SCANNED ON 10/20/2006

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: IRA GAMMERMAN
Justice

PART IA Part 27

Index Number : 401002/2006
PEOPLE OF THE STATE OF
VS
ENTERCOM COMMUNICATIONS CORP
Sequence Number : 001
DISMISS

INDEX NO.
MOTION DATE 10/12/06
MOTION SEQ. NO.
MOTION CAL. NO.

this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

FILED
OCT 20 2006
NEW YORK COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 10/12/06

IRA GAMMERMAN
J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 27

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THE PEOPLE OF THE STATE OF NEW YORK
by ELIOT SPITZER, Attorney General of
the State of New York,

Plaintiff,

-against-

ENTERCOM COMMUNICATIONS CORP.,
ENTERCOM RADIO, LLC, ENTERCOM NEW YORK,
INC., ENTERCOM BUFFALO, LLC, ENTERCOM
BUFFALO LICENSE, LLC, ENTERCOM ROCHESTER,
LLC, and ENTERCOM ROCHESTER LICENSE, LLC,

Defendants.

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Index No.: 401002/06
P.C. No.: 19614

Decision and Order

FILED
OCT 20 2006
NEW YORK
COUNTY CLERK'S

GAMMERMAN, J.H.O.:

This action is commenced by Eliot Spitzer, as the Attorney General of the State of New York (Attorney General), against the above-captioned defendant Entercom Communications Corp. and a group of its affiliated business entities (collectively, Entercom, or Defendant). In the amended complaint dated March 15, 2006, the Attorney General alleges that Defendant has and is engaging in deceptive and fraudulent business activities, and asserts two causes of action against the Defendant, the first under General Business Law (GBL) § 349(b) and the second under Executive Law § 63 (12). The complaint seeks a judgment enjoining and restraining Defendant from engaging in the deceptive activities complained of, directing Defendant to disgorge all profits obtained in connection therewith, and to pay penalties pursuant to section 350-d of the GBL. Defendant moves, pursuant to CPLR 3211 (a) (7), for an order dismissing the complaint for failure to state a cause of action.

Background

Entercom is the fifth largest radio conglomerate in the United States, and owns more than 100 radio stations nationwide. According to the complaint, Entercom has repeatedly engaged in a deceptive scheme of choosing songs for broadcast on its radio stations based upon the receipt of "payments or non-cash consideration from record labels, or their independent promoter representatives," without disclosure to the public. Compl. ¶¶ 2, 4. The practice by record companies (or their promoters) of paying money or other consideration to radio stations in exchange for the "airplay" or "spin" of their records, to enhance the ranking or popularity of their songs on music charts and to increase the sales of the "exposed" songs, is commonly known in the music and broadcast industry as "payola" or "pay-for-play."

In the wake of industry-wide scandals in the late 1950's, the inherently deceptive practice of payola was outlawed by Federal Trade Commission (FTC), acting under the Federal Communications Act, unless timely and appropriate sponsorship announcements are made by the broadcast stations that the spins are exchanged for consideration, 47 USC §§ 317, 508. The Federal Communications Commission (FCC) has also promulgated rules and regulations with respect to sponsorship identification and related requirements, 47 CFR § 73.1212. "The reason for this requirement is to ensure that the station makes the requisite disclosure of such payments to the public, or refrains from accepting payment in the first place." Compl. ¶ 22.

The complaint alleges that Entercom has actively traded airplay time for revenue, with the "knowledge and encouragement" of its "corporate leadership." Compl. ¶ 4. More specifically, the complaint alleges that several of Entercom's New York-based radio stations, including WKSE in Buffalo (which plays top 40 music) and WBEE in Rochester (which plays country music), have repeatedly solicited and received payments or other benefits from record companies or independent promoters (who act as middlemen for record companies in delivering cash or in-kind "promotional support" to radio stations), in exchange for spins or "adds," which are new songs added to the stations' weekly updated play lists. Compl. ¶¶ 31 - 58. Copies of documents reflecting such practices are attached to the complaint, including corporate authorization forms and reports, and e-mails amongst Entercom's station program managers, supervisors and executives with record company representatives or independent promoters. Compl. Exhs. A - G. These documents purport to show that Entercom's corporate senior leadership is fully aware of, and actively supports and encourages, the practice of pay-for-play.

In addition to the pay-for-play schemes carried out at the local level by radio stations without the required sponsorship identification, the complaint alleges that Entercom's "most senior management" has developed and directed the implementation of several corporate programs, including "CD Preview" and "CD Challenge" (collectively, CD Programs), that are tantamount to "the sale [to the record companies] of airplay on Entercom stations for the purpose of manipulating the music charts." Compl. ¶ 5. According to the complaint, the record companies purchase airtime spins on these CD Programs, which are aired during the overnight hours when there are few listeners, for the purpose of moving the played songs up the music charts. The complaint asserts that the CD Programs operate as follows: the stations provide a "brief identification" of the record companies paying for the spins, followed by the purchased songs, whose electronic "fingerprints" are detected by monitoring services (such as Mediabase and BDS)[1] that count spins. The results are used by music magazine publishers (such as Billboard and Radio & Record) to compile music charts. These charts purport (and are understood by the consuming public) to reflect the popularity of

[1] Mediabase is used by Billboard, and BDS is used by Radio & Record, to monitor and count spins. Billboard and Radio & Record are major music industry companies that publish music magazines and popularity charts. Compl. ¶ 29. Mediabase is owned by a subsidiary of Clear Channel Communications, and BDS is owned by Nielsen, the Netherlands-based media research ratings company.

songs. Compl. ¶¶ 59 - 73.

The complaint also alleges that Entercom failed to notify the monitoring services that these are paid-for spins (and thus should not be counted), and that its senior management sought to conceal such information from the monitoring services by threatening Entercom employees not to disclose that information, thereby misleading these services and consumers about the actual popularity of the played songs. Compl. ¶ 66. Hence, through these programs, "Entercom has helped generate misleading chart information, to the detriment of consumers." Compl. ¶ 73. Attached to the complaint are documents and e-mails relating to the CD Programs that reflect their objectives, pricing structures, operations, revenue generating power and mandatory implementation. Compl. Exh. H.

The Federal and State Regulatory Schemes

In its memorandum of law in support of the motion to dismiss (Def. Brief), Defendant contends that because "radio broadcasts are governed by federal law," the Attorney General "has no authority to enforce the federal payola laws or to supplant the FCC as regulators of the radio airwaves." Def. Brief, at 3, 4.

Although it is true that the Attorney General does not have the jurisdictional authority to enforce federal laws (including the payola laws), the Federal Communications Act (FCA) "does not manifest a clear Congressional intent to preempt state law actions prohibiting deceptive business practices," *Marcus v AT&T Corp.*, 138 F3d 46 (2d Cir 1998) (noting that in *Metropolitan Life Ins. Co. v Taylor*, 481 US 58 [1987], the U.S. Supreme Court made clear that the federal complete preemption doctrine applies only where the Congress has unambiguously manifested an intent to disallow state law claims in a particular field). Indeed, as noted by the Attorney General in his opposition to the motion to dismiss, subsequent to the 1960 amendments to the FCA, legal actions commenced against participants in the industry-wide payola scandal were brought successfully by the states (such as New York and Pennsylvania) under state bribery laws, even though the illegal payola practices were actionable under federal law, *see Segrave, Payola in the Music Industry: A History, 1880-1991.*

Accordingly, the FCA, including the federal payola laws, neither preempts nor precludes the Attorney General in the enforcement of state consumer protection statutes that prohibit deceptive business practices, such as GBL § 349.[2]

Consumer Injury Under GBL § 349

Defendant argues that because the complaint "collapses two distinct elements" (deception and injury) of a section 349 claim

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[2] In its reply memorandum of law in further support of the motion to dismiss (Def. Reply Brief), Defendant concedes that its motion does not "argue that federal law preempts all state action in this context (though it does explain that the federal payola laws, enforceable by the FCC, were enacted to address precisely the kind of allegations at issue)." Def. Reply Brief, at 1.

into one, it must be dismissed as "legally flawed".

Defendant's reliance on cases involving claims brought by private parties, such as *Donahue v Ferolito, Vultaggio & Sons*, 13 AD3d 77 (1st Dept 2004), is misplaced. GBL § 349 provides different standards for cases brought by the Attorney General and those brought by private parties.

Actions brought by the Attorney General are authorized by section 349 (b). That statute provides, in pertinent part:

> Whenever the attorney general shall believe from evidence satisfactory to him that any person, firm, corporation ... has engaged in or **is about to engage** in any of the acts or practices stated to be unlawful[,] he may bring an action in the name and on behalf of the people of the state of New York to enjoin such unlawful acts or practices and to obtain restitution of any moneys or property obtained directly or indirectly by any such unlawful acts or practices [emphasis added].

Thus, far from requiring the Attorney General to show that consumers have been injured before seeking relief, the statute expressly authorizes the Attorney General to seek relief, including an injunction, even prior to the occurrence of the deceptive conduct itself, and, therefore, ipso facto, prior to the occurrence of any injury resulting from the deceptive conduct.

In sharp contrast to section 349 (b), which governs actions brought by the Attorney General, GBL § 349 (h), added by the Legislature in 1980 to permit actions by private parties, expressly requires a showing of injury:

> In addition to the right of action granted to the attorney general pursuant to this section, any person who **has been injured** by reason of any violation of this section may bring an action in his own name to enjoin such unlawful act or practice, an action to recover his actual damages ... or both such actions [emphasis added].

The inclusion in section 349 (h) of an express "injury" requirement for actions by private parties, underscores that there is no such requirement for actions brought by the Attorney General under section 349(b).

The distinction between these two sections was pointed out by the Court of Appeals in *Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314 (2002):

> Unlike private plaintiffs, the Attorney General may, for example, seek injunctive relief without a showing of injury (*see* General Business Law § 349 [b]). ... [I]n 1980 a private right of action was provided to "any person who has been injured by reason of any violation of this section" (General Business Law § 349 [h]).

See also People v Network Associates, 195 Misc 2d 384 (Sup Ct, NY County 2003) (granting monetary and injunctive relief without identifying any consumer who was actually misled or injured by deceptive practices); *Matter of State v Colorado State Christian College of the Church of Inner Power of New York, Inc.*, 76 Misc 2d 50 (Sup Ct, NY County 1973) (Attorney General may seek to enjoin practices that have the "capacity to deceive"; "no specific injuries need be established"); *Porwick v Fortis Benefits Ins. Co.*, 2004 WL 2793186 (SD NY 2004) ("Although the New York State Attorney General may seek injunctive relief without a showing of injury, a private plaintiff may not").

Citing a footnote in *Small v Lorillard Tobacco Co.*, 94 NY2d 43 (1999), Defendant argues that both section 349 (b) and section 349 (h) require consumer injury. Defendant's reliance on this footnote is misplaced.

Small was a private action brought under section 349 (h). The sole role played by the Attorney General was the filing of an amicus brief in support of the private plaintiffs. The footnote on which Defendant relies states:

> The Attorney General, who appears as amicus curiae in support of appellants' position, likens this case to a situation where a distributor asserts that its bottled water is from a pure and pristine mountain stream while in reality, in was only tap water. The Attorney General may be right that a plaintiff might have a claim for the higher price the consumer paid for the product as a result of the misrepresentation in that circumstance. That is not this case. Plaintiffs do not contend that the deception here caused an inflated price.

Nothing in this footnote suggests that had the action been brought by the Attorney General as a plaintiff, the Attorney General would be required to plead or prove actual injury to consumers. To the contrary, the court's holding that the private plaintiffs were required to show injury expressly cites section

349 (h), which governs claims brought by private parties, not by the Attorney General:

> Plaintiffs' definition of injury is legally flawed. Their theory contains no manifestation of either pecuniary or "actual" harm; plaintiffs do not allege that the cost of cigarettes was affected by the alleged misrepresentation, nor do they seek recovery for injury to their health as a result of their ensuing addiction (General Business Law S 349 [h]).

Neither *Matter of People* v *Applied Card Systems, Inc.*, 27 AD3d 104 (3d Dept 2005), *lv dismissed* 7 NY3d 741 (2006) nor *F.T.C.* v *Crescent Publishing Group, Inc.*, 129 F Supp 2d 311 (SD NY 2001), compel a different result. In *Applied Card Systems*, the Third Department affirmed the grant of a permanent injunction in favor of the Attorney General. While the court stated, as to the Attorney General's claims under GBL §§ 349 and 350, that the Attorney General was required to establish that respondents engaged "in an act or practice that is deceptive or misleading in a material way and that [the consumer] has been injured by reason thereof," the cases cited by the court for that proposition all involve private plaintiffs, and the court failed to cite the Court of Appeals' decision in *Goshen, supra*.

In *Crescent Publishing,* the federal court granted a preliminary injunction to the FTC under the Federal Trade Commission Act, and to the Attorney General under GBL §§ 349, 350. Defendant relies on the following language from a footnote in the decision:

> Section 349, which was drafted to parallel FTCA Section 5, see *State v. Colorado State Christian College of Church of Inner Power, Inc.*, 76 Misc.2d 50, 53-54, 346 N.Y.S.2d 482, 486 (1973), prohibits "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service." In order to prevail under Section 349, the state must demonstrate only that a consumer-oriented act or practice was misleading in a material respect and that an injury to the plaintiff resulted from such act or practice. See *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 85 N.Y.2d 20, 24-25, 623 N.Y.S.2d 529, 532-33, 647 N.E.2d 741 (1995); *McGill v. General Motors Corp.*, 231 A.D.2d 449, 647 N.Y.S.2d 209, 210 (1st Dept.1996). There is no requirement of justifiable reliance, *see Oswego Laborers' Local 214*, 85 N.Y.2d at 26, 623 N.Y.S.2d at 533, 647 N.E.2d 741, or of fraudulent intent or recklessness on the part of the defendants, *see Oxman v. Amoroso*, 172 Misc.2d 773, 782-83, 659 N.Y.S.2d 963 (1997).

The statement that the Attorney General must demonstrate "injury to the plaintiff" is dictum, and in any event misstates the role played by the Attorney General as plaintiff in such a case, who does not bring suit as plaintiff based on his own "injury." The statement is based solely on cases involving private plaintiffs. The court did not cite *Goshen*, *supra*. I am not bound by the federal court's misapprehension of New York state law.

Material Deception Under GBL § 349

Defendant also argues that to satisfy the "deceptive" element of GBL § 349, the Attorney General must establish that the payment arrangements between "Entercom and the record labels were important to reasonable consumers, and would likely affect their behavior." Def. Brief, at 11-12.

Section 349 does not define material deceptive practices. In *Bildstein v Mastercard Int'l, Inc.*, 329 F Supp 2d 410 (SD NY 2004), cited by Defendant, the federal district court observed that section 349 "is modeled after Section 5 of the Federal Trade Commission Act [FTCA]"; *accord Goshen, supra* (section 349 is "much like its federal counterpart, the [FTCA]"); *Colorado State Christian College, supra* ("the legislative purpose in enacting section 349 ... was to follow in the steps of the Federal Trade Commission with respect to the interpretation of deceptive acts and practices outlawed in section 5 of the [FTCA]").

As noted above, because of the widespread payola practices in the late 1950's, the FTC took significant enforcement efforts against violators, which resulted in the entry of many consent decrees. For example, one of such consent decrees, *In the Matter of Louis J. Bedell,* Docket 8191, 58 FTC 559 (April 6, 1961), recites:

> Deception is inherent in "payola" inasmuch as it involves the payment of a consideration on the express or implied understanding that the disc jockey will conceal, withhold or camouflage such fact from the listening public ... Thus, "payola" has been used by respondents to mislead the public into believing that the records "exposed" were the independent and unbiased selection of the disc jockeys based either on each record's

> merit or public popularity. This deception of the public has the capacity and tendency to cause the public to purchase the "exposed" records which they might otherwise not have purchased and also to enhance the popularity of the "exposed" records in various popularity polls, which in turn has the capacity and tendency to substantially increase the sales of the "exposed" records ... The aforesaid acts and practices of respondent ... were and are all to the prejudice and injury of the public and of respondents' competitors and constitute unfair and deceptive acts and practices ... within the intent and meaning of the [FTCA].

This construction by the FTC of the very statute on which section 349 was modeled, supports my conclusion that the practices here at issue are deceptive within the scope of section 349.

Defendant argues that "[c]iting to 1960-era FTC cases simply cannot cure a failure to allege facts establishing material deception in 2006" because the Attorney General must also establish "that consumer attitudes and music listening behavior and options have remained unchanged for over forty years despite the many new listening options available to consumers." Def. Reply Brief, at 16.

This contention is unpersuasive. The mere fact that other options are available to consumers does not mean that the conduct alleged in the complaint is not deceptive. In a news release by the FCC captioned "Commissioner Adelstein Applauds New York Attorney General Payola Settlement With Warner Music," dated

November 22, 2005, the Commissioner stated:

> Attorney General Eliot Spitzer has once again achieved a breakthrough in the effort to combat payola and *protect consumers from misleading broadcasts*. The settlement with Warner Music Group adds more dirt to the mountain of evidence that payola is pervasive in the music business. This agreement once again raises serious concerns that not only has New York State law been violated, but Federal law under the FCC's jurisdiction, as well. The FCC needs to act on this evidence and conclude as soon as possible the investigation we are now undertaking [emphasis added].[3]

While not binding authority, the view of the FCC, the agency entrusted with enforcement of the statute on which section 349 was modeled, is consonant with my conclusion that the practices here at issue are deceptive within the scope of section 349.

Material Deception - the CD Programs

Defendant argues that because on-air sponsorship identifications are announced when paid-for spins are played during the CD Programs, these programs are "in no way deceptive, let alone materially deceptive." Def. Reply Brief, at 17.

This argument fails because the spins generate two types of matter that are broadcast, which are directed at two different classes of "listeners" and affect two different types of

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[3] The FCC also issued a Public Notice on Video News Release and a payola fact sheet. In the Notice, the FCC stated that payola rules "are grounded in the principle that listeners and viewers are entitled to know who seeks to persuade them with programming." www.fcc.gov/cgb/consumerfacts/PayolaRules.html.

consumers.

The first type of matter broadcast is the traditional playing of the song. This type of communication is directed to the traditional "listener," who is also a consumer. As to this listener/consumer, the verbal announcement is sufficient.

The second type of matter broadcast is the inaudible electronic "fingerprint" that is directed at the monitoring services. The monitoring service is thus a "listener" that hears neither the audible broadcast of the song nor the verbal identification announcement. Instead, it "hears" the electronic fingerprint, which is unaccompanied by any announcement discernible by the monitoring service. This is designed to influence a second "consumer," the potential purchaser of the recording, whose purchasing decision is influenced by charts prepared from information gleaned by the monitors from the inaudible, electronic fingerprints broadcast by the station for that purpose.

The electronic fingerprint is not directed at the first type of listener/consumer, who cannot even hear it. Rather, it is broadcast by the station with the intent, expectation, and result that the monitor will "listen" to this inaudible matter, and then convey misleading information to the second type of consumer. Indeed, as noted above, the crux of the complaint is that there is no disclosure to this second type of consumer that the spin has been paid for. Indeed, the complaint alleges that Defendant has actively sought to conceal that information from the monitoring services (Compl. ¶¶ 66, 70). Therefore, the music charts do not reflect and identify the paid-for spins, and are thereby deceptive and misleading to consumers.

Accordingly, I conclude that the allegations of the complaint as to the materially deceptive nature of the CD Programs are sufficient to withstand a motion to dismiss.[4]

Statutory Exemptions Under GBL § 349

Defendant argues that its CD Programs' practices are not actionable under section 349 because they are within the scope of certain statutory provisions shielding them from liability.

Section 349 (d) Defense

Section 349 (d) provides, in pertinent part, that "it shall be a complete defense" if a business practice is "subject to and complies with the rules and regulations of ... the federal trade commission or any official ... agency of the United States." Defendant argues that, as to the CD Programs, because it complied with FCC requirements by making on-air sponsorship announcements when paid-for spins are played, it has a "complete defense" to

[4] While I have no occasion to reach this issue, I note that if an electronic signal were inserted during airplay to indicate that a song is a paid-for spin, to enable the monitoring services to either (a) not count the spin or (b) count it as a paid-for spin, such a step might well resolve the deceptive nature of the CD programs.

the Attorney General's section 349 (b) claim.

That defense presupposes that the federal statute and regulation are complied with. Where one portion of the defendant's conduct complies with federal requirements but another portion either is outside the scope of the federal requirements or does not comply with applicable federal requirements, only the complying, regulated portion is within the safe harbor of the statutory defense, *see e.g. Sclafani v. Barilla America, Inc.*, 19 AD3d 577 (2d Dept 2005); *People v General Electric Co., Inc.*, 302 AD2d 314 (1st Dept 2003); *Samuel v Time Warner, Inc.*, 10 Misc 3d 537 (Sup Ct, NY County 2005); *Blue Cross and Blue Shield of New Jersey v Phillip Morris, Inc.*, 133 F Supp 2d 162 (ED NY 2001).

Therefore, the key inquiry is whether the federal provisions encompass the broadcasting of electronic fingerprints directed to monitoring services; and, if so, whether the making of a verbal announcement, not communicated to the entity "listening" to the electronic fingerprint, constitutes compliance with the federal provisions. Section 349 (d) provides a defense only if both of these questions are answered in the affirmative.

47 USC § 317 (a) (1) provides, in pertinent part:

> **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** ... [emphasis added].

47 CFR § 73.1212 similarly provides, in pertinent part:

> **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 ... .

As the court explained in *National Assn for Better Broadcasting v F.C.C.*, 830 F2d 270 (DC Cir 1987), albeit in a somewhat different context:

> The statutory language extending the requirement of sponsorship identification to "[a]ll matter broadcast" is as clearly a barrier to the Commission's attempted limitation on its scope as words are capable of erecting, and nothing in the legislative history indicates that they do not mean precisely what they say. This provision originated in the Radio Act of 1927, [FN36] ... The provision was codified, without amendment or debate, in the Communications Act of 1934, [FN37] and in 1959 the Commission itself held that the words "[a]ll matter broadcast" prohibited any restriction upon the applicability of Section 317 as well as exclusion of any class of broadcast matter from its demand. [FN38] Congress revised the Act [substantially] soon after this ruling, but left the clause "[a]ll matter broadcast" unchanged. [FN39] [referring to Pub.L. No. 86-752, S 8, 74 Stat. 889, 895 (1960). And while Congress at that time did amend the Act to empower the Commission to waive the requirement of sponsorship announcement in certain circumstances, the existence of that authority is irrelevant to the litigation

before us today. [FN40] [footnotes omitted].

Here, the electronic fingerprint appears to come squarely within the definition of "all matter broadcast."[5] Therefore, the issue is whether an oral announcement made just prior to the time that an inaudible electronic fingerprint, engineered to be received by electronic equipment, is broadcast, where the oral announcement cannot be discerned by that equipment, constitutes an "announcement" within the scope of the statute with regard to the electronic "listener." I conclude that it does not.

To "announce" means "to make known publicly," American Heritage College Dictionary. An "announcement" that is made in a manner that is not calculated to make the information "known" to the intended recipient, is not an "announcement."[6] Thus, while compliance with the disclosure requirements would satisfy

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[5]It might be argued that because the technology of electronic fingerprints had not yet been developed at the time the statute was promulgated, the statute does not encompass electronic fingerprints. On that theory, the conduct in question is not subject to federal regulation and would therefore be outside the safe harbor of section 349 (d).

[6]*cf. United States v Mendoza*, 433 F2d 891 (5th Cir 1970) (announcement sufficient where it was "was made loudly enough so that it is fair to infer that anyone inside the house also heard the agent's words"); *State of Arizona v. Wright*, 131 Ariz 578, 643 P2d 23 (Ariz App 1982) (same); *Stamper v Link*, 117 Ind App 212, 69 NE2d 600 (Ind App 1946), <u>mandate mod.</u> 117 Ind App 212, 71 NE2d 128 (Ind App 1947) ("A finding is not 'announced' within the meaning of the above statute, until it is orally announced in open court or, by order of the court, spread of record, so as to bring the ruling to the notice of all parties").

Defendant's obligations as to the first type of listener, I do not read the federal requirements as permitting Defendant to communicate *electronically* to the second type of "listener" that a song has been played, without communicating to the second type of "listener" that the spin was paid for. This is especially so since the effect of the failure to communicate this information to the second type of "listener" is that consumers are given misleading information.

Moreover, there is no showing that the Attorney General's section 349 (b) claim interferes with the FCC's exercise of its own regulatory powers.

Also unpersuasive is Defendant's argument that it should not be held liable for the acts or omissions of the monitoring services and charting companies in not accounting for the sponsorship disclosures. As discussed, the CD Programs appear to have been designed primarily for the purpose of using the monitoring services and charting companies as a conduit to disseminate misleading information. Such conduct is actionable under section 349, *see City of New York v Coastal Oil New York, Inc.*, 1998 WL 82927 (SD NY 1998) ("Coastal's reporting of misleading prices in a publication widely used by fuel oil purchasers" actionable under section 349).

Accordingly, I conclude that the section 349 (d) defense does not warrant dismissal on this motion.

Section 349 (e) Defense

Section 349 (e) provides:

> Nothing in this section shall apply to any television or radio broadcasting station or to any publisher or printer of a newspaper, magazine or other form of printed advertising, who broadcasts, publishes, or prints the advertisement.

Defendant argues that because the paid-for spins are advertisements of record companies, its broadcast of such spins are not actionable under section 349 because of the exemption under section 349 (e). Defendant also argues that because the statutory language is unambiguous, the courts should give effect to its plain meaning.

The purpose of this statutory defense is to shield the media from liability for deceptive content of advertisements where the function of the media is merely that of a passive vehicle for a third party's deceptive advertisement, *see N.Y. Electrolysis Assoc., Inc. v Bell Atlantic Yellow Pages Co.*, 2000 NY Misc LEXIS 534 (Sup Ct, NY County 2000) (yellow pages of the telephone directory were advertisements within the scope of the statutory exception). Here, the deception is not in the content of the advertisement, but in the failure to inform the "listener" that what is being broadcast <u>is</u> an advertisement. That is the conduct of the station itself. While the text of the statutory exception could be read literally to encompass Defendant's conduct, such a result would be unreasonable and absurd, *see e.g. People v*

Garson, 6 NY3d 604 (2006) ("we must interpret a statute so as to avoid an unreasonable or absurd application of the law" [internal quotation marks and citations omitted]; *Milbrandt v A.P. Green Refractories Co.*, 79 NY2d 26 (1992) (courts should not interpret a statute in a way that a literal reading produces an absurd or illogical result). Accordingly, I conclude that § 349 (e) does not bar the Attorney General's claims.

Applicability of Executive Law section 63 (12)

Section 63 (12) provides, in relevant part, that "[w]henever any person shall engage in repeated fraudulent or illegal acts ... in the carrying on, conducting or transaction of business, the attorney general may apply ... for an order enjoining the continuance of such business activity ... directing restitution and damages ... ." Executive Law § 63 (12).

Defendant argues that the Attorney General cannot pursue a claim under section 63 (12), unless there is also a viable claim under section 349. Quoting an excerpt from *Spitzer v Frink America, Inc.*, 2 AD3d 1379 (4th Dept 2003), Defendant contends that section 63 (12) "does not create any new causes of action, but does provide the Attorney General with standing to seek redress and additional remedies for recognized wrongs based on the violation of other statutes" [internal quotation marks omitted]. Thus, Defendant argues that because the complaint fails to state a claim under section 349, the section 63 (12) claim must also be dismissed.

Defendant's reliance on *Frink America* is misplaced. The case holds that where a statute sets forth the remedies available to a private party, the Attorney General, proceeding as plaintiff, is not limited to those statutory remedies. Nothing in the case supports the proposition that in order to proceed under Executive Law § 63 (12), the Attorney General must establish a violation of an underlying substantive statute. Indeed, the plain text of section 63 (12) belies this contention. The Attorney General's authority to seek relief against deceptive conduct under Executive Law § 63 (12) is illustrated in cases in which the Attorney General proceeded without relying on GBL § 349, *see e.g. Matter of State of New York, by Lefkowitz v ITM, Inc.*, 52 Misc 2d 39 (Sup Ct, NY County 1966); *People v B.C. Associates, Inc.*, 22 Misc 2d 43 (Sup Ct, NY County 1959).

Accordingly, it is

ORDERED that Defendant's motion to dismiss the complaint is denied in all respects; and it is further

ORDERED that Defendant is directed to serve an answer to the complaint within twenty (20) days of service of a copy of this

Order with notice of entry.

Dated: 10/12/06

ENTER:

IRA GAMMERMAN
J.H.O.

FILED
OCT 20 2006
NEW YORK
COUNTY CLERK'S OFFICE