BEFORE THE FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

MB Docket No. 15-52

Comments of David Lowery In the Matter of Media Bureau Seeks Comments on Petition for Class Waiver of the Commission’s Sponsorship Identification Requirements Filed by the Radio Broadcasters Coalition – March 20, 2015

My name is David Lowery. I am a founding member of the groups Cracker and Camper Van Beethoven and a lecturer at the Terry School of Business at the University of Georgia at Athens. I have written or co-written and recorded the songs performed by my bands for many years. I also write The Trichordist blog devoted to issues of importance to independent artists and songwriters. I am filing this comment on my own behalf from the perspective of an independent artist and songwriter.

I appreciate the opportunity to comment on the Radio Broadcaster Coalition payola waiver, and appreciate the FCC’s interest in hearing from the public on this critical matter of public interest. I respectfully oppose the Commission’s grant of the payola class waiver because I think at least iHeartMedia and Pandora have entered into many “steering agreements” that demonstrate a desire to find a loophole in the payola laws. I suggest that the Commission should make it no easier for these massive media companies to circumvent the law than it already is. I also respectfully suggest that granting the waiver will make steering agreements the 21st century version of the notorious “$50 handshake.”

A. Are Steering Agreements the New $50 Handshake?

While I concur with many of the comments that have been already filed objecting to the class payola waiver on public interest grounds, “steering agreements” are a problem with the waiver that I have not seen made by others. “Steering agreements” implicate the “other valuable consideration” and “indirect payment” prongs of the payola rules.¹

¹ 47 C.F.R. § 73.1212(a): Sponsorship identification; list retention; related requirements.
(a) When a broadcast station transmits any matter for which money, service, or other valuable consideration is either directly or indirectly paid or promised to, or charged or accepted by such station, the station, at the time of the broadcast, shall announce:
(1) That such matter is sponsored, paid for, or furnished, either in whole or in part, and
(2) By whom or on whose behalf such consideration was supplied: Provided, however, That “service or other valuable consideration” shall not include any service or property furnished either without or at a nominal charge for use on, or in connection with, a broadcast unless it is so furnished in consideration for an identification of any person, product, service, trademark, or brand name beyond an identification reasonably related to the use of such service or property on the broadcast....
I respectfully suggest that “steering agreements” are already creating a “payola lane” on both terrestrial and Internet radio to which the listener is none the wiser as it is. If the Commission grants the class waiver to the Radio Broadcasters Coalition, the Commission will make it even easier for a “payola lane” to form which I respectfully suggest is not in the public interest.

This payola lane is not only a creature of at least iHeartMedia’s “steering agreements” with record companies, it is also a factor in Pandora’s direct licenses. While Pandora is not part of the Radio Broadcast Coalition, the “class waiver” sought will benefit Pandora when the Commission approves Pandora’s acquisition of KXMZ, which appears to be imminent given the Commission’s recent ruling in Pandora’s favor on foreign ownership.2

1. Steering Agreement Background

The direct licenses between record companies and iHeartMedia and Pandora are reported to contain “steering agreements.” “Steering agreements” relate to situations where the broadcaster or webcaster pays a performance royalty and wishes to reduce the cost to the broadcaster or webcaster of those royalty payments. The broadcaster or webcaster negotiates a “steering agreement” directly with a record company (outside of any statutory license) pursuant to which the broadcaster or webcaster pays less if they play more of the record company's catalog. This arrangement sounds counterintuitive because if the station plays more of the label’s music, one would expect that the station would pay a higher royalty—because more is...well, more.

However, “steering agreements” allow the broadcaster or webcaster to pay a lower royalty payment (the *quid*) if the broadcaster or webcaster plays more of the record company’s recordings (the *pro quo*). The broadcaster or webcaster then “steers” more of the record company’s recordings to the listener in order to qualify for the lower royalty payment. (I suspect that there is a contractual formula to give effect to the *quid pro quo*, but the specific contract terms of the iHeartMedia and Pandora deals are confidential.)

At this point, I can guess that the artists whose recordings were “steered” are paid less and the lower rate could apply on a catalog-wide basis even to artists whose recordings were owned by the record company concerned but were not “steered.” We just don’t know because the deals are secret.

