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Is the Artists' Newly-Found Independence an Opportunity for Law to Protect Artistic Creativity and Diversity

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Is the Artists' Newly-Found Independence an Opportunity for Law to Protect Artistic Creativity and Diversity

IS THE ARTISTS' NEWLY-FOUND INDEPENDENCE AN OPPORTUNITY FOR LAW TO PROTECT ARTISTIC CREATIVITY AND DIVERSITY?

By Aïssatou Sylla

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INTRODUCTION

Before internet access became generalized in the late 1990s, a large number of recording artists, especially those born after the 1970s when multinational record companies started consolidating, could not conceive success without a contract with a major record company. Because the recording artists known to have such deals enjoy or have enjoyed international fame, many could not imagine success without traditional mass media, i.e., television and terrestrial radio.

Similarly, the phrase “music industry” has only just started to echo the existence of actors outside of the “big four” major record companies.¹ The amalgam in referring to the “majors” as equating “music industry,” and opposing them to “artists,” “independent record labels” and lately, “internet music providers,” is a clear indicator of the majors’ domination of the recording market on the one hand, and of a certain disregard of musical initiatives taking place outside the structures created or adjusted in order to suit the majors’ activities.

In the 1990s, artists started gaining more independence as they gained access to recording and mastering tools, relieving them from exorbitant studio costs.² With affordable computer software and recording instruments, they could produce masters of good quality from their home or with the help of someone else who possessed those tools.³

However, the ability for artists to promote and distribute their work themselves, through increasingly popular internet websites, has changed the face of the recording industry. This turn follows a period in which the lack of musical diversity in the mass media had reached its peak.⁴ As regards consumers, many criticize songs’ over-repeated formulas, the lack of choice and the

¹ Also referred to as “major labels”, “majors” or the “the Big Four.” Those corporations are today Sony BMG Music Entertainment, Universal Music Group, Warner Music Group and EMI Group. *See infra* note 9 for their market share.

² Adam Webb, *Technology: Is Garageband Top of the Pops?: Apple's Free Software is Credited with Getting Many Bands Started, but is the Inclusion of the Program on Macs Pure Generosity or Clever Marketing, Wonders*, The Guardian (London), 18 October 2007.

³ *Id.*

⁴ *Practicing the Blues*, Planning, 10 December 2004.

decreased quality in available music.⁵

Networking websites such as the leader MySpace⁶ are now blooming and becoming more organized and structured in their objective to facilitate music discovery, through “Do-it-yourself” (DIY) promotion and distribution.

The latest changes in terms of music access and independent music marketability seem to be more fortuitous than anything else. They result from an unanticipated combination of technological innovation, business ideas and public enthusiasm in using new formulas. Since the music industry cannot guarantee a long-term promotion of musical creativity and plurality, isn't it time for the US government and courts to take positive actions for this purpose? Many answer yes.⁷

This question is an opportunity to examine the broader issue of the promotion and protection of artistic diversity. Indeed state and federal legislators have occasionally endeavored to promote creativity. Congress, for instance, has created the National Endowment for the Arts,⁸ whereas some states have set up tax-credit schemes to locally boost (or create) their cinema or recording industry.⁹ Moreover, in line with its constitutional powers, Congress has created copyright laws, which are supposed to promote artistic creativity. However, no matter how well-drafted these laws may be, in the present era of mass media concentration, they would not efficiently serve this goal.¹⁰

In order to find out whether the government ought to promote artistic diversity and creativity, we will, in the first part (Part 1), come back to the precariousness of musical diversity. In a second part (Part 2), we will see that Congress generally does not promote or protect artistic creativity. The third part (Part 3) will propose means of achieving these goals.

Part 1. Precariousness of musical diversity and need for legal protection

Today with the internet, artists have tremendously more opportunities to be heard than five,

⁵ In a survey, consumers have estimated that there were 25 “great albums” released each year between 1969 and 1972, compared to 3 for the year 2003. *Music's Brighter Future*. THE ECONOMIST, 28 October 2004, www.economist.com/business/printerfriendly.cfm?story_id=3329169, last visited on 19 December 2006.

⁶ www.myspace.com, last visited on 23 March 2007.

⁷ See The Future of Music Coalition for example, www.futureofmusic.org, and countless independent labels and artists, last visited on 23 March 2007.

⁸ *Infra* note 24.

⁹ This is the case for Alabama, Florida, Georgia, Louisiana, Mississippi, Oklahoma, North Carolina, South Carolina, Tennessee, Virginia, Arizona, Hawaii.

¹⁰ Panel discussion: *Few Gate Keepers, Many Views: Will the New Rules Compromise the Representation of Marginalized Voices?* 53 Am. U.L. Rev. 547 (2004).

10 or 20 years ago,¹¹ even though this may not guarantee the success they seek.¹² Such opportunities are unprecedented, as this overthrows major record labels' monopoly as middlemen artists and the public.¹³ On the other hand, the public has for the first time had access to the gigantic pool of artists that flourish on the internet. As a result, a diversity of musical content and sources has emerged and a relative independence from the major record labels has taken place.

However these recent changes were not prompted by the Government's will and the stability of the present situation is uncertain.¹⁴

In order to appreciate the fragility of musical diversity, it is necessary to explain the independence artists have acquired (A). Then, the future industry evolutions that could jeopardize this diversity and send artists back underground shall also be discussed (B).

A. Today's situation: Relative independence from large media and entertainment groups

Artists and the public have just started to enjoy independence in circulating music and accessing it even though it is insufficient for many (1). Yet, this independence is unlikely to last without legal protection (2).

1. Newly-found, yet relative independence

In order to grasp the present situation, we shall quickly go back in time and observe the process of music democratization (a), then look at the more skeptical view on access to music and DIY music (b). Finally, we shall look at the legal consequences resulting from the recent changes (c).

a. Road to the democratization of music making and music listening

Compared to the time when it was unthinkable for an artist to make his music available to the public without having gained the interest of record company willing to invest for the production, release and distribution of his recording, it can be said that in 2007, artists have gained a

¹¹ *Music's Brighter Future*, The Economist, 28 October 2004, http://www.economist.com/business/PrinterFriendly.cfm?story_id=3329169, last visited on 19 December 2006.

¹² Adam Walton, *Independent of the Rock Myth; Ear Buzz*, Liverpool Daily Post, 6 August 2004.

¹³ Bobbie Johnson, *Threat to Music Labels as Website Offers Bands a Shortcut to Big Time*, The Guardian, 5 September 2006.

¹⁴ *Infra* part I (A).

considerable independence from record labels.¹

Indeed, since the early 20th century, music has had different phases of democratization² resulting from technological innovations which have often been unwelcome by media and entertainment organizations¹. For example, in the late 19th century, the use of player pianos,² which made music accessible to a larger number of listeners because the presence of a musician was no longer required, was widely resented by music publishers whose business was based on the sale of sheet music.³

Later, in the 1920s, broadcast radio and phonographs brought music to the home of listeners, making record companies and radio stations unavoidable in order to reach the public.⁴ These technologies were the source of what is commonly called “popular music” – music that can be heard at home by the public nationwide or worldwide and that often contributes to a popular culture.⁵ Conversely, more artists, on top of or instead of recognition, could acquire financial wealth and stardom comparable to the success of Hollywood celebrities.

Until the mid 1990s, the task of most unsigned artists was to hunt for a deal in order to have someone financing and providing for record production and promotion.⁶ As a consequence, most of those unsigned artists could not even clear the record production hurdle and create a quality sound recording to circulate.⁷ Artists remained tied to recording studios' goodwill until cheap music recording software appeared on the market⁸ and freed them from

¹ *Supra* note 8.

² Alana Semuels, *More Bands Finding Venues on the Web*, Los Angeles Times, 10 December 2006.

¹ For example, home videocassette tape recorders introduced in 1975 and rendered famous with Sony's Betamax brand, faced vivid hostility from the cinema and television broadcast industry. *See* the “Betamax Case” *Universal City Studios, Inc. et al. v. Sony Corporation of America Inc. et al* 464 U.S. 417 (1984).

² Player-pianos play music automatically without a pianist. They were initially programmed mechanically.

³ *See* *White-Smith Music Publishing Co. v. Appollo Co.*, 209 U.S. 1 (1908). In this case, a publishing company claimed that the use of piano rolls infringed the copyright vested in sheet music. The Supreme Court held that there was no violation. After continuous pressure from publishers, Congress introduced a compulsory licensing scheme allowing the use of the copyrighted work for piano rolls and automatically granting copyright owners a royalty. *See* 43 Cong Rec. 3831-32 (1909).

⁴ *History of Recorded Music*, <http://www.soc.duke.edu/~s142tm01/history4.html>, last visited on 23 March 2007.

⁵ Opposed to “folk music.”

⁶ Production here must be understood as making the arrangements necessary for the recording of music.

⁷ *Supra* note 2.

⁸ *Id.* and *supra* note 11.

expensive studio costs.⁹

Generalized access to the internet in industrialized countries developed at the same time, giving artists the opportunity to introduce themselves and their self-produced music online, by means of their own website. However the public had little means of discovering the existence of such websites in the absence of advertising, hearsay or networking.

The year 2005 saw the blooming of internet platforms allowing social networking, or other platforms inviting artists to sell and promote their recordings directly to the public. MySpace, which is currently the most popular and lucrative website with over 100 million users,¹⁰ allows people, including artists of all kind,¹¹ to present themselves and their work on a user-friendly and “customizable” webpage and connect with other people. Recording artists can thus upload their music, photographs, videos, tour schedule and any other information for free and endlessly get worldwide exposure. MySpace, which has been acquired by the media giant News Corporation, has just developed a very user friendly online sales system.¹² Other networking websites are exclusively dedicated to music and also allow online purchase¹³. As a consequence, today, most artists can 1) create their own sound recordings, 2) distribute their recordings, and 3) promote their recordings.

b. Real freedom?

The freedom to discover diverse music and the degree of artists’ independence brought about by the latest technological innovations has been questioned.¹⁴ Indeed, even if there have been success stories of artists using internet DIY promotion,¹⁵ they remain an exception

⁹ *Id.*

¹⁰ *MySpace Future is Golden*, iMedia Connection. <http://www.imediaconnection.com/content/11027.asp>, last visited on 21 March 2007.

¹¹ For example, painters, writers, poet, dancers, filmmakers etc.

¹² *MySpace, SnoCap Strikes Music Sales Partnership*, Digital Music News, May 9 2006.

¹³ See for example www.mysongstore.com www.brodjam.com www.musicane.com www.cdbaby.com, last visited on 23 March 2007.

¹⁴ *Supra* note 12.

¹⁵ For success stories, see the example of *Arctic Monkeys* who gained popularity by distributing their music on the internet and performing live. They won two Brit Awards in 2007. See also the US band *Clap Your Hands Say Yeah* who achieved fame and commercial success via the internet. For “overnight” internet successes, see also the example of French artist *Kamini* whose web link showing his video, filmed by a student, had, in 2006 circulated by email and generated over four million page views in less than one month. He was immediately noticed by the national press and offered deals by major labels. He has, since then, signed a record deal with RCA Records (part of Sony BMG Music Entertainment). In early 2007, his video became the lowest-budget

to the general trend.

It is often argued that DIY promotion cannot replace promotion by record companies as the latter are the gatekeepers of radio and television marketing.¹⁶ It is true that television and terrestrial radio are still largely the main means of music discovery, but for how long?¹⁷ Television is slowly being incorporated into the online world and the number of people watching TV programs on the internet is constantly growing¹⁸. Therefore, it would not be unreasonable to imagine a computer becoming the primary multimedia tool, narrowing the cohabitation between established and non-established artists. Besides, it is yet to be demonstrated that all of the online artists' ambition is to achieve the stardom that major labels have accustomed us to. Undeniably, a significant part aspires to that,¹⁹ but many are content with a loyal fan base, the opportunity to perform live, and to earn a decent income as long as they are independent.

In relation to the public's access to music, doubts about the usefulness of the internet are cast because of the absence of a compulsory licensing scheme that would coerce record companies to allow the online use of their copyrighted work by anyone in exchange for a fixed fee.²⁰ The advocates of compulsory licensing have been armwrestling record companies, which have been decrying the unauthorized listening, copying and sharing of their material. This conflict has garnered a lot of ink and has resulted in lawsuits²¹ and

video ever (€200) to be awarded the prestigious best French music video of the year prize. www.kamini.fr also www.arcticmonkeys.com and www.clapyourhandssayyeah.com, last visited on 23 March 2007.

¹⁶ *Supra* note 12.

¹⁷ *Terrestrial Radio Still Primary New Music Discovery Destination*, 21 July 2006, http://www.bridgeratings.com/press_07.21.06.New_percent20Music.htm, and *Jupiter Research Finds That MySpace Music Community Activity Far Outpaces Online Music Sites*, last visited on 23 March 2007. http://www.jupiterresearch.com/bin/item.pl/press:press_release/2006/id=06.05.31myspace_music_community.html, last visited on 19 December 2006.

