Copyright, Mergers, and Acquisitions in the Music Industry
The Sound Recording Case

Jose Espinosa

要　旨

長年にわたって、音楽産業において合併は共通の傾向となってきている。メジャー・レーベルは、市場の 70 から 80 パーセントを占めている。ユニバーサル・ミュージック・グループ（UMG）と EMI グループ（EMI）の間の取引により、メジャー・レコード・レーベルは 4 から 3 に減少した。この集中レベルにあるほぼ全ての産業において、かかる減少は残存事業者の市場力の拡大と反競争的な結果の可能性を示す。明らかに、この格言は音楽産業においてはあてはまらない。本稿は、ユービキタスなプライバシー脅威と強力なオンライン配信業者が分析における重要な変数となる一方、消費者は新しいデジタル音楽技術に直面しているので、UMG と EMI の取引を音楽産業の革新的な転換を検証するためのモデルとして利用する。この新しい現実は、結果として、音楽産業における合併の評価における変化を引き起こしてきている。

Keywords: monopsony, copyright, market concentration, sound recording

Introduction

The music industry is a two –tier market. First, wholesalers or labels engage in the selection, publishing, and marketing of albums.[1] There are two kinds of wholesaler: major labels and independent labels. On the second level, retailers deliver the final product to the customer. This tier is divided into physical and digital sellers. Digital channels offer two different options: download (pay per transaction model) and the subscription model (monthly payment), which could be interactive or not.

A particular feature of the music industry is consolidation, a trend it has had through history. The merger agreement reached by Universal Music Group and Sony Music Entertainment in 2012 to acquire the assets of EMI reduced the major record labels from four to three.[2] The antitrust principles adopted in most jurisdictions establish that any concentration that gives the prospective merged entity a 40% market share will prompt authorities to impose strict control and even impede such transaction. Not in this case. As stated by Commissioner Almunia: "In my mandate as competition commissioner this case has been one of the most difficult ones, in particular for the reason I mentioned at the start of this speech: music may be an industry, but it is no ordinary industry."[3]

Therefore, which are the features that make the music industry so unique that worldwide-accepted anticompetitive principles do not apply?

The aim of this paper is to examine this question by describing the music industry's structure, the effects of variables such as piracy and the appearance of dominant online music retailers that change the scenario as well as the authorities' assessment of mergers and acquisitions in this particular market.

This paper will address the issue as follows: First, Chapter 1 will introduce the copyright concept and its importance as a financial asset in the recording music industry. Following, Chapter 2 will briefly expose the main postulates of merger analysis. Next, Chapter 3 will look at previous merger in the music industry. Moreover, Chapter 4 will explain the specifics of the Universal Music and EMI integration and finally our concluding remarks.

I. Understanding Music Copyright

As soon as composed and recorded, music creates two different properties, both protected by the copyright laws: property over the written music and property over the musical performance recorded.

Therefore, there are two separate components of a musical work: the musical composition and the sound recording. A musical composition consists of music, including any accompanying words. The author of a musical composition is the composer and the lyricist if there are lyrics. A musical composition can be in the form of a notated copy (for example, sheet music), a phonorecord (for example, cassette tape, LP, or CD), or a Digital Phonorecord Delivery (DPD). A sound recording, on the other hand, results from the fixation of a series of musical, spoken, or other sounds. The author of a sound recording is the artist(s) whose performance is fixed, the record producer who processes the sounds and fixes them in the final recording, or both.

The copyright's owner for the musical composition and the sound recording, have the exclusive right to reproduce, distribute, display, perform and create derivative works with those musical properties.[4]

A. Justification for Copyright Protection

Copyright gives its owners the right to exclude others from obtaining economics benefits from their work without permission. Initially, the notion gave authors the exclusive rights to make copies of their books. Nevertheless, at present copyright law goes much farther in protecting work just against copying in the strict sense of the work.[5] Modern copyright law protects performance right, display and derivative works rights, software, databases and so on; therefore, the law covers broader grounds. It plays a crucial role in creative industries since the consensus is that the higher the protection level, greater the encouragement for authors to create expressions of intellect. Some scholars, however, argue that copyright law work in an opposite way, stultifying creative endeavors. For this approach, the copyright legal framework had permitted companies to accumulate a vast amount of material, which made almost impossible for newcomers or even small independent enterprises to be competitive and innovative by themselves.[6]

The relationship between copyright and creativity derived from the fact that the copyright holder has a property interest in preventing others from reaping the fruits of his labor, not in preventing the authors and thinkers of the future from making use of, or building upon, his advances.

B. Copyright As A Financial Asset In The Music Industry

The life of a piece of music, as a financial asset, is dependent upon the duration of its copyright. Therefore, copyright term's duration has always been of pivotal importance to the record industry.[7] The universal tendency has been towards extending the duration terms as well as tightens measures against copyright infringement. The justification for these measures is the fight against piracy, especially in the cyber age.[8]

The copyright is alienable as an author can assign his copyright interest. The main reason for copyright transfers is the exposition need for music producers and interpreters to reach more consumers. If a recording artist is contracted to a record company, the artist's performance recording becomes the company's property and can be sold or traded without any need for the artist's consent.

Skillfully, the large companies which benefit from the status quo have focused efforts on fighting fiercely digital file sharing. Entreprises are investing large sums of money in lawsuits against sites devoted to hacking and its users but have made no effort in ending the excessive control they have over the amount and quality of the music that reaches its audience. The immediate consequence of this situation is that meanwhile the firms exert their market power to suppress competition; they produce a sub-optimal level of creative content. Fortunately, this tendency has been changing during the last five years, because telecommunication and high-speed Internet providers became important players in the market.

II. Merger and Acquisitions Analysis and Principles

Now, let's examine the most important principles of merger and acquisitions analysis by competition authorities.

A. Merger Control Overview (Dominance, SLC, and SIEC Tests)

There are different substantive standards for merger control. The United States and Japan have adopted the substantial lessening of competition test (SLC test) while the European Union implemented the dominant position test (Dominance test)[9] until 2004. Europe changed its approach embracing the significantly impede effective competition test (SIEC test) instead.[10] Apparently, the criteria for merger review of the three jurisdictions have substantively converged.[11]

The dominance test is mainly a structural (market share) examination. If the merger led to a market structure that the competition authorities did not like; usually because it either had a firm in it with a market share of more than 40% or because it had a three-firm or two-firm concentration ratio of 70% or above; then it would likely be blocked on these structural grounds.

The substantive lessening of competition test focuses on whether the merger truly lessens competition significantly. Thus, it is much closer to being a direct test of the relevant situation than a structural test is. , If the intensity of competition is lessened in the market, prices rise or quality falls, both of which harm consumers.[12]

The differences between these two substantive approaches are truer at the theoretical than at the practical level. The different tests do not give themselves rise to serious friction. It is also clear that there will always be some cases where different authorities reach different conclusions – whether they are applying or not the same test – for the simple reason that a particular transaction may have a different impact on one state or region compare to another.[13]

B. Principles of Merger Analysis

Until 2010, some universal principles always permeated the merger analysis. Generally, each jurisdiction developed it inquiry thru a five steps process: (1) Determine whether the merger would significantly increase concentration and result in a concentrated market; (2) Evaluate potential adverse competitive effects; (3) Assess whether entry would deter or counteract adverse effects; (4) Evaluate pro-competitive efficiencies; (5) Determine whether either of the merging firms would otherwise have failed and been forced to exit the market.[14]

This process is still used in European and Japanese jurisdictions; however, the American system made significant changes in their guidelines for mergers in 2010. These changes resulted in a new 4-step process outlined as follows: (1) Market Definition (determine product market and geographic market); (2) Establishes market shares and concentration (including safe harbors); (3) Assess the transaction's unilateral and coordinated effects (e.g. evidence of vulnerability to coordinated conduct, innovation and product variety, among others); (4) Consider any offsetting factors (powerful buyers, entry barriers, efficiencies, failing and exiting firms).[15]

III. Mergers and Acquisitions Case Law: Previous Cases

While it is true that the consolidation of the music industry has been a constant phenomenon, prevalence has increased in recent years.

