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Is Music the Next eBooks? An Antitrust Analysis of Apple's Conduct in the Music Industry

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Is Music the Next eBooks? An Antitrust Analysis of Apple's Conduct in the Music Industry

Alexa Klebanow
as advised and edited by
*Tim Wu**

Over the last twenty years, two waves of technological change have transformed the way people purchase and listen to music. First, digital downloads displaced physical sales of albums. More recently, digital downloads, once the primary way to gain access to digital music, have come to be challenged by streaming services. Apple, a leader in the digital download market with iTunes, has engaged in various strategies to meet the challenge. This Note specifically focuses on two types of conduct: Apple's pressure on labels to enter into exclusive license agreements, also known as windowing, and Apple's pressure on the market to abandon streaming options like Spotify's "freemium" service.

This Note conducts an antitrust analysis of windowing in the music industry and also examines the legality of eliminating the advertising-based "free" streaming model. The Note engages in an examination of Section 1 and Section 2 Sherman Act claims against Apple for these exclusionary acts based on parallel exclusion, joint refusal to deal, price maintenance, and monopoly maintenance theories. We believe of greatest concern is the potential elimination of the free advertising based model, which may be a per se violation of the antitrust laws.

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INTRODUCTION

At the severe risk of stating the obvious, the music industry has undergone significant changes over the last two decades.¹ We begin our analysis in the 2010s, at a point where Apple established a dominant and profitable presence in digital music downloads with its iTunes download store.² Over the last decade, Apple has come to face a serious challenge by a new generation of “streamers”—companies like Pandora and Spotify that use different technologies and licensing strategies to offer unlimited music for a low monthly price.

As streaming companies like Spotify continue to rise in popularity, Apple is responding in increasingly aggressive ways. The question addressed by this Note is simple: At what point will conduct by Apple or the major music labels violate the American antitrust laws?

In this Note, we consider two of the major ways, *inter alia*, in which Apple may attempt to damage the prospects of its streaming competitors.³ First, Apple can seek and has sought, in various ways, to restrict the supply of music to its streaming competitors. Most notably, Apple executives pressure labels to provide Apple with exclusives—that is, to exclusively launch their content first on Apple before making it available on other platforms.⁴ This practice is sometimes referred to as “windowing.”⁵

As of this writing, Apple has already struck various exclusive deals. Beyoncé’s fifth studio album, *Beyoncé*, which was released in December 2013, was offered exclusively on iTunes for one week and became the fastest selling album in the digital store ever at that time.⁶ More recently, Apple and U2 struck up a deal for

1. David Brown, *Survival of the Fittest in the New Music Industry*, ROLLING STONE (Nov. 8, 2012), <http://www.rollingstone.com/music/news/survival-of-the-fittest-in-the-new-music-industry-20121108> [http://perma.cc/TQP4-44XY].

2. For earlier parts of the story, see TIM WU & JACK GOLDSMITH, WHO CONTROLS THE INTERNET?: ILLUSIONS OF A BORDERLESS WORLD 105–128 (2006).

3. In particular, this Note does not address the use of Apple’s iOS platform.

4. Dawn C. Chmielewski & Randy Lewis, *Apple is Asking Record Labels for Exclusive iTunes Releases*, L.A. TIMES (Mar. 10, 2014, 4:35 PM), <http://www.latimes.com/entertainment/envelope/cotown/la-et-ct-apple-record-labels-itunes-20140311-story.html> [http://perma.cc/G56V-YR23]; Ed Christman & Alex Pham, *Apple Press Labels For More ‘Beyoncé’-Type Exclusives in Wake of Downloads’ Slide*, BILLBOARD (Feb. 28, 2014, 2:22 PM), <http://www.billboard.com/biz/articles/news/record-labels/5922966/apple-presses-labels-for-more-beyonce-type-exclusives-in> [http://perma.cc/C52D-Y7LD].

5. “Windowing” is defined as the act of holding back a new release from other digital services. It is the practice of staggering a title’s release-date so consumers have access at different times on different services. See Glenn People, *Exclusive: Windowing Hurts Sales, Increases Piracy, Says Paper Released by Spotify*, BILLBOARD (July 17, 2013, 11:48 AM), <http://www.billboard.com/biz/articles/news/digital-and-mobile/2032983/exclusive-windowing-hurts-sales-increases-piracy-says> [http://perma.cc/A6TW-EEZ6].

6. Keith Caulfield, *Beyoncé Fastest Selling Album Ever in iTunes Store*, BILLBOARD (Dec. 16, 2013), <http://www.billboard.com/articles/news/5839825/beyonce-fastest-selling-album-ever-in-itunes-store-828773-in-three-days> [http://perma.cc/BJA8-KGGD]; Chmielewski & Lewis, *supra* note 4; Christman & Pham, *supra* note 4.

\$100 million to initially launch U2's new album exclusively on iTunes.⁷ Taylor Swift also recently generated significant attention by removing her song catalog from Spotify, which many believe was an effort to maximize sales on iTunes.⁸ In November 2014, Taylor Swift's label, Big Machine Label Group, a subsidiary of Universal Music Group (UMG), withdrew the entire Taylor Swift catalog from Spotify while keeping her music on other streaming services owned by Apple including Beats Music and iRadio.⁹

These exclusive deals raise the question as to whether they may reach a point where Apple is in a position to maintain its dominance by foreclosing competition in the industry.¹⁰ If certain content is only available through Apple products, other services may experience a decline in users and ultimately be forced out of business.

Second, Apple could attempt to weaken competitors by pressuring labels to ban its "free" options.¹¹ Spotify's "freemium" (ad-supported) tier, for example, poses a real challenge to Apple as it launches its own pay-for-access streaming service. As a result, Apple has reportedly placed pressure on the music labels to refuse to sell content to streaming companies who then make the music available on an ad-revenue basis.¹² In other words, Apple could attempt to force its competitors to abandon an entire business model (ad-share revenue) in order to maintain the dominance of paid downloads and aid its own version of streaming. Given that Apple remains the dominant seller of music, the successful elimination of a business model relied on by competitors would have clear consequences for competition in the industry.

This Note engages in the first in-depth analysis of the antitrust implications of windowing and ad-revenue bans in the music industry. As with any antitrust analysis, the challenge here is to distinguish legitimate methods of competition from anticompetitive conduct. This Note argues that Apple's exclusive deals and weakening of competitors' business models may have anticompetitive effects in the music industry. Pressuring labels to ban ad-revenue based access poses even more serious questions as a potential per se violation of Section One of the Sherman Act.

7. Nathan Ingraham, *U2 Releases Its New Album for Free Today Exclusively on iTunes*, THE VERGE (Sept. 9, 2014, 2:56 PM), <http://www.theverge.com/2014/9/9/6126711/u2-releases-its-new-album-for-free-today-exclusively-on-itunes> [https://perma.cc/DQW8-5UL4?type=source].

8. Lucas Shaw, *What's Behind Taylor Swift's Decision to Drop Spotify*, BLOOMBERG (Nov. 4, 2014), <http://www.bloomberg.com/news/articles/2014-11-04/what-s-behind-taylor-swift-s-decision-to-drop-spotify> [http://perma.cc/F3NM-EK82]; Jim Farber, *Taylor Swift to Spotify: You Can't Stream '1989' Or Any of My Music*, NY DAILY NEWS (Nov. 3, 2014), <http://www.nydailynews.com/entertainment/music/taylor-swift-fights-spotify-article-1.1997766>.

9. Hannah Karp & Sven Grundberg, *Taylor Swift Pulls Her Music from Spotify*, WALL ST. J. (Nov. 4, 2014, 12:25 AM), <http://online.wsj.com/articles/spotify-says-taylor-swift-pulls-her-music-from-service-1415035751?tesla=y&ref=/home-page>.

10. This Note acknowledges that not all effects on the industry from exclusive agreements are negative. From the rights holder perspective, windowing could provide labels and artists with a bargaining power tool to get a streaming compensation model that they believe is more aligned with what they deserve.

11. Micah Singleton, *Apple Pushing Music Labels to Kill Free Spotify Streaming Ahead of Beats Relaunch*, THE VERGE (May 4, 2015), <http://www.theverge.com/2015/5/4/8540935/apple-labels-spotify-streaming> [https://perma.cc/47KR-RBXP?type=source].

12. *Id.*

Part One of this Note will provide background information on the music market, followed by an examination of specific conduct in Part Two. Part Two will focus on two types of conduct (without any claim to being comprehensive): (1) Apple's increasing practice of signing exclusive licenses with particular artists to create windows in the music distribution world and (2) Apple's pressure on labels to ban "free" streaming options—that is, streaming to customers that is based on an ad-revenue model. Part Three will engage in an antitrust analysis of this conduct, under joint refusal to deal/parallel exclusion, price maintenance/monopoly, and monopoly maintenance theories. We conclude that windowing, if it remains limited in time and scope, may not have serious anticompetitive consequences, whereas the second type of conduct raises serious questions of a per se violation of Section One of the Sherman Act.

I. BACKGROUND

A. THE LANDSCAPE

As recently as the late 1990s, most Americans listened to music through physical media, whether the compact disc or vinyl record.¹³ Nonetheless, after the development of the MP3 music file, it became obvious that music could be easily and efficiently distributed online. The major labels, however, stuck to physical media, leading to the rise of uncompensated peer-to-peer file sharing, as offered by firms like Napster or Kazaa, which for a time threatened to become the norm.¹⁴ Finally, in 2003, Apple and the major labels agreed to offer an online alternative to the peer-to-peer sites and launched the iTunes Music Store.¹⁵ iTunes, the brainchild of Apple CEO Steve Jobs, was unique at the time in that the store provided consumers with a way to legally access digital music by purchasing and downloading albums and individual tracks and also provided the industry with various protections against piracy.¹⁶ iTunes proved popular and as the peer-to-peer file sharing services went bankrupt after losing copyright litigation,¹⁷ it quickly grew dominant,¹⁸ becoming the "sole king reigning over the digital music realm"¹⁹

13. Jacob Ganz, *The Decade in Music: The Way We Listen Now*, NATIONAL PUBLIC RADIO (Dec. 2, 2009), <http://www.npr.org/2009/12/02/121023882/the-decade-in-music-the-way-we-listen-now>.

