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# Copyright Cartels or Legitimate Joint Ventures? What the MusicNet and Pressplay Litigation Means for the Entertainment Industry's New Distribution Models

**Rachel Landy\***

*Starr v. Sony BMG Music Entertainment illustrates the inherent tension between copyright holders seeking to enforce their exclusive rights and antitrust doctrine. In Starr, competing record labels pooled their copyrights into digital distribution joint ventures, MusicNet and Pressplay. Such collaboration toes a thin line between cartel-like conduct and joint venture legitimacy. Competitors in the entertainment industry have often collaborated to protect their copyrights. While some of these joint ventures have survived antitrust scrutiny, others have not. The result is often guided by the choice of antitrust standard of review: per se or rule of reason.*

*The current MusicNet/Pressplay litigation demonstrates how the fundamental tenets of competition law become muddled when intellectual property owners attempt to use their monopolies to control new online distribution models. After examining how the choice of antitrust standard will impact the MusicNet/Pressplay litigation, this Comment considers how current digital joint ventures between content owners, Vevo, Hulu and Ultraviolet, would be analyzed under antitrust doctrine. Despite the record labels' apparent anti-competitive conduct in MusicNet/Pressplay, the conflicting statutory policies of copyright and antitrust law, and lack of judicial scrutiny in this area suggests the rule of reason would be more appropriate.*

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I. INTRODUCTION

“Even a naif must realize that in forming and operating a joint venture, [members’] representatives must necessarily meet and discuss pricing and licensing, raising the specter of possible antitrust violations.”<sup>1</sup> Reconciling the inherently conflicting legal doctrines of intellectual property and antitrust is no easy task. Copyright holders start with a state-sanctioned monopoly,<sup>2</sup> while antitrust law promotes competition by de-concentrating markets. Facing ever-evolving consumption trends and technologies, content owners in the entertainment industry have, time after time, collaborated on new distribution methods by pooling their copyrights in newly formed entities. While partnerships with competitors may generate pro-competitive efficiencies, they are also fraught with anticompetitive potential. When joint venture participants hold exclusive intellectual property rights, the joining of those rights into restrictive distribution systems raises several red flags for antitrust authorities.

Joint ventures, in which two or more companies partially integrate related resources, are often used for pooling copyrights. Joint ventures are subject to two different standards of antitrust review, as determined by their purpose. If the venture’s primary aim is to disguise purely anticompetitive behavior (e.g., price fixing or naked market allocation),

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<sup>1</sup> *In re Napster, Inc. Copyright Litig.*, 191 F. Supp. 2d 1087, 1109 (N.D. Cal. 2002).

<sup>2</sup> 17 U.S.C. § 106 grants exclusive rights to copyright holders, who may, subject to the few statutory licensing provisions in the Copyright Act, unreasonably refuse to license at any time.

then courts may “per se” condemn it as a cartel or sham, without any consideration of its competitive potential.<sup>3</sup> On the other hand, if the venture serves efficiency-enhancing aims, then the “rule of reason”<sup>4</sup> analysis will be applied to its legality and the challenged anticompetitive conduct, during which the venture may defend itself as pro-competitive.<sup>5</sup>

This Comment discusses the differing antitrust standards of review used to determine the legality of joint ventures and how they have been applied to entertainment content owners’ attempts to control digital distribution. In Part II, I distinguish between the rule of reason and per se standards and discuss their application to the legality of joint ventures. Part III provides a brief history of the intersection between antitrust law and the entertainment industry’s attempts to control downstream distribution. In Part IV, I analyze the current MusicNet and Pressplay litigation and the impact of the choice of antitrust standard on the result. Lastly, in Part V, I look at new digital distribution joint ventures in the entertainment industry and consider their competitive implications under prevailing law.

## II. OUTRIGHT CONDEMNATION OR OPPORTUNITY FOR JUSTIFICATION? PER SE AND THE RULE OF REASON

Section One of the Sherman Act, which governs competition law in the United States, prohibits any combination in restraint of trade.<sup>6</sup> Joint ventures satisfy both of the two elements of the Act because they (1) result from an agreement (combination) among competitors that, by joining previously “independent centers of decisionmaking [sic],”<sup>7</sup> (2) reduces competition.<sup>8</sup> As such, joint venture analysis begins from an

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<sup>3</sup> Nat’l Soc’y of Prof. Engineers v. United States, 435 U.S. 679, 692 (1978) (defining “per se illegal” agreements as those “whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality); see also FTC & U.S. Dep’t of Justice, *Antitrust Guidelines for Collaborations Among Competitors* §1.2 (2000) [hereinafter *Collaboration Guidelines*] (noting that “courts conclusively presume [per se illegal] agreements, once identified, to be illegal, without inquiring into their claimed business purposes, anticompetitive harms, procompetitive benefits, or overall competitive effects”).

<sup>4</sup> See text accompanying notes 24-36 for a brief explanation of the rule of reason.

<sup>5</sup> See Robert H. Wood, *Something Radical Is Afoot: Texaco, Inc. v. Dagher and the Revolutionary Treatment of Price Fixing in the Joint Venture Context*, 8 BARRY L. REV. 1, 5-6 (2007) (discussing the rule of reason’s application to joint ventures).

<sup>6</sup> 15 U.S.C. §1. Early on, the Supreme Court limited the reach of the Act to only unreasonable restraints. See *Standard Oil Co. v. United States*, 221 U.S. 1, 60 (1911).

<sup>7</sup> *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 769 (1984).

<sup>8</sup> See *Am. Needle, Inc. v. Nat’l Football League*, 130 S. Ct. 2201, 2214 (2010) (declaring

anticompetitive standpoint. In creating a venture, potential participants, who are competitors, must meet to discuss relevant terms, which may include setting prices and other restraints.<sup>9</sup> Although suspect by nature, because a venture's structure is highly conducive to conspiracy,<sup>10</sup> joint ventures have plenty of legal, efficiency-enhancing purposes. Many create situations in which the whole is greater than the sum of its parts; "firms. . . combine to provide offerings . . . that none could as easily provide by itself,"<sup>11</sup> be it by producing a new product, entering a new industry or undertaking substantial research and development in a particular area.<sup>12</sup> Such efficiency-enhancing joint ventures are not per se illegal.<sup>13</sup>

Because of the dueling competitive qualities of joint ventures, courts use a venture's purpose, structure, and actions to determine which standard of review should be applied to its conduct. If the venture has no redeeming pro-competitive conduct, then it will be "per se" denounced, with no opportunity for self-justification.<sup>14</sup> This rule is reserved for wholly un-redeeming anticompetitive actions, such as those that fix prices or allocate markets.<sup>15</sup> If competitors create a joint venture *only* to cover up such illegal activity, it will be deemed a sham or cartel, and illegal.<sup>16</sup>

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that even pro-competitive agreements among joint venturers still restrain trade).