¹⁸ *Id.*

¹⁹ This is the case of one-hit wonder Band Koopa who topped the charts for one month and disappeared for lack of promotion. <http://newmusicstrategies.com/2007/02/27/the-real-storyof-koopa/>, last visited on 5 March 2007.

²⁰ Ankur Srivastava, *The Anti-Competitive Music Industry and the Case for Compulsory Licensing in the Digital Distribution of Music*, 22 *Touro L.Rev.* 375.

²¹ See for example Lime Wire's action against the Big Four and some of their labels. Nancy Gohring, *Lime Wire Turns Tables, Sues Record Companies*, IDG News Service www.macworld.com/news/2006/09/26/limewire/index.php, last visited on December 19th 2006. See also FTC inquiry on price-fixing, where it was found that there were reasons to believe that Sony, Time Warner, BMG, Universal and EMI used MAP policies in order to inflate retail record prices. To this finding followed settlements whereby the majors agreed to cease the use of these policies and to pay \$143,075,000 as an estimated \$480 million have been unduly paid by record consumers. Statement of Chairman Robert Pitofsky and Commissioners Sheila F. Anthony, Mozelle W. Thompson, Orson Swindle, and Thomas B. Leary, In the Matter of Sony Music Entertainment, Inc.; In the Matter of Time Warner, Inc.; In the Matter of BMG Music, d.b.a.

government lobbying.²² The proliferation of doubtful talents on the internet who decide to become artists overnight just because they have the tools to record and promote themselves, has also been criticized for turning discovery of “good music” into a treasure hunt.²³

However, for the purpose of this paper, which focuses on the availability to the public of diverse music coming from a plurality of sources and encouraging artistic creativity, an objective view shall be taken: even though music is not promoted on terrestrial radio and television, it is the first time that the music of any independent recording artist has been available to the public worldwide. It is important, again for the purpose of the present paper, to look from the listeners’ angle and to draw a distinction between *unguided access* to a jungle of unknown artists and *no access at all* to independent music. Here, the conclusion still is that the public is *free* to access music of all kind and sources as long as it has access to the internet.

Furthermore, concerning the artistic creativity issue, it can be said that despite the purported proliferation of artists, independent online promotion has opened doors to innovation by offering creative freedom, which is no longer available amongst large record labels concerned about recouping their marketing costs.²⁴

c. Legal consequences

The early part of the 21st century has so far been part of a transition between old and new music business models.²⁵ The immediate legal implications of the changes are nonetheless considerable. Many of them are linked to contractual practices and to copyright clearances.

First of all, the fact that an artist no longer *has to* sign a recording agreement with a record company means that he can now reasonably promote his work while retaining all of his copyrights instead of transferring or licensing them, which had been the common practice. As

"BMG Entertainment"; In the Matter of Universal Music & Video Distribution Corp. and UMG Recordings, Inc.; and In the Matter of Capitol Records, Inc., d.b.a. "EMI Music Distribution" et al., Docket Nos. C-3971, C-3972, C-3973, C-3974, and C-3975, <http://www.ftc.gov/os/2000/09/musicstatement.htm>, last visited on 19 December 2006.

²² Recording Industry Association of America (RIAA), representing the U.S. recording industry has been by far the strongest lobby group. Phil Gallo, *RIAA's Got Burning Desire*, Daily Variety, 15 August 2005.

²³ *Supra* note 19.

²⁴ *Supra* note 11.

²⁵ For the business models and contractual practices of the late 1990s, see Corey Field, *New Uses and New Percentages: Music Contracts, Royalties, and Distribution Models in the Digital Millennium*, 7 UCLA, Ent. L. Rev. 289 (2000).

a consequence, unless charged a percentage for online sales, an artist can potentially earn the totality of the sales income.

In the event that he wishes to work with, for example, an independent record company that would undertake all the recording and marketing, his increased bargaining power could allow him to only agree for the license of certain rights, as opposed to the assignment of his copyright in the sound recording and/or in the composition. Besides, should he take the assignment route, the artist could still negotiate for a limited duration of the assignment rather than irreversibly give his rights away.²⁶

In addition, an artist wishing to sign a recording contract with an independent label could negotiate a higher royalty rate reflecting the label's decreased distribution and promotional investment. For example, instead of the common 50/50 split, an artist would have grounds to claim a 70/30 or an 80/20 split in his favor and labels would have to show obligations and commitments justifying higher royalty rates.

If labels' distribution and promotion costs are anticipated to be low, royalty rates could be based on net receipts instead of retail price or published price to dealer.²⁷ This would ensure that the label pays the artist only when it has effectively made a profit from the recordings exploitations, and that the costs to be deducted from the gross income are not high to the point of leaving nothing left to the artist as a royalty.

Furthermore, artists would still need a manager, but not to the same extent and certainly not for the same purposes.²⁸ As regards unsigned artists, managers' role has started shifting from artist promotion towards major record companies in order to get a deal to artist promotion exclusively towards the public, engaging artists in regular live performances, and promoting them through traditional media and the internet. The decrease of the traditional record deal shopping obligation could equally result in a decrease or in an increase of a manager's responsibility, depending on the manager's contractual commitments.²⁹ Either

²⁶ *Id.*

²⁷ Retail Price stands for the price charged to store customers whereas Published Price to Dealer (PPD) is the equivalent of wholesale price.

²⁸ See the usual roles and duties of a manager at <http://www.musicmanagersforum.co.uk/findamanager>, last visited on 27 October 2007.

²⁹ In the absence of record companies, some managers' work and risk has increased as they have decided to financially invest on the artist's promotion. Other managers have started turning to venture capital firms interested in investing in promising online artists (deal or not deal).

way, this change should be taken in consideration in establishing his commission.³⁰

Consequently, in this transition period, artists and their lawyers must be aware of the shifting industry practices while dealing and negotiating with other parties and contractual practices should generally be reviewed.

Another consequence of the newly acquired freedom is the necessity for everyone wishing to stream or sell music online to seek at least a license from the copyright owner, in accordance with the Copyright Act,³¹ as mentioned above.³² Some mid-size independent labels embracing those opportunities have thus started licensing their catalogue to websites such as MySpace.³³ Artists who have assigned their copyrights (in sound recordings or in compositions) will need to obtain a license from the copyright owner of the material he performs in order to make their full discography available online. Many artists, who overlooked (or had forgotten) this restriction, were asked to remove all their recordings or videos, for which they owned no rights.³⁴ This means that, in such a case, they need to obtain a license, for which they usually must pay for, to upload some of their work.³⁵

Overall the new face of the music industry is advantageous, not only for creators and small organizations, but also for the public that can benefit from a vaster choice in music listening. In the past few years, music had been used more like a homogenized commercial commodity than a way to promote the arts, creativity or social culture.³⁶ What the public could hear was almost entirely controlled by a few multinationals needing to generate enough income to cover all their costs.³⁷

However, what guarantees this situation will last? So far, majors and other media and telecommunication giants³⁸ still have the heaviest financial weight and have not yet had their

³⁰ Commission is usually around 20 percent of the artist's gross income.

³¹ 17 U.S.C. §§ 101-810.

³² *Supra* note 20.

³³ Brian Garrity, *Indie Labels Rethinking Strategies For Web Exposure*, Billboard, 30 June 2007.

³⁴ *See* for example, singer Maxwell who had to remove all the videos and music he had made available, because they belonged to Columbia Records (SONY BMG).

³⁵ For the proposal of compulsory licensing in because of the prohibitive licensing fees, *see* Patrick Bukart, *Loose Integration in the Popular Music Industry*, Popular Music and Society, 1 October 2005.

³⁶ Anthony Maul, *Are the Major Labels Sandbagging Online Music? An Antitrust Analysis of Strategic Licensing Practices*, 7 N.Y.U.J. Legis. & Pub. Pol'y 365 (2003/2004).

³⁷ *Id.*

³⁸ Sony BMG has started following the trend in October 2007. *See* the Sony BMG press release: "SONY BMG will license music videos, select audio material, and other content from its extensive artist roster and will make

slice of the online music market pie.

2. Short-lived freedom in the absence of effective legal protection

The present situation has little chance to last and has been evolving in different directions. The traditional players in the media, telecommunications and entertainment industries have not yet taken a clear and definite stance apart from showing discontentment towards the use of their copyrighted work.³⁹ Today, two tendencies, which could hinder the promotion of music diversity and artistic creativity, can be observed. The first one is the media and entertainment giants' move towards the internet market (a). The second one is the telecommunications companies' attempts to eliminate internet neutrality through the exercise of their pipe control (b).

a. Domination through market entry

DIY music websites are growing. In terms of quantity, they are increasing in number and, in terms of quality, they are becoming more structured, user-friendlier, music-focused and are expanding their partnerships worldwide. Regarding the large entertainment groups' response, three general long-term scenarios can be envisaged.

The least likely scenario would be the existence of two parallel, developed and sophisticated markets within the music industry, one having the financial means to guarantee a certain amount of hits through the heavy use of television and terrestrial radio. This situation could somehow be conceived given the hostility expressed by media groups towards competing online music providers. The latest strike was Viacom's \$1 billion lawsuit against YouTube for allowing the streaming of their copyrighted material without a license.⁴⁰ However, nothing shows that the public's attraction to traditional media will be long lasting, judging by the rapid development of internet services.

the content available on its artists' MySpace profile pages. MySpace and Sony BMG will share in sponsorship and advertising revenues generated from the music videos and profile pages. Additionally, MySpace will work with SONY BMG to promote the music company's artists throughout the site." MySpace and Sony BMG Music Entertainment Sign New Licensing Pact, <http://www.sonybmg.com/press/101607.html>, last visited on 27 October 2007. Also, *see infra* Part 1 (B).

³⁹ *See infra* note 40.

⁴⁰ Brian Deagon, *Viacom Suit vs YouTube Could Set the Legal Standard*, INVESTOR'S BUSINESS DAILY, 17 March 2007.

The second scenario, which is taking shape today, is the media and entertainment groups' entry into the online music market in order to compete directly with internet-only corporations.⁴¹ One way to proceed would be for a media or entertainment empire to make available their whole catalogue online while continuing to refuse to authorize the use of their work. This would result in bringing TV and radio into the internet. A catalogue which is, in the case of major record companies, more than 50 years old and which contains famous artists would attract the public eye, especially if they can consume music and videos without the fear of violating the law. There would thus be a shift from independent online music providers, which can legally play mainly unknown acts. This shift of public attention would very probably pull independent music labels and independent artists towards those new platforms, as their chances to be noticed would be higher. Media giants, taking back a big part of the bargaining power they had lost, could possibly require an exclusive license in order to admit an unsigned artist on their platform. The future of the primary internet music providers would then be unsure. Their financial gain would be drastically reduced and they would be at risk of spending a lot more in litigation should a user upload unauthorized material on their website.

If, in this situation, contracts between large groups and artists or unsigned labels are negotiated in such a way that the latter retain full use of their rights and can have their music available in any other venue, artistic diversity would be enhanced rather than hindered by the presence of media and entertainment giants in the online music market. This would indeed create a one-stop shop containing record labels' repertoire as well as new material by unsigned artists and independent labels. However, the imbalanced bargaining power between both parties would render such a negotiation difficult. NBC Universal and News Corporation's announcement of its plan to create an internet venue competing with YouTube is an example of this second scenario.⁴² The two empires are planning to grant free online access to most of their current and old television shows.⁴³

The third scenario, which is the most likely on a long-term basis, is the large entertainment and media groups' direct or indirect control over the most popular internet

⁴¹ See Stefanie Balogh, *Media Giants Battle YouTube*, THE ADVERTISER (Australia) 24 March 2007; Todd Spangler, *Pumping Up a New Tube: NBCU, News Corp. Web Venture to Take on You Tube*, Multichannel News, 26 March 2007, or Emily Bell, *The Big Guys Decide it's Gang Up on Google Time*, 26 March 2007.

⁴² *Supra* note 41.

⁴³ *Id.*

companies. This is what happened to MySpace, that News Corporation acquired in 2005.⁴⁴ Moreover, history shows that media and entertainment corporations, like most businesses, do not hesitate to learn from their competitors' practices in order to increase their assets.⁴⁵

Large media and entertainment groups' potential behavior are not the only threat to music diversity and artistic creativity. Telecommunications companies are indeed attempting to control internet access.

b. Attempts to eliminate net neutrality

The largest telecommunications companies, namely AT&T, Verizon, Comcast and Time Warner have been lobbying Congress in order to have the right to charge customers for pipe use¹ and prioritize internet content by allowing higher-speed information delivery for higher paying customers, in the name of free competition rather than regulation.² Those companies have formed a coalition in order to push Congress to enact a now buried bill named the Communications Opportunity Promotion and Enhancement Act (COPE)³ in order to provide for their wishes.