14. Stephen Witt, *The Man Who Broke the Music Business*, THE NEW YORKER (Apr. 27 2015), <http://www.newyorker.com/magazine/2015/04/27/the-man-who-broke-the-music-business>; Richard Nieva, *Ashes to Ashes, Peer to Peer: An Oral History of Napster*, FORTUNE (Sept. 5, 2013), <http://fortune.com/2013/09/05/ashes-to-ashes-peer-to-peer-an-oral-history-of-napster/>.

15. APPLE LAUNCHES THE iTUNES MUSIC STORE (Apr. 28, 2003), <http://www.apple.com/pr/library/2003/04/28Apple-Launches-the-iTunes-Music-Store.html> [<http://perma.cc/7N67-M6LS>].

16. *Id.*

17. Domingo Karsten, *A Look At Internet History: The Most Popular Websites from the Past*, TECH.CO (Sept. 6, 2015), <http://tech.co/internet-history-websites-wrote-2015-09> [<http://perma.cc/NS53-XQVX>].

18. Companies like Nielsen providing data and sales tools to music industry professionals for years have incorporated digital sales into its reports, as the industry grew to accept digital sales as a significant revenue source. In 2012, Billboard, the company for decades who has defined music hits with its song charts, started counting digital sales and online streams along with radio airplay,

and the “world’s largest music store.”²⁰ In 2013, at its height, Apple controlled about 75% of the digital music market.²¹

But the landscape has changed in the last five years. In a classic example of Schumpeterian competition, Apple has begun to face its own innovative challengers.²² Namely, iTunes has faced increasingly intense challenge from various types of music “streaming” firms, including Spotify, Rdio, Rhapsody, Pandora, Google, and Tidal. Streaming models come in two varieties (arising from a distinction in the Copyright Act of 1976).²³ Some using the “Pandora” model more or less replicate radio and allow the user to choose a genre of music, but not the particular songs. The companies using this model rely on a compulsory license under 17 U.S.C. § 115 to gain access to the music. An alternate model is the Spotify model which allows users to choose individual songs from a broad catalogue of music. Companies following this model rely on licenses individually negotiated with the labels. Both models offer either advertising-supported options that are free to the user (also known as “freemium”), or subscription models where access is based on a user’s monthly payment.

Streaming firms, or streamers, offer several important distinctions and advantages as compared to Apple’s iTunes. The first major distinction is a broader range of music—streamers provide access to an extensive catalog of published music. The second distinction is the ability to access that catalogue from almost anywhere with the click of a button, sometimes even without an Internet connection. Finally, streamers provide an option for consumers who are unwilling to pay in a traditional sense but are willing to listen to advertisements—the “freemium” model. Many consumers prefer streaming to purchasing individual albums or tracks; consequently, streaming has reengaged an entire population of individuals who previously were reluctant to purchase music. Many see streaming as the future; as *Billboard* Editor-at-Large Joe Levy says, “We are moving to a streaming economy.”²⁴

The industry data provides evidence for the shift toward streaming models. Since the rise of streamers, Apple has experienced significant declines in iTunes’ market share, reporting 63% of the market of digital downloads in 2013, down

acknowledging that a stream on Spotify or a download on iTunes are all a meaningful part of the fan experience. See James McKinley Jr., *Changes To Charts By Billboard Draw Fire*, N.Y. TIMES (Oct. 26, 2012), http://www.nytimes.com/2012/10/27/arts/music/billboards-chart-changes-draw-fire.html?pagewanted=all&_r=0.

19. *The Music Industry: Believing in Streaming*, THE ECONOMIST (Mar. 22, 2014), <http://www.economist.com/news/business/21599350-record-bosses-now-hope-online-streaming-could-become-big-enough-business-arrest-their>.

20. Christman & Pham, *supra* note 4.

21. Peter Kafka, *Apple Still Has Giant Advantage in Digital Music, With 75 Percent of the Market*, ALL THINGS DIGITAL (June 20, 2013, 1:57 PM), <http://allthingsd.com/20130620/apple-still-has-a-giant-advantage-in-digital-music-with-75-percent-of-the-market/> [<http://perma.cc/Y2TN-WWXV>].

22. Herbert J. Hovenkamp, *Schumpeterian Competition and Antitrust*, U. OF IOWA LEGAL STUDIES RESEARCH PAPER NO. 08-43 (2008).

23. 17 U.S.C. § 115.

24. Farber, *supra* note 8.

from 70% in 2010.²⁵ In January 2014, sales of digital albums and tracks fell for the first time since the iTunes store launched in 2003.²⁶ The entire industry experienced more than a 13% decrease in downloads in the first quarter of 2014,²⁷ ending 2014 with a decline of 9% in paid downloads of albums and 12% in paid songs.²⁸ For the first time since the advent of digital sales, the format's decline resembles the now-routine annual percentage decline for the CD.²⁹ Meanwhile, the use of streaming increased in 2014 by 54%.³⁰ The music companies in their first quarter 2015 earnings reported substantial revenue from streaming. CEO of Warner Music Stephen Cooper announced in a recent earnings call that Warner generated more money from streaming than from digital downloads in the first quarter, and streaming revenue increased by over 33% while digital sales revenue increased by only 7%.³¹ Vivendi and Universal Music Group also announced in their first quarter earnings that "growth in subscription and streaming revenues more than offset the decline in both digital download sales and physical sales."³² And, in a recent presentation at the Music Biz Conference in Nashville, Will Page, Spotify's director of economics, revealed that Spotify accounted for one out of every ten dollars that record labels had earned in the first quarter of 2015.³³

25. Andy Fixmer, *Apple's 10 Year Old iTunes Loses Ground to Streaming*, BUSINESS WEEK (Apr. 25, 2013), <http://www.businessweek.com/articles/2013-04-25/apples-10-year-old-itunes-loses-ground-to-streaming>. See also Greg Keizer, *Apple Controls 70% of the U.S. Music Download Biz*, COMPUTER WORLD (May 26, 2010, 3:57 PM), <http://www.computerworld.com/article/2518165/technology-law-regulation/apple-controls-70-of-u-s-music-download-biz.html>; Ed Christman, *What's Behind the Digital Download's Decline and Can Streaming Save the Day?* BILLBOARD MAGAZINE (Jan. 18, 2014), <http://www.billboard.com/biz/articles/news/record-labels/5869521/whats-behind-the-digital-downloads-decline-and-can-streaming>. This decline may be attributed to the fact that iTunes remains unavailable on Android operated mobile devices, while consumers are turning to mobile for music more frequently and the Android mobile operating system continues to grow in popularity. See Rolf Winkler, *Google's Android Begins to Top Out*, WALL ST. J. (Nov. 2, 2014), <http://www.wsj.com/articles/googles-android-begins-to-top-out-1414972604>.

26. Ed Christman, *Nielson's Q1 Numbers: Sales Down, Streams Up*, BILLBOARD (Apr. 7, 2014, 12:43 PM), <http://www.billboard.com/biz/articles/news/legal-and-management/6041328/nielsen-q1-numbers-sales-down-streams-up>.

27. J.J. McCorvey, *Why Does Apple Need Beats? It's All About the Music*, FAST COMPANY (Aug. 4, 2014, 6:00 AM), <http://www.fastcompany.com/3033501/why-does-apple-need-beats-its-all-about-the-music> [<http://perma.cc/GK4H-VMBH>].

28. Ethan Smith, *Music Downloads Plummet in U.S., but Sales of Vinyl Records and Streaming Surge*, WALL ST. J. (Jan. 1, 2015, 1:09 AM), <http://www.wsj.com/articles/music-downloads-plummet-in-u-s-but-sales-of-vinyl-records-and-streaming-surge-1420092579>.

29. Christman, *supra* note 26. See also Ben Sisario, *Downloads in Decline as Streaming Music Soars*, N.Y. TIMES (July 3, 2014), http://www.nytimes.com/2014/07/04/business/media/sharp-rise-seen-in-music-streaming-as-cd-sales-and-downloads-plummet.html?_r=0.

30. Sisario, *supra* note 29.

31. Brad Reed, *A Win for Apple: Spotify Will Reportedly Severely Restrict Its Free Streaming Tier*, BGR MEDIA (May 15, 2015), <http://bgr.com/2015/05/15/apple-beats-music-vs-spotify-free-streaming/> [<http://perma.cc/D8LW-9QK4>].

32. Andrew Flanagan, *Universal Music Group and Vivendi See Revenue Up in First Quarter*, BILLBOARD (May 12, 2015), <https://www.billboard.com/articles/business/6561347/universal-music-group-and-vivendi-see-revenue-up-in-first-quarter> [<https://perma.cc/684B-4GKG?type=source>].

33. Glenn Peoples, *Spotify Was 10 Percent of U.S. Label Revenue in First Quarter, Says Will Page*, BILLBOARD (May 13, 2015), <http://www.billboard.com/articles/business/6561447/spotify-ten-percent-label-revenue-first-quarter-2015-will-page> [<http://perma.cc/FJQ6-BYQ8>].