<sup>9</sup> *In re Napster, Inc. Copyright Litig.*, 191 F. Supp. 2d 1087, 1109 (N.D. Cal. 2002) (noting that in forming a joint venture, competitors must collaborate on material terms).

<sup>10</sup> *See, e.g., Compact v. Metro. Gov't of Nashville & Davidson Cnty., Tenn.*, 594 F. Supp. 1567, 1574 (D.C. Tenn. 1984) (stating that a joint venture's structure may "engender[] collusion detrimental to competition").

<sup>11</sup> *Augusta News Co. v. Hudson News Co.*, 269 F.3d 41, 48 (1st Cir. 2001).

<sup>12</sup> For example, Catchlight Energy is a joint venture between Chevron and Weyerhaeuser that is developing new forms of biofuel by taking advantage of Chevron's experience in the fuel industry and Weyerhaeuser's knowledge of natural resources. Neither company possessed the necessary expertise to undertake such a project on its own. *See Who is Catchlight Energy?*, CATCHLIGHT ENERGY, <http://www.catchlightenergy.com/WhoWeAre.aspx> (last visited June 1, 2012).

<sup>13</sup> *See Collaboration Guidelines*, *supra* note 3, § 3.2 (including in the category of ventures analyzed under the rule of reason "efficiency-enhancing integration[s] of economic activit[ies]. . . [that are] reasonably related to the integration and reasonably necessary to achieve [the venture's] procompetitive benefits").

<sup>14</sup> *Addamax Corp. v. Open Software Found., Inc.*, 152 F.3d 48, 51 (1st Cir. 1998).

<sup>15</sup> *See Collaboration Guidelines*, *supra* note 3, § 3.2 (discussing the kinds of agreements that traditionally trigger the per se rule).

<sup>16</sup> *See, e.g., Am. Needle, Inc. v. Nat'l Football League*, 130 S. Ct. 2201, 2205 (2010) (describing the Court's practice of "repeatedly [finding] instances in which members of a legally single entity violated § 1 when the entity was controlled by a group of competitors and served, in essence, as a vehicle for ongoing concerted activity").

Sham joint ventures usually exhibit no integration between member firms, unlike efficiency-enhancing collaborations that combine resources to generate greater competency.<sup>17</sup> A simple agreement on pricing without any accompanying functional integration will not survive per se analysis.<sup>18</sup> These joint ventures often include members that produce a fungible product, such as recorded music, which makes coordination of costs and prices easier.<sup>19</sup> Member firms typically raise eyebrows by carrying a significant market share, such that the venture can truly impact the competitive landscape by increasing prices or reducing output, the two signposts of anticompetitive agreements.<sup>20</sup> When direct competitors collaborate, it is very easy for these collaborators to observe one another's behavior and adjust accordingly.

The natural tensions in competitor collaborations render the waters between per se illegal (shams or cartels) and permissible joint ventures undoubtedly murky. Courts are treading further and further from the per se analysis for joint ventures,<sup>21</sup> analyzing the vast majority of them (unless they truly have no redeeming competitive virtues) under the rule of reason, which accords the ventures an opportunity to support their legality with pro-competitive justifications.<sup>22</sup> Most joint ventures are guided by legal purposes, such as research and development considerations, increased production goals, or a combination of other

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<sup>17</sup> See *Timkin Roller Bearing Co. v. United States*, 341 U.S. 593, 597-598 (1951), *overruled on other grounds by Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 769 (1984) (holding that an agreement for the sole purpose of restraining trade does not survive antitrust scrutiny simply because it is called a joint venture, when no functions are actually integrated). *But see Citizen Publ'g Co. v. United States* 394 U.S. 131, 134 (1969) (holding that despite venturers' complete integration, price fixing, profit pooling and market allocation violations were still subject to per se treatment).

<sup>18</sup> These agreements "are so likely to be harmful to competition and to have no significant benefits that they do not warrant the time and expense required for particularized inquiry into their benefits." *Collaboration Guidelines*, *supra* note 3, § 3.1; *see also* Herbert Hovenkamp & Christopher R. Leslie, *The Firm as Cartel Manager*, 64 VAND. L. REV. 813, 818-19 (2011) (delineating between cartels and joint ventures according to the level of integration between the member firms).

<sup>19</sup> *Id.* at 832 (noting that cartels are more "stable" in "markets with homogenous products").

<sup>20</sup> See *Collaboration Guidelines*, *supra* note 3, §1.2 (noting that agreements "that always or almost always tend to raise price or to reduce output are per se illegal"); U.S. Dep't of Justice & FTC, *Antitrust Guidelines for the Licensing of Intellectual Property* § 4.1.1 (1995) [hereinafter *Intellectual Property Guidelines*] (noting that "competitive harm depends in part on the degree of concentration in . . . the relevant markets").

<sup>21</sup> See Neil E. Roberts, *Cartels and Joint Ventures*, 57 ANTITRUST L. J. 849, 849-51 (1989) (recounting the tradition of condemning cartels and describing the new trend of considering pro-competitive efficiencies in joint ventures).

<sup>22</sup> *Addamax Corp. v. Open Software Found., Inc.*, 152 F.3d 48, 52 (1st Cir. 1998).

functions to create greater efficiency in a market.<sup>23</sup> In the realm of intellectual property, efficiency is often achieved by licensing arrangements that allow for new products or markets to be developed, or the pooling together of complementary rights to streamline licensing.<sup>24</sup>

Under the rule of reason, the plaintiff<sup>25</sup> must show anticompetitive effects in a defined relevant market, and then the defendant may put forth pro-competitive justifications.<sup>26</sup> The relevant market includes relatively fungible products or services<sup>27</sup> within a defined geographical area.<sup>28</sup> Analyzing the anticompetitive effects includes an analysis of the market concentration and defendants' market share: if the defendants' combined market share is not enough to impact a market, then a Section One challenge is unlikely to be successful.<sup>29</sup> Additionally, the level of concentration in the market before and after the joint venture should be considered.<sup>30</sup> If the market is highly concentrated prior to the combination, then the joining of competitive forces will decrease the number of market participants, thereby increasing the

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<sup>23</sup> See *Collaboration Guidelines*, *supra* note 3, § 2.1.

<sup>24</sup> See *Intellectual Property Guidelines*, *supra* note 20, § 5.5; *Broad. Music, Inc. v. Columbia Broad. Sys., Inc. (BMI)*, 441 U.S. 1, 20 (1979) (recognizing the pro-competitive efficiencies generated by a blanket license, when the alternative is to negotiate thousands of licenses individually).

