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PAYOLA IN RADIO AND TELEVISION BROADCASTING*

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I. INTRODUCTION

PAYOLA in radio and television broadcasting may be defined as undisclosed payments (or other inducements) which are given to bring about the inclusion of material in broadcast programs.[1] The making of such payments has become a crime as a result of amendments to the Communications Act in 1960,[2] and is now prohibited by regulations of the Federal Communications Commission (FCC).[3] The aim of this paper is (1) to discover why these payments came to be made, (2) to consider whether the results of allowing such payments should be regarded as beneficial or harmful, and, in the light of this, (3) to evaluate the worth of the 1960 amendments to the Communications Act and of the FCC's regulations.

To understand why payola became so common in the broadcasting industry it should be realised that payola became a feature of the broadcasting industry not in the late 1950s, when the practice received considerable publicity in the press and was investigated by a congressional committee, but in the 1930s and that it entered the broadcasting industry simply as a continua-

* I am greatly indebted to Mrs. Clara Ann Bowler who, as research assistant, showed considerable enterprise in unearthing information on payola from a wide variety of sources. I am also grateful for financial assistance to the Law and Economics Program of the University of Chicago Law School and the Foundation for Research in Economics and Education. I have to thank officials of both the Federal Communications Commission and the Federal Trade Commission for their help in providing me with information. They are not, of course, responsible in any way for the use which I have made of this information. It is pleasant to recall that I started to write this paper at Stanford University in 1977 while a Senior Research Fellow at the Hoover Institution. In revising this paper, I have greatly benefited from comments made by participants at seminars at UCLA and the Hoover Institution and by written comments by Professors Edmund W. Kitch, John H. Langbein, H. Douglas Laycock, Bernard D. Meltzer, and Geoffrey R. Stone of the University of Chicago Law School and by Professor Earl A. Thompson of UCLA.

[1] The term "payola" is generally said to have been introduced by the trade periodical *Variety* and its popularity resulted from its use in that periodical. In *Webster's Third New International Dictionary*, payola is defined as "an undercover or indirect payment for a commercial favor (as to a disc jockey for plugging a song)."

[2] See P.L. 86-752, 74 Stat. 895-97.

[3] See Applicability of Sponsorship Identification Rules (Public Notice), 40 Fed. Reg. 41936 (1975).

tion of business practices which were normal in the popular music industry. Section II gives an account of the history of payola (or its equivalent) in the popular music industry. This shows not only why such payments were made but also why it was to be expected that payola would ultimately make its appearance in the broadcasting industry. Nor should it be supposed that the 1960 amendments to the Communications Act represented the first attempt to regulate payola. As is demonstrated in Section III, numerous attempts had been made over a long period before 1960 to do this. The main proponents of such regulation were the music publishers and their arguments in support of their position make clear the effects such regulation was expected to produce. The 1960 amendments were, however, brought about by a combination of events which took place in the 1950s. These events are described in Section IV. An account is given in Sections V and VI of the resulting change in the law and of its implementation by the FCC. In Section VII, I consider, in the light of the historical materials in the earlier sections, what effects the 1960 amendments are likely to produce and I attempt to assess whether the situation brought about by the change in the law represents, on balance, an improvement in the situation.

II. Payola in the Popular Music Industry

Payola in connection with radio programs seems first to have been noticed in the press in the late 1930s. It was then reported that dance band leaders and performers were given gifts by music publishers to induce them to include certain songs in their programs.[4] This was the period of the "big bands" and their performances in hotels and ballrooms were regularly broadcast by radio stations. The popularity of a song and therefore the sales of sheet music as well as performance royalties (and therefore the profits of the firm that published the song) depended, so it was thought, on its "exposure" by the "big bands" and it was therefore understandable that music publishers should endeavour to get them to play their pieces. Given the inefficiency of barter, direct money payments were no doubt often made. Another arrangement said to be common was for a dance band leader to be given a financial interest in the publishing house or in the copyright of a song.[5]

Such payola was merely a continuation of practices which had long existed in the music industry. About a hundred years before payola became a feature of the radio broadcasting industry, it has been recorded of the London music publishing house, Novello, that members of the Novello family used to sing songs published by the firm with a view to increasing the sales of the firm's sheet music:

[4] See Variety, Feb. 9, 1938, at 1; and *id.*, Feb. 23, 1938, at 1.

[5] See Variety, Feb. 23, 1938, at 1 & 48.

The sisters, Cecilia, Clara, and Sabrina Novello, either as singers or as teachers, . . . assisted directly and indirecly to further the love for music . . . and to augment the fortunes of the house, by bringing its publications into notice. This valuable form of help, highly appreciated by Alfred Novello [the head of the firm], together with his own exertions as a vocalist, mitigated the cost of advertisement, which in those days was burdened with a heavy duty, and was oppressed by a capricious mode of estimating the amount.[6]

The Novello firm also organized choral concerts and the motive was no doubt in part to increase the demand for music published by Novello since it is not to be expected that music published by the sponsoring firm would be neglected. For example, we are told that in 1867, "Madame Arabella Goddard played at the Monday Popular Concert, for the first time in public, Book Eight of Mendelssohn's 'Lieder ohne Worte,' a few days before its publication by the firm."[7] There is no mention of musicians being paid to perform music at concerts not organized by the Novello firm although on occasion this may have been done. According to the head of the Boosey music publishing firm, this was certainly the practice of British music publishers late in the nineteenth century:

In the old days the leading singers . . . received a royalty for a term of years upon all new songs introduced by them. . . . There was a special reason for giving the leading singers royalties because if a leading soprano, contralto, tenor or baritone introduced a new song at the ballad concerts, all the smaller singers, according to their voices, would take up the ballads made popular by the star artists. After a while, however, a certain W. H. Hutchinson appeared on the horizon, and he saw at once, being publisher and composer, that he could never get his songs advertised through concerts under the big ballad concert system. He therefore approached all the smaller singers, and paid them so much a time for so many concerts, provided they sang one of the songs that he was pushing. . . . I was the first of the leading publishers to understand immediately that this new system was going to deal a severe blow to our old system, so, although we still paid the big singers royalties, I set to work at once subsidizing the small singers in the same way that Hutchinson did.[8]

Similar practices were also common in the United States. Books relating to the history of popular music in America are filled with accounts of the activities of song-pluggers, whose exploits often outshine those of the performers. Such books are not normally scholarly publications and lack detailed references to sources, and, indeed, are probably not accurate in all their particulars. But the general picture they paint is clear. Isaac Goldberg has described the efforts made in the 1880s and 1890s to switch the al-

[6] See Joseph Bennett, A Short History of Cheap Music 31 (1887) (at University of Chicago Library).

[7] *Id.* at 111.

[8] See William Boosey, Fifty Years of Music 26-27 (1931).

legiance of a performer from one music publisher to another. "Pay his board bill. . . . Buy him a suit of clothes. . . . Promise her a glittering stone. . . . Present him with a trunk. . . . Subsidize his act with a weekly pourboire. The performer heard but one refrain: 'Sing our song!' "[9] Edward B. Marks, a leading American music publisher, has written of this same period as follows:

> The best songs came from the gutter in those days. Indeed, when I began publishing in 1894, there was no surer way of starting a song off to popularity than to get it sung as loudly as possible in the city's lowest dives. . . . When a number was introduced from the stage of one of the more pretentious beer halls, that was a plug! And a plug . . . is any public performance which is calculated to boost a song. . . . In the nineties, a young music publisher had to know his way about the night spots. It was important to get his wares before the bibulous public; so he had to spend a large part of his time making the rounds for plugs, and more plugs. . . . Sixty joints a week I used to make. Joe Stern, my partner, covered about forty. What's more, we did it every week.[10]

Later, he remarked that the "train of association whereby 'Annie Rooney' eventually appeared on the piano in a small town banker's house would have shocked many a fine community."[11]

Isaac Goldberg says this of the song-plugger: "The Plugger . . . is the publisher's lobbyist wherever music is played. He it is who, by all the arts of persuasion, intrigue, bribery, mayhem, malfeasance, cajolery, entreaty, threat, insinuation, persistence and whatever else he has, sees to it that his employer's music shall be heard."[12] Services mentioned as being provided to performers by music publishers include free copies of sheet music,[13] orchestral arrangements,[14] and rehearsal rooms.[15] In addition, gifts and money were given to performers as an inducement to sing particular songs. It is reported of the Shapiro-Bernstein firm that from its inception (in the 1890s), it "instituted a policy of getting stage stars to sing their songs by means of tactful, though not always inexpensive, bribes. Lottie Gilson, for example, was once presented a diamond ring valued at $500."[16] And we are told that (also in the early 1890s) a composer-publisher, Charles K. Harris, was "able to place his song ('After the Ball') in Charles Hoyt's fabulous extravaganza *A*

[9] Isaac Goldberg, Tin Pan Alley 112 (1930).

[10] Edward B. Marks, They All Sang 3-4 (1934).

[11] *Id.* at 18.

[12] Isaac Goldberg, *supra* note 9, at 203.

[13] Edward B. Marks, *supra* note 10, at 209.

[14] David Ewen, The Life and Death of Tin Pan Alley 59 (1964).

[15] *Id.* at xii.

[16] *Id.* at 66.

Trip to Chinatown by the simple expedient of paying the singing star, J. Aldrich Libbey, $500 in cash and a percentage of the song's royalties."[17]

Isaac Goldberg tells us that in the middle 1890s, an attempt was made to eliminate such payments. The music publishers "banded together and agreed to give up the practice of buying singers to plug their works." However, the agreement was not successful. "Publishers began to make secret arrangements with headliners; the duplicity was discovered, and the lid blew off."[18] By the early 1900s, such song-plugging arrangements seem to have been commonplace. "To get a musical comedy star or vaudeville headliner to use a song was . . . the surest way a plugger knew to launch a song successfully and keep it alive for years. . . . Before long, performers were beginning to get a regular weekly stipend from a publisher."[19] Of Al Jolson in the 1910s, the same author says that he made "more song hits than any other single performer of his generation. Along Tin Pan Alley, it became a truism that to get Jolson to sing a song was to have a big hit on your hands. Publishers used cajolery, flattery, the intercession of Jolson's closest friends to get him to sing their numbers. When these failed, bribery was called upon. One publisher gave him the gift of a race horse; others got him a cut in a song's royalties; still others listed him as collaborating lyricist or composer."[20] Al Jolson provides but a spectacular example of a common practice. The position as it existed in 1912 was described in *Variety*:

> A few seasons ago the vaudeville singer selected the song wanted, and blithely asked the publisher for a weekly salary to sing it. Not all did but the great majority. The publisher paid the price, as other competitors stood ready to bid. . . . They "put on" a number one week, and "took off" the next, using someone else's song instead. To hold singers, publishers advanced the "plugging scale" somewhat. Then another kind of money-paying publisher appeared. He offered to make the "production," plunged heavily on gowns for "woman singles," supplied "special drops," did almost everything possible. The "act-making" publisher says he doesn't pay money, but that statement is accepted doubtfully.[21]

In May, 1916, the practice of publishers making payments to performers was again noted in *Variety* when it was reported that some music publishers were threatening legal action against performers who had taken money to sing the publishers' songs but who, after receiving payment in advance, had failed to do so (or had not done so to the extent agreed). This report makes clear both that paying performers was an accepted part of the music pub-

[17] *Id.* at 17.

[18] Isaac Goldberg, *supra* note 9, at 206.

[19] David Ewen, *supra* note 14, at 133.

[20] *Id.* at 117.

[21] Variety, Dec. 20, 1912, at 32.

lishers' business and that no serious doubts were entertained about its legality. The report adds that, "there is a large possibility of [the publishers] combining their complaints for individual and collective protection."[22]

Whatever arrangements may subsequently have been made to check on the compliance of performers with the terms of their agreements, it is certain that the practice of paying performers continued. Of course, its character changed. As Isaac Goldberg said in 1930: "Plugging methods have simply followed the transformation of the mechanical agencies for publicity. Once it was Libbey's face—and figure—that shone from the sheets on the piano racks. Now it is Rudy Vallee's. Nor is it an accident that Libbey was a singer, while Vallee is a band-leader. We have become band-minded. The big names . . . are no longer . . . purely singers. . . . They are Paul Whiteman, Ted Lewis, Ben Bernie, Vincent Lopez, Paul Ash. For plugging certain numbers these leaders collect—'cut in'—on payments and royalties, even as did the Libbeys of 1893. There is little philanthropy in Tin Pan Alley. If you scratch my back, I must scratch yours—or your palm."[23] It is therefore hardly surprising to learn that, when the "big bands" became an important part of radio programming, payola entered the broadcasting industry. It was a normal business practice in the popular music industry in the United States.[24]

III. Early Attempts to Regulate Payola

Although payments to performers by music publishers, in one form or another, continued right through the 1930s, it should not be concluded that there were no attempts to stop the practice. An unsuccessful attempt by music publishers in the 1890s to make an agreement to ban payola was noted in the previous section.[25] A more serious attempt was made late in 1916. Earlier in that year, a report in *Variety* seemed to suggest that the music publishers were trying to establish some general scheme for checking

[22] Variety, May 26, 1916, at 5.

[23] Isaac Goldberg, *supra* note 9, at 210.

[24] It was at the same time, and for the same reason, that payola entered broadcasting in Britain. "Plugging had existed in the music market long before the appearance of broadcasting, and special payments to singers and musical directors by publishers and writers had long been a recognized means of ensuring public performance of new works. Faced with a broadcasting monopoly, the only means of directly influencing the content of music programmes was for the publisher or song writer to pay dance band leaders for playing selected items. Those who were unable to make such payments were simply left out. To satisfy the large number of complaints about plugging, the BBC prohibited dance band leaders from using announcing microphones." Alan Peacock & Ronald Weir, The Composer in the Market Place 65-66 (1975). They add in a footnote: "Whilst plugging has always involved special payments, it was also, until about 1930, regarded as a legitimate form of advertisement in the music trade. . . ." *Id.* at n.2.

[25] See p. 273 *supra*.

whether performers carried out the terms of their agreements.[26] But when the collective action came, it had a very different character. It aimed to abolish what we now call payola, but was, at that time, called the "payment system."

The first move had a somewhat unusual character. In October, 1916, it was reported in *Variety* that the head of a "5-and-10-cent store syndicate" was attempting to bring the music publishers together "to eliminate the existing evils of the business, the principal one being the payment system." Under his plan, publishers would promise to "discontinue paying professional singers for 'popularizing' their numbers." A committee "composed of outside men would decide whether the publisher was guilty of a violation of the rules." If found guilty, "the 5-and-10-cent stores would discontinue sale of the violator's products." Although "several of the larger firms had tentatively agreed to combine under such arrangements," many were clearly unwilling to do so. They were suspicious of the motives of the organizer. "It is gossip among the music men that the syndicates always advocated the payment of moneys to professional singers, they claiming a better service was assured and the songs popularized more quickly and a demand for copies simultaneously created. Just why the syndicate people should become suddenly interested in organizing the publishers seemed a problem to the veterans of the trade and they began looking around for the 'friendly reason.'" Some publishers seem to have thought that the scheme might enable the store syndicates to secure "complete control of the selling end of all popular music." In any case, it would be "quite as simple for the publishers themselves to reorganize independently of the syndicates and after forming an association, appeal to the syndicates for their cooperation."

It was clear that the scheme of the 5-and-10-cent storeman would not succeed. But the report in *Variety* concluded that some such arrangement was needed since the "'payment system' is slowly but surely tearing large chunks into [the publishers'] reserve bank rolls." But nothing would be done "until some disinterested party takes the initiative," since "everyone is suspicious of his competitor." But there was hope. "It is understood another attempt will be made by an outsider to bring the publishers together."[27]

This account is disingenuous. The outsider was none other than John J. O'Connor, business manager of *Variety*, and he actively set about organizing an association of music publishers. He secured the cooperation of vaudeville theater operators (or certain of them) and persuaded music publishers to join. He became the first chairman of the association and Edward B. Marks,

[26] See pp. 273-74 *supra*.