After reviewing the concept of copyright and the principles for analyzing mergers and acquisitions, we will study the major cases of mergers and acquisitions in Europe and the United States. Let's see.

A. Case Time Warner/Polygram (US FTC)

United States' Federal Trade Commission blocked Warner's first attempt with PolyGram in 1984. At the time, Warner was the second largest music label in the United States, while PolyGram was the sixth largest and experiencing financial problems. The United States Court of Appeals noted that the factors to consider when determining the impact on competition included: market shares of merging firms, industry trends towards concentration, degree of concentration within the industry, prior mergers by the companies in question, and barriers to entry in the industry.[16]

The court noted that the central issue was not to make a final determination on whether the proposed merger violates Section 7,[17] but rather to make only a preliminary assessment of the merger's impact on competition. In this case, the investigation wanted to assess the effects of this potential merger on competition in the future. At the time (1984), the recorded music market was moderately concentrated. However, the court already saw a trend towards increased concentration, noting that the proposed joint venture would present serious, substantial, and difficult questions about its anti-competitive effects.[18]

Most importantly, it was emphasized that if the merger were completed, the new venture's market share would be 26 percent whereas the total market share of the top four record companies was 75 percent. The ruling gave due attention to the increased concentration amongst record distributors, disadvantages in obtaining airplay and substantial barriers to entry. Therefore, the Court of Appeals found it necessary to assess those non-price issues. Moreover, the judgment in the Warner/PolyGram case set out that financial weakness did not justify a merger with another record company. The latter reiterated that antitrust law does not protect competitors, but protect competition. Finally, the Court considered public interest factors, such as beneficial economic effects and procompetitive advantages for consumers. After considering all the above criteria, the court blocked the merger.[19]

B. Case Warner/EMI (EU Commission)

In 2000, EMI and Time-Warner notified the Commission of their agreement to combine their music business, including music publishing, on-line distribution, and retail distribution.[20] During the early stages of the investigation, the Commission reached the conclusion that the transaction should be prohibited for several reasons. Firstly, the Commission pointed out that the market was already highly concentrated (with the majors holding around 80 percent of the market share), and the merger would create a collective dominant position in the EU. Another fear was that the new entity would have been between 2 to 5 times bigger than its next competitors were (Universal, BMG, or Sony).[21]

In its initial investigation stage, the Commission produced a list of factors to be taken into account when considering whether the merger was likely to be anticompetitive:

- Time-Warner was the ‘maverick’ of the market, the removal of which would have significantly changed the incentive to compete effectively. It seems that the Commission adopted the conventional view that maverick firms could be good at forcing competition in given market.[22]
- Time-Warner/EMI could have consolidated their structural links with the other majors through distribution agreements and album compilations. That, in turn, could result in fewer opportunities for small labels to break into the market.
- The majors would have had little incentive to deviate from their coordinated behavior because of market transparency and retaliatory measures, for example, withdrawing a deviator from the highly profitable compilation deals.
- The recorded music market would have become more transparent as the number of majors would decrease.
- Another important factor in rejecting the merger proposal was that small and new independent music labels, as well as the consumers, would not be able to challenge the collusion.[23]

In their desire to merge, the companies even offered to sell record labels, music, catalogs, and distribution networks to meet the Commission’s concerns, but this was to no avail. Bearing in mind the above concerns of the Commission, the parties withdrew their merger application.

C. Case Warner/EMI (US FTC)

In the United States, the FTC reached the same conclusion than European authorities, although used different criteria for its evaluation. First, the competition authorities stated that the recorded music market was already highly concentrated. Furthermore, the Commission considered that the proposed merger would have increased the coordinated behavior among the majors.[24]

As for the structural links, the recorded music market was qualified as ruled by a tight oligopoly with a history of price coordination, and formidable impediments to entry.[25] Furthermore, the FTC took into account non-price matters, which are crucial regarding the record industry, for example, entry conditions, and expansion opportunities by independent labels. The FTC was of the view that independents operate in a different market segment than the majors because the majority of independents do not have established artists and catalogs, do neither they own their distribution companies, nor possess any marketing mechanisms.[26] Therefore, it was concluded that were there to be an anticompetitive price increase by the majors; independents would not have been able to defeat it, and, therefore, could not provide strong enough competition to the majors

D. Case Sony/BMG (EU Commission)

The Sony/BMG case was the first test case for the application of the European Commission's new economic approach.[27] The Commission allowed the agreement; subsequently, the Court of First Instance rendered a prohibition judgment. Finally, the Commission produced a second approval of the merger. The first two rulings are thought-provoking because they focus only on the economic analysis of the record industry, completely leaving out the in-depth analysis of non-price competition issues. The non-price issues are discussed for the first time in the reasoning in the course of the third ruling, but the analysis only gave a surface treatment to these matters.[28]

1) Reasons For Approval

The primary justification for the initial approval was insufficient evidence that the four major companies could tacitly coordinate their prices through a collective dominant position.[29]

The first main difference between the Sony/BMG merger, which was allowed, and the other mergers that were disallowed, is that they Sony and Bertelsmann did not merge their music publishing activities, manufacturing and distribution chains. Sony and BMG only joined their Artist & Repertoire departments and were said to be involved in the subsequent marketing and sale of recorded music.[30] The two companies alleged that those activities would not affect competition because the merger was aimed at concentrating on the developing of new artists and the selling of their records.[31]

The Commission analysis showed indications of coordinated behavior; therefore, the analysis goes further to establish whether the markets features facilitated collective dominance. The features chosen were product homogeneity, transparency, and retaliatory measures.[32]

- Product Homogeneity

Regarding product homogeneity, the commission noted that heterogeneity in the content reduced transparency in the market and made tacit collusion more difficult.[33] It seems the analysis relied on the opinion of the parties themselves that recorded music released by majors constituted a heterogeneous product, as each release was unique.

This feature is of utmost importance since from the competition theory point of view; homogenous products may play a crucial role in collusive behavior because it is easier to monitor the prices and output of a single commodity product than to keep track of competitor behavior about hundreds of distinct items.[34] It is not clear why the commission blindly took the parties statements about the product’s heterogeneity and neglected the issues of format homogeneity, particularly when is stated that the format, pricing and marketing strategies are quite standardized.[35]

In the second decision, the Commission paid far greater attention to independent labels. For example, it found that the digital sector created growth opportunities for the independents too.[36] It is possible to agree that the digital segment creates more opportunities for independents, but they are unlikely to be described as growth opportunities. There is no doubt that the Internet represents a more level playing field between the majors and independents. Nevertheless, the Commission stated that “promotion activities, signing up of new artists, vertical integration, and international presence imply that majors will be more able to exploit a given record.”[37]

Obviously, the independents can upload their music on iTunes via a rights aggregator, but there are about 10 million songs in the iTunes store, [38] and unless there is a very expensive PR, TV and radio marketing campaign, it is tough to be noticed by the consumers. Thus, it seems that the Commission has over-simplified the increasing role of the Internet, and it did not come as a surprise when the Commission found no coordinated effects amongst the majors. It is not to say that the Commission acted unlawfully, but rather its analysis lacked the necessary depth into the problem of online sales.[39]

- Transparency of the Recorded Music Market

Since there was enough evidence of steady long-term relationships between majors and distributors, the Commission considered whether the market for recorded music was transparent enough to constitute a state of collective dominance.