<sup>25</sup> Plaintiffs in antitrust cases may take many forms. The statutory authority for standing is in 15 U.S.C. § 15, which gives both private parties and the government a right to sue under the federal antitrust laws. Generally speaking, an antitrust plaintiff must have suffered "antitrust injury," or "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). In determining whether the injury is related enough to the anticompetitive conduct, courts weigh several factors, including: "(1) the directness or indirectness of the asserted injury; (2) the existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement; (3) the speculativeness [sic] of the alleged injury; and (4) the difficulty of identifying damages and apportioning them among direct and indirect victims so as to avoid duplicative recoveries." See *In re Digital Music Antitrust Litig.*, 812 F. Supp. 2d 390, 400 (S.D.N.Y. 2011) (citing *In re DDAVP Direct Purchaser Antitrust Litig.*, 585 F.3d 677, 688 (2d Cir. 2009)).

<sup>26</sup> *Nat'l Hockey League Player's Ass'n v. Plymouth Whalers Hockey Club*, 419 F.3d 462, 469 (6th Cir. 2005).

<sup>27</sup> See *id.* at 471.

<sup>28</sup> See *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1063 (9th Cir. 2001) (defining "relevant market" as "encompass[ing] notions of geography...").

<sup>29</sup> *Leegin Creative Leather Prod., Inc. v. PSKS, Inc.*, 551 U.S. 877, 898 (2007) (stating that without market power, attempts at anticompetitive conduct probably will not succeed).

<sup>30</sup> See *Collaboration Guidelines*, *supra* note 3, § 3.33 (stating an increase in market power after the "relevant agreement" increases the "ability and incentive" to raise prices or limit output).

impact of anticompetitive effects on competitors.<sup>31</sup> Anticompetitive effects are generally framed as increased prices and/or reduced output,<sup>32</sup> but courts also consider the risks of collusion and information sharing as a result of collaborations among competitors.<sup>33</sup>

After a plaintiff demonstrates anticompetitive effects, a defendant may offer legitimate pro-competitive justifications in its defense, showing that the venture actually reduced prices or increased output.<sup>34</sup> The justification must actually enhance market-wide competition, and not just be a good business move for the defendant.<sup>35</sup> For example, reducing costs to increase profitability will not suffice unless there are positive ripple effects in the market.<sup>36</sup> If a court accepts the venture as pro-competitive, then a plaintiff may attempt to show that the action taken was not the “least restrictive alternative” or that there were more competitive mechanisms to accomplish the same goal.<sup>37</sup>

There is a distinct trend towards affording joint ventures the rule of reason analysis.<sup>38</sup> Courts have become increasingly likely to recognize the venture efficiencies suggested by the Federal Trade Commission (FTC),<sup>39</sup> which shares antitrust jurisdiction with the Department of Justice (DOJ). Additionally, unique market conditions may indicate that a rule of reason analysis is the proper route. Copyrights, for example, present an antitrust conundrum: under the Copyright Act, authors are guaranteed a statutory monopoly of six exclusive rights,<sup>40</sup>

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<sup>31</sup> *See id.*

<sup>32</sup> *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 104 (1984)

<sup>33</sup> *Collaboration Guidelines*, *supra* note 3, § 3.31.

<sup>34</sup> *Bd. of Regents*, 468 U.S. at 113.

<sup>35</sup> *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010, 1022 (10th Cir. 1998) (rejecting “cost-cutting” as a legitimate pro-competitive justification).

<sup>36</sup> *See id.*

<sup>37</sup> *Nat'l Hockey League Player's Ass'n v. Plymouth Whalers Hockey Club*, 419 F.3d 462, 469 (6th Cir. 2005).

<sup>38</sup> *See Am. Needle, Inc. v. Nat'l Football League*, 130 S. Ct. 2201, 2217 (2010) (subjecting the licensing arrangements of an intellectual property joint venture to the rule of reason); *Bd. of Regents*, 468 U.S. at 100-101 (applying the rule of reason to “price fixing and output limitation” claims because the case involved “an industry in which horizontal restraints on competition [we]re essential if the product [wa]s to be available at all”) and *Texaco, Inc. v. Dagher*, 547 U.S. 1, 7 (2006) (refusing to apply per se analysis to a joint venture's internal price-fixing).

<sup>39</sup> *Collaboration Guidelines*, *supra* note 3, § 2.1.

<sup>40</sup> The rights of copyright owners are:

- (1) to reproduce the copyrighted work...;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public...;
- (4) in the case of literary, musical, dramatic, and



which, subject to specific limitations and exceptions,<sup>41</sup> may be unreasonably withheld from others at the owners' discretion.<sup>42</sup> However, the Sherman Act is designed to dissuade, and even criminalize, anticompetitive or monopolistic conduct.<sup>43</sup> The FTC and DOJ recognize the inherent tension between these doctrines, and have stated that intellectual property does not carry with it a presumption of market power.<sup>44</sup> Rather, intellectual property ventures are subject to the same per se or rule of reason analyses applied to all other ventures.<sup>45</sup> The careful treatment of intellectual property combinations has resulted in the sanctioning of anticompetitive behavior when it yielded enough efficiency, or was "necessary to market the product at all," to render it worthy of the deferential rule of reason analysis.

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choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

17 U.S.C. § 106.

<sup>41</sup> The Section 106 rights are subject to the limitations and exceptions listed in Sections 107-122 of the Copyright Act. These include narrow statutory licensing schemes as well as the affirmative defense of fair use.

<sup>42</sup> This underlying tension between the doctrines is reflected in intellectual property law, which condemns the use of a copyright or patent monopoly beyond the scope of its applicable statutory grant. The patent statute has codified the affirmative defense of "patent misuse" and the corresponding copyright doctrine is developing in the common law. Misuse can only be invoked as an affirmative defense in an infringement suit, and so will not show up in an antitrust case unless there is an accompanying infringement claim. Courts have not clarified how the standards for anticompetitive behavior differ in misuse and antitrust law. See 35 U.S.C. § 271 (codification of patent misuse); *Lasercomb Am., Inc. v. Reynolds*, 911 F.2d 970, 977 (4th Cir. 1990) (recognizing the defense of copyright misuse). For further discussion on antitrust's relationship with the misuse doctrine, see generally Daniel J. Gifford, *Antitrust's Troubled Relations with Intellectual Property*, 87 MINN. L. REV. 1695 (2003); Troy Paredes, *Copyright Misuse and Tying: Will Courts Stop Misusing Misuse?*, 9 HIGH TECH. L. J. 271 (1994).

<sup>43</sup> In addition to the prohibition on unreasonable restraints of trade in Section One, Section Two of the Sherman Act makes "monopolizing a trade" a felony. 15 U.S.C. § 2. Monopoly power arises from "the power to control prices or exclude competition." *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956). Copyright owners, subject to limited exceptions (see *supra* note 37), are granted the power to control price and exclude competition from the use of their works by the Copyright Act.

<sup>44</sup> *Intellectual Property Guidelines supra* note 20, § 2.2. As the DOJ and FTC stated, "[i]ntellectual property is thus neither particularly free from scrutiny under the antitrust laws, nor particularly suspect under them." *Intellectual Property Guidelines supra* note 20, § 2.1.