Allowing such control over internet access can have disastrous consequences when it comes to, among many other things, innovation and artistic diversity. The direct result is that internet content would not be treated equally.⁴ It is indeed increasingly common to have one service provider in charge of TV, telephone and internet for a household.⁵ Those providers already control the content available on digital television and intend to have a similar influence on the internet in order to make online organizations pay them to have a bigger

⁴⁴ See News Corporation Annual Report 2006, p. 5, <http://www.newscorp.com/Report2006/AR2006.pdf>, last visited on 27 October 2007.

⁴⁵ *Supra* note **Error! Bookmark not defined.**

¹ See the statement of Ed Whitacre of AT&T: "Now, what they would like to do is use my pipes free, but I ain't going to let them do that because we have spent this capital and we have to have a return on it. So there's going to have to be some mechanism for these people who use these pipes to pay for the portion they're using. So why should they be allowed to use my pipes?" *Content Creators, Online Music Fans Support Net Neutrality, Conference Hears*, Washington Internet Daily, 3 May 2007.

² *Net Neutrality Proponents Claim Victory, Prepare for the Next Battle*, CMP Media LLC, 11 December 2006.

³ H.R. 5252, 109th Cong.

⁴ This is what is claimed in the Save the Internet website www.savetheinternet.com, last visited on 23 March 2007. See also Christopher S. Yoo, *Beyond Network Neutrality*, 19 Harv. J. Law & Tec 1 (2005), Ryan Blethen, *Much Work to be Done to Preserve Net Neutrality*, The Seattle Times, 2 February 2007 and *Hope for an Open, Free-Flowing Internet*, The Seattle Times, 11 January 2007.

⁵ *Id.*

online presence (like an advertiser would do) and have the consumers pay too to have a fast connection.¹ The non-payers would experience slow connection or unavailability. Further, telecommunications companies would have the right to favor their own services and therefore limit the use of other providers. Some instances of this type of control have been alleged. For example, in 2004, internet users were blocked by their carrier from using a competing web-based phone service.² Another illustration is the case in which a Canadian cable, internet, and telephone carrier intentionally downgraded the “quality and reliability” of competing services that their customers might have chosen.³

After a long battle between the telecommunications companies’ coalition, “Hands Off the Internet,” and another lobbyist, “Save the Internet”, campaigning for net neutrality, the COPE bill, which the House of Representatives passed in June 2006, was dropped.⁴ Three Senators, Olympia Snow, Byron Dorgan and Ron Wyden had been resisting the passage of the bill, advocating network neutrality.⁵ Later, the new House of Representatives brought more support to the cause.⁶

Yet the risk of having internet gatekeepers taxing users at will has not disappeared and the battle may well resurface in 2009 as no legislation or regulation requires internet neutrality.⁷ All that was done was for the Federal Communications Commission (FCC) to condition AT&T’s acquisition of BellSouth⁸ upon AT&T’s promise to respect neutrality for two years, whereas the other pipe owners are not concerned with this agreement.

This section has showed that today’s music industry setting, which is ideal for musical creativity, diversity, and free access,⁹ basically results from technology, good ideas and entrepreneurial flair.¹⁰ The public interest in diversity is here served by a combination of circumstances in a transition period. Consequently, this freedom and diversity, without

¹ *Id.*

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ See Ryan Blethen at *supra* note 4.

⁸ Making AT&T the leader in 22 states, see Seattle Times at *supra* note 4.

⁹ *Supra* note 8.

¹⁰ *YouTube - an online success story*, <http://www.tamingthebeast.net/articles6/youtubesuccess.htm>, last visited on 20 March 2007.

effective legal protection is not viable, even though the resistance to large media, entertainment and telecommunications companies has proved to be stronger than expected.

It is now necessary to explore how such a situation of precariousness has been brought about.

B. Evolution to the peak of lack of artistic diversity and creativity

One of the main reasons for the lack of musical and general artistic diversity, through access to a plurality of artists, is a lack of market regulation leading to a consolidation of the music, media and telecommunications industries through an oligopolistic domination by the few gatekeepers of public access.¹

Those three industries are closely-linked, which makes diagonal, horizontal and especially vertical integration easier and potentially dangerous, not only for artistic creativity and diversity, but also for democracy, as the expression of ideas and opinions falls into the hands of the telecommunications and media industries.²

Here, the evolution of the music business through record companies' concentrations shall be looked at (1) separately from the evolution of the media and telecommunication industry (2), as the latter is extremely dependent on the policy changes of its regulatory body, the Federal Communications Commission (FCC), whereas the former has been less affected by the merger regulatory organizations such as the Federal Trade Commission (FTC).

1. Consolidation of the music industry

The music industry has never solely been made of record companies. Yet, since the advent of recorded music, large labels have steered the business and have had a privileged place amongst mass media.³

The companies which today form the Big Four have a merger and acquisition history which is not unusual in the business world (car industry, for example); however, the oligopoly characterizing the end of the 20th century is singular.⁴

¹ Patrick Burkart, *Loose Integration in the Popular Music Industry*, *Popular Music and Society*, Volume 28, Issue 4, October 2005.

² *Id.*

³ *Id.*

⁴ *Infra* note 85.

Warner Music Group and Universal Music Group were created as divisions of their respective motion pictures studios, Universal Pictures and Warner Bros. in order to produce film soundtracks.⁵ Those groups later acquired independent music labels.⁶ EMI is the fruit of a merger in 1991 between two gramophone companies.⁷ The company grew larger, then merged with Thorn Electrical Industries in 1979, until the 1996 de-merger, and acquired Virgin Records in 1992.

In the early 1980s, the Japanese conglomerate Sony Corp. entered the music business by purchasing Columbia Broadcasting System (CBS),⁸ a leading record company, thus forming Sony Music Entertainment, which later purchased a number of other large labels.¹

Finally, Bertelsmann,² originally a publisher, created a music division³ in 1958 and subsequently bought out other successful record labels, while developing its media and entertainment businesses mainly through the acquisition of stakes in radio and newspaper groups.⁴ In 2004, the conglomerate set up Sony BMG, a joint venture with Sony Music.⁵

In the same year, AOL-Time Warner divested Warner Music Group.⁶ Today, the Big Four consist of two companies' fully-integrated media conglomerates (Sony BMG and Universal Music) and of two companies which operate separately from such empires.⁷

⁵ See Keith Suter, *When Movies Turned into Sound Business*, The Daily Telegraph (Australia), 5 October 2007 and see Jack Bishop, *Building International Empires of Sound: Concentration of Power and Property in the "Global" Music Market*, Popular Music and Society, No. 4, Vol. 28; p. 443, 1 October 2005.

⁶ Warner Music Group notably acquired Atlantic Records in 1967, Elektra Records in 1970, whereas, Universal (then MCA Entertainment) acquired PolyGram, Island Records, Motown Records.

⁷ The Columbia Graphophone Company and the Gramophone Company.

⁸ Columbia Records was founded in 1888 and later co-founded Columbia Broadcasting System. Columbia and CBS became music industry leaders in the United States in the 1960s with acquisitions and numerous partnerships, such as Epic Recordings.

¹ *Supra* note 5.

² Bertelsmann Aktiengesellschaft.

³ It was named Ariola.

⁴ Bertelsmann purchased the Gruner und Jahr publishing house in 1969, thus obtaining stakes in newspapers and magazines. The group also acquired Arista Records in 1979, RCA Victor in 1986 and Windham Hill Records in 1992. It also teamed up with internet provider AOL for services in Europe. Bertelsmann now owns RTL group, Europe's top television, radio and production group.

⁵ www.sonybmgmasterworks.com, last visited on 23 March 2007.

⁶ See Warner Music Group's Investors Relation webpage <http://investors.wmg.com/phoenix.zhtml?c=182480&p=irol-irhome>, last visited on 10 February 2007.

⁷ *Supra* note 71.

For over 40 years, those majors have increasingly been gatekeepers to music discovery due to their close links with radio and television broadcasters and to their tremendous investment capacity in artist development and marketing.⁸ Even though 18 percent of market shares lay in the hands of independent initiatives,⁹ the music business consolidation has made it harder for smaller labels to penetrate the market and gain public exposure. This affects plurality of artists and music diversity.¹⁰ Of course, it can be argued that before the emergence of the internet, diversity remained because most successful independent labels had not disappeared;¹¹ they had only been bought and had kept their traditions. However, on a corporate level, those labels had to follow non-music related guidelines.¹² Besides, their concerns about covering the losses of subsidiaries has resulted in intensive promotion of a small number of artists whose songs and “image” had to please radio stations, which themselves had to please advertisers.¹³ The direct result is the uniformity of sounds, best illustrated by the boom of manufactured bands and one-hit wonders in the 1990s.¹⁴

2. (De)regulation of media ownership.

The United States has known an unprecedented media ownership deregulation¹⁵ (b) in direct contradiction with the former regulatory policy (a), but allegedly for the same purpose: the public interest.¹⁶

⁸ *Id.*

⁹ According to Nielsen SoundScan, 81.87 percent of the 2005 market share is owned by the Big Four. Universal Music Group's part amounted to 31.71 percent; Sony BMG had 25.61 percent; Warner Music had 15 percent and EMI's part was 9.55 percent, http://www.undercover.com.au/news/2006/jan06/20060105_universal.html, last visited on 19 December 2006.

¹⁰ *Supra* note 1.

¹¹ *Supra* note 85 for the independent labels market share.

¹² *Supra* note 1.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ The primary sources of information in this Section are Ben Scott, *The Politics and Policy of Media Ownership*, 53 Am. U. L. Rev. (2004) and Rachel M. Stilwell, *Which Public? Whose Interest? How the FCC's Deregulation of Radio Station Ownership Has Harmed the Public Interest, and How We Can Escape from the Swamp*. 26 Loy. L.A. Ent. L. Rev. 369 (2006).

¹⁶ *Id.*

a. Regulation of media ownership for the public interest – the marketplace of ideas doctrine: 1912-1981

Media ownership regulation started with the regulation of radio stations. In radio's early days, legislators were concerned about the fact that broadcasters did not hesitate to step on another broadcaster's airwaves, creating nothing less than a mess for the listeners and potentially creating a monopoly.¹⁷ Therefore, in 1912 the Radio Act was passed and instituted a compulsory licensing system on a first-come-first-served basis.¹⁸ This act proved to be insufficient in preventing oligopolistic domination of radio frequencies by patent owners in radio manufacture,¹⁹ so, following ex-president Hoover and President Coolidge's request, the 1927 Radio Act was passed and created the Federal Radio Commission (FRC).²⁰ With the 1927 Act, broadcasters could no longer own radio frequencies.²¹ They could only be granted the right to occupy them as long as they acted for the "public interest".²² For the first time, broadcasters acted as trustees of the public interest.²³ The latter, though undefined, made its first appearance in the Commission's charter, which required it to support "public interest, convenience and necessity".²⁴

In 1934, the Federal Communications Commission (FCC) came into existence with the Communications Act.²⁵ The Commission was vested the authority to regulate radio stations for the public interest by controlling ownership, through the grant and renewal broadcast licenses, and broadcast content.²⁶ Music industry leaders immediately objected to the FCC's authority, claiming that content regulation by a governmental agency violated the First Amendment.²⁷ The Supreme Court found that the public interest, linked to the needs of democracy, outweighs broadcasters' interests and it held that the FCC's regulations were necessary to ensure fluid circulation of ideas and information due to the scarcity of

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Notably the Radio Corporations of America.

²⁰ *Supra* note 15.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ 47 U.S.C. § 151 et seq.

²⁶ *Supra* note 15.

²⁷ Mary V. Sooter, *To Convergence and Beyond: First Amendment Law to Withstand FastPaced Change in the Telecommunications Industry*, 74 U. Colo. L. Rev. 281.

expression tools and channels.²⁸ In addition, in *FCC v. Pottsville Broad Co.*²⁹, the Supreme Court reused the phrase “public interest, convenience and necessity” when confirming that those values were inherent to the FCC’s existence.³⁰

For years, the FCC considered, like the Supreme Court, that the public interest would be best served “with diversity, competition and localism” in broadcasting.³¹

The FCC, therefore, endeavored to promote these objectives by setting limits to broadcast ownership in order to prevent monopolies. The agency adopted the following a set of ownership rules:

1. The Rule of Sevens, limiting frequency ownership to seven AM, seven FM and seven TV stations;
2. The Local TV Multiple Ownership Rule, prohibiting TV broadcasters from owning more than one of the top four stations in a single market;
3. Local Radio Ownership Rules, limiting the number of radio stations that can be owned in a single market;
4. The Radio Duopoly rule, creating minimum geographic distances between stations offering the same service;
5. The National TV Multiple ownership rule, limiting multiple ownership of local TV stations to a percentage of the national TV audience;
6. The One-to-a-Market rule, which banned cross-ownership of radio and television stations in the same market;
7. The Dual Network Rule, according to which no one can own more than one major television network.³²

²⁸ *National Broadcasting Co. v. U. S.*, 319 U.S. 190 (1943).

²⁹ *FCC v. Pottsville Broadcasting Co.* 309 US 134, 138 (1940).