What worried the Commission the most were the uniform prices in digital markets. However, as the market investigation showed, it was the Apple corporation that was in control of setting the prices at 0.99 Euro, and therefore, it was outside of the majors' control.[40] Secondly, the Commission found that the rapidity of new entrants and string of changing business models resulted in much uncertainty in the digital market, [41] and as such price-fixing was not an issue.[42]

- Retaliatory Measures

In its final attempt to establish the existence of a collective dominant position amongst the majors, the commission explored whether or not there were any indications that the majors had retaliated against any 'cheating' major in the past, particularly in respect to hit compilation albums.

The Commission could not find an example of how retaliation could take place in the digital world given the nascent stage of the digital market, [43] but for the sake of completeness, it turned to examining the physical formats. It was held that on compilation releases, their success depended on the popularity of the songs included in them, and, therefore, excluding "a major from a compilation could potentially hurt the retaliating majors more than the deviating major."[44] The Commission also cited another reason in support for deeming compilations relatively unimportant was that in the digital world, the customers preferred to create their compilations.[45] That seems logical and correct, but in the same ruling, the Commission noted that the CD market still accounted for about 82 percent of global music sales, [46] and, therefore, compilations still constituted a significant part of the record business.[47]

2) Airtours Case's Influence

The most plausible reason for the approval of the merger seems to be a higher burden of proof set by the Airtours case. The tripartite requirement for a collective dominant position is tough to satisfy, and it left the authorities with less freedom to block a merger, except where collective dominance could be proved or where the transaction would lead to a single dominance, usually meaning a market share of 40 percent. Some scholars refer to collective dominance test as a legal 'straitjacket', which focuses on static considerations while ignoring wider dynamic and behavioral factors.[48]

Authorities looked at typical competition law issues, such as market shares and price. The overall market share of the recorded music business did not change after the merger. However, it would be incorrect to consider the merger only as the mathematical adding up of the two companies' market shares. A combined market share equals combined market power, which allows greater ability and power to dictate market conditions, to lower output, reduce the quality of content, and constraint diversity. Here the Commission followed the guidelines set up in Airtours case, which emphasized the importance of the economic analysis of a merger.[49]

The Commission simply ignored other vital issues, such as physical and online distribution, combined financial, licensing, and lobbying powers of the new venture as well as the doubled advertising and marketing budgets that would result.[50]

Based on the above analysis, the Commission has ruled out the creation or strengthening of a collective dominance in the market for digital distribution of music.

IV. Universal Music Group-EMI Case Analysis

The agreement between UMG-EMI comes at a crucial time for the music industry as it occurs when there is a mature market regarding digital music formats. This scenario implies that the dynamics in assessing the transaction are different from those used in the past.[51]

Universal and EMI contend that the market shares resulting from the merger should not concern and that the power to set prices is in the hands of online distributors or the large chain retailers with whom they must deal. This countervailing market power may well protect against labels' successfully raising marginal prices.[52]

Furthermore, the ongoing problem of piracy, they argued, effectively constrains their ability to raise prices when consumers can easily get music for free via illegal downloads.

Nonetheless, it is necessary to examine whether reducing the number of major record companies to three and giving Universal as much as 40 percent of the music business by some measures will adversely affect competition. Concerns are especially high in the market for online distribution. Will Universal's music catalog be so large as to make it a gatekeeper that can make or break any new online service and allow it to prevent new competitively priced services from launching?[53]

Under most definitions of the relevant markets, this merger will result in a significant degree of concentration. As the merger guidelines make clear, however, this is not the end of the analysis, and the merger may proceed where other competitive factors counteract the potentially harmful effects of increased concentration.[54]

Universal and other proponents of the merger assert that there are reasons to believe such competitive factors are present in the various markets for recorded music. Appropriate variables for valuation would be (1) product and geographic market definition, (2) market shares and market concentration, (3) possible anticompetitive effects and (4) countervailing factors. Let's review each one.[55]

A. Product and Geographic Market Definition

Market definition plays two roles: First, market definition helps specify the line of commerce (product market) and territory (geographic market) in which the competitive concern arises.[56]

The first question concerning the relevant product market for recorded music is whether online and offline (physical sales) formats should be treated as analytically separate markets. According to Fortes, "Although it can be argued that digital and physical formats are merely different methods of distributing the same product, the substitutability between the two different methods may prove low. A teenager that is used to buying music on iTunes would probably never consider buying a CD while a technophobe without an iPod might never consider downloading an individual track."[57]

The cost structure, technical and commercial conditions of the two markets are also very different. In the online segment, licenses are negotiated, whereas offline the record company has to procure production and distribution of the physical product. Therefore online and offline formats are two separate markets, there are significant differences between the distribution of recorded music via physical carrier and its online sale.[58]

The investigation focused on the markets for the wholesale of digital music. In these markets, record companies negotiate licensing deals for their music with customers such as Apple, Amazon, Spotify, Deezer, and Mobile Network Operators such as Vodafone and Telefónica that offer music together with their telephony subscriptions.[59]

The relevant geographic market for the proposed transaction is likely national. Although the major record companies operate on a global basis, they tend to organize and structure themselves and set prices and assess consumer preferences, on a country-by-country basis. Online music licenses are granted, mostly on a national level. As a result, distributors must usually warrant that their customers are residents of a particular country, and they cannot sell products outside national borders.[60] An exception to this rule would be the European Union Pan Licensing Regulations.[61]

B. Market Shares, Market Concentration, and the Herfindahl–Hirschman Index (HHI)

In evaluating market concentration, the investigator considers both the post-merger level of market concentration and the change in concentration resulting from a merger.

The Herfindahl–Hirschman Index (HHI), a measure of the size of firm related to the industry is the most used tool to calculate market concentration during the analysis of a proposed merger.[62] The index is calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers.

The index takes into account the relative size distribution of the firms in a market. It approaches zero when a market has a large number of firms of relatively equal size and reaches its maximum of 10,000 points when a single firm controls a market. It increases both as the number of enterprises in the market decreases and as the disparity in size between those firms increases.[63]

Different jurisdictions have different rules regarding safe harbors and threshold requirements for inquiring during mergers and acquisitions proposals. Let us examine each case related to the music market.

1) HHI Index (United States)

For instance, in the United States, agencies consider markets in which the index is between 1,500 and 2,500 points to be moderately concentrated and qualify markets in which the index is more than 2,500 points to be highly concentrated. Any transactions that increase the index by more than 200 points in highly concentrated markets are likely to enhance market power.[64]

2) HHI Index (Europe)

The European Commission considers a proposal with a post-merger index between 1000 and 2000 and a delta above 250, or a post-merger index above 2000 and a delta above 150, to present competition concerns.[65] Nevertheless, in some exceptional circumstances, agreements below these thresholds will require examination. Regarding market concentration, where either the market share of the undertakings concerned does not exceed 25% in the common market or a substantial part of it; the Commission will not examine the agreement.[66]

3) HHI Index (Japan)

The Japanese legal framework also has several safe harbors that will prevent authorities to evaluate a proposed merger agreement. It states as follows “if the HHI is not more than 2,500, and the market share of the company group after the business combination is not more than 35%, the possibility that a business combination may be substantial to restrain competition is usually thought to be small.”[67]

4) HHI Index in the Sound Recording Market

In the US, at the beginning of 2012, the “Big Four” major record labels controlled almost 90% of the total recorded music market, and the market scored a 2,208 on the Herfindahl–Hirschman Index (2,208 “HHIs”), rendering it “moderately concentrated” according to the Merger Guidelines. A Universal/EMI merger had nearly 40% of the market in 2011, leaving only Sony with approximately 30% and Warner with less than 20% among rival "majors." This 4-3 reduction took the market from "moderately concentrated" to "highly concentrated" under the Guidelines, and at 2,782 HHIs, (an increase of 574 HHIs), the acquisition nearly tripled the HHI-increase threshold for mergers that are "presumed to be likely to enhance market power." Structurally, at least, the transaction is therefore presumptively anticompetitive by a wide margin.[68]