Despite the decline of digital music downloads, Apple still maintains its position as a recognized leader in the distribution of digital music, particularly given the power of Apple's brand, other products, lock-in strategies, and famous cash reserves.³⁴ Yet, as suggested by the rise of streaming, Apple's market position has been threatened by changes in how consumers listen to music. Apple has reacted to the challenge presented by streamers in several ways. First, Apple launched its iRadio service in June 2013,³⁵ which follows the Pandora model but came to market nearly a decade after Pandora.³⁶ In 2014, Apple acquired Beats Electronics for \$3.2 billion, which was considered by some as a "bid to stay relevant in the music world."³⁷ And most recently, in 2015, Apple launched "Apple Music," an on-demand streamer at a \$9.99 per-month price point, with a three-month free trial period, but no "freemium" ad-revenue model.³⁸ Apple Music, unlike Spotify's application, comes pre-installed on new Apple products. With the entire Apple ecosystem and integration capabilities that exist between iCloud and iTunes, Apple is in a position to create a serious threat to its streaming rivals.³⁹

But Apple is a company with over \$100 billion in revenue and some of the largest profits in corporate history; why would it care about competition in the relatively small market for streaming music? iTunes is, of course, only one Apple product among many, and not even close to the most profitable. To many sources, the answer to this question is that dominance in music distribution is the "cornerstone of Apple's content strategy and is key to facilitating Apple's larger business goals."⁴⁰ Eddy Cue, Apple's senior vice president of Internet Software and Services, says, "Music is such an important part of Apple's DNA and always will be."⁴¹ Music is strategically important to Apple because it helps keep users locked

34. See, e.g., Diane Bartz & Julia Love, *FTC Exploring Apple Rules for Streaming Music Rivals in App Store*, REUTERS (July 10, 2015), <http://www.reuters.com/article/2015/07/11/us-apple-music-antitrust-idUSKCN0PL03O20150711> (citing Apple's restrictions on in-app advertising as potential antitrust concerns).

35. APPLE ANNOUNCES iTUNES RADIO (June 10, 2013), <https://www.apple.com/pr/library/2013/06/10Apple-Announces-iTunes-Radio.html> [<https://perma.cc/3SSP-AMDQ>].

36. Charles Arthur, *iTunes Radio: Apple Reveals Spotify Rival – and Says it Will be Free to iPhone and iPad Users*, THE GUARDIAN (June 11, 2013), <http://www.theguardian.com/technology/2013/jun/10/apple-unveils-itunes-radio> [<http://perma.cc/V5CP-SD8K>].

37. McCorvey, *supra* note 27, at 2.

38. Nelson Granados, *Apple Music Launch: Too Bad Steve Jobs Is Not Around*, FORBES (June 30, 2015), <http://www.forbes.com/sites/nelsongranados/2015/06/30/apple-music-launch-too-bad-steve-jobs-is-not-around>.

39. Tony Bradley, *3 Reasons Apple Streaming Music Will Be Serious Threat to Rival Services*, FORBES (Feb. 5, 2015), <http://www.forbes.com/sites/tonybradley/2015/02/05/3-reasons-apple-streaming-music-will-be-serious-threat-to-rival-services/2/>.

40. See *The Universal Music Group/EMI Merger and Future of Online Music: Hearing Before the Senate Subcommittee on Antitrust, Competition Policy and Consumer Rights*, 112th Cong. 10 (2012) (statement of Edgar Bronfman, Director, Warner Music Group). See also Douglas A. McIntyre, *Why Apple is Now No.1 Company in the World*, NBC NEWS (Aug. 10, 2011, 4:27 PM), http://www.nbcnews.com/id/44090899/ns/business-us_business/t/why-apple-now-no-company-world/ [<http://perma.cc/44H8-EZM3>]. See generally Walter Isaac, STEVE JOBS (2013). See also *supra* Introduction.

41. Dale Eisinger, *Taylor Swift Dumps Spotify, Igniting Turf War Between Spotify and Apple*, THE DAILY BEAST (Nov. 3 2014), <http://www.thedailybeast.com/articles/2014/11/03/taylor-swift-dumps-spotify-igniting-turf-war-between-spotify-and-apple.html> [<http://perma.cc/EYJ4-VGUS>].

in to Apple's highly profitable iPhone, iPad, and computer products. Consider, for example, the fact that it can be harder or inconvenient for users to switch to an Android phone, made by Samsung, when their music was already purchased from Apple and remains most easily accessible from an Apple device.⁴² In contrast, a Spotify user can switch between different operating systems and still access the same music. Because music allows Apple to attract and retain customers throughout the hardware upgrade cycle, Apple is extremely eager to meet the competition from the streamers.⁴³

B. MARKET STRUCTURE & MAJOR PLAYERS

The music industry is an industry with a history of anticompetitive behavior in violation of antitrust law and fair trade practices.⁴⁴ As already discussed, Apple is the clear leader in non-streaming digital downloads, having previously "won the download market,"⁴⁵ but has, over the 2010s, faced a weakening of its market position. Three major record companies dominate the music industry, down from the six that existed fifteen years ago.⁴⁶ In 2013, Universal Music Group (UMG) occupied 38.9% of the market, Sony Music Entertainment controlled 29.5%, and Warner Music Group held 18.7%.⁴⁷ Together these companies control about 87% of global music sales and are the rights holders to a comprehensive back catalog of song recordings.⁴⁸

Streaming is a more competitive industry, with a range of companies including Spotify, Rdio, Rhapsody, Pandora, Tidal, and Google (with Google Play, Songza, and YouTube).⁴⁹ As discussed earlier, within streaming there is a divide between companies offering online radio services, like Pandora, and other services offering on-demand listening, like Spotify or Rdio.⁵⁰ If one considers all of these services

42. Christman & Pham, *supra* note 4.

43. Eisinger, *supra* note 41, at 2.

44. *Music Licensing under Title 17 – Part 1: Hearing Before the House Committee on the Judiciary Subcommittee on Courts, Intellectual Property and the Internet*, 113th Cong. 3 (2014) (statement of Lee Knife, Executive Director of the Digital Media Association), http://judiciary.house.gov/_cache/files/6e799edc-1cb8-4365-a9bb-e48c32b91353/113-105-88240.pdf.

45. Shirley Halperin & Ed Christman, *Apple Doesn't Want to Compete – It Wants To Own the Record Business*, BILLBOARD (Feb. 13 2015), <http://www.billboard.com/biz/articles/news/digital-and-mobile/6472756/apple-doesnt-want-to-compete-it-wants-to-own-the-record> [http://perma.cc/Y468-YP5Y].

46. THE ECONOMIST, *supra* note 19, at 3.

47. Christman, *supra* note 25, at 4.

48. Matt Pollock, *Three Huge Record Labels Are Preparing to Take a Lot of Money From Their Artists*, MIC (July 17, 2014), <http://mic.com/articles/93502/three-huge-record-labels-are-preparing-to-take-a-lot-of-money-from-their-artists> [http://perma.cc/SHZ7-SJWK].

49. *Id.* See also Glenn Peoples, *Google & Apple Show Strong Potential For Digital Music Apps in New comScore Mobile Report*, BILLBOARD, (Aug. 22 2014), <http://www.billboard.com/articles/business/6229137/google-apple-digital-music-apps-comscore-mobile-report> [http://perma.cc/5JLR-Q23J].

50. Some "on demand services" still may not be entirely on demand for all users based on subscription type. For example, on Spotify, as a free subscriber on mobile, a user does not have the ability to play songs on demand.

to constitute the streaming industry, Pandora is the market leader with 31% market share.⁵¹ The newest entrant in the streaming market is, of course, Apple with its Apple Music product, which launched on June 30, 2015.⁵² As a new competitor, its market share has yet to be established.

Understanding the digital music service industry is complicated by the entanglement and interdependence of the various parties. The record labels are invested in music streaming services, demanding equity as part of the deal for licensing agreements.⁵³ The major labels have equity in both Beats and Spotify, and recent negotiations between the labels and SoundCloud also involved exchanging equity.⁵⁴

Music is, of course, protected by copyright law and, under copyright law, streamers differ in how they gain access to the music that they provide to end-users.⁵⁵ Pandora relies on a compulsory license and a statutory-set fee, which means that it cannot be harmed or excluded by exclusive deals between Apple and the labels.⁵⁶ However, all other types of streamers must negotiate with the labels for licenses to their catalogs of sound recordings.⁵⁷

C. MARKET DEFINITION

We have, to this point, relied on the music industry's market definition in providing this background information, but it is well recognized that economic market definitions used in antitrust law can deviate from industry usage.⁵⁸ We will consider three main alternative market definitions.

51. Philip Elmer-DeWitt, *iTunes Radio Overtakes Spotify, Gaining On iHeartRadio In U.S.*, FORTUNE (Mar. 11, 2014, 10:05 AM), <http://fortune.com/2014/03/11/itunes-radio-overtakes-spotify-gaining-on-iheartradio-in-u-s/> [<http://perma.cc/XCZ9-CL64>].

52. Darrell Etherington, *Apple Music Launches With iOS 8.4 At 8 AM PT On June 30*, TECHCRUNCH (June 29, 2015), <http://techcrunch.com/2015/06/29/apple-music-launches-with-ios-8-4-at-8-am-pt-on-june-30/> [<http://perma.cc/7VXY-SDA2>].

53. Adam Satariano, *SoundCloud Said to Near Deals With Record Labels*, BLOOMBERG (July 10, 2014, 6:54 PM), <http://www.bloomberg.com/news/2014-07-10/soundcloud-said-to-near-deals-with-record-labels.html> [<http://perma.cc/2EL7-CZPQ>].