³⁰ Phrase also incorporated in the 1934 Communications Act, which required the commission to “encourage larger and more effective use of radio in the public interest”. See Communications Act of 1934, Ch 652, 303(f), 48 Stat/ 1064, 1082 (codified as amended at 47 U.S.C. 303(f) (2000).

³¹ The FCC had “long regulated media ownership as a means of promoting diversity, competition, and localism in the media without regulating the content of broadcast speech”. 2002 Biennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Report and Order on Notice of Proposed Rule Making, 17 F.C.C.R 18503, 18504 (adopted Sep. 12, 2002).

³² *Supra* note 15.

Those regulations were naturally highly unpopular amongst large broadcasters, who were increasingly powerful and who vehemently and successfully lobbied the government.³³

b. Deregulation of media ownership “for the public interest” – the marketplace doctrine: 1981 to present

Waves of ownership deregulation started in 1981 with the arrival of President Reagan, who had positively responded to powerful broadcasters’ demand for a free market during his campaign for the White House.³⁴ The policy change started with Reagan’s appointment of new commissioners willing to go in his direction.³⁵ They justified this move by invoking the broadcasters’ argument that regulation, as practiced until then, violated free speech and that such regulation was no longer needed since technological innovation has multiplied information sources, and has thus rendered media platforms less and less scarce by multiplying information sources. More importantly, the FCC announced that the way to pursue its public interest mission was to let competition in the marketplace serve as a regulator instead of being restricted in their ability to grow and serve their customer base.³⁶

Thus, past rules started being relaxed – such as the Duopoly Rule or the One-To-A-Market Rule – or eliminated – such as programming requirements or formal ascertainment of community needs.³⁷ During this time, the agency legitimized its actions with reports showing that large media groups provided more varied television and radio programs and of a higher quality. However, the independence of those studies has been challenged.³⁸

³³ *Id.*

³⁴ He notably proclaimed that “excessive and needless federal regulations were overburdening the nation’s economy”. Address before a Joint Session of the Congress on the Program for Economic Recovery, 1981 Pub. Papers 108 (18 February 1981).

³⁵ Mark Fowler, appointed as the FCC Chairman in 1982, voiced his intention to depart from the past regulatory policies pushing forward importance of the business aspect of commercial broadcasting. *See* Mark S. Fowler, *The Public’s Interest* 56 Fla. B.J. 213 (1982).

³⁶ Federal Communications Commission, *In the Matter of Deregulation of Radio* (Part 1 of 2), BC Docket No. 79-219; RM-3099; RM-3273, 84 F.C.C.2d 968.

³⁷ *See* Erwin G. Krasnow & Jack N. Goodman, *The “Public Interest” Standard: The Search for the Holy Grail*, 50 Fed. Comm. L.J. 605, 608 (1998).

³⁸ One report was the result of studies solely led by NBC, which has an obvious interest in stating that its acquisitions enhanced quality and diversity. Another study consisted in collecting and analyzing the points of view of the directors of top broadcasting companies on the fulfillment of their public interest mission.

The loosening of regulatory rules moved up a gear (rather two gears) with the 1996 Telecommunications Act,³⁹ unenthusiastically signed by President Clinton.⁴⁰ The act removed all restrictions on national radio ownership,⁴¹ and relaxed the Multiple Station Ownership Rule, granting the right for one company to own up to eight commercial radio stations in one market. In 2001, the One-To-A-Market Rule was again loosened so as to allow one organization to own up to six radio stations and two TV stations in the same market.⁴² This move allowed Clear Channel's empire to rocket from 40 stations to 1240.⁴³

In 2002, knowing that the FCC was to open its Biennial Review, the White House pressed for an immediate increase for market freedom from governmental interference. Both Congress and the FCC were divided on the matter. FCC Commissioners Michael Copps and Johnathan Adelstein confronted FCC Chairman Michael Powell, and campaigned against deregulation, arguing, among other things, that the public interest was far from being served and that Congress should reconsider its media policy to find ways to better serve the public interest.⁴⁴

In June 2003, the FCC, despite unprecedented public opposition,⁴⁵ decided to speed up the deregulation process by flattening the last main barriers to free media market.⁴⁶ The Senate rejected this decision. In *Prometheus Radio Project v. FCC*,⁴⁷ the Third Circuit Court of Appeals eventually put a halt to the FCC's projects, stating that the FCC had used a diversity index to weigh cross-ownership, which contained "irrational assumptions and

³⁹ 47 U.S.C et seq.

⁴⁰ Clinton had threatened to veto the bill in order to avoid mass consolidation, but he changed his mind after Congress made some compromises. See Mike Mills & Paul Fahri, *This is a Free Market? The Telecommunications Act So Far: Higher Prices, Few Benefits*, Washington Post, 19 January 1997.

⁴¹ *Supra* note 39.

⁴² *Id.*

⁴³ Peter DiCola, *Falses Premises, False Promises, a Quantitative History of Ownership Consolidation in the Radio Industry*, Future of Music Coalition (2006).

⁴⁴ See Thane Peterson, *Why the FCC Needs a New Chief*, Business Week Online, American University Law Review, September 2004.

⁴⁵ Hundreds of organizations and millions of citizens filed comments in the media ownership proceedings, with 97 percent of citizen comments disapproving further deregulation. *Supra* note 120.

⁴⁶ What was proposed was that one organization could own local TV stations that reach an audience of up to 45 percent. Corporations can own a TV station and a newspaper in any market with four or more TV stations (i.e., the majority of the US market). Besides, corporations may own any combination of newspapers, TV and radio stations in markets with over eight stations. *Changes in FCC's Media Ownership Rules* http://www.usatoday.com/money/media/2003-06-01-ownership-rule-changes_x.htm, last visited on 20 February 2007.

⁴⁷ 373 F.3d 372.

inconsistencies.” The Supreme Court denied the petition a writ of certiorari⁴⁸ and, as a consequence, the FCC still has to provide valid justification for deregulation. In 2007, the FCC, with its new chairman Kevin Martin, is to deliver a review of ownership rules. As usual, giant media corporations have been lobbying for less control and notably want to raise the cap on radio ownership in a market to 12 stations, instead of eight.⁴⁹ Now, less than 12 conglomerates control most of the media in the United States. Five companies control 80 percent of the TV viewing audience. The airwaves are controlled by four companies, which also share two-thirds of the listeners of news radio stations. TV networks are controlled by two large radio groups.⁵⁰

As will be seen below, the consolidation of the recording industry on the one hand, and of the media industry on the other hand has done little for the promotion or protection of artistic creativity and diversity.

c. Direct consequences of music and media market consolidation

This part will briefly state the logical consequences on music creativity and diversity of such a consolidation. An important asset for of big corporations controlling and wishing to further control the media and music industry is the difficulty in measuring diversity and the absence of thorough and independent research in this regard.⁵¹ However, since the 1996 Telecommunications Act and even more after the 2003 deregulation efforts, public interest groups, such as consumer groups, have joined forces, supported by politicians opposing deregulation and have initiated and financed more objective and thorough research projects, despite the lack of cooperation of the giants, who disclose much less data than the average US listed company. The data used below on diversity derives from different studies instigated by the Future of Music Coalition (FMC), a not-for-profit group gathering members of the music, technology, public policy and intellectual property law communities. The work was carried out mainly by university researchers. As said earlier, television and radio have so far consistently been the main music discovery tools. Therefore, the consequences of

⁴⁸ FCC v. Prometheus Radio Project, 545 U.S. 1123 (U.S. 2005).

⁴⁹ Andrew L. Shapiro, *Aiding the Final Push of the Digital Transition*, 5 Cardozo Pub. L. Pol'y & Ethics J. 339 (2006).

⁵⁰ *Supra* note 15.

⁵¹ See for example the very opaque websites of major record labels www.sonybmg.com, www.umusic.com, www.emigroup.com, and for the most generous website, www.wmg.com, last visited on 23 March 2007.

deregulation on music diversity will be looked at from this end.

First, music and media market consolidation has caused TV and radio music to be more homogenous. Radio stations have multiplied and diversified the branding of music genres. However, an observation of radio and TV broadcast based on songs rather than format shows increased similarities of genres with different names and a decreased number of songs played within those formats. In 2006, 15 formats constituted 76 percent of commercial programming. Small and marginal radio stations offer other music genres, such as jazz, americana, bluegrass, new rock folk, whereas sports, talk, and classic rock have grown solidly amongst large groups since the 1996 Act.⁵²

Secondly, music localism is being pushed away by the growing media conglomerates. This is especially true when it comes to radio groups, which found the opportunity, with concentration, to cut programming costs by drastically reducing the number of programming directors. This affects the exposure of local artists who need to be discovered by a programming director located in the radio group's head office. Today, it is not uncommon to have one programming director in charge of 40 radio stations. Nor is it uncommon to have the studios of former local radios, which have been acquired by a big group, relocated to a larger studio gathering different radio stations, with hosts speaking with a "local accent," misleading listeners who still believe that their radio is local.⁵³

Third, music discovery on television and the radio is limited to music provided by the Big Four record companies which occupy 80 to 100 percent of their playlists, depending on the music genre.⁵⁴ With the shrinkage of programming directors amongst large media groups,

⁵² The Yale Daily News reported in 2002 that radio consolidation after passage of the 1996 Act had resulted in "less diversity, shorter playlists, and a staggering amount of repetition" in the community of New Haven, Connecticut. The article pointed out that Clear Channel controlled "more than half of all popular music stations" and "almost two-thirds of rock stations across the country", and that "ten Clear Channel stations can be received in New Haven alone." The paper compared the playlists of three of those New Haven stations, finding that the three stations shared seven of the same songs in their respective top ten most frequently played singles, David Grimm, *Clear Channel Killed the Radio Star*, Yale Daily News, Sept. 16, 2002, at <http://www.yaledailynews.com/article.asp?AID=19664>, last visited on 23 March 2007.

⁵³ See Stilwell at *Supra* note 15. See Clear Channel's practices of voice tracking: "Via a practice called 'voice-tracking', Clear Channel pipes popular out-of-town personalities from bigger markets to smaller ones, customizing their programs to make it sound as if the DJs are actually local residents." Anna Wilde Mathews, *Clear Channel Uses High-Tech Gear to Perfect the Art of Sounding Local*, The Wall Street Journal, 25 February 2002.

⁵⁴ Releases from major record labels had an overwhelming presence on radio charts over the last decade. Major labels enjoyed 87 percent to 100 percent share on country and Contemporary Hit Radio. The share in rock music varies from 80 percent to 99 percent. *A Report on the Effects of Radio Ownership Consolidation following the 1996 Telecommunications Act*, published by the Future of Music Coalition 18 November 2002.

it is practically impossible for anyone not signed with a major label to be discovered or promoted by a programming director managing approximately 40 radio stations. Even major labels cannot ensure that all the recordings they want to promote will make it through this bottleneck. This is why majors have been using very expensive “independent promoters” in order to have music on air.⁵⁵ Therefore, having four media groups occupying over 70 percent of the market, and exclusively broadcasting music from four record companies, casts a serious doubt upon access to diversity and artistic creativity.

This concern seems to have reached listeners who decry the fact that commercial radio stations increasingly tend to repeatedly play a limited number of songs. Indeed, according an FMC survey, a majority of listeners have expressed the wish to have longer playlists with more artists to discover and less repetition of tracks.⁵⁶ A majority of surveyed listeners also oppose further deregulation and support the preservation or increase of locally-owned independent stations.⁵⁷

The decline of musical diversity and creativity is not surprising given the lack of governmental protection. So far, only a federal court has slowed down the deregulation process. Even though Congress is by definition an institution meant to serve the public interest, notably via the House of Representatives, artistic diversity and creativity has very rarely been protected, and *a fortiori*, promoted.

Part 2: How market regulation does not protect artistic diversity and creativity

Artistic diversity and creativity has occasionally been considered to be paramount to the “public good” by courts and by Congress.⁵⁸ Moreover, the Constitution encourages Congress to “Promote... the Progress of... useful Arts.”⁵⁹ However, those interests have hardly been the object of laws regulating trade and are, therefore, seldom the object of legal disputes and court holdings. Congress has not gone any further than granting exclusive rights to authors⁶⁰

⁵⁵ See Part 2 (A).

⁵⁶ *Number of Stations Owned by the Top 50 Owners, 1975-2005* Media Access Pro (Radio Version), BIA Financial Networks, November 2005 data.

⁵⁷ *Supra* note 49.

⁵⁸ *Infra* note 24.

⁵⁹ U.S. CONST. Art. 1, § 8.

⁶⁰ *Supra* note 31.

and inventors,⁶¹ as prescribed by the Constitution, in order to promote creation. The first part of the paper has shown that the existence of copyright law was not enough to successfully promote artistic creativity and diversity and that Congress' diversity and plurality concerns of the 1934 Communications Act belonged to history.

Apart from invoking copyright law, plaintiffs have based their suits on legislation and regulations that pursue other objectives than the promotion of those interests. When those interests happen to be protected, it is incidentally, through the protection of other interests by Congress, federal agencies, and courts.