[27] Variety, Oct. 6, 1916, at 3.

whose exploits as a song-plugger we have already noticed,[28] became its first president. The name given to the association was the Music Publishers' Protective Association (MPPA).[29] Preliminary moves to establish the association were reported in *Variety* late in 1916.[30] By May, 1917, the MPPA was formed, the headline to the report in *Variety* giving this news being, "Song Payments End This Week." In the same issue of *Variety*, there was an advertisement which gave the aims of the MPPA:

> The primary and main object of this association just formed shall be to promote and foster clean and free competition among music publishers by eradicating the evil custom of paying tribute or gratuities to singers or musicians employed in theatres, cabarets and other places to induce them to sing or render music, which custom has worked to the detriment of the theatre management and the public through the rendition of music, not because of its merits, but because those singing or rendering it received gratuities in some form for so doing. Such practices have tended to discourage and retard the work of music writers, whose labors have not had a free field for competition.[31]

During 1917, *Variety* reported with enthusiasm on the success of the MPPA. Immediately after its formation, *Variety* reported: "The payment system to singers automatically became a thing of the past this week when the publishers notified their clients that in future all dealings would necessarily have to be conducted without the cash propositions. As far as could be ascertained, there has not been a single instance where the singer has not agreed to do all in his power to cooperate with the publishers, the majority recognizing the future good to be attained by the abolition of payments."[32] At the end of 1917, an article in *Variety* summed up what had been accomplished. The MPPA had "wiped out the most insidious curse . . . the 'payment system' . . . the [MPPA] has not only lived, but has strengthened itself beyond the fondest dreams of its organizers."[33]

These accounts which appeared in *Variety* about the success of the MPPA were inaccurate. Isaac Goldberg, after stating that the MPPA "ostensibly put a stop to [the 'payment system']," adds: "It is optimistic to believe that the practice has been eliminated."[34] Hazel Meyer says this of the formation of the MPPA: "Within twenty-four hours, the overt payola to vaudeville

[28] See p. 272 *supra*.

[29] For accounts of the formation of the Music Publishers' Protective Association, see Edward B. Marks, *supra* note 10, at 134-35, David Ewen, *supra* note 14, at 135, and Hazel Meyer, The Gold in Tin Pan Alley 158-62 (1958).

[30] Variety, Nov. 3, 1916, at 5; *id.*, Nov. 24, 1916, at 5.

[31] Variety, May 4, 1917, at 4.

[32] Variety, May 11, 1917, at 11.

[33] Variety, Dec. 28, 1917, at 8.

[34] Isaac Goldberg, *supra* note 9, at 206-7.

performers stopped. Within another twenty-four hours, payola was underground."[35] David Ewen says this: "It did not take long for now one publisher, now another, to devise devious ways of influencing performers to use their songs. The most effective way, and the hardest to pin down as a violation of the rules, was to give a star a share in the song's royalties. . . . The fact that the performer thus profited from the future success of the song made him more partial to including it in an act or show."[36] Even Edward B. Marks, who was president of the MPPA and was no doubt inclined to magnify its accomplishments, states: "We got rid of the flagrant evil of paying acts, but the sub rosa practice never entirely ceased."[37] It is abundantly clear, not only from these opinions, but from other evidence, that "the payment system" or what we would now call "payola" continued after the formation of the MPPA.

This outcome would not have surprised most music publishers since there seems to have been considerable scepticism about the possibility of abolishing the "payment system" when the idea of an association was first broached.[38] But if this was so, why did all the important music publishers join the MPPA? Some (but certainly not all) undoubtedly thought they would be better off if this restraint on competition were instituted. This would also be true of those few popular music publishers who did not use the "payment system" to promote their own properties or who were not adept in using it. Edward B. Marks may have been one of those. He said this of the "payment system": "Stern and I stood out against the thing, because we sensed that it would ruin the houses that spent the most money. It took will power to stay out of the procession—just a little more than I had. One day I authorized our professional manager . . . to go ahead and see to it that our numbers got a few breaks. In two days he came back disappointed. 'Boss,' he said, 'I can't give your money away. Every team worth a damn is signed to sing for other publishers.'"[39] It was apparently shortly after this experience that Marks agreed to become MPPA's first president.

But even those who would benefit from the abolition of the "payment system" might well have hesitated to join if they thought their competitors would not abide by the rules, as many no doubt did. It seems that O'Connor's success in securing the cooperation of some of the vaudeville theatre operators was decisive in inducing the hesitant (or hostile) to join. It is said

[35] Hazel Meyer, *supra* note 29, at 162.

[36] David Ewen, *supra* note 14, at 135-36.

[37] Edward B. Marks, *supra* note 10, at 135.

[38] When Edward B. Marks was first approached, he states that, "At first, I demurred." Edward B. Marks, *supra* note 10, at 134. See also the statements in Variety, Dec. 28, 1917, at 8.

[39] Edward B. Marks, *supra* note 10, at 134.

that O'Connor was able to enlist their aid by taking an executive of the Keith-Albee-Orpheum circuit to a show in which the same song ("I Didn't Raise My Boy to Be a Soldier," an antiwar song of the day) was used in a whole series of acts: the melody served as background music for the opening animal act, accompanied a dramatic sketch, was sung first by a duo and later by a quartet, was used in a "pepped-up" version to introduce the comic, while the melody was again used to accompany (in waltz time) the acrobatic troup which closed the show. It was a song-plugger's triumph.[40] Whether or not this incident really took place, it is clear that, even though there may not have been great hostility to the "payment system" among vaudeville theatre operators (it would obviously lower the amounts that had to be paid to artists), there was some concern that the use of vaudeville theatres for song-plugging might affect the popularity of the shows.[41] What the manager of the Keith-Albee-Orpheum circuit apparently did was to refuse to allow music to be performed unless the publisher of the music was a member of the MPPA.[42] At first, three prominent firms, Feist (publisher of "I Didn't Raise My Boy to Be a Soldier"), Remick, and Harms, declined to join the MPPA, but after the announcement of the ban on the music of publishers not members of the MPPA they did so.[43]

The reasons why the music publishers joined the MPPA seem fairly clear. But why did O'Connor undertake the task of organizing the association? Was it an example of that philanthropy which is apparently so rare in the popular music industry? According to Hazel Meyer, it was not. She states that O'Connor drew the attention of the management of *Variety* to the negative relationship between payola and *Variety*'s advertising revenues and was then given authority to act as that "disinterested party" who, according to *Variety*, was needed to bring the publishers together.[44] The view that the "payment system" might have been dampening *Variety*'s advertising revenues is not illogical. Paying a singer to popularize a song is a form of promotional expenditure and therefore competitive with other promotional activities, including paying for an advertisement for the song in a trade periodical. But whatever O'Connor's motives may have been, the results achieved by the MPPA must have been a disappointment. What seems to

[40] See Hazel Meyer, *supra* note 29, at 160-61. This tale is repeated in David Ewen, *supra* note 14, at 135.

[41] Compare Hazel Meyer, *supra* note 29, at 158. In Variety, Dec. 3, 1915, at 5, the general booking manager for the Loew Circuit was reported as objecting to an agent who was directing his acts what songs to sing. The music publisher involved was Leo Feist. The agent denied that he had required his acts to sing Feist songs but "stated he felt under obligation to the Feist firm for furnishing the small time with such a large number of new tunes." *Id.*

[42] See Hazel Meyer, *supra* note 29, at 161.

[43] *Id.* at 162.

[44] *Id.* at 155 & 158.

have happened is that at first the "payment system" simply became, in Edward B. Marks's words, "sub rosa," but, as time went by, the need for concealment was less acutely felt. The MPPA, by its rules, had authority to fine members who used the "payment system," but we are told that these rules were "unenforced and ineffective."[45]

An opportunity to correct the situation came with the establishment of the National Recovery Administration (NRA) in June, 1933.[46] The act creating the NRA empowered members of an industry to draw up a code which, once approved by the NRA-code authorities and signed by the president, became binding on the whole industry. The first draft of such a code for the music publishing industry was submitted to the NRA on September 1, 1933.[47] The initiative in formulating this code was taken by the MPPA, and its chairman, Mr. John G. Paine, was the driving force in the negotiations.[48] The popular music publishers (that is, the members of the MPPA) made it clear that Section 8 of the code, which consisted of "Trade Practice Rules," and was largely designed to prohibit "payola," was for them the most important part of the code. In the official case history of the music publishers' code, it is stated that "representatives of [the popular music publishers] . . . said, from time to time, that they were willing to agree to any other provisions in the Code that the Government desired if they might be granted these Trade Practice Rules."[49] The standard music publishers (broadly speaking, those who published classical music) expressed no interest in the Trade Practice Rules, and the task of justifying these provisions was assumed by the popular music publishers.

In the hearing on the proposed code in July, 1934, Mr. Paine explained that the MPPA

> . . . was organized 17 years ago in an endeavor to put a stop to . . . unfair trade practices which are in the nature of bribes paid to orchestra leaders, radio performers and to other artists who appear in public, to induce those artists to perform the copyrighted composition of one publisher in competition or in opposition to their selecting . . . the composition of another publisher. . . . These practices run into enormous sums of money annually and are extremely costly to the industry. We have tried as an association, to put a stop to them. We cannot very readily do that because we cannot

[45] Sidney Shemel & M. William Krasilovsky, This Business of Music 97 (rev. ed. 1971).

[46] 48 Stat. 195 (1933).

[47] See P. A. Markland, Case History of the Code of Fair Competition for the Music Publishing Industry, Code No. 552, Oct. 12, 1935, at 5f, contained in Approved Code Histories, Division of Review, Records of the National Recovery Administration (Record Group 9, National Archives, Washington D.C.).

[48] See the Report of H. Brewster Hobson, Asst. Deputy Administrator, June 22, 1935, at 2, contained in Appendix I of Case History of the Code of Fair Competition for the Music Publishing Industry, *supra* note 47.

[49] *Id.* at 11.

control the whole industry but only the members of the Association, and that is one of the reasons we have felt the need of the code because by having it, we would be able to control these activities and practices in connection with the entire industry. . . . [The code] is protective . . . of the small publisher who does not have the money, does not have the capital, to go out and buy this talent. . . . We feel [that] the exploitation should be . . . solely on the merit of the musical composition which is offered. If I go to Mr. Rudy Vallee . . . with my musical composition I think he should decide whether he will include that in his repertoire solely on the merit of my . . . composition and not because I happen to be a wealthy publisher and can pay him a substantial sum of money to put mine in to the exclusion of somebody else's whose musical merit might be even greater than mine. We feel that the competition should be solely on the basis of the merit of the composition and not on any extraneous inducements.[50]

Other provisions in the code were justified by Mr. Paine on the ground that they were necessary to prevent evasion. For example, the prohibition on the supply of special arrangements was needed because, in practice, it would merely be a means of evading the ban on payola:

We go to an orchestra leader and we say ". . . We would like very much to have you use this musical composition." He looks it over and says he is not particularly interested in that musical composition, that it does not quite fit his particular band; . . . and then we say to him ". . . You make a special arrangement . . . and we will pay you whatever that cost is" . . . [T]hat is just a subterfuge for paying directly to the orchestra leader because in . . . practically all instances, the orchestra has its own arranger who arranges the music for the particular and peculiar instrumentation of that orchestra, and that arranger is on a salary.[51]

The effect of the code, according to Mr. Paine, would be to prevent public performance being "dominated completely and absolutely by those publishers that have substantial bankrolls to the utter exclusion of those publishers who may have meritorious compositions, good writers, and yet no money for exploitation."[52] What the NRA code did was to impose on the music publishing industry the regulations which the MPPA had attempted unsuccessfully to introduce in 1917. Section 8 of the music publishers' code is reproduced in Appendix A. There was also a section in the radio broadcasting code which prohibited payola and this will also be found in Appendix A.

[50] Testimony of John C. Paine, Chairman, Board of the Music Publishers Protective Ass'n in The Music Publishing Industry: Hearings on a Code of Fair Practices and Competition before the National Industrial Recovery Administration 158-61 (July 26, 1934), contained in Vol. III, Code of Fair Competition for Music Publishing Industry, Transcripts of Hearings, 1933-1935, Records of the National Recovery Administration (Record Group 9, National Archives, Washington D.C.).

[51] *Id.* at 162.

[52] *Id.* at 164.

According to a representative of the National Association of Broadcasters this provision was inserted in the radio broadcasting code at the request of the music publishers.[53] The chairman of the Code Authority for the Music Publishing Industry was Mr. Paine, who was also chairman of the MPPA. Although the original draft of the music publishers' code had been submitted on September 1, 1933, owing to bureaucratic delays the code was not finally approved until March 4, 1935, to become effective March 18, 1935. However, on May 27, 1935, the Supreme Court declared the act establishing the NRA unconstitutional; as a result the NRA code for the music publishing industry was only in operation for about two months.[54]

In a letter dated June 18, 1935, sent to an NRA official, Mr. Paine stated that the Supreme Court decision had removed "the most valuable aid to the [music publishing] industry which we have had ever in our history. . . . Should some method be devised which would again give to our industry a code effective upon the whole industry, which would be aimed only at eliminating the practices set out in Article 8 . . . of the Code . . . we feel that . . . the savings . . . will be so beneficial to our industry that we can undoubtedly solve most of the commercial problems which lie before us."[55]

The method which Mr. Paine had in mind to ensure that the industry continued to abide by the Trade Practice Rules of the NRA code was soon to be revealed. About four months after the NRA act had been declared unconstitutional, on September 20, 1935, the MPPA submitted to the Federal Trade Commission (FTC) Trade Practice Rules for the music publishing industry. In a memorandum sent to the Trade Practices Board of the FTC by a staff member it was noted that the rules proposed "were taken practically verbatim from the [NRA] Code of Fair Competition for the Music Publishing Industry." This approach to the FTC by the MPPA was quite proper. The FTC could approve rules of fair trade practices for an industry, once it has determined that to grant the industry's request would not sanction practices contrary to law or be in some way inimical to the public interest. Such rules are divided into two groups. The FTC took the position that group I rules were legally binding and took appropriate action to enforce them. Group II rules were advisory. Their observance was considered desirable but their nonobservance was not per se a violation of the law. However, if it was determined that nonobservance would result in unfair

[53] Letter from Oswald F. Schuette, Nat'l Ass'n of Broadcasters, to Dr. Lindsay Rogers, Deputy Administrator, National Recovery Administration, Dec. 15, 1933, contained in Music Publishing Industry, Code No. 552, Consolidated Approved Code Industry File, Records of the National Recovery Administration (Record Group 9, National Archives, Washington D.C.).

[54] Report of H. Brewster Hobson, *supra* note 48, at 2.

[55] Letter from John C. Paine to H. Brewster Hobson, June 18, 1935, contained in Consolidated Approved Code Industry File, *supra* note 53.

competition or unfair deceptive acts or practices, the FTC might take the same action as it would for group I violations.[56]

This application of the MPPA was to have a difficult passage.[57] While there was some support for the proposed rules within the FTC, reservations were expressed about the legality of the provisions and their desirability. Lengthy negotiations followed with Mr. Paine and his legal counsel, Joseph V. McKee (a former mayor of New York City). The character of the obstacles to FTC approval may be gathered from a memorandum sent by the Trade Practices Board to the Commission in June, 1937. The memorandum first describes the situation of the popular music industry: "The products of the industry consist of popular songs, orchestrations and musical compositions. To induce members of the public to buy it is necessary to afford them the means of hearing the tune of the musical composition, for it is only when they are attracted by the tune that they are induced to buy. Thus in promoting the sale of their products the members of the industry constantly strive to have their songs and musical compositions accepted by those providing public entertainment and played or performed over the radio, in theaters or by orchestras or singers in hotels, restaurants and other places of public amusement." It then explains that the "practice has grown up of publishers paying so-called bribes or making gifts of money, articles or favors to orchestra leaders, singers and other artists to play or sing their songs . . . . it is the purpose of the proposed trade practice conference to provide rules prohibiting it." It notes that "the employers of such musicians, singers or artists, for the most part at least, have no objection to such professional employees receiving such payments or gifts. It is proposed, however, to prohibit the practice when indulged in either with or without such employer's consent. Except for this the practice has much similarity to commercial bribery. Our ordinary commercial bribery rule is limited to cases where the bribe is paid without the knowledge or consent of the employer."[58]

The drafting problem as seen by the staff of the Trade Practices Board is then described but hardly resolved:

> The [MPPA] desires that the rules prohibit the practice "with or without" the knowledge or consent of the employer and moreover, that they be placed in Group I as

[56] See Federal Trade Commission, Control of Unfair Practices through Trade Practice Conference Procedure of the Federal Trade Commission (TNEC Monograph No. 34, 1941).

[57] The following account of the attempt to secure the FTC's approval for a Code of Fair Competition for the Music Publishing Industry is based on memoranda and various other material made available to me by the Federal Trade Commission. These materials have been collected as U.S. Federal Trade Commission, Materials on the Popular Music Industry used in Preparation of R. H. Coase's Payola in Radio and Television Broadcasting (available at University of Chicago Law School Library). The pagination on the following notes refers to the bound volume of materials at the University of Chicago Law School Library.