<sup>45</sup> *Intellectual Property Guidelines supra* note 20, § 2.1.

In *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc. (BMI)*,<sup>46</sup> Columbia Broadcasting System (CBS) sued the two performance rights organizations (PROs) that administered music composition performance rights—Broadcast Music, Inc. (BMI) and the American Society of Composers, Authors and Publishers (ASCAP).<sup>47</sup> To use music in its programming, CBS had to secure blanket licenses from the PROs, which each granted rights to its entire catalog.<sup>48</sup> CBS asserted that, in pooling their rights in the PROs and setting a price for the blanket license, composers and music publishers had engaged in anticompetitive price fixing.<sup>49</sup> Although the organization did indeed fix the compositions' prices, the court held that it was not subject to per se analysis because of "unique market conditions."<sup>50</sup> First, the issue only existed because of the copyright owners' exclusive statutory rights.<sup>51</sup> Second, the market was extraordinarily fragmented: each PRO held authorizations from thousands of composers, and granted licenses to thousands of licensees each year.<sup>52</sup> Negotiating licenses on a case-by-case basis would be impractical.<sup>53</sup> Third, the rights granted to BMI and ASCAP were non-exclusive. Each author held the right to license his or her composition individually.<sup>54</sup> Fourth, because of the high potential for anticompetitive behavior, both PROs were already subject to consent decrees allowing potential licensees to seek a determination from a "rate court" if fees could not be agreed upon.<sup>55</sup>

Additionally, the blanket license served significant pro-competitive efficiencies. Notably, it resulted in a substantial reduction of costs for consumers, like CBS, who no longer needed to negotiate with every

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<sup>46</sup> *Broad. Music, Inc. v. Columbia Broad. Sys., Inc. (BMI)*, 441 U.S. 1 (1979).

<sup>47</sup> *Id.* at 6. The public performance right is one of the rights granted to copyright holders by the Copyright Act, 17 U.S.C. § 106(4). Similar "pooling" occurs all the time in the patent realm, but usually on a smaller level than is seen in *BMI*. Such patent pools are often pro-competitive because they streamline licensing, and reduce transaction costs. See Robert P. Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 CAL. L. REV. 1293, 1340-1358 (1996) for a thorough discussion of patent pools and antitrust liability.

<sup>48</sup> *BMI*, 441 U.S. at 5.

<sup>49</sup> *Id.* at 8.

<sup>50</sup> *Id.* at 14 (citing Memorandum for the United States as Amicus Curiae on Pet. for Cert., *K-91, Inc. v. Gershwin Publ'g Corp.*, O.T. 1967, No. 147, p. 10).

<sup>51</sup> *Id.* at 18.

<sup>52</sup> *Id.* at 15.

<sup>53</sup> *Id.* at 14.

<sup>54</sup> *Id.* at 11.

<sup>55</sup> *Id.* at 11-12.

composer.<sup>56</sup> Streamlined licensing also allowed for increased output (composition use); undeniably, more music was being used because of the blanket license.<sup>57</sup> The peculiar characteristics of the market, as well as the efficiencies generated by BMI and ASCAP pulled it out of the “per se” purview, despite the organizations’ primary purpose of price fixing. The *BMI* litigation is just one example of how courts have favorably treated copyright owners’ attempts to control the distribution of their content with potentially anticompetitive tactics.<sup>58</sup>

### III. COPYRIGHT OWNERS FACE ANTITRUST LAW: *PARAMOUNT*, *BMI*, PREMIERE AND MOVIELINK

The entertainment industry<sup>59</sup> is notorious for fighting technological innovation to maintain customary revenue and business models.<sup>60</sup> The acceptance of new technology into the entertainment industry is often accompanied by an attempt at vertical integration: content owners try to exert greater control over downstream dissemination of copyrighted material by integrating with other entities in the distribution chain. Increasingly, joint ventures are being used for this purpose.<sup>61</sup> Competitors, such as record labels or movie studios, join forces to “exploit an opportunity on . . . [a] level of the marketing chain” in which they were not originally competitors, such as retailing.<sup>62</sup> These

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<sup>56</sup> *Id.* at 21-22.

<sup>57</sup> *Id.* at 22.

<sup>58</sup> Even though BMI and ASCAP won at the Supreme Court, they persist as popular defendants in antitrust suits, and have successfully defended their licensing practices several times over. See *Buffalo Broad. Co. v. Am. Soc’y of Composers, Authors and Publishers*, 744 F.2d 917 (2d Cir. 1983); *Nat’l Cable Television Ass’n v. Broad. Music, Inc.*, 772 F. Supp. 614 (D.D.C. 1991); *Broad. Music, Inc. v. Moor-Law, Inc.*, 484 F. Supp. 357 (D. Del. 1980).

<sup>59</sup> For the purposes of this Comment, “entertainment” is defined as music, movies and television.

<sup>60</sup> For example, movie and television producers were so scared of the VCR that they sued the manufacturer (and lost). *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984). Millions of dollars have been spent fighting peer-to-peer network operators, and even users. E.g., *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005); see also *WPIX, Inc. v. Ivi, Inc.*, 765 F. Supp. 2d 594 (S.D.N.Y. 2011) (granting a preliminary injunction because plaintiffs had proved a likelihood of success on the merits of their copyright infringement claim against an internet service that streamed broadcast television); *Warner Bros. Entm’t Inc. v. WTV Systems, Inc.*, 824 F. Supp. 2d 1003 (C.D. Cal. 2011) (granting a preliminary injunction because plaintiff film studios had proved a likelihood of success on the merits of their copyright infringement claim against a service transmitted DVD performances to users over the internet).

<sup>61</sup> Jonathan A. Mukai, *Joint Ventures and the Online Distribution of Digital Content*, 20 BERKELEY TECH. L. J. 781, 781 (2005) (noting the growing use of joint ventures by the entertainment industry to control downstream distribution).