54. *Id.*

55. 17 U.S.C. § 115. Pursuant to § 115, radio streaming services like Pandora are governed by the compulsory license provision, which entitles these services to automatically obtain the license for a sound recording as long as they pay a royalty rate set by the government and comply with the processes outlined in § 115; they do not need to negotiate with the record labels. On the other hand, companies like Spotify are not governed by the compulsory license provision, and must negotiate with the labels for their licensing rates. Because companies like Spotify are not governed by the compulsory provision, exclusive dealing contracts specifically hurt these companies because their agreements are completely negotiated with the labels and could be limited by exclusive windowing agreements.

56. *Id.*

57. Digital music providers need licenses for all aspects of the music, including compositions and sound recordings. Typically, the labels possess the licenses for the sound recordings, and for the purposes of this note the focus will be on sound recording licenses that the labels manage. See 113th Cong. 3, *supra* note 44.

58. U.S. Dep't of Justice & F.T.C., *Commentary on the Horizontal Merger Guidelines 12–13* (Mar. 2006), <http://www.justice.gov/atr/commentary-horizontal-merger-guidelines#15> [<http://perma.cc/FG8S-QAVC>].

Today, the industry and press draw a distinction between “digital downloads” (where the consumer buys a copy of the song and stores it locally, like iTunes), “streaming” (where the consumer has continuous access to songs through a computer or mobile device), and physical sales (i.e., CDs or vinyl records).

It is possible that these are appropriate market definitions, in which case, Apple, based on its market share, may likely be assumed to enjoy market power, and perhaps monopoly power, in the digital download market. Apple’s market share has varied between 60% and 70%; its main competitor in downloads is Amazon, with 22% of the market in 2013.⁵⁹

Under *United States v. Du Pont*, whether this is an appropriate market definition depends on whether consumers consider streaming and downloading substitutes, non-substitutes, or even possibly complements.⁶⁰ The industry and press, referring to streaming and downloads as separate markets, also often consider streaming as a substitute for downloads.⁶¹ This is evidenced by statements like Apple “losing” consumers to streaming services,⁶² and the fact that industry experts suggest streaming music will universally overtake digital downloads in the near future.⁶³ This suggests two other alternatives. First, that the correct market definition might simply be digital music in general, in which case, Apple’s market power, while not insignificant, may be less than the narrower market definition would suggest.

The other possibility is that music streaming is not a current substitute, but a future substitute—a technological challenger for the market for downloaded music. As such, streamers would be in the same position as Netscape’s browser was to the Microsoft Windows operating system in the late 1990s (Apple Music, in this comparison, is the equivalent of Microsoft Explorer). In this view, the products are not direct competitors, but instead, streaming applications are a product model that might be understood as a full substitute for iTunes and therefore a threat to Apple’s dominance.

If digital downloads and streaming are separate markets, a related question is whether the Pandora-style “radio” and Spotify “on-demand” streaming are themselves in the same market. As a functional matter, services like Pandora and Spotify are quite different; most importantly, one cannot fully control the songs one listens to on Pandora, unlike on iTunes and Spotify, but may merely specify an artist or genre (and even if an artist is specified, Pandora will play “similar” artists; for example, Nicki Minaj may play on the “Beyoncé” channel). Additionally, under the copyright law, the services are treated differently—Pandora is governed

59. Yoni Heisler, *iTunes Maintains Its Music Download Dominance as Amazon Plays Catch-Up*, ENGADGET (Apr. 17, 2013), <http://www.engadget.com/2013/04/17/itunes-maintains-its-music-download-dominance-as-amazon-plays-ca/> [<http://perma.cc/56RQ-KPJE>].

60. *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 394–95 (1956).

61. Substitutes are two goods that can be used for the same purpose.

62. Andy Fixmer, *Apple’s 10 Year Old iTunes Loses Ground to Streaming*, BLOOMBERG BUSINESS (Apr. 25, 2013), <http://www.bloomberg.com/bw/articles/2013-04-25/apples-10-year-old-itunes-loses-ground-to-streaming> [<http://perma.cc/MK7E-MS5T>].

63. Brad Reed, *A Win For Apple*, BGR (May 15, 2015), <http://bgr.com/2015/05/15/apple-beats-music-vs-spotify-free-streaming/> [<http://perma.cc/VW3C-XETY>].

by the compulsory license while Spotify is not.⁶⁴ Based on these facts it is possible that digital downloads and on-demand streamers are in the same market, while the “radio” services are in a different market. However, this is complicated further by the fact that Spotify, an on-demand service, also offers “radio-style” music to subscribers. Full consideration of the market definition issues here discussed depends on data and economic analysis not available to the authors or necessarily in existence.

Finally, we should make clear that the question of whether Apple has market power in the music distribution market is not limited to an analysis of circumstantial evidence like market share. Direct evidence may also be considered. In *Toys “R” Us v. F.T.C.*, the Seventh Circuit noted that market power might be evident from the very ability to push the entire industry into exclusive agreements.⁶⁵ It is possible that Apple’s very power to pressure the labels, who are themselves a concentrated industry, to act in ways that may seem contrary to their interests may prove a direct demonstration of market power. Such direct theories of market power ultimately depend on a more careful economic analysis of Apple’s dealing with the labels, which is beyond the scope or data available to this paper.

A finding of market power typically depends on some existence of barriers to entry, which in Apple’s case are not difficult to demonstrate. For one thing, entry depends on access to music licenses and industry history suggests that there are only a limited number of firms who are trusted by the labels and meet the upfront capital-intensive requirements to offer a competitive service. When faced with full competition from iTunes, there are also structural barriers. By integrating music with Apple’s iOS operating system, Apple can ensure consumers will continue to use its music products given the synergies and ease that come from integration with the Apple operating system.⁶⁶ Apple can utilize its 850 million credit cards on file and integrate with its one billion iOS devices sold, something an entrant would find difficult to match.⁶⁷ By preloading apps on Apple devices and storing credit cards, Apple has mastered the distribution problem that other companies face.⁶⁸

II. CONDUCT

A. WINDOWING AND OTHER EXCLUSIVE PRACTICES

For historic reasons, windowing is a fairly common practice in media industries

64. See *supra* note 55.

65. *Toys “R” Us, Inc. v. F.T.C.*, 221 F.3d 928, 937 (7th Cir. 2000).

66. Josh Constine, *Apple, The Record Label?*, TECHCRUNCH (Feb. 8, 2015), <http://techcrunch.com/2015/02/08/exclusive-streaming/#CPdSdP> [<http://perma.cc/D5FR-EW7E>]. See also James Cook, *Why Apple Wants to End the Era of Free Music Streaming*, BUSINESS INSIDER (May 5, 2015), <http://www.businessinsider.com/free-music-streaming-was-a-big-experiment—and-now-major-record-labels-are-declaring-it-a-failure-2015-5> [<http://perma.cc/4JSZ-ARMH>].

67. Cook, *supra* note 66.

68. See Jason Snell, *Apple Music Will Dominate With the Power of the Preinstalled App*, MACWORLD (June 17, 2015), <http://www.macworld.com/article/2937162/apple-music-will-dominate-with-the-power-of-the-preinstalled-app.html> [<http://perma.cc/JN2Q-N3SV>].

other than music.⁶⁹ Film theaters were traditionally divided into first run and second run theaters, and audiences remain accustomed to movies launching first in theaters before becoming available in different formats, such as DVD, video-on-demand, or video streaming services such as Netflix.⁷⁰ The same model has also come to television, where hit shows premiere on the network that owns or underwrites them, only later moving to other distribution platforms.⁷¹ In publishing, the hardcover traditionally precedes the paperback, which is sold for a cheaper price. Windowing is usually accomplished by an exclusive contract between the content owner and a distributor—say, when a TV show is available exclusively on HBO, and then later sold by other distributors.

Economists have generally understood windowing practices as a means of price discrimination.⁷² The early time window with a higher price is meant to capture consumers with a higher willingness to pay, while those willing to pay less get later-in-time versions.⁷³ For the seller, windowing, like other forms of price discrimination, can yield increases in revenue by better utilizing consumers who are willing to pay more. For the consumer, the implications are ambiguous, consisting of a reduction of consumer surplus, but also an elimination of deadweight loss.⁷⁴

Music does not have a similar tradition of windowing. Instead, until the 2010s, a new record or single would be launched on radio at the same time it became available for sale in record stores (or later, on iTunes). Sometimes, singles would be launched before or after albums, generally with the goal of targeting younger audiences. The recent spread of exclusivity-based windowing to the music industry, which did not previously have such a practice, raises questions. However, such questions are not usefully considered in the abstract. The relevant inquiry, as we shall see, is whether windowing, or exclusive deals, may be employed as a means to maintain Apple's dominant position in online music sales, or, potentially, to maintain the dominant position of the three major music labels.

Over the last five years or so, Apple has pioneered the practice of exclusive windowing in the music industry. So far there is no general pattern—instead,

69. Philip Ingehlbrecht, *The Music Industry Is About To Change, and Apple And U2 Are Just The Beginning*, TECHCRUNCH (Sep. 13 2014), <http://techcrunch.com/2014/09/13/the-music-industry-is-about-to-change-and-apple-and-u2-are-just-the-beginning/> [<http://perma.cc/8BJ6-NYRZ>].

70. *Id.* However, recently there has actually been movement away from windowing in TV and movies. Netflix is leading the change in this area, disrupting the current model and looking to restore choice and options by moving to day and date releases. See Scott Roxborough, *MIPCOM: Netflix's Ted Sarandos Talks "Antiquated Movie Distribution Model,"* THE HOLLYWOOD REPORTER (Oct. 14, 2014, 3:54 AM), <http://www.hollywoodreporter.com/news/mipcom-netflixs-ted-sarandos-talks-740591> [<http://perma.cc/EMM3-9HNY>].

