, traffic, and news info.

*Id.*

sive auctions empower the audience to vote for or against the music that gets played on their favorite radio stations. American Idol, FOX's wildly successful reality television show which allows viewers to vote for the winner of a singing competition, epitomizes the community-building externality that would likely translate to responsive-auction radio stations. The MySpace.com online community explosion, in which almost all major label music artists participate, similarly demonstrates the value of virtual music communities.<sup>58</sup> Likewise, radio station listeners who choose to contribute to the ratings system will derive value from participation in a loyal and vested virtual music community that responds to their preferences.

On the other hand, responsive auctions ensure that money will remain the controlling force in radio airplay. Although the auctions represent an improvement from independent promoters and undisclosed private agreements, listeners might be turned off by the sanctioned monetization of their airwaves. However, while artistic merit might be the ideal arbiter of airplay, this notion naïvely ignores the realities of the music industry's inner workings. As a consolation, these listeners can take comfort in the unification of interests that responsive auctions bring about. A responsive auction radio station also deriving revenue from advertising still wishes to preserve its audience share in order to maintain advertising rates. Concurrently, record labels will spend their marketing dollars on music that is most likely to stimulate record sales amongst the radio station's audience. As such, listeners will likely hear music which is compatible with their tastes because this will ultimately deliver a maximum return for radio stations and record labels alike.

Lastly, as a consequence of the above independent artist externality, the airing of independent music would also necessarily increase the diversity of songs on the radio – a direct benefit to the audience.

## VII. ALTERNATIVE AUCTION APPLICATIONS

### A. *Radio Station "Jukeboxes"*

As an alternative to the responsive auction, perhaps a radio station might want to do away with the record label's input and place the

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<sup>58</sup> Jessie Hempel & Paula Lehman, *The MySpace Generation*, BUSINESS WEEK (Dec. 12, 2005), available at [http://www.businessweek.com/magazine/content/05\\_50/b3963991.htm](http://www.businessweek.com/magazine/content/05_50/b3963991.htm). Myspace.com is an online community which boasts more than 40 million members and was recently sold to Rupert Murdoch for \$580 million. *Id.* "The Myspace.com community includes almost every major label artist and thousands of unsigned artists and is considered by the music industry to be the next generation breeding ground for music talent as well as an important marketing tool." Telephone Interview with Zach Katz, Entertainment Attorney and Recording Artist Manager (Apr. 11, 2006).

playlist entirely into the audience's hands by simply allowing *them* to bid for airplay of their favorite songs. This populist approach would potentially yield very accurate and useful data on audience impressions and preference.

Practically speaking, the jukebox radio station would likely utilize eBay or some other established multi-purpose auction website that would allow them to bid for a requested song and perhaps add a personalized dedication to be read on-air. In comparison to iTunes and other legal music downloading websites, where listeners can purchase a song for a mere \$0.99 – the per-song jukebox bid price would likely be much lower. However, while the jukebox bids might yield a relatively modest income, the resulting community-building externality might generate significantly increased audience share. Conversely, it could prove difficult to prevent record labels from cannibalizing the system and bidding for their songs on the jukebox. Naturally, this path would begin to resemble the responsive auction mechanism.

#### B. *Broadcast Television Auctions*

The application of responsive auctions to broadcast television presents a more subtle alteration to the media landscape. The thrust of this application essentially parallels the independent music artist externality. For example, an independent production firm could generate a television pilot and round up investors to bid for a primetime slot on a national network. Armed with meaningful audience impression data, the producers could negotiate with the network for a development deal, or perhaps continue to self-finance their television show and work out an advertisement revenue sharing arrangement. As a result, the responsive auction would siphon a given level of creative control away from the national television networks to the benefit of industry outsiders. Again, responsive auctions would serve to increase programming diversity by offering independent and original content providers access to national airwaves.

However, broadcast television does not suffer from the payola violations that afflict the radio industry. In this comparison, a television network is akin to the radio station. Like radio music programming, the popularity of television programs drives advertising revenue. However, in this medium, the television studios – which are content providers akin to the record labels – are actually seamlessly fused with the television networks. For example, NBC both produces *and* broadcasts television programming. The same goes for CBS, FOX, ABC and so forth. Incongruently, the government does not require a separation of the content producer and broadcaster in this medium. Accordingly, the

wholly unified interest of increasing advertising revenue, permits programs to succeed or fail on solely the basis of Nielsen research data.

