

ATTORNEY GENERAL OF THE STATE OF NEW YORK
-----X

In the Matter of

EMI MUSIC NORTH AMERICA,

Respondent.
-----X

**ASSURANCE OF DISCONTINUANCE
PURSUANT TO EXECUTIVE LAW § 63(15)**

In 2004, Eliot Spitzer, Attorney General of the State of New York, initiated an investigation pursuant to the provisions of Article 22-A of the General Business Law and Section 63 of the Executive Law into practices relating to the promotion of music to radio broadcasting stations, including practices engaged in by EMI Music North America, (“EMI”). EMI has cooperated with the Attorney General through the course of this investigation and, in or about February 2005 and again in August 2005, implemented guidelines that address some of the conduct discussed below. EMI has further revised its Guidelines to be fully consistent with Exhibit B to this Assurance of Discontinuance. The Attorney General finds that the practices discussed below are pervasive within the music industry and by no means unique to EMI. Further, the Attorney General makes no finding as to the artistic merit of the work of any of the artists mentioned in this document.

Based on its investigation, the Office of the Attorney General (“OAG”) makes the following findings:

Preliminary Statement

1. Respondent, EMI is a Delaware corporation with its principal place of business located at 150 Fifth Avenue, New York, New York 10011.

2. EMI is engaged in the production, distribution and sale of pre-recorded music.

EMI is the third largest record company in the world and is one of the four major record companies that dominate the music industry. EMI includes several record labels that sign artists; produce records; and market, promote, and sell those records.

3. To sell music and reap profits, EMI label groups aggressively promote their music to radio broadcasting stations, because radio airplay is the single most significant driver of music sales: the more a song is played on the air, the more people are likely to hear it and then buy it. Moreover, the more airplay a song receives, the higher it is likely to climb on the published charts that purport to reflect the song's popularity. This, in turn, increases the likelihood that retailers will stock the song and consumers will buy it. Simply put, increased airplay translates into increased sales.

4. EMI has illegally provided radio stations with financial benefits to obtain airplay and boost the chart position of its songs. Contrary to listener expectations that songs are selected for airplay on the basis of their popularity or artistic merit, EMI has obtained airplay for its songs through such deceptive and illegal practices as: (a) bribing radio station employees, on occasion, to play its songs; (b) providing a stream of financial benefits to radio stations to assist with stations' overhead costs or to benefit listening audiences, on the condition that its records receive airplay; (c) using independent promoters as conduits for illegal payments to radio stations to obtain airplay; (d) purchasing spin programs and time buys, and using syndicated programs to manipulate chart positions of its music; and (e) engaging in fraudulent call-in campaigns to increase airplay of its songs.

5. The Federal Communications Act prohibits undisclosed purchase of airplay, also

known as payola. 47 U.S.C. § 508 requires any employee of a radio station who accepts or agrees to accept money, services or other valuable consideration in exchange for the broadcast of any particular piece of programming, to disclose this payment to the station. This provision makes a failure to comply with these disclosure requirements a misdemeanor and subjects the violator to imprisonment of up to one year and fines of up to \$10,000. 47 U.S.C. § 317 requires radio stations to exercise due diligence to ensure that the prescribed announcements take place.

6. In addition to the federal payola statutes, New York State law prohibits the paying of bribes to radio station personnel. Under the State's commercial bribery statute, New York Penal Law § 180.00, it is a misdemeanor for anyone to confer (or offer to confer) a benefit upon another party with the intent to influence the recipient's conduct regarding the business affairs of the recipient's employer, without the employer's consent.

7. Section 349 of the New York General Business Law ("GBL") empowers the Attorney General to seek injunctive relief when any person or entity has engaged in deceptive acts or practices in the conduct of any business. Section 350-d of the GBL empowers the Attorney General to seek, inter alia, civil penalties in the amount of \$500 for each violation of section 349, the Deceptive Practices Statute. Finally, Executive Law §§ 63(12) and 63(15) empower the Attorney General to seek injunctive and equitable relief when any person or business entity has engaged in or otherwise demonstrated repeated fraudulent or illegal acts in the transaction of business.

I. Modern Pay-for-Play

8. In the 45 years since the enactment of the federal payola statutes, the practice of pay-for-play has changed significantly. The bribes to local disc jockeys have evolved into an

elaborate corporate payola strategy. The increased sophistication of such a strategy reflects the significant consolidation that has taken place within the radio industry in the wake of the Telecommunications Act of 1996, which substantially increased the number of stations that could be owned by a single entity. With the advent of conglomerates such as Clear Channel Communications, Inc. (“Clear Channel”), Entercom Communications (“Entercom”), and CBS Radio, Inc. (“CBS”), record label executives can, and do, negotiate deals netting airplay across a large number of stations serving a host of different geographic markets.

9. Radio stations – whether independent or belonging to a conglomerate – no longer rely on disc jockeys to choose recorded music for broadcast. Rather, programming personnel now have responsibility for formulating “play lists,” strict and detailed schedules setting forth exactly those songs the radio station will play each week. As they update the play lists from one week to the next, programmers generally remove a limited number of songs and add new songs to fill the vacated slots. The newly added songs are referred to in the industry as “adds.” Record labels pursue carefully designed promotion campaigns aimed at garnering adds, which represent in each case a significant achievement for the label’s promotion staff. In general, an “add” amounts to a commitment by the radio station not only to play the label’s song, but to do so regularly over a period of several weeks.

10. Once a radio station has finished its play list for the upcoming week, the station often will report the play list to other music industry participants, including record labels and the two charting companies, Billboard and Radio & Records. The charting companies compile charts for various music formats that purport to reflect the popularity of individual songs based on radio airplay, as monitored by two other companies, Broadcast Data Systems (“BDS”) and

Mediabase, which track the number of times (or “spins”) each song is played on the air.

11. Accordingly, in addition to seeking to have their songs added to play lists, record labels are intensely interested in seeing each add receive as many spins as possible. Frequent airplay not only creates audience awareness but improves the song’s chart position and its prospects for becoming a lucrative hit. Thus, label promotion staff work to obtain commitments from stations to play each add a minimum number of times, preferably between 6:00 a.m. and midnight, when listening audiences are the largest.

12. Intense competition among record labels for the relatively small number of valuable play list slots has caused a variety of aggressive pay-for-play mechanisms to emerge. All labels share the common objective of advancing the circulation of record labels’ products to the listening public. In each case, music consumers remain unaware of the extent to which radio programming and record popularity statistics are being manipulated and compromised.

13. In addition to employing the traditional device of delivering bribes to radio programmers – which now can take the form of expensive vacation packages, electronics, and other valuable items – record labels endeavor to gain airplay for their songs by providing such inducements to the radio stations as “promotional support,” which the stations can then use either to help meet their own operational needs or as prizes and “giveaways” designed to increase the size of the stations’ listening audience. Similarly, labels routinely arrange for their artists to perform on the radio for free or at reduced rates, with the clear understanding that each such performance will take place only if the station gives the artist’s recorded work airplay.

14. In an effort to dodge the payola laws, record labels and radio stations have also enlisted the services of so-called independent promoters, or “indies,” middlemen who act as

conduits for delivery of the labels' "promotional support" to the stations and help perpetuate the fiction that this support is not actually being delivered by the labels in exchange for airplay and therefore does not violate the payola statutes. Many independent promoters receive compensation from the labels for each add and increased spins they obtain.

15. Labels also strive to boost the popularity of their recorded music through the deceptive device of "spin programs" – air time bought by the labels under the guise of advertising, during which particular songs are played so that the charting companies (BDS and Mediabase) will credit those songs with spins beyond those attributable to the radio stations' own programming decisions. At times, labels also have used "syndicated programs," countdown shows sponsored by radio conglomerates, to obtain numerous detectable spins for songs.

16. Finally, to increase spins and exposure, labels direct their own personnel (or paid agents) to contact radio stations and radio programs, and place fraudulent requests that certain songs be played.

17. By engaging in such an elaborate scheme to purchase airplay, increase spins, and manipulate the charts, EMI and the other record labels present the public with a skewed picture of the country's "best" and "most popular" recorded music.

II. EMI's Multi-Faceted Pay-for-Play Strategy

18. Rather than relying exclusively on the quality or originality of its music to obtain airplay for its artists' recordings, EMI has pursued all of the foregoing "pay-for-play" techniques. These practices have been carried out by the promotion departments of EMI's various label groups – which include Virgin Records America, Inc. ("Virgin"), Capitol Records ("Capitol"), and S Curve Records – and have been tolerated and condoned by senior executives at EMI record

labels.

19. Each of the major EMI label's promotion departments is headed by a senior or executive vice president of promotion, who receives reports from staff responsible for the specific music formats adopted by music radio stations, such as Top 40, Pop, Adult Contemporary, Alternative Rock, and Adult Album Alternative.

20. The national promotion staff is responsible for promoting songs by music format. The promotion department of each major EMI label also has a regional promotion staff, focused geographically but also based on relationships with certain programmers at radio stations, who report directly to national promotion staff and interact regularly with the senior or executive vice president of promotion through weekly conference calls. The sole function of promotion department employees is to obtain airplay for EMI's artists.

21. In recent years, a significant portion of EMI's radio promotion dollars has been used to purchase airplay and create hit records. These practices are so fundamental to EMI's success as a record company that senior label executives frequently have been involved.

A. Gifts and Bribes to Station Programmers

22. EMI has provided items of value to radio station programmers, such as sporting events tickets, airfare, concert tickets, and other gifts for programmers' personal use in exchange for airplay commitments.

23. When employed, this practice is used both to secure airplay commitments on specific songs and to buy the good will of a programmer who, in return, commits to playing EMI music on a regular basis.

24. EMI promotion employees have admitted providing radio station programmers

with items of value in exchange for airplay. For example, a September 2004 email, a Virgin promotion manager explained that a radio program director was seeking Toronto Stones tickets for himself and that the director was willing to offer “what it takes for us to get them.” [EMI 72611]. When questioned about this email during testimony taken by the OAG, the promotion manager confirmed that the program director from WOTT in Watertown, NY, did indeed receive tickets to a Rolling Stones concert for his personal use, and the label received airplay on Rolling Stones and Exies songs. On another occasion, a Virgin promotion executive provided WMMM with a flyaway for contest winners as well as with a pair of tickets for station personnel in exchange for a Bryan add and a “Lenny bump.” [EMI 01160]. And, in August 2004, when a Capitol promotion director learned that WXDX’s music director had requested Capitol’s re-released Megadeth Collection, he asked “Where’s my add?? Then, and only then, do we talk Megadeth . . .” [EMI 31939]. see also [2EMI 14173].

25. EMI promotion employees also occasionally purchased gifts for radio programmers to maintain a “positive relationship” with the goal of eventually obtaining airplay. For example, a former Virgin promotion director admitted to purchasing the Playstation 2 video game “Grand Theft Auto: Vice City” for Mike Danger of WXPY, in Rochester, NY, a CBS station. Danger requested the game and the promotion director acknowledged that “it wouldn’t bode well for the relationship not to provide it, under the circumstances” [2EMI 21158].

26. In addition to buying gifts, EMI employees also paid the airfare and hotel expenses of radio programmers to buy their goodwill. A January 2003 email from a Virgin promotion director documents arrangements to provide airfare and hotel to Mike Danger and another WXDX employee. [2EMI 21125]. See also, [EMI 35322].

B. Promotional Support to Radio Stations

27. In addition to bribing individual radio station employees to secure airplay, EMI regularly provided “promotional support” to radio stations in exchange for airplay of its songs. EMI provided this support with the specific purpose of influencing the stations’ airplay decisions, without disclosing the direct connection between the two to consumers.

28. In their regular direct contact with radio station programmers, EMI promotion department employees communicated the availability of promotional support as an explicit and implicit inducement for programmers to add songs and/or increase airplay. Radio stations also communicated to EMI that promotional support would result in increased airplay. Stations use the promotional support they receive for two general purposes: to assist with operating costs and to benefit their listening audience. Such support is attractive to stations because it lowers overhead, draws listeners, and boosts ratings.

29. A Capitol promotion director admitted in testimony that the primary goal in offering promotional support is to maximize radio exposure for a song, which includes getting the song added to the play list, getting increased rotations, and getting airplay during daytime hours.

1. Payment of Radio Station Expenses and Overhead Costs

30. At times, radio stations are not interested in the promotional support being offered but instead will ask the label employee to pay bills that the station owes to third party vendors, in exchange for airplay. In the past, radio stations, well aware of EMI’s eagerness for adds and spin increases, knew they need only ask EMI to provide a particular item and EMI would comply. Consequently, as EMI employees testified, EMI has paid costs for radio station sponsored concerts, production bills for station jingles, radio station “party bus” costs, and other radio station

expenses.

31. A Capitol promotion manager testified that the label paid for production costs if a radio station was putting on a concert, and other radio station bills and expenses, in exchange for airplay. A Virgin promotion executive testified that , “. . . [the stations] might say, ‘I’m thinking of adding your’ whatever this week. ‘Do you think you can take care of lighting for my show, production for my show, or T-shirts’ or something like that.” When EMI agreed to pay these costs, it would either be billed directly by the radio station or would pay the invoices submitted by third-party vendors to cover a station’s production costs.

32. Generally, the invoices EMI paid on behalf of radio stations were from third party vendors. On one occasion, EMI reimbursed the station for an invoice payment, in exchange for airplay. In other cases, fictitious invoices sent to EMI were unrelated to expenses incurred by the station but were for dollar amounts payable directly to the station for the stations’s use. David Universal, a former program director at WKSE in Buffalo, was notorious for sending phoney invoices directly to EMI to have its music played. If EMI did not pay the invoices sent by Dave Universal, EMI risked losing future airplay of its songs at WKSE. See e.g., [EMI 78396].

33. In some instances, EMI disguised direct payments to stations. The following October 2000 email exchange between Michelle Clark, an independent promoter, and a Virgin promotion director concerning KSRH, a west coast radio station, adding a Gomez record to its playlist shows how EMI concealed direct cash payments to radio stations using bills from independent promoters:

Clark: hi r, krsh is in on gomez! what do you need the \$400 invoice to say?

Virgin employee: How ‘bout \$400 website promotion? If they have a website.

Clark: hi r, no, they don’t want a web site promotion - you know fred. just the \$. how do you want the bill to read?

Virgin employee: I meant as long as they have a website, in case somebody checked, let's call it a website promo.

[EMI 02109-10].

34. EMI also would provide promotional support to radio stations to tip the balance in favor of its records. According to one Capitol promotion employee, after promoting to radio stations, radio programmers would come back and say, “[b]ut Sony has this on the table. Warner Brothers has this on the table. What are you going to do for me.’ Then I have to go to the bosses and say ‘Well?’ And they usually say ‘If we have the budget, yes.’” A Virgin promotion director testified about the implicit nature of certain promotional support offerings:

You have gone to a radio station. They have heard your record or maybe let's just say they are not playing the record yet. You have gotten them to a point where they are interested in it, they like it. They have heard your pitch and what is going on around the country. They can see the chart. They can see that a record is starting to happen in a certain way. They may say “Is there support available? Will we be able to do stuff with this artist?” And in the back of my mind, that implies that they are very close to this record. Let's go for it.

35. Stations requesting “promotional support” included WKSE, an Entercom station; WFLY in Albany, a Pamal station; WZNE in Rochester and WTIC in Hartford, CT, both CBS stations; and WAXQ in New York City, a Clear Channel station. EMI employees, singled out David Universal as always requiring something in exchange for adding a song. A Virgin promotion executive testified that they “[a]bsolutely felt that every time we talked to Dave Universal about a record there was a dollar amount attached to it.” See e.g., [EMI 42936; EMI 42835; EMI 61617; EMI 43497].

36. However, one Capitol promotion director testified that while many large stations requested support, “[i]t ran the gamut. . . . a lot of the smaller stations that didn't have a marketing budget were the ones that asked more so.” In the experience of a Virgin promotion executive,

requests for promotional support connected to airplay more typically occurred in smaller markets.

37. The impropriety of EMI's supplying promotional support to radio stations is amplified by the fact that "promotional support" may include items that are not related to any of EMI's artists. Testifying about the period prior to the OAG's investigation, one Capitol employee stated, "[W]hen they ask us to pay an invoice, I hate that, because it doesn't do anything for our artists whatsoever. That's the way it was. It's not like that anymore. Back then that's how it went."

38. Some stations would also request that labels purchase time buys on their station as a form of promotional support in exchange for airplay. A former Virgin promotion director testified that when promoting music to WEQX in Albany, NY, a Northshire Communications station, "[i]t was an understanding with that station that to get the record added you needed to buy into that time buy."

2. Promotional Tours and Concert Performances

39. In addition to the payment of radio station expenses, EMI also made its artists available to radio stations during promotional tours, in exchange for airplay commitments. Promotional tours are used to familiarize radio station personnel with artists and, in certain instances, identify, or "brand," certain artists with particular stations. On these tours, EMI artists do on-air interviews, perform private music sessions for radio station staff, and meet with contest winners. A July 2004 email from a Capitol promotion executive sent to the promotion staff demonstrates the label's willingness to provide a promotional tour in exchange for airplay. The email reads: "[L]et's talk today about specific airplay COMMITMENTS that need to go with this promo tour. Be very upfront with the stations about what we are looking for in regards to airplay.

NO GRAY AREAS!" [EMI 16330 (emphasis in original)].

40. According to EMI employees, a frequent problem with providing promotional tours to specific stations is the consideration that must be given to music industry politics. For example, in obtaining approval from a Virgin promotion executive for an appearance by The Beu Sisters at WKKF, a Clear Channel station in Ballston Spa, NY, a Virgin promotion director discussed the concerns of Rob Dawes, a WKKF program director about the label's relationship with the station's competitor, WFLY:

[Rob Dawes] was concerned that WFLY got a Beu Sisters appearance/visit to give us the add. I told him that was not the case (I gave him no more details.) The conversations that [a Virgin employee] and I have been having with Rob have included getting the band to Albany to record an interview for WKKF's sister TV station...he wanted to make sure we didn't take that idea (or similar visit) to WFLY. Rob did say, though, that if we can CONFIRM that The Beu Sisters will DEFINITELY be able to come to the station...HE WILL ADD THE RECORD this week.

[EMI 75968 (emphasis in original)].

41. EMI also used promotional tours of more popular artists to get airplay for lesser known artists. As one Capitol promotion director testified, "I do remember Radiohead was definitely leveraged in helping getting our smaller acts played, because at the time no one cared about the smaller acts."

42. Separate from promotional tours, EMI routinely arranged for its artists to perform at radio station events and station-sponsored concerts in exchange for airplay. Artist performances have come to represent a particularly attractive revenue source for radio stations, presenting significant branding and advertising opportunities at reduced expense, as the artists typically agree to perform for free or at reduced rates. For example, in explaining an October 2003 email exchange concerning WLIR in Garden City, NY, a former Virgin promotion director

testified that “we were offering Ima Robot for a concert if they were to add the record.” In the October 2003 email, the regional promotion director wrote to an EMI marketing employee:

As WLIR support on Ima Robot has increased to 4x day, I would like to make sure the station gets a signed contract for the band’s performance at their 10/25 concert. While airplay at the moment is only after 7pm, that was understood before they added ‘Dynamite,’ since they mainly play their ‘rock’ songs during ‘LIR After Dark.’ There was, however, an agreement that airplay would increase to other dayparts as the show grew closer.

[EMI 35306].

43. EMI also made its artists available for radio station-sponsored concerts in exchange for airplay of records by artists different from those performing in the concerts. For example, in responding to a request from a Capitol promotion director to add “Stuck” by Stacie Orrico to the radio station’s play list, David Universal wrote, “[W]e may never come in on the record..... Seriously, only an Amanda Perez confirmation letter will probably get us on it!” [EMI 05878].

3. Contest Give-away Promotions

44. In addition to providing promotional support to assist with stations’ overhead costs, and making artists available for station events, EMI also has provided stations with flyaways, concert tickets, electronics, CDs, and gift cards for their listening audiences. EMI routinely has made aggressive promotion pitches to radio stations that plainly tie promotional support to airplay. One Virgin promotion director described flyaways as “page 3 of the playbook. That’s a very standard, exciting promotion.” A Capitol promotion director described his arrangement with WBLI to obtain airplay for the artist Sky Sweetnam as follows:

I did a promotion with WBLI that was a flyaway to the MTV Music Awards, I believe two years ago, for an artist in exchange for [WBLI] adding it to [its] playlist....[WBLI] added it and it went into rotation. It went into light rotation.

That promotion was to get it started. The first step is to get it onto a playlist.

45. EMI promotion employees have admitted providing radio stations with trips for winners for “Spring Break” or to see a band in a glamorous city; concert tickets; DVD players; digital cameras; Sony Playstations; Microsoft Xboxes; iPods; autographed items; gift cards; t-shirts; and CDs. See e.g., [EMI 26010 (Xbox); EMI 17887 (autographed Paul McCartney albums); EMI 54742 (Rolling Stones autographed guitars); 2EMI 13350 (jackets); EMI 48233 (Simon & Garfunkel Miami flyaway); EMI 54194(snowboards); 2EMI 21167 (Best Buy gift certificates); EMI 48850 (Rolling Stones concert tickets)].

46. Frequently, EMI employees seek not just a promise from the station to add a song, but a specific spin commitment –an agreement by the radio programmer to play the song a minimum number of times, usually at specified times of day. As one Capitol promotion director testified, “I will always do my best to get specific numbers of where I’m going to go. That is expected by my higher-ups.” For example, in obtaining approval from a Virgin promotion executive to send winners of a WPXY contest to Las Vegas, a Virgin promotion director asked in an October 2002 email, “[S]hould we proceed with this if we are guaranteed 4 weeks of 2xday on Norah (Jones) all in the mid-days?” [2EMI 10076]. When asked how often promotions like the Las Vegas flyaway would be offered for increased spins, a former Virgin promotion director testified that “it happened about maybe 60/40. It wasn’t always the case but it definitely was an opportunity for us to increase airplay.”

47. EMI personnel have monitored and enforced the spin commitments they have obtained by using the services of BDS and Mediabase, airplay monitoring companies that provide real time access to spins accumulating on current songs at radio stations across the country. For

example, in an August 2004 email concerning Skye Sweetnam, a Capitol promotion executive wrote, “FIX [W]BLI NOW. We did not pay for that god damn promotion to the VMAs for one spin a day.” He then asked, “do they have their tickets yet? do they have their flight shit done? I mean we can cancel the travel portion. I really don’t give a rats ass.” [EMI 71456] . In another example, an independent promoter writing on Virgin’s behalf, emailed a WSTW station employee in July 2004, and advised him that the promotional funds committed to the station in support of Nerd would not be honored by Virgin because “ your spins weren’t sufficient for payment” [EMI 35300].

48. When asked about whether promotional support was offered to stations that were not monitored by BDS or Mediabase, a Virgin promotion executive answered in the negative and explained that “[t]he two reasons would be smaller market stations don’t sell as many records. And the other reason would be that nonmonitored stations don’t contribute to the chart. And therefore labels don’t pay as much attention to getting airplay on those stations.”

4. Involvement of EMI Senior Promotion Executives

49. Such pay-for-play deals have constituted an integral part of EMI’s business strategy and have proceeded with knowledge of and direction from the top promotion executives at EMI labels. When EMI promotion employees sought to provide promotional support to radio stations, they were required to demonstrate the value of specific promotional activity in terms of airplay. See e.g., [EMI 35306]. In addition, EMI managers required concrete spin commitments in exchange for providing promotional support to radio stations. One promotion employee testified that his supervisors told him to make sure airplay commitments were received in return for the promotional support given to the station. A Capitol promotion director explained that

when promotional support was given in direct exchange for airplay, the specific spin commitments agreed to by the radio station were required to be reported to the label's senior vice president of promotion. Similarly, a Virgin promotion executive admitted that her approval of promotional support given in exchange for concrete airplay commitments could be required depending on the value of the promotion and "if it has political connotations, like doing something with one station in a market will end up being a problem with another station in the market."

50. In September 2004, an EMI promotion manager offered the promotion staff a bonus if they could meet certain airplay goals. The promotion manager emailed his staff saying, "anyone out there who can find one real major, any format, to give this song a major shot, 3 spins a day for 2 weeks, will get a \$500 bonus out of my pocket." [EMI 23044].

51. In addition to label promotion executives encouraging pay-for-play deals, senior EMI promotion executives had knowledge of, and were at times involved in securing pay-for-play deals. For example, in a June 2002 email regarding the group the Baha Men, a Capitol senior promotion manager informed the general manager: "[w]e just got WBLI to commit to 3 times a day by giving them a show on July 18th." [EMI 18740-41]. The general manager subsequently circulated the email to other top EMI executives, including the label's chairman and the president of S Curve Records.

52. Finally, EMI management pressured promotion employees to use time buys to get airplay. In a February 2002 email to the promotion staff, an EMI senior vice president of promotion exclaimed "USE TIME BUYS, THE MIAMI PROMO ON 3/29 IS IN PLAY FOR ADDS & SPINS....WITH THE BAND (Gorillaz) JUST ARRIVING, THE PRESS WILL BE

HUGE AND THE BUZZ WILL ONLY INCREASE....DON'T LOSE THIS!!!!!!" [EMI 83163-64 (emphasis in original)].

C. Independent Promoters

53. EMI supplements the work of its promotion employees through the use of independent promoters or "indies" – third parties who deal directly with the radio stations in seeking to gain airplay for EMI music. Although they are hired by the record labels, some independent promoters enjoy exclusive arrangements with particular radio stations, and are guaranteed regular, direct access to the programmers responsible for the all-important play lists. These independent promoters are often referred to as "exclusive indies." Other independent promoters promote to radio on a non-exclusive basis.

54. Many independent promoters have a financial relationship with radio stations. Although the financial arrangements between independent promoters and the radio stations they work with vary, the essence of this financial relationship is the same: money and promotional support supplied by EMI and other record labels are funneled through the independent promoters to the stations with the explicit understanding that the future level of support will depend on the stations adding the songs promoted by the independent promoters. In this way, and through even more explicit communications, the independent promoters have served as de facto conduits for pay-for-play transactions.

55. EMI has often used exclusive indies – including Michele Clark Promotions, Jeff McClusky and Associates, Tri-State, and McGathy Promotions – to implement its pay-for-play strategy. EMI established a compensation rate for each exclusive independent promoter used to secure airplay. These indies generally have been paid a fee by the record labels, often referred to

as an “add fee,” each time one of the promoter’s stations has added an EMI song to its play list.

56. Although many of the independent promoters hired by EMI have exclusive arrangements with radio stations, these indies work for other record companies as well. EMI promotion departments have developed a pay scale for exclusive indies requiring a minimum number of spins at monitored stations before the indies receive payment. The fees range from \$300 to \$1,000 per add, depending on the particular market served by the station making the add. [EMI 35323].

57. This policy demonstrates that EMI’s payments to independent promoters have been tied expressly to airplay at radio stations – right down to the number of spins a song must receive before payment will be made to the independent promoter. The pay-for-play nature of these payments is clear. For example, in a June 2004 a Capitol promotion executive emailed his staff stating, “I want to create an exact spin number where the per station indies get paid after they hit that number. I don’t care if its within a 4-6 period but I need [the senior coordinator] and [the promotion manager] to know what we consider to be fair.” [EMI 31958].

58. In addition to add fees, exclusive independent promoters have received the following types of payments from EMI:

- Indies occasionally have received volume bonuses for hitting a particular threshold set by the label. For example, a label might set a target of 10 adds, at which point the indie would receive a bonus payment.
- Indies could receive spin bonuses if their group of stations collectively moved a record up a certain number of spins per week.
- Indies might also ask for and receive an additional fee per add if a song proved particularly difficult to promote. This fee could amount to an additional \$300 per add.

- Indies could also receive additional payment in the form of a “billback.” When a station purportedly needed help with a promotional bill, the exclusive indie would request an additional fee from the label.

59. A number of EMI employees expressed their belief that the exclusive independent promoters are simply “gatekeepers” for the radio stations. An “indie toll” is paid even when label promotion employees are working a record; the indie gets paid if the song is added to a play list. As a Capitol promotion director put it, “[W]e do all the work and they get some of the glory.” “Indie toll” is a term commonly used in the record industry. A Virgin promotion executive explained:

There are people who say some independents are just toll-takers. It has just become a phrase where what that describes is you know that the independent doesn’t really have a relationship with the station, but the record company is made to feel that they have to pay the toll to get through or there will be some kind of a problem with the label and the radio station, as opposed to the indie actually doing the work.

The phrase “indie toll” has been used as a description for an expense on EMI’s purchase order records. [EMI 21852-53].

60. At the time when Clear Channel, CBS, and Entercom had exclusive arrangements with independent promoters, EMI’s indie budget could be as much as \$200,000 per song. See e.g., [EMI 66246-47].

61. An exclusive indie would not be compensated if EMI had already spent a large amount of money on promotional support for play on a station the exclusive indie claimed to have a relationship with. Simply put, EMI would not pay for the same airplay twice. See e.g., [EMI 18718].

D. Spin Programs, Time Buys and Syndicated Programs

62. EMI regularly purchased radio time to increase airplay and deceptively boost chart position for its artists. In particular, EMI availed itself of the “spin programs” offered by certain radio stations and broadcasting conglomerates. Spin programs are blocks of advertising time during which EMI music is played. Because the monitoring services, BDS and Mediabase, detect these spins just like any other airplay that has not been purchased, the paid spins become part of the data used by Billboard and Radio & Records to compile the record charts.

63. Sometimes, these advertising “spots” sound like a commercial advertisement for a new song or artist. In fact, however, the purpose of spin programs is to generate additional spin detections by the airplay monitoring companies, even if the spins occur in the dead of night when relatively few people are listening to the radio. Nighttime spins may still prove effective as a means to improve song chart positions. Accordingly, EMI has purchased spin programs— frequently during overnight hours – to generate dozens, sometimes hundreds, of additional spin detections each week.

64. EMI has used spin programs strategically to vie for higher chart position and to maintain a record’s current position when it begins to show signs of weakness on the charts. If a song does not produce enough of a spin increase from one week to the next, or its spins actually decrease, the song will fall in chart position and radio programmers, who watch the charts and the weekly spin tallies, will consider dropping the song from their play lists. A Virgin promotion executive stated, “The real purpose of a spin program is to make your plays look better and actually have more plays in your cumulative spins on a record really on a given Monday

morning.”

65. On Mondays, when the charts were released, EMI would examine them to determine the position of EMI songs and then decided whether to purchase spin programs. Spin programs are purchased by the labels through independent promoters or directly from radio conglomerates, as in the case of Entercom. Often independent promoters have acted as brokers for spin programs. For example, Jeff McClusky sold time on Citadel’s spin program, Airbound. Airbound was broadcast on all Citadel stations and cost EMI approximately \$3,000 per week to purchase. Entercom’s spin programs, CD Preview and CD Challenge, could be purchased by EMI directly from Entercom. Entercom’s programs ranged from \$3000 - \$4,500 per week.

66. High level EMI executives had knowledge of the use of spin programs. In testifying about the awareness of Virgin’s general manager and chairman of spin programs, a Virgin promotion executive explained that “I just felt that, you know, it was expensive. . . . I just felt that in those situation [sic] that I needed to make them aware of it and have them be a part of the decision.”

67. EMI has also generated spins for its records by utilizing time buys. Unlike spin programs, time buys are radio advertisements for a particular artist or recording, in which only a segment of a song is played on the air. Until the Fall of 2004, the broadcast of the segment registered as a full spin with the BDS monitoring service, because BDS merely used a segment of each song or thumb print, to detect and credit airplay of a song. BDS’ monitoring system captured each time buy broadcast as if the entire song had been played, and reported this false data to Billboard for use in compiling Billboard’s charts. As a result, EMI’s music appeared to be more popular than it actually was. See e.g., [2EMI 06455].

68. Less frequently, EMI has used syndicated radio programs – such as Clear Channel’s, Carson Daly, Rick Dees and Ryan Seacrest -- to increase spins and impact the charts. Generally, syndicated programs are weekly countdown shows broadcast simultaneously over more than 50 stations nationwide. The spins generated by these shows are detected by BDS and Mediabase. Labels could buy advertising and as a result get a spin on the syndicated show. A Virgin promotion director stated, “You work them [syndicated shows] like you would any other program director, music director.”

E. Fraudulent Call-In Requests

69. In addition to the foregoing practices, EMI has orchestrated fraudulent call-in request campaigns to obtain additional airplay. Most radio stations take requests from listeners to play particular songs. In fact, most stations have dedicated phone lines and website features that handle listener call-in requests and record listener feedback. Such information is monitored carefully by radio stations and syndicated radio programs, which frequently incorporate actual listener calls into the radio broadcast. Additionally, many radio stations have programs that broadcast music derived exclusively from listener requests, such as, an all-request weekend or all-request hour. Often, the number of requests a station receives for a particular song will influence the station’s decisions whether to add the song to its play list or whether to play the song more often. Request formats, particularly on-air requests and voting mechanisms, attract listeners by projecting the image of a station with a responsive, even democratic, programming process

70. Unbeknownst to the listening public, EMI has expended significant resources to manipulate the listener request process. Specifically, EMI has used outside vendors, including

Takeout Marketing and Market Development Company, to pose as listeners “requesting” that certain EMI songs be played by radio stations and syndicated radio programs. EMI’s outside vendors have hired teams of people who place call after call to radio stations while pretending to be avid listeners requesting their favorite new song. Often these callers know nothing about the song or artist they are requesting, or the station they are calling.

71. To make the calls sound authentic, EMI promotion personnel have provided details about the stations and the songs that help the callers develop a believable script. To the same end, EMI has requested that the companies have the callers identify themselves as being of a certain age and gender. For example, in an October 2002 email, a Virgin promotion director instructed, “[P]lease make sure the callers are Women [sic] 20-28 years old. AND please make sure they don’t get caught. If they are asked about how they know of Norah, please have them say either thru a friend, video (VH1, M2), saw her on a TV show etc.” [EMI 60988 (emphasis in original)]. A Virgin promotion manager testified that he has used these fraudulent call-in requests to generate listener interest, with the hope that the phony requests eventually would lead to legitimate requests. According to the Virgin manager, “some of how the radio station judges the response of records is via requests, so you hope that the requests make a difference in achieving more airplay.” In testifying about the circumstances under which Virgin would engage outside vendor services, the executive vice president of promotion admitted that “there was just a feeling that in order to appear competitive and appear like you had a hit to the radio community, that’s why that decision would be made.”

72. EMI also has used fraudulent call-in request to manipulate syndicated radio programs’ Top 10 countdown shows. EMI promotion employees are well aware that the Top 10

songs on such shows reflect reports the shows receive from particular radio stations as to the most frequently requested songs. EMI's practice of hiring marketing companies to strategically place call-in requests helps its songs gain airplay on the countdown programs.

73. According to a Virgin promotion executive, label executives at the highest levels knew and were likely involved in approving the solicitation of fraudulent phone requests.

74. EMI's fraudulent request strategy has extended to its efforts to induce MTV to play videos of EMI artists. Thus, as in the case of the call-in radio shows, EMI has hired Takeout Marketing and Market Development Company to lodge fraudulent viewer requests for EMI videos. EMI would also make bonus payments to those vendors if its artists' videos ended up being the most requested.

IV. Statutory Violations

75. The Attorney General alleges that, by engaging in the practices described above, EMI has violated GBL § 349 and Executive Law § 63(12).

IT NOW APPEARS that EMI MUSIC NORTH AMERICA ("EMI") is willing to enter into this Assurance of Discontinuance, without admitting or denying the Attorney General's allegations, but acknowledging that some of its employees pursued wrong and inappropriate promotion practices, as set forth in EMI's Statement annexed hereto as Exhibit A; and that the Attorney General is willing to accept the terms of this Assurance of Discontinuance pursuant to Executive Law § 63 (15) in lieu of commencing a civil action. This Assurance shall conclude any action the Attorney General could commence against EMI arising from or relating to the subject matter of this Investigation: provided, however, that nothing contained in this Assurance shall be construed to cover any claims that may be brought by the Attorney General to enforce

EMI's obligations arising from or relating to the provisions contained in this Assurance.

AGREEMENT

IT IS HEREBY UNDERSTOOD AND AGREED by and between EMI, and the Attorney General that:

1. This Assurance of Discontinuance shall be binding upon and extend to EMI, its employees, directors, officers, principals, divisions, subsidiaries, joint ventures or representatives, or any other person or entity whose acts, practices or policies with respect to radio are directed or controlled by EMI;

2. Within 90 days of the Effective Date of this Assurance, EMI will contribute and cause the total amount of \$ 3.75 million to be delivered to the Rockefeller Philanthropy Advisors who will distribute these funds to New York State not-for-profit corporations, to inure to the benefit of the residents of the State of New York by funding programs aimed at music education and appreciation; and

3. EMI will pay to the New York State Department of Law the sum of \$50,000, to cover the costs of this investigation, made payable to the New York State Department of Law and forwarded to the following address: New York State Department of Law, Division of Public Advocacy, 120 Broadway, 25th Floor, New York, N.Y. 10271, Attn: Terryl Brown Clemons, Assistant Deputy Attorney General.

BUSINESS REFORMS

4. Consistent with the provision Business Reforms set forth in Exhibit B annexed hereto, EMI has implemented Guidelines and Rules for its employees annexed hereto as Exhibit C.

COOPERATION WITH THE ATTORNEY GENERAL

5. EMI shall fully and promptly cooperate with the Attorney General with regard to the Investigation, and related proceedings and actions, of any person, corporation or entity, including but not limited to EMI's current and former employees, concerning the music and broadcasting industries. EMI shall use its best efforts to ensure that all of its officers, directors, employees, and agents also fully and promptly cooperate with the Attorney General in the Investigation and related proceedings and actions. Cooperation shall include without limitation: (1) production voluntarily and without service of subpoena any information and all documents or other tangible evidence reasonably requested by the Attorney General, and any compilations or summaries of information or data that the Attorney General reasonably requests be prepared; (2) without the necessity of a subpoena, having EMI's officers, directors, employees and agents attend any proceedings or otherwise ("proceedings" include but are not limited to any meetings, interviews, depositions, hearings, grand jury hearing, trial or other proceedings); (3) fully, fairly and truthfully disclosing all information and producing all records and other evidence in its possession relevant to all inquiries reasonably made by the Attorney General concerning any fraudulent or criminal conduct whatsoever about which it has any knowledge or information; and (4) in the event any document is withheld or redacted on grounds of privilege, work-product or other legal doctrine, a statement shall be submitted in writing by EMI indicating: (a) the type of document; (b) the date of the document; (c) the author and recipient of the document; (d) the general subject matter of the document; (e) the reason for withholding the document; and (f) the Bates number or range of the withheld document. The Attorney General may challenge such claim in any forum of its choice and may, without limitation, rely on all documents or

communications theretofore produced or the contents of which has been described by EMI, its officers, directors, employees, or agents. Nothing herein shall prevent EMI from providing such evidence to other regulators, or as otherwise required by law.

6. EMI shall comply fully with the terms of this Agreement. If EMI violates the terms of the previous paragraph in any material respect, as determined solely by the Attorney General: (1) the Attorney General may pursue any action, criminal or civil, against any entity for any crime it has committed, as authorized by law, without limitation; (2) as to any criminal prosecution brought by the Attorney General for violation of law committed within 5 years prior to the date of this Agreement or for any violation committed on or after the date of this Agreement, EMI shall waive any claim that such prosecution is time barred on grounds of speedy trial or speedy arraignment or the statute of limitations.

MISCELLANEOUS

7. Nothing contained herein shall be construed as relieving EMI of the obligation to comply with all state and federal laws, regulations or rules, nor shall any of the provisions of the Assurance be deemed permission to engage in any act or practice prohibited by such law, regulation or rule.

8. The acceptance of this Assurance of Discontinuance by the Attorney General shall not be deemed approval by the Attorney General of any of EMI's business practices, and EMI shall make no representation to the contrary.

9. This Assurance of Discontinuance is contingent on and relies on the truthfulness and accuracy of all representations made by EMI herein and during this investigation.

10. Unless otherwise provided, all notices as required by this Assurance of

Discontinuance shall be provided as follows:

Charles H. Smith, III, Assistant Attorney General
New York State Attorney General's Office
Division of Public Advocacy
120 Broadway, 3rd Floor
New York, New York 10271
tel. (212) 416-8414
fax. (212) 416-8393

11. In any application or in any such action, facsimile transmission of a copy of any papers to current counsel for EMI shall be good and sufficient service on EMI unless EMI designates, in a writing to the Attorney General, another person to receive service by facsimile transmission.

12. This Assurance shall be governed by the laws of the State of New York without regard to conflict of laws principles.

13. This Assurance may be executed in counterparts.

RIGHTS OF CUSTOMERS

14. Nothing contained in this Assurance of Discontinuance shall be construed to alter or enhance any existing legal rights of any consumer or to deprive any person or entity of any existing private right under the law. Nothing in this Assurance of Discontinuance shall in any way affect, restrict, or otherwise govern any rights of recourse EMI may have or seek to assert against any third-party.

EFFECTIVE DATE

15. This Assurance of Discontinuance shall be effective on the date that it is signed by an authorized representative of the Attorney General's Office.

VIOLATION AS PRIMA FACIE PROOF OF LAW VIOLATION

16. Any violation of the terms of this Assurance of Discontinuance shall constitute *prima facie* evidence of violation of the applicable law in any civil action or proceeding thereafter commenced against EMI by the Attorney General.

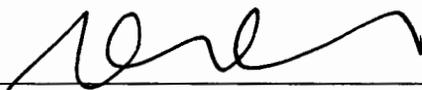
ENTIRE ASSURANCE OF DISCONTINUANCE

17. The terms stated herein constitute the entire terms of this Assurance of Discontinuance.

WHEREFORE, the following signatures are affixed hereto this 14th day of June, 2006.

EMI MUSIC NORTH AMERICA

**ELIOT SPITZER,
ATTORNEY GENERAL
OF THE STATE OF NEW YORK**

By: 
ALASDAIR McMULLAN
Senior Vice President, Legal Affairs
EMI Music North America

By: 
TERRYL BROWN CLEMONS
Assistant Deputy Attorney General
Division of Public Advocacy