The listener is none the wiser and neither are artists not “lucky” enough to be included in one of these agreements—absent the sponsorship identification required by the payola statute that the FCC is required to oversee. I can easily understand why the Radio Broadcast Coalition would want a class waiver to further obfuscate this *quid pro quo.*

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2 In re Pandora Radio LLC, Petition for Declaratory Ruling Under Section 310(b)(4) of the Communications Act of 1934, as Amended (Adopted May 1, 2015).
2. Is Less More?

This whole arrangement may seem counterintuitive because we are accustomed to payola being a cash payment or other valuable consideration paid to a broadcaster to incent them to do something they do not disclose to the public at all—a mistake that even Pandora’s CEO made in public\(^3\). The popular conception of payola predates the payment of public performance royalties for sound recordings in the U.S.\(^4\)

I suggest that an undisclosed payment under a “steering agreement” is the identical transaction to more traditional payola, it just takes the “$50 handshake” into the digital age. The benefit still flows from the record company to the broadcaster or webcaster, it’s just in the form of paying less rather than palming a bill. Broadcasters did not want to disclose the $50 handshake, so perhaps it is not surprising that they are seeking a waiver to further obfuscate the benefits from their “steering agreements.”

If anything, these steering transactions are even more insidious than the $50 handshake as they are only detectable if you have access to the relevant contracts or the Commission requires that broadcasters disclose them under the payola statutes. iHeartMedia announced their deals but not much in the way of specifics. Pandora likewise disclosed some terms of their Merlin deal but became more circumspect with their Naxos agreement.

It is also important to point out that “steering agreements” ostensibly apply to entire catalogs of music and not just to the “Top 40” hits.

I initially thought that Pandora would not be subject to the payola laws as an Internet radio station, but I have become persuaded by a 2008 article\(^5\) about the applicability of the payola laws to Internet radio written by Pandora’s well-known Washington, DC counsel, David Oxenford. I think this passage by Attorney Oxenford applies particularly well by analogy to Pandora’s steering agreements:

> “The payola statute, 47 USC Section 508, applies to radio stations and their employees, so by its terms it does not apply to Internet radio (at least to the extent that Internet Radio is not transmitted by radio waves – *we’ll ignore questions of whether Internet radio transmitted by wi-fi, WiMax or cellular technology might be considered a “radio” service for purposes of this statute*). But that does not end the inquiry. Note that neither the prosecutions brought by Eliot Spitzer in New York state a few years ago nor the prosecution of legendary disc

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\(^3\) See NPR Article, note 9 below.
jockey Alan Fried in the 1950s were brought under the payola statute. Instead, both were based on state law commercial bribery statutes on the theory that improper payments were being received for a commercial advantage. *Such statutes are in no way limited to radio, but can apply to any business. Thus, Internet radio stations would need to be concerned.*

While Mr. Oxenford’s excellent and thorough analysis raises the question of whether Internet radio stations ought to be subject to commercial bribery rules regardless of whether the station is an FCC licensee, in Pandora’s case the Internet radio station will be an FCC licensee if the Commission approves the KXMZ transfer. I have to believe this additional fact could change his analysis.

His point seems to be that the behavior is bad, even if Pandora can find a loophole to hide in for purposes of the payola statute.

**B. Goose and Gander: The Payola Lane and Pandora’s Planned Acquisition of KXMZ**

The payola lane and steering agreements are of particular concern to artists and songwriters in light of the pending application to assign FM broadcast station KXMZ(FM), Box Elder, South Dakota, from Connoisseur Media Licenses, LLC to Pandora Radio. As the Commission’s recent ruling suggests that the FCC may approve the assignment without regard for Pandora’s motivation, I respectfully believe that artists and songwriters will expect the FCC to address the payola implications of “steering agreements.”

I would assume that approving the assignment of the KXMZ license to Pandora will require the FCC to enforce the law against Pandora as it would any other licensed broadcaster. This presents the question: How should the FCC address payola in Pandora’s existing online business if Pandora becomes an FCC licensed broadcaster? Will the FCC treat Pandora differently in its existing webcasting business than its newly acquired broadcasting business? For that matter, will the FCC require iHeartMedia to comply with the payola statutes in its online business following the same logic?

Will all broadcasters subject to the statutory webcasting license be able to take what would otherwise be payola as Attorney Oxenford suggested in 2008? Will Pandora or other licensees not currently before the FCC be able to benefit from the requested payola waiver from the FCC?

Is what’s good for the goose also good for the gander? Is there a principled reason why there should be a “payola lane” on the Internet where the substance of the rules do not

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6 *See* File No. BALH-20130620ABJ.
7 *Id.* and note 2 above.
8 *See* note 2 above.
apply, even once Pandora becomes an FCC licensed broadcaster? If so, then why should Internet radio receive special treatment?

As Pandora will be the only “pureplay” webcaster that is also an FCC licensee once the Commission approves the assignment of KXMX, I respectfully suggest that it is incumbent on the FCC to clarify whether the payola rules apply to all aspects of Pandora’s business, including its webcasting business. That would certainly seem to be the public policy intent of the payola statutes as I follow Attorney Oxenford’s argument.

Pandora’s motives for buying KXMX are well known—Pandora has no connection to South Dakota and has shown little interest in the public welfare of the citizens of Box Elder. Pandora is buying the station for one reason only—Pandora wants to align itself against songwriters for a commercial advantage in its webcasting business otherwise unrelated to its KXMX broadcasting business.

As the FCC has made it clear to songwriters that Pandora’s motives for buying KXMX are of no concern in approving the license assignment, I respectfully suggest that the FCC should also make it clear to songwriters, artists and indeed to the citizens of South Dakota, whether the *quid pro quo* in steering agreements are subject to the payola statutes and if the same rules will apply to Pandora.

C. **Examples of Steering Agreements by Pandora and iHeartMedia**

I wish to call the Commission’s attention to two categories of steering agreements. The first is the type of agreement between Pandora Media and Merlin that Pandora may have replicated with Naxos Records. The second is the type between iHeartMedia and Big Machine Label Group that iHeart Media has stated that it has replicated with dozens of record companies including Warner Music.

Because these agreements are in large part secret and subject to confidential treatment, I can only point to press reports and some public disclosures in the Webcasting IV proceeding currently underway before the Copyright Royalty Judges.

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9 See CNN report in note 15 below.
I respectfully suggest that steering deals should be of concern to the Commission in considering the payola waiver requested. As Billboard Magazine reported\(^\text{14}\), these deals can be used to mask commercial shenanigans and Pandora hired an expert in these matters:

Back in 2007-2010, when ASCAP and BMI rate court judges were involved in litigation between DMX and performance rights societies, the judges examined the direct licensing deals DMX cut with publishers. During that process, judges did not review the advances or any of the other aspects of the deal, and only looked at the reduced per-store royalty rate. Consequently, in the case of BMI, this resulted in the per-store negotiated rate falling from $36.36 to a per-location fee of $18.91, much to the chagrin of the publishers, who stayed a part of the PROs’ blanket licenses. The ASCAP rate court returned a similar finding.

\(\text{(Did we mention that Pandora VP of business affairs and assistant general counsel Chris Harrison was DMX’s vp of business affairs at the time of the rate court ruling in a lower per-location blanket fee?)}\)

1. Pandora’s Steering Agreement with Merlin

The payola waiver offers the Commission an opportunity to consider the legality of steering agreements for both the Radio Broadcasters Coalition but also for Internet radio operated by an FCC licensee. Pandora is a great example.

As Pandora has sought the Commission’s approval and indicated its intention to become an FCC licensed broadcaster, I can infer that Pandora intends to comply with the payola rules over all of its businesses, both terrestrial broadcast and webcasting. If this were not the case, it would be a strange result that a broadcaster with an Internet radio offering could violate the spirit of the payola rules as an Internet radio operator but not as a terrestrial broadcaster. That would be quite a loophole.\(^\text{15}\)

As National Public Radio reporter Laura Sydell wrote in the NPR Article about the Merlin deal (in which I am quoted):

\begin{quote}
Pandora recently signed a deal with a company called Merlin, a consortium of independent record labels that’s adding another factor to the [Pandora music genome] algorithm: money.

Performers get paid a small royalty each time one of their songs is played on Internet radio, at a rate set by a Royalty Court at the Library of Congress. But
\end{quote}


\(^{15}\) As Mr. Oxenford persuasively argues, the Internet radio provider might well be subject to prosecution for commercial bribery.
Internet radio and labels can strike individual deals, as Pandora did with Merlin. The Internet service will recommend Merlin artists over those not affiliated with the consortium in exchange for paying Merlin’s musicians a lower royalty rate.

Merlin artists get more spins, and Pandora winds up paying less in royalties than it would if were giving those same spins to non-Merlin artists. Plus, consortium labels will get to suggest favorite tracks.

There is no way for an artist like me to find out what the terms of these agreements are, even if the terms are being used to benchmark my royalty rates in Web IV.

I respectfully suggest that if the FCC grants this class payola waiver, the Commission should do so with specific guidance for how steering agreements are to be addressed by the payola rules. This is particularly true for Pandora. The lines between FCC licensees and Internet radio are rapidly blurring as companies like Pandora compete directly with broadcast radio and manipulate loopholes.

As CNN reported¹⁶:

Pandora is angry about the royalties it's paying to [songwriters and] music publishers, so the company is making a bold move: It’s buying a terrestrial radio station in South Dakota mainly to score lower rates.

For reasons that are not obvious, Pandora has devoted itself to spending large sums to litigate royalty payments to artists and songwriters, to lobby in Congress against artist and songwriters, and to conduct public relations campaigns against us. Respectfully, the Commission should not allow them to also manipulate the public through steering agreements that skirt at best or may violate the payola rules and get away with it through an FCC loophole.

As Ms. Sydell reported in the NPR Article, Pandora’s CEO has an odd idea about what the payola rules require:

Jim Burger, a copyright lawyer and adjunct professor at Georgetown University, says this kind of deal would receive legal scrutiny if it were taking place on old-fashioned radio.

"If they were a terrestrial radio station and they were getting a discount on certain music as long as they played it more than other music, that would be considered illegal," Burger says, adding that stations would have to announce such an arrangement upfront….

Pandora CEO Brian McAndrews says there's no comparison between that and what his company is doing.

"Payola is where record labels pay radio stations to get airplay," McAndrews says, "and the opposite is what happens today. As Pandora, we pay the record labels and the artist to allow airplay. So it’s completely different.”

Mr. McAndrews clearly never read *Hit Men*. He may be confusing the $50 handshake with a liquidation preference. This is troubling because Pandora is going to great effort to become an FCC licensee and their CEO evidently has a poor understanding of the payola laws.

As Mr. Burger told National Public Radio (arguably concurring with Mr. Oxenford’s prescient 2008 article), if Pandora were a terrestrial station, the “discount” from the steering agreement would be considered illegal—and Pandora is trying hard to become one. As Mr. McAndrews is eager to tell investors, “Pandora is Radio”.

Respectfully, I do not see how the FCC can ignore Pandora’s efforts at skirting the payola laws either in the current waiver proceeding or in Pandora’s assignment application for KXMZ.

2. iHeartMedia Steering Agreements

The iHeartMedia “steering agreements” were described in a heavily redacted statement filed under a protective order in Web IV by Mr. Steven Cutler, Executive Vice President of Business Development and Corporate Strategy at iHeartMedia. In the unredacted part of his statement, Mr. Cutler confirms that iHeartMedia has 26 similar deals with independent labels and another with Warner Music Group.

Mr. Cutler states:

Although listener demand for iHeartRadio had more than doubled in the past year, iHeartMedia recognized that the cost of licensing music for the services was so high relative to the revenues these services could generate that it constrained the company’s ability and incentive to grow the services. [REDACTED]

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To address this problem, iHeartMedia developed a multi-pronged approach to reducing its music licensing costs. It began a campaign to negotiate performance licenses directly with individual record labels. These licenses were designed to promote the growth of iHeartRadio and increase overall digital promotion of the participating labels’ music. [REDACTED] [Emphasis added.]

Mr. Cutler clearly identifies the purpose of these direct agreements as being to (1) “promote the growth of iHeartRadio” and to (2) “increase overall digital promotion of the participating labels’ music.” I would add that there may well have been was a third purpose—to manufacture benchmarks for use in Web IV to influence the royalty rates to be paid to artists like me who are not party to one of these iHeartMedia agreements.