<sup>62</sup> *Id.* at 792.

ventures may result in concerted vertical restraints in licensing agreements with third parties.<sup>63</sup>

Traditionally, entertainment companies licensed content to third parties (e.g., iTunes or Blockbuster) for sale or streaming. However, in the face of widespread piracy, owners have become hesitant to loosen their leashes on content, giving rise to two anticompetitive harms: (1) “upstream” issues, where competitors combine and abuse their market power in licensing agreements with third parties,<sup>64</sup> and (2) “downstream” injury to consumers who see higher prices and less innovation as a result of the venture’s excessive control.<sup>65</sup>

In *United States v. Paramount Pictures*, the entertainment industry encountered the harsh per se analysis when the Supreme Court outlawed several vertical agreements.<sup>66</sup> In their licenses to theaters for exhibition, the defendant motion picture studios set minimum admission prices theaters could charge to show their films.<sup>67</sup> The studios did not license through a joint venture, but the Court still found a clear horizontal agreement among them.<sup>68</sup> There were both upstream and downstream harms from these price fixing agreements among the defendant-studios, and between the defendant-studios and the defendant-exhibitor/licensees.<sup>69</sup> The court condemned the former agreement, stating that although copyright holders have exclusive rights to their works, they cannot use their rights to fix prices across an entire industry.<sup>70</sup> The same rationale was applied to the latter agreement.<sup>71</sup> Additionally, five of the defendant-studios owned or were affiliated with the defendant-exhibitors.<sup>72</sup> Several defendant-exhibitors were jointly managed, and their profits were split according

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<sup>63</sup> *Id.* (suggesting the most anticompetitive restraints may occur not in the horizontal agreement creating the venture, but in the vertical integration of different “segments of the marketing channel”). Vertical restraints “occur[] when businesses at different levels of competition collude in the same market,” whereas “horizontal restraint[s] [are] agreement[s] between businesses at the same level of competition.” Gareth S. Lacy, *Standardizing Warhol: Antitrust Liability for Denying the Authenticity of Artwork*, 6 WASH. J. L., TECH. & ARTS 185, 198 (2011).

<sup>64</sup> Mukai, *supra* note 61, at 797.

<sup>65</sup> *Id.*

<sup>66</sup> *United States v. Paramount Pictures*, 334 U.S. 131, 143 (1948).

<sup>67</sup> *Id.* at 141.

<sup>68</sup> *Id.* at 142.

<sup>69</sup> *Id.* at 142-44.

<sup>70</sup> *Id.* at 143.

<sup>71</sup> *Id.* at 144.

<sup>72</sup> *Id.* at 140.

to pre-determined amounts.<sup>73</sup> The Court found that the profit-sharing arrangements had significant anticompetitive effects because the defendant-studios could allocate their films to whichever theater was most profitable for them, pursuant to the pre-determined formula.<sup>74</sup> *Paramount* demonstrates the potential harms courts see in anticompetitive agreements for copyright licensing, including two-way price-fixing and profit allocation irrespective of market forces.

*Paramount* is contrasted with *BMI*, which held that price-fixing was not subject to per se analysis if sufficiently unique market conditions exist and price fixing is necessary for the product to exist.<sup>75</sup> Unlike *Paramount*, in *BMI*, the composers did not first agree to prices prior to licensing to a PRO.<sup>76</sup> Additionally, the composer market was much less concentrated, and any of them could negotiate with licensees individually at any time.<sup>77</sup> These pro-competitive efficiencies afforded BMI and ASCAP much more favorable treatment than the *Paramount* studios.

Around the time *BMI* was bubbling in the courts, four film studios combined to form a paid cable network, Premiere, to compete with HBO.<sup>78</sup> The studios believed HBO was the cause of decreased profits.<sup>79</sup> The networks assumed that taking control of distribution would mean higher revenues and a new market for “marginal productions” that did not generate much licensing revenue elsewhere.<sup>80</sup> The studios licensed films to Premiere for an exclusive nine-month window, effectively precluding HBO from accessing their new releases.<sup>81</sup> The studios also used a set formula to determine license fees, completely irrespective of whether a movie succeeded or failed.<sup>82</sup> Like BMI, the studios asserted that market conditions (changes in the cable industry) necessitated this venture to develop a new product for the paid television market.<sup>83</sup> The court rejected Premiere’s argument, however,

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<sup>73</sup> *Id.* at 149.

<sup>74</sup> *Id.*

<sup>75</sup> *Broad. Music Indus. v. Columbia Broad. Sys. (BMI)*, 441 U.S. 1, 15 (1979).

<sup>76</sup> *Id.* at 23-24 n.42.

<sup>77</sup> *Id.* at 11.

<sup>78</sup> *United States v. Columbia Pictures Indus.*, 507 F. Supp. 412, 419 (S.D.N.Y. 1980). The four studios involved in the venture were Columbia, Universal, Paramount, and Fox.

<sup>79</sup> *Id.* at 418.

<sup>80</sup> *Id.* at 419. The court defined “marginal productions” as those “that would not otherwise be accepted on pay television.”

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 420.

<sup>83</sup> *Id.* at 422, 430.

and found that the exclusive window amounted to a per se illegal group boycott.<sup>84</sup> The only purpose of the venture was to prevent HBO from further eroding the movie studios' business, and no pro-competitive justification could be conceived of.

In the Premiere litigation (*Columbia Pictures*), the venture was not at all necessary for the product to be made: movies would be produced irrespective of their licensing for television.<sup>85</sup> However, unlike both the *Paramount* defendants and BMI/ASCAP, movie studios faced a disruptive technology—cable television—against which they had never previously competed. The joint venture was necessary, in their minds, to successfully navigate new waters.<sup>86</sup> The court did not address the argument by the government (the plaintiff) that Premiere was a cartel, possibly because the court granted a preliminary injunction against the venture<sup>87</sup> only four months after it was launched. *Columbia Pictures* made it very clear to the entertainment industry that antitrust law would be looking over its shoulder every time content owners attempted to control downstream distribution in the face of disruptive technology.

The movie industry applied much more antitrust caution in creating Movielink.<sup>88</sup> Fearing increased piracy via peer-to-peer and file sharing networks,<sup>89</sup> five major motion picture studios, with a combined market share of over fifty percent, joined together for a “video-on-demand” service, which let users “rent” a movie online.<sup>90</sup> If studios controlled the means by which movies were digitally distributed, including encrypting them with digital rights management<sup>91</sup> (DRM) to limit

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<sup>84</sup> *Id.* at 429.

<sup>85</sup> See Katherine L. Race, *The Future of Digital Movie Distribution on the Internet: Antitrust Concerns with the Movielink and Movies.com Proposals*, 29 RUTGERS COMPUTER & TECH. L.J. 89, 122 (2003) (extrapolating on the court's distinction between the case at hand and other litigation in which the venture was necessary for the product to be produced).

<sup>86</sup> See Joseph F. Brodley, *Joint Ventures and Antitrust Policy*, 95 HARV. L. REV. 1521, 1558 (1982) (defining Premiere as a viable joint venture because it would have established a new mechanism to distribute films in a new market).

<sup>87</sup> *United States v. Columbia Pictures Indus.*, 507 F. Supp. 412, 434 (S.D.N.Y. 1980).

<sup>88</sup> Formerly known as Moviefly.

<sup>89</sup> Race, *supra* note 85, at 97.

<sup>90</sup> Press Release, Dep't of Justice, Justice Department Closes Antitrust Investigation into the Movielink Movies-On-Demand Joint Venture (June 3, 2004), available at [http://www.justice.gov/atr/public/press\\_releases/2004/203932.htm](http://www.justice.gov/atr/public/press_releases/2004/203932.htm).