As a by-product of the fusion of content providers and broadcasters, television programming remains unique and exclusive to each network. For example, NBC cannot air new episodes of the enormously popular show, *Desperate Housewives*, because the program belongs to ABC. Conversely, record labels wish to promote their product on the maximum number of radio stations. This situation largely exists because, unlike radio airplay, television broadcast exists *only* to drive advertising revenue. Not counting the scourge of recent DVD sales, television studios never intended to offer a product for sale based on viewers' exposure to the television program. On the other hand, radio airplay raises both advertising revenue for the radio station and separately promotes album sales for record labels. As television show DVD sales begin to reach into the billions, perhaps broadcast television and radio business models will converge.<sup>59</sup>

Lastly, television networks tend to operate on a national scale, while radio markets are defined locally and radio stations may be subject to corruption with significantly smaller payments. Ultimately, only a few of the many advantages present in the radio responsive auction model can actually translate into the broadcast television model.

#### VIII. FCC REGULATORY REDUX: FEASIBILITY

In the wake of the 2005 record label payola settlements, Commissioner Adelstein issued a press release challenging the entertainment industry to reform its practices and openly calling for additional monitoring and enforcement of the Payola Rules.<sup>60</sup> Adelstein and his fellow commissioners unanimously restated that the Payola Rules have been "grounded in the principle that listeners and viewers are entitled to know who seeks to persuade them with the programming."<sup>61</sup> If the dissemination of financial sponsorship information remains the lone regulatory roadblock for radio stations, then it appears quite conceiva-

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<sup>59</sup> Adam Dawtrey, *Tube faves power U.S. DVD sales*, VARIETY (June 24, 2005). Americans spent \$2.8 billion buying TV shows on DVD in 2004, up from just \$160 million in 2000, making TV product the fastest-growing sector of the U.S. [video business]. Adams [Media Research] and Screen Digest predict that TV product will outpace the rest of the DVD market for the foreseeable future, with U.S. business estimated to reach \$4.4 billion in 2009.

*Id.*

<sup>60</sup> Press Release, Federal Communications Commission, Commissioner Adelstein Applauds New York Attorney General Payola Settlement with Warner Music (Nov. 22, 2005), available at <http://www.fcc.gov/commissioners/adelstein/pressreleases.html>.

<sup>61</sup> *Id.*

ble that the FCC might accept website disclosure as a solution to the Payola Rules ambiguity referenced in this article.

Undoubtedly, the Internet has become an exceedingly ubiquitous and user-friendly tool, requiring little technical sophistication on behalf of the user. Since under the responsive auction mechanism, radio stations retain incentives to direct audiences to their website for interactive responses, listeners will be able to easily view the bid sheet, which would contain sufficient Payola Rules disclosure. Additionally, since website disclosure is generally accessible at all times, it serves as an excellent platform for this type of information dissemination. Moreover, should the FCC remain concerned that listeners will not necessarily know the website addresses for each radio station, they could simply republish the bid sheet on their own government regulated online portal – accessible from the FCC website. These prospective measures would be relatively easy to implement and require minimal set up and maintenance costs. Furthermore, the FCC could wisely issue clear mandates regarding the format and conspicuity requirements for the bid sheet disclosure. Above and beyond mere feasibility, online disclosure plainly appears to be a more accessible and palatable information source for the public at large.

#### IX. CONCLUSION

The nexus of modern technology and the current regulatory climate has brought about an unprecedented era for broadcast radio. No longer scarce or beholden to the public interest doctrine, the broadcast radio industry is merely regulated by mainstay constitutional limits and the FCC Payola Rules. Provided that the FCC permits online payola disclosure to resolve newfound regulatory ambiguities, the atmosphere remains ripe for the advent of the responsive auction mechanism to reform the music playlist selection process that has been plagued by longstanding and pervasive payola scandals. Responsive auction mechanisms introduce time-honored market forces and transparency into the realm of radio airplay and ultimately serve to benefit radio stations, record labels, and listeners alike. While certainly not without its drawbacks, the responsive auction mechanism provides a significant improvement over the current paradigm of broadcast radio airplay.

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