When considering separate physical and digital relevant product markets, the concentrating effect of the proposed transaction does not change. In the physical market, the deal remains a 4-3, with HHIs going from 1943 to 2510, an increase of 557. In the digital market, the agreement likewise continues to be a 4-3, with HHIs going from 2340 to 2917, an increase of 567. Thus, regardless of whether one analyzes a total recorded music market or separate digital and physical recorded music markets, the transaction takes the market in question from moderately concentrated to highly concentrated, and it nearly triples the HHI-increase threshold for acquisitions that are presumed to be likely to enhance market power.[69]

In the Japanese music recording business presents the peculiarity that independent labels control more than sixty percent of the market, creating a very fragmented and competitive environment. A large percentage of its consumption is music in the national language in which for obvious reasons, independent labels have a competitive edge.[70]

In 2012, Avex Group Holdings, an independent, was the market leader with only 16 percent of sales, whereas Sony, Universal, Warner, and EMI have market shares of 14%, 3%, and 5%, respectively.[71] Nowadays, Avex holds 17 percent of sales, whereas Sony remains at 14% while Universal has 12% post-merger percentage as the top three market leaders.[72]

C. **Anticompetitive Effects**

There are two main theories of harm under which competition authorities intervene in a horizontal merger investigation: unilateral and coordinated effects.

A unilateral effect, also known as non-coordinated effect arises where, because of the merger, competition between the products of the merging firms is reduced or eliminated. This circumstance allows the merged entity to exercise unilaterally market power, for instance by profitably raising the price, reducing output, reducing quality or reducing variety as a result of the elimination of competition between the merging parties, thus harming consumers.[73]

Coordinated effects arise where, under certain market conditions, the merger increases the probability that, post merger, merging parties, and their competitors will successfully be able to coordinate (tacit collusion) their behavior in an anti-competitive way.[74]

1) Undertakings' Market Position (Economic and Financial Power)

This point will take notice of the financial wherewithal of the merged entity. Besides, the investigation will take notice of the alternatives available to suppliers and users, their access to supplies or markets, any legal or other barriers to entry, supply, and demand. Furthermore, it will take notice of trends for the relevant goods and services, the interests of the intermediate and ultimate consumers.

- Universal Music: The "Super-Major."

Critics point out that any streaming or online downloading service to be commercially successful should be able to carry the most up to date repertory. Major labels own copyrights for around an 80% of the market, meaning that each company will have two singles in the top 10 chart; therefore, in a licensing deal, a newcomer should secure an agreement with the three major companies, forcing the outsider to get into a deal. Reducing the quantity to three companies will give Universal, at least, a 40% of the list, making futile any effort without the larger company catalog included. The advantage such company will have is undeniable.[75]

In Europe, the investigation concluded that in these markets, the size of a record company increases its bargaining power and hence its ability to increase licensing prices and impose more onerous licensing terms. Furthermore, if Universal were to increase its size significantly after the merger, digital platforms would be likely faced with a significantly increased licensing cost. This fusion would be particularly the case for the smaller platforms that offer innovative ways for consumers to buy and listen to digital music. New digital platforms could be hampered in their ability to launch or expand their services, which would reduce consumer choice for music and harm cultural diversity. Some platforms would be forced to increase the prices that consumers pays for music downloads and streams.[76]

Opponents of the agreement stated that because of the way digital rights are negotiated, one firm, Universal/EMI, would be in a position to pick winners and losers among digital music services. This gatekeeper could block any service that did not give it the deal terms it sought, resulting in fewer choices and higher prices. With Universal/EMI dictating the scope of innovation, and "taxing" it, consumers would bear the consequences.[77]

Some experts stated that the claim of an over-concentrated music market and a "super-major" that could constrain output, raise prices and thwart online distribution channels, thus harming consumers is based on a stylized, theoretical economic model, far too simplistic and ignores the market's commercial realities, the labels' self-interest and the merger's manifest benefits to artists and consumers.[78]

- Popular Music Substitutability

In the US, the commissioners sought to determine whether the transaction would lead to higher costs for interactive streaming consumers or a more limited selection of recorded music. Nevertheless, did not consider the Universal's future position as dangerous to the market because music is more complementary than substitutable in the online context.[79] In the real world, there simply isn't much price competition across music labels or among the artists and songs they distribute. Their catalogs are not interchangeable, and there is so much heterogeneity among consumers and artists ("product differentiation," in the antitrust lingo) that relative prices are a minor factor in consumption decisions: No one decides to buy more Lady Gaga albums because the Grateful Dead's are too expensive. The two are not substitutes, and assessing competitive effects as if they are, simply because they are both "popular music," is not instructive.[80]

2) Elimination of a Potential Competitor

A proposed merger may lessen competition by eliminating a "maverick" firm, i.e., a firm that plays a disruptive role in the market for the benefit of customers.[81] As a major competitor, EMI took particular actions to balance the competitive environment and that were critical to the market at a given moment.[82]

As the fourth largest label in the marketplace, EMI was always looking for opportunities to grow market share. Unlike its bigger competitors, EMI did not only focus on preserving its market share but rather was willing to try the new business methods and strategies. Concerning digital music services, EMI Music was the first major label willing to take risks and innovate. As a result, consumers have reaped the benefit of music that can play on more devices and services than ever before at prices they demand and artists have benefited from having a label more willing to meet their needs in exchange for their talent.[83]

A defense known as repositioning stated that a merger might give rise to a new maverick that might be able to exert as ample a constraint on the potentially coordinating group as the former maverick eliminated by the merger. However, neither Sony nor Warner likely replaces EMI's position as an innovation maverick in a scenario where one major has enough power to function as a gatekeeper to new platforms, as would be the case here. Even if any of these companies decided to support a new digital service, the service could not be long- lasting without Universal's sponsorship.[84]

3) Effects on Independent Labels and Diversity

According to both jurisdictions, remedies, in this case, are far-reaching and sufficiently reduce Universal's size after the merger. Therefore, competitors would not be confronted with a significantly larger Universal that would have had the ability to reduce their access to enough distribution channels for their artists and music. Smaller competitors should have adequate access to consumers.[85]

Although independent labels currently only command a small market share, their recent growth shows their potential to grow into competitors to the major labels.　A major label can stifle this competition by limiting the number of successful digital distribution platforms, which are the very places where independent labels' offerings can compete with those of the major labels on a level playing field.　The major record labels may accomplish this by withholding licenses entirely or by demanding enormous advances; royalties disproportionate to their market share or an equity stake in the digital service as a condition of a license. Any of these tactics threatens the long-term sustainability of independent labels.[86]

D. **Countervailing Factors**

Countervailing factors present an important element in the merger analysis since any compensation against the possible harmful effects of the transaction should be taken into account.

1) Buyer Power

The ability of customers to counter the increase in market power that a proposed merger may create has been a determining factor in approving or disapproving a case.[87] However, investigators do not presume that the presence of powerful buyers alone forestalls adverse competitive effects flowing from the merger.　Even buyers that can negotiate favorable terms may be harmed by an increase in market power.　The outcome depends on choices available to powerful buyers, as well as how those choices would change due to the merger.[88]

Regarding our case study, Lucian Grange, Chairman, and CEO of Universal Music Group stated that companies such as Apple and Google make a minuscule percentage of their revenue from music, and has the financial resources that would allow them to buy and sell the music industry.[89] The executive stated, "in addition to its sales of devices such as iPods, iPhones, and iPads, Apple also has its iTunes store, which sells movies, television shows, audiobooks, Podcasts, applications and related services – in addition to music.　If Apple stops selling our music we go out of business, Apple does not.　We depend on digital services to reach our consumers."[90]

In Europe, the investigation did not confirm that digital customers would have buyer power such as to prevent price increases by Universal.　It confirmed that even a customer such as Apple continues to launch new digital music services and that it is not established that it could defeat price increase or other types of worsening of licensing terms by Universal.