[58] *Id.* at 242-44.

compulsory. Otherwise, it is claimed, the rules would mean little and would be ineffectual and not worthwhile. Under the circumstances therefore the rules will have to be phrased so as to prohibit practices which are contrary to law and no more. In our study of the proposed rules thus far we have not been fully convinced that they prohibit only that which is illegal. On the other hand, however, we are likewise not yet fully convinced of the impossibility of making such rules eligible for Group I, although thus far we have not been able to devise appropriate language which would, in our judgment, bring the rules wholly within the law and at the same time meet the situation which the applicant desires, namely, complete and compulsory prohibition of such "song plugging" practices. While strict legal construction . . . of the rules [submitted by the MPPA] would seem to bring them within the Group I category, proof of a case thereunder would appear to be next to impossible.[59]

The memorandum next alludes to the antitrust suit pending against the American Society of Composers, Authors, and Publishers (ASCAP), of which the popular music publishers were, of course, members. The existence of this suit seemed to some in the FTC enough to bar approval of the rules even though the Department of Justice had stated in a letter that the "proposed rules . . . do not affect the issues in the antitrust suit."[60]

The memorandum also referred to a charge by an independent music publisher—one, that is, not affiliated with a motion picture company—that the proposed rules would inflict great harm on such independent publishers. He said that many independent publishers "signed the petition unwillingly because of threats that their songs would be boycotted by orchestra leaders and artists under the control of the dominant music publishers." The harm this publisher had in mind was recounted in the memorandum:

Through using the songs and orchestrations of their own publishing subsidiaries in their motion pictures and their large chains of theaters throughout the country, such affiliated publishers, who are competitors of the independents, have means for exploiting their songs and orchestrations in public performances without the necessity of resorting to "song plugging." . . . The independent publisher claims that not having such motion picture outlets, it is necessary for him to induce orchestras and singers in hotels, restaurants and in other non-controlled places of entertainment to play his music in order that the public may hear his tunes and thus become interested in buying his sheet music. It should be remembered that it is only when the buying public are attracted by the tune that they can be induced to buy. And the tune can, of course, only be imparted audibly. The opponents, therefore, claim that if these rules should deprive the independent publishers of the privilege of paying orchestra leaders or other artists to sing, play or perform their compositions, their means of bringing their tunes to the attention of the public would be cut off and the business would be monopolized by the motion picture corporations and their subsidiaries who have

[59] *Id.* at 244.
[60] *Id.*

control of the use of songs and music in motion pictures and in motion picture theaters throughout the country.

The chief examiner of the FTC reported that it "appears from the record so far made, that at least some of the independent publishers under duress or threat of injury to their business agreed to the Proposed Trade Practice Conference rules as submitted to the Commission by the Industry" and that it was the opinion of his investigating attorney that the proposed rules "would mean the elimination of the independent publisher."[61]

The position was further complicated by the fact that the MPPA announced in the press that it had already put the trade practice rules into effect and in terms which gave the impression that this had been sanctioned by the FTC. "The applicant's committee has expressed fear that unless the Commission grants the conference promptly, violations of the rules will increase because members of the industry are beginning to realize that the rules, although put into effect by the association, have not as yet been sanctioned or approved by the Commission and therefore may not be enforceable."[62]

The Trade Practice Board's conclusion was as follows: ". . . we do not believe the trade practice conference matter should be postponed to await conclusion of further investigation . . . if, under all the circumstances, the Commission . . . feels that a trade practice conference is not feasible or desirable, the application should be denied forthwith. . . . On the other hand, we do not see how material harm could come from holding a conference and allowing all sides to be heard in an effort to thrash out the whole matter."[63] Given the divergent views within the FTC, it is hardly surprising that the commission, on July 13, 1937, denied the application for a conference. However, following representations from the industry and modification of their proposed rules, the FTC rescinded this decision on July 30, 1937 and agreed to hold a trade practice conference.[64]

After this conference, held on October 4, 1937, the FTC received a letter from the Southern Music Publishing Company, New York City, which said that the conference proceedings "represented only an expression of the wishes and desires of the motion picture owned publishers and a few long established independent houses." The rules were, however, tentatively approved by the FTC and an oral hearing was set for January 4, 1938.[65] In the meantime, the commission had received a letter from Mr. Albert

[61] *Id.* at 245-46.
[62] *Id.* at 245-48.
[63] *Id.* at 248.
[64] *Id.* at 254, 262.
[65] *Id.* at 289, 276.

Bader, President, Independent Music Publishers, U.S.A., claiming that the proposed rules were "concocted under the influence of the ASCAP and the MPPA, the representative organizations of the Music Publishers Monopoly."[66]

The Trade Practice Board recommended approval of the rules. The chief counsel of the FTC, however, noted the pending antitrust suit and the charges of monopoly against members of the MPPA. He concluded: "I believe that the approval of the Trade Practice Rules should be considered as the grant of a privilege and that in no event should it be extended unless the sponsors come before the Commission with absolutely clean hands and unquestioned honesty of purpose and intent." He therefore recommended that approval of the rules be denied, leaving it open to the MPPA to make a new application "as soon as all pending charges against the members of this industry have been disposed of."[67] On May 25, 1938, the FTC rejected the proposed trade practice rules for the music publishing industry.[68]

One more attempt was to be made in the 1930s to eliminate payola. In 1939, the song-pluggers formed a union, affiliated with the American Federation of Labor, the Music Publishers' Contact Employees Union. From the reports, in November, 1939, about the contract to be signed between the union and the music publishers, we learn that one of its main provisions was intended to prevent payola. *Billboard* had this to say: "Basic element in the contract (and likewise in the original formation of the union) is the abolition of the evil of bribery for song plugs, contact men feeling that the situation was growing to a point where a publisher's checkbook would finally obviate the necessity of maintaining a plugging staff." The contract provided for a fine for any publisher found guilty by an arbitration board of resorting to payola, plus the posting of a $1,000 bond to be retained by the union if the publisher repeated the offense.[69] The account in *Variety* gave more detail about the practices which would subject a publisher to such penalties: "The unfair practice clause . . . bars publishers from giving or offering any form of gratuity or reward for a plug, including cut-ins, or the making of special arrangements or extractions but prevents them from having their employees attending band leaders' 'command performances' or special nights, unless the consent of the union has been obtained."[70]

There would have been little difficulty in the music publishers and the

[66] *Id.* at 312.

[67] *Id.* at 332.

[68] *Id.* at 325.

[69] Billboard, Nov. 25, 1939, at 15.

[70] Variety, Nov. 22, 1939, at 39. "Cut-ins" refer to the practice of making a band leader or performer a part-composer of a song and therefore giving him a share in the copyright royalties.

union coming to an agreement to restrict payola. The publishers wanted to impose these regulations on the industry; the song-plugger employees of the publishers would see the abolition of payola as leading to an increased demand for their services. The American Federation of Musicians (AFM), some of whose members received the payola, did not welcome this development. Although indicating that they would cooperate, they were, in fact, reluctant to help the new union. The president of the New York local of the AFM is reported to have said that if payola is to be abolished, "the music men must do it for themselves." And *Billboard* added: "AFM officials are . . . known to regard the bribery angle as not in their province and they do not care to deter a leader from picking up a little extra money in this way."[71]

There is no reason to suppose that the Music Publishers' Contact Employees Union was able to stop payola. It was reported in *Variety* in 1944 that the contact men's salaries had risen so high that they were making payments to broadcasters and performers out of their own pockets.[72] And in 1945, payola was apparently so widespread that some publishers threatened to make open payments for broadcasting plugs for their songs.[73] It is clear that the union had not been able to stop payola. Up to the end of World War II, all attempts to stop payola seem to have failed.

IV. The Situation in the 1950s

Until the end of World War II, payola, although it affected the radio programs broadcast, did not normally involve directly either the radio stations or their employees. It consisted of payments by music publishers to performers. By the 1950s, its character had changed radically. The predominant form of payola became payments by record companies (who were often also music publishers) to disc jockeys. Whether because of a change in tastes in music, a change in the composition of the potential audience of radio stations following the advent of television, an improvement in the quality of recordings, or more probably a combination of all these factors (and others), "big band" radio programs disappeared and there emerged as an important form of programming on radio stations the disc jockey who played recordings, interspersed with comments and commercials. At first, record companies (or some of them) had resisted such programming, no doubt believing that listening to records on the radio would reduce the demand for records to be played at home.[74] But it soon became apparent that the playing of a

[71] Billboard, Nov. 25, 1939, at 15.

[72] Variety, Aug. 2, 1944, at 31.

[73] Variety, Nov. 21, 1945, at 49.

[74] At the Hearings on a Code of Fair Practices and Competition for the Radio Broadcasting Industry, Vol. 1, at 149 (Sept. 27, 1933), RCA-Victor made a request, which was supported by

record by a disc jockey increased the sales of that record and the desire of record companies to have their records played on disc jockey programs led naturally to payola. In the trade press throughout the 1950s there are repeated references to record companies making gifts or money payments to disc jockeys to play their records.[75] However, it was not until late in 1959 that payola came under congressional scrutiny.

In the meantime, the broadcasting industry was the subject of several congressional investigations. At first, it was corruption within the FCC itself which attracted attention. Commissioner Mack was alleged to have been given money to obtain his support for the award of a television channel to a particular applicant (who was in fact successful). This resulted in the resignation and later indictment of the commissioner.[76] It was a continuation of this concern about improper relations between the FCC and the industry that in 1960 led to the resignation of the chairman of the FCC, Commissioner Doerfer, following his acceptance of hospitality from a broadcast-station operator.[77] Attention, however, soon shifted from corruption within the FCC to corruption within the broadcasting industry itself and to the need to give the FCC additional powers to regulate the industry.

In 1958, Senator Smathers introduced a bill which provided that no one engaged in music publishing or the manufacture and distribution of musical records could hold a license to operate a broadcasting station. This bill seems to have been an outcome of the rivalry between two organizations controlling musical copyrights, the American Society of Composers, Authors, and Publishers (ASCAP) and Broadcast Music, Inc. (BMI). Broadcasting stations and the networks (who also owned recording companies) were stockholders in BMI. It was alleged that broadcasting organizations favoured the playing by disc jockeys of records in which they had an interest. It is easy to see that this practice would have affinities with payola. However, in the course of the enquiry, there were many references to payola, one witness

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Mr. H. A. Huebner of the American and Brunswick Record Corporation, to put a provision in the code which would make it a violation "to broadcast records without prior written consent of the manufacturer of such records." Later Mr. Huebner indicated that he would support a provision to ban "all use of records for broadcasting," *id.* at 157. The hearings are contained in Transcript of Hearings, 1933-1935, Records of the National Recovery Administration (Record Group 9, National Archives, Washington, D.C.).

[75] See, for example, the articles mentioned in Investigation of Television Quiz Shows: Hearings before a Subcomm. of the House Comm. on Interstate & Foreign Commerce, 86th, 1st Sess. at 1142-47 (1959) [hereinafter cited as Investigation of Television Quiz Shows]; and Meyer, *supra* note 29, at 154-85.

[76] See Investigation of Regulatory Commissions and Agencies: Hearings before a Subcomm. of the House Comm. in Interstate & Foreign Commerce, 85th Cong., 2nd Sess., pt. 4 (Feb.—March, 1958). Mack was indicted, but criminal charges were dropped in August 1961. New York Times, Aug. 31, 1961, at 41, col. 1.

[77] For the circumstances surrounding Doerfer's resignation, see Broadcasting, March 14, 1960, at 31-40.

stating that it was paid to disc jockeys to induce them to play BMI songs.[78] But these payments to disc jockeys do not seem to have occasioned any great concern at that time. Senator Pastore likened the practice to paying "a headwaiter $5 to get a desirable table."[79] The bill never passed.

It was part of the case against BMI, with Mr. Vance Packard as the principal proponent, that the disc jockeys had filled their programs with "whining guitarists, musical notes put to a switchblade beat, obscene lyrics about hugging, squeezing and rocking all night long," which they substituted for the music of such composers as Cole Porter, Richard Rodgers, and Irving Berlin (who were members of ASCAP). It was clear to Mr. Packard that "something more than artistic judgment or poll results was going into the decision to feature rock and roll, or rhythm and blues" and in support of this statement he referred to an article which appeared in *Billboard* in 1951 which stated that "the 'payola' situation is worst among the rhythm and blues spinners." According to Mr. Packard, the "rock and roll surge" really got going when RCA-Victor made a contract with a "pallid, sullen young man named Elvis Presley."[80] Although no legislation resulted from these hearings, the idea that the demand for "rock and roll" music was created by the broadcasters through playing records of such music on disc jockey programs and that this was in some way connected with payola was to remain a factor influencing congressional attitudes.

The next congressional enquiry arose out of charges in 1958 that the popular television quiz shows, which had been presented as honest contests, had in fact been rigged, that the contestants were groomed before the programs, knew the questions that were to be put to them and how they should answer and that the contestant who would win was arranged in advance. The contests were the subject of a New York grand jury investigation. After completion of this investigation, the testimony given to the grand jury was made available to the Subcommittee on Legislative Oversight of the House of Representatives, which then held its own hearings. The proceedings of the subcommittee left no doubt that the charges were true. But payola did not make its appearance until the proceedings were nearing their end.

It was then disclosed that the owner of a department store, Mr. Hess of Allentown, Pennsylvania, had paid $10,000 so that an employee, Mr. Hoffer, would be a contestant on the most popular of the quiz programs, the "$64,000 Question." It had been expected by Mr. Hess that the contestant, in the course of being introduced, would be asked where he was employed

[78] Amendment to Communications Act of 1934: Hearings before the Subcomm. on Communications of the Senate Committee on Interstate & Foreign Commerce, 85th Cong., 2nd Sess. at 208.

[79] *Id.* at 209.

[80] *Id.* at 138. Mr. Vance Packard's testimony is at 106-41.

and in fact this happened. The transaction offended the moral sensibilities of some congressmen as the following extracts from the hearings show:

MR. ROGERS: Did you feel what you were doing was wrong, Mr. Hess?
MR. HESS: I thought it was a terrific promotion for the store.

. . . .

MR. FLYNT: So basically as far as you were concerned the whole idea of getting Mr. Hoffer on there was to plug your store. We will say it was deceitful, at the very least.
MR. HESS: I thought it was a good promotion.
MR. FLYNT: Yes, but you were not trying to promote an honest quiz show. You were trying to plug your store.
MR. HESS: I didn't know whether he could answer the questions or not.[81]

Following a statement by Mr. Hess that he had appeared on a TV show with Kate Smith for a payment, he explained, under questioning by Mr. Lishman, counsel to the subcommittee, that such payments were common:

MR. LISHMAN: Do you think this was a common practice in order to get these plugs that a person would have to pay?
MR. HESS: It was not "was"; it is a common practice.
MR. LISHMAN: It is. Isn't it a fact that the sponsor buys the time and unbeknownst to the sponsor ostensibly somebody gets a free ride by paying some side money to a producer. Is that the case?
MR. HESS: This is considered a business today. There are plenty of people—
MR. LISHMAN: It is considered a business?
MR. HESS: Yes.
MR. LISHMAN: Wouldn't this closely approach commercial bribery, in your opinion?
MR. HESS: Commercial what?
MR. LISHMAN: Commercial bribery.
MR. HESS: No, sir. This is a recognized business. There are certain people in New York that do just nothing but plug words.

. . . .

MR. LISHMAN: Are these people commonly known as "schlukmeisters" that you are referring to? "Schlukmeisters," masters of making a sharp bargain on the side? Is that what they are known as in the trade? You say it is a business. I am trying to find the business name for them.
MR. HESS: These people are in the business like everybody else and it is a recognized thing with them.
MR. LISHMAN: Don't you think it is a fraud on the sponsor who pays the big sum of money to get the program format established and buys the time of the network and then someone comes along and for a comparatively small amount of money gets a free ride on the sponsor's program?
MR. HESS: I think it is a terrific thing for a little business to be able to get on some of those big network shows.[82]

[81] Investigation of Television Quiz Shows, *supra* note 75, at 964 & 970.
[82] *Id.* at 959.