71. Jason Epstein and Rob Glaser, *Why Streaming (Done Right) Will Save the Music Business*, RECODE (Nov. 21, 2014), <http://recode.net/2014/11/21/why-streaming-done-right-will-save-the-music-business/> [<http://perma.cc/KJ6M-E3XD>].

72. MARK ARMSTRONG & HELEN WEEDS, *THE ECONOMIC REGULATION OF BROADCASTING MARKETS: EVOLVING TECHNOLOGY AND CHALLENGES FOR POLICY* 92 (Paul Seabright and Jurgen Von Hagen eds., Cambridge Univ. Press 2007).

73. See Ingehlbrecht, *supra* note 69.

74. See, e.g., Epstein & Glaser, *supra* note 71.

windowing occurs primarily in the form of one-off individualized agreements between labels and retailers at the artist level.⁷⁵ A label may represent dozens of artists and yet only negotiate a windowing deal with Apple for one of its artists. The kind of windowing seen most frequently today is when artists launch music first on iTunes as digital downloads before making it more widely available on streaming services.⁷⁶ Some artists and labels have chosen to withhold music from streaming entirely because they feel the royalties are inadequate and that streaming dilutes digital sales.⁷⁷ Taylor Swift and her label, Big Machine, have been outspoken about their belief that streaming services don't compensate artists adequately.⁷⁸ However, despite pulling her entire catalog off of Spotify, Swift's music remains available to paid subscribers on other streaming services,⁷⁹ and there has been speculation that the Spotify decision was Big Machine's attempt to increase Swift's iTunes revenue at a time when the label was up for sale.⁸⁰ This situation further exemplifies the power Apple has by being in a position to offer attractive solutions to artists in exchange for withholding music from other services.

Examples of windowing in the music industry have varied widely in duration. Beyoncé's album was a one-week iTunes exclusive, Sam Smith's album *In the Lonely Hour* was withheld from streaming for one month, while U2's exclusive lasted about five weeks.⁸¹ The time frames for windowed releases are generally short, especially when compared with similar practices for movies or the nine-year long contracts common to sports broadcasting rights.⁸² The more serious competition questions come not from these one-off deals, but rather from the prospect of widespread windowing in the industry by entire labels (or perhaps by all the labels), particularly if orchestrated by Apple, who could use the practice to both attract new subscribers to its own music services and to prevent existing

75. See, e.g., Ben Sisario, *Sam Smith, Up for Six Grammys, Is Getting Used to Arenas*, N.Y. TIMES (Feb. 4, 2015), http://www.nytimes.com/2015/02/08/arts/the-crowds-stay-with-him-and-grow.html?_r=1 (explaining that Capitol Records withheld the release of Sam Smith from streaming for a month to drive up its sales).

76. See, e.g., Chmielewski & Lewis, *supra* note 4 (offering examples of artists who successfully garnered sales by windowing their releases).

77. Aloe Blacc, *Streaming Services Need to Pay Songwriters Fairly*, WIRED (Nov. 5, 2014), <http://www.wired.com/2014/11/aloe-blacc-pay-songwriters/2014> [<http://perma.cc/3XBS-ASA5>]; Kelsey McKinney, *Is Streaming Bad for Artists? Yes and No. The Future of Music, Explained*, VOX (Dec. 17, 2014), <http://www.vox.com/2014/11/24/7272423/taylor-swift-spotify> [<http://perma.cc/ZK9P-XY9L>].

78. Karp & Grundberg, *supra* note 9.

79. *Id.*

80. Lucas Shaw, *Taylor Swift Pulls Music From Spotify as New Album Debuts*, BLOOMBERG (Nov. 3, 2014, 12:46 PM), <http://www.bloomberg.com/news/articles/2014-11-03/taylor-swift-pulls-music-from-spotify-as-new-album-debuts> [<http://perma.cc/MT9B-Z3LT>].

81. Christman & Pham, *supra* note 4; Ben Sisario, *For U2 and Apple, A Shrewd Marketing Partnership*, N.Y. TIMES (Sep. 9, 2014), <http://www.nytimes.com/2014/09/10/business/media/u2-appears-at-apple-event-and-songs-of-innocence-appears-free-on-itunes.html>; Sisario, *supra* note 75.

82. Robert T. Sharkey, *Pecover v. Electronic Arts, Inc.: Should Exclusive Licensing Agreements Made By Madden NFL's Publisher Be Sacked by the Sherman and Cartwright Acts?*, 20 VILL. SPORTS & ENT. L.J. 167, 174 (2013).

consumers from defecting.⁸³

B. BANNING COMPETITOR BUSINESS MODELS

A different form of conduct that Apple has considered is pushing the labels to refuse to deal with streaming companies who employ an advertising-based revenue model, commonly known as “freemium.”⁸⁴ Streaming companies, in general, have two business models: paid subscription-based and advertising-based. Advertising-based streaming, like broadcast radio, places a commercial between a certain number of songs and therefore appears to be “free” to the listener. Paying subscribers, by contrast, enjoy streaming music without interruption in exchange for a monthly payment. The advertising model is important to streaming services for two reasons. First, there are some consumers who will never become paying subscribers and the advertising-based service is therefore the only way to sell to capture this audience. If this service is not available, these users will likely resort to free music elsewhere, including the use of piracy sites. Second, the ad-based service provides a means for a new consumer to trial the service, with the idea that the consumer will become used to it, and eventually become a paid subscriber.⁸⁵ Thus, the ad-based model helps grow the subscriber base of the streamers. For example, 80% of Spotify’s 15 million paying subscribers started out as free users before converting.⁸⁶

The banning of a freemium or ad-revenue model, in its most serious form, looks like the following: Apple individually pressures each label, using carrots and sticks, to refuse to deal with any streaming service that relies on the ad-based revenue model. The carrots and sticks might include changed payment terms or variable treatment on iTunes or Apple Music. If Apple’s strategy is successful, the labels may all end up jointly refusing to deal with the streamers that use an advertising-based model, thereby eliminating a form of lower priced competition to Apple Music and iTunes.

III. ANTITRUST ANALYSIS

A. JOINT REFUSAL TO DEAL/PARALLEL EXCLUSION

The first question in the antitrust analysis is whether widespread exclusives or

83. See Brad Reed, *A Win for Apple: Spotify Will Reportedly Severely Restrict Its Free Streaming Tier*, BGR (May 15, 2015), <http://bgr.com/2015/05/15/apple-beats-music-vs-spotify-free-streaming/> [<http://perma.cc/VW3C-XETY>].

84. E.g., Ty Pendlebury, *Spotify Rival Deezer Launches Podcasts, Questions Freemium Services*, CNET (May 19, 2015), <http://www.cnet.com/news/spotify-rival-deezer-launches-podcasts-questions-freemium-services/> [<http://perma.cc/F2MZ-TNN4>] (explaining the use of the “freemium” model).

85. See Victoria Young, *The Product Strategy Fueling Spotify’s Growth To 60 Million Users*, CREATE INTERACTIONS (Jan. 13, 2015), <http://www.createinteractions.com/designtech/2015/1/13/spotify-growth-analysis-product-strategy> [<http://perma.cc/8P5A-L5SJ>].

86. John McDuling, *The Music Industry Wants to Fight the Internet Again and It’s Probably Going to Lose*, QUARTZ (Mar. 23, 2015), <http://qz.com/360002/the-music-industry-is-going-to-fight-the-internet-again-and-its-probably-going-to-lose/> [<http://perma.cc/J95A-DPSA>].

refusals to deal with advertising-based streamers represent a species of parallel exclusion or a joint refusal to deal under the authority of *Northwest Stationers* in violation of Section One of the Sherman Act.⁸⁷ This theory, notably, may imply liability not only for Apple, but for the record labels as well.

The *Toys “R” Us* litigation from recent decades provides some sense of what such a case would look like.⁸⁸ In the early 2000s, Toys “R” Us generated scrutiny when the company responded to threats in the industry coming from discount club competitors by limiting the accessibility of toys to those retailers. In *Toys “R” Us*, the Seventh Circuit affirmed the F.T.C.’s finding that the toy company acted as a coordinator of agreements among a number of toy manufacturers in violation of Section One.⁸⁹ Toys “R” Us entered into individual vertical agreements with ten manufacturers that restricted the manufacturers from selling certain products to discount clubs, which was, at the time, a new business model competing with Toys “R” Us.⁹⁰ While the individual agreements were vertical between supplier and retailer, the Seventh Circuit found Toys “R” Us had also orchestrated a horizontal agreement between the toy manufacturers by coercing the suppliers to cut off supply to the clubs. The course of dealing was relevant to the litigation, as Toys “R” Us actively influenced manufacturers to cut ties with a previously profitable sales outlet.⁹¹

Another even more directly obvious parallel to the pressure to ban freemium models is Apple’s own coordination of pricing agreements in the *eBooks* case.⁹² There, Apple met with individual book publishers and convinced them to, effectively, jointly raise their prices by adopting an “agency” model, which restricted the ability of retailers like Amazon to offer discounts.⁹³ Apple had strong incentives to encourage publishers to act collectively, and an interest in limiting retail competition, and therefore attempted to indirectly limit its own horizontal competitors’ ability to compete.⁹⁴ There, as in *Toys “R” Us*, Apple played the critical role of a coordinator of a hub-spoke conspiracy, as opposed to a horizontal member of the conspiracy. While the recent litigation may serve as a deterrent, the evolution of the music industry presents similar challenges to the company that suggest Apple might be willing to engage in similar activity in the future.