The fact that music may not account for a significant proportion of a customer's revenues does not confer market power on that customer vis-à-vis the record companies if music, as an input, is essential to its business for reasons other than the revenue streams it directly generates. In fact, in this case, its bargaining power will be rather limited, particularly in relation to record companies holding must- have repertoire, since the customer will not be able to threaten to switch to other suppliers"; and music has brand value, driving traffic to stores where consumers may purchase other higher value goods as a result of a visit initially to buy a music product.[91]

2) Effects of Piracy in Market Power

Music piracy is a serious and lasting problem for the industry, and it has contributed to a significant decline in the industry's revenues. However, the risks associated with obtaining music illegally -- moral concern, exposure to possible criminal liability, inferior product quality, and potential exposure to computer viruses, among other things -- make piracy an unattractive option for many consumers.[92]

Indeed, the practice is in decline. It seems especially questionable to suppose that consumers whom today buy music thru legal options would turn to illegal alternatives in the future in response to a small increase in price. For instance, why would consumers who paid $10.40 per digital album suddenly resort to piracy if its price went up to $11? Here, it is important to keep in mind that according to the Merger Guidelines this is the order of magnitude of a price increase that commands the attention of antitrust officials.[93]

As regulators actively fight piracy, it likely will be substantially reduced or eliminated. The proposed transaction must be viewed as permanent, and thus, piracy is no defense.[94] Industry‐generated studies and evidence contradict the idea that piracy removes or even significantly alters the elasticity of demand. A study commissioned by a major label to examine the impact of pricing flexibility in digital single sales found that the elasticity is small and that raising prices by 30 percent increased revenues. If piracy were the strongly disciplinary force that UMG claims, the study of pricing flexibility would have found that raising prices does not increase revenues.[95]

Pirates represent a relatively small fraction of the population and total listeners. Their spending is less than their share of the population or time spent listening, but the record labels "lose" more sales to radio listeners than they do to pirates. Compared to the period when the record labels were claiming losses to piracy that equaled more than half of their projected revenues, piracy is a small problem today. In fact, as discussed below, the early debate over the extent of piracy identified several reasons stating that the difference between listening and purchases may not represent a loss of sales.[96]

Moreover, for the antitrust analysis, the question is whether this is a big, enough part of the market or one that would expand quickly enough to discipline the abuse of post‐ merger market power. Given the overall elasticity calculated for the music market and the small size of this group that seems highly unlikely.[97]

3) Structural Remedies

When a proposed concentration raises competition concerns, antitrust authorities can either block the merger or negotiate commitments with the merging parties to eliminate any such concern. Authorities clear a large proportion of mergers that raise competition concerns subject to commitments. Such requirements can be either behavioral (e.g. termination of exclusive agreements, licensing agreements to provide access to infrastructure) or structural (e.g. divestment of assets or brands to potential or existing competitors). There is, however, a clear preference for structural remedies because these are easier to implement and less difficult to monitor ex-post than behavioral commitments.[98]

The FTC did not include any remedy to protect competition in the United States but noted that the conditions obtained by the European Commission to address the different market conditions in Europe will reduce concentration in the market in the United States as well.[99]

The European Commission establishes as a condition for approving the merger that Universal Music Group compromises to divest about 30 percent of EMI group revenues; approximately 10 percent of sales for the combined entity.[100]

4) Ease to Entry the Market and Prospects Buyers

Ease of entry is one of the factors that any investigator is obliged to take into account while reviewing a merger. United States' antitrust authorities consider three critical factors, namely, whether entry will be likely, timely, and sufficient to prevent the potential anticompetitive effects of a merger, to measure ease to entry possibilities to the market. The general requirement is the ease of entry should be adequate to prevent anticompetitive harm.[101]

In Europe, the investigation stated that Universal has to sell the assets to purchasers that are either already active as a record company, or have a proven record of accomplishment in the music industry. From the commission viewpoint, this requirement will allow for the emergence of a strong competitor to Universal. A prospective competitor can develop the divestment business, including by attracting new artists based on the assets that are divested, and challenge Universal's market position in the future. Furthermore, Universal committed to not re-acquire the assets and not re-sign any artists signed with the relevant entities for ten years.[102]

5) Behavioral Remedies (Most Favored Nation Clause)

Most favored nation (MFN) clauses provide that if a digital customer negotiates an attractive licensing deal with Universal's competitors, this client needs to offer the same terms to Universal.[103]

The effect of these clauses is two-fold. First, the licensing cost of this customer increases, as it needs to provide the favorable conditions to both, Universal and its competitor. Second, Universal's competitors may be constrained in their negotiations with digital customers, as these negotiations take place under the threat that customers need to extend any favorable treatment agreed to Universal as well.[104]

Universal now committed not to enter into any agreement with any digital customer that contains most favored nation clauses. This commitment includes new agreements that Universal negotiates with digital customers and the re-negotiation or renewal of existing agreements. This commitment should assist digital customers in preventing increases in their licensing cost. It also helps competitors in competing effectively with Universal, as they will no longer negotiate with digital customers under the constraints of a most favored nation clause.[105]

According to Bronfman, pundits have concluded that behavioral remedies are unattractive for many reasons. First, the FTC is not set up as a regulatory agency. It is not, and should not be, in the business of ongoing oversight of conduct in the marketplace. Indeed, to the extent that the FTC is market-oriented, behavioral remedies can be perverse, in that, they limit the ability of a firm to make market-based decisions, and they are by necessity applied only to the merged company and not to its competitors. Second, a recent retrospective study of merger remedies has suggested that horizontal mergers subject only to conduct remedies have resulted in much higher price increases than mergers subject to divestitures or outright prohibition.[106] Because neither selective divestitures nor behavioral reliefs are likely to be effective, there is no reason to believe that some combination of the two would be more effective.[107]

Conclusions

Historically the recording industry's consolidation trends have been present to the point that today only three companies control 70 to 80 percent of the market. This tendency has increased in the context of the technological revolution that has enabled greater and easier access to recorded material by consumers and allowed the proliferation of self-made artists. While it is true that the power of the major labels has been reduced still, they fulfill a significant role in the market in aspects such as promotion, marketing, and logistics.

Recently, competition authorities have allowed market concentration among market players based on the compliance with structural and behavioral remedies or based on the consideration of a lack of anticompetitive consequences.[108]

Both European and American regulators approved the purchase of EMI by Universal. The deal was closed after months of heated debate about whether or not the merger would yield too much of a competitive advantage. In Europe, the European Commission (EC) approved it under certain conditions. In the US, the Federal Trade Commission decided that Universal and EMI had different product portfolios and that both companies could complement each other.[109]

The foray of enterprises such as Apple, Spotify, Deezer and Pandora has allowed disqualifying the big recording companies' market share as an important factor from the competition law perspective.　Authorities sided with the argument that is not a feasible business strategy to deny licensing to any new or incumbent digital service for the sake of exercising market control.

It will be interesting to know how the market continues to evolve in the future with the new philosophy adopted by the competition authorities.

End Notes

1 See ANDREA LEURDIJK & OTTILIE NIEUWENHUIS, STATISTICAL, ECOSYSTEMS AND COMPETITIVENESS ANALYSIS OF THE MEDIA AND CONTENT INDUSTRIES: THE MUSIC INDUSTRY. 27 (2012), http://dx.publications.europa.eu/10.2791/796 (last visited Oct 12, 2015).

2 See Billboard biz Staff, *Universal Music-EMI Deal Approved by European Union*, BILLBOARD BIZ ONLINE MAGAZINE, 2012, http://www.billboard.com/biz/articles/news/1083699/universal-music-emi-deal-approved-by-european-union (last visited Dec 27, 2015); See also Andy Gensler, *Universal Music-EMI Deal Approved By Japanese Regulators*, BILLBOARD BIZ ONLINE MAGAZINE, 2012, http://www.billboard.com/biz/articles/news/1084738/universal-music-emi-deal-approved-by-japanese-regulators (last visited Dec 27, 2015); See also Ed Christman, *Universal Music's Acquisition of EMI Approved by Federal Trade Commission*, BILLBOARD BIZ ONLINE MAGAZINE, 2012, http://www.billboard.com/biz/articles/news/1083693/universal-musics-acquisition-of-emi-approved-by-federal-trade-commission (last visited Dec 27, 2015).

3 Joaquin Almunia, UNIVERSAL MUSIC GROUP/EMI MUSIC (PRESS RELEASE) (2012), http://europa.eu/rapid/press-release_SPEECH-12-631_en.htm.

4 See UNITED STATES' COPYRIGHT LAW, 17 U.S.C. § 106 (2011), http://www.copyright.gov/title17/ (Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following: ...(3) To distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; ...(6) In the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission); See DIRECTIVE 2001/29/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 22 APRIL 2001 ON THE HARMONISATION OF CERTAIN ASPECTS OF COPYRIGHT AND RELATED RIGHTS IN THE INFORMATION SOCIETY, 2001 O.J. (L 167/10) 9 Art. 3–4 (2001), http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001L0029&from=EN; See JAPANESE COPYRIGHT LAW (ACT # 48 OF 1970), Art. 10, parr. 1, Art. 23 and Art. 26 (1970).

5 ELIZABETH D. HOCHBERG, FABIAN M. KOENIGBAUER & HOCH, ALLISON B., E-Z REVIEW FOR INTELLECTUAL PROPERTY: AUTHORITATIVE OVERVIEW AND EXPLANATION OF KEY TOPICS FOR PATENTS, TRADEMARKS, AND COPYRIGHT 1 (Alexander P. Errico et al. eds., 1 ed. 2004).
6 Oxana Chiscenco, *The Record Industry and Competition Law in the Twenty-First Century*, September 1, 2009, http://library-collections-search.westminster.ac.uk/primo_library/libweb/action/search.do;jsessionid=7D157D7B3DC027E6C69B70F9F12F0556?mode=Basic&vid=WST_VU1&vl(freeText0)=Concrete+music&fn=search&tab=eprints&.
7 *Id.* at 130.
8 See ANTI-COUNTERFEITING TRADE AGREEMENT (ACTA) (NOT IN FORCE), (2011), https://ustr.gov/acta (A multinational treaty for the purpose of establishing international standards for intellectual property rights enforcement. The agreement aims to establish an international legal framework for targeting counterfeit goods, generic medicines and copyright infringement on the Internet, and would create a new governing body outside existing forums, such as the World Trade Organization, the World Intellectual Property Organization, or the United Nations. At this date, has been ratified just by Japan.).
9 See Richard Whish, *Analytical Framework of Merger Review*, 36 (2002), http://www.internationalcompetitionnetwork.org/uploads/library/doc565.pdf.
10 Guo Wenje, *Merger Control: Comparison of Substantive Criteria for Horizontal Merger Review in Japan, the EU, and the US and Their Implications for China*, March 31, 2011, http://opac.lib.niigata-u.ac.jp/opc/recordID/catalog.bib/NT00001726 (last visited Dec 30, 2015).
11 See Larry Fullerton & Megan Alvarez, *Convergence in International Merger Control*, 26 ANTITRUST MAG. 20, 21 (2012), http://connection.ebscohost.com/c/articles/79787131/convergence-international-merger-control.
12 See Wenje, *supra* note 10 at 89.
13 See Whish, *supra* note 9 at 1.
14 MICHAEL A. CARRIER, INNOVATION FOR THE 21ST CENTURY: HARNESSING THE POWER OF INTELLECTUAL PROPERTY AND ANTITRUST LAW 59 (2011).
15 See Wenje, *supra* note 10 at 73.
16 See Federal Trade Commission v. Warner Communications., et al, 742 F 2d 1156, 13 (1984); See also e.g. JOHN QUALEN, THE MUSIC INDUSTRY: THE END OF VINYL? (1985).
17 UNITED STATES' CLAYTON ACT, 15; 29 U.S.C. § 18 (1914), http://gwclc.com/Library/America/USA/The%20Clayton%20Act.pdf (No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.).
18 FEDERAL TRADE COMMISSION V. WARNER COMMUNICATIONS., ET AL, *supra* note 16 at 15.
19 Chiscenco, *supra* note 6 at 169.
20 See European Commission, COMMISSION OPENS FULL INVESTIGATION INTO TIME WARNER/EMI MERGER (PRESS RELEASE) (2000), http://europa.eu/rapid/press-release_IP-00-617_en.htm; See Commission Investigation 2000/C 180/10 To Review A Concentration Compatibility with the Common Market and the functioning of the EEA Agreement (Case COMP/M.1852 — EMI/Time Warner), 2000 OJ C 180 (2000), http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_1852#; Chiscenco, *supra* note 6 at 170; See also Valerie Rabassa, *Joint Ventures As a Mechanism That May Favour Co-ordination : n An Analysis of the Aluminium and Music Mergers*, 25 EUR. COMPET. LAW REV. 771, 778 (2004), http://katalog.efzg.hr/pagesResults/bibliografskiZapis.aspx?&currentPage=4&searchById=1&sort=0&spid0=1&spv0=natjecanje&xm0=1&selectedId=12025263.
21 Chiscenco, *supra* note 6 at 170.
22 See THE ECONOMICS OF THE ANTITRUST PROCESS, (Malcolm Coate & Andrew Kleit eds., 1 ed. 1996).
23 Chiscenco, *supra* note 6 at 170.
24 *Id.* at 172.
25 See Molly Boast, *Report From the Bureau of Competition Prepared Remarks of Molly S. Boast, Acting Director Bureau of Competition, FTC, before the ABA Antitrust Section (Spring Meeting 2001)*, 13 LOYOLA CONSUM. LAW REV. 312 (2001), http://lawecommons.luc.edu/lclr/vol13/iss4/2.
26 Chiscenco, *supra* note 6 at 172.
27 See Wenje, *supra* note 10; See also Whish, *supra* note 9.
28 Commission Decision Summary 2005/L 062/05 Declaring A Concentration Compatible with the Common Market and the functioning of the EEA Agreement (Case COMP/M.3333 — SONY/BMG I), 2005 OJ 062 (2004), http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_3333; Case T- 342/99 Airtours plc v Commission of the European Communities., 2002 ECR II 146 (2002), http://curia.europa.eu/juris/liste.jsf?language=en&num=T-342/99; See Commission Decision Summary 2008/C 094/09 Declaring A Concentration Compatible with the Common Market and the functioning of the EEA Agreement (Case COMP/M.3333 — SONY/BMG II), 2008 OJ C 094 (2007),