Mr. Hess also pointed out that his store also made payments to newspaper columnists. He mentioned the names of Jack O'Brien, Bob Considine, and John Hall. Mr. Levine, public relations manager at the Hess store, gave more particulars of these transactions. He provided the subcommittee with a list of TV shows on which a mention of the Hess store or its activities had been obtained by a payment of money in the 1950s. They included the Steve Allen "Tonight" show and "Name That Tune."[83] In his testimony, he added the Dave Garroway "Today" show and the "Garry Moore Show."[84] He also mentioned that in a television film with the locale in New York City, one of their trucks had been spotted.[85] Mr. Levine also added the names of Hal Boyle and Earl Wilson to the names of newspaper columnists mentioned by Mr. Hess. When Congressman Bennett started to question Mr. Levine about the columnists, the chairman (Mr. Oren Harris) intervened to say that "that gets into the newspaper business" and Mr. Bennett said "I withdraw the question about the newspapers because I guess that is out of our field."[86] In statements issued after this testimony, Earl Wilson denied that he had received money from Hess while Jack O'Brien denied that he had mentioned the Hess store. Other columnists (Bob Considine, Stanley Delaplane, and Hal Boyle), who had mentioned the store in their columns, explained that the payments they received were for "personal appearances" or "travel expenses." But the question of payments to newspaper columnists seems to have attracted very little attention compared to that accorded payments to disc jockeys.[87]

The members of the subcommittee showed great interest in the way in which Mr. Hess made his payments.[88] Who actually received the $10,000 paid (in cash) to secure Mr. Hoffer's appearance on the "$64,000 Question" was never revealed. A Mr. Schwartz who, it was said, was handed the money by an employee of the Hess store, claimed that his testimony might "tend to defame, degrade or incriminate some person" and his testimony was in consequence taken in executive session and was not published.[89] Mr. Hess, mindful no doubt of the presence at the hearings of a representative of the district attorney of New York, showed considerable circumspection in his answers on this subject. What is apparent, however, is that this particular transaction was very unusual. Normally the payment was made by check

[83] *Id.* at 1008.

[84] *Id.* at 1007 & 1009.

[85] *Id.* at 1010.

[86] *Id.* at 1012.

[87] See the New York Times, Nov. 5, 1959, at 28; *id.*, Nov. 6, 1959, at 16; *id.*, Nov. 13, 1959, at 12; and Time, Nov. 16, 1959, at 65.

[88] Investigation of Television Quiz Shows, *supra* note 75, at 967.

[89] *Id.* at 1024.

and to a public relations firm. How the public relations firm obtained these "mentions" for the Hess store, whether by payment or in some other way, was not disclosed.

The heads of two of the networks were questioned about Mr. Hess's transactions. Mr. Kintner, President of the National Broadcasting Company (NBC), said that the showing of some fashions from the Hess store on the "Today" show, probably arose because the show wants to have interesting people on it and "apparently some public relations firm told the Hess Department Store that they could get some interesting person on 'Today.'"[90] This, he thought, was not objectionable. Asked about the practice of producers or employees of NBC being paid to insert plugs into programs, Mr. Kintner said that it was not "general," was "reprehensible," and would lead to dismissal if discovered. However, he added a qualification: "You understand the operation of all these types of shows, for example—and this is just a theoretical example—if Miami wants the 'Today' show to come to Florida, in order to boom for tourists, the program, itself, may be paid some of the costs of transportation, but it does not go to the individuals or staff, and it is part of the budget of the show. I would not consider the example I gave as reprehensible."[91] Mr. Stanton, President of the Columbia Broadcasting System (CBS), said that the practices disclosed by Mr. Hess's testimony were "deplorable." But he did not "quarrel with the idea that personalities and institutions retain agents, public relations people, to try to get as much public attention as possible. The place where I draw the line is the passing of money from the act or from the personality to the person who writes the column or does the show or plans the display window, or whatever that might be."[92]

At the end of the hearings into the television quiz programs, there were introduced into the record a letter and memorandum from Mr. Burton Lane (composer of the musical score for "Finian's Rainbow" and a number of popular songs) in his capacity as president of the American Guild of Authors and Composers. The letter stated in part that the "practices of audience deception in broadcasting which have been revealed in the testimony adduced before your committee, is by no means limited to quiz programs. It has a counterpart in the promotion of music, and in music products. There is no doubt that commercial bribery has become a prime factor in determining what music is played on many broadcast programs and what musical records the public is surreptitiously induced to buy."[93] The memorandum gave ex-

[90] *Id.* at 1045.
[91] *Id.* at 1046.
[92] *Id.* at 1106.
[93] *Id.* at 1142.

amples of payola, mainly taken from the trade press. According to *Variety*, it was Burton Lane's letter which led to the payola enquiry.[94] Whether this is true or not, the great payola enquiry followed.

The hearings on "payola and other deceptive practices"[95] opened with a statement by the chairman of the subcommittee, Representative Oren Harris, in which he referred to the Hess testimony and to Burton Lane's letter. He continued: "Since that time, the subcommittee has been flooded with complaints . . . about . . . the selection of material sent over the airwaves [being] influenced by undisclosed economic inducements. When this happens, we are told, the public interest suffers in many ways. The quality of broadcast programs declines when the choice of program materials is made, not in the public interest, but in the interest of those who are willing to pay to obtain exposure of their records. The public is misled as to the popularity of the records played. Moreover, these practices constitute unfair competition with honest businessmen who refuse to engage in them. They tend to drive out of business small firms who lack the means to survive this unfair competition."[96] Mr. Harris said that the subcommittee had not "prejudged any of these matters,"[97] although this was not evident from the questioning which followed.

The first witness was Mr. Norman Prescott, who had been a disc jockey with WBZ, Boston, and who had accepted from record distributors, over approximately a three-year period, payments totaling about $10,000. He had been reluctant to testify (apparently because he did not wish to incriminate others) but had agreed to cooperate with the subcommittee, according to its counsel, after they confronted him "at every turn" with "documentary proof" collected by the subcommittee's investigators. Mr. Prescott explained that he left WBZ in July, 1959, because, among other things, he was "disgusted with the payola conditions in the industry; and I walked away from it for that reason." (There is some conflict about this in the testimony—the manager of WBZ said that Mr. Prescott was fired.) Mr. Prescott testified that he considered payola to be bribery and explained that it comes about because "it is impossible to play the big percentage of the output of the manufacturers. That is why payola is functioning today and will continue to function if something is not done about it." Payola led to the playing of "rock and roll" records:

[94] Variety, Nov. 11, 1959, at 1.

[95] Responsibilities of Broadcasting Licensees and Station Personnel: Hearings before a Subcomm. of the House Comm. on Interstate & Foreign Commerce on Payola and Other Deceptive Practices in the Broadcasting Field, 86th Cong., 2d Sess. (1960).

[96] *Id.* at 1.

[97] *Id.* at 2.

MR. BENNETT: Well, do you think without payola that a lot of this so-called junk music, rock and roll stuff, which appeals to the teenagers would not be played, or do you think that kind of thing would be played anyway, regardless of the payola?
MR. PRESCOTT: Never get on the air.
MR. BENNETT: Do you think payola is responsible for it?
MR. PRESCOTT: Yes; it keeps it on the air, because it fills pockets.[98]

The effect of Mr. Prescott's testimony was to suggest that payola was widespread, that it was immoral, that it prevented the broadcasting of "good music," and that it should be stopped by new legislation. Mr. Harris complimented Mr. Prescott on his "frank and forthright" testimony. "Even though you were at first, understandingly so, reluctant to provide information or talk about it to the investigators or our staff, after you got into it and found out what the situation was, you have been very helpful, explaining for the record just how this business operates from the standpoint of an experienced man."[99]

Later witnesses, record manufacturers and distributors who made the payments and the disc jockeys who received them, denied, when pressed by members of the subcommittee, that the payments were wrong or improper. Indeed they usually denied that these payments were "payola," in the sense that the disc jockeys agreed to play records in return for the payments. The payments were made for taking charge of record hops (dances at which the records were played), for consultation, for advice, for listening to records, or were gifts. The congressmen, as was to be expected in men of their experience, expressed scepticism or outright disbelief at these explanations. Nor need we doubt that whatever the ostensible reason for these payments, the aim was to increase the likelihood that the records of the suppliers would be played. But the fact that the transactions might be held to constitute commercial bribery in New York State, where many of the transactions took place, doubtless made many witnesses reluctant to be completely candid about them.

The remainder of the hearings were largely devoted to the affairs of Dick Clark, who was responsible for an ABC network television show on which he played records while teenagers danced and also another show on which the performers sang the songs they had recorded. Until late in 1959, when, under pressure from ABC, Mr. Clark disposed of most of his outside interests, he had been an owner or part owner of several music-publishing and record-manufacturing corporations and also of a record-pressing corpora-

[98] *Id.* at 39.

[99] *Id.* at 42. Mr. Norman Prescott's testimony is found in *id.* at 3-45. The testimony of Mr. Paul O'Friel, general manager of WBZ, denying that Mr. Prescott left WBZ voluntarily is found in *id.* at 1548-49.

tion. It was implied that Mr. Clark received payola in an indirect form, that individuals or firms who had their music published by or recorded by or pressed by one of the corporations in which he had an interest were more likely to have their records played or music performed on his programs. Mr. Clark denied that he had ever agreed to play records or select songs in return for business given to his corporations or that he had ever taken payola. The closest Mr. Clark ever came to an admission that his outside interests may have influenced him in his choice of records was the following: "The truth, gentlemen, is that I did not consciously favor such records. Maybe I did so without realizing it." The questioning by members of the subcommittee and its counsel was unable to shake Mr. Clark's contention that he had not accepted payola in any form.[100]

Nonetheless, the testimony made it clear that the acceptance of payola by disc jockeys was widespread, a conclusion confirmed by information uncovered by the FTC. The FTC started its investigations late in 1959 after receiving "a letter of complaint . . . dated about November 2, from a record manufacturer who offered to supply some names, dates, and places."[101] The publicity given to payola by the congressional committee also brought complaints "from the public . . . in unprecedented volume."[102] The investigations of the FTC revealed the pervasive character of payola and the many forms that it assumed. In his testimony to the subcommittee, Mr. Earl W. Kintner, Chairman of the FTC, said that the investigations had revealed 255 disc jockeys or other employees of broadcast licensees and 7 broadcast licensees as having received payola. Payola took the form of cash payments (which might be on a regular weekly or monthly basis), royalties on the sales of records, a share in a record company, advertisements in the disc jockeys' hit sheets, the reimbursement of recording stars' fees for appearances on the disc jockeys' programs or at record hops which they organized, expensive gifts, and mortgage loans on disc jockeys' homes. The FTC also investigated what had come to be known as "plugola," the kind of activity in which Mr. Hess had been involved and found that there were firms which regularly engaged in securing such "plugs" on broadcast programs. That such "plugola" was extremely common was made evident by published reports about performers who received payments or gifts for mentioning certain products in the course of their programs.[103] The FTC seems to have taken

[100] *Id.* at 1182. Mr. Clark's testimony will be found in *id.* at 1168-233.

[101] *Id.* at 658.

[102] 1960 FTC Annual Report 52.

[103] Mr. Kintner's testimony is in Responsibilities of Broadcasting Licensees, *supra* note 95, at 640-66. For a published report about the prevalence of "plugola," see Time, Nov. 23, 1959, at 63-66.

no legal action to deal with "plugola," no doubt because the change in the law in 1960 made the FCC the agency primarily responsible for regulating these activities. The FTC issued many complaints against record manufacturers and distributors and, in most cases, these firms entered into a consent decree whereby they agreed not to give "without requiring full public disclosure" money or other material consideration to anyone to select and broadcast records in which they had "a financial interest of any nature" or to influence the employee of a broadcasting station or anyone else to do so.[104] The basis for this action by the FTC seems to have been that the "concealment of such payments is a deceptive act within the meaning of Section 5 of the Federal Trade Commission Act since listeners are misled into believing that the recordings played are selected strictly on their merits or public popularity."[105] These payments were also likened to "push money" (paid to the employees of retail stores to "push" certain products) and constituted unfair competition since the records of those who paid payola would be played more frequently than "those who made no such contribution or refused to pay tribute."[106]

The congressmen on the subcommittee were consistently hostile to payola. It was "bribery," "immoral," "wrong," "reprehensible," and so forth. Records were played because of undisclosed economic inducements rather than because it was in the public interest. These feelings were undoubtedly enhanced by the press accounts of a convention of disc jockeys held in Miami Beach, Florida in June, 1959, at which the record manufacturers and distributors seem to have attended to the disc jockeys' every need with a lack of restraint which recalled Rome under the emperors.[107] And in the background of the questioning was a hostility to "rock and roll" (the music played by many disc jockeys), defined as "raucous discord" by Congressman Moss, who argued that "good music did not require the payment of payola."[108] As has been said, in these hearings there was "an assumption that rock was 'bad' music . . . and that it could only have been forced on the public by illegal business activities."[109] The upshot of these deliberations was that the subcommittee recommended, among other things, amendments to the Communications Act which would make payola a crime in the broadcasting industry. These amendments became law on September 13, 1960.

[104] *Supra* note 102, at 52-53.

[105] *Supra* note 95, at 641.

[106] *Supra* note 102, at 52.

[107] See Time, June 9, 1959, at 50.

[108] Responsibilities of Broadcasting Licensees, *supra* note 95, at 869.

[109] Charles Belz, The Story of Rock 109 (1969).

V. The 1960 Amendments to the Communications Act

Up to September, 1960, the only authority which the FCC had to regulate payola came from Section 317 of the Communications Act of 1934. It read as follows: "All matter broadcast by any radio station for which service, money, or any other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting, from any person, shall, at the time the same is so broadcast, be announced as paid for or furnished, as the case may be, by such person." This section, which was taken, substantially unchanged, from the Radio Act of 1927, had apparently been based on a section of the Postal Appropriations Act of 1912 under which editorial and other published material appearing in newspapers receiving second-class mailing privileges had to be clearly marked "advertisement" if money or other valuable consideration had been paid in return for publication.[110]

Until 1959, the administration of Section 317 does not appear to have created any great difficulty for the FCC.[111] However, the situation revealed by the congressional enquiries presented the FCC with a new problem. Section 317 referred to the disclosure of payments or other valuable consideration made to the station. But payola in the 1950s did not, generally speaking, involve payments to stations; rather they were made to disc jockeys. It was presumably this fact that led to the FTC being the administrative agency which took action to stop payola rather than the FCC. However, in December, 1959, as a result of the publicity given to payola, the FCC sent an enquiry to all broadcast licensees and the answers received led the FCC to conclude that broadcast stations were not complying with Section 317. In March, 1960, the FCC issued a public notice in which it explained what, in its view, compliance with Section 317 implied. The playing of free records should be accompanied by an announcement indicating that the station had received consideration for playing them and stating from whom the consideration had been received. All mentions of, or the playing of records to be featured at outside activities, such as "record hops," where a profit would be derived or where broadcast exposure is provided in exchange for payment of a performer's fee or the donation of records, prizes, or the use of a hall should

[110] See the discussion at 67 Cong. Rec. 5488.

[111] Only two policy statements seem to have been issued by the FCC before 1960: one related to how a sponsor should be identified and the other to "teaser" announcements. 40 FCC 2 (1950); 40 *id.* 60 (1959). Only one incident seems to have called for extensive FCC action. When the National Association of Manufacturers supplied broadcast stations with a film of the Senate Hearings on the Kohler labor dispute, the FCC intervened to require that an announcement be made stating that the film had been made available by the association. KSTP, Inc., 17 Radio Reg. (P. & F.) 553 (1958); Storer Brodcasting Co., *id.* at 556a; Westinghouse Broadcasting Co., *id.* at 556d.

be accompanied by an announcement. This would identify those who benefited financially from the activity "as well as other parties providing consideration in any form whatsoever in exchange for . . . broadcast exposure." Announcements were also required when transportation, accommodation, and other expenses were paid for in "remote" pickups as an inducement to broadcast material about "a place, product, service or event." This was required because otherwise "the public may reasonably believe that the licensee considered the place, event, etc., to be of sufficient news or entertainment value so as to justify extraordinary expenditures in order to provide broadcast coverage when, in fact, consideration offered by a party or parties other than the licensee or commercial sponsor of the program was responsible, to a degree, for the decision to broadcast the particular program material."[112] The commission rejected the argument that no announcement is called for because these are normal business practices and the press are regularly given such favors, since special requirements have been imposed on broadcasting stations. The commission also explained that "plugola" and "sneaky commercials" violated Section 317.[113]

The FCC's interpretation of Section 317 brought protests from the broadcasting industry, protests which became part of the discussion of the amendments to the Communications Act which were then being considered in Congress. There was general agreement that change in the law was required to deal with payola. Late in 1959, the attorney general sent a report to the president on "Deceptive Practices in Broadcasting Media." The attorney general argued that when a broadcast license is awarded the broadcaster "enters into an agreement with the government to serve the public interest in return for the valuable privilege he is granted."[114] In particular, programming should not be determined by "naked commercial selfishness."[115] A disc jockey receiving payola "does not disclose that he is being paid to play the record and creates the impression that it is being broadcast because of its merit."[116] Given his view that the government could impose extensive regulation in return for the license, it is not surprising that the attorney general concluded that the FCC and the FTC "appear to have authority adequate under existing law to eradicate most, if not all, of the deceptive and corrupt practices in broadcasting which have been disclosed—particularly if the agencies are accorded the full cooperation of the broadcasting industry."[117]

[112] 40 FCC 73 (1960).

[113] *Id.* at 69-75.

[114] U.S. Dep't of Justice, Report to the President by the Attorney General on Deceptive Practices in Broadcasting Media iii (1959).