<sup>91</sup> Digital rights management refers to technologies used to control what can and cannot be done with digital files, such as limiting the amount of devices that can play a particular track or only allowing for access via certain portals. See LARRY DOWNES, *THE LAWS OF DISRUPTION* 160-161, 215 (2009).

future transfer, they could potentially curb file-sharing.<sup>92</sup> Concerned about the potential harms arising from content owners controlling distribution methods, the DOJ launched an investigation into Movielink's licensing practices and potential to facilitate collusion.<sup>93</sup> The DOJ found no issue with Movielink, noting that each studio had a non-exclusive license with the venture and set its own pricing and terms.<sup>94</sup> For example, Sony set a different price for its films than Universal. Additionally, each studio determined the Movielink release date for its films.<sup>95</sup> By retaining independent authority over material terms, and not delegating such powers to the venture, the opportunity for anticompetitive conduct was significantly less than in *Columbia Pictures*. Prices were not raised and output was not limited, so the DOJ closed its investigation, even with little showing of pro-competitive gain on Movielink's part.<sup>96</sup>

At the same time Movielink was developed, two studios who had opted out of Movielink, Disney and Fox, created their own online rental system, Movies.com.<sup>97</sup> However, Disney and Fox granted Movies.com exclusive licenses, which as *Columbia Pictures* demonstrated, were highly suspect under antitrust doctrine.<sup>98</sup> Not surprisingly, the Movies.com venture was abandoned due to pressure from the DOJ.<sup>99</sup>

The varying approaches to vertical integration bring to light where anticompetitive conduct is most likely to be found in these joint ventures. Where the *Paramount* defendants, Premiere, and Movies.com failed, BMI and Movielink succeeded. From these situations, it can be concluded that exclusive licensing, price-fixing, and profit sharing elicit greater scrutiny by the DOJ and antitrust courts.

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<sup>92</sup> See Race, *supra* note 85, at 92 (describing Movielink's DRM: after downloading the film, the movie will exist on the consumer's hard drive for thirty days, but once the user opens the file, she must watch the film within twenty four hours, or it will be deleted. Additionally, each file was encrypted to prevent burning to DVD).

<sup>93</sup> Press Release, Dep't of Justice, *supra* note 90.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

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

<sup>97</sup> Race, *supra* note 85, at 93.

<sup>98</sup> The *Columbia Pictures* court stated that exclusive licensing "suggest[s] the exercise of" anticompetitive power. *United States v. Columbia Pictures Indus.*, 507 F. Supp. 412, 425 (S.D.N.Y. 1980).

<sup>99</sup> Race, *supra* note 85, at 94 (noting that Fox withdrew from the venture due to "potential regulatory problems" and that "the Department of Justice had been scrutinizing the proposed venture to ascertain whether Movies.com would prove to be monopolistic").

IV. MUSICNET AND PRESSPLAY: “THE CONTINUING DEVALUATION OF MUSIC. . . UNLESS WE DO SOMETHING ABOUT IT”<sup>100</sup>

In 2006, a group of music purchasers filed a class action lawsuit against the four major record labels,<sup>101</sup> asserting antitrust violations stemming from the labels’ formation of two joint ventures, MusicNet and Pressplay, earlier in the decade.<sup>102</sup> The joint ventures distributed music digitally by offering downloads or streams to consumers and catalog licenses to third party retailers.<sup>103</sup> After extensive briefing and an appellate decision by the Second Circuit, the plaintiffs’ Section One claims survived a motion to dismiss in July 2011.<sup>104</sup> Unlike other entertainment joint ventures before them, MusicNet and Pressplay exhibit several cartel qualities and may be subject to per se condemnation. However, judicial deference to joint ventures, especially to those involving intellectual property, may afford the labels the much more forgiving rule of reason.

A. *Background: “We Determine the Price”*<sup>105</sup>

In 2001, Sony Music and Universal Music Group banded together to launch “Pressplay,” a joint venture that sold digital music subscriptions to consumers.<sup>106</sup> At the same time, BMG, EMI, and Warner Music Group created MusicNet, which was also a consumer subscription service.<sup>107</sup> MusicNet would later license catalogs to third party retailers.<sup>108</sup> Initially, each joint venture only carried its parent companies’ catalogs, so access to all five repertoires required a user to

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<sup>100</sup> Second Consolidated Amended Complaint at 21, *In re Digital Music Antitrust Litig.*, 592 F. Supp. 2d 435 (S.D.N.Y. 2008) (No. 06-MD-1780), 2007 WL 2064015, *rev’d sub nom.* Starr v. Sony BMG Music Entm’t, 592 F.3d 314, 318 (2010) [hereinafter *In re Digital Music Complaint*] (quoting former Universal executive Edgar Bronfman, on the reason for forming Pressplay).

<sup>101</sup> Sony, Universal, EMI and Warner. However, the relevant facts in the litigation occurred when there were five major labels (the four defendants and BMG). Sony and BMG have since merged, and as this Comment is being written, there is a possibility of further consolidation in the industry if Universal’s purchase of EMI is approved.

<sup>102</sup> *In re Digital Music Complaint*, *supra* note 100, at 1.

<sup>103</sup> *Id.* at 15-16.

<sup>104</sup> *In re Digital Music Antitrust Litig.*, 812 F. Supp. 2d 390, 420 (S.D.N.Y. 2011)

<sup>105</sup> *In re Digital Music Complaint*, *supra* note 100, at 21 (quoting former Universal executive Edgar Bronfman, on Pressplay’s “affiliate model”).

<sup>106</sup> Starr v. Sony BMG Music Entm’t, 592 F.3d 314, 318 (2d Cir. 2010), *rev’g In re Digital Music Antitrust Litig.*, 592 F. Supp. 2d 435 (S.D.N.Y. 2008).

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*



subscribe to both services, for \$240 each year.<sup>109</sup> Eventually, each label licensed to both services, so only one subscription was needed.<sup>110</sup>

Each license between the labels and ventures contained a “most favored nations” (MFN) clause, guaranteeing that the label would receive no less favorable terms than any other label.<sup>111</sup> Additionally, the ventures distributed revenues according to a profit-sharing formula, without consideration of the success of any particular song, album, or catalog.<sup>112</sup> When MusicNet licensed to third parties, it did so only on the same terms it had with each label, creating a network of essentially identical agreements, implemented with MFNs that set wholesale floors.<sup>113</sup> The revived “legal” Napster was one such licensee, and Napster used the labels’ anticompetitive conduct in MusicNet as part of its own copyright infringement defense against the record labels.<sup>114</sup> In asserting that the labels violated antitrust and copyright laws, Napster declared it had been forced into a heavily restrictive MusicNet license because none of the labels would grant it an individual license.<sup>115</sup> Further, Napster was restricted from bargaining with labels once the MusicNet license was granted.<sup>116</sup>

The DOJ investigated MusicNet and Pressplay, but did not find any anticompetitive conduct.<sup>117</sup> The DOJ attributed its finding in part to the recent third party purchases of the services and the growing digital music marketplace.<sup>118</sup> The DOJ did not, however, examine ventures from a cartel-like standpoint. Nor did it inquire into the effect that collusion throughout the ventures’ term may have had in the years

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<sup>109</sup> *Id.*

<sup>110</sup> *In re Digital Music Complaint*, *supra* note 100, at 15-16.

