



January 2007

With Spitzer Gone, What Price Settlement of Payola Inquiries?

Joseph Di Scipio
703-812-0432
discipio@fhhlaw.com

New York Governor elect Eliot Spitzer has closed his case against Entercom for alleged “payola” violations. We have written in these pages before that Spitzer was wrong – there was no payola and the legal grounds under which Spitzer stalked Entercom (and Sony BMG and Warner Music) were at best questionable. Entercom was the last to settle. Without admitting any guilt, Entercom agreed to contribute \$3.5 million (down from the \$20 million Spitzer reportedly originally sought) to the Rockefeller Philanthropy Advisors for use in the funding of programs aimed at music education and appreciation for the residents of the State of New York. Funny, that sure reads a lot like state-sponsored payola. We’re just sayin’ . . .

Now that Spitzer is done with his state-sponsored payola, we turn to the ongoing, independent FCC investigation. Whisperers in Washington indicate that the staff is close to a deal with the radio groups caught in the FCC probe. The deal is said to include setting aside airtime to promote “independently”-produced music. None of us here on the outskirts of Washington, D.C. (but still inside the Beltway) have any idea what “independently”-produced music is or what it will sound like, but we do know this is a very bad idea for about a zillion reasons (f’ instance, how does one define “independently”, how would a station prove compliance, how could the FCC enforce such a requirement – just to name a few problems that come immediately to mind). It would suck the FCC back into the quicksand of program regulation from which we thought the agency had successfully escaped (with the blessing of the Supreme Court, if you please) decades ago. Plus, it would force the Commission to supervise in some fashion not just the broadcast industry, but also the music industry, since regulation of the broadcast of “independently”-produced music would require the FCC to determine, and likely define in some sense, precisely what music is “independently”-produced and what isn’t.

We will, of course, provide the details of any deal that is reached between the FCC and the probed radio groups in a future issue of the Memo to Clients.