[115] *Id.* at iv.

[116] *Id.* at 9.

[117] *Id.* at v.

However, since the FCC's authority was limited to the actions of stations and did not extend to employees, "Legislation should be enacted which would make it a criminal offense for employees of stations to accept payola for material which is broadcast without making arrangements with the broadcaster for an appropriate sponsorship announcement."[118]

The problem was to devise a wording (and interpretation) of the new law which would secure "the full cooperation of the broadcasting industry." In testimony to the subcommittee, it was argued on behalf of the industry that the FCC's interpretation of Section 317 was too restrictive. After this testimony, the staff of the subcommittee submitted draft amendments to the Communications Act to representatives of the industry, including the National Association of Broadcasters and the networks ABC, CBS, and NBC. There followed several meetings with the staff of the subcommittee, at which representatives of the FCC were present. Later, the conclusions of the broadcasting industry, about how the Communications Act should be amended, were sent to Representative Oren Harris, who was both chairman of the subcommittee and of the main committee on Interstate and Foreign Commerce. These conclusions set out not only what the law should be but also a series of illustrations on how the law should be interpreted.[119]

The sections in the act relating to payola substantially followed the proposals of the broadcasting industry. To the old Section 317 was added a proviso: "*Provided*, That 'service or other valuable consideration' shall not include any service or property furnished without charge or at a nominal charge for use on, or in connection with, a broadcast unless it is so furnished in consideration for an identification in a broadcast of any person, product, service, trademark, or brand name beyond an identification which is reasonably related to the use of such service or property on the broadcast."[120] The effect of this proviso was to allow broadcasting stations to accept products or services without charge for use in broadcasting without any announcement being required provided that its use was reasonably related to the program. The illustrations, which were reproduced in the report of the committee recommending that the amendments be passed, and which therefore became part of the legislative history, indicate what this proviso was intended to accomplish.[121] For example, if a Coca-Cola distributor furnished a Coca-Cola dispenser for use in a drugstore scene, no announcement was required. And, of course, it was made clear that the playing of free records would no longer require an announcement (unless more were

[118] *Id.* at 52.

[119] Communications Act Amendments: Hearings before a Subcomm. of the House Comm. on Interstate & Foreign Commerce, 86th Cong., 2d Sess. 157-63 (1960).

[120] H.R. Report No. 1800, 86th Cong., 2d Sess. at 20 (1960).

[121] *Id.* at 1-26.

supplied than were needed for broadcast purposes), thus reversing the previous legal position, at any rate as the FCC believed it to have been. (The complete list of illustrations will be found in Appendix B.)

Other parts were added to Section 317. In the case of "any political program or any program involving the discussion of any controversial issue," subsection (a) (2) provided that the FCC could require an announcement if films, records or other materials or services were provided free or at a nominal charge "as an inducement to the broadcast of such program." It should be noted, however, that "news releases" furnished to stations by government, business, labor unions, or similar organizations or by private persons did not require any announcement even though "editorial comment therefrom is used on a program" (illustration 11). By subsection (d), the FCC was empowered to waive any requirement of the section if this would serve "the public interest, convenience, or necessity."

A new section, 508, was added to deal with payments which were made not to the stations but to employees of the station or program producer. It was provided that the station's employee who received payments to include material in programs and also the person who made them had to inform the station about them, and, in the case of payments to a program producer's employee, disclosure had to be made to the employer, or to the person for whom the program was being produced or to the licensee of the station over which the program was to be broadcast. A supplier of a program had to disclose any information about such payments of which he had information to the person to whom it was supplied for broadcasting. In Section 317, an obligation was placed on the station to make an appropriate announcement when there were such payments and also to "exercise reasonable diligence" to obtain this information. The proviso to Section 317 also applied to Section 508. Violation of Section 508 could result in a fine of $10,000, imprisonment for one year, or both.

VI. Implementation of the 1960 Amendments to the Communications Act

With the passage of the amendments to the Communications Act, implementation of the law prohibiting payola became the responsibility of the FCC. The FTC stopped issuing complaints against record manufacturers and distributors and dismissed several complaints which were still outstanding (these appear to have been cases in which the FTC complaint had been contested). The basis for these dismissals was that the public interest was now fully protected by the amendments to the Communications Act and that continued prosecution by the FTC would be "an unnecessary expenditure of

time, effort and funds."[122] Some firms which had earlier entered into consent decrees attempted to have them set aside but, although Commissioner Elman thought this should be done, mainly because not to do so would mean that only those firms which had cooperated with the FTC would be subject to decrees, the rest of the commission decided to let their earlier orders stand.[123]

The FCC, in its enforcement of the new law, had been given illustrations by the House Committee on Interstate and Foreign Commerce, worked out in cooperation with industry representatives, indicating how the amendments should be interpreted. In short, the aim was to prevent "extreme types" of payola while avoiding "some of the hardships" which would have resulted from the FCC's interpretation of the old sponsor identification provision as set out in its public notice of March 16, 1960.[124] These congressional illustrations made it clear that payments in cash or in kind to bring about the inclusion of material in programs required that an announcement be made but that, when it came to the provision of free material without any agreement for identification beyond its use on the program, the law was to be liberally interpreted. In particular, the provision of free records for playing on a program did not require an announcement (illustration 1). We have seen that the supply of a Coca-Cola machine for use in a drugstore scene did not require an announcement (illustration 11). Similarly, the supply of an identifiable automobile to be driven by a detective to chase the villain did not require an announcement (illustration 17). In the same way, the supply of a refrigerator for a kitchen scene did not require an announcement (illustration 15), but this would be required if the actress made a reference to the brand (illustration 22). However, if the refrigerator is furnished as a prize on a give-away show and the brand name, cubic capacity, and the particulars are mentioned, no announcement was required because "the costly or special nature of the prizes is an important feature of this type of program" (illustration 23a). Again, if an aircraft manufacturer furnished free transportation to the cast of a show and the arrival of the cast is shown on the program (the name of the manufacturer being identifiable on the fuselage), no announcement was required, although it would be if an extra close-up of the insignia was shown (illustration 24). (The full list of illustrations will be found in Appendix B.)

The FCC was soon to add two more illustrations of its own. The networks

[122] See, for example, Chess Record Corp., 59 FTC 361 (1961). Other cases will be found at 58 FTC 1016 (1961); and in 59 FTC 166, 209, 230, & 302 (1961).

[123] See Bernard Lowe Enterprises *et al.*, 59 FTC 1485 (1961). However, in at least one case (involving the Radio Corporation of America), an earlier order was set aside, 62 FTC 1291 (1963).

[124] See pp. 296-97 *supra*.

and the National Association of Broadcasters submitted to the FCC in December, 1960, new illustrations relating to automobiles and hotels. These were accepted by the FCC with some minor changes in wording and became illustrations 28 and 29. The effect was to broaden the previous exemptions. FCC illustration 28 amended illustration 17 to allow the supply of automobiles "for other business purposes in connection with the production of the programs, such as transporting the cast, crews, equipment and supplies from location to location or transporting executive personnel to business meetings in connection with the production of the programs." Similarly, congressional illustration 14 had allowed a hotel to originate programs on its premises without an announcement. FCC illustration 29 allowed a hotel also to provide room and board for "cast, production and technical staff" and to provide other services such as electrical and cable connections without an announcement being required.

The other illustrations of the FCC (30 to 36) did not significantly change the position from what it had been before the 1960 amendments. Illustration 33 made clear that the regulations against payola applied to political broadcasts and required that "the true identity of the person or persons by whom and in whose behalf payment was made" should be disclosed.[125] In illustration 35, the FCC reaffirmed its earlier opinion (made in connection with the supply of a film of the Senate Kohler hearings by the National Association of Manufacturers) that an announcement of the name of the supplier of a film was required. The full list of the FCC's illustrations will be found in Appendix C.

The waiver from the payola regulations which the FCC granted for feature films produced initially for theater showing should also be noted. The early negotiations about the interpretation of the 1960 amendments had been carried out with representatives of the broadcasting industry. The film industry does not appear to have become aware of the possible effect of these amendments on its operations until later, and it was not until the final debate in the Senate that serious questions were raised about their impact on the industry. It was then stated that these amendments could be interpreted in such a way as to make illegal many of the normal business arrangements of the film industry.[126] Shortly after the new law came into effect, the FCC held a conference with representatives of the film industry.[127] Following this, in October, 1960, the Alliance of Television Film Producers filed a petition with the FCC asking for a ruling that the old law applied to all films produced before the date of the new law and for the issue of a waiver for

[125] This requirement was to cause some difficulty for the FCC. See 52 FCC 2d 701 (1975).

[126] 106 Cong. Rec. 17625-26 (Aug. 25, 1960).

[127] See 34 FCC 829, 832 (1963).

films produced after that date. That the amendments did not apply to films produced before September 13, 1960, when the new law came into effect, was readily conceded by the FCC. The problem that remained concerned films produced after this date. The FCC proposed to issue a regulation stating that all such films would "in the absence of an adequate showing to the contrary, be presumed to have been intended for television exhibition,"[128] and therefore subject to its regulations on payola. The FCC's view, which it buttressed with facts it had gathered about the film industry, was that "one of the purposes behind the production of virtually all 'feature' films produced today is eventual television exposure."[129]

The film industry argued that FCC regulations concerning payola should not be applied to films produced for theater distribution, even though they might be broadcast in future years. They claimed that the film industry was commonly supplied with "props" such as automobiles for use in films or for other corporate purposes without payment and that to require "credit lines" would greatly reduce the value of such films for second-run syndication, since sponsors making products competitive with those mentioned in the "credits" would not use the films. This would reduce the number of films available for broadcast purposes and/or would lower the quality of those produced.[130]

Although the FCC continued to claim that it had the right to regulate feature films, it did not adopt the subsection under which all films would be presumed to be "intended for television exhibition," and it also decided to waive the requirements of the new Section 317 for feature films produced initially for theatrical exhibition. To justify this action, the FCC stated that its "prior experience with respect to the administration and enforcement of Section 317, of course, contains nothing which would indicate that the theatrical motion picture industry has engaged in practices which were felt to be contrary to the public interest as it relates to broadcasting." This is understandable since the previous law did not call for the FCC to look into the practices of the motion picture industry. The FCC continued: "Lacking any such indications in our own experience, we next turn to the . . . proceedings before the Special House Subcommittee on Legislative Oversight. A thorough overview of the proceedings . . . similarly fails to indicate the existence of practices in the motion picture industry" similar to those which had been found to exist in the broadcasting industry. This again is hardly surprising since the subcommittee was largely concerned with the broadcasting industry and particularly with the activities of disc jockeys. After acting

[128] *Id.* at 833 & 834.

[129] *Id.* at 838-39.

[130] *Id.* at 833.

in a manner which recalls Nelson placing a telescope to his blind eye, the FCC is able to conclude that "we are aware of no public interest considerations which dictate the immediate adoption of a rule similar to that proposed . . . before we adopt a rule which might have some disruptive and dislocating economic effects and which might inhibit program production . . . we believe that we should have evidence indicative of a need for such a rule."[131]

There is something paradoxical about the contrast between the considerable efforts made by the film industry to avoid being subject to the new law and the opinion of the FCC that there did not appear to be any practices in the industry which would justify the enforcement of the anti-payola provisions. There can be no doubt that if these feature films had been produced to be shown first on television, the business arrangements involved in their production would have required special announcements. Perhaps what the FCC had in mind was that the film industry did not appear to engage in the cruder forms of payola, such as were disclosed in the 1959 congressional enquiry. But, as the Begelman affair indicates, the film industry is not without employees capable of engaging in them.[132] It is hard to believe that the business arrangements in making feature films are not essentially the same as those found in making films for the broadcasting industry (and which have been held to require regulation).

The House Committee on Interstate and Foreign Commerce explained that the 1960 amendments only dealt with payments in cash or their equivalent. They did not cover indirect benefits which accrued to licensees and their employees, and which might affect the selection of program material, such as stock ownership or other interests in the production of programs or program material. However, the committee added that "disclosure of such benefits may be required by the commission under its general rulemaking powers."[133] In 1961, the FCC published proposed rules covering indirect benefits (with examples).[134] All comments filed with the commission opposed the proposed rules. Some argued that the FCC lacked the authority to make such rules. The FCC issued a new notice setting out proposed new rules in 1970. The FCC maintained that the selection of program material, such as the records to be played on a radio program should be made "on its merits—*i.e.*, not on the basis of what will further the non-broadcast financial inter-

[131] *Id.* at 841-42.

[132] In February 1978, David Begelman resigned as president of Columbia Pictures Industries Inc. amid allegations of a cover-up within the company involving forgery charges. The Begelman affair brought on investigations of financial practices throughout the film industry. See the New York Times, Feb. 7, 1978, at 1, col. 2; and N.Y. Times Index 1978, at 221.

[133] See H.R. Report No. 1800, *supra* note 120, at 19-20.

[134] 40 FCC 119 (1961).

ests of the licensee or someone else involved in the selection process."[135] To make this possible, persons having such a financial interest should be insulated from the selection process and if this could not be done, steps should be taken to ensure that such financial interests were not a factor influencing the selection of program material. To the extent that this was done, no announcement would be required. However, if such insulation was not possible, and where such financial interests were, or might be, a factor influencing the selection of program material, an announcement should be made except where the financial interest was "readily apparent." The FCC, in a series of examples, dealt with the practical problems that would be faced by licensees and others in conforming to such rules. Up to the present time, the FCC has not issued rules relating to indirect benefits.

According to the House Committee on Interstate and Foreign Commerce, reporting on the 1960 amendments, their main purpose was to stop the "extreme types" of payola and in particular the cash payments (and other favors) given to disc jockeys by record producers and distributors.[136] What has been the effect of the change in the law? Those writers on the record industry who deal with the subject state that payola has continued.[137] Reports in the press tell the same story.[138] The FCC's own investigations confirm the essential accuracy of these accounts. In 1964, the FCC announced that it had received "allegations from many sources indicating the continued existence of 'payola,' 'plugola' and other related practices by broadcast licensees,"[139] and, as a consequence, the FCC, starting in 1966, conducted non-public hearings on the subject. These hearings left little doubt that payola had not been stopped by the change in the law.[140]

Starting in 1973, the Department of Justice (assisted by the Internal Revenue Service and the FCC), as well as four grand juries, investigated payola in the record industry for two years, as a result of which they concluded that payola had been received by radio station employees in sixteen cities. Sixteen

[135] 35 Broadcast Announcement of Financial Interest, Fed. Reg. 7983 (released May 18, 1970).

[136] H.R. Report No. 1800, *supra* note 120 at 19.

[137] See Arnold Passman, The Deejays, 242-43 & 258-59 (1971); R. Serge Denisoff, Solid Gold: The Popular Record Industry 232, 260, & 273-79 (1975); Paul Hirsch, The Structure of the Popular Music Industry 54 (Survey Res. Center, Inst. for Soc. Res., Univ. of Michigan, n.d., c. 1967); and Steve Chapple & Reebee Garofalo, Rock 'n' Roll Is Here to Pay 183 (1977).

[138] See Jack Anderson, New Disc Jockey Payola Uncovered, Washington Post, March 31, 1972; and Disc Jockey Play-for-Drugs Outlined, Washington Post, April 21, 1972; The Specter of Payola '73, Newsweek, June 11, 1973, at 74 & 79.

[139] See "Payola," "Plugola," and Other Related Practices (FCC 64-1101) 29 Fed. Reg. 16220 (released Nov. 27, 1964).

[140] I was given permission by the FCC to read most of the transcript of the non-public hearings (Docket No. 16648) at the Washington office of the FCC.

individuals and six corporations were indicted by grand juries in Newark, Philadelphia, and Los Angeles for "violating the federal statute banning under-the-table payoffs for playing records, as well as for travelling between states to commit bribery, for mail and wire fraud, for filing false income tax returns and for perjury." In addition, a fourth grand jury, in New York City, indicted a former president of the CBS/Record Group and a former director of artist relations for CBS Records, for income tax evasion. Both had earlier been fired by CBS after allegations that they had engaged in payola.[141] In April, 1976, four executives of the Brunswick Record Company were fined and given prison terms, after a trial in which radio station music directors (who had been granted immunity), gave testimony that they had received cash payments from representatives of the company. The lawyers for the executives had argued that "cash payments were a way of life in the record industry and part of the promotion end of the business," to which the judge replied, "If this is true, then the record business is a dirty business indeed."[142] It should be noted that although these cases are usually referred to in the press as "payola" cases and the headline in the *New York Times* said that the Brunswick executives were sentenced "for payola," the charge in such cases, whether because of plea bargaining or for some other reason, is usually income tax evasion, perjury, or some similar offense, rather than infringing the Communications Act. In the case of the Brunswick executives, they were found guilty of a conspiracy to sell records for cash and not report the income and defrauding recording artists and song writers of their royalties. In December, 1976, the FCC announced that it had received "new information and new complaints from the public" and it resumed its proceedings on payola.[143] The proceedings have not yet terminated.