<sup>111</sup> The use of MFNs was corroborated in a *Wall Street Journal* article in 2006. *See id.* at 23.

<sup>112</sup> *Starr v. Sony BMG Music Entm’t*, 592 F.3d 314, 318-19 (2d Cir. 2010), *rev’g In re Digital Music Antitrust Litig.*, 592 F. Supp. 2d 435 (S.D.N.Y. 2008)

<sup>113</sup> *Id.*

<sup>114</sup> *In re Napster, Inc. Copyright Litig.*, 191 F. Supp. 2d 1087, 1103-1110 (N.D. Cal. 2002); *see supra* note 40, discussing the relationship between anticompetitive conduct and the copyright infringement defense of copyright misuse.

<sup>115</sup> *Napster*, 191 F. Supp. 2d at 1094.

<sup>116</sup> *Id.*

<sup>117</sup> Press Release, Dep’t of Justice, Statement by Assistant Attorney General R. Hewitt Pate Regarding the Closing of the Digital Music Investigation at 3-4 (Dec. 23, 2003) *available at* [http://www.justice.gov/atr/public/press\\_releases/2003/201946.htm](http://www.justice.gov/atr/public/press_releases/2003/201946.htm).

<sup>118</sup> *Id.* at 3. Pressplay was sold to Roxio in 2003 and MusicNet was unloaded in 2005 to an investment group in New York. *See id.*; *see also* Mark Hefflinger, *Record Labels, RealNetworks Sell MusicNet Joint Venture to Baker Capital*, DIGITAL MEDIA WIRE (Apr. 13, 2005), <http://www.dmwmedia.com/news/2005/04/13/record-labels-realnetworks-sell-musicnet-joint-venture-to-baker-capital>.

subsequent to the labels' unloading of MusicNet and Pressplay.

In light of the DOJ investigation of MusicNet and Pressplay, inconclusive on several issues, the class action complaint alleges that even after the ventures were terminated or bought, the labels continued to use MFNs in their licensing deals with third party services, insisting that defendants require parallel pricing from download (e.g., iTunes, Amazon) and subscription (e.g., Rhapsody, Spotify) services.<sup>119</sup> The plaintiffs assert several Section One claims,<sup>120</sup> including price-fixing and a challenge to the legality of the joint ventures themselves, an issue that was addressed by neither the *Columbia Pictures* court nor the DOJ in the Movielink investigation.

B. *Cartel Behavior: "These Joint Ventures Look Bad, Sound Bad and Smell Bad"*<sup>121</sup>

Although the plaintiffs' challenge to the ventures' legality is buried in the complaint, the Second Circuit clarified that the "sham" route was indeed being pursued.<sup>122</sup> The plaintiffs assert that the ventures served no legal purpose and should be condemned as shams.<sup>123</sup> They allege MusicNet and Pressplay were simply used as shells to cover up unlawful price-fixing, which subsisted after the ventures' termination.<sup>124</sup> Characteristics such as MusicNet and Pressplay's purpose, output and price, structure, integration, and business rationale, as well as the labels' post-venture actions and ability to cheat on the venture, should be analyzed to determine the legality of the ventures.

Determining MusicNet and Pressplay's purpose is a crucial step in ascertaining their legality. If the ventures were formed to further an

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<sup>119</sup> *In re Digital Music Complaint*, *supra* note 100, at 15-16.

<sup>120</sup> The plaintiffs do not mention Section Two of the Sherman Act (monopolization) at all, possibly leaving colorable claims on the ground. For discussions of these potential claims against MusicNet and Pressplay, see Kelly Donohue, *MusicNet & Pressplay: To Trust or Antitrust?*, DUKE L. & TECH. REV., no. 39, 2001 at 1; Anthony Maul, *Are the Major Labels Sandbagging Online Music? An Antitrust Analysis of Strategic Licensing Practices*, 7 N.Y.U. J. LEGIS. & PUB. POL'Y 365 (2003-2004).

<sup>121</sup> *In re Napster, Inc. Copyright Litig.*, 191 F. Supp. 2d 1087, 1109 (N.D. Cal. 2002).

<sup>122</sup> *Starr v. Sony BMG Music Entm't*, 592 F.3d 314, 326 (2d Cir. 2010), *rev'g In re Digital Music Antitrust Litig.*, 592 F. Supp. 2d 435 (S.D.N.Y. 2008).

<sup>123</sup> A "sham" joint venture is one used merely to cover up illegal or cartel activity. See WILLIAM HOLMES, ESQ. AND MELISSA MANGIARACINA, ESQ., ANTI-TRUST LAW HANDBOOK § 2:22 (2011).

<sup>124</sup> *In re Digital Music Complaint*, *supra* note 100, at 23. See *Am. Needle, Inc. v. Nat'l Football League*, 130 S. Ct. 2201, 2215 (2010) ("Agreements made within a firm can constitute concerted action covered by § 1 when the...intrafirm agreements may simply be a formalistic shell for ongoing concerted action.").

illegal purpose, such as fixing prices, they should be per se struck down. One member's own words are useful in this regard: Edgar Bronfman, former Executive Vice Chairman of Universal, stated that Pressplay's aim was to "determine the price" for retail music to prevent the "continuing devaluation" of the product due to piracy.<sup>125</sup> From Bronfman's statements, two purposes can be deduced: (1) stabilize pricing; and (2) fight piracy. The weight the court gives to each of these may be determinative, as price stabilization is illegal under the antitrust laws. Fighting piracy operates in a grey area between copyright and antitrust policy, and grey areas should be subjected to rule of reason analysis.<sup>126</sup> If price-fixing was the reason the ventures were formed in the first place, then any ancillary pro-competitive legal activity is disregarded and the venture is condemned.<sup>127</sup>

The two critical elements of any anticompetitive allegation are increased price and decreased output. Indeed, the ventures operated, according to the plaintiffs, with the guiding purpose of fostering "artificially high prices" for digital music and compact discs.<sup>128</sup> Throughout the ventures' existence and after they were sold, digital music was priced at the same levels as physical products. However, because producing digital music eliminated the need for manufacturing and shipping costs, under a pro-competitive theory, consumers should have seen reduced prices.<sup>129</sup> Thus, the evidence that the prices for digital music were "artificially high" is strong—without the costs associated with a physical product, the price of a digital file should be lower than that of a hard copy. The ability of venture participants to achieve an artificially high price for a product is symptomatic of a

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<sup>125</sup> *In re Digital Music Complaint*, *supra* note 100, at 21.