An exhaustive analysis of the entire United States legal framework in order to see the extent to which artistic diversity and creativity is protected would lead to redundant and superfluous findings. Therefore, the approach taken in this second part is to first observe a situation in which Congress, confronted by a dilemma, clearly made the choice to privilege economic interests over artists' rights with its rejection of the Berne Convention's moral rights (A).⁶² is the approach is to then look at the purposes of laws regulating trade, as they are the ones which are the most closely related to the protection of artistic creativity and diversity and have a potential, though limited, to indirectly serve this interest (B). Finally, we will see that one of the reasons why trade regulations do not reach their potential is that they sometimes do not even meet their initial objectives. This is the case with anti-payola laws (C).

A. Rejection of the Berne Convention's protection of moral rights

With Congress' refusal to add moral rights to its law (1), artists can only awkwardly turn to other legal rules in order to remedy alleged violation of moral rights (2).

1. Decision not implement the moral right provision

The 1886 Berne Convention is the most fundamental and inclusive international agreement on intellectual property when it comes to the rights granted and the number of signatory countries. Initiated by France, it has a civil law approach that some common law

⁶¹ *Id.*

⁶² *Id.*

countries have had problems accepting or integrating.⁶³

The Convention expressly intends to guarantee the protection of moral rights, which is a French notion widely accepted by European civil law countries. Article 6 bis provides that

(1) independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation

(2) the rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the country where protection is claimed.⁶⁴

The Convention grants fewer rights than the French *droit moral*.⁶⁵ It nevertheless provides important safeguards for creators of artistic and literary works by recognizing the right to be identified as the author (paternity right), the right not to have the work derogatorily treated (integrity right), and by affirming that those rights are personal and attached to the author's personality as opposed to copyright, which is regarded as a patrimonial (pecuniary) right. If it is difficult to prove that such safeguards have the actual effect of promoting artistic creativity by acknowledging artists' creation as part of their own personality, it is undeniable that those safeguards, at least, had this purpose.⁶⁶

Whereas England has reluctantly and partially accepted Article 6 bis,⁶⁷ the United States refused to sign the Convention for over 100 years. In 1989, Congress finally decided to join the 74 contracting countries, mainly because of its desire to bring the United States to the forefront of international intellectual property policy- and law-making. However, the Berne Convention Implementation Act (BCIA),⁶⁸ preceding the United States' Convention,

⁶³ *Infra* note 67.

⁶⁴ The Berne Convention, art. 6 bis

⁶⁵ *Droit moral* (literally translated as *Moral right*) in French law also includes the right for an author to divulge his work to the public and the right to withdraw his work from the public and the market even when he had previously divulged it. *See* articles 121-2 and 121-4 of the Code de la Propriété Intellectuelle.

⁶⁶ Calvin D. Peeler, *From the Providence of Kings to Copyrighted Things (and French Moral Rights)*, 9 *Int'l & Comp. L. Rev.* 423, 426 (1999).

⁶⁷ England has made those rights waivable, as opposed to inalienable, and authorship has to be asserted for moral rights to exist. Copyright, Designs and Patent Act 1988 Sections 77, 78 and 79.

⁶⁸ Pub. L. No. 100-568, 102 Stat. 2853-54 (1988).

unmistakably excluded the grant of moral rights as set out in Article 6 bis.⁶⁹ Congress argued that no such law was to be added to the copyright legislation because common law,⁷⁰ state law, and federal law⁷¹ already provided the necessary protection.⁷²

Later, with the Visual Artists Rights Act of 1990,⁷³ Congress made a timid move towards moral rights by expressly recognizing a paternity right and an integrity right to a limited number of authors of “works of visual art.”⁷⁴ In addition to the narrowness of the material scope of the protection,⁷⁵ the rights granted do not have the inalienable feature of the Berne Convention’s moral rights. The rights granted by Congress are indeed waivable and are extinguished at the death of the creator.⁷⁶ It has also been argued that the Visual Artists Rights Act could even eliminate more favorable rights enjoyed by artists in certain states by

⁶⁹ See BCIA (3)(b), “Certain Rights Not Affected: The provisions of the Berne Convention, the adherence of the United States thereto, and satisfaction of United States obligations, do not expand or reduce any right of an author of a work, whether claimed under Federal, State or the common law (1) to claim authorship of the work; or (2) to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to the work, that would prejudice the author's honor or reputation.”

⁷⁰ According to Congress, common law regarding “publicity, contractual violations, fraud and misrepresentation, unfair competition, defamation, and invasion of privacy” corresponds to some moral rights. See H.R. Rep. No. 609, *supra* note 2, at 32-34.

⁷¹ Congress considered that the Copyright Act provisions relating to derivative works, to the prohibitions on distortions of musical works and to the compulsory license attached to performing rights (in section 106, 115 and 203) guaranteed the same protections as the moral rights article of the Berne Convention. It also found safeguards in the 1946 Lanham Act proscribing false description and false designations regarding origin. See H.R. Rep. No. 609.

⁷² Congress notably stated: “The committee believes that U.S. adherence to the Berne Convention should not change current law on moral rights. Therefore, S. 1301 will not, and should not, change the current balance of rights between American authors and proprietors, modify current copyright rules and relationships, or alter the precedential effect of prior decisions. The committee also does not intend to change, reduce, or expand existing U.S. law with respect to the author's right to claim authorship or his or her right to object to distortion”. Joint Explanatory Statement on House-Senate Compromise Incorporated in Senate Amendment to H.R. 4262

⁷³ Visual Artists Rights Act of 1990, title VI of the Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089, 5128, enacted 1 December 1990.

⁷⁴ Visual Artists Rights Act of 1990 603, 17 U.S.C. 106A. See sub-section (c) for exceptions: “(c) Exceptions. (1) The modification of a work of visual art which is a result of the passage of time or the inherent nature of the materials is not a distortion, mutilation, or other modification described in subsection (a)(3)(A). (2) The modification of a work of visual art which is the result of conservation, or of the public presentation, including lighting and placement, of the work is not a destruction, distortion, mutilation, or other modification described in subsection (a)(3) unless the modification is caused by gross negligence. (3) The rights described in paragraphs (1) and (2) of subsection (a) shall not apply to any reproduction, depiction, portrayal, or other use of a work in, upon, or in any connection with any item described in subparagraph (A) or (B) of the definition of “work of visual art” in section 101 [17 USC 101], and any such reproduction, depiction, portrayal, or other use of a work is not a destruction, distortion, mutilation, or other modification described in paragraph (3) of subsection (a).”

⁷⁵ *Id.*

⁷⁶ 17 U.S.C. 106A(e).

preempting state laws⁷⁷.

2. Attempts to claim moral rights through existing common law and statutory law.

Moral rights claims under state and federal statutes (a) and under common law (b) will be examined in this section.

a. Statutory law

While refusing to amend its copyright laws, Congress has listed different statutory and jurisprudential legal rights and duties that, allegedly, largely encompass moral rights guarantees.⁷⁸ Although some cases do indeed assert some rights found in the Berne Convention, other cases illustrate the inaccuracy of Congress' statement.

In relation to the paternity right, trademark law has been relied on. Indeed, in *Smith v. Montoro*,⁷⁹ an actor brought a suit under the Lanham Act against a distributor who had failed to give him the agreed acting credit. The court found that such action constituted a violation of § 43(a) of the Lanham Act and its prohibition of false designations or representations⁸⁰ and it considered that "there is a vital interest of actors in receiving accurate credit for their work."⁸¹ However, the court limited its key statement to actors leaving out a rule concerning other artists. Additionally, this decision was rendered in a breach of contract context.⁸²

The 1976 Monty Python case, *Gilliam v. American Broadcasting Co.*, directly addressed the integrity right. Gilliam involved the unauthorized editing and broadcasting of a television comedy program by a licensee.⁸³ The British comedy group known as the Monty Python had an agreement with the British Broadcasting Corporation (BBC) for the creation of television series over which Monty Python retained strict creative control as writers and performers except for minor alterations. The BBC licensed broadcasting rights to the American

⁷⁷ Patrick G. Zabatta, *Moral Rights and Musical Works: Are Composers Getting Berned?* 43 Syracuse L. Rev. 1095, 1136 1992 at 1112.

⁷⁸ *Supra* note 70 and 71.

⁷⁹ 648 F.2d 602 (9th Cir. 1981).

⁸⁰ Trademark (Lanham) Act 1946 15 USC, Section 43 (a) (1): "Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact."

⁸¹ *Supra* note 79 at 608.

⁸² *Id.* at 603.

⁸³ 538 F.2d 14 (2d Cir. 1976).

Broadcasting Company (ABC), which edited and broadcast three comedy programs. The court held that this “impaired the integrity” of the plaintiff’s work and amounted to a misrepresentation under § 43(a) of the Lanham Act. But once more, the court heavily relied on the agreement between the troupe and the BBC to reach its decision. Moreover, the concurring Circuit Judge Murray I. Gurfein clearly declared that there “are no such [moral] rights recognized in copyright law in the United States” and that the “the Lanham Act [...] is not a substitute for *droit moral* which authors in Europe enjoy [...] and does not deal with artistic integrity. It only goes to misdescription of origin and the like.”⁸⁴

In another case,⁸⁵ the court considered that the false attribution of products to an artist did not violate a New York privacy statute because the legislative protection did not extend to pseudonyms and the copyright assignment in the work creates an “implied license” to use the name to sell the artistic production.⁸⁶ We can see here that an artist could turn to federal trademark law, but apparently only in the context of the existence of a contract. As to laws protecting privacy, they do not guarantee remedy against false attribution of paternity to artists who have transferred their copyright. This does not correspond to the idea and the explicit language of Article 6 bis.

b. Common law

Congress also pointed the law of contract, unfair competition and defamation for remedies against moral rights infringement.⁸⁷ In *Geisel v. Poynter Prods., Inc.*,⁸⁸ the children’s books author Dr. Seuss sued a company for manufacturing and commercializing dolls derived from a cartoon that he had sold to a magazine. Dr. Seuss considered the dolls “tasteless, unattractive and of inferior quality.”⁸⁹ The court held that the defendants violated his trade name, under the Lanham Act, but it rejected his claims of false designation of origin, right to privacy, defamation, and conspiracy.⁹⁰

First, concerning the unfair competition claim, the court considered that any action on this

⁸⁴ 538 F.2d 14 at 25.

⁸⁵ *Infra* note 8886.

⁸⁶ *Id.* at 356.

⁸⁷ *Supra* note 69.

⁸⁸ *Geisel v. Poynter Prods., Inc.*, 295 F. Supp. 331 (1968).

⁸⁹ *Id.* at 333.

⁹⁰ *Id.* at 351 - 58

count was extinguished with the copyright transfer to the magazine. This holding contradicted the perpetual and non-pecuniary characteristic of moral rights.

Then, in relation to the defamation claim, the court found that the dolls had been manufactured with “great care, skill and judgment by a designer and manufacturer”⁹¹ and that the dolls were “attractive and of good quality.”⁹² Such reasoning, overlooking the adequacy between the work of which paternity was falsely attributed to the artist and the personality of the artist, is also in contradiction with moral rights. The court indeed acknowledged the fact that common law and statutory law only partially complied with the moral rights doctrine⁹³. In *Shostakovich v. Twentieth Century Fox Film Corp.*,⁹⁴ the court held that Soviet composers, who protested against the use of their compositions and the against credit they received in an anti-communist film, did not have a valid defamation claim because there was no willful injury or invasion of a moral right. However, the same action was successful before a French appellate court.⁹⁵

In conclusion, in the view of the statutory and common law, the contractual expectations of the plaintiff seem to determine whether he will be entitled to a remedy comparable to a moral rights protection. Generally, a plaintiff’s conveyance of his copyright will be detrimental to his moral rights unless he contractually asserts his control over the use of his work and his name in relation to his work. Moreover, an artist who no longer owns the copyright to his work and has no contractual relationship with the copyright holder (for example the second or third assignee) is very unlikely to have any remedy for what would constitute a violation of moral rights under the Berne Convention. Therefore the Berne Convention’s desire to promote artists’ creativity has not outweighed the economical interests deriving from the exploitation of creations.

⁹¹ *Id.* at 357.

⁹² *Id.*

⁹³ *Id.* at 339 ‘The doctrine of “moral right” recognized by the civil law of many European and Latin American countries encompasses the right of an author or artist “* * to object to any distortion, mutilation or alteration * * *” of his work even after the transfer of the copyright in his work (...) However, the doctrine of moral right is not part of the law in the United States, except insofar as parts of that doctrine exist in our law as specific rights -- such as copyright, libel, privacy and unfair competition.’

⁹⁴ 196 Misc. 67 (N.Y. Misc. 1948).

⁹⁵ *Société Le Chant du Monde v. Société Fox Europe et Société Fox American Twentieth Century Fox*, 80 Cour d’appel Paris, 13 janv 1953, 1 G.P. 191 (1953), 1953 J.C.P. II, No. 7667.