http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_3333; Case C-413/06 P - Bertelsmann AG, Sony Corporation of America v Commission of the European Communities Independent Music Publishers and Labels Association (Impala, an international association), Sony BMG Music Entertainment BV, 2008 ECR I 392 (2008), http://curia.europa.eu/juris/liste.jsf?num=C-413/06&language=en.
29 Chiscenco, *supra* note 6 at 175.
30 CASE COMP/M.3333 — SONY/BMG I) 2005 O.J. L 062, *supra* note 28 at 6.
31 Chiscenco, *supra* note 6 at 175.
32 See CASE COMP/M.3333 — SONY/BMG I) 2005 O.J. L 062, *supra* note 28; See also CASE COMP/M.3333 — SONY/BMG II) 2008 O.J. C 094, *supra* note 28 at 109–114; See also Simon Hirsbrunner, *Rebalancing EC Merger Control: The ECJ's Judgment in Case C-413/06 P (Bertelsmann and Sony)*, 7 ANTITRUST CHRON. COMPET. POLICY INT. (2008), http://www.propuestadesitio.com/rebalancing-ec-merger-control-the-ecjs-judgment-in-case-c-41306-p-bertelsmann-and-sony/ (last visited Jan 10, 2016); See also Caroline Pauwels & Ben Van Rompuy, *The European Commission's Reexamination of the SonyBMG Merger: A Precedent-Setting Attempt to Jump the Fence*, 7 ANTITRUST CHRON. COMPET. POLICY INT. (2008), https://www.competitionpolicyinternational.com/the-european-commissions-reexamination-of-the-sonybmg-merger-a-precedent-setting-attempt-to-jump-the-fence/ (last visited Jan 10, 2016).
33 CASE COMP/M.3333 — SONY/BMG II) 2008 O.J. C 094, *supra* note 28 at 110.
34 See George J. Stigler, *A Theory of Oligopoly*, 72 J. POLIT. ECON. 44 (1964), http://home.uchicago.edu/~vlima/courses/econ201/Stigler.pdf (According to Stigler if the price of the product is determined in a standardized way transactions would be regarded as uniform and the product deemed homogenous, irrespective of that products' content).
35 CASE COMP/M.3333 — SONY/BMG II) 2008 O.J. C 094, *supra* note 28 at 110.
36 *Id.* at 55.
37 *Id.* at 91.
38 *Id.* at 427.
39 Chiscenco, *supra* note 6 at 199.
40 CASE COMP/M.3333 — SONY/BMG II) 2008 O.J. C 094, *supra* note 28 at 51,70,71.
41 *Id.* at 56–58.
42 *Id.* at 132.
43 *Id.* at 123.
44 *Id.* at 140.
45 *Id.* at 456.
46 *Id.* at 443.
47 Chiscenco, *supra* note 6 at 200.
48 See CASE T- 342/99 AIRTOURS PLC V COMMISSION OF THE EUROPEAN COMMUNITIES., *supra* note 28.
49 Chiscenco, *supra* note 6 at 181.
50 *Id.* at 181.
51 See FEDERAL TRADE COMMISSION V. WARNER COMMUNICATIONS., ET AL, *supra* note 16; See European Commission, *supra* note 20; See CASE COMP/M.1852 — EMI/TIME WARNER) 2000 O.J. C 180, *supra* note 20; See CASE COMP/M.3333 — SONY/BMG I) 2005 O.J. L 062, *supra* note 28; See CASE COMP/M.3333 — SONY/BMG II) 2008 O.J. C 094, *supra* note 28.
52 THE UNIVERSAL MUSIC GROUP-EMI MERGER AND THE FUTURE OF ONLINE MUSIC: HEARING BEFORE THE SUBCOMM. ON ANTITRUST, COMPETITION POLICY AND CONSUMER RIGHTS OF THE H. COMM. ON THE JUDICIARY, 112TH CONG., 4 (2012), http://www.judiciary.senate.gov/meetings/postponed__the-universal-music-group-emi-merger-and-the-future-of-online-music (statement of Sen. Mike Lee, Ranking Member, S. Comm. on Antitrust, Competition Policy and Consumer Rights).
53 *Id.* at 1. (statement of Sen. Herb Kohl, Chairman, S. Comm. on Antitrust, Competition Policy and Consumer Rights).
54 FED. TRADE COMM'N & DEPARTMENT OF JUSTICE (DOJ), HORIZONTAL MERGER GUIDELINES (UNITED STATES) § 2.1.3 (2010), http://www.justice.gov/opa/pr/department-justice-and-federal-trade-commission-issue-revised-horizontal-merger-guidelines; EUROPEAN COMMISSION, GUIDELINES ON THE ASSESSMENT OF HORIZONTAL MERGERS UNDER THE COUNCIL REGULATION ON THE CONTROL OF CONCENTRATIONS BETWEEN UNDERTAKINGS 2004/C 31/5 (2004), http://ec.europa.eu/competition/mergers/legislation/merger_law_2013_web.pdf.
55 See Wenje, *supra* note 10 at 73.
56 FED. TRADE COMM'N AND DEPARTMENT OF JUSTICE (DOJ), *supra* note 54 at § 4.
57 FLAVIA T. FORTES, MUSIC INDUSTRY CONSOLIDATION: THE LIKELY ANTICOMPETITIVE EFFECTS OF THE UNIVERSAL/EMI MERGER 4 (2012), http://www.antitrustinstitute.org/content/aai-white-paper-analyzing-emi-universal-music.
58 See CASE COMP/M.3333 — SONY/BMG II) 2008 O.J. C 094, *supra* note 28.

59 See European Commission, MERGERS: COMMISSION CLEARS PROPOSED MERGER BETWEEN UNIVERSAL AND EMI MUSIC SUBJECT TO CONDITIONS-FREQUENTLY ASKED QUESTIONS (PRESS RELEASE) (2012), http://europa.eu/rapid/press-release_MEMO-12-696_en.htm?locale=en.

60 FORTES, *supra* note 57 at 5.

61 See e.g. Ana Eduarda Santos, *Experimenting With Territoriality: Pan-Euopean Music License and The Persistence of Gold Paradigms*, 2009 DUKE LAW TECHNOL. REV. 7 (2009), http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1191&context=dltr; See also e.g. Monika Ermert, EU PARLIAMENT PASSES DIRECTIVE ON COLLECTIVE RIGHTS MANAGEMENT, PAN-EU LICENCES INTELLECTUAL PROPERTY WATCH (2014), http://www.ip-watch.org/2014/02/04/eu-parliament-passes-directive-on-collective-rights-management-pan-eu-licences/ (last visited Dec 14, 2015); See also e.g. Richard Smirke, PAN-EUROPEAN LICENSING HUB ICE INTRODUCED, SIMPLIFYING PROCESS FOR DIGITAL SERVICES BILLBOARD (2015), http://www.billboard.com/articles/business/6752813/ice-licensing-hub-prs-for-music-stim-gema (last visited Dec 26, 2015).

62 See Department of Justice (DOJ), HERFINDAHL-HIRSCHMAN INDEX DOJ ANTITRUST DIVISION (2015), http://www.justice.gov/atr/herfindahl-hirschman-index.

63 See MARK COOPER & JODIE C. GRIFFIN, THE ROLE OF ANTITRUST IN PROTECTING COMPETITION, INNOVATION, AND CONSUMERS AS THE DIGITAL REVOLUTION MATURES: THE CASE AGAINST THE UNIVERSAL-EMI MERGER AND E-BOOK PRICE FIXING 6 (2012), http://papers.ssrn.com/abstract=2460992 (last visited Nov 13, 2015).

64 FED. TRADE COMM'N AND DEPARTMENT OF JUSTICE (DOJ), *supra* note 54 at § 5.2.

65 EUROPEAN COMMISSION, *supra* note 54 at Art. 19 & 20.

66 *Id.* at Art. 18.

67 JAPAN FAIR TRADE COMMISSION (JFTC), GUIDELINES TO APPLICATION OF THE ANTIMONOPOLY ACT CONCERNING REVIEW OF BUSINESS COMBINATION (MERGER GUIDELINES) 20 (2004), http://www.jftc.go.jp/en/legislation_gls/imonopoly_guidelines.html.

68 FORTES, *supra* note 57 at 6.

69 *Id.* at 7.; For European Case see Commission Decision Summary 2013/C 220/06 Declaring A Concentration Compatible with the Internal Market (Case COMP/M.6458 — Universal Music Group/EMI Music), 2013 OJ C 220 (2012), http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_6458 (The market shares percentages are similar to US).

70 See World Intellectual Property Organization (WIPO) (Japan Office), JAPAN'S UNIQUE MUSIC INDUSTRY WORLD INTELLECTUAL PROPERTY ORGANIZATION (WIPO) (2015), http://www.wipo.int/about-wipo/en/offices/japan/news/2015/news_0034.html.

71 See Tokyo Hive Staff, RECORD LABEL AVEX TOPS TOTAL SALES RANKING FOR THE FIRST HALF OF 2012 TOKYO HIVE (2012), http://www.tokyohive.com/article/2012/07/record-label-avex-tops-total-sales-ranking-for-the-first-half-of-2012 (last visited Dec 31, 2015).

72 See Daisuke Kikuchi, *2014 A Groundhog Year for Top Record Labels*, THE JAPAN TIMES, January 20, 2015, http://www.japantimes.co.jp/culture/2015/01/20/music/2014-groundhog-year-top-record-labels/ (last visited Dec 31, 2015); See also Amara Japan, TOP 10 HIGHEST GROSSING RECORD LABELS 2014 AMARA JAPAN (2014), http://aramajapan.com/chart/top-10-highest-grossing-record-labels-2014/16414/ (last visited Dec 13, 2015).

73 See ICN Merger Working Group (Investigation and Analysis), *ICN Merger Guidelines Workbook*, (2006), http://www.internationalcompetitionnetwork.org/uploads/library/doc321.pdf.

74 See *Id.*

75 See CASE COMP/M.6458 — UNIVERSAL MUSIC GROUP/EMI MUSIC) 2013 O.J. C 220, *supra* note 69.

76 See *Id.*

77 See THE UNIVERSAL MUSIC GROUP-EMI MERGER AND THE FUTURE OF ONLINE MUSIC, *supra* note 52 (Statement by Edgar Bronfman Jr., Director at WMG).

78 See e.g. Geoffrey Manne, *Let The Music Play: Critics Of Universal-EMI Merger Are Singing Off-Key*, FORBES, 2012, http://www.forbes.com/sites/beltway/2012/09/20/let-the-music-play-critics-of-universal-emi-merger-are-off-key/; See also e.g. Alex Pham, *An EMI Sale Might Not Raise Antitrust Concerns*, LOS ANGELES TIMES, August 13, 2011, http://articles.latimes.com/2011/aug/13/business/la-fi-ct-music-monopoly-20110814 (last visited Jan 12, 2016).

79 See Vivendi S.A. and EMI Recorded Music (Feinstein Statement), FTC Docket C-N/A Sept. 21 2012 (2012), https://www.ftc.gov/news-events/press-releases/2012/09/ftc-closes-its-investigation-vivendi-sas-proposed-acquisition-emi.

80 See e.g. Manne, *supra* note 78; See also e.g. Pham, *supra* note 78.

81 FED. TRADE COMM'N AND DEPARTMENT OF JUSTICE (DOJ), *supra* note 54 at § 2.1.5.

82 EUROPEAN COMMISSION, *supra* note 54 at Art. 60 (For a merger with a potential competitor to have significant anti-competitive effects, two basic conditions must be fulfilled; the potential competitor must already exert a significant constraining influence or and there must not be a sufficient number of other potential competitors, which could maintain sufficient competitive pressure after the merger).

83 For Detalied Actions See e.g. THE UNIVERSAL MUSIC GROUP-EMI MERGER AND THE FUTURE OF ONLINE MUSIC, *supra*

note 52 (Statement by Gigi B. Sohn, Public Knowledge Group); See also FORTES, *supra* note 57 at 13.
84 See FORTES, *supra* note 57 at 14; See also CASE COMP/M.6458 — UNIVERSAL MUSIC GROUP/EMI MUSIC) 2013 O.J. C 220, *supra* note 69.
85 See VIVENDI S.A. AND EMI RECORDED MUSIC (FEINSTEIN STATEMENT), *supra* note 79; See also CASE COMP/M.6458 — UNIVERSAL MUSIC GROUP/EMI MUSIC) 2013 O.J. C 220, *supra* note 69.
86 COOPER AND GRIFFIN, *supra* note 63 at 33.
87 See JOHN J. PARISI, A SIMPLE GUIDE TO THE EC MERGER REGULATION 15 (2010), https://www.ftc.gov/system/files/attachments/key-speeches-presentations/ecmergerregsimpleguide.pdf.
88 See FED. TRADE COMM'N AND DEPARTMENT OF JUSTICE (DOJ), *supra* note 54 at § 8.
89 See THE UNIVERSAL MUSIC GROUP-EMI MERGER AND THE FUTURE OF ONLINE MUSIC, *supra* note 52 at 5 (Statement by Lucian Grange, Universal Music Group CEO).
90 See *Id.* at 5. (Statement by Lucian Grange, Universal Music Group CEO).
91 See CASE COMP/M.6458 — UNIVERSAL MUSIC GROUP/EMI MUSIC) 2013 O.J. C 220, *supra* note 69 at 436.
92 See COOPER AND GRIFFIN, *supra* note 63 at 28; See CASE COMP/M.6458 — UNIVERSAL MUSIC GROUP/EMI MUSIC) 2013 O.J. C 220, *supra* note 69 at 674–705.
93 COOPER AND GRIFFIN, *supra* note 63 at 19; See FED. TRADE COMM'N AND DEPARTMENT OF JUSTICE (DOJ), *supra* note 54 at 10 (The Agencies most often use a SSNIP [Small but Significant and Non‐transitory Increase in Price] of five percent of the price paid by customers for the products or services to which the merging firms contribute value. However, what constitutes a “small but significant” increase in price, commensurate with a significant loss of competition caused by the merger, depends upon the nature of the industry and the merging firms' positions in it, and the Agencies may accordingly use a price increase that is larger or smaller than five percent.) .
94 See FORTES, *supra* note 57 at 24.
95 COOPER AND GRIFFIN, *supra* note 63; See Brett Danaher et al., *An Empirical Analysis of Digital Music Bundling Strategies*, 60 MANAG. SCI. 1413 (2014), http://pubsonline.informs.org/doi/abs/10.1287/mnsc.2014.1958 (last visited Jan 5, 2016).
96 COOPER AND GRIFFIN, *supra* note 63 at 20.
97 *Id.* at 21.
98 See Thibaud Vergé, *Horizontal Mergers, Structural Remedies, and Consumer Welfare in a Cournot Oligopoly with Assets*, 58 J. IND. ECON. 723 (2010), http://onlinelibrary.wiley.com/doi/10.1111/j.1467-6451.2010.00432.x/abstract (last visited Jan 5, 2016).
99 See VIVENDI S.A. AND EMI RECORDED MUSIC (FEINSTEIN STATEMENT), *supra* note 79.
100 See Christman, *supra* note 2.
101 FED. TRADE COMM'N AND DEPARTMENT OF JUSTICE (DOJ), *supra* note 54 at § 9.
102 See CASE COMP/M.6458 — UNIVERSAL MUSIC GROUP/EMI MUSIC) 2013 O.J. C 220, *supra* note 69.
103 *Id.*
104 *Id.*
105 *Id.*
106 THE UNIVERSAL MUSIC GROUP-EMI MERGER AND THE FUTURE OF ONLINE MUSIC, *supra* note 52 at 6.
107 THE UNIVERSAL MUSIC GROUP-EMI MERGER AND THE FUTURE OF ONLINE MUSIC, *supra* note 52.
108 See European Commission, *supra* note 59; See also VIVENDI S.A. AND EMI RECORDED MUSIC (FEINSTEIN STATEMENT), *supra* note 79.
109 See Mariana Migliore & Megan Dervin-Ackerman, *The Merger of Universal and EMI*, October 2012 MUSIC BUS. J. BERKLEE COLL. MUSIC (2012), http://www.thembj.org/2012/10/the-merger-of-universal-and-emi/ (last visited Dec 10, 2015).

主指導教員（沢田克己教授）、副指導教員（駒宮史博教授・鈴木正朝教授）