So far as I know, no action has ever been taken by the FCC to prosecute any licensees or their employees, using the 1960 amendments to the Communications Act. Even in the investigations of the Department of Justice in 1973-1975 the FCC seems to have played a minor role. The chief of the FCC's Complaints and Compliance Division has indicated that he lacks the resources for a full-scale investigation of payola.[144] However, in its regulation of individual licensees, the FCC does take into account any information which it uncovers about payola and imposes administrative sanctions when the licensee has not exercised "reasonable diligence" in preventing payola.[145] This has given the individual licensee an incentive to set up procedures

[141] See Broadcasting, June 30, 1975, at 27-29.

[142] See the New York Times, April 13, 1976, at 66; and Broadcasting, Feb. 23, 1976, at 53-54, and April 19, 1976, at 47.

[143] FCC Notice (released Dec. 30, 1976).

[144] See Broadcasting, June 30, 1975, at 27.

[145] *Id.*

which make the giving of payola more difficult. A common way in which this has been done is for the program director of the station to prepare play-lists from which disc jockeys are required to choose the records which they play on their programs.[146] Although, no doubt, payola is on occasion received by the man who prepares the play-list, the procedure must discourage the making of such payments and has almost certainly had the effect of reducing the number of transactions involving payola and, very probably, the total amount paid.

Other evidence points in the same direction. There is now said to be greater reliance by record companies on the promotion man (the equivalent in the record industry of the song-plugger) to do what is necessary to obtain "exposure" for their records. "With the diminuation of direct payola, the industry representative or promo man was restored to a position of importance. . . . In part, this restored the majors to a place of competitive advantage over the [independents] since many of the smaller companies, having relied heavily upon payola, did not have a promotional apparatus of any magnitude."[147] Promotion includes advertisements in trade papers, mailings, personal appearances by recording stars, visits to radio stations, the supply of records, as well as other activities which build "goodwill" and which, if not payola, border on it.

Although payola continues, there can be little doubt that its incidence has been reduced since 1960. The fact that there have been no prosecutions by the FCC does not mean that the 1960 amendments to the Communications Act have been without effect.

VII. The Rationale of the 1960 Amendments

The payola enquiry by the House subcommittee which preceded the enactment of the 1960 amendments to the Communications Act was conducted as if everything that really mattered had already been discovered. The underlying purpose seems to have been to obtain confessions of guilt from the witnesses and to demonstrate the high moral standards of the congressmen. No attempt was made to understand the phenomenon under consideration, to enquire what would happen if the proposed legislation was passed, or to consider, if payola had adverse consequences, whether there were alternative ways of dealing with it. In the circumstances it is hardly surprising that widely held misconceptions about payola were perpetuated by the enquiry.

In spite of the fact that payola is commonly referred to as commercial

[146] See R. Serge Denisoff, *supra* note 137, at 234; Paul Hirsch, *supra* note 137, at 63; Charles Belz, *supra* note 109, at 116.

[147] R. Serge Denisoff, *supra* note 137, at 233.

bribery,[148] most cases of payola do not involve commercial bribery as that term is generally understood. A person is guilty of commercial bribery, according to the New York Penal Law, "when he confers, or agrees to confer, any benefit upon any employee, agent or fiduciary without the consent of the latter's employer or principal, with intent to influence his conduct in relation to his employer's or principal's affairs."[149] The victim of commercial bribery is the employer, whose employees are induced to perform acts inimical to his interest. It is obvious that payola would not constitute commercial bribery if the employer was aware that it was being given and did not object to its acceptance or even encouraged it. As was said by a judge in New York: "It would seem that there could be no violation of the [commercial bribery] statute if the principal or employer had knowledge and either approved or condoned the act of his employee or agent."[150]

What is apparent from the history of payola is that it has not been the employers who objected to the acceptance of payola by their employees. Nor can there be much doubt that in most cases they were aware of what was going on. It was the music publishers who wished to put a stop to the payments made to dance band leaders and singers rather than the hotels and dance halls in which they performed or the radio stations on which their programs were broadcast. When payola was banned in the NRA code for the broadcasting industry, this provision was inserted, not at the behest of the broadcasters, but of the music publishers. And later, when the music publishers wanted the FTC to approve a code of fair practice which would make payola illegal, the Fair Practice Board of the FTC noted that "the employers of such musicians, singers or artists, for the most part at least, have no objection to such professional employees receiving such payments or gifts."[151] Still later, in the 1950s, when payola was directed to disc jockeys, it was apparently a letter from Burton Lane, representing the American Guild of Authors and Composers, which led to the payola enquiry and it was a record company's complaint which set into motion the FTC's investigation of the payments which record companies made to disc jockeys.

While all this was happening, the operators of radio stations remained passive. The inference that I draw from this conduct is that most of them did not consider the acceptance of payola by disc jockeys as particularly harmful to their interests. This inference is strengthened if we have regard to the actions of the FCC, which since the change in the law in 1960, has used fines and other administrative sanctions, to make sure that broadcast licenses

[148] See, for example, the Attorney General's Report to the President, *supra* note 114, at 39-40.

[149] N.Y. Penal Law, § 180 at 326 (McKinney).

[150] June Fabrics v. Teri Sue Fashions, 194 Misc. 267, 270, 81 N.Y.S. 877 (1948).

[151] See p. 282 *supra*.

show "reasonable diligence" in combatting payola. This is something which one would have supposed that they would do without FCC prodding if payola really harmed them.

The lack of any serious effort on the part of the broadcasting industry in the 1950s to prevent payola suggests that there was a broad congruence of interest between the operators of radio stations and the disc jockeys. This was undoubtedly true. And the reason for this becomes clear if we compare the results of a system without payola with one in which payola is received by disc jockeys. Assume that the operator of a radio station (no doubt in the person of the music director or some similar officer) chooses the records to be played and there is no payola (although the records are supplied free). He would select records so as to attract as large an audience as possible, which would enable him to maximize the revenue obtained from the sale of commercial time. He may also be concerned about the composition of the audience but this complication will be ignored for the time being. Now assume that the choice of records to be played is made by the disc jockey, who receives payola. That such payments are made does not necessarily imply that there has been a change in the records played from what it would have been without payola. Suppose, for example, that the disc jockey wished to play the same records as those the station operator would have chosen. The disc jockey would not be denied an income from payola. Record companies would be willing to pay the disc jockey to play these records since there would presumably be other records which could be substituted for them without any great loss of audience and for which payola could be obtained. The ability of disc jockeys to obtain payola would lower the salary for which they would be prepared to work for radio stations and would therefore increase station profits. But disc jockeys would receive a reward for the extra work in which they engaged to obtain payola and so their earnings would also rise. Payola would benefit both the operators of radio stations and the disc jockeys.

Although it is unlikely that the records selected would remain exactly the same in the new situation, the claim of some disc jockeys that their acceptance of payola had not affected their choice of records is not perhaps as far from the truth as might at first appear. To induce a disc jockey to play a particular record, a record company would be willing to pay up to the increase in profits which would result from playing the record. But a disc jockey would not simply play those records for which he was offered the greatest payola. Like the radio station operator, he would also want to have a large audience since a fall in the rating of his show would lead both to a reduction in his salary and to a reduction in the amount which record companies would offer as payola for playing any given record. In assessing his

gain from playing a record, a disc jockey would have to deduct from the payola he would receive from playing a less popular record both the fall in his salary and the loss of payola received from playing other records. This calculation would make a disc jockey reluctant to play less popular records. But even if there were some loss in revenue from commercials the station operator would not suffer since this would be offset by the reduction in the disc jockey's salary. Station profits would rise or, at the least, remain the same.

The harmony between the interests of the broadcast licensee and the disc jockey is probably even greater than this analysis would indicate. It has been assumed that since a station operator (not receiving payola) would wish to maximize the size of the audience, to entrust the selection of records to a disc jockey (receiving payola) could not increase but could only reduce the station's audience. But this would not necessarily happen. It seems probable that disc jockeys, who are not part of management, would be able to see more representatives of the record companies, would be closer to their audience, would be more aware of trends in popular music, and would also know better which records were suitable for their own particular programs. As a consequence, a transfer of the choice of records to the disc jockey need not entail a reduction in audience and may indeed lead to an increase.

Payola is also likely to have some effect on the character of programming. Since record programs will become more profitable with payola, there may be a tendency for such programs to displace non-record programs. There may also be a change in the character of the record programs themselves. Up to now it has been assumed that the revenue from commercials depended solely on the size of the audience. But it is obvious that the composition of the audience may also be of importance since advertisers prefer an audience more heavily weighted with persons likely to buy their products. The addition of payola as a source of income for the disc jockey (and, indirectly, for the station) would almost certainly mean that the records played would be such as to attract an audience which included more record buyers than if the aim of the program was simply to gather an audience for commercials for clothing, cosmetics, cameras, or whatever was advertised in the commercials. Such a change in audience would, of course, only come about if the gain from the additional payola offset the loss in revenue from the sale of commercial time. All in all, it is easy to see why the operators of radio stations were not in the forefront of those opposing payola and therefore why it is hard to regard payola as constituting commercial bribery.

But the view that payola was commercial bribery was not the sole basis for objecting to it. It was also argued that it fosters deception. As the attorney general said in his report to the president: "A disc jockey who receives

such a payment does not disclose that he is being paid to play the record and creates the impression that it is being broadcast because of its merit."[152] The FTC adopted a similar point of view except that the phrase it used was "merits or public popularity."[153] This deception, according to the attorney general and the FTC, comes about because listeners assume (in the absence of any disclosure that the disc jockey is receiving money from record companies) that a disc jockey has picked what he considered to be the best of the current records and they are therefore led to buy these records without checking or hearing others. The result is a disappointment for the purchasers, who become tired of playing the record sooner than they (although not necessarily their families) had hoped. Or they may discover that a record which they had been led to believe would be extremely popular is not and this may adversely affect the enjoyment they derive from playing the record. That this may happen is not open to dispute. But it seems improbable that such deception would occur on a large scale. Purchasers not only hear the disc jockey—they also hear the record before buying. And a disc jockey who receives payola would not wish to disappoint his listeners often since otherwise they would cease to take his recommendations seriously and his income would fall.

It has been suggested to me that even though a disc jockey receiving payola would tend to play records which would appeal to his particular audience, deception would still exist in that, if there were disclosure of the fact that the disc jockey was being paid by record companies, the attitude of his listeners would be adversely affected and this would result in them being less willing to purchase the records played on his programs. As it is generally agreed that hearing a record is the most powerful factor bringing about its purchase, presumably this disclosure of payola would lead to a decline in the sales of records (as well as less pleasure from the programs). Whether listeners would be happier with disclosure is another matter. The prevalence of self-deception suggests that there are many truths that we prefer not to know. Unfortunately, those conducting the congressional inquiry thought it unnecessary to investigate what listeners thought the motives of the disc jockeys were or how they felt about them or what their record-buying habits really were, and so it is difficult to come to any conclusion on these questions. One may, however, doubt whether the disclosure of the existence of payola would make much difference since disc jockeys are skilled in handling commercials, an art in which sincerity (or the appearance of sincerity) is generally considered important.

The puzzle to be explained is why the stations did not make a direct

[152] *Supra* note 114, at 9.

[153] FTC Notice (released Dec. 6, 1959).

charge for playing records and thus eliminate, at least to a large extent, the opportunities for payola. The sales staff of a station are expert in the pricing and selling of commercial time, and it would be surprising if they could not carry out this function more efficiently than most disc jockeys. There would appear to be three possible explanations for this failure to make a direct charge. First, payola is more difficult to trace and may therefore be omitted from an income tax return with less risk than a salary. Consequently, the amount by which the station could reduce the disc jockey's salary would be more than the amount of the payola (since income tax would be paid on his salary). Second, the amount which the stations could charge for playing records would be reduced to the extent that disclosure of these payments diminished the sales of records, a factor which obviously would not affect the payola received by disc jockeys. I am, however, inclined to lay more stress on a third explanation, namely that the obstacle to direct charges was the form of announcement which the FCC would have required the stations to make. I base this on the FCC's ruling in 1960 on the announcements required in connection with the broadcast use of "free records" and on the response to this of the stations, who regarded the FCC's requirements as completely unacceptable. They complained that the announcements which had to accompany the playing of each record turned a large part of the program into a commercial and imposed a great hardship on the listening public.[154] It is easy to see that such policies on the part of the FCC would discourage the stations from attempting to introduce a charge for broadcasting records. The FCC never seems to have thought that a charge for broadcasting records was desirable and was therefore never led to search for a form of announcement which would have been acceptable to the stations but which would let listeners know that payments were made by record companies.

The objection to payola by the attorney general and the FTC should be differentiated from much that was said by congressmen in the payola enquiry. Echoing what the music publishers had said about the choice of songs in the period before World War II, the congressmen argued that the records should be chosen because of their "merit" or because they served "the public interest." The attorney general and the FTC argued that since the disc jockey did not disclose that he had accepted payola he created the false impression that the records broadcast were chosen on their merit. Their objection would be removed if there were disclosure of the payments. The congressmen's objection would apply whether or not the payments were disclosed. However, it is an objection of little practical importance. The alternative in the United States to a system involving payola is not one in

[154] See FCC File 13454, Original Vol. 3 (National Archives, Washington, D.C.).

which the choice of program depends on merit but one in which program content is determined by its success in assembling the right kind of audience for the commercials. The main effect on the programs of the abolition of payola would be to displace record programs which were attractive to record buyers by record programs which appealed to buyers of other goods and services. It seems difficult to argue that such programs would have more "merit" (considered as record programs). What undoubtedly caused the congressmen (and others) to think in this way was their belief that the records actually played (mainly rock and roll and similar music) lacked merit, were corrupting, and would not be played in the absence of payola. The music may have been corrupting, but the congressmen seem to have thought that the choice of "immoral" music was due to "immoral" business practices. But payola has always been a feature of the popular music industry. In times past, when the public enjoyed songs with music (and lyrics) very different from those of today, it was these songs which were promoted by payments to performers. What has been promoted by payola has always depended on what the public would buy (sheet music earlier and records more recently) after they had heard the music. And this has depended on the tastes of the period. But the congressmen were not wholly wrong. Although there has to be a receptivity to a type of music if it is to be successfully promoted, without promotional activity (which includes payola), the movement towards a new type of music would undoubtedly be slower (because the opportunity of hearing it would be less). So the abolition of payola, if it would not necessarily have stopped or reversed the trend towards rock and roll music, would have slowed it down and would therefore have resulted, at least for a period, in more "good music" being broadcast. Another factor would work in the same direction. Payola, by leading to the playing of records which appealed to record buyers rather than to consumers of the goods advertised in the commercials, would result in the audience containing relatively more teenagers who are more likely than other age groups to enjoy rock and roll music.

The FCC, in justifying the "sponsor identification" rule (under which payola is prohibited), has adopted a point of view similar to that of the FTC: ". . . the public is entitled to know by whom it is persuaded."[155] In its notice about indirect benefits, the FCC added that "the public is no less entitled to know of the existence of such benefits and motivations as in the other kind of case where the inducement is created by payments or the furnishing of programs without charge."[156] Concealment of the fact that program material was broadcast because of a payment or other consideration constituted

[155] 40 FCC 105 (1961).
[156] 40 FCC 119 (1961).

"deception."[157] Of course there is usually no problem. A soap, automobile, drug, or cosmetics concern, which has paid for the expenses of a program will normally want everyone to know that it sponsored the program. But even if there is concealment, what prompted a supplier to provide program material may not matter to the radio and television audience. A consumer's ability to choose wisely between what is offered to him may not depend on knowing the "benefits and motivations" which prompted its supply. Of course, it was the FCC's contention that knowledge of whether a disc jockey received a payment from record companies helps the audience to appraise the worth of the disc jockey's opinions—and this may be true. But there are other programs in which knowing who paid for it or the motivations of the supplier can influence even more the response to the program. For example, in the case of news programs and commentaries, knowledge of the source of finance and the political and religious doctrines and affiliations of the speaker is likely to influence the degree of confidence one has in the accuracy of the news and the responsibility of the comment. However, in this case full disclosure is not required. There need be no announcement when "[n]ews releases are furnished to a station by Government, business, labor and civic organizations, and private persons, with respect to their activities, and editorial comment therefrom is used on a program" (House committee illustration 11). It is not easy to reconcile this exemption in an area in which the case for disclosure is strong with the FCC's view of what the anti-payola provisions are intended to accomplish, or with the attitude taken towards the acceptance of payola by disc jockeys.

On the other hand, it would not seem important in choosing between programs or in one's enjoyment of them to know how the salaries of the performers are determined. Among the House committee's illustrations of cases to which the anti-payola provisions did not apply was the following: "A well-known performer appears as a guest artist on a program at union scale because the performer likes the show, although the performer normally commands a much higher fee" (illustration 20). Philanthropy being rare in the entertainments industry, it is easy to imagine the circumstances which would lead a performer to like a show and to be willing to work at less than his normal fee. These include boosting the sales of his records, increasing the likelihood of obtaining concert engagements or roles in films and so on. A similar question has arisen in relation to performers whose normal fee is not much higher than the union rate. The FCC has held that it violates the anti-payola provisions for a performer, paid the union rate, to arrange for a recording company or other business to reimburse the producer for part or all of his fee, even though it is announced at the end of the program that

[157] 25 Fed. Reg. 2406 (1960).

"promotional assistance" has been received from that recording company or business. Similarly, it is a violation for a group to make a similar arrangement under which the producer is reimbursed for the difference between the union rate for a single performer and that for a group. Again, it is a violation for a performer to reimburse the producer for special expenses involved in his act. For example, it would violate the anti-payola provisions for a performer "to reimburse the producer for the fees paid by the latter to musicians, not normally provided in the program, who accompanied the performer."[158] Payola, in effect, exists whenever an attempt is made to circumvent union restrictions on methods of payment. The result is to allow well-known performers to take into account the other benefits which flow from appearing on a broadcast program but to restrict or deny this possibility to less well-known performers. The aim of this regulation, if we believe the FCC, is to prevent the public from being deceived.

If we have regard not to what congressmen and government agencies have said about the purpose of the anti-payola provisions but to the business interests which, over the years, have sought to curb payola, it becomes easier to discern what these provisions were expected to accomplish. Up to World War II, there is no doubt about the businesses that wanted payola to be abolished. The music publishers tried to secure this on many occasions and for those of them still alive in 1960, the amendments to the Communications Act would have represented the final passage into law of the anti-payola provisions of the NRA codes. After the war, when payola was paid by record companies to disc jockeys, it was the suppliers of "good music" (the music, that is, of composers such as Oscar Hammerstein, Richard Rodgers, Irving Berlin, and Burton Lane) who objected to payola. This hostility to payola came to the fore in 1958 and 1959 and was, it seems clear, in large part a response to the changes which took place in the 1950s in the kind of music purchased.

In the 1950s, particularly from 1955 on, "rock and roll" music became extremely popular. Many new record companies were formed, mainly concentrating on the new music. The effect on the market shares of existing companies was dramatic. In the years 1948 through 1955, four companies (Capitol, Columbia, Decca, and RCA-Victor) had, on an average, 78 per cent of the records which were ever on *Billboard*'s top ten Hit Parade, and the figure was never less than 71 per cent (in 1953). In 1956, the share of the hit records of these four companies was 66 per cent, in 1957, 40 per cent, in 1958, 36 per cent, and in 1959, 34 per cent.[159] These changes in the popular-

[158] 23 FCC 2d 588-89 (1970).

[159] See Richard A. Peterson & David G. Berger, Cycles in Symbol Production: The Case of Popular Music, 40 Am. Soc. Rev. 158, 160 (1975).

ity of different kinds of music also affected the relative positions of the two major royalty collecting agencies, ASCAP and BMI. BMI was heavily concentrated in country and western music and rhythm and blues while ASCAP was more evenly spread over all types of music. During the period 1948 through 1955, 68 per cent of the tunes which were number 1 on *Billboard*'s top hits were controlled by ASCAP, and ASCAP's share was never less than 50 per cent (in 1951). In 1956, its share was 23 per cent, in 1957 and 1958, 25 per cent and in 1959, 31 per cent.[160]

In the circumstances, it is hardly surprising to find that the suppliers of "good music" came to the conclusion that something was wrong with the economic organization of the popular music industry. In the 1958 hearings, it was argued that the networks and broadcasting stations, as a result of their ownership of BMI, had encouraged the playing of BMI-controlled pieces on disc jockey programs and that this was the main reason why "good music" had been displaced by "bad music." But it was also claimed that disc jockeys had been induced to play BMI records by means of payola. In the 1959 hearings, no reference was made to BMI and the growth in the popularity of rock and roll music was ascribed solely to payola.

That payola in the late 1950s was used in the main to promote the playing of rock and roll and similar music is true. Indeed, as early as 1951, it had been reported in *Billboard* that "By universal agreement in the music trade, the payola situation is at its worst among the rhythm and blues spinners."[161] There can be no doubt that the new companies, which entered the business in the 1950s and succeeded in securing such an important share of the record market, relied on payola to obtain "exposure" for their records. In an article in *Variety* in January, 1958, dealing with the inroads which the "indies" [independents] had made into the markets of the major record companies, there is a barely disguised reference to the part played by payola in the operations of the independents:

> Another aspect of the indie breakthrough is its free-wheeling operation. Working without the problems of a fixed overhead and a 'loose' bookkeeping system, the indies have been able to knock the majors out of the box in key areas. Working with hustling freelance distributor setups, the indies have been able to kick off their product in the areas that serve as a springboard for nationwide prominence. It's on the local level, particularly, that the indies have been outscoring the majors with giveaway deals and 'special' considerations for deejays but this is all the start they ask. And, as has been evidenced by the mopup during the past year, it's all they need.
>
> Since it's open season in the disk business all year round, more small labels than ever before have been able to climb on the national hit lists. Some of the labels

[160] I am grateful to Professor Richard A. Peterson, Vanderbilt University, who provided me with these figures.

[161] Billboard, Jan. 13, 1951, at 1, col. 4.

weren't even around the year before. The market became wide open for such left field diskery entries as Keen, Phillips International, Cameo, Imperial, Chess, Aladdin, Roulette Sun, Speciality, Gone, Ember, Checker, Ebb, Lance, Paris, Class, Vee-Jay and Argo.[162]

To sell music on a large scale it is necessary that people hear it. Payola is one way of inducing people to play it so that it can be heard. From a business point of view, the ban on payola is therefore simply a restraint on one kind of promotional or advertising expense. Before World War II, when it was the music publishers who wished to see payola abolished, their aim was to eliminate one dimension of competition and thereby to increase their total profits. What they wanted was similar to the more general bans on advertising which have been instituted by various professional associations. After World War II, when opposition to payola came from those segments of the popular music industry which were hurt by the rise of the new music and the associated development of new record companies, the aim of the business interests which sought to curb payola seems to have been not so much to secure a general benefit for the industry as to hobble their competitors.[163]

Mr. Paine, in justifying the anti-payola provisions of the NRA code, said that it would protect the small publisher,[164] and Congressman Oren Harris, in his introductory remarks to the payola enquiry, said that "we are told" that payola tends "to drive out of business small firms who lack the means to survive this unfair competition."[165] Such statements convey a completely false impression. Although the music publishers' attempts to regulate payola do not seem to have been designed to harm the small publisher, it was, in fact, small firms which protested to the FTC in the 1930s about the harm they would suffer if payola was banned.[166] In the period after World War II, all record companies seem to have given payola to disc jockeys, but, as we have seen, the smaller companies thrived on it. These companies lacked the name-stars and the strong marketing organization of the major companies, and payola enabled them to launch their new records in a local market and, if success there was achieved, to expand their sales by making similar efforts in other markets. There is no reason to suppose that a ban on payola would,

[162] Variety, Jan. 8, 1958, at 215.

[163] See p. 314 *supra*. Richard A. Peterson & David G. Berger state that "[in] an effort to curb the influence of the new independents, and protect their investment in the crooners they had promoted into stardom, the older established Tin Pan Alley-oriented companies 'exposed' the payola practices of these new entrepreneurs in 1958." Three Eras in the Manufacture of Popular Music Lyrics in The Sounds of Social Change 295-96 (edited by R. Serge Denisoff & Richard A. Peterson, 1972). This statement is in part based on confidential sources and cannot therefore be checked. But it is not inconsistent with what can be learnt from published sources.

[164] See p. 280 *supra*.

[165] See p. 292 *supra*.

[166] See pp. 283, 284, 285 *supra*.

in general, have helped the small music publishers or has helped the small record companies.

Since the 1960 amendments to the Communications Act impose a restraint on a particular kind of advertising expenditure, it is to be expected that it would lead firms to increase other forms of promotional activity, trade press advertising, mailings, visits by salesmen, personal appearances by performers and, in general, all other forms of "plugging." And this appears to have happened. We have seen that shortly after payola became illegal, there was apparently an increased activity by the promotion departments of record companies.[167] An article in *Fortune,* published in April, 1979, by Peter W. Bernstein, indicates that this heightened activity has continued. It notes that record companies are "vastly increasing promotion expenses, while the most powerful form of advertising—radio play—remains free." At the same time the smaller companies have lost ground: ". . . small record companies, and small divisions of big companies have been making deals with, or selling out to, their big competitors—principally because the majors have built up distribution systems so powerful that smaller companies using wholesale middlemen have lost their ability to compete in the retail marketplace. . . . Six major companies—CBS, Capitol, MCA, Polygram, RCA, and Warner Communications—now control more than 85% of the U.S. market."[168] This growth in concentration was probably largely a result of the larger companies adjusting to the new taste in music but the 1960 amendments, which made payola illegal, undoubtedly helped in the process.

It is consistent with the view that a ban on payola would lead to an increase in other promotional activities that, in the past, support for curbing payola has come from those likely to benefit from this diversion of advertising expenditures: *Variety* early in the century and the song-pluggers at the time their union was formed. What the song-pluggers then said that they feared was that the "publisher's check book would finally obviate the necessity of maintaining a plugging staff."[169] This makes clear one of the disadvantages of the ban since, leaving aside its anti-competitive aspects, advertising is diverted from a form which, apart from the expenses involved in giving payola, does not use resources to a form that does. By leading to the employment of more resources in promotional activity, the ban on payola has a tendency to reduce the national product elsewhere.

Of course, firms will only expand their other promotional activities up to the point where they yield sufficient additional net income to cover their

[167] See p. 306 *supra.*

[168] Peter W. Bernstein, The Record Business: Rocking to the Big-Money Beat, Fortune, April 23, 1979, at 59, 61.

[169] See p. 285 *supra.*

cost, and it could be that the increase in the amount spent on these promotional activities would be less than the amount previously paid as payola. In this case industry profits would rise by the amount by which the payola previously paid exceeded the increase in expenditures on other promotional activities. This was presumably the belief of the music publishers before World War II. But the rise in profits inherent in this situation would have other effects. In the case of the record companies, such an increase in profits would lead to an increase in the supply of new records. Previously, record companies would have been deterred from expanding their output of new titles because they thought that the probable additional receipts would not warrant increasing the additional cost. But in the new situation, the probable net income from producing a record would have risen. The effect would be for the output of new titles to expand. And this would lead to a decrease in the probable receipts from any given new title. When these probable receipts have fallen sufficiently to make it no longer worthwhile to incur the costs of producing additional records, the expansion in output would cease. If the records in the additional supply induced by the ban on payola were on average essentially the same as those already produced in terms of the pleasure given to their audience, it seems clear that the expansion in the output of records would entail a waste of resources.

What has been described as happening after the ban on payola is the normal result of a situation in which no price is exacted for the receipt of a valuable service.[170] Indeed, in the early days, what we now call payola was termed the "payment system," or, as economists would say, the pricing system. When a pricing system is not used and something of value is provided for nothing, people are willing to incur costs up to its worth in order to secure the benefits of that service. One reason, among others, for pricing a service is to avoid this unnecessary use of resources. Normally we consider such pricing as natural without considering the advantages it brings. If locating stores on a particular street or in a particular section of a town enables those stores to achieve greater sales, we expect that the rent charged will reflect this. In the same way, if the playing of a record by a radio station increases the sales of that record, it is both natural and desirable that there should be a charge for this. If this is not done by the station and payola is not allowed, it is inevitable that more resources will be employed in the production and distribution of records, without any gain to consumers, with the result that the real income of the community will tend to decline. In addition, the prohibition of payola *may* result in worse record programs, will tend to lessen competition, and will involve additional expenditures for

[170] Susan Rose-Ackerman adopts a somewhat similar position in Corruption: A Study in Political Economy (1978). See esp. 204-05.

regulation. The gain which the ban is thought to bring is to make the purchasing decisions of record buyers more efficient by eliminating "deception." It seems improbable to me that this problematical gain will offset the undoubted losses which flow from the ban on payola. But no attempt was made, before the 1960 amendments were adopted, to estimate the gains and losses which would flow from the change in the law and an assessment of its effects must remain very imprecise. Futhermore, no attempt was made to discover whether it might be possible to devise a form of announcement which would alert listeners to the fact that payments were made by record companies whose records were played (so that "deception" could be prevented) without the clutter of announcements to which broadcasters objected when the FCC wanted the stations to make announcements when free records were used. If this could be done, it would be possible to prevent the deception without bringing about those other disadvantages which result from the present regulations of the FCC.

It is not enough to outlaw payments simply because they can be described as "improper." Some attempt should be made to discover why such payments are made and what would in fact happen in the world as it exists if they were made illegal.

APPENDICES

APPENDIX A

NRA Code of Fair Competition for the Music Publishing Industry No. 552

Article VIII Trade Practice Rules

1. No member of the Industry shall pay or give, directly or indirectly, or in any other manner present to any performer, singer, musician, or orchestra leader, employed by or otherwise performing under contract for another, or to their agents or representatives, any sum of money, gift, rebate, royalty, favor, or any other thing or act of value, when the purpose is to induce such person to sing, play, perform, or to have sung, played, or performed, any works published, copyrighted, owned, and/or controlled by such member of the Industry.

2. No member of the Industry shall furnish without charge to any performer, singer, musician, orchestra leader, or other professional person, any copies other than regular professional copies of musical compositions published by such member or regularly published orchestrations of such musical compositions; it being intended that no member of the Industry shall furnish special arrangements of such professional copies or such orchestrations to any performer, singer, musician, orchestra leader, or other professional person, or to any one designated by, or representing, or associated with such persons, nor pay such persons for the making of any such arrangements. If, however, any member of the Industry permits such persons to

make a special arrangement, then no member of the Industry shall extract parts or otherwise copy such special arrangement thus made, either in whole or in part, nor pay for such extractions or copying; but nothing contained herein shall be deemed to limit the transposition of any musical work from one key to another.

3. No member of the Industry shall: (a) purchase tickets, or pay for any advertisement in the program, for any benefit, performance, dance, or similar function, if the purchase is in effect a gift to, or a favor for, any performer; (b) pay for any advertisement in a catalogue of a mail-order house; (c) pay for any advertisement in a dealer's and/or distributor's catalogue or house-organ; (d) insert advertising in any trade paper, or other like periodical, if the advertisement is intended to "puff," flatter, compliment, or exploit any performer, singer, or orchestra leader.

4. No member of the Industry shall pay, present, or otherwise give any money, service, favor, or thing or act of value, to any owner, lessee, manager, employee, or other person in control of or interested in, any talking machine company, radio broadcasting company or station, electrical transcription company, motion picture company, or any place of public entertainment, for the privilege of performing, recording or reproducing, or having performed, recorded or reproduced, in such places, any works published, copyrighted, owned and/or controlled by such member of the Industry. Any member of the Industry may engage the facilities of a broadcasting studio or hire any theatre or other place of public entertainment for the purpose of having performed therein any of the musical compositions published, copyrighted, owned and/or controlled by such member, provided however, that a public announcement is made at such performance that the performance is at the expense of such member and for the purpose of exploiting the said musical compositions of such member.

5. No member of the Industry shall pay, or contract to pay any compensation, of any nature whatsoever, either as royalties or otherwise, to any performer, singer, actor, musician or orchestra leader, or any agent or representative thereof, either directly or indirectly, in connection with the publication in printed form of any song or other musical composition, unless such person shall be the bona fide composer, arranger, or writer of the words and/or music of such song or musical composition.

6. No member of the Industry shall give, permit to be given, or offer to give, anything of value for the purpose of influencing or rewarding the action of any employee, agent, or representative of another in relation to the business of the employer of such employee, the principal of such agent or the represented party, without the knowledge of such employer, principal or party. This provision shall not be construed to prohibit free and general distribution of articles commonly used for advertising except so far as such articles are actually used for commercial bribery as hereinabove defined.

7. No member of the Industry shall give away, directly or indirectly, or through any subsidiary or associated company, or through any person employed by such member, copies of music or other musical material except for the bona fide purposes of "sampling," either to the trade or to professional performers. All such copies of music and musical material given away under the provisions of this Article must be

plainly marked in some appropriate manner to indicate that they are not for resale. Each member of the Industry shall keep in some appropriate manner an accurate account of the merchandise thus given away.