In the music industry, Apple, like Toys “R” Us, runs the risk of being understood as a coordinator of a horizontal agreement not to deal with Apple’s streaming competitors, or alternatively, of a simple price fixing agreement. If, for instance, all three of the major record companies ultimately engaged in exclusive licensing agreements with Apple and also agreed not to allow music to be distributed on an advertising revenue basis, either course of conduct could result in

87. *Nw. Wholesale Stationers v. Pac. Stationary & Printing Co.*, 472 U.S. 284 (1985).

88. *Toys “R” Us, Inc., v. F.T.C.*, 221 F.3d 928 (7th Cir. 2000).

89. *Id.* at 930.

90. *Id.* at 930–32.

91. *Id.* at 935–36.

92. *In re Elec. Books Antitrust Litig. (“eBooks”)*, 859 F.Supp.2d 671, 684 (S.D.N.Y. 2012).

93. *Id.*

94. *Id.* at 684–85.

serious antitrust scrutiny.

As a matter of antitrust law, the first pattern of conduct would technically be a joint refusal to deal and would be subject to per se illegality under the authority of *Northwest Stationers*.⁹⁵ The second, an agreement not to deal with advertising-based services, may be considered a coordinated manipulation of price under *Interstate Circuit*, and as such similar to the recent *eBooks* case.⁹⁶

Both of the claims face various challenges. The first is finding evidence of an actual agreement (or an attempted agreement, or an invitation to collude). All of the conduct described here might be described as action taken independently by the labels in their independent self interest. For example, the labels may each persuasively argue that their exclusive deals with Apple represent merely an independently motivated, win-win deal between label and Apple as its distributor and nothing beyond that. Similarly, a label may argue that its refusal to deal with freemium streamers represents merely a unilateral, independent business decision not to deal with a “discount” distributor, one that under the *Colgate* doctrine is not subject to antitrust condemnation at all.⁹⁷

The question of whether an agreement exists at all for either of these species of conduct could be settled by direct evidence. Meetings and communications are common in the industry, and—as with the *eBooks* case—there might be evidence of an agreement reached at a meeting between the labels and Apple. Examples of relevant communications would include threats from Apple executives to bury artists’ songs in the iTunes store or limit upfront payments unless labels withdraw from free streaming services, or alternatively, promises to better promote artists, but only if the labels refuse to deal with freemium services. Another more likely scenario is one akin to *Toys “R” Us* or the Apple *eBook* litigation where vertical agreements were evident and the court was willing to infer the existence of a horizontal agreement from the vertical conduct and agreements.

There are important parallels between the *Toys “R” Us* litigation and music streaming that suggest the utility of that case for understanding the current situation. *Toys “R” Us* was reacting to competition emerging from warehouse clubs, a new distribution channel changing the industry in a way that was challenging its market position, much like streaming services are now challenging the music industry. *Toys*, like music, are fad-driven products, and retailers want to be able to sell the season’s hottest items to their customers, which made the restriction and denial of merchandise in *Toys “R” Us* detrimental.⁹⁸ Similarly, in the music industry, a new song is a hit for limited amount of time, after which consumers may lose interest in gaining access to it. The course of dealing was

95. *Nw. Wholesale Stationers v. Pac. Stationary & Printing Co.*, 472 U.S. 284, 289–98 (1985).

96. *Interstate Circuit v. United States*, 306 U.S. 208, 232 (1939) (“The consequence of the price restriction, though more oppressive, is comparable with the effect of resale price maintenance agreements, which have been held to be unreasonable restraints in violation of the Sherman Act.”).

97. *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919) ([T]he [Sherman A]ct does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal; and, of course, he may announce in advance the circumstances under which he will refuse to sell.”).

98. *Toys “R” Us*, 221 F.3d at 931.

important to this case: in *Toys “R” Us*, the court was concerned by the “abrupt shift” that occurred, where manufacturers that previously supplied toys to the clubs stopped and cut off a legitimate profitable sales source.⁹⁹ Similarly, the music companies currently rely on multiple services for revenue. If record labels stopped licensing music to retailers other than Apple, even for just a period of time, a court would likely be skeptical of that abrupt shift. Especially considering the growth of streaming, and how much revenue labels are reporting from streaming,¹⁰⁰ it seems curious for the labels to now consider cutting off a profitable revenue source while there is so much opportunity evident.¹⁰¹

Ultimately, Apple’s actual role in negotiations would be critical to any potential antitrust claim. It was clear in *Toys “R” Us* that the manufacturers would not have entered into the agreements without Toys “R” Us ensuring them that their competitors were doing the same thing.¹⁰² The agreement did not seem like it was in the manufacturers’ best interest and yet they agreed to it because of what Toys “R” Us promised.¹⁰³ With music it seems more likely that if all of the labels agreed to exclusives they would be doing so because they believed it would ultimately help them make more money and sell more songs. However, if evidence appeared that Apple played an active role in inducing the labels to withdraw their music from other services, by offering incentives or making threats, Apple could find itself in a similar situation as Toys “R” Us.

B. PRICE MANIPULATION/MAINTENANCE

A strong claim against Apple and the music labels relies on a theory that pressuring streamers to abandon advertising-revenue-based models is a form of price manipulation that is per se illegal under Section One of the Sherman Act, or retail price maintenance that is per se illegal in some states (including California, Apple’s home). In *Socony-Vacuum*, the Supreme Court made it clear that the federal antitrust laws ban any price fixing agreement that tampers with the “central nervous system” of the economy.¹⁰⁴ Presuming a horizontal agreement to ban free streamers were found, is that ban a species of horizontal price manipulation falling under the authority of *Socony-Vacuum*? Or should it be considered a form of vertical price maintenance under *Leegin*, or something else entirely?¹⁰⁵

A general agreement to ban advertising-revenue driven models may be

99. *Id.* at 935.

100. See McKinley, *supra* note 18; THE ECONOMIST, *supra* note 19.

101. The International Federation of the Phonographic Industry (IFPI), a nonprofit organization representing recording companies around the world, released their annual report in April, which showed digital revenues worldwide for the first time equaling revenues from physical media, thus keeping overall revenue stable for the industry after years of decline. See Rich Trenholm, *Streaming May Save Record Industry, Says One Insider*, CNET (May 14, 2015), <http://www.cnet.com/news/streaming-may-save-record-industry-says-one-insider/> [http://perma.cc/VT3Z-RSTJ] (quoting Alex Jacob of the IFPI as saying, “Streaming and physical media can coexist in a way physical and downloading couldn’t.”)

102. *Toys “R” Us*, 221 F.3d at 932–33.

103. *Id.* at 933.

104. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940).

105. *Leegin Creative Leather Prods. v. PSKS Inc.*, 551 U.S. 877, 882 (2007).

understood as an agreement not to sell music at its lowest price point, and in this sense a manipulation of prices. The theory relies on the idea that the consumer of advertising-supported music regards the product as free, even if in fact she is paying by listening to the advertisement. As a customer whose purchase point is at or near free, she occupies a position on a standard demand curve very close to the bottom. An agreement to eliminate sales at this part of the demand curve is not unlike an agreement not to offer large discounts and if an agreement can be identified it is likely a per se violation of the Sherman Act.

In the *eBooks* case, Apple was found by the district court to be the coordinator of a horizontal scheme among the publishers to raise book prices.¹⁰⁶ Apple's conduct consisted of coordinating the signing of identical vertical agreements with suppliers and in other ways facilitating collusion.¹⁰⁷ That collusion, moreover, was useful to Apple, as it effectively raised the price of its retail competitor (Amazon). The same logic may apply to a case in which Apple convinces the labels to pressure the streamers to effectively raise their prices by eliminating the "free" or ad-supported option.

Alternatively, it is possible that the ban on ad-revenue models could be considered a form of retail price maintenance. Under this theory, by specifying in a vertical agreement that a streamer cannot offer a "free" option, the labels are specifying a minimum retail price, namely something more than free or ad-supported. That vertical agreement would be examined under the rule of reason under federal law, but would be per se illegal in some of the states that Apple operates, including its home state of California.¹⁰⁸

C. MONOPOLY MAINTENANCE

A Section Two analysis of Apple's conduct in the music industry relies on some version of the following theory: Apple, having long held a monopoly over the online sales of music, has reacted to the threat of losing its dominant position to more innovative competitors—streamers—with various forms of exclusionary conduct. It has attempted to freeze out the streamers by signing exclusive windowing agreements with the labels, starving them of "hits" and therefore weakening them as competitors. Second, it has pressured the labels to weaken its competitors' business models and new user acquisition by forcing them to abandon advertising-revenue models. Considered individually, or perhaps in combination, these strategies effectively have helped Apple maintain its monopoly over digital downloaded music. Depending on the facts, Apple may also be attempting to illegally monopolize the online streaming market with Apple Music.

The facts to support the above theory have not been demonstrated, but rather

106. *In re Elec. Books Antitrust Litig.*, 859 F. Supp. 2d 671, 684–86 (S.D.N.Y. 2012).