Ben Sisario of the New York Times reported on iHeartMedia’s steering deal with Warner Music:

…that would for the first time allow the label and its acts to collect royalties when their songs were played on Clear Channel’s 850 broadcast stations. In exchange, Clear Channel will receive a favorable rate in the growing but expensive world of online streaming.

This quotation from the iHeartMedia press release also suggests that the labels are participating in iHeartMedia’s broadcasting revenues, further highlighting the quid pro quo:

“Focusing that same creativity on how best to grow the music business, [Big Machine] has developed this new model with [iHeartMedia] to let [Big Machine’s distributed] labels and artists participate in the revenue of broadcast radio immediately and in digital radio as it builds.”

Mr. Cutler’s testimony includes this statement regarding what I suspect are “steering” payments:

Prior to the [Warner agreement] being signed, my staff and I prepared a set of projections for iHeartMedia’s Board of Directors that demonstrated what iHeartMedia would pay Warner for the use of its sound recordings absent a deal, as well as what it would pay [the quid] – and the additional performances it would receive [the pro quo] – if the deal were signed. [Emphasis added.]

This reference raises the question of what the form of iHeartMedia label agreements said regarding steering payments and the method by which those payments are triggered and then calculated. If the purpose of the agreement was in part to lower royalty payments as

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stated by Mr. Cutler and if Mr. Cutler prepared projections for the approval of iHeartMedia’s board showing what iHeartMedia would pay without the agreement (presumably more) than with the agreement (presumably less), then the reference to “additional performances” would again seem to be the quid pro quo for the lower royalty payments. In other words—arguably the exact type of transaction that the payola statutes address.

I am also more persuaded that this quid pro quo was the very purpose of the agreement because there is a section of Mr. Cutler’s testimony entitled “iHeartMedia’s Efforts to Use Lower Royalty Music” that is entirely redacted.

In other words—the agreements that iHeartMedia negotiated and its board of directors approved are for consideration for airplay that seems to me would require disclosure under the payola rules. As Mr. Cutler stated in his sworn testimony, this was the purpose of the deals.

I would respectfully suggest to the Commission that these steering agreements are of vital importance to the public interest because of the vast number of recordings that we know are involved and that likely will be covered in the future. Over time, steered recordings could easily crowd out recordings by artists who were not party to a steering agreement—and the public would be none the wiser absent the FCC’s robust sponsorship identification requirements.

3. Other Steering Agreements

I am not aware of other steering agreements, but the Commission is in a position to ask members of the Radio Broadcasters Coalition to present any such agreements in evidence as part of the waiver hearing and is also in a position to ask Pandora to present their steering agreements as part of the evidentiary record for the KXMr license assignment.

Pandora’s direct agreement with Naxos Records might be just such a candidate. The agreement was announced after the NPR Article and others raised questions about the payola implications of “steering agreements.” As the Radio and Internet Newsletter explained:

[Pandora’s p]rivate licensing deals are significant for another reason. The CRB process of setting government-mandated rates has been distorted, some audio publishers believe, by a lack of real-world deal-making examples which could establish a value of licensed music that isn’t theoretical. Pandora used its Merlin [steering] deal as an anchor example in its initial argument brief. Presumably, the Naxos agreement could bolster Pandora’s case during this year-long lead-up to

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new rates….*We reached out to Pandora to ask whether the Naxos licensing agreement includes similar “steering” as with Merlin, and received a polite “no comment.”*

Why “no comment” and why all the secrecy regarding “steering agreements”?

D. Conclusion

I would respectfully suggest that the Radio Broadcasters Coalition appears to be seeking to create a “payola lane” on their stations by further obfuscating from artists, songwriters, and the public the kinds of disclosure that would make them remind their listeners about steering deals.

Not only would the proposed class payola waiver potentially deceive the public, iHeartMedia and Pandora appear to be using steering agreements as benchmarks in rate proceedings that affect the rates paid to all artists. The FCC has the opportunity to address the legality of steering agreements in this proceeding and the Commission’s decision to act or refrain from acting could have far reaching effects.

From my perspective as an artist and songwriter, I see no reason why any broadcaster should be relieved of its obligations under the payola rules further to blur a *quid pro quo* that is exactly what the payola rules were designed to prevent.

Respectfully submitted.

David C. Lowery /s/