8. No member of the Industry shall publish advertising (whether printed, radio, display, or any other nature), which is misleading or inaccurate in any material particular, nor shall any member of the Industry in any way misrepresent any services, policies, values, credit terms, products, or the nature or form of the business conducted.

9. No member of the Industry shall publish or sell any book of songs, pamphlet, song sheet, or other compilation of songs, or the lyrics of songs, without the special written permission of the several copyright owners whose works appear in such compilation.

10. No member of the Industry shall pay, furnish, bestow, or in any other manner, directly or indirectly, present to any customer, teacher, or any person, firm, or corporation whatsoever, or to their agents, or any one representing them, any sum of money, gift, bonus, refund, rebate, royalty, service, or any other thing or act of value in excess of published rates and discounts, as a bribe, secret rebate, or other inducement to acquire any business or custom from such person, firm, or corporation.

11. No member of the Industry shall pay transportation charges in any form whatsoever upon any musical works sold, consigned, or otherwise designated for shipment to a purchaser or prospective purchaser, except in instances where musical works are sold for cash or where delivery is to be made within the recognized local delivery limits of the city within which such member is situated.

12. No member of the Industry shall wilfully induce or attempt to induce the breach of existing contracts between competitors and their customers or sources of supply, either foreign or domestic, or otherwise interfere with or obstruct the performance of any such contractual duties or services, with the purpose and effect of hampering, injuring, or embarrassing competitors in their business.

NRA Code of Fair Competition for the Broadcasting Industry

Article VII—Trade Practices

4. General Provisions

(d) No broadcaster or network shall accept or knowingly permit any performer, singer, musician, or orchestra leader regularly employed by such broadcaster or network to accept any money, gift, bonus, refund, rebate, royalty service, favor, or any other thing or act of value from any music publisher, composer, author, copyright owner, or the agents or assignees of any such persons for performing or having performed any musical or other composition for any broadcaster or network when the purpose is to induce such persons to sing, play, or perform, or to have sung, played, or performed any such works.

APPENDIX B

Interpretative Illustrations of the House Committee on Interstate and Foreign Commerce from H.R. Rep. No. 1800, 86th Cong., 2d Sess. 20-26 (1960)

A. *Free Records*

1. A record distributor furnishes copies of records to a broadcast station or a disc jockey for broadcast purposes. No announcement is required unless the supplier furnished more copies of a particular recording than are needed for broadcast purposes. Thus, should the record supplier furnish 50 or 100 copies of the same release, with an agreement by the station, express or implied, that the record will be used on a broadcast, an announcement would be required because consideration beyond the matter used on the broadcast was received.

2. An announcement would be required for the same reason if the payment to the station or disc jockey were in the form of cash or other property, including stock.

3. Several distributors supply a new station, or a station which has changed its program format (*e.g.*, from "rock and roll" to "popular" music), with a substantial number of different releases. No announcement is required under Section 317 where the records are furnished for broadcast purposes only; nor should the public interest require an announcement in these circumstances. The station would have received the same material over a period of time had it previously been on the air or followed this program format.

4. Records are furnished to a station or disc jockey in consideration for the special plugging of the record supplier or performing talent beyond an identification reasonably related to the use of the record on the program. If the disc jockey were to state: "This is my favorite new record, and sure to become a hit; so don't overlook it," and it is understood that some such statement will be made in return for the record and this is not the type of statement which would have been made absent such an understanding, and the supplying of the record free of charge, an announcement would be required since it does not appear that in those circumstances the identification is reasonably related to the use of the record on that program. On the other hand, if a disc jockey, in playing a record, states: "Listen to this latest release of performer 'X,' a new singing sensation," and such matter is customarily interpolated in the disc jockey's program format and would be included whether or not the particular record had been purchased by the station or furnished to it free of charge, it would appear that the identification by the disc jockey is reasonably related to the use of the record on that particular program and there would be no announcement required.

B. *Where payment in any form other than the matter used on or in connection with the broadcast is made to the station or to anyone engaged in the selection of program matter*

5. A department store owner pays an employee of a producer to cause to be mentioned on a program the name of the department store. An announcement is required.

6. An airline pays a station to insert in a program a mention of the airline. An announcement is required.

7. A perfume manufacturer gives five dozen bottles to the producer of a giveaway show, some of which are to be identified and awarded to winners on the show, the remainder to be retained by the producer. An announcement is required since those bottles of perfume retained by the producer constitute payment for the identification.

8. An automobile dealer furnishes a station with a new car, not for broadcast use, in return for broadcast mentions. An announcement is required; the car constituting payment for the mentions.

9. A Cadillac is given to an announcer for his own use in return for a mention on the air of a product of the donor. An announcement is required since there has been a payment for a broadcast mention.

C. *Where service or property is furnished free for use on or in connection with a program, but where there is neither payment in consideration for broadcast exposure of the service or property, nor an agreement for identification of such service or property beyond its mere use on the program*

10. Free books or theater tickets are furnished to a book or dramatic critic of a station. The books or plays are reviewed on the air. No announcement is required. On the other hand, if 40 tickets are given to the station with the understanding, express or implied, that the play would be reviewed on the air, an announcement would be required because there has been a payment beyond the furnishing of a property or service for use on or in connection with a broadcast.

11. News releases are furnished to a station by Government, business, labor and civic organizations, and private persons, with respect to their activities, and editorial comment therefrom is used on a program. No announcement is required.

12. A Government department furnishes air transportation to radio newscasters so they may accompany a foreign dignitary on his travels throughout the country. No announcement is required.

13. A municipality provides street signs and disposal containers for use as props on a program. No announcement is required.

14. A hotel permits a program to originate on its premises. No announcement is required. If, however, in return for the use of the premises, the producer agrees to mention the hotel in a manner not reasonably related to the use made of the hotel on that particular program, an announcement would be required.

15. A refrigerator is furnished for use as part of the backdrop in a kitchen scene of a dramatic show. No announcement is required.

16. A Coca-Cola distributor furnishes a Coca-Cola dispenser for use as a prop in a drugstore scene. No announcement is required.

17. An automobile manufacturer furnishes his identifiable current model car for use in a mystery program, and it is used by a detective to chase a villain. No announcement is required. If it is understood, however, that the producer may keep the car for his personal use, an announcement would be required. Similarly, an announcement would be required if the car is loaned in exchange for a mention on the

program beyond that reasonably related to its use, such as the villain saying: "If you hadn't had that speedy Chrysler, you never would have caught me."

18. A private zoo furnishes animals for use on a children's program. No announcement is required.

19. A university makes one of its professors available to give lectures in an educational program series. No announcement is required.

20. A well-known performer appears as a guest artist on a program at union scale because the performer likes the show, although the performer normally commands a much higher fee. No announcement is required.

21. An athletic event promoter permits broadcast coverage of the event. No announcement is required in absence of other payment by the promoter or agreement to identify in a manner not reasonably related to the broadcast of the event.

D. *Where service or property is furnished free for use on or in connection with a program, with the agreement, express or implied, that there will be an identification beyond mere use of the service or property on the program*

22. A refrigerator is furnished by X with the understanding that it will be used in a kitchen scene on a dramatic show and that the brand name will be mentioned. During the course of the program the actress says: "Donald, go get the meat from my new X refrigerator." An announcement is required because the identification by brand name is not reasonably related to the particular use of such refrigerator in this dramatic program.

23. (*a*) A refrigerator is furnished by X for use as a prize on a giveaway show, with the understanding that a brand identification will be made at the time of the award. In the presentation, the master of ceremonies briefly mentions the brand name of the refrigerator, its cubic content, and such other features as serve to indicate the magnitude of the prize. No announcement is required because such identification is reasonably related to the use of the refrigerator on a giveaway show in which the costly or special nature of the prizes is an important feature of this type of program.

(*b*) In addition to the identification given in (*a*) above, the master of ceremonies says: "All you ladies sitting there at home should have one of these refrigerators in your kitchen," or "Ladies, you ought to go out and get one of these refrigerators." An announcement is required because each of these statements is a sales "pitch" not reasonably related to the giving away of the refrigerator on this type of program.

The significance of the distinction between the identification in (*a*) and that in (*b*) is, that in (*a*) it is no more than the natural identification which a broadcaster would give to a refrigerator as a prize if he had purchased the refrigerator himself and had no understanding whatever with the manufacturer as to any identification. That is to say, in situation (*a*), had the broadcaster purchased the refrigerator he would have felt it necessary, in view of the nature of the show, adequately to describe the magnitude of the prize which was being given to the winner. On the other hand, the broadcaster would not, where he had purchased the refrigerator, have made the type of identification in situation (*b*), thus providing a free sales "pitch" for the manufacturer.

24. (*a*) An airplane manufacturer furnishes free transportation to a cast on its new jet model to a remote site, and the arrival of the cast at the site is shown as part of the program. The name of the manufacturer is identifiable on the fuselage of the plane in the shots taken. No announcement is required because in this instance such identification is reasonably related to the use of the service on the program.

(*b*) Same situation as in (*a*), except that after the cameraman has made the foregoing shots he takes an extra closeup of the identification insignia. An announcement is required because the closeup is not reasonably related to the use of the service on the program.

25. (*a*) A station produces a public service documentary showing development of irrigation projects. Brand X tractors are furnished for use on the program. The tractors are shown in a manner not resulting in identification of the brand of tractors except as may be recognized from the shape or appearance of the tractors. No announcement is required since the identification is reasonably related to the use of the tractors on the program.

(*b*) Same situation as in (*a*), except that the brand name of the tractor is visible as it appears normally on the tractor. No announcement is required for the same reason.

(*c*) Same situation as in (*b*), except that a closeup showing the brand name in a manner not required in the nature of the program is included in the program, or an actor states: "This is the best tractor on the market." An announcement is required as this identification is beyond that which is reasonably related to the use of the tractor on the program.

26. (*a*) A bus company prepares a scenic travel film which it furnishes free to broadcast stations. No mention is made in the film of the company or its buses. No announcement is required because there is no payment other than the matter furnished for broadcast and there is no mention of the bus company.

(*b*) Same situation as in (*a*), except that a bus, clearly identifiable as that of the bus company which supplied the film, is shown fleetingly in highway views in a manner reasonably related to that travel program. No announcement is required.

(*c*) Same situation as in (*a*), except that the bus, clearly identifiable as that of the bus company which supplied the film, is shown to an extent disproportionate to the subject matter of the film. An announcement is required, because in this case by the use of the film the broadcaster has impliedly agreed to broadcast an identification beyond that reasonably related to the subject matter of the film.

27. (*a*) A manufacturer furnishes a grand piano for use on a concert program. The manufacturer insists that enlarged insignia of its brand name be affixed over normal insignia on the piano. An announcement is required if an enlarged brand name is shown.

(*b*) Conversely, if the piano furnished has normal insignia and during the course of the televised concert the broadcast includes occasional closeups of the pianist's hands, no announcement is required even though all or part of the insignia appears in these closeups. Here the identification of the brand name is reasonably related to the use of the piano by the pianist on the program. However, if undue attention is given the insignia rather than the pianist's hands, an announcement would be required.

APPENDIX C

Interpretative Illustrations of the Federal Communications Commission from 40 FCC 141, 149-51.

28. (*a*) An automobile manufacturer or dealer furnishes to a producer of television programs a number of automobiles with the understanding that the producer will use them, or some of them, in some of his programs which call for the use of automobiles; and that the automobiles may be used for other business purposes in connection with the production of the programs, such as transporting the cast, crew, equipment and supplies from location to location or transporting executive personnel to business meetings in connection with the production of the programs. There is no understanding that there will be any identification on the television programs beyond an identification which is reasonably related to the use of the automobiles on the programs. No other consideration is involved. Under such uses, no announcement is required.

29. (*a*) A hotel permits a program to originate from its premises and furnishes hotel services, such as room and board, for cast, production and technical staff, and also furnishes other elements for use in connection with the programs to be broadcast, such as electricity and cable connections, free of charge, and with no other consideration. There is no understanding that there will be an identification of the hotel on the program beyond that reasonably related to the use made of the hotel on the program. No announcement is required.

(*b*) If the hotel pays money or furnishes free or at a nominal charge any services or items which are not for use on or in connection with the program (*e.g.*, furnishing free or at a nominal charge room and board for the producer for any period of time not related to the production of the program at the hotel site), an announcement is required.

E. Effective Date

30. Does Section 317 as amended on September 13, 1960 apply to programs or portions of programs produced or recorded prior to September 13, 1960?

No, unless valuable consideration was provided to a broadcast station (rather than to a producer or other person) for the program or the inclusion of any program matter therein and the program was broadcast after said date.

F. Nature of the Announcement

31. A station broadcasts spot announcements which solicit mail orders from listeners. The sponsor is merely referred to in the announcements and in the mail order address as "Flower Seeds" or "Real Estate" or "the Record Man." Such a reference to the sponsor of the announcements is insufficient to constitute compliance with the Commission's sponsorship identification Rules because it is limited to a description of the product or service being advertised. The announcement requirement contemplates the explicit identification of the name of the manufacturer or seller of goods, or the generally known trade or brand name of the goods sold . . . .

32. A station broadcasts "Teaser" announcements utilizing catch words, slogans, symbols, etc., designed to arouse the curiosity of the public by telling it that something is "coming soon." The sponsor of the announcements is not named therein, nor is any generally known trade or brand name given, but it is the intention of the station and the advertiser to inaugurate at a later date a series of conventional spot announcements at the conclusion of the "teaser" campaign. Announcements of this type do not comply with the Commission's sponsorship identification rules. All commercial matter must contain an explicit identification of the advertiser or the generally known trade or brand name of the goods being advertised . . . .

33. A station carries an announcement (or program) on behalf of a candidate for public office or on behalf of the proponents or opponents of a bond issue (or any other public controversial issue). At the conclusion thereof, the station broadcasts a "disclaimer" or states that "the preceding was a paid political announcement." Such announcements per se do not demonstrate compliance with the sponsorship identification rules. The Rules do not provide that either of the above-mentioned types of announcements must be made, but they do provide in such situations that an identification be broadcast which will fully and fairly disclose the true identity of the person or persons by whom or in whose behalf payment was made. If payment is made by an agent, and the station has knowledge thereof, the announcement shall identify the person in whose behalf such agent is acting. If the sponsor is a corporation, committee, association or other group, the required announcement shall contain the name of such group; moreover, the station broadcasting any matter on behalf of such group shall require that a list of the chief officers, members of the executive committee or members of the board of directors of the sponsoring organization be made available upon demand for public inspection at the studios or general offices . . . of the station . . . .

34. Must the required sponsorship announcement on television broadcasts be made by visual means in order for it to be an "appropriate announcement" within the meaning of the Commission's Rule?

Not necessarily. The Commission's Rule does not contain any provision stating whether aural or visual or both types of announcements are required. The purpose of the Rule is to provide a full and fair disclosure of the facts of sponsorship, and responsibility for determining whether a visual or aural announcement is appropriate lies with the licensee . . . .

G. Controversial Issues

35. (*a*) A trade association furnishes a television station with kinescope recordings of a Senate committee hearing on labor relations. The subject of the kinescope is a strike being conducted by a labor union. The station broadcasts the kinescope on a "sustaining" basis but does not announce the supplier of the film. The failure to make an appropriate announcement as to the party supplying the film is a violation of the Commission's sponsorship identification rules dealing with the presentation of program matter involving controversial issues of public importance. Moreover, the Commission requires that a licensee exercise due diligence in ascertaining the identity of the supplier of such program matter. An alert licensee should be on notice that

expensive kinescope prints dealing with controversial issues are being paid for by someone and must make inquiry to determine the source of the films in order to make the required announcement . . . A station which has ascertained the source of kinescopes is under an additional obligation to supply such information to any other station to which it furnishes the program.

(*b*) Same situation as above, except that the time for the program is sold to a sponsor (not the supplier of the film) and contains proper identification of the advertiser purchasing the program time. An additional announcement as to the supplier of the films is still required, for the reasons set forth above.

(*c*) Same situation as in (*a*) or (*b*), above, except that only *excerpts* from the film are used by a station in its news programs. An announcement as to the source of the films is required . . .

36. A church group plans to film the proceedings of its national convention and distribute film clips "dealing with numerous matters of profound importance to members of (its) faith" in order to "disseminate to the American people information concerning its objectives and programs." The group requests a general waiver under Section 317(d) of the Communications Act so that it need not "waste" any of the short periods of broadcast time donated to it by making sponsorship identification announcements. In the below-cited case, the Commission did not grant such a waiver because of the absence of information indicating that the subject matter of the clips was not controversial and because the alleged "loss" of a few seconds of air time was not of decisional significance vis-a-vis Congressional and Commission policy relating to issues of public importance.