107. *Id.*

108. See, e.g., *Mailand v. Burckle*, 20 Cal.3d 367, 376 (1978); *Antitrust Alert: California Challenges Minimum Resale Price Maintenance as Per Se Illegal*, JONES DAY (Mar. 2010), <http://www.jonesday.com/antitrust-alert—california-challenges-maximum-resale-price-maintenance-as-per-se-illegal-03-19-2010/> [<http://perma.cc/245E-68LQ>].

represent what a strong version of a Section Two claim would look like. We now consider a few particulars. A Section Two claim requires, first, a finding of monopoly power, which is debatable here. We have previously discussed the various market definitions possible in this case and the implications of a finding of monopoly power. Worth highlighting is the idea that Apple may be currently in a similar position as Microsoft in the 1990s in that it was initially slow to realize the potential significance of streaming and aggressively redirected its efforts in order to maintain the monopoly.¹⁰⁹ However, if the music market is the entire digital music market, including both streaming and downloads, it is possible that Apple's market share is lower.¹¹⁰ Additionally, the very exclusionary conduct Apple engages in, like in *Microsoft*, is only rational if the firm knows it possesses monopoly power.¹¹¹

A finding of monopoly power alone is not sufficient to state a Section Two claim. There would also need to be evidence that Apple anticompetitively maintained that power. The antitrust analysis would require determining whether the exclusive restraints are likely to have anticompetitive effects, and, if so, whether the restraint is reasonably necessary to achieve procompetitive benefits that outweigh those anticompetitive effects.¹¹² Given the fact that anticompetitive effects and procompetitive efficiencies become more significant as exclusionary conduct is adopted at greater scale, it is clear that one off exclusive license agreements at the artist level would likely not be in violation of antitrust laws. However, at some point, windowing on a grander scale or banning the free streaming service would generate antitrust concerns.

D. ANTICOMPETITIVE EFFECTS

The challenge for a claim based either on a Section One or Section Two theory would be the determination of anticompetitive effects, particularly in light of the procompetitive justifications that Apple is likely to develop and present.

Windowing, or even widespread industry exclusives, whether premised on a Section One or Two theory, may prove more difficult from which to conclusively demonstrate consumer harm. To challenge the legality of an exclusive dealing, historically the Supreme Court has focused on whether the arrangement "forecloses competition in a substantial share of the line of commerce affected."¹¹³ However, in recent years, circuit courts have taken into account broader factors when assessing legality, including the nature of the product and relationship between the parties, the percentage of the market foreclosed to rivals as a result of the arrangement, and the duration of the arrangement.¹¹⁴ The circuit court case law suggests that short durations usually, but not always, can negate a finding of

109. See *United States v. Microsoft Corp.*, 253 F.3d 34, 56 (2011).

110. Peoples, *supra* note 33.

111. *Microsoft*, 253 F.3d at 56.

112. U.S. Dep't of Justice, *Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act* (2008), <http://www.justice.gov/sites/default/files/atr/legacy/2009/05/11/236681.pdf>.

113. *Id.* at 132. See *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U.S. 346, 357 (1922). See also *Standard Oil Co. of Cal. v. United States*, 337 U.S. 293, 314 (1949).

114. U.S. Dep't of Justice, *supra* note 112, at 132, 134.

foreclosure.¹¹⁵ On the other hand, dealings may be illegal if (1) the arrangement reasonably makes a significant contribution to the maintenance of monopoly power, (2) it leaves rivals with significantly higher transaction costs, or (3) it exposes rivals to other risks, forcing them to be unable to pose a real threat to the monopoly.¹¹⁶ Additionally, exclusive dealings can be particularly difficult to assess because they may provide benefits while at the same time impeding rivals' ability to compete. In those cases, "what makes exclusive dealing potentially harmful is the very same mechanism that makes the arrangement efficient and may lead to lower prices for consumers."¹¹⁷

As this suggests, one-off exclusives or windowed songs are difficult to describe as strongly anticompetitive. Instead, the strongest theory of harm relies on the following ideas: widespread windowing, even with short durations, creates harm to competition at the retailer level, because by limiting other retailers' accessibility to new music, the other retailers will become second-run distributors who are unable to truly compete with Apple, the dominant player. This relies in part on the theory that, while other music may remain available on competitors' services, there is no true substitute for the specific music being restricted. The harm is therefore proportional to the popularity of the artist, in addition to how many artists or labels engage in the practice. If all of the music by the most popular artists was not available on rival services, consumers would likely stop using the rival services. At their most extreme, Apple exclusives might create a situation like that encountered in *Pecover v. Electronic Arts*, which involved an exclusive license to the entire roster of all members of the NFL.¹¹⁸

Ultimately the duration of exclusives would play a large role in a finding of harm. Whether an exclusive is available for one week versus one month would make a meaningful difference. Limiting access temporarily is quite different from foreclosing access permanently. Currently most exclusives range from a few weeks to a month, which is much shorter than the types of perpetual or long-term licenses that have more typically been of concern.

The Billboard charts also provide a source for a data driven approach to determining reasonable durations. The lists provide evidence of how long a song remains popular. According to Billboard, in 2014 Pharrell's "Happy" was the top digital song for nine weeks, meaning it was the top-downloaded song across all genres, based on data from Nielsen Music.¹¹⁹ However, most songs throughout the

115. U.S. Dep't of Justice, *supra* note 112, at 134–36 (citing *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 395 (7th Cir. 1984); *Omega Envtl. Inc. v. Gilbarco, Inc.*, 127 F.3d 1157, 1162 (9th Cir. 1997)).

116. U.S. Dep't of Justice, *supra* note 112, at 134–36 (citing *United States v. Microsoft Corp.*, 253 F.3d 34, 64 (D.C. Cir 2001) (en banc) (per curiam); *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 191–93 (3d Cir. 2005)).

117. U.S. Dep't of Justice, *supra* note 112, at 132.

118. See *Pecover v. Elecs.*, No. C-08-2820, 2010 WL 8742757 (N.D. Cal., Dec. 21, 2010).

119. Gary Trust, *Pharrell Williams' Happy & More: The 20 Biggest Crossover Hits*, BILLBOARD (Apr. 24, 2015), <http://www.billboard.com/articles/columns/chart-beat/6069790/pharrell-williams-happy-more-the-20-biggest-crossover-hits> [<http://perma.cc/W69G-SVA6>].

year were the top song for only about one to three weeks.¹²⁰ This suggests that exclusives lasting for more than one month might generate concerns from an anticompetitive perspective. Another approach would be to look at the life cycle of music sales for a given song or album. If 90% of an album's total sales occur in one month, then an exclusive that extends much beyond that might suggest there are other anticompetitive motivating factors contributing to the arrangement besides a desire to increase sales.

There are several important limitations to the theory of harm from exclusives. First, the extent of the exclusion that Apple and the labels may achieve may always face a limit from the compulsory licenses in the federal copyright law. The radio-style services like Pandora can automatically obtain licenses to distribute music by paying the compulsory rate.¹²¹ If Pandora and similar services are considered part of the same market as the streamers—an open question—this may limit the effect of any exclusive deals. For this reason, the impact on the music market may never reach the 40-50% threshold typically required for a Section One claim. However, this would not necessarily prohibit the finding of a Section Two violation. As *Microsoft* illuminated, to prevail on a Sherman antitrust claim the market share foreclosed in a Section Two case can be less substantial than in a Section One case.¹²²

There is also a risk of anticompetitive coordination given the concentrated nature of the music market and the fact that there are very high barriers to entry.¹²³ This anticompetitive effect is relevant to both exclusives and the ban on ad-revenue-based streaming. High barriers to entry exist because it is incredibly difficult and costly to obtain licenses to be able to provide a legal platform for digital music. Licensing costs are the highest operating costs for streaming companies and their biggest challenge to maintaining profitability.¹²⁴ This inherently makes it more difficult for a smaller streaming company to compete with Apple, and exclusives by companies like Apple only compound this. Additionally, given the fact that there are only three major record companies, if Apple pressured one or two labels into windowing or limiting music to “free” streamers, the third will also likely be forced to follow. This coordinated behavior has been exhibited before. After Universal made a licensing agreement with Spotify, since E.M.I. and Sony had already negotiated with the streaming service, “Warner was virtually compelled to join the other major labels in negotiating.”¹²⁵ This coercion occurred while there were four major record companies; now with only three the likelihood of coordination is even greater. Additionally, given the business model of a company like Spotify that is reliant on maintaining a robust catalog of music, one

120. *Id.*

121. 17 U.S.C. § 115.

122. *United States v. Microsoft*, 253 F.3d 34, 70 (D.C. Cir. 2001).

123. *Id.*

124. Spotify pays out nearly 70% of its total revenue to rights holders. *See How is Spotify Contributing to the Music Business*, SPOTIFY, <https://www.spotifyartists.com/spotify-explained/> [https://perma.cc/9FZV-VKPL] (last visited Nov. 2, 2015).

125. John Seabrook, *Is Spotify The Music Industry's Friend or Its Foe?*, THE NEW YORKER (Nov. 24, 2014), <http://www.newyorker.com/magazine/2014/11/24/revenue-streams>.

label's decision to limit its access to music would probably be enough to cause significant damage.

The anticompetitive effects can also be described in terms of their impact on innovation. The streamers represent a technological advancement over the iTunes store. To the extent Apple's conduct slows or ultimately renders streaming a second rate service, it has impeded innovation in the delivery of music. Spotify's product, with a premium and free ad-based service, has generated significant benefits to rights holders, contributed to substantial revenue growth in the industry, and solved serious problems in the music industry (like capturing a new audience previously reliant on piracy). To stunt that development now by eliminating the free tier of streaming would be a threat to innovation. However, this point is weakened, somewhat, by Apple's introduction of its own streaming service. But it is also true that if any innovation in music distribution faces the prospect of anticompetitive elimination, the incentive to innovate in the future may be reduced.

Another, particularly interesting question is what will be the impact of Apple's or the labels' conduct on music piracy. The elimination of a free ad tier service would likely result in a resurgence of piracy. We should mention that it is not clearly the job of the antitrust law to fight piracy—in fact, an economist, disregarding the law, might see content piracy as effectuating antitrust's interest in lower prices. But the prospect of increased piracy might, alternatively, be considered a form of indirect anticompetitive effect that is a drain on the legitimate competition that antitrust is meant to promote. The people who do not convert to Spotify's premium service are consumers who have actively chosen not to pay for their music. If the free tier were eliminated these people would likely seek an alternative free music option (if it exists) or pirate music.