<sup>126</sup> The Supreme Court reserves the "per se" rule for "for 'plainly anticompetitive' agreements." *Texaco, Inc. v. Dagher*, 547 U.S. 1, 2 (2006) (quoting *Nat'l Soc'y of Prof. Engineers*, 435 U.S. at 692) (emphasis added).

<sup>127</sup> *Timkin Roller Bearing Co. v. United States*, 341 U.S. 593, 598 (1951), *overruled on other grounds by Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 769 (1984) (finding that the primary purpose of agreement was to allocate the market for trademark and disregarded any incidental attempts to "implement a valid trademark licensing system"); *United States v. New Wrinkle*, 342 U.S. 371, 380 (1952) (entering into licensing agreements solely to fix prices, with the result thereof plainly violates Sherman Act); *Palmer v. BRG, Inc.*, 498 U.S. 46, 49 (1990) (holding that agreement between competitors with sole purpose of raising prices is per se illegal).

<sup>128</sup> *In re Digital Music Complaint*, *supra* note 100, at 15-16.

<sup>129</sup> *In re Digital Music Complaint*, *supra* note 100, at 18. See *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (emphasizing that antitrust laws are intended to protect "competition, not competitor"); see also *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010, 1023 (10th Cir. 1998) (cost-cutting may be pro-competitive if accompanied by a benefit to the consumer). If an action is pro-competitive, it will result in lower prices, benefiting consumers.

cartel.<sup>130</sup>

Uniformity in pricing for each label's content also evidences an illegal joint venture. By implementing MFNs in each agreement with the ventures and third party licensees, the ventures have, like the *Paramount* studios, created upstream and downstream issues. Consumers are harmed by illogically high prices, while competitors and third party licensees are hindered by restrictive, anti-market condition terms in the licenses. The venture participants were well aware of the suspicious nature of MFNs, hiding the provisions in "side letters" because of "legal/antitrust reasons."<sup>131</sup> As the labels surely knew, a venture formed for the purpose of simply fixing prices is impermissible, even if it streamlines licensing of intellectual property.<sup>132</sup>

As demonstrated in *Paramount* and *Columbia Pictures*, antitrust courts are wary of agreements to share revenues based on pre-determined formulas rather than real market responses.<sup>133</sup> Distributing profits from a pool according to a formula reduces the "incentive [for venture participants] to compete."<sup>134</sup> By creating the ventures, the labels had already ceased competition in the digital distribution market. The guaranteed profit percentage operated to further eliminate competition by removing all motivation to create a best-selling product (for example, a hit record).

Decreased output is the other main characteristic of a cartel.<sup>135</sup> Because MusicNet and Pressplay were entering new markets (digital music), it is difficult to say whether output decreased: there were very

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<sup>130</sup> Bd. of Regents of Univ. of Okla. v. Nat'l Collegiate Athletic Ass'n, 546 F. Supp. 1276, 1301 (W.D. Okla. 1982).

<sup>131</sup> Starr v. Sony BMG Music Entm't, 592 F.3d 314, 324 (2d Cir. 2010), rev'g *In re Digital Music Antitrust Litig.*, 592 F. Supp. 2d 435 (S.D.N.Y. 2008) (citing *In re Digital Music Complaint*, *supra* note 100, at 23).

<sup>132</sup> See *Intellectual Property Guidelines*, *supra* note 20, § 5.5 ("pooled intellectual property rights with collective price setting...may be deemed unlawful if they do not contribute to an efficiency-enhancing integration").

<sup>133</sup> See *United States v. Columbia Pictures Indus.*, 507 F. Supp. 412, 431 (S.D.N.Y. 1980) (condemning the studios' "substitut[ion of] a profit sharing formula for the competitive negotiations over the value of individual films in the pay television market"); *United States v. Paramount Pictures*, 334 U.S. 131, 154 (1948) (finding the formula set by studios to be a "restraint of trade").

<sup>134</sup> *Citizen Publ'g Co. v. United States*, 394 U.S. 131, 135 (1969). *But see* *Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 320 (2d Cir. 2008) (declining to find antitrust injury stemming from venturers' profit sharing because output increased).

<sup>135</sup> *Broad. Music, Inc. v. Columbia Broad. Sys. (BMI)*, 441 U.S. 1, 23 n.40 (1979); *see also* *Salvino*, 542 F.3d at 327 (declining to paint a joint venture as a cartel when output multiplied).

few legal avenues for obtaining digital music prior to these ventures. As such, the ventures likely increased output incrementally. However, they also hindered the growth of the market beyond their own ventures. Napster recollected the nearly-impossible task of securing a license from the major labels.<sup>136</sup> The labels also flat-out refused to license to the second biggest digital music retailer, eMusic, because they disagreed with eMusic's pricing policy.<sup>137</sup> With unnaturally high prices and very limited output, the MusicNet and Pressplay ventures certainly resembled per se illegal joint ventures.

However, the DOJ investigated MusicNet and Pressplay from 2001 to 2003 and declined to find any anticompetitive conduct.<sup>138</sup> In fact, the DOJ concluded there were ample "safeguards" in place to protect sensitive confidential information from being transmitted between labels.<sup>139</sup> While on its face this fact appears to weigh heavily in the defendants' favor,<sup>140</sup> there has been ample suggestion that the defendants were less than forthcoming in the original investigation.<sup>141</sup> The plaintiffs contend that the defendants deliberately misled the DOJ, leading to a renewed inquiry by the DOJ and the New York State Attorney General.<sup>142</sup> The Second Circuit accepted this contention as supporting the theory of an illegal agreement.<sup>143</sup> Additionally, several of the purported anticompetitive practices took place after the ventures had disbanded, so the DOJ would have never uncovered such conduct.<sup>144</sup> Lastly, the labels have a long history of anticompetitive conduct from which a pattern of price-fixing may be inferred.<sup>145</sup>

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<sup>136</sup> *In re Napster, Inc. Copyright Litig.*, 191 F. Supp. 2d 1087, 1105-06 (N.D. Cal. 2002).

<sup>137</sup> *In re Digital Music Complaint*, *supra* note 100, at 24-25.

<sup>138</sup> Press Release, Dep't of Justice, *supra* note 117, at 3-4.

<sup>139</sup> *Id.* at 3.

<sup>140</sup> *See Texaco, Inc. v. Dagher*, 547 U.S. 1, 4 (2006) (accepting the FTC's approval of the joint venture as dispositive on the legality of the combination).

<sup>141</sup> *See* Fred Von Lohmann, *Did EMI and UMG Lie to Antitrust Investigators?*, ELECTRONIC FRONTIER FOUNDATION (Apr. 23, 2006), <https://www.eff.org/deeplinks/2006/04/did-emi-and-umg-lie-antitrust-investigators>.

<sup>142</sup> *Complaint*, *supra* note 100, at 25, 31.

<sup>143</sup> *Starr v. Sony BMG Music Entm't*, 592 F.3d 314, 324 (2010), *rev'g In re Digital Music Antitrust Litig.*, