

## Fair Music and False Advertising

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### INTRODUCTION

CD Baby, an online music seller, purports to offer “the most free-range, organic, grass-fed independent music in the world.” It also claims that when you buy music from its store, “you’re buying directly from the artist.” Music-subscription service Magnatune makes similar claims, describing itself as “a pioneer in the fair trade music movement.” The company emphasizes that “[b]ecause we aren’t evil, fully 50% of your membership goes straight to the musicians (not to lawyers or labels).” Both CD Baby and Magnatune’s advertising suggests that consumers should care about how musicians are treated and favor sellers who compensate artists “fairly” or “better” than certain commercial counterparts.

In this article, I argue that “fair music” advertising is an example of “process” advertising that scholars have recognized in messaging by sellers of food and durable goods, like coffee, clothes, and makeup. Such advertising appeals to what these scholars term “process preferences”—consumer preferences favoring products made or distributed using certain processes, even though those processes do not tangibly affect the resulting product. Recognizing fair-music claims as process advertising is important because such advertising falls within the scope of federal and state laws prohibiting false and misleading statements. I argue that under existing advertising laws, music sellers who make fair-music claims can be required to produce evidence substantiating claims that they treat musicians fairly or more favorably than competing sellers.

This article has three parts. Part I introduces consumer process preferences for fair musician compensation and identifies various fair-music claims made by music sellers CD Baby, Magnatune, and Bandcamp. Part II discusses how fair-music claims can be enforced under existing federal and state advertising laws, specifically the Federal Trade Commission Act, the Lanham Act, and state UDAP laws. Part III discusses some potential legal challenges to enforcing fair-music claims and concludes that false advertising suits nevertheless offer a novel tool for government agencies, consumers, and competitors to ensure that music sellers pay musicians as claimed. Policing fair-made music claims through advertising law therefore could augment existing protections of musicians under copyright and contract law, which some scholars have criticized as inadequate for ensuring that a sufficient portion of music revenues reaches artists.

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<sup>1</sup> Attorney, Federal Trade Commission. These thoughts are my own and not the opinions of the Federal Trade Commission, individual commissioners, or staff. This paper is still in preliminary form, and I very much welcome questions and comments at [yfangpost@gmail.com](mailto:yfangpost@gmail.com). Thank you for reading.

## I. Recognizing Fair-Music Claims as Process Advertising

Consumers have numerous, unique reasons why they prefer certain goods over others.<sup>2</sup> Some consumers have preferences for price, color, shape, or size, while others are sensitive to product attributes such as performance and durability.<sup>3</sup> Yet others have preferences for the ways in which a good is made or distributed. Scholars have recognized that such consumers may be influenced by process advertising that identifies goods as organic, environmentally friendly, dolphin safe, non-genetically modified, cage free, fair trade, conflict free, carbon neutral, union-made, or made in the USA.<sup>4</sup> Although this last set of product attributes does not necessarily affect the functionality, performance, or safety of the ultimate product, they nevertheless can influence the willingness of consumers to buy the product.<sup>5</sup>

Often, consumers prefer goods with certain “process attributes” for reasons collateral to their use of the actual goods. For example, consumers may believe that goods produced via certain processes help (or harm to a lesser degree) the people, animals, and natural environment affected by the production process.<sup>6</sup> People who seek organically grown foods, for example, may care about the consequences of pesticide use on the environment or farm workers’ health.<sup>7</sup> Those who seek cage-free eggs may want to avoid subjecting animals to factory production.<sup>8</sup> Those who eschew goods made from genetically modified seeds may “believe that GM agriculture exacerbates the trend toward concentrated, monocultural production, thereby

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<sup>2</sup> See, e.g., Lillian R. BeVier, *Competitor Suits for False Advertising Under Section 43(a) of the Lanham Act: A Puzzle in the Law of Deception*, 78 VA. L. REV. 1 (1992).

<sup>3</sup> *Id.*

<sup>4</sup> See Douglas A. Kysar, *Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice*, 118 HARV. LAW REV. 526 (2004); Margaret Chon, *Marks of Rectitude*, 77 FORDHAM LAW REV. 2311, 2315 (2009) (“[M]arks now express--whether implicitly or explicitly--environmental, human rights, and labor characteristics, as well as classic health and safety standards (e.g., Underwriters Laboratory). These marks place a proverbial stamp of ethical approval upon standards developed largely outside of public view.”); Ezra Rosser, *Offsetting and the Consumption of Social Responsibility*, 89 WASH. UNIV. LAW REV. (2011).

<sup>5</sup> Kysar, *supra* note \_\_\_\_.

<sup>6</sup> See, e.g., Carter Dillard, *False Advertising, Animals, and Ethical Consumption*, 10 ANIM. LAW 25 (2004); Benjamin N. Gutman, *Ethical Eating: Applying The Kosher Food Regulatory Regime to Organic Food*, 108 YALE LAW J. 2351 (1999); Jeffrey J. Minneti, *Relational Integrity Regulation: Nudging Consumers Toward Products Bearing Valid Environmental Marketing Claims*, 40 ENVIRON. LAW 1327, 1341-42 (2010) (distinguishing product- and process-based attributes); Kysar, *supra* note \_\_\_\_;

<sup>7</sup> See, e.g., Valerie J. Watnick, *The Organic Foods Production Act, the Process/Product Distinction, and a Case for More End Product Regulation in the Organic Foods Market*, 32 UCLA J. ENVIRON. LAW POLICY 40 (2014); Ariel Lessing, *A Supplemental Labeling Regime for Organic Products: How the Food, Drug, and Cosmetic Act Hampers A Market Solution to an Organic Transparency Problem*, 18 MO. ENVIRON. LAW POLICY REV. 415 (2011). Michelle T. Friedland, *You Call That Organic? The USDA’s Misleading Food Regulations*, 13 N. Y. UNIV. ENVIRON. LAW J. 379 (2005); Gutman, *supra* note \_\_\_\_;

<sup>8</sup> See, e.g., Delcianna J. Winders, Note, *Combining Reflexive Law and False Advertising Law to Standardize “Cruelty-Free” Labeling of Cosmetics*, 81 N.Y.U. L. REV. 454 (2006); Dillard, *supra* note \_\_\_\_.

threatening national food security and traditional agrarian culture.”<sup>9</sup> Those who prefer fair trade<sup>10</sup> or made-in-the-USA goods<sup>11</sup> may want to avoid supporting unsafe or low-wage employment conditions. In other words, purchasing decisions by consumers can express preferences for equitable outcomes and aim to affect those outcomes.<sup>12</sup>

While consumers are willing to pay for a product with certain process attributes, many cannot directly verify whether that product truly has its advertised process attributes.<sup>13</sup> Consumer goods can contain components from dozens of different suppliers, often from different countries, and it can be nearly impossible for consumers to determine the truth of a fair-process claim. Further, products advertised as having beneficial process attributes often command higher market premiums.<sup>14</sup> Without external scrutiny, companies may be tempted to make false or misleading process claims. Advertisers have exaggerated or even fabricated the benefits of green,<sup>15</sup> kosher,<sup>16</sup> organic,<sup>17</sup> sweat-free,<sup>18</sup> and cruelty-free goods.<sup>19</sup>

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<sup>9</sup> Kysar, *supra* note \_\_\_\_.

<sup>10</sup> Patrick Pelsmacker & Wim Janssens, *A Model for Fair Trade Buying Behaviour: The Role of Perceived Quantity and Quality of Information and of Product-specific Attitudes*, 75 J. BUS. ETHICS 361-80 (2007); Patrick De Pelsmacker, L. Driesen & Glenn Rayp, *Do Consumers Care About Ethics? Willingness to Pay for Fair-Trade Coffee*, 39 J. CONSUM. AFF. 363-85 (2005).

<sup>11</sup> See, e.g., *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310 (2011).

<sup>12</sup> Rosser, *supra* note \_\_\_\_; Kysar, *supra* note \_\_\_\_.

<sup>13</sup> See Chon, *supra* note \_\_\_\_ (“One observer claims that the typical commodity transaction involves no fewer than eighteen links.”) (citing Jacqueline DeCarlo, *FAIR TRADE: A BEGINNER’S GUIDE* 14 (2007) (citing Michael Barratt Brown, *FAIR TRADE: REFORM AND REALITIES IN THE INTERNATIONAL TRADING SYSTEM* (1993)); Kysar, *supra* note \_\_\_\_ (quoting Ken Conca, *Consumption and Environment in a Global Economy*, in *CONFRONTING CONSUMPTION* 133, 145 (2002) (“As commodity chains grow longer and more complex, and production systems more dynamic, it becomes harder to contextualize production in terms of its social and ecological ramifications.”); Gutman, *supra* note \_\_\_\_ (citing Jaime A. Grodsky, *Certified Green: The Law and Future of Environmental Labeling*, 10 YALE J. ON REG. 147, 150 (1993)) (“[B]ecause both the ‘kosher’ and ‘organic’ categories are defined by production and processing methods, it is generally difficult or impossible for consumers to evaluate directly the truthfulness of a producer’s claims.”).

<sup>14</sup> See, e.g., Paul H. Luehr, *Guiding the Green Revolution: The Role of the Federal Trade Commission in Regulating Environmental Advertising*, 10 UCLA J. ENVTL. L. & POL’Y 311, 313 (1992) (“Consumers not only seek products that are safer for the environment, they are also willing to pay a premium to acquire those products.”); Gutman, *supra* note \_\_\_\_, at 2368-69 (“The market premium commanded by kosher food, for example, creates a strong temptation, in the absence of external checks, to pass off non-kosher food as kosher.”)

<sup>15</sup> See, e.g., Jacob Vos, *Actions Speak Louder Than Words: Greenwashing in Corporate America*, 23 NOTRE DAME J.L. ETHICS & PUB. POL’Y 672, 681 (2009); John M. Church, *A Market Solution to Green Marketing: Some Lessons From the Economics of Information*, 79 MINN. L. REV. 245, 246 (1994) (“[M]anufacturers, striving for greater profits, may have an incentive to inflate or even lie about the environmental attributes of their products.”); Luehr, *supra* note \_\_\_\_, at 313-14 (“As competition mounts, so does the tendency of advertisers to make exaggerated or irrelevant claims.”); Thomas C. Downs, *“Environmentally Friendly” Product Advertising: Its Future Requires a New Regulatory Authority*, 42 AM. U. L. REV. 155, 168 (1992) (“[V]ague messages such as ‘environment-friendly’ and ‘earth safe’ that are unsupported by any claims of specific environmental benefits are also problematic.”); Roger D. Wynne, Note, *Defining “Green”: Toward Regulation of Environmental Marketing Claims*, 24 U. MICH. J.L. REFORM 785 (1991).

When a consumer purchases or streams a recorded song,<sup>20</sup> she also obtains a product with a long and complex production history. Like the creation and distribution of food and durable goods, the creation and distribution of recorded music involves many actors, entities, and processes.<sup>21</sup> Songwriters may compose music and lyrics, while recording artists and background musicians perform the music. Sound engineers and producers may be involved in recording and editing. Other parties—such as record labels, music publishers, agents, lawyers, performing rights organizations—may participate in promoting, distributing, and managing revenue from the song. Copyright laws governing authorship, reproduction, distribution, performance, and digital transmission further complicate how revenue from that song is calculated and distributed.<sup>22</sup>

These legal and practical complexities can obscure the roles and compensation of the participants in the production process. There is often news about how little songwriters and recording artists make after record labels, music publishers, and music services take their cuts,<sup>23</sup>

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<sup>16</sup> See, e.g., Gutman, *supra* note \_\_\_\_.

<sup>17</sup> Watnick, *supra* note \_\_\_\_; see also S. Rep. No. 101-357, at 289-90 (1990), reprinted in 1990 U.S.C.C.A.N. 4656, 4943-44 (noting the “growing evidence that some conventionally grown food is deliberately mislabeled as ‘organic’ by dishonest traders looking to cash in on the premium prices organic food commands”).

<sup>18</sup> Maria Gillen, *The Apparel Industry Partnership’s Free Labor Association: A Solution to the Overseas Sweatshop Problem or the Emperor’s New Clothes?*, 32 N.Y.U. J. INTL. L. & POL. 1059, 1064 (2000).

<sup>19</sup> Winders, *supra* note \_\_\_\_; Dillard, *supra* note \_\_\_\_, at 60 (“[B]ecause consumers will often pay more for humanely produced goods, and because those goods often cost more to produce, there may be an incentive to convince buyers at the point of purchase that the goods are created under more animal-friendly conditions than they in fact are.”).

<sup>20</sup> Sound recordings are “works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied”). 17 U.S.C. § 101. I focus on recorded songs for their discreteness as single units, which is more akin foods and durable goods with recognized process attributes. Cf. Jay Anderson, Note, *Stream Capture: Returning Control of Digital Music to the Users*, 25 HARV. J.L. & TECH. 159 (2011) (discussing music’s “service-product” spectrum).

<sup>21</sup> See, e.g., Henry H. Perritt, Jr., *New Business Models for Music*, 18 VILL. SPORTS & ENT. L.J. 63 (2011); Jessica Silbey, *Harvesting Intellectual Property: Inspired Beginnings and Work-Makes-Work, Two Stages in the Creative Processes of Artists and Innovators*, 86 NOTRE DAME L. REV. 2091 (2011). Cf. Ruth Towse, *Creativity, Copyright and the Creative Industries*, 63 KYKLOS 461, 474 (2010) (outlining the creative production chain from creator to market consumption).

<sup>22</sup> See generally WILLIAM W. FISHER, PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT (2004); PAUL GOLDSTEIN, COPYRIGHT’S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX (2003).

<sup>23</sup> See, e.g., Paul Resnikoff, *Who’s Screwing You Worse: iTunes Radio, or Pandora?*, DIGITAL MUSIC NEWS, November 21, 2013, <http://www.digitalmusicnews.com/permalink/2013/11/21/itunespandoraworse> (last visited Nov 26, 2013); Steve Knopper, *THE NEW ECONOMICS OF THE MUSIC INDUSTRY* ROLLING STONE (2011), <http://www.rollingstone.com/music/news/the-new-economics-of-the-music-industry-20111025> (last visited Oct 3, 2013); Laura Sydell, *How Musicians Make Money (By The Fraction Of A Cent) On Spotify*, THE RECORD: NPR, September 26, 2012, <http://www.npr.org/blogs/therecord/2012/09/26/161758720/how-musicians-make-money-by-the-fraction-of-a-cent-on-spotify> (last visited Oct 25, 2012); Eric Lyday, *How Much Artists Earn Online Infographic*, DAILY INFOGRAPHIC, August 20, 2013, <http://dailyinfographic.com/how-much-artists-earn-money-online->

but the news is not necessarily accurate or comprehensive. Consumers concerned about the compensation of performers and songwriters have thus tried to avoid business arrangements perceived as mistreating musicians. Some have bought recorded music released by independent labels rather than major labels.<sup>24</sup> Others have bought directly from an artist's website to reduce the number of intermediaries who share in the artist's revenue.<sup>25</sup> And others "strike a blow for authors by stealing from the corporations that fleece them"<sup>26</sup> and downloading music from unauthorized peer-to-peer networks.<sup>27</sup> Rightly or wrongly,<sup>28</sup> some consumers want more dollars go to artists than to other music-production parties.

Because technological change has reduced greatly the cost of distributing music to consumers, it is now more economically feasible for recording artists to self-release songs. For example, rather than signing a contract with a record label to record a certain number of songs that would then be distributed by the record label, an artist can record her own songs and distribute those songs online, through outlets such as band websites; social media websites such as YouTube and MySpace; band pages on direct-to-fan platforms such as Bandcamp or Topspin; large online stores such as iTunes, Amazon, Google Play, and eMusic; non-interactive streaming services such as Pandora; and interactive streaming services such as Spotify, Rdio, Google Play, and Rhapsody.<sup>29</sup> Most large online music stores and streaming services, however, do not accept

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infographic (last visited Dec 10, 2013); Faza, *The Paradise That Should Have Been*, THE CYNICAL MUSICIAN, January 21, 2010, <http://thecynicalmusician.com/2010/01/the-paradise-that-should-have-been/> (last visited Jul 25, 2014); Benj, *Thank You for my \$0.00077601. No really thank you*, PLEDGEMUSIC, May 24, 2010, <http://www.pledgemusic.com/blog/25-thank-you-for-my-0-00077601-no-really-thank-you> (last visited Jul 25, 2014).

<sup>24</sup> See, e.g., RIAA Radar, Home, <http://www.riaaradar.com/> (last visited May 12, 2011). RIAA Radar was a website and application that allowed consumers to see if a particular music label is affiliated with the Recording Industry Association of America (RIAA). The RIAA is a trade organization that represents record labels and distributors, including the "Big Three" labels Universal Music Group, Sony Music Entertainment, and Warner Music Group. <http://www.riaaradar.com/> is no longer accessible. Sources of the website are on file with the author. See also ALEX SAYF CUMMINGS, *DEMOCRACY OF SOUND: MUSIC PIRACY AND THE REMAKING OF AMERICAN COPYRIGHT IN THE TWENTIETH CENTURY* (2013); MICHAEL AZERRAD, *OUR BAND COULD BE YOUR LIFE: SCENES FROM THE AMERICAN INDIE UNDERGROUND 1981-1991* (2002).

<sup>25</sup> See, e.g., Jacob Ganz, *Where To Buy Music To Get More Cents On The Dollar To The Musician*, NPR.ORG, February 18, 2011, <http://www.npr.org/blogs/therecord/2011/02/18/133872018/where-to-buy-music-to-get-the-most-of-your-cash-to-the-musician> (last visited Jul 10, 2014).

<sup>26</sup> Jane Ginsburg, *The Author's Place in the Future of Copyright*, 45 WILLAMETTE L. REV. 381 (2008).

<sup>27</sup> Peter S. Menell, *File-Sharing Copyrighted Works Without Authorization: A Misguided Social Movement*, THE MEDIA INSTITUTE, February 17, 2010, [http://www.mediainstitute.org/new\\_site/IPI/021710\\_FileSharingCopyrighted.php](http://www.mediainstitute.org/new_site/IPI/021710_FileSharingCopyrighted.php). ("Joel Tenenbaum's defense sought to disguise selfish motivation and self-righteous indignation at paying a penalty for violating copyright liability as a cynical and disingenuous social movement.").

<sup>28</sup> See ROBERT P. MERGES, *JUSTIFYING INTELLECTUAL PROPERTY* (2011) (recommending that the "heroic" author be replaced with a "prosaic" author model that encourages not only individual and small team ownership, but also large corporate entities, which form an important part of the ecosystem that nurtures and supports individual creative professionals").

<sup>29</sup> See generally Peter Dicola, *Money from Music: Survey Evidence on Musicians' Revenue and Lessons About Copyright Incentives*, 55 ARIZ. L. REV. 301, 334 (2013); Henry H. Perritt, Jr., *New Architectures for Music: Law*

direct submissions from musicians not affiliated with a major label.<sup>30</sup> Thus, to distribute music via any of these services, independent or self-releasing musicians generally need to work with companies such as CD Baby,<sup>31</sup> Magnatune,<sup>32</sup> Tune Core,<sup>33</sup> ReverbNation,<sup>34</sup> or Zimbalam,<sup>35</sup> which can then distribute their music to larger music stores or services such as iTunes and Spotify. These distribution companies are often called digital aggregators. While digital aggregators keep a percentage of the revenues generated by the sale or streaming of songs, this percentage is significantly smaller than the cuts taken by major record labels or music publishers.<sup>36</sup> Generally, this percentage is also public information.<sup>37</sup>

In addition to distributing songs to third-party music services, digital aggregators such as CD Baby and Magnatune offer their own online stores, through which the company directly sells or streams music to consumers. For example, CD Baby sells digital downloads of single songs and of albums, in addition to selling and shipping physical CDs.<sup>38</sup> Magnatune also offers music directly through a \$15-per-month subscription fee that allows consumers to download or stream

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*Should Get Out of the Way*, 29 HASTINGS COMM. & ENT L.J. 259 (2007). Cf. Kristin Thomson, Music and How the Money Flows, FUTURE OF MUSIC COALITION, June 18, 2013, <http://futureofmusic.org/article/article/music-and-how-money-flows> (last visited Oct 4, 2013); Future of Music Coalition, EXAMPLES OF NEW BUSINESS MODELS IN MUSIC, <https://docs.google.com/spreadsheet/lv?key=0AiuVS0lhWQsjdFBFMXRYVzZDck9IRGR3RVByOXVGcFE> (last visited Oct 4, 2013).

<sup>30</sup> See, e.g., Spotify, GUIDES: GET YOUR MUSIC ON SPOTIFY, <http://www.spotifyartists.com/guides/#list-of-aggregators> (last visited Jul 12, 2014); TuneCore, TUNECORE IS THE BEST WAY TO SELL YOUR MUSIC ON iTUNES, AMAZON, SPOTIFY & MORE, <http://www.tunecore.com> (last visited Oct 3, 2013) (“Without a label, most acts cannot get their music onto iTunes and Spotify, but for \$50 a year TuneCore will place any album on dozens of online services around the world and route all royalties to the artist.”); SOCAN, A GUIDE TO DIGITAL MUSIC PLATFORMS, <http://www.socan.ca/content/guide-digital-music-platforms> (last visited Jan 13, 2014).

<sup>31</sup> CD Baby, SELL YOUR MUSIC EVERYWHERE, <http://members.cdbaby.com/> (last visited Feb 22, 2014); CD Baby, WORLDWIDE CD DISTRIBUTION, <http://members.cdbaby.com/cd-distribution.aspx> (last visited Oct 3, 2013).

<sup>32</sup> Magnatune, WHAT WE DO FOR OUR MUSICIANS, <http://magnatune.com/info/whatwedo> (last visited Feb 22, 2014). (“Magnatune is a next-generation record label offering shared revenue, sales, and licensing to its musicians.”); Magnatune, WHY MAGNATUNE IS NOT EVIL, <http://magnatune.com/info/whynotevil> (last visited Jul 14, 2014).

<sup>33</sup> TuneCore, *supra* note \_\_\_\_.

<sup>34</sup> ReverbNation, FAIR SHARE: ARTISTS RECEIVE HALF OF ALL AD REVENUE REVERBNATION, [http://www.reverbnation.com/band-promotion/fair\\_share](http://www.reverbnation.com/band-promotion/fair_share) (last visited Jul 14, 2014); ReverbNation, DIGITAL DISTRIBUTION: HOW TO GET MUSIC ON iTUNES, <http://www.reverbnation.com/band-promotion/how-to-sell-music-on-itunes> (last visited Feb 21, 2014).

<sup>35</sup> Zimbalam, DISTRIBUTION, <http://www.zimbalam.com/digital-music-distribution.php> (last visited Jan 11, 2014).

<sup>36</sup> See Thomson, *supra* note \_\_\_\_ [Music and How the Money Flows]; Kristin Thomson, *Digital Distribution*, FUTURE OF MUSIC COALITION, September 12, 2012, <http://futureofmusic.org/article/article/digital-distribution> (last visited Oct 4, 2013) [Examples of New Business Models in Music]; SOCAN, *supra* note \_\_\_\_.

<sup>37</sup> See *supra* n. 36.

<sup>38</sup> CD Baby, ABOUT US, <http://www.cdbaby.com/about> (last visited May 4, 2014).

as many albums or songs as they seek.<sup>39</sup> This article focuses on fair-music claims made in the context of online music services selling music directly to consumers.

Both CD Baby and Magnatune heavily advertise the percentage of music sales or streaming revenues paid to musicians. CD Baby tells consumers that they are “buying directly from the artist” and that the “lion’s share of the money you spend at CD Baby ends up back in the hands of the artists themselves!”<sup>40</sup> Specifically, “[w]e keep 9% of all digital music sales, including MP3 sales on cdbaby.com and download and streaming revenue from our digital partners like iTunes, Spotify, Amazon, etc,” and “[a]rtists get 91% of their chosen purchase price.”<sup>41</sup> CD Baby has also advertised that since its founding in 1998, it has distributed music for more than 330,000 artists and paid more than \$300 million to those musicians.<sup>42</sup>

Magnatune makes similar claims. It tells consumers, “Because we aren’t evil, fully 50% of your membership goes straight to the musicians (not to lawyers or labels).”<sup>43</sup> Its website further explains how it calculates the 50% of subscription fees passed on to musicians<sup>44</sup> and what it does for artists to justify the 50% it keeps.<sup>45</sup> To consumers seeking music to play in restaurants or to use in films, Magnatune also touts its direct relationships with artists: “[W]e sign contracts directly with musicians, so you can rest assured that we can legally license music to you, and no middlemen get in the way of the artist’s royalties.”<sup>46</sup>

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<sup>39</sup> Magnatune, FAQ: DOWNLOAD MEMBERSHIP, [http://magnatune.com/info/faq\\_download](http://magnatune.com/info/faq_download) (last visited May 4, 2014).

<sup>40</sup> CD Baby, *supra* note \_\_\_\_.

<sup>41</sup> CD Baby, PRICING, <http://members.cdbaby.com/cd-baby-cost.aspx> (last visited Jan 24, 2014). CD Baby keeps \$4 of every CD or vinyl record sold on its retail website. *Id.*

<sup>42</sup> Inside CD Baby: 5M Tracks from 330,000 Artists Infographic, December 4, 2013, <http://www.hypebot.com/hypebot/2013/12/inside-cd-baby-5m-tracks-from-330000-artists-infographic.html> (last visited Dec 14, 2013).

<sup>43</sup> Magnatune, *supra* note \_\_\_\_ [FAQ: Download Membership]

<sup>44</sup> *Id.* (“50% of your monthly membership is allocated to pay our musicians. From that, half is paid to the musicians you stream while listening online, and the other half is paid to the musicians whose albums you download each month (divided equally based on which albums you downloaded). If you stream an album more than once, the musician is paid for each listen. For example, in one month, if you download two albums, and stream-listen to 10 albums, this is how we would pay our musicians from your \$15/month fee: \$7.50 (50%) goes to Magnatune; \$3.75 is allocated for the streaming listening you did; \$3.75 is allocated for the downloads you did. Since you downloaded two albums, each musician gets \$1.875 that month for your downloads. Since you streamed 10 albums, each musician you streamed gets \$0.375 that month. In the case of the lifetime membership, musicians are paid as if you had a five year membership, so that they get paid sooner rather than later.”). [FAQ: Download Membership]

<sup>45</sup> Magnatune, THE PLAN: PROBLEMS WITH THE MUSIC INDUSTRY AND HOW MAGNATUNE IS TRYING TO FIX THEM, <http://magnatune.com/info/plan> (last visited Feb 22, 2014) (“running a web site can be expensive (computers, bandwidth, insurance) . . . Magnatune’s split of sale will go back into funding the site. Magnatune founder will initially fund the site, and has no short-term need to return-on-investment as costs are low.”); Magnatune, THE BUSINESS MODEL, <http://magnatune.com/info/model> (last visited Feb 22, 2014).

<sup>46</sup> Magnatune, MUSIC LICENSING AT MAGNATUNE, <http://magnatune.com/info/licensing> (last visited Feb 22, 2014).

Both CD Baby and Magnatune also encourage consumers to think about where they buy their music and how their where-to-buy decisions affect the livelihoods of musicians. CD Baby asks consumers to “[s]upport musicians who have bypassed the major label system in order to be independent,” emphasizing when a consumer buys from CD Baby, she is “supporting an artist’s ability to continue recording and performing.”<sup>47</sup> Magnatune tells consumers that they are “doing a good deed by listening to our music!”<sup>48</sup> Both companies also evoke recognized consumer process values for organic foods and fair-trade goods to push consumers to act on their fair-music process concerns.<sup>49</sup>

Similar claims appear on direct-to-fan platforms. Bandcamp is a music-focused website that allows musicians to offer music (digital downloads and streaming) or merchandise through an artist-specific webpage.<sup>50</sup> Unlike CD Baby and Magnatune, Bandcamp does not distribute music to other third party download or streaming services such as iTunes or Spotify. Bandcamp does, however, make a variety of fair-music claims. Like CD Baby and Magnatune, the company advertises how the revenue percentage it keep. Its pricing page explains, for example, that Bandcamp makes money via a 15% share of revenue on digital sales and 10% of revenue on merchandise sales.<sup>51</sup> Bandcamp also announces how much it has paid to artists to date (*e.g.*, \$48 million as of October 2013).<sup>52</sup>

Bandcamp and CD Baby also use testimonials to make fair-music claims. Both feature positive reviews from musicians who praise the companies’ roles in facilitating music and revenue distribution:

CD Baby has always been a family to me . . . Their payouts and accounting are very artist friendly and that’s appreciated, because I’m a doo doo at math. But you

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<sup>47</sup> CD Baby, *supra* note \_\_\_\_\_. [About Us]

<sup>48</sup> Magnatune, *supra* note \_\_\_\_\_. [FAQ: Download Membership]

<sup>49</sup> Magnatune, INFORMATION ABOUT MAGNATUNE, <http://magnatune.com/info/> (last visited Feb 22, 2014); CD Baby, *supra* note \_\_\_\_\_. [About Us]

<sup>50</sup> Bandcamp, FREQUENTLY ASKED QUESTIONS, <http://bandcamp.com/faq#whatitis> (last visited July 13, 2014) (“Bandcamp, for example, seeks to “help artists sell their music and merch[andise] directly to their fans” and “help fans discover new music and directly support those who make it.”); *see also* SOCAN, *supra* note \_\_\_\_\_. “Artists choosing Bandcamp will get a customizable microsite with the albums they upload and unlimited storage. Bandcamp has every stat you can imagine, including sales, streaming time, and details on when people stop listening to a track. It offers a way to sell music in a range of audio formats, set your own prices, track real-time stats, collect fan e-mails and more.”); Future of Music Coalition, *supra* note \_\_\_\_\_. (Bandcamp provides fast, dependable streaming and downloads of an artists’ entire catalog. It also allows artist to set prices (which can include free) and to choose high bitrates. Bandcamp provides the web interface for a very powerful, artist-controlled storefront.”).

<sup>51</sup> Bandcamp, PRICING, <http://bandcamp.com/pricing> (last visited Jul 25, 2014). Bandcamp’s basic service is free to artists, with no signup costs and no listing fees. If an artist’s sale exceeds \$5000, Bandcamp’s share of each digital transaction decreases from 15% to 10%. *Id.*

<sup>52</sup> Bandcamp, ARTISTS, <http://bandcamp.com/artists> (last visited Oct 3, 2013), <http://bandcamp.com/artists> (last visited Oct 3, 2013) (“We’ve driven 7,037,081 paid transactions and served 64,335,445 downloads to happy fans.”).



know what? I don't need to be good at math because I'm a rapper. And CD Baby knows that. Love those dudes. —Macklemore<sup>53</sup>

[Bandcamp] really is incredible, and I can't imagine life as an independent musician without it! . . . The minute you guys realise you need to make some money some time and start charging for your services, I wouldn't mind a bit, I'll be first in line. Dan Lyth<sup>54</sup>

Bandcamp also features a testimonial from a consumer enthusiastic about the company's transparency in disclosing its revenue split with musicians:

I spend a lot of money on music and I worry a lot about where that money goes . . . how much of my money goes to Amazon, how much to the label, and how much actually reaches the artist? I always wonder. A few times I've simply thrown up my hands in frustration and decided that it's impossible to know which mode of purchase will most greatly benefit the artist, which is why I've settled on Amazon—it's the most straightforward and seamless for me, the consumer. That said, Bandcamp blows Amazon out of the water. Hands down. No clunky downloader, no frustrating searches for the right artist, album, or song . . . And most important is your transparency about the cut you take. I think the cut is a perfectly reasonable amount for the service you provide. It's not just reasonable, it's a great deal for the artist . . . . Andrew Smith<sup>55</sup>

Such testimonials bolster the companies' claims that they pay musicians fairly.<sup>56</sup> Notably, some of the fair-music claims are directed to *musicians* considering using the company's aggregation or platform services, rather than to *end consumers* considering buying music from the company.<sup>57</sup> Because these testimonials are featured on websites accessible to musicians and end consumers alike, however, they serve a dual audience and ultimately influence the meaning and materiality of those fair-music claims targeted at consumers.

All three companies also claim that they treat musicians more fairly than other music

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<sup>53</sup> See, e.g., CD Baby, CD BABY REVIEWS, <http://members.cdbaby.com/reviews.aspx> (last visited Jan 24, 2014).

<sup>54</sup> See, e.g., Bandcamp, TESTIMONIALS, <http://bandcamp.com/testimonials> (last visited Oct 3, 2013).

<sup>55</sup> *Id.* (testimonial from Andrew Smith).

<sup>56</sup> Of course, many musician and consumer testimonials also recommend the tangible attributes of Bandcamp or CD Baby, such as breadth in music formats and distribution tools. See, e.g., *id.* [Bandcamp Testimonials] ("Thank you for: 1. Allowing me to listen to the whole CD before purchasing[,] 2. Giving me that many choices of downloadable music (I rip all my CDs to FLAC, so that is great), especially the open and non-drm formats, 3. [Letting me download the music right away even though I opted to purchase the CD], 4. Making the whole site experience work perfectly in Linux . . . . -Andrew"); CD Baby Reviews, *supra* note \_\_\_\_ ("CD Baby is simply the best independent music aggregator around, giving unsigned musicians like myself all the tools we need to succeed.").

<sup>57</sup> See, e.g., CD Baby, *supra* note \_\_\_\_ ("We keep only 9% and pay you a whopping 91% per download sold on our store"). [Pricing]

services. Magnatune explicitly criticizes record labels and other online music services for not compensating musicians sufficiently: “Record labels lock their artists into legal agreements that hold them for a decade or more . . . Online sales (such as Amazon.com) often cost the artist 50% of their already-pathetic royalty.”<sup>58</sup> CD Baby emphasizes that artists make significantly greater revenue from consumer purchases on its website than from other digital retailers: “We keep only 9% and pay you a whopping 91% per download sold on our store – more than iTunes, Amazon, or any other retailer.”<sup>59</sup> And Bandcamp seeks to make its “pricing to be as clear as possible,”<sup>60</sup> distinguishing itself from the “frustrating lack of transparency in [the music] industry, with many services requiring you to comb through fine print to see what you’ll really be paying.”<sup>61</sup> Musician testimonials similarly emphasize the superiority of the fair-music seller:

I’ve always tried to be as directly connected with fans as possible, but until you guys came along, the actual facilitation and sales-element of the infrastructure was much more difficult. Bandcamp brings the whole picture together into a very lovely package that not only works, but works WELL. Me and my team made more in one night than I’ve seen to date from my 2008 (major-label) album.  
Amanda Palmer.<sup>62</sup>

. . . Every inch of the site is executed with wonderful common sense, and as a former major label artist it’s a relief to be able to release my music with such control over the process. Best of luck in changing the way bands and their fans interact. Dave Smallen<sup>63</sup>

The appearance of fair-music claims on commercial websites is significant. Practically, it hints at the commercialization of the fair-music process concerns that drive consumer and musician-directed efforts to avoid businesses perceived as mistreating musicians.<sup>64</sup> Businesses advertise to gain customers, and the willingness of companies like CD Baby, Magnatune, and Bandcamp to advertise fair-music practices to consumers suggests that there is a meaningful segment of consumers who care about whether a seller prioritizes compensating musicians well—a fair-music market. Legally, the appearance of fair-music claims suggests that enforcing such claims may be a new tool for scrutinizing how music sellers promote their treatment of

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<sup>58</sup> Magnatune, FOUNDER’S RANT, <http://magnatune.com/info/why> (last visited Oct 2, 2013) (“If it’s not working out, labels don’t print the band’s recordings but nonetheless keep them locked into the contract, forcing them to produce new albums each year. Even hugely successful artists often end up owing their record label money.”); Magnatune, *supra* note \_\_ (“[W]e have absolutely nothing to do with major labels, their lawyers or the RIAA.”). [Why Not Evil]

<sup>59</sup> CD Baby, *supra* note \_\_. [Pricing, <http://members.cdbaby.com/cd-baby-cost.aspx>]

<sup>60</sup> Bandcamp, *supra* note \_\_. [Pricing <http://bandcamp.com/pricing>]

<sup>61</sup> Bandcamp, *supra* note \_\_. [Frequently Asked Questions]

<sup>62</sup> Bandcamp, *supra* note \_\_. [Testimonials]

<sup>63</sup> *Id.* [Testimonials]

<sup>64</sup> See *supra* text accompanying notes \_\_.

musicians. In contrast to record labels and music publishers' vague invocations of musician welfare in support of expanding copyright laws or initiating mass lawsuits against consumers,<sup>65</sup> commercial fair-music claims fall within the scope of federal and state advertising laws requiring that companies have substantiation for their advertising claims. In the next section, I explain how government agencies, consumers, and competitors can bring false advertising suits against seller making false or misleading fair-music claims.<sup>66</sup>

## II. Enforcing Fair-Music Claims Under False Advertising Laws

In this section, I will discuss how government agencies, consumers, and competitors can sue advertisers who disseminate false or misleading fair-music claims. In subsection A, I identify three categories of fair-music claims. In subsections B, C, and D, I discuss the prospects of government agencies, consumers, and competitors, for bringing fair-music actions under applicable state and federal laws.

### A. Types of Fair-Music Claims

Fair-music claims generally fall within three categories, which I term artist-compensation claims, moral-positioning claims, and practice-contrast claims.

*Artist-compensation claims* describe sales revenues from songs that sellers pass onto musicians. Such claims include *percentage-revenue claims*, which state a percentage of sales revenue, and *aggregate-revenue claims*, which state aggregate amounts of total sales revenue. CD Baby, Bandcamp, and Magnatune make artist-compensation claims when they state, respectively, that they pay musicians 91% of digital sales revenues, 85–90% of digital sales revenues, and 50% of consumers' monthly memberships.<sup>67</sup> CD Baby and Bandcamp make aggregate-revenue claims when they advertise, for example, that they have paid more than \$300 million<sup>68</sup> or \$48 million<sup>69</sup> to musicians to date. Musician testimonials describing “artist friendly”

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<sup>65</sup> See generally WILLIAM PATRY, HOW TO FIX COPYRIGHT (2012); WILLIAM F. PATRY, MORAL PANICS AND THE COPYRIGHT WARS (2009). See also CATHERINE L. FISK, WORKING KNOWLEDGE: EMPLOYEE INNOVATION AND THE RISE OF CORPORATE INTELLECTUAL PROPERTY, 1800-1930 252 (2009) (“So when the Disney Corporation seeks yet another extension of the term of copyright, they bring out creative individuals . . . as their advocates. And when the Motion Picture Association of America (MPAA) launched its major public relations in 2003 to discourage unauthorized copying of DVDs, they used the working man to state their case that piracy is bad . . . and ran a series of short ‘public service’ films before the previews in movie theaters featuring a worker who contributes to the making of a film (a set designer, a stunt man). The workers describe how they feel about their contributions to the movie, how important their hard work and talent is to the success of the movie, and how piracy in effect steals ‘their property.’”).

<sup>66</sup> Before proceeding, I want to note that my purpose is not to argue that that CD Baby, Magnatune, or Bandcamp make false or misleading claims. Rather, my goal is to identify the types of fair-music claims that they make and analyze how those types of claims, if false or misleading, could be enforced under false advertising laws.

<sup>67</sup> CD Baby, *supra* note \_\_\_\_ [About Us]; Magnatune, *supra* note \_\_\_\_ [FAQ: Download Membership].

<sup>68</sup> Inside CD Baby: 5M Tracks from 330,000 Artists Infographic, *supra* note \_\_\_\_.

<sup>69</sup> Bandcamp, *supra* note \_\_\_\_ (“We’ve driven 7,037,081 paid transactions and served 64,335,445 downloads to happy fans.”) [Artists]

payouts and accounting also fall within the artist-compensation claim category. Such statements support sellers' claims that musicians are paid as promised.<sup>70</sup> Artist-compensation claims also include *direct-payment* claims—claims regarding how consumers can “directly” support musicians through the company’s websites. For example, Magnatune tells consumers that “fully 50% of your membership goes *straight* to the musicians (not to lawyers or labels).”<sup>71</sup> CD Baby advertises that “[w]hen you buy music at CD Baby, you’re buying *directly* from the artist.”<sup>72</sup>

*Moral-positioning claims* encourage consumers to conceive of buying music from the seller as part-and-parcel of an overall moral stance in favor of fair treatment for musicians. For example, CD Baby and Magnatune make moral-positioning claims when they analogize to sellers of organic and fair trade goods,<sup>73</sup> or when they encourage consumers to “support[] an artist’s ability to continue recording and performing”<sup>74</sup> and to “do[] a good deed by listening to our music!”<sup>75</sup> Testimonials from consumers concerned about “where that money goes” and “how much actually reaches the artist”<sup>76</sup> also give rise to moral-positioning claims because they encourage consumers to care about musician welfare and to act on those concerns by buying from the fair-music seller.

Finally, *practice-contrast claims* compare the fair-music seller’s practices with “music industry” or “major label” practices. CD Baby makes practice-contrast claims when it states that artists earn more revenue from sales via CD Baby than from iTunes or Amazon sales: “We keep

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<sup>70</sup> Bandcamp, *supra* note \_\_\_\_ (Palmer testimonial) (“Me and my team made more in one night than I’ve seen to date from my 2008 (major-label) album”); CD Baby, Testimonials and Reviews, *supra* note \_\_\_\_ (Macklemore testimonial) (“Their payouts and accounting are very artist friendly and that’s appreciated, because I’m a doo doo at math”); CD Baby Testimonials and Reviews, *supra* note \_\_\_\_ (Gauthier testimonial) (“CD Baby has always been a part of my team, always paid me properly and promptly.”). [Testimonials]

<sup>71</sup> Magnatune, *supra* note \_\_\_\_ [FAQ: Download Membership]; Magnatune, *supra* note \_\_\_\_ (“[W]e sign contracts directly with musicians, so you can rest assured that we can legally license music to you, and no middlemen get in the way of the artist’s royalties.”) [Music Licensing].

<sup>72</sup> CD Baby, *supra* note \_\_\_\_ [About Us]; *see also* Bandcamp, *supra* note \_\_\_\_ [Artists]; Bandcamp, *supra* note \_\_\_\_ [Pricing] (“[W]e bring your music to a thriving community of enlightened listeners who understand that the best way to support the artists they love is by *directly* giving them money.”) (emphasis added).

<sup>73</sup> CD Baby touts itself as “[t]he most free-range, organic, grass-fed independent music in the world.” CD Baby, *supra* note \_\_\_\_ [About Us] “Magnatune is a pioneer in the fair trade music movement: we share profits equally with them and they keep all the rights to their own music.” Magnatune, *supra* note \_\_\_\_ [About Us] RIAA Radar also analogized to other consumer process concerns to encourage consumers to avoid buying music from companies affiliated with the RIAA. On its former Q&A page, RIAA Radar explained, “Just as people can currently find out where some products come from and who made them (Is this banana organic? Does this milk contain growth hormones? Were these clothes made in a sweatshop?), it is important to have that knowledge for as many consumer goods as possible. Knowledge is power, and knowing where the product came from can (and should) influence what you buy.” RIAA Radar: Home, <http://www.riaaradar.com/> (last visited May 12, 2011).

<sup>74</sup> CD Baby, *supra* note \_\_\_\_ [About Us]

<sup>75</sup> Magnatune, *supra* note \_\_\_\_ [FAQ: Download Membership, [http://magnatune.com/info/faq\\_download](http://magnatune.com/info/faq_download)]

<sup>76</sup> Bandcamp, *supra* note \_\_\_\_ (testimonial from Andrew Smith) [<http://bandcamp.com/testimonials>]

only 9% and pay you a whopping 91% per download sold on our store – more than iTunes, Amazon, or any other retailer.”<sup>77</sup> Magnatune directly criticizes record companies and online music services for not compensating musicians sufficiently: “Online sales (such as over Amazon.com) often cost the artist 50% of their already-pathetic royalty (due to a common record contract provision).”<sup>78</sup> Bandcamp advertises that it “want[s] our pricing to be as clear as possible,”<sup>79</sup> given the “frustrating lack of transparency in [the music] industry, with many services requiring you to comb through fine print to see what you’ll really be paying.”<sup>80</sup> Musicians’ testimonials that they “made more in one night than I’ve seen to date from my 2008 (major-label) album”<sup>81</sup> also fall within this third category.

## **B. Enforcement by Government Agencies**

In the United States, the Federal Trade Commission (“FTC” or “Commission”) and state attorneys general have primary responsibility to protect consumers from false advertising.

*The Federal Trade Commission.*— The FTC was created in 1914 through the passage of the Federal Trade Commission Act (“FTC Act”).<sup>82</sup> The FTC Act broadly prohibits “unfair or deceptive acts or practices in or affecting commerce,”<sup>83</sup> and only the FTC is permitted to enforce the Act.<sup>84</sup> The Agency’s Policy Statement on Deception and its Policy Statement Regarding Advertising Substantiation, along with federal and administrative case law interpreting the Act, establish the framework under which the agency assesses whether a practice is deceptive.<sup>85</sup>

Specifically, an advertisement is deceptive if it is likely to mislead consumers, acting

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<sup>77</sup>CD Baby, *supra* note \_\_\_\_\_. [<http://members.cdbaby.com/cd-baby-cost.aspx>]

<sup>78</sup> Magnatune, FOUNDER’S RANT, <http://magnatune.com/info/why> (last visited Oct 2, 2013) (“If it’s not working out, labels don’t print the band’s recordings but nonetheless keep them locked into the contract, forcing them to produce new albums each year. Even hugely successful artists often end up owing their record label money.”); Magnatune, *supra* note \_\_\_\_ (“[W]e have absolutely nothing to do with major labels, their lawyers or the RIAA.”) [Why Not Evil].

<sup>79</sup>Bandcamp, *supra* note \_\_\_\_\_. [Pricing, <http://bandcamp.com/pricing>]

<sup>80</sup> Bandcamp, *supra* note \_\_\_\_\_. [FAQs]

<sup>81</sup> See, e.g., Bandcamp, *supra* note \_\_\_\_\_. [Testimonials]

<sup>82</sup> 15 U.S.C. §§ 41–58.

<sup>83</sup> 15 U.S.C. § 45(a)(1).

<sup>84</sup> See, e.g., *Holloway v. Bristol-Myers Corp.*, 485 F.2d 986, 1002 (D.C. Cir. 1973).

<sup>85</sup> *In re Cliffdale Associates, Inc.*, 103 F.T.C. 110, 176 (1984) (reprinting as appendix a letter dated Oct. 14, 1983, from the Commission to The Honorable John D. Dingell, Chairman, Committee on Energy and Commerce, U.S. House of Representatives) [hereinafter FTC Deception Policy]; FTC Policy Statement Regarding Advertising Substantiation, appended to *In re Thompson Medical Co.*, 104 F.T.C. 648, 839 (1984), *aff’d*, 791 F.2d 189 (D.C. Cir. 1986) [hereinafter FTC Substantiation Policy].

reasonably under the circumstances, in a material respect.<sup>86</sup> When applying this standard, the FTC first must establish what claims the advertisement conveys.<sup>87</sup> For express claims—those stated literally in an ad—the FTC is required only show that the representation occurred, as “the representation itself establishes the meaning.”<sup>88</sup> For implied claims—those not stated literally in the ad, but inferable from it<sup>89</sup>—the FTC first conducts a facial analysis of the ad to determine meaning.<sup>90</sup> If a facial analysis is insufficient to establish that consumers reached the implied claims,<sup>91</sup> the FTC may require extrinsic evidence of the representation, such as expert opinion, consumer testimony, copy tests, surveys, or other reliable evidence of consumer interpretation.<sup>92</sup>

Second, the FTC considers whether the representation is false or likely to mislead a consumer acting reasonably in the circumstances.<sup>93</sup> There are two main analytic routes by which the FTC can prove that a misrepresentation is likely to mislead: “One is to carry the burden of proving that the express or implied message conveyed by the ad is false. The other is to show

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<sup>86</sup> *Kraft, Inc. v. F.T.C.*, 970 F.2d 311, 314 (7th Cir. 1992); *In re Thompson Medical Co.*, 104 F.T.C. 648, 788 (1984); FTC Deception Policy, § II.

<sup>87</sup> *Kraft, Inc. v. F.T.C.*, 970 F.2d 311, 314 (7th Cir. 1992)

<sup>88</sup> FTC Deception Policy, § II (citing *American Home Products*, 98 F.T.C. 136, 374 (1981)).

<sup>89</sup> “The Commission reviews implied claims as if they are on a continuum: at one end claims are virtually synonymous with express claims; at the other end are claims that use language that few consumers would interpret as making a particular representation.” *In re Pom Wonderful LLC*, 155 F.T.C. 1 (2013) (citing *In re Novartis Corp.*, 127 F.T.C. 580, 680 (1999)).

<sup>90</sup> The agency would examine factors such as word, phrase, and image juxtaposition. *See, e.g., In re Pom Wonderful LLC*, 155 F.T.C. 1 (2013); *Cliffdale Associates*, 103 F.T.C. at 176.

<sup>91</sup> *Kraft Inc.*, 970 F.2d at 319 (“[T]he Commission may rely on its own reasoned analysis to determine what claims, including implied ones, are conveyed in a challenged ad, so long as those claims are reasonably clear from the face of the advertisement.”); *In re Stouffer Foods Corp., Corp.*, 118 F.T.C. 746, 798 (1994) (“If after examining the interaction of all the different elements in the ad, the Commission can conclude with confidence that an ad can reasonably be read to contain a particular claim, a facial analysis is sufficient basis to conclude that the ad conveys the claim.”); *see also Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 652-53 (1985) (“When the possibility of deception is as self-evident as it is in this case, we need not require the State to ‘conduct a survey of the ... public before it [may] determine that the [advertisement] had a tendency to mislead.’”) (quoting *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 391-92 (1965)).

<sup>92</sup> *Kraft, Inc. v. F.T.C.*, 970 F.2d 311, 318 (7th Cir. 1992) (“In determining what claims are conveyed by a challenged advertisement, the Commission relies on two sources of information: its own viewing of the ad and extrinsic evidence. Its practice is to view the ad first and, if it is unable on its own to determine with confidence what claims are conveyed in a challenged ad, to turn to extrinsic evidence.”); *In re Pom Wonderful LLC*, 155 F.T.C. 1 (2013) (“Yet, if extrinsic evidence has been introduced, that evidence ‘must be considered by the Commission in reaching its conclusion’ about the meaning of the advertisement.”) (citations omitted); FTC Deception Policy, § II, n.8.

<sup>93</sup> *In re Thompson Med. Co., Inc.*, 104 F.T.C. 648 (1984) (“[T]o make a case that advertising is deceptive, the Commission has the burden of showing that the material claims communicated to reasonable consumers by the advertising are false in some manner. In other words, deceptive representations must be ‘likely to mislead.’”); FTC Deception Policy, § III

that the advertiser lacked a reasonable basis for asserting that the message was true.”<sup>94</sup>

Third, the FTC examines whether the representation is material. A representation is material if it is “likely to affect a consumer’s choice or use of a product or service.”<sup>95</sup> The FTC also presumes materiality where the seller made an express claim<sup>96</sup> or where the seller intended to make an implied claim.<sup>97</sup> In other instances, the FTC may require evidence of materiality.<sup>98</sup> If a representation is material, “consumer injury is likely, because consumers are likely to have chosen differently but for the deception.”<sup>99</sup>

The FTC’s ability to enforce the FTC Act against fair-music claims will vary depending on the type of claim under question. Since artist-compensation claims involve express claims regarding the percentages or aggregate amounts of revenue paid to musicians, the representations would be false if any of these sellers did not pay out the stated percentages or aggregate amounts. Accordingly, such claims would be easiest to enforce.

Significantly, an artist-compensation claim would also be false if the advertiser lacks a “reasonable basis” for advertising claims *before* the claims were disseminated.<sup>100</sup> For aggregate or percentage-revenue claims, the FTC can demand the company to produce what “reasonable

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<sup>94</sup> *In re Thompson Med. Co., Inc.*, 104 F.T.C. 648 (1984) (“For example, if an advertisement claims that a new brand of orange juice is more nutritious than others on the market, the Commission could put on its own evidence showing the claim to be false or it could show that the substantiation the advertiser had to support the ad did not provide a reasonable basis for the claim of greater nutritional value.”).

<sup>95</sup> FTC Deception Policy, § IV (citing *American Home Products Corp.*, 98 F.T.C. 136,368 (1981)).

<sup>96</sup> *Id.*

<sup>97</sup> *Kraft, Inc. v. F.T.C.*, 970 F.2d 311, 322-23 (7th Cir. 1992) (“The Commission is entitled to apply, within reason, a presumption of materiality, *Colgate-Palmolive*, 380 U.S. at 392, and it does so with three types of claims: (1) express claims; (2) implied claims where there is evidence that the seller intended to make the claim; and (3) claims that significantly involve health, safety, or other areas with which reasonable consumers would be concerned.) (citations omitted); FTC Deception Policy, § IV (citing *Central Hudson Gas & Electric Co. v. PSC*, 447 U.S. 557, 567 (1980) (“In the absence of factors that would distort the decision to advertise, we may assume that the willingness of a business to promote its products reflects a belief that consumers are interested in the advertising.”)).

<sup>98</sup> *Kraft, Inc. v. F.T.C.*, 970 F.2d 311, 322-23 (7th Cir. 1992) (“Absent one of these situations, the Commission examines the record and makes a finding of materiality or immateriality.”); FTC Deception Policy, § IV.

<sup>99</sup> FTC Deception Policy, §§ I, IV.

<sup>100</sup> FTC Substantiation Policy. Over the past two decades, the FTC has prosecuted many of its environmental-marketing actions in terms of lack of substantiation. See, e.g., Press Release, Federal Trade Commission, *Too Good To Be Green: Company’s Plastic Lumber Claims Don’t Hold Up*, July 17, 2014, <http://www.ftc.gov/news-events/press-releases/2014/07/too-good-be-green-companys-plastic-lumber-claims-dont-hold> (last visited Jul 25, 2014); Press Release, Federal Trade Commission, *FTC Announces Actions Against Kmart, Tender and Dyna-E Alleging Deceptive “Biodegradable” Claims*, June 9, 2009, <http://www.ftc.gov/news-events/press-releases/2009/06/ftc-announces-actions-against-kmart-tender-dyna-e-alleging> (last visited Jul 25, 2014); Press Release, Federal Trade Commission, *FTC Announces Actions Against Kmart, Tender and Dyna-E Alleging Deceptive “Biodegradable” Claims*, June 9, 2009, <http://www.ftc.gov/news-events/press-releases/2009/06/ftc-announces-actions-against-kmart-tender-dyna-e-alleging> (last visited Jul 25, 2014).

basis” it had for claims before making those claims.<sup>101</sup> Substantiation could include, for example, the company’s financial or accounting statements or audit reports to musicians.<sup>102</sup> Substantiation could also include copies of the company’s contracts with other parties in the music distribution process, which would allow the FTC to determine whether the advertised artist-compensation claims are true.<sup>103</sup> If the seller lacks reasonable substantiation, then the unsubstantiated claim would be treated as false. Of course, comparing complex contracts and reviewing financial documents would require technical expertise that the FTC lacks. The agency, however, can learn the intricacies of royalty payments, as it learns the complex science underlying health and environmental claims. For example, it could consult the Copyright Office<sup>104</sup> or hire experts in payment processes and music industry practices.

Whether the FTC could challenge a direct-compensation claim<sup>105</sup> depends on how

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<sup>101</sup> What constitutes a reasonable basis is context-specific, involving an analysis of a number of “factors relevant to the benefits and costs of substantiating a particular claim,” including “the type of claim, the product, the consequences of a false claim, the benefits of a truthful claim, the cost of developing substantiation for the claim, and the amount of substantiation experts in the field believe is reasonable.” *In re Pfizer Inc.*, 81 F.T.C. 23 (1972); FTC Substantiation Policy.

<sup>102</sup> Since companies generally keep such contracts and financial records, companies should not face undue burden in producing such information during an investigation or during litigation. *Cf.* Robert Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 HARVARD L. REV. 661, 683 (1977) (“When the focus shifts to minor economic injury, justification of required prior substantiation is not as clear. If all or most claims are true, the substantiation process adds little to consumer welfare. Even if a few claims are untrue and the substantiation process helps to disclose them to the seller or to the government, the costs of substantiation may outweigh the combined benefits of disclosure resulting from the avoidance of economic injury and from the greater certainty in the market of dissemination of accurate product information”).

<sup>103</sup> While this type of substantiation differs from the scientific studies that the agency reviews in cases involving health or environmental claims, the use of financial statements as evidence of truth or falsity is not new. In the late 1990s, for example, the FTC entered numerous settlement consent decrees with charity fundraisers that allegedly misrepresented the percentage of donor funds going to non-profit entities. *See, e.g.*, Press Release, Federal Trade Commission, *Professional Fundraiser Agrees to Pay \$200,000 to Settle FTC Charges that it made False Representations in Connection with its Charitable Solicitations* (June 28, 1994), available at 1994 WL 285405 (“The complaint alleges that Heritage has falsely represented that a specific and substantial portion of the donor funds collected—for instance, 72 percent or more—would go directly to the non-profit entity for which they were intended. In fact, because Heritage routinely has kept most of the funds, this representation is false, the FTC alleged. Further, the FTC charged that Heritage falsely represented that donations collected on behalf of non-profit entities would be earmarked to be used in the donor’s state or local area, when in fact, the funds were not earmarked for such use.”). [Compare percentage-donation claims to artist-compensation claims, under false and failure-to-substantiate theories. Discuss percentage claims in *Kraft, Inc. v. F.T.C.*, 970 F.2d 311, 324 (7th Cir. 1992) (“The FTC found solid evidence that consumers placed great importance on calcium consumption and from this reasonably inferred that a claim quantifying the calcium in Kraft Singles would be material to consumers. It rationally concluded that a 30% exaggeration of calcium content was a nutritionally significant claim that would affect consumer purchasing decisions. This finding was supported by expert witnesses who agreed that consumers would prefer a slice of cheese with 100% of the calcium in five ounces of milk over one with only 70%.”) (citations omitted).]

<sup>104</sup> The FTC consults with the Department of Energy when issuing changes to the Energy Labeling Rule. *Cf.* 16 C.F.R. § 305.1 *et seq.*

<sup>105</sup> Magnatune, *supra* note \_\_\_\_ [FAQ: Download Membership] (“fully 50% of your membership goes *straight* to the musicians (not to lawyers or labels)”; Magnatune, *supra* note \_\_\_\_ [Music Licensing] (“[W]e sign contracts directly



concrete the claim is. One could argue that direct-compensation claims are misleading because each seller itself is a “middle man” between consumers and artists: the surest ways to pay musicians directly is to buy from the musician in person or to buy from her website.<sup>106</sup> On the other hand, fair-music sellers prominently advertise that they keep a share of the sale and membership fees paid by consumers. If consumers patronize such a seller, they likely know that they are not *directly* paying the artist. Accordingly, the FTC would likely require extrinsic evidence to challenge direct-compensation claims.

Moral-positioning claims would likely be even difficult to enforce. Statements that a seller is a “pioneer in the fair trade music movement”<sup>107</sup> or a purveyor of “free-range, organic, grass-fed independent music”<sup>108</sup> are opinions or puffery: statements of fact not susceptible to being proven true or false.<sup>109</sup> Similarly, pleas to consumers to “support[] an artist’s ability to continue recording”<sup>110</sup> and to “do[] a good deed by listening to our music”<sup>111</sup> are likely unenforceable due to their generality and lack of measurability. Depending on how one defines “support” or “good deed,” the claim could be either true or false.

Similarly, practice-contrast claims would need to involve statements of facts. Some comparative claims are measurable and could be verified. For example, CD Baby directly states that artists earn more revenue from sales via CD Baby than from iTunes or Amazon: “We keep only 9% and pay you a whopping 91% per download sold on our store – more than iTunes, Amazon, or any other retailer.”<sup>112</sup> Other comparative claims veer closer to the puffery camp, such as Bandcamp’s aspiration to make its “pricing to be as clear as possible.”<sup>113</sup> Like “support” and “good deed,” “clear” and “transparen[t]” are general terms that may or may not be true, depending on how the term is defined and how the claim is measured.

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with musicians, so . . . no middlemen get in the way of the artist’s royalties.”); CD Baby, *supra* note \_\_\_\_ [About Us] (“When you buy music at CD Baby, you’re buying *directly* from the artist.”); Bandcamp, *supra* note \_\_\_\_ [Artists] (“[W]e bring your music to a thriving community of enlightened listeners who understand that the best way to support the artists they love is by *directly* giving them money.”).

<sup>106</sup> See, e.g., Ganz, *supra* note \_\_\_\_.

<sup>107</sup> Magnatune, *supra* note \_\_\_\_ (“[W]e share profits equally with them and they keep all the rights to their own music.”). [About Us]

<sup>108</sup> CD Baby, *supra* note \_\_\_\_ [About Us]

<sup>109</sup> “[T]he Commission generally will not bring advertising cases based on subjective claims (taste, feel, appearance, smell) or on correctly stated opinion claims if consumers understand the source and limitations of the opinion.” FTC Deception Policy, § III; see *id.* n.42 (“[T]here is a category of advertising themes, in the nature of puffing or other hyperbole, which do not amount to the type of affirmative product claims for which either the Commission or the consumer would expect documentation.”) (citing *In re Pfizer, Inc.*, 81 F.T.C. 23, 64 (1972); *Wilmington Chemical*, 69 F.T.C. 828, 865 (1966)).

<sup>110</sup> CD Baby, *supra* note \_\_\_\_ [About Us]

<sup>111</sup> Magnatune, *supra* note \_\_\_\_ [FAQ: Download Membership]

<sup>112</sup> CD Baby, *supra* note \_\_\_\_ [Pricing]

<sup>113</sup> Bandcamp, *supra* note \_\_\_\_ [Pricing]

That said, opinions that function as endorsements can be enforceable.<sup>114</sup> An endorsement is “any advertising message” that “consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser.”<sup>115</sup> Under the FTC’s *Guides Concerning Use of Endorsements and Testimonials in Advertising*, an endorsement “must reflect the honest opinions, findings, beliefs, or experience of the endorser” and “may not convey any express or implied representation that would be deceptive if made directly by the advertiser.”<sup>116</sup> Since artist-compensation and practice-contrast claims are difficult for consumers to verify, musician endorsements play a crucial role in reassuring consumers that musicians are compensated as promised. To the extent musician testimonials bolster fair-music claims or give rise to independent fair-music claims,<sup>117</sup> such endorsements cannot convey a message that would be deceptive if made directly by the seller. Thus, if a seller generally did not pay 91% of each sale to musicians, it could be deceptive for that seller to post musician testimonials touting how they earned 91% of each music sale.

These three categories claims can also give rise to additional, implied fair-music claims. For example, percentage-revenue claims—alone or combined with moral-positioning claims—may imply that revenue from music sales by the seller constitute a significant portion of a musician’s income. In truth, however, revenue from recorded music typically constitutes only a (small) slice of musician earnings.<sup>118</sup> Similarly, aggregate-revenue claims may also imply that music sales by the seller constitute a significant portion of a musician’s income when the average revenue per artist is actually quite low.<sup>119</sup> Since such implied claims are not necessarily

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<sup>114</sup> See FTC Deception Policy, § III (“[T]he Commission generally will not bring advertising cases based on subjective claims (taste, feel, appearance, smell) or on *correctly stated opinion claims if consumers understand the source and limitations of the opinion.*”) (emphasis added).

<sup>115</sup> FTC Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. § 255.0(b).

<sup>116</sup> 16 C.F.R. § 255.1(a).

<sup>117</sup> See *supra* note 70.

<sup>118</sup> See, e.g., Peter Dicola, *Money from Music: Survey Evidence on Musicians’ Revenue and Lessons About Copyright Incentives*, 55 ARIZ. L. REV. 301, 311 (2013) (reporting survey data from more than 4,500 musicians who took the Future of Music Coalition’s Money from Music Survey). The study classified revenue sources and concluded that “in aggregate, the musicians in our sample earned 12% of revenue from sources directly related to copyright, 10% from sources with a mixed relationship to copyright, and 78% from sources indirectly related or unrelated to copyright.” *Id.* at 304-05. See also Future of Music, Artist Revenue Streams, 42 REVENUE STREAMS, <http://money.futureofmusic.org/40-revenue-streams/> (last visited Jul 12, 2014); Kristin Thomson, *Mythbusting: Data Driven Answers to Four Common Assumptions About How Musicians Make Money*, FUTURE OF MUSIC, ARTIST REVENUE STREAMS, December 2, 2012, <http://money.futureofmusic.org/mythbusting/> (last visited Oct 13, 2013).

<sup>119</sup> In Leah Belsky, Byron Kahra, Max Berkelhammer, and Yochai Benkler’s study of three artist-to-fan platforms, including Magnatune, singer-songwriter Jane Siberry’s online music store, singer-songwriter Jonathan Coulton’s personal website, they observed:

Since its founding ten years ago, more than 228,000 artists have distributed their music through CD Baby, and over 4.2 million albums have been sold through the site, generating over \$97 million in revenue distributed directly to artists. In 2008, the site’s most successful sales year to

“reasonably clear from the face of the advertisement,”<sup>120</sup> the FTC would likely seek extrinsic evidence of whether consumers received any implied messages,<sup>121</sup> such as expert opinion, consumer testimony, copy tests, or surveys.<sup>122</sup>

As discussed above, the FTC must also consider whether the representation is likely to mislead a consumer acting reasonably under the circumstances.<sup>123</sup> For percentage-revenue and aggregate-revenue claims, the FTC could likely presume that consumers’ interpretations—that revenue is paid as advertised—is reasonable.

For direct-compensation, moral-positioning, and practice-contrast claims, however, the FTC would likely need extrinsic evidence on reasonability (assuming that those representations are not opinions or puffery). Since fair-music claims are made to a broad audience, the sophistication of the audience likely ranges from those quite knowledgeable about music and the music industry to those who know little. If evidence showed, for example, that the seller’s audience targeted knowledgeable consumers (*e.g.*, consumers who are also musicians)—or that negative publicity surrounding artist-compensation practices by major record labels has disillusioned ordinary consumers<sup>124</sup>—the FTC could have a tougher time of showing that reasonable consumers would believe fair-music claims.<sup>125</sup> That said, “an interpretation may be reasonable even though it is not shared by a majority of consumers in the relevant class, or by

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date (based on available information), CD Baby paid out more than \$34 million in revenue to artists. While the aggregate sales numbers are impressive—especially considering the industry-wide decline in CD sales—the average artist selling music through CD Baby received a payment of just \$228 in 2008. Four thousand artists received between \$1000 and \$10,000 in payments from CD Baby, and roughly 200 (out of more than 150,000 artists selling music on the site) earned more than \$10,000.<sup>66</sup>

Leah Belsky *et al.*, *Everything in Its Right Place: Social Cooperation and Artist Compensation*, 17 MICH. TELECOMM. & TECH. L. REV. 1, 52, 64 (2010) (citing Tony van Veen, *CD Baby 2008 Stats for CD and Download Sales*, CD BABY BLOG (Jan. 15, 2009, 8:49 AM), [http:// cdbaby.org/stories/09/01/15/8158752.html](http://cdbaby.org/stories/09/01/15/8158752.html))). The original van Veen post is no longer on the CD Baby website. [Since CD Baby clearly states how many artists were involved in the generation of \$97 million, CD Baby has likely not created any misleading impressions.]

<sup>120</sup> *Kraft Inc.*, 970 F.2d at 319.

<sup>121</sup> See FTC Deception Policy, § II (citing *American Home Products*, 98 F.T.C. 136, 374 (1981)).

<sup>122</sup> FTC Deception Policy, § II, n.8.

<sup>123</sup> FTC Deception Policy, § III.

<sup>124</sup> *Cf.* Lital Helman, *Fair Trade Copyright*, 36 COLUMBIA J. LAW ARTS 157, 186 (2013) (“[I]t is becoming a well-known secret that the money collected on legal sites scarcely compensates recording artists, as descriptions of the travels of money in the record business have spread all over the web.”) (citations omitted).

<sup>125</sup> *Cf.* Rebecca Tushnet & Eric Goldman, *ADVERTISING & MARKETING LAW: CASES AND MATERIALS* 229 (2012) (“For example, courts may hold that a reasonable consumer consults other available information rather than relying solely on the advertiser’s claims, especially where information about a product is readily available.”). But the FTC does enforce false or misleading environmental claims, even though many consumers are suspicious of such claims.

particularly sophisticated consumers. A material practice that misleads a significant minority of reasonable consumers is deceptive.”<sup>126</sup>

The amount of evidence the FTC would need to show materiality would also vary depending on the claim.<sup>127</sup> For express artist-compensation claims, the FTC could presume that consumers’ interpretations that revenue would be paid as advertised are reasonable. For implied claims, however, the agency would likely need evidence that fair-music claims affect consumers’ buying decisions. Since process claims generally do not affect the functioning or performance of a good,<sup>128</sup> a price premium charged for fair-trade-claimed music, compared to the prices of non-fair-trade claimed music, could also serve as evidence that the misleading claim is material. Some empirical research suggests that consumers pay more on music websites when they know that their payment goes directly to the musician.<sup>129</sup> Or the FTC could seek evidence on the creation or dissemination of the ads (e.g., company emails and market research), to determine if the seller intended to make the implied claim. Alternatively or additionally, the FTC could administer a consumer survey, seek consumer declarations, or obtain expert testimony on the materiality of the challenged claim.<sup>130</sup> When evaluating materiality, the FTC “takes consumer preferences as given. Thus, if consumers prefer one product to another, the Commission need not determine whether that preference is objectively justified.”<sup>131</sup>

Ultimately, the question of whether a representation is material (and therefore more likely to cause consumer injury) is related to the FTC’s enforcement priorities: whether the FTC should use any resources to police fair-music claims.<sup>132</sup> Recorded music is typically a low-value, repeat-purchase product that does not risk physical or economic injury to the consumer or affect

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<sup>126</sup> FTC Deception Policy at n.20 (citing *Heinz W. Kirchner*, 63 F.T.C. 1282 (1963)).

<sup>127</sup> See FTC Deception Policy, § IV.

<sup>128</sup> Material claims typically involve representations about health, safety, efficacy, cost, purpose, performance, warranties, quality, durability, and other information pertaining to the “central characteristics” of a product or service. See FTC Deception Policy, § IV. “[T]he fact that the product or service with the feature represented costs more than an otherwise comparable product without the feature” could also be evidence of materiality. *Id.*

<sup>129</sup> Belsky, *supra* note \_\_\_, at 64.

<sup>130</sup> See FTC Deception Policy, § IV (citing *American Home Products*, 98 F.T.C. 136, 369 (1981)). Notably, some consumers also care about whether the musician was affiliated with the RIAA. See, e.g. Bandcamp, *supra* note \_\_\_, (“It has probably been about 10 years since I have purchased any music, but that changed yesterday when I ran across your site while searching for NiT GriT. I loved the fact that I could listen to entire tracks instead of 30 second sound clips . . . Before purchasing anything I did a search to find out if NiT GriT was under an RIAA label, but luckily they were not, so I bought the album . . . --Karl Mohler”).

<sup>131</sup> FTC Deception Policy, § IV (citing *FTC v. Algoma Lumber Co.*, 291 U.S. 67 (1933)). Cf. *Benton Announcements v. FTC*, 130 F.2d 254 (1942) (per curiam) (“[P]eople like to get what they think they are getting, and courts have steadfastly refused in this class of cases to demand justification for their preferences.”).

<sup>132</sup> FTC Deception Policy, § IV (“When consumers can easily evaluate the product or service, it is inexpensive, and it is frequently purchased, the Commission will examine the practice closely before issuing a complaint based on deception. There is little incentive for sellers to misrepresent (either by an explicit false statement or a deliberate false implied statement) in these circumstances since they normally would seek to encourage repeat purchases.”).

the “functioning” of the music. Generally, without traditional consumer injuries or widespread deception (as evidenced, for example, by numerous consumer complaints), the FTC would be unlikely to expend resources policing fair-music claims. The FTC’s enforcement of environmental marketing claims, however, suggests that the agency does pay attention to claims that consumers would have trouble evaluating for themselves.<sup>133</sup>

*State Attorneys General.*— Each state also has consumer protection laws authorizing the state attorney general and certain private parties to bring actions against purveyors of false or misleading advertising.<sup>134</sup> These laws are often known as “little FTC Acts” or “UDAP” statutes. Some UDAP laws mirror the FTC Act by broadly barring “unfair methods of competition or unfair or deceptive acts.”<sup>135</sup> Indeed, several draw their text directly from language in the FTC Act and explicitly instruct their courts to rely on FTC opinions in interpreting and applying their terms. Other UDAP laws are directed at false, misleading, or deceptive practices only, leaving out any prohibition against “unfair” practices.<sup>136</sup> A third approach is to enumerate a list of prohibited activities, along with a “catch-all” prohibition against practices “unfair or deceptive to the consumer.”<sup>137</sup>

State attorney-general enforcement of fair-music claims would play out similarly as FTC enforcement where the terms of UDAP laws mirror the FTC Act, especially in states that defer to federal administrative and judicial case law in interpreting them.<sup>138</sup> [Discuss relevant UDAP variations. It is notable that some states have taken initiative in policing green marketing.<sup>139</sup>

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<sup>133</sup> Cf. FTC Guides for the Use of Environmental Marketing Claims at 16 C.F.R. § 260.1 *et seq.*

<sup>134</sup> See DEE PRIDGEN & RICHARD ALDERMAN, CONSUMER PROTECTION AND THE LAW § 210 (2013-2014).

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> Most UDAP laws are based on one of three variations of a model law, the Unfair Trade Practices and Consumer Protection Law (UTCPL), developed by the FTC in collaboration with the Council of State Governments. A few are based on a different model, the Uniform Deceptive Trade Practices Act (UDTPA), developed by the National Conference of Commissioners on Uniform State Laws. The “chief feature” of this second model is that “it itemizes twelve specific deceptive practices, covering misleading trade identification (including the traditional unfair competition sorts of passing off and trademark infringement), false advertising, deceptive advertising, and a final catchall ban on ‘any other conduct which similarly creates a likelihood of confusion or misunderstanding.’” Tushnet & Goldman, *supra* note \_\_\_, at 138. Some states have adopted both the UTCPL and the UDTPA. *Id.*; see also Dee Pridgen, *Wrecking Ball Disguised as Law Reform: ALEC’s Model Act on Private Enforcement of Consumer Protection Statutes*, 39 N. Y. UNIV. REV. LAW SOC. CHANGE (forthcoming 2015), available <http://papers.ssrn.com/abstract=2426381> (last visited Jul 16, 2014).

<sup>138</sup> See PRIDGEN AND ALDERMAN, *supra* note \_\_\_, Appendix 3B. States vary in the extent to which they follow the FTC Act. About half of the states explicitly instruct courts to draw on FTC opinions in deciding cases; others direct state courts to give the federal standard “consideration” or “due consideration and great weight,” or instruct that courts be “guided” by or “consistent” with federal decisions. Tushnet & Goldman, *supra* note \_\_\_, at 139.

<sup>139</sup> Cf. *Association of National Advertisers, Inc. v. Lungren*, 44 F.3d 726 (9th Cir. 1994); *Int’l Dairy Foods Ass’n v. Boggis*, 622 F.3d 628 (6th Cir. 2010) (Ohio Department of Agriculture regulation prohibiting dairy processors from making claims about the absence of artificial hormones in their milk products (composition claims) and requiring them to include a disclaimer when making such claims about their production processes (production claims));

Discuss the complementary and mutually reinforcing roles of state AG offices and the FTC, as well as differences in priorities (*e.g.*, a state agency may be more keen to scrutinize process claims with a demonstrably local impact, especially if the seller is located in that state.)<sup>140]</sup>

### C. Enforcement by Consumers

UDAP also laws permit private enforcement by consumers injured by deceptive practices.<sup>141</sup> If a consumer buys music from a seller assuming that musicians would be paid as advertised, that consumer could bring an action against that seller for the misrepresentation. Some UDAP laws even permit “private attorney general” actions, which allow consumer plaintiffs to represent not only themselves but also the public in general.<sup>142</sup>

Consumers have used UDAP laws to enforce false or misleading claims in the music industry context. In 2003, California resident Eric Parke filed state-law UDAP claims against the Recording Industry Association of America (“RIAA”), for representations concerning the RIAA’s “Clean Slate Program.” According to Parke, RIAA press releases and brochures effectively promised to “grant amnesty to [peer-to-peer network] users who voluntarily identify themselves and pledge to stop illegally sharing music on the Internet.”<sup>143</sup> Parke asserted that the RIAA’s actions “constitute[d] unlawful, fraudulent, misleading, and unfair business practices” under California’s UDAP law,<sup>144</sup> and sought a wide variety relief, including an injunction, remedial advertising, and a declaratory order.<sup>145</sup> Consumer UDAP actions against false or

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*International Dairy Foods Association v. Amestoy*, 92 F. 3d 67 (2nd Cir. 1996) (Vermont statute requiring that “[i]f rBST has been used in the production of milk or a milk product for retail sale in this state, the retail milk or milk product shall be labeled as such”); California Attorney General et al., *THE GREEN REPORT: FINDINGS AND PRELIMINARY RECOMMENDATIONS FOR RESPONSIBLE ADVERTISING* (1990); California Attorney General et al., *THE GREEN REPORT II: RECOMMENDATIONS FOR RESPONSIBLE ENVIRONMENTAL ADVERTISING* (1991).

<sup>140</sup> See, *e.g.*, *Illinois, ex rel. Madigan v. Telemarketing Associates, Inc.*, 538 U.S. 600, 621-22 (2003) (“What the First Amendment and our case law emphatically do not require, however, is a blanket exemption from fraud liability for a fundraiser who intentionally misleads in calls for donations . . . [The attorney general] has alleged that Telemarketers attracted donations by misleading potential donors into believing that a substantial portion of their contributions would fund specific programs or services, knowing full well that was not the case . . . Such representations remain false or misleading, however legitimate the other purposes for which the funds are in fact used.”).

<sup>141</sup> See Tushnet & Goldman, *supra* note \_\_\_, at 142 (“Currently, all state consumer protection laws allow private parties to sue to enforce them, with Iowa at last joining the ranks in 2009.”) (citing SEARLE CIVIL JUSTICE INSTITUTE, *STATE CONSUMER PROTECTION ACTS, AN EMPIRICAL INVESTIGATION OF PRIVATE LITIGATION*, PRELIMINARY REPORT 10 (December 2009)).

<sup>142</sup> See Pridgen, *supra* note \_\_\_, at 21 (citing William B. Rubenstein, *On What a “Private Attorney General” Is—And Why It Matters*, 57 VAND. L. REV. 2129, 2146-2154 (2004)).

<sup>143</sup> *Parke v. RIAA*, Compl. Ex. A, available at [https://w2.eff.org/IP/P2P/Parke\\_v\\_RIAA/Parke\\_RIAA\\_Complaint.pdf](https://w2.eff.org/IP/P2P/Parke_v_RIAA/Parke_RIAA_Complaint.pdf)

<sup>144</sup> Cal. Bus. & Prof. Code §§ 17200 *et seq.*

<sup>145</sup> *Parke v. RIAA*, Compl. ¶ 13 (“[I]n the Clean Slate Affidavit, the] RIAA is only ‘agreeing not to support or assist in copyright infringement suits based on past conduct against individuals who meet the conditions outlined below.’

misleading fair-music claims could apply similar theories of deception.

[Discuss challenges that consumers may face in enforcing such claims, including establishing that they have standing,<sup>146</sup> saw or relied on the claim, were influenced by the claim (materiality),<sup>147</sup> or suffered injury as a result of the false or misleading claim. Discuss class-certification challenges.<sup>148</sup> Proving up a connection between a seller's claim and a particular consumer transaction raises evidentiary difficulties well known to practitioners and scholars in the consumer protection area.]

#### **D. Enforcement by Competitors**

Compared to music consumers, competing fair-music sellers may have a better chance of enforcing false or misleading fair-music claims. Music sellers could bring actions, for example, if they have been falsely disparaged in a fair-music seller's ad. Fair-music sellers could also bring false advertising actions if they believe that another seller misrepresents how it pays musicians.

One route for competitors would be to sue under UDAP laws, which some statutes permit. Many UDAP laws, however, allow competitor actions only if the competitor demonstrates that it is protecting a direct consumer interest.<sup>149</sup> [Discuss challenges that competitors may encounter in suing under UDAP laws.]

An alternative route for competitors would be to bring suit under the federal Lanham Act,

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This sentence limits the obligations of RIAA to only not "support or assist in copyright infringement suits." In other words, according to this language, and contrary to the reasonable expectations of the general public induced by RIAA's other above described statements, the RIAA is not guaranteeing amnesty, release, or immunity from copyright lawsuits, but only that, at best, it will not support or assist such lawsuits.").

<sup>146</sup> See *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 329-30 (2011) ("For each consumer who relies on the truth and accuracy of a label and is deceived by misrepresentations into making a purchase, the economic harm is the same: the consumer has purchased a product that he or she paid more for than he or she otherwise might have been willing to pay if the product had been labeled accurately. This economic harm—the loss of real dollars from a consumer's pocket—is the same whether or not a court might objectively view the products as functionally equivalent . . . A consumer who relies on a product label and challenges a misrepresentation contained therein can satisfy the standing requirement of section 17204 by alleging, as plaintiffs have here, that he or she would not have bought the product but for the misrepresentation.").

<sup>147</sup> See, e.g., *Kane v. Chobani, Inc.*, No. 12-cv-02425 (N.D. Cal. Feb. 20, 2014) (reliance required for "all natural" ingredients claim).

<sup>148</sup> See, e.g., *Astiana v. Ben & Jerry's Homemade, Inc.*, Nov. 4:10-cv-04387 (N.D. Cal. Jan. 7, 2014) (no predominance of common issues over individual issues for "all natural" claims); *Hernandez v. Chipotle Mexican Grill, Inc.* (No. 212-cv-05543 (C.D. Cal. Dec. 2, 2013) (individual inquiry necessary to determine whether class member saw store ad or relied on ad or menu touting "naturally raised" meats). See also *Larsen et al. v. Trader Joe's Co.*, No. 3:11-cv-05188 (N.D. Cal. Feb. 7, 2013) ("all natural" class action settlement approved).

<sup>149</sup> See Tushnet & Goldman, *supra* note \_\_\_, at 384-85.

which is intended to protect competitors harmed by false advertising.<sup>150</sup> Under the Act, “[a]ny person” who “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,” which “in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person’s goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.”<sup>151</sup>

A plaintiff can prevail under the Lanham Act by establishing (1) a false or misleading statement of fact about a product, (2) in connection with commercial advertising or promotion, (3) that actually deceives or has the capacity to deceive a substantial segment of potential consumers, (4) that is material, (5) that is likely to cause injury to the plaintiff, and (6) that product is in interstate commerce.<sup>152</sup> [Analyze facially false and implicitly false claims. Discuss a plaintiff competitor’s burden in showing that a defendant’s claim is false or misleading.<sup>153</sup> If the defendant lacked adequate substantiation for a fair-music claim before the claim was disseminated, for example, the competitor plaintiff could not rely on the absence of substantiation to meet its burden of proving that the claim is false. In addition, courts assume materiality where the ad is facially false, but require plaintiffs to demonstrate materiality where the ads are only implicitly false.<sup>154</sup>]

[Discuss how private plaintiffs could prove falsity by demanding, during discovery, the same types of documents and information that the FTC or state AGs could seek during investigations. The Federal Rules of Civil Procedure and state civil procedure laws obligate parties to produce evidence that is relevant to complaint claims and defenses. In addition, defendants are likely to defend suits by submitting substantiating evidence. After defendants produce such evidence, plaintiffs can issue interrogatories or admission requests or schedule depositions to question the evidence.]

[Discuss how various types of competitors would establish standing.<sup>155</sup> While the

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<sup>150</sup> See *POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228, 2238 (2014) (“the Lanham Act protects commercial interests against unfair competition”).

<sup>151</sup> 15 U.S.C. § 1125 (a)(1)(B).

<sup>152</sup> See, e.g., *Pizza Hut, Inc. v. Papa John’s Intl., Inc.*, 227 F.3d 489, 495 (5th Cir. 2000).

<sup>153</sup> See, e.g., *S.C. Johnson & Son, Inc. v. Clorox Co.*, 241 F.3d 232, 238 (2d Cir. 2001); see also Tushnet & Goldman, *supra* note \_\_\_, at 157, 312-13.

<sup>154</sup> See Rebecca Tushnet, *Running the Gamut from A to B: Federal Trademark and False Advertising Law*, 159 UNIV. PA. LAW REV. 1305, 1327-28 (2011). In the past, some courts have required that the challenged advertised relate to an “inherent quality or characteristic” of the good or service, but court today “are likely to find that an ‘inherent quality’ is any quality likely to influence a consumer decision.” Tushnet & Goldman, *supra* note \_\_\_, at 109. Some courts, however, have also developed doctrines allowing them to presume materiality in cases of completely unsubstantiated claims. Tushnet & Goldman, *supra* note \_\_\_, at 231 (citing *Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharmaceuticals Co.*, 290 F.3d 578 (3d Cir. 2002) (finding a Lanham Act violation where claims were wholly unsubstantiated)).

<sup>155</sup> Cf. Tushnet & Goldman, *supra* note \_\_\_, at 229.



Lanham Act allows for “any person who believes that he or she is or is likely to be damaged by” false advertising to bring a civil action, the Supreme Court has held that “a plaintiff must allege an injury to a commercial interest in reputation or sales.”<sup>156</sup> In addition, that injury must be “proximately caused by the defendant’s misrepresentations.”<sup>157</sup> Since some musicians sell their music *directly* to consumers via personal or band websites, those musicians may also be able to bring actions as “competitors” against false or misleading fair-music claims, though establishing standing in such suits may be more difficult.]

### **E. Comparing Government, Consumer, and Competitor Enforcement**

[Compare competitor suits, consumer suits, and government. Compared to consumers, a competitor would not have to show that a majority of consumers would likely be deceived, but only that a substantial percentage of consumers would. Compared to consumers and government agencies, competitors may have stronger technical understanding of the processes for disbursing music revenue to artists.<sup>158</sup>]

[Compare injunctive and monetary relief available under the FTC Act, UDAP laws, and the Lanham Act, including bans on misrepresentations, “fencing-in” relief, and corrective advertising.]

## **III. Challenging Fair-Music Claims**

The previous section has identified how government agencies, consumers, and competitors might bring suit to enforce fair-music claims under applicable state and federal laws. In this section, I will consider such suits’ potential conflict with other bodies of law implicated by music sales and fair-music claims, as well as the overall prospects and policy implications of permitting litigation of fair-music advertising. In subsections A and B, I discuss possible First Amendment and Copyright Act challenges to suits to enforce fair-music claims. Although I conclude that those challenges may ultimately frustrate litigation to enforce some fair-music advertising claims, I argue in Subsection C that efforts to enforce fair-music claims through advertising laws will be an important tool for promoting seller honesty and consumer trust in the growing fair-music market.

### **A. Fair-Music Claims and the First Amendment**

[For each type of fair-music claim, discuss possible First Amendment challenges in false

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<sup>156</sup> *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1390 (2014) (“A consumer who is hoodwinked into purchasing a disappointing product may well have an injury-in-fact cognizable under Article III, but he cannot invoke the protection of the Lanham Act—a conclusion reached by every Circuit to consider the question.”). *Id.*

<sup>157</sup> *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1395 (2014).

<sup>158</sup> *Cf.* Tushnet & Goldman, *supra* note \_\_\_, at 154-56.

advertising actions.<sup>159</sup> Suits related to moral-positioning claims are most susceptible First Amendment challenges. These claims are made in the course of “proposing a commercial transaction,”<sup>160</sup> but they also address issues of public concern, like artist welfare and music-industry reform.<sup>161</sup> Although references to issues of public interest, do not “immunize false or misleading product information from government regulation,”<sup>162</sup> courts will be tasked with some difficult line-drawing in this area. Also discuss how orders requiring an advertiser to cease advertising or to engage in corrective advertising could be challenged on First Amendment grounds.<sup>163]</sup>

## **B. Fair-Music Claims and Copyright Laws**

[Discuss potential conflicts between copyright laws and the FTC Act, the Lanham Act,<sup>164</sup> and state UDAP statutes.<sup>165</sup> Discuss the different purposes served—and the different parties

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<sup>159</sup> “Actually misleading” or “inherently misleading” commercial speech is treated the same as false commercial speech, which may be prohibited entirely, but “potentially misleading” speech may not be completely banned “if the information also may be presented in a way that is not deceptive.” *In re R. M. J.*, 455 U.S. 191, 203 (1982). Where “the possibility of deception is [] self-evident,” however, courts “need not require the State to ‘conduct a survey of the . . . public before it [may] determine that the [advertisement] had a tendency to mislead.’” *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 652-53 (1985) (quoting *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 391-92 (1965)).

<sup>160</sup> *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 776 (1976) (“[A] communication which does no more than propose a commercial transaction is not ‘wholly outside the protection of the First Amendment.’”).

<sup>161</sup> *Cf. Nike, Inc. v. Kasky*, 539 U.S. 654, 676-78 (2003) (Breyer, J., dissenting).

<sup>162</sup> See *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 68 (1983) (“Advertisers should not be permitted to immunize false or misleading product information from government regulation simply by including references to public issues.”); *Illinois, ex rel. Madigan v. Telemarketing Associates, Inc.*, 538 U.S. 600, 621-22 (2003) (“What the First Amendment and our case law emphatically do not require . . . is a blanket exemption from fraud liability for a fundraiser who intentionally misleads in calls for donations”).

<sup>163</sup> [Discuss *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of New York*, 447 U.S. 557 (1980); *Novartis Corp. v. F.T.C.*, 223 F.3d 783, 789 (D.C. Cir. 2000) (“The remedy here advances precisely the ‘interest involved,’ namely the avoidance of misleading and deceptive advertising.”); *Kraft, Inc. v. F.T.C.*, 970 F.2d 311, 325 (7th Cir. 1992) (“Unlike the prophylactic regulation in *Peel*, which banned an entire category of commercial speech, the restriction at issue here is an administrative cease and desist order directed toward one company’s cheese ads and predicated on a specific finding of past deceptive practices.”)].

<sup>164</sup> In *Dastar v. Twentieth Century Fox*, the Supreme Court held that a plaintiff could not assert false designation of origin violation under Section § 43(a)(1)(A) of the Lanham Act. 539 U.S. 23, 32 (2003). The Court noted, however, that an advertisement giving the false impression that a defendant’s work was “quite different” from plaintiff’s work could give rise to a false-advertising action under Section 43(a)(1)(B) of the Act. *Id.* at 38.

<sup>165</sup> 17 U.S.C § 301(a). The Copyright Act preempts “only those state law rights that ‘may be abridged by an act which, in and of itself, would infringe one of the exclusive rights provided by federal copyright law.’” *Computer Associates Int’l, Inc. v. Altai, Inc.*, 982 F.2d 693, 716 (2d Cir. 1992). If an “‘extra element’ is ‘required instead of or in addition to the acts of reproduction, performance, distribution or display, in order to constitute a state-created cause of action, then the right does not lie ‘within the general scope of copyright,’ and there is no preemption.” *Id.*

protected—by copyright and false advertising laws.<sup>166]</sup>

### C. Fair-Music Claims and the Fair-Music Market

Even in light of these challenges, suits to police commercial fair-music claims under state and federal advertising laws could promote seller honesty and consumer trust in the fair-music marketplace. Fair music is a nascent consumer market.<sup>167</sup> Because fair music is distinguishable from songs purchased from other music sellers solely by a process attribute, the existence of the fair-music market depends crucially on consumers' willingness to credit sellers' representations about their musician payment practices. Policing seller honesty in such a market is especially important because the dissemination of false or misleading fair-music claims by just a few sellers could jeopardize consumer trust in other sellers. This risk will increase as the market grows. At present, it is dominated by the firms I have focused on in this article—smaller music sellers who employ a fair-music marketing strategy under an apparently sincere commitment to promote musician welfare. But if there is indeed an untapped willingness among consumers to seek out and pay more for fair-music, other music sellers may very well seek to enter the market with their own fair-music marketing efforts.

Indeed, larger music sellers have also started making fair-music claims. Google Play, an online platform through which Google sells songs and streaming memberships, advertises that musicians who submit music to its “artist hub,”<sup>168</sup> will earn a “revenue share (up to 70%),” with Google keeping a “30% commission on any sales.”<sup>169</sup> Spotify also enthusiastically publicizes its aggregate payments to musicians:

Spotify has now paid out a total of more than \$1 Billion USD in royalties to-date, \$500 Million USD of which we paid in 2013 alone! . . . Our belief has always been that if we can offer fans a listening experience superior to piracy, then they

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<sup>166</sup> See Lital Helman, *Fair Trade Copyright*, 36 COLUMBIA J. LAW ARTS 157, 160 (2013) (“Copyright law contains few mandatory remuneration provisions for creators, and nothing in the law ensures that creators benefit in any way from works they have created if they do not hold the copyrights in those works.”) (citations omitted); see also JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY xiii, 55 (1996) (arguing that the conception of the romantic author allows “bureaucratic and corporate actors who employ [artists to] justify their own, derivative intellectual property rights through the rhetoric of individualism and original genius”); Julie E. Cohen, *Copyright As Property in the Post-Industrial Economy: A Research Agenda*, 2011 WIS. L. REV. 141, 162 (2011) (“[T]he author-intermediary relationship can be reconceptualized as a variation on the relationship between employees and employers. This comparison allows us to examine the ways in which the copyright regime provides, or fails to provide, for good stewardship of its human capital.”).

<sup>167</sup> Notably, the fair-music market is not wholly new. Independent labels in the 1970s and 80s—with do-it-yourself ethics for recording and distribution—also appealed to consumers' fair-music process concerns, even while trying to eschew consumerism. See CUMMINGS, *supra* note \_\_; AZERRAD, *supra* note \_\_; RUSSELL SANJEK, PENNIES FROM HEAVEN: THE AMERICAN POPULAR MUSIC BUSINESS IN THE TWENTIETH CENTURY (1996).

<sup>168</sup> Google Play describes “artist hub” as “a direct-to-fan route” for musicians to sell and stream original music. Google Play, GOOGLE PLAY FOR ARTISTS: SELL YOUR ORIGINAL MUSIC, <http://play.google.com/artists/> (last visited Dec 11, 2013).

<sup>169</sup> *Id.* [Google Play for Artists]

will be happy to pay for it, and in turn we are happy to pay out nearly 70% of all the money we earn in royalties. We believe that this is the fair approach to take, and that as we grow we will become an increasingly significant contributor to artists' financial lives . . . So today, we are pleased to welcome artists, managers, or interested listeners to our new Spotify Artists website, where we explain our business with the specific numbers and analyses that we use internally to measure our own progress.<sup>170</sup>

As more, and bigger, music sellers employ fair-music marketing, the credibility of fair-music claims will no longer be enhanced by the perception that the entities making them are controlled by people sincerely committed to dealing with musicians on equitable terms.<sup>171</sup> The prospect of liability under false advertising laws thus can play an increasingly large role in keeping advertisers honest and sustaining the willingness of consumers to credit fair-music sellers' claims and to buy from fair-music sellers.

As the fair-music market grows, seller certification may also be a tool with increasing salience. Scholars and musician organizations have already been prompted by fair-music process concerns to establish certification models for "fair trade" music. Lital Helman has proposed a "Fair Trade Copyright" system in which a branded button would be installed on authorized and unauthorized music websites.<sup>172</sup> The button would allow consumers to donate money directly to musicians and could be used only by websites meeting certain guidelines.<sup>173</sup> The American Federation of Musicians of the United States and Canada ("AFMUC")<sup>174</sup> has begun promoting a "Fair Trade Music" certification project with the explicit goal of "promot[ing]

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<sup>170</sup> Welcome to Spotify for Artists!, SPOTIFY FOR ARTISTS, <http://www.spotifyartists.com/welcome-to-spotify-for-artists/> (last visited Jan 2, 2014) ("Just one year ago, our total royalties paid were \$500 Million USD, and this rapid progress speaks to our success at convincing millions of music fans around the world to once again pay for the music they love."); *see also* Future of Music Coalition, *Spotify Makes a Move Towards Transparency*, December 4, 2013, <http://www.futureofmusic.org/blog/2013/12/04/spotify-makes-move-towards-transparency> (last visited Jan 2, 2014).

<sup>171</sup> Cf. Lessing, *supra* note \_\_\_, at 2344 ("The difference between the original activist approach to coffee certification and the newer marketing approaches has led to the suspicion that, the space so slowly won by fair trade practitioners for transforming the international commodity chain may be captured by agro-food corporations able to transform this progressive initiative into a niche marketing scheme for products re-packaged under 'green' [and/or] 'ethical' symbols . . . This leads to the situation where consumers may believe a company to be a fair trade practitioner (labeling used to brand), whereas in reality a small percentage of its product lines are actually bought under the terms of fair trade labeling.").

<sup>172</sup> Lital, *supra* note \_\_\_.

<sup>173</sup> Helman, *supra* note \_\_\_ ("These guidelines would be designed to ensure that the full amount of contributions is being transferred and that users' information is securely stored. The guidelines would likely include, inter alia, using secure payment services, providing accurate information regarding users' payments, and allowing the PRO to supervise the payments . . . The PRO will further retain the right to supervise the use of the trademark or revoke it if the service does not adhere to the PRO's guidelines.").

<sup>174</sup> Fair Trade Music, ABOUT, <http://fairtrademusicafm.org/about/> (last visited Mar 6, 2014).

a healthy music business . . . that pays musicians fair wages.”<sup>175</sup> Local chapters of the AFMUC certify music venues that “pay wages and benefits that are fair to both the musicians and the venue.”<sup>176</sup> Another project is the “Fair Trade Music Initiative,” which was recently launched by an international consortium of musician organizations.<sup>177</sup> “Inspired in many ways by the well known ‘Fair Trade Coffee’ movement,” this project is developing a certification standards to ensure “that all actors in the music business adhere to standards of transparency and fair compensation for music creators.”<sup>178</sup>

Certification schemes, however, can lose credibility absent meaningful remedies for seller misrepresentations.<sup>179</sup> A “fair-music” certified seller that actually fails to meet

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<sup>175</sup> Originally founded in Portland, Oregon, Fair Trade Music has sprouted chapters across the United States, including in Los Angeles, Seattle, Rochester, and Washington, DC. *See* Fair Trade Music, WHAT ARE THE REQUIREMENTS FOR FAIR TRADE MUSIC CHAPTERS?, <http://www.fairtrademusicpdx.org/node/557> (last visited Jul 28, 2014); Rochester Musicians’ Association, FAIR TRADE MUSIC, <http://rochestermusicians.org/fair-trade-music-roc/> (last visited Jul 28, 2014); FAIR TRADE MUSIC D.C., <http://www.fairtrademusicdc.org/About> (last visited Jul 28, 2014).

<sup>176</sup> *See* Fair Trade Music, VENUES, <http://fairtrademusicafm.org/venues/> (last visited Jul 28, 2014); *see also* Fair Trade Music, *supra* note \_\_\_\_\_. By allowing certified venues to use the Fair Trade Music logo (a fist holding a microphone), the project “encourages consumers to patronize venues where they know that their favorite bands are treated with respect and fairness.” [Fair Trade Music, About]

<sup>177</sup> The network includes the European Composer and Songwriter Alliance (ECSA), Music Creators North America (MCNA), the International Council of Creators of Music (CIAM), the Pan African Composers and Songwriters Alliance (PACSA) and the Alliance of Latin American Creators of Music (ALCAM). Press Release, *Announcing the “Fair Trade Music” Initiative, World’s Songwriters and Composers Unite to Form a Global Advocacy Network*, June 4, 2013, <http://online.wsj.com/article/PR-CO-20130604-903736.html> (last visited Mar 6, 2014); National Music Council of the United States, *Fair Trade Music Project Launched*, February 11, 2014, <http://www.musiccouncil.org/fair-trade-music-project-launched/> (last visited Jul 20, 2014).

<sup>178</sup> National Music Council of the United States, *supra* note \_\_\_\_\_. It has also identified five core “Fair Trade Music Principles” relating to fair compensation, transparency, recapture of rights, independent music creator organizations, and freedom of speech. *Id.*

<sup>179</sup> *See, e.g.,* Chon, *supra* note \_\_\_\_\_. (“Within a third-party certification framework generally, the potential for abuse of consumer trust exists because supplier firms requiring certification to do business with purchaser firms may pick the third-party certifier—resulting in an obviously less than fully disinterested certifier.”); Kysar, *supra* note \_\_\_\_, at 627-28 (“[V]oluntary third-party certification schemes may develop to guarantee the accuracy of manufacturer processing claims, as was the case with organic labeling prior to the promulgation of federal standards. Economic modeling suggests, however, that voluntary disclosure schemes along these lines will not be forthcoming when an insufficient proportion of consumers comprehend the significance of the disclosed information, a market structure that may be likely to accompany the early reception by consumers of goods with technologically complex characteristics. On the other hand, where consumer interest is sufficiently widespread to spur the development of voluntary certification schemes, the very proliferation of such schemes may give rise to conflicting standards and consumer confusion . . . .”); *see also* Ariele Lessing, *supra* note \_\_\_\_\_. (“Consumer confusion resulting from an abundance of conflicting information about which foods were genuinely organic served as the motivating factor behind Congress’s passage of the [Organic Foods Production Act]”); Jessica Fliegelman, *The Next Generation of Greenwash: Diminishing Consumer Confusion Through A National Eco-Labeling Program*, 37 FORDHAM URBAN LAW J. 1001, 1025 (2010) (“[T]he proliferation of organic products caused confusion among consumers, who could not verify the authenticity of organic claims. As a result, conflicting and misleading claims threatened to undermine consumer confidence in organic products. In turn, consumers and retailers became reluctant to purchase organic products.”). *Cf.* Press Release Federal Trade Commission, *Made in USA Brand, LLC Agrees to Drop Deceptive*

certification standards, for example, could easily reduce consumer confidence in claims made by other companies using the same certification.<sup>180</sup> As scholars have recognized, consumer trust is crucial to the success of “cooperative” music distribution models relying on “voluntary contributions and other forms of prosocial fan behaviors.”<sup>181</sup> Early empirical evidence also suggests that these “cooperative” models can “amount to a major improvement over existing options” for some individual musicians.<sup>182</sup> Government, consumer, and competitor enforcement of fair-music claims can encourage companies to disseminate accurate information and facilitate consumers’ willingness to trust fair-music claims and buy from fair-music sellers.

It is important to note that prevailing in court is not necessary for a plaintiff suing to enforce a fair-music claim to promote market-wide seller honesty. This is so because the discovery process offers the collateral benefit of publicizing the truth or falsity of a company’s fair-music claims independently of the ultimate outcome of the lawsuit. Currently, business agreements among record labels, music publishers, musicians, composers, and music sellers often prohibit release of information about the actual division of revenues among those parties.<sup>183</sup> Although fair-music sellers appear to disclose how much they pay musicians, their agreements with music services prevent them from full disclosure of payouts. CD Baby, for example, describes how much retail-sales revenue goes to musicians, but its contracts with music services prevent it from revealing how much revenue goes to musicians in its digital aggregator business.<sup>184</sup> Spotify’s website cites “strict confidentiality requirements” in its “agreements with

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*Certification Claims*, July 22, 2014, <http://www.ftc.gov/news-events/press-releases/2014/07/made-usa-brand-llc-agrees-drop-deceptive-certification-claims> (last visited Jul 27, 2014).

<sup>180</sup> Cf. FTC GUIDES FOR THE USE OF ENVIRONMENTAL MARKETING CLAIMS at 16 C.F.R. §§ 260.6(a) (“It is deceptive to misrepresent, directly or by implication, that a product, package, or service has been endorsed or certified by an independent third party.”); 260.6(b) (“A marketer’s use of the name, logo, or seal of approval of a third-party certifier or organization may be an endorsement, which should meet the criteria for endorsements provided in the FTC’s Endorsement Guides.”).

<sup>181</sup> See, e.g., Leah Belsky, Byron Kahra, Max Berkelhammer, & Yochai Benkler, *Everything in Its Right Place: Social Cooperation and Artist Compensation*, 17 MICH. TELECOMM. & TECH. L. REV. 1, 52, 64 (2010) (identifying website design levers for stabilizing and extending consumer voluntary cooperation models, thereby improving the model’s role as a steady source of revenue for artists).

<sup>182</sup> Belsky et al., *supra* note \_\_\_, at 12. Cf. Dicola, *supra* note \_\_\_, at 331, 341 (“A majority of recording artists reported increases in royalties from online retail sales (58%) and on-demand streaming (51%). A near-majority reported increases in webcasting royalties from SoundExchange (46%)”; “Revenue sources like traditional retail, sheet music, and mechanical royalties have suffered. Online retail, on demand streaming, and webcasting are beginning to grow.”)

<sup>183</sup> See, e.g., Michelle Davis, *Non-Disclosure Agreements: What They Are and Why They’re Annoying*, FUTURE OF MUSIC COALITION, November 5, 2013, <http://www.futureofmusic.org/blog/2013/11/05/non-disclosure-agreements-what-they-are-and-why-theyre-annoying> (last visited Jul 23, 2014); Ann Chaitovitz, *Principles for Artist Compensation in New Business Models*, FUTURE OF MUSIC COALITION, April 2, 2009, <http://futureofmusic.org/article/article/principles-artist-compensation-new-business-models> (last visited Jul 23, 2014).

<sup>184</sup> CD Baby, CD BABY HELP, FREQUENTLY ASKED QUESTIONS, <http://members.cdbaby.com/faq.aspx> (last visited Oct 3, 2013) (“You will be paid a small streaming fee (less than a penny) when your song is listened to on Spotify. CD Baby keeps just 9% of your earnings. The more your music is shared, the more money you make. Because of contractual obligations we can’t post actual payout amounts, but you will be able to see payments in your account.”).

record labels, digital distributors, aggregators and publisher collecting societies” to explain why it does not disclose to consumers the exact percentages or revenue figures that are paid to specific parties.<sup>185</sup>

A music seller litigating a false advertising claim, or subject to civil investigation by federal or state regulators may be required to produce information about compensation and revenue, notwithstanding confidentiality provisions in its business agreements. Of course, information disclosed to a government agency or an adverse party does not thereby become available to the public. For example, a company producing information in response to an FTC civil investigative demand may oblige the agency to avoid publicizing information by deeming it confidential; if the FTC’s investigation does not ultimately give rise to litigation, the information may never be made public. In litigation, courts can issue protective orders shielding information from public view. Even so, the public can still discern the import of what the agency has learned through the allegations in the publicly filed complaint. Moreover, courts do not always grant requests for protective orders, or an order may lose effect at the end of the litigation. Ultimately, even if the information stays in the courtroom, the additional scrutiny by government agencies, private litigants, and courts will give sellers additional incentives to keep their claims true.

While false advertising laws can be an important tool for prompting seller honesty and consumer trust in the fair-music market, it is not clear the extent to which enforcing fair-music claims can actually improve musician compensation or welfare. Admittedly, relying on consumers’ fair-music process preferences is a circuitous way to adjust any current inequities in the distribution of music sales revenues. Policing fair-music claims through advertising laws is similarly roundabout: such laws aim to protect consumers and competitors, not third-party beneficiaries such as musicians. Copyright and contract laws are more direct and established paths to improving musician compensation. To the extent that copyright and contract laws inadequately support musicians, however, applying advertising laws to ensure that consumer dollars are directed to musicians as promised is a novel tool that should not be dismissed.

## CONCLUSION

Fair-music advertising is an example of process advertising that should be policed under federal or state false advertising laws. Such enforcement is important because it promotes seller honesty and consumer trust in a nascent market that depends crucially on consumers’ willingness to credit sellers’ process claims.

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<sup>185</sup> Spotify, HOW DO ARTISTS GET PAID ON SPOTIFY?, <http://www.spotify.com/us/work-with-us/artists/get-paid-from-spotify/> (last visited Nov 3, 2012) (“Spotify has direct agreements with record labels, digital distributors, aggregators and publisher collecting societies, to whom we regularly pay royalties, and who then pay recording artists and songwriters according to their specific contractual agreements. These agreements are subject to strict confidentiality requirements, but we recommend that artists reach out to their distributors to better understand the specific economics that apply to them.”). [How do Artists Get Paid on Spotify]