Additionally, according to a Spotify study conducted in the Netherlands, artists who held out from offering releases on the service experienced higher levels of piracy than other artists.¹²⁶ Robbie Williams and One Direction released singles on Spotify the same day as other music channels and sold four copies for each illegal download.¹²⁷ On the other hand, “Unapologetic” by Rihanna and Taylor Swift’s “Red” were both withheld from Spotify and sold only one copy for each illegal download.¹²⁸ Rihanna released her singles on Spotify after holdbacks between two and five weeks, and once available on Spotify, the piracy demand weakened.¹²⁹ The study also concluded from the sample that there was no evidence that withholding music from the service even led to more sales, suggesting that a hit is a hit regardless of its availability, but that if you limit its availability people will continue to find it through illegal means. This study demonstrates that the risk of a resurgence in illegal downloads is certainly a foreseeable consequence if windowing were to become more mainstream. Placing limitations on the ability to

126. Will Page, *Adventures In The Netherlands: Spotify, Piracy and the New Dutch Experience*, SPOTIFY RESEARCH REPORT 2 (July 2013), http://static3.volkskrant.nl/static/asset/2013/Adventures_in_the_Netherlands___Final_2201.pdf [<http://perma.cc/EF5S-EHK7>].

127. *Id.* at 18.

128. *Id.* at 17–18.

129. *Id.*

access digital music legally would inevitably undo many of the advances made in recent years to combat piracy. Ironically, a business practice such as windowing, which claims to improve market conditions, could in fact end up doing more harm than good.

E. PROCOMPETITIVE JUSTIFICATIONS

Assuming some existence of anticompetitive harm, there are important procompetitive efficiencies that need be considered. Some of the antitrust theories considered here, including horizontal price manipulation and the per se version of retail price maintenance, do not include a consideration of procompetitive benefits, but others do.

Exclusive deals and windowing, as suggested above, are common practices in media industries, and, as already stated, may be viewed as a form of price discrimination, which should, in theory, be of some utility to consumers who wish to pay less. The theoretical benefits for consumers, however, are not well supported here, where windowing would simply result in some music being unavailable at a lower price. Moreover, the ban on “free” options finds no defense under a theory of price discrimination.

More generally, exclusive vertical restraints are allowed only where efficiencies result from collaboration between distributor and manufacturer. Exclusive dealings can help consumers because the arrangements encourage distributors to devote their efforts to manufacturers’ brands, increase loyalty, and cause distributors to promote the products more proactively.¹³⁰ These types of advertising and promotional investments ultimately might benefit consumers, but might not be provided absent exclusive agreements.¹³¹ In exchange for exclusivity deals with artists and labels, Apple features the artists in the iTunes store.¹³² The Apple U2 deal is just one example of this. Apple was deeply invested in marketing the launch of U2’s album, committing to a \$100 million valued marketing campaign including a global television campaign as part of the exclusive deal with the band.¹³³ The launch included an extreme form of proactive promotion, including an attention grabbing media event where it was announced that iTunes users would not even have to pay for the album—it was a “gift from Apple to their customers.”¹³⁴ In this case, exclusive dealing can be seen as creating a dedicated, loyal distributor who is committed to promoting U2’s products, like the gas stations in *Standard Solutions*.¹³⁵

This case also exemplifies how exclusives might yield some innovative distribution strategies. With the security of an exclusive, Apple and U2 were able

130. U.S. Dep’t of Justice, *supra* note 112, at 138–139.

131. U.S. Dep’t of Justice, *supra* note 112, at 139.

132. Constine, *supra* note 66.

133. Ben Sisario, *For U2 and Apple, A Shrewd Marketing Partnership*, N.Y. TIMES (Sep. 9, 2014), <http://www.nytimes.com/2014/09/10/business/media/u2-appears-at-apple-event-and-songs-of-innocence-appears-free-on-itunes.html> [<http://perma.cc/9R92-LH83>].

134. *Id.*

135. *Standard Oil Co. of Cal. & Standard Solutions v. United States*, 337 U.S. 293 (1949).

to experiment with the launch and the novel concept of a “gift” that automatically appeared in users’ music libraries. Of course, that “gift” proved unpopular and was widely viewed as an intrusion, but it was an interesting experiment nonetheless.¹³⁶

The challenge with justifying windowing is that many of the standard benefits of exclusive dealings are not present in the windowing context given the nature of the product. Additionally, benefits from banning a “free” streaming service are even more tenuous. Benefits such as assuring adequate supply and allowing suppliers to anticipate demand do not exist with digital music, where the supply is endless.¹³⁷ Additional frequently cited efficiencies such as facilitating distribution and long term planning and minimizing costs and risks in uncertain markets, which lead to increased operating efficiencies and therefore decreased costs to consumers, are less relevant, although not completely absent, with digital music services.¹³⁸ Exclusives are also often justified as preventing costly free riders.¹³⁹ In the case of digital music, there is no classic free rider justification because whatever assets the labels provide retailers like Apple, Apple cannot use those assets to promote other music given the inherently unique nature of each song. However, with exclusives, Apple can more freely promote its artists without fearing a consumer will then go to an alternate service to listen to that artist.

Without the typical exclusive efficiencies, it is difficult to justify windowing and the ban on free streamers. Nevertheless, companies engaged in windowing argue that they have legitimate business justifications for doing so. The music industry is in a tenuous state. Industry insiders predict a continued downfall of sales and irrelevancy of the album as an economic entity in the future.¹⁴⁰ Artists criticize the current payouts they receive from streaming and believe withholding music from streaming will lead to more sales.¹⁴¹ It could be argued that exclusives or banning free streamers can lead to more efficient licensing rates—as the sole retailer and without ad-revenue supported customers, the business might be able to negotiate better rates. It could also be argued that distributing music to fewer platforms reduces transaction costs. Advocates of windowing view the practice as a way to make the music industry more profitable. However, the data is not conclusive on whether withholding from streaming actually directly increases sales.¹⁴² Nevertheless, under *Colgate* it is clear that an artist or label can choose to withhold their music from a particular format if they do not believe their use of the format is

136. Christopher Williams, *Apple Tie-Up With U2 Branded a ‘Dismal Failure’ by Music Retailers*, TELEGRAPH (Sept. 16, 2014), <http://www.telegraph.co.uk/finance/newsbysector/mediatechnologyandtelecoms/digital-media/11098907/Apple-tie-up-with-U2-branded-a-dismal-failure-by-music-retailers.html> [<http://perma.cc/8LPR-WUBZ>].

137. U.S. Dep’t of Justice, *supra* note 112, at 139.

138. Wanda Jones Rogers, *Beyond Economic Theory: A Model For Analyzing The Antitrust Implications of Exclusive Dealing Arrangements*, 45 DUKE L.J. 1009, 1018 (1996).

139. *Id.*

140. Ben Sisario, *Taylor Swift’s ‘1989’ Carries High Hopes*, N.Y. TIMES (Oct. 22, 2014), <http://www.nytimes.com/2014/10/23/business/media/taylor-swifts-1989-carries-high-hopes-but-no-country-music.html> (“This year, no new title has cracked the one-million-sales mark—a symbolic milestone—and album sales over all are down 14 percent from the same period last year.”).

141. *Id.*

142. Page, *supra* note 126, at 2.

economically advantageous.¹⁴³

CONCLUSION

Today's one-off exclusive windowing, as already suggested, seems unlikely to be enough of a source of competitive harm to warrant serious antitrust condemnation, unless considered part of a large exclusionary scheme. Breadth and duration of an exclusive is critical to a finding of reasonableness under an anticompetitive analysis.¹⁴⁴ As it stands, the exclusives are individually negotiated. As for duration, it is challenging to determine exactly when the duration changes from reasonable to unreasonable.

As a single incident, the practice of granting a digital retailer an exclusive of a song or album for a specified period of time seems like a typical byproduct of a competitive market that would not violate Section One or Two of the Sherman Act. Additionally, without a finding of market power, there is unlikely to be competitive harm for a Section Two claim. However, if multiple labels adopted windowing for entire catalogs of music or if Apple facilitated coordination among record companies, these might be signs that the restraint is no longer reasonable under Section One or Two. Given the restrictive nature of windowing and the music industry's tendency to engage in anticompetitive behaviors, at some point a line must be drawn where windowing activity raises serious antitrust concerns. Condemning efficient activity involving intellectual property rights can undermine incentives to innovate that result in economic growth; however, failure to challenge exclusionary conduct can have negative consequences for consumers.¹⁴⁵

In contrast, the bans on "free" streaming seem to raise much more serious antitrust concerns. As a potential means of eliminating a low cost option for consumers, any such pressures should be seriously investigated, and if the conduct is identified, condemned under one of the theories specified above.

Those in favor of overhauling the current music-licensing scheme seek a licensing framework that creates a "level playing field" for all music services where one service is not advantaged over another.¹⁴⁶ And yet, companies like Apple have pioneered windowed exclusives and advocate for the elimination of advertising-based streaming. While Apple and record companies may publicly say the goals of these practices are to increase revenue, the industry is at risk of annihilating alternative legal competitors and contributing to a resurgence of piracy.

143. *United States v. Colgate & Co.*, 250 U.S. 300 (1919).

144. *See generally* Part I and Part II

145. U.S. Dep't of Justice & F.T.C., *supra* note 58, at 2.

146. *Music Licensing under Title 17*, *supra* note 44, at 35.