B. The protection of artistic diversity and creativity is not the direct purpose of trade regulation

Trade regulation has been present in common law (1). It is also the object of law on unfair competition, which is linked to trademark law and antitrust law (2). Consumer law deals with individuals in their transactions with merchants (3).

1. Trade regulation in common law

Common law provides rules against unfair competition. Those rules are part of torts law and they grant remedies to parties injured as a result of unfair trade practices. Courts originally sought to ensure physical security of persons and property.⁹⁶ Then they extended the protection to nonphysical harm to the “advantageous trade relations” by providing remedies for actions such as nuisance, injurious speech, breach of confidentiality, deception, and falsehood. From there also derived the tort of palming off, which developed parallel to statutory trademark law⁹⁷ and the tort of misappropriation condemning the appropriation of the fruits of another party’s intellectual efforts and investment in time and money.⁹⁸ All this formed a concept of malicious competition even though there were instances in which the wrong-doer was not the direct competitor but was another party who had other interests.⁹⁹ Even though courts have sometimes mentioned the existence of a public interest, common law trade regulation has, from the beginning, aimed at protecting market players from prejudicial conducts. Here, there is obviously little room for promotion and protection of artistic diversity and creativity.

2. Unfair competition law: trademark and antitrust law

Through federal and state laws, governments and agencies have significantly added to the

⁹⁶ See the “Schoolmaster’s case” Y.B. Hilary, 4, f. 47, pl. 10 (1410).

⁹⁷ Also known as “passing-off”. Palming off takes place “where there is a prospect of confusion of identity through the unauthorized use of similar marks or get up, and such use damages, or is likely to damage the goodwill and reputation of a business”. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, Fourth Edition, Houghton Mifflin Company, 2006.

⁹⁸ International News Service v. Associated Press 248 U.S. 215 (1918).

⁹⁹ For manufacturers causing a nuisance to retailers. See *Unfair Competition. Retailer's Bait and Switch Selling Technique a Tort Enjoinable by Manufacturer of Advertised Product*, Virginia Law Review, Vol. 46, No. 2. (1960), pp. 358-361.

incomplete protection awarded by common law. Trademark¹⁰⁰ and antitrust law are not exclusively federal.¹⁰¹ However, congressional legislation is crucial to trade relations.

The 1946 Lanham Act's provisions, without expressly stating their objectives (in a preamble for example), further shield merchants by listing all the practices amounting to a trademark infringement. The notions of "consumers"¹⁰² and "public interest"¹⁰³ appear but are not defined. Most of the listed practices seem to be more injurious to business than to consumers. Trademark law initially targets commodities and nothing artistic. So, on the one hand, consumer protection is not the primary purpose of trademark law and, on the other hand, the promotion and protection of artistic diversity is in no way an objective of trademark law. However, the control of trade practices, when it comes to the arts, can benefit, to a certain extent, consumers of these types of products.

Antitrust law is another way by which artistic creativity and diversity could be protected.¹⁰⁴ It is generally defined as the "law intended to promote free competition in the market place by outlawing monopolies."¹⁰⁵ As stated in *Northern Pacific Railway Co. v. United States*,¹⁰⁶ antitrust law aims to preserve "free and unfettered competition"¹⁰⁷ as the rule of trade in order to best allocate "economic resources, lowest prices, the highest quality and the greatest material progress"¹⁰⁸ while "providing an environment conducive to the preservation of [...] democratic political and social institutions,"¹⁰⁹

Like for trademark law, federal legislators have not articulated the purpose of antitrust laws. Again, of course, no legislative statement related to antitrust refers to the promotion and protection of artistic diversity. The closest one can get to that is the Supreme Court's onetime

¹⁰⁰ See the Supreme Court decision in the Trademark Cases of 1879 in which it was held that trademark does not "depend upon novelty, invention, discovery, or any work of the brain. It requires no fancy or imagination, no genius, no laborious thought. It is simply founded on priority of appropriation". 100 U.S. 82 (1879).

¹⁰¹ *California v. ARC America Corp.*, 490 U.S. 93 (1989), at 101-02.

¹⁰² Trademark (Lanham) Act 1946 15 USC. Section 43 (c) (3) (A) (i), for example.

¹⁰³ *Id.* at Section 10.154 (a) (1) for example.

¹⁰⁴ See for example Lime Wire's action against the big four and some of their labels. Nancy Gohring *Lime Wire turns tables, sues record companies*, IDG News Service www.macworld.com/news/2006/09/26/limewire/index.php, last visited on 19 December 2006.

¹⁰⁵ *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 4 (1958).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 4.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

position in favor of a public interest approach of antitrust law.¹¹⁰ This view comes from a movement, which has been referred to as “the Consumer Protection School,” that considers antitrust law’s objective is to limit consumers’ transfer of wealth to organizations exercising monopolistic power, to the excesses of monopolistic behavior, such as the power to fix exorbitant prices.¹¹¹

The Supreme Court has found that antitrust law has a social and political goal (rather than economic),¹¹² and, in 1984, it held that the primary aim of the Sherman Act was to serve consumers.¹¹³

However, without providing additional details, the Court later came back to its dominant position and espoused the now very influential view of the Chicago School according to which the main purpose of the Sherman Act is the optimization of economic efficiency.¹¹⁴ This brings antitrust law further away from consumers’ interest. Further, consumer law shows that there is also a long distance between consumer protection and the intention to promote artistic creativity and diversity.

3. Consumer Law

Consumer law departs from unfair competition and antitrust law by clearly taking a position to protect consumers, i.e., the public. Yet consumer law limits its scope to pecuniary transactions between consumers who have little bargaining power and merchants. There are a number of statutes serving this purpose. For example, the Fair Credit Reporting Act¹¹⁵ and the Fair Debt Collection Practices Act¹¹⁶ deal with consumer credit and aim to prevent abusive practices in relation to grant of credit, debt collection and use of consumer credit information.

¹¹⁰ *Infra* note 112.

¹¹¹ Christopher R. Leslie, *Achieving Efficiency Through Collusion: A Market Failure Defense to Horizontal Price-Fixing*, 81 Calif. L. Rev. 243 (1993).

¹¹² See *Reiter v. Sonocone Corp.*, 442 U.S. 330 at 343 (1979) looking at the legislators’ intent and finding that the debates “suggest that Congress designed the Sherman Act as a ‘consumer welfare prescription’”. See also *Jefferson Parish Hospital Dist. No. 2 v. Hyde* 466 U.S. 2 (1984) at 16, in which the Supreme Court stated: “And from the standpoint of the consumer -- whose interests the statute was especially intended to serve -- the freedom to select the best bargain in the second market is impaired by his need to purchase the tying product, and perhaps by an inability to evaluate the true cost of either product when they are available only as a package”.

¹¹³ *Id.*

¹¹⁴ See *National Collegiate Athletic Association v. Board of Regents* 468 U.S. 85 (1984).

¹¹⁵ 15 U.S.C. 1681.

¹¹⁶ 15 U.S.C. 1692.

The Equal Credit Opportunity Act,¹¹⁷ the Truth in Lending Act¹¹⁸ and the Fair Credit Billing Act¹¹⁹ also seek to shield consumers from the credit industry's unfair and predatory practices. Consumers rights to artistic diversity or at least viewpoint diversity is evoked nowhere.

The legal safeguards seen above, especially antitrust law and unfair competition law, have indirectly served artistic diversity and creativity, while targeting other goals. Yet the benefits have logically been insufficient as such legal frameworks rarely have the perfect domino effect that would make them incidentally protect other interests which are barely identified. This explains why plaintiffs hesitate to put forward the diversity and creativity argument in court and prefer relying on the interference with more obviously protected interests. However, in the music industry, it is also to be noted that, many times, such plaintiffs happen to be professionals of the industry who desire to remedy their pecuniary harm. The increasingly powerful internet music providers and lobby groups campaigning for artistic creativity and diversity¹²⁰ are very likely to bring the "public interest" argument back to the courtrooms on a more regular basis.

C. A failed measure that could have protected artistic diversity and creativity: anti-payola Laws

The neologism "payola" is an amalgamation of the words "pay" and "Victrola," a brand of vinyl record player.¹²¹ This term designates the practice of offering consideration, such as money, to a radio broadcaster in order to have a record played.¹²² Given the scarcity of the airwaves, their concentration in only a few hands, the consolidation of record companies and the use of radio as a primary source of music discovery, as described in Part 1, it is easy to envisage the harm that such a practice can cause to musical diversity. The response to payola has so far been very mild (1) and therefore has had little effect (2). The inefficiency of anti-payola laws has become even more blatant since the massive broadcast industry consolidation following the 1996 Telecommunications Act (3).

¹¹⁷ 15 U.S.C. 1691.

¹¹⁸ 15 U.S.C. 1601.

¹¹⁹ 15 U.S.C. 1666.

¹²⁰ See for example: Future of Music Coalition.

¹²¹ THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, Fourth Edition, Houghton Mifflin Company, 2006.

¹²² *Id.*

1. Lenient anti-payola laws

Radio stations started accepting money to play records in the 1930s. Since then, the practice has become increasingly organized, sophisticated and institutionalized.¹²³ In the beginning, radio broadcasters, who then were fairly open about payola, justified it with supply and demand logic, according to which it was normal to pay for the use of the scarce resource they provided.¹²⁴ It is interesting to note that this argument resembles the one used today by the telecommunications groups seeking to charge the use of internet pipes, as seen in Part 1.

Congress responded to a 1950 public scandal following an investigation which revealed the wide extent of pay-for-play. The then-popular disc-jockeys Dick Clark and Alan Freed were involved and Freed pleaded guilty for commercial bribery.¹²⁵

In 1960, Congress decided to tackle the payola issue by adding to the 1934 Communications Act the obligation to inform listeners of the acceptance of consideration in exchange of the airplay of a recording.¹²⁶ Section 317¹²⁷ provides that

all matter broadcast by any radio station for which any money, service or 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.¹²⁸

Section 508¹²⁹ condemns payola practices and bribery when they are deceptive. This joins the disclosure requirement of § 317. Section 507¹³⁰ requires radio station employees to inform the management of any consideration received for airplay.

First, what is striking is that the anti-payola laws actually do not prohibit payola practices. They just submit them to some conditions. Therefore, the phrase “anti-payola” is a misnomer.

¹²³ See Kristen Lee Repyneck, *The Ghost of Alan Freed: An Analysis of the Merit and Purpose of Anti-Payola Laws in Today's Music Industry*, 51 VILL. L. Rev. 695 (2006) and see Stilwell *supra* note 15.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ 47 U.S.C. 317.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ 47 U.S.C. 508.

¹³⁰ 47 U.S.C. 507.

But since those payola rules have been thus baptized by the academic world, the entertainment industry, and the public in general, we will carry on referring to them as “anti-payola laws.”

Second, the FCC has created a “friendly exception” which allows gifts (even valuable) to be received when they constitute “social exchanges between friends.”¹³¹ This exception is in effect an invitation (planned or not) for broadcasters to open their hearts and arms to record labels who in return open their wallet.

Finally, not only are the laws mild to address the issue, but their enforcement is mainly triggered by journalists’ controversial documentaries and reports, by lone FCC commissioners battling against the grain for diversity in the media,¹³² or by zealous prosecutors.¹³³

2. Early loopholes and violations of anti-payola laws.

The main way by which radio stations and record companies have managed to get around the law is by having recourse to independent promoters (individuals or corporations) as middlemen. Those promoters were initially inoffensive people hired by record companies that wanted to shield themselves from any prosecution relating to bribery, especially since the enactment of the Racketeer Influenced and Corrupt Organizations Act (RICO) of 1970.¹³⁴ Those promoters were supposed to look like experts that could evaluate the potential success of a record and, therefore, influence radio stations’ choice of what records to play.¹³⁵ As before, money determined this choice. As the practice spread, record labels became dependent on those promoters who were the *sine qua non* for airplay.¹³⁶ Similarly, radio stations, which needed to attract advertisers and were accustomed to the extra money (millions) generated by pay-for-play, were keen to rely on promoters.¹³⁷ The latter naturally became increasingly powerful and charged record labels astronomical amounts in order to put their recordings in the playlist that promoters submitted to radio stations.

¹³¹ See Kaye-Smith Enter, 71 F.C.C.2d 1402, 1408 (1979).

¹³² Referring to Commissioner Adelstein, see *infra* Part 2 (C) (3).

¹³³ Referring to Eliot Spitzer, see *infra* Part 2.C.3.

¹³⁴ Pub. L. No. 91-452, 84 Stat. 922 (1970), codified at 18 U.S.C. 1961-1968 (2005).

¹³⁵ *Supra* note 123.

¹³⁶ *Id.*

¹³⁷ *Id.*

This practice reached its peak in the 1980s with the emergence of “The Network,” a powerful collective of approximately 30 promoters. This group effectively demonstrated its force by having radio broadcasters suddenly cease the airplay of records belonging to labels that had announced their intention to boycott the use of promoters. Those high costs are still generally regarded as part of promotion costs recoupable from artists’ royalties. As a consequence, many artists who are signed with a major label have little to no chance of ever receiving any royalty payment if they do not exclude promotion costs from recoupment in their contract.¹³⁸

The excesses of the 1980s were ignored by the government until 1989 when a television program unveiled to the public the music industry practices of the time. After the broadcast of this documentary, The Network’s mastermind, Joseph Isgro, was arrested and charged for RICO and payola violations, among others. Evidence that The Network offered drugs for airplay was also brought by the prosecution.¹³⁹

The principal consequence of this affair is that record labels, promoters and radio stations have become craftier in their payola practices.

3. Payola practices since the 1996 Telecommunications Act.

After seeing the “payola power” shifting from record labels to promoters, the 1996 Telecommunications Act’s deregulation transferred this power to concentrated radio stations, even if promoters still have a favorable place.¹⁴⁰ Broadcasters had indeed not waited in order to merge and consolidate the market. The resulting oligopoly has permitted them to set the rules.¹⁴¹

At the same time, the 1996 deregulation faced vehement opposition by the advocates of plurality and diversity. One of them is FCC Commissioner Jonathan Adelstein, who has played a crucial role in the FCC’s recent inquiries. Another key character in the enforcement of anti-payola laws is Eliot Spitzer, who had energetically prosecuted white-collar crimes when he was the New York State Attorney General.

The latest loopholes that were revealed after the enactment of the 1996 Act consisted of

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *See* Stilwell, *supra* note 15.

¹⁴¹ *Id.*

record labels “buying” airplay by financing with money and all sorts of expensive perks all the aspects of record promotion that a broadcaster engages in.¹⁴² It also consisted of radio conglomerates having an exclusive promoter acting as a gatekeeper for all the radio stations that they owned.¹⁴³

For example, in 2000, the Los Angeles Times reported that A&M Records had purchased from the Chancellor Media radio group a \$237,000 marketing package involving intensive advertising and a number contests for the promotion of a Bryan Adams single. Concerts of the artist were also given for free at several radio stations of the conglomerate.¹⁴⁴ The FCC’s inquiry immediately followed the publication of the news article, whereas the facts took place in 1998.¹⁴⁵ Chancellor Media was eventually fined \$8,000 for the willful and repeated violation of anti-payola laws after the FCC concluded that out of the 10 stations investigated, two made the single’s airplay depend on the consideration received.¹⁴⁶

In 2002, with the presence of Commissioners Copps and Adelstein at the FCC, the behavior of the broadcast and recording industry became the object of closer scrutiny by the federal agency. In addition, Spitzer, who became the New York State Attorney General in 1998, also had a suspicious eye on the industry. Consequently, some broadcasting groups publicly affirmed their desire to eradicate unlawful practices by their stations. They terminated their exclusive promotional agreements and even went as far as organizing well-publicized dismissals of radio staff suspected of dealing with promoters.¹⁴⁷ In 2004, Spitzer launched an investigation involving the Big Four record companies and the largest radio groups. He concluded that Sony BMG’s label Epic Records had been making payments and making “expensive gifts” such as paying Infinity Broadcasting for listeners to attend a Céline Dion show in Las Vegas. Spitzer and Sony BMG settled for \$10 million.¹⁴⁸

There have been many faint appeals to Congress in order to promote or at least not impair artistic creativity and diversity¹⁴⁹. Before the massive deregulation of 1996 and the FCC’s

¹⁴² *Id.*

¹⁴³ For example, Jeff McClusky Promotions were Cumulus Media’s exclusive middleman. The radio group then owned 210 stations. Frank Saxe, *CC Sees Labels as Revenue Source*, BILLBOARD, March 24 2001.

¹⁴⁴ See Stilwell, *supra* note 15.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Supra* note 43.

latest attempt to raise ownership caps, the protesting voices predominantly required Congress to stop passing laws damaging diversity and creativity and to outlaw industry behaviors having the same effect.¹⁵⁰ Since 1996, the appeals to Congress have become louder and more widespread. The idea that Congress had to not only promote but also protect diversity and creativity has become well articulated.

Part 3: Possible ways of ensuring protection of artistic creativity and diversity

Many proposals have urged Congress to enact or repeal laws so as to ensure or restore plurality, diversity and innovation.¹ However, two important points must be stressed.

First, many of the problems faced in the past 10 years and many of the potential issues, such as network neutrality, derive from technological changes that Congress was not ready for. Because technology evolves and rules and practices attached to technology become obsolete, the laws proposed have to adapt to those changes, which is very difficult. Thus, it is not uncommon to see whole sets of proposals becoming outdated before they can even be subject to a debate. Making sustainable laws is therefore essential.²

Second, a question that does not appear much in discussion is whether Congress has the duty to promote and protect artistic diversity and creativity. This question is crucial because if Congress has no such duty, it will take on this responsibility only if its majority feels it must, or under pressure from lobbyists. From a legal standpoint, advocates of diversity and innovations will have not much to rely on apart from the laws referred to in Part 2 and copyright law. However, if there is a duty to promote and protect artistic creativity and diversity, then there should be a focus on invoking the law that Congress is subject to, i.e. constitutional law, before the jurisdiction that can say “what law is,”³ i.e. the Supreme Court.

Different propositions from the author and other people concerning the issues discussed above shall be exposed (A). Then, the question of the constitutional duty to promote and protect artistic diversity and creativity shall be discussed (B).

¹⁵⁰ *Id.*

¹ See Stilwell for example, *supra* note 15.

² Ryan S. Henriquez, *Facing the Music on the Internet: Identifying Divergent Strategies for Different Segments of the Music Industry in Approaching Digital Distribution*, 7 UCLA Ent. L. Rev. 57 (1999).

³ *Marbury v. Madison* 5 U.S. 137, 177 (1803).

A. Proposed solutions

As seen in Part 1, today's situation is one in which artists have gained a relative independence in terms of creating, promoting and selling their music and, in which the public has gained, with the internet, unprecedented access to music worldwide. The main concern in this logic is to ensure that this situation, which creates diversity and encourages creativity, does not change to what it used to be just a few years ago (1). Because of the precariousness of this state of affairs, the ideas proposed to solve the problems described earlier must not be neglected and should be looked at (2).¹

1. Keeping the status quo

In order to push away the threats that the online market entry by entertainment giants and the elimination of network neutrality represent to diversity and creativity, Congress could ban assignments or exclusive licenses of rights to online distributors (a); it could put a limit on the royalty rate allocated to those distributors (b); it could limit the online purchase price of recordings (c); and it *ought to* impose net neutrality (d).

a. Interdiction of copyright assignments and exclusive licenses²

One way for the major record labels to abuse their strong bargaining position would be to require copyright assignments or exclusive licenses from artists wishing to promote and sell their recordings on high-traffic websites. For instance, a major could offer, among other things, packages enhancing promotion, web presence and other similar services, in exchange for an exclusive license to use the work, reproduce it, issue it to the public, in exchange for a transfer of the copyright in the sound recording.

Such a practice would undoubtedly be challenged by smaller competitors and decried by the whole artistic community and it could be prevented through legislation banning any copyright assignment or exclusive licensing of rights to online distributors.

It could be argued that when a company endeavors to make promotional efforts it should

¹ In Part 1 and Part 2.

² Proposition by the author.

be granted exclusivity so as to better exploit the recording and generate optimum income. However, the economic argument traditionally used by record companies would not be valid concerning online distribution because digital technology, applied to the internet, drastically reduces promotion costs and distribution costs. Moreover, the survival of such websites does not depend on recording sales and on flat distribution fees, but on online traffic, directly linked to advertising.¹

b. Limits on fees and royalty rates

Royalty rates should reflect the promotional and distribution efforts made by a record company. Whereas store retail involves, for example, manufacturing costs, packaging costs, store markups, store discounts, such expenses do not exist for online distribution, which is, therefore, much cheaper.

At present, the online sales portal, CD Baby,² takes a 9 percent of sales revenue for distribution on CDbaby.net and on all the main online distribution websites like iTunes or MSN.³ This is fair because of CD Baby's contracts with other distributors. Then again, if CD Baby were to be acquired by a bigger corporation or by a major, most of the circulation and advertising income would be directed at and divided between a few hands. Thus, the distribution costs would most likely be reduced and this should be echoed in the royalty rates.

It is not advisable to restrict royalties to a fixed rate. This measure would be overbroad. Distributors could indeed argue that this would put a restraint on their trade. For example, if they wished to offer much more valuable services which would guarantee the increased exposure of a recording, a royalty payment could be proportional to the service offered. Furthermore, distributors could argue that artists have the freedom to turn to less visited websites in order to distribute their music. It would, therefore, be more appropriate to fix a ceiling on royalty rates that would be revisable every five years. Today, a maximum of 12

¹ See for example, MySpace statement on its website: "Every feature and function you currently see on the site is FREE. MySpace is supported solely by advertising. In the future, MySpace may add paid Premium Services, but all the features and functions you have currently been enjoying on the MySpace site will always remain FREE!", <http://www.myspace.com/index.cfm?fuseaction=misc.faq&Category=9&Question=33>, last visited on 27 October 2007.

² <http://www.cdbaby.net>, last visited on 23 March 2007.

³ CD Baby <http://cdbaby.net/submit>, last visited on 23 March 2007.

percent for distributors seems fair.

c. Limits on purchase price⁴

In the same logic as the limits on royalty rates and in order to make online music affordable to the widest number people in the world, purchase prices should be justified by distribution costs. In the retail store context, those costs are high, which explains the average retail price. Online distribution being relatively cheap, Congress should be able to estimate a maximum purchase price and require distributors to fix prices proportional to the costs incurred.

d. Interdiction to hamper net neutrality

Congress could enumerate a list of forbidden behaviors and practices that hinder network neutrality. This is, in fact, what it does when it is pushed to make compromises as a result of strong opposition to its proposed laws.⁵ The reason for this is that preparing an exhaustive list gives room for loopholes. For instance, Congress could prohibit telecommunications companies from requiring payment for the use of their pipes. It could also forbid telecommunications companies from discriminatorily downgrading the quality of internet services. In return, internet service providers could bypass those prohibitions by, for example, agreeing to generalized (hence nondiscriminatory) slower internet connections and then offering to upgrade the services of only those clients who also use their cable television and telephone network or they could delegate. Therefore, what Congress should do is to proscribe any action that would damage net neutrality rather than trying to guess the form that those actions may take.

2. Solving the issues created or aggravated by market deregulations.

Suggestions regarding media concentration (a) and payola practices (b) have been made by a number of authors. The main ones shall be examined.

⁵ It also uses vagueness so as to give room to wide interpretations. See Gillian K. Hadfield, Symposium: Void For Vagueness: Weighing the Value of Vagueness: An Economic Perspective on Precision in the Law, 82 Calif. L. Rev. 541 (1994).

a. Propositions regarding media concentration

One idea put forward is that Congress should put a halt to deregulation and no longer raise ownership caps, especially the caps on radio ownership. A measure of this kind took place in 2004 when Congress legislated to freeze the Local TV Multiple Ownership cap to 35 percent on a permanent basis.⁶

Another proposal, dear to the opponents of deregulation, is to deconsolidate the media industry. In 2005, Democrat Representative Maurice Hinchey introduced a bill to this effect. Entitled the Media Ownership Reform Act (MORA),⁷ the text was blocked in committee.⁸ With the new majority in the House, Hinchey plans to re-introduce the bill.⁹ MORA intends to annul the FCC's 2003 reform attempts and to strengthen viewpoint diversity.

Among other measures, MORA plans to bring back the cap on local radio ownership back to 35 stations, instead of 45, and to limit the ownership of the total FM and AM stations in the US to 5 percent.

MORA also re-establishes the "Fairness Doctrine" of the 1934 Communications Act. This doctrine, eradicated by the FCC in 1987, requires broadcasters to cover controversial issues, such as the Iraq War, in a balanced and fair manner.¹⁰ Finally, the bill imposes stricter reviews of broadcast licenses when they are due to be renewed.¹¹

b. Propositions regarding payola practices

This may sound like a simplistic reasoning, but if payola practices are frowned upon by legislators and the public opinion¹² and if, despite the fact that those practices are prohibited, radio stations fail to disclose (and hence validate) them, then there must be a real social and legal problem inherent in the pay-per-play principle. Congress must redefine its objectives as

⁶ See Stilwell, *supra* note 15.

⁷ Then HR 3302.

⁸ Jon Gingerich, *Bill targets U.S. Media Monopolies*, O'Dwyer's PR Report, April 2007.

⁹ Myles Duffy Washington, *Media Reform*, New York Times, 19 December 2007.

¹⁰ *Sen. Sanders, FCC Commissioner Stump For Independent Media*, US Fed News, 14 February 2007.

¹¹ *Id.*

¹² See Survey 5.

regards payola. It should break the taboo surrounding this subject, ban payola practices, and make the broadcast and recording industry much more transparent in their transactions.¹³

Moreover, it has been suggested that Congress imposes severe punishment to broadcasters who sanction – by holding back airplay, for example – recordings for which no consideration is given.¹⁴ Those punishments could take the form of onerous fines and license revocations.¹⁵

B. Constitutional duty to promote and protect artistic diversity and creativity

The purpose of this section is to assess the possibility of using a different approach relating to the protection of artistic diversity and creativity. The question we will try to answer is “can a government rule or action be invalidated because it fails to protect or promote artistic creativity and diversity?” Two constitutional provisions, the Copyright Clause (1) and the Freedom of Speech Clause (2), will be considered.

1. The Copyright Clause

In its Article 1, Section 8, the Constitution expressly provides that Congress has the power “to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”.¹⁶

It is highly debatable that the Copyright Clause gives Congress an implied obligation to promote artistic creativity (a). However, the argument according to which the promotion of artistic creativity has a constitutional value that should not be impaired could have more standing (b).

a. Obligation to promote artistic creativity

The Supreme Court has repeatedly held that Congress’ copyright legislation should be

¹³ See Stilwell, *supra* note 15.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Supra* note 59.

limited to what is necessary for the “public good”¹⁷ and that creative work had to be encouraged and rewarded.¹⁸ For example, in *Century Corp v. Aiken*,¹⁹ it stated that “the immediate aim of...copyright law is to secure a fair return for an author’s creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.”²⁰ The Supreme Court thus clarified that the application of the latter part of the Copyright Clause (“by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”) could not be read without the preamble part (“to promote the Progress of Science and Useful Arts”).²¹

However, the Supreme Court has not been this eloquent as to whether the preamble can be read on its own independently from the second part, i.e., as to whether Article 1 allows the Congress to promote and protect artistic creativity outside copyright legislation.

While the Copyright Act²² says little about the issue, Congress, as it established the National Endowment for the Arts (NEA), declared that

the arts and humanities belong to all the people of the United States[, they] reflect the high place accorded by the American People to the nation’s rich cultural heritage[, and] an advanced civilization must not limit its efforts to science and technology alone, but must give value and support to other great branches of scholarly and cultural activity.²³

Congress also declared that “it is necessary and appropriate for the Federal Government to help create and sustain not only a climate encouraging freedom of thought, imagination and inquiry, but also the material conditions facilitating the release of this creative talent”.²⁴ The constitutionality of the federal legislature’s power to promote the arts through organizations such as the NEA has not been directly challenged, perhaps because of a general consensus on

¹⁷ *Infra* note 19.

¹⁸ *See, e.g., Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975), *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), and *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994), *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991).

¹⁹ *Id. See Twentieth Century Music Corp.*, at 156.

²⁰ *Id.*

²¹ *Id.*

²² *Supra* note 31.

²³ *See the NEA Declaration of Findings and Purposes*, 20 U.S.C. § 951

²⁴ *Id.*

the matter, as long as there are no limitations on trade. Yet the Supreme Court has had the opportunity to confirm Congress' right to financially support artistic creations in freedom of speech cases.²⁵

However, returning to the Copyright Clause itself, it must be noted that it is an enabling clause, just like the entire section to which it belongs. One could proceed to a strict and textual analysis by first remarking that Article 1 Section 8 states "The Congress shall have the Power". Then an analogy could be made with Article 1 Section 8 Clause 11 which grants Congress the power "to declare War, grant Letter of Marque and Reprisal, and make Rules concerning the Captures on Land and water."²⁶ The conclusion, in this case would be that the Constitution certainly does not oblige Congress to declare war. Why, therefore, would it oblige Congress to "promote the Progress...of useful Arts"?

On the other hand, a much broader reading of the Constitution could first point out that the Copyright Clause is the only one in Article 1 Section 8 that contains a preamble. This preamble enounces interests that justify the rest of the Clause – the right to make copyright and patent laws. Then, a comparison could be made with the enabling clause of the 13th Amendment Section 2 which provides that "Congress shall have power to enforce this article by appropriate legislation."²⁷ This enabling clause follows the Section 1 prohibition on anyone to impose slavery or involuntary servitude anywhere in the United States.²⁸ Since the Thirteenth Amendment's enabling clause follows the undeniable constitutional objective of the preceding clause and since Congress' power to enact copyright and patent law also follows the objective of its preamble, then the preamble's objective is constitutional and, therefore, it must be complied with. This would mean that the promotion of useful arts is an obligation.

History shows that the Supreme Court is capable of more twisted reasoning.²⁹ However, since *Marbury v. Madison* the Supreme Court's tendency to depart from the letter of the Constitution has especially served individuals' rights against government power.

²⁵ National Endowment for the Arts, et al., Petitioners v. Karen Finley, et al. Supreme Court of the United States. 524 U.S. 569 (1998).

²⁶ U.S. CONST. Art. 1, § 8 Clause 11.

²⁷ U.S. CONST. Amend. 13.

²⁸ *Id.*

²⁹ For example, *Marbury v. Madison supra* note 3, or *Griswold v. Connecticut* 381 U.S. 479 (1965).

Notwithstanding the New Deal episode and the regulations granting minimum protection to individuals, the government has been hostile to too much paternalism.³⁰ Additionally, the Copyright Clause dates back to 1787, a time where not much place was given to paternalism. The protections of the Bill of Rights only came four year later and none went as far as obliging Congress to promote anything.

However, arguing that the clauses of Article 1 Section 8 exist to merely allow the protection of interests which have constitutional value should have a greater chance of success.

b. The constitutional value of the protection of artistic creativity.

The Supreme Court has held that the protection of artistic creativity served a public interest,¹ but it has not said whether this interest was constitutional because this specific question has not yet been dealt with by the Court.

What would the Court hold if the Congress suddenly decided that because of the change in American culture, the protection of artistic creativity was no longer in the public interest and was to be proscribed? Would the Supreme Court defer to the congressional point of view and accept such a measure or would it reply that the text of the Constitution gives implied protection to artistic creation and innovation?

The second answer seems to be the most likely because if the Copyright Clause's preamble does not impose a duty to promote the arts, it clearly expresses the Framers' intent. As a consequence, it is possible that the Supreme Court could declare that artistic creativity is a constitutional interest which cannot be hindered without a good reason. This interest would not have the force of an individual's fundamental right, so the restrictions would have to be submitted to the rational basis test, i.e. justified by a legitimate governmental interest.²

The fact that the promotion of artistic innovation is mentioned in the text of the Constitution should be taken into consideration when looking at the First Amendment

³⁰ See for example *Home Building & Loan Assoc. v. Blaisdell*, 290 U.S. 398 (1934).

¹ *Supra* note 18.

² *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926).

because art is speech.³

2. Artistic diversity and Freedom of Speech

This section will address the constitutionality, under the First Amendment, of government actions injuring artistic diversity. This issue has also drawn little attention from the Supreme Court. As a matter of fact, the Court has denied a number of petitions for a writ of certiorari that could have led to such a debate. First, it is interesting to note that apart from disputes on content-based speech restrictions,⁴ most of the freedom of speech litigation that has taken place has challenged the FCC's regulatory power. None have dealt with artistic diversity. Those cases are nevertheless useful in order to solve this issue. Second, the FCC has previously justified its regulations by claiming a protection of diversity for the public interest. With deregulation, the FCC has insisted more on public interest and has watered down the diversity justification by blurring the very notion of diversity.⁵

The Supreme Court's position on diversity (a) and the latent return to the philosophy of *Lochner v. New York* (b) will be examined.

a. Viewpoint diversity

According to the First Amendment, "Congress shall make no law...abridging the freedom of speech, or of the press."⁶ Broadcasters have not hesitated to invoke this provision to counter the FCC's regulations. The latter were traditionally subject to the rational basis standard of scrutiny and upheld. For example, in *FCC v. National Citizens Commission for Broadcasters*, the Supreme Court maintained that limits on ownership were constitutional because they were necessary to further "viewpoint diversity."⁷

In *Associated Press v. United States*, the Court also said, that diversity was a goal of the First Amendment, stating "the 'public interest' standard necessarily invites reference to...the

³ *Supra* note 25.

⁴ *Id.*

⁵ *Infra* note 18.

⁶ U.S. CONST. Amend. 1.

⁷ 436 U.S. 775, 796 (1978).

First Amendment goal of achieving the widest possible dissemination of information from diverse and antagonistic sources”.⁸

Although the Court has subsequently stopped assimilating plurality to diversity, it has not come back to the principle according to which the First Amendment protects diversity of speech.

After *Associated Press*, the Court started deferring the definition of “diversity” to the FCC.⁹ The DC Circuit Court held in *National Citizens Committee for Broadcasting v. FCC* that

notwithstanding the inconclusiveness of the rulemaking record, the Commission acted rationally in finding that diversification of ownership would enhance the possibility of achieving greater diversity of viewpoints (...) diversity and its effects are (...) elusive concepts, not easily defined let alone measured without making qualitative judgments objectionable on both policy and First Amendment grounds.¹⁰

While regulating ownership, the FCC thus had to demonstrate how it would further the diversity goal of the First Amendment. Likewise, the FCC is not exempt from this responsibility when it seeks to deregulate. The Third Circuit Court of Appeals indeed found that the FCC failed to do so in its 2003 deregulation attempt.¹¹

Artistic diversity has not been the object of court holdings regarding the entertainment industry consolidation. Nevertheless, even if art is traditionally characterized by its aesthetic aspect, some artistic creations have also been regarded as speech expressing viewpoint.¹² In this case, artistic diversity would be protected by the First Amendment. Yet, art does not always express viewpoint. This is the case for instrumental music, for instance. The First Amendment could then be read in light of the Copyright Clause, which recognizes the promotion of artistic creativity. The link between creativity and diversity should therefore be made by, for example, claiming that diversity boosts creativity and vice-versa. This approach

⁸ 326 U.S. 1 (1945).

⁹ *FCC v. Nat'l Citizens Commission for Broadcasters* 436 U.S. 775, 796 (1978).

¹⁰ *Id.*

¹¹ *See Prometheus*, *supra* note 48.

¹² *Supra* note 25.

would, however, face a new hurdle – the Supreme Court’s recently expressed hostility towards regulations protecting diversity.

b. Hostility towards regulations protecting diversity

Since the mid 1990s, the Supreme Court’s tolerance to speech restrictions in favor of individuals’ protection in relation to their transactions with businesses has diminished. In *44 Liquor Mart v. Rhode Island*, the Rhode Island legislature had prohibited all price advertising of alcoholic beverages by local news media in order to promote “temperance.”¹³ While declaring this measure in violation of the First Amendment, Justice Stevens held that “[u]nder the rational of *Virginia Pharmacy Board v. Virginia Consumer Council*, a State’s paternalistic assumption that the public will use truthful, non-misleading commercial information unwisely cannot justify a decision to suppress it.”¹⁴ Justice Thomas, who is a strong opponent of paternalism, concurred.¹⁵

As to FCC ownership regulations, they have been more strictly scrutinized since the 1994 decision in *Turner Broadcasting System v. FCC*.¹⁶ The Court indeed abandoned the rational basis scrutiny for content-neutral speech restriction and applied intermediate scrutiny, which requires the restriction to be substantially related to an important governmental objective. This was a 5-4 decision in which the dissenters – Justices Thomas, Scalia, Ginsburg and O’Connor – demanded strict scrutiny, which requires narrowly drawn restrictions justified by the furtherance of a compelling governmental interest.¹⁷

This shift of position has been labeled Lochnerism¹⁸ in reference to the doctrine followed in the landmark case *Lochner v. New York* making freedom of contract a fundamental right which could not be interfered with by imposing minimum work hours.¹⁹ Despite the higher

¹³ 517 U.S. 484 (1996).

¹⁴ *Id.* citing *Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. 748 (1976).

¹⁵ *Id.*

¹⁶ *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994) (Turner I), followed by *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180 (1997) (Turner II).

¹⁷ *Id.*

¹⁸ Adam Candeb, *The First Amendment and Measuring Diversity: Constitutional Principles and Regulatory Challenges*, 33 N. Ky. L. Rev. 373, 399 (2006).

¹⁹ *Id.* See also *Adair v. United States*, 208 U.S. 161 (1908) and *Adkins v. Children's Hospital*, 261 U.S. 525 (1923).

level of scrutiny, the Supreme Court still finds that the First Amendment demands diversity. However, the deference to the FCC's definition of diversity creates a problem of clarity and reliability. To examine the concept of "diversity," it would preferable to rely on more neutral and rigorous scientific expertise carried out by independent organizations and taking into consideration social, political, and economic data.²⁰

Conclusion:

The Constitution seems to provide dormant safeguards for the protection of artistic diversity and creativity that still remain to be invoked before the Supreme Court. The idea of protection of diversity and creativity of the arts has been gaining more attention in the public debate in the past 10 years. However, it seems unlikely the Supreme Court will ever impose a duty on Congress to promote artistic innovation. It is nevertheless conceivable that the Supreme Court hears and rules on claims brought by growing independent organizations, holding that a government action hindering artistic diversity is unconstitutional under the Copyright Clause and the First Amendment or a government action hindering artistic creativity is unconstitutional under the Copyright Clause alone.

²⁰ *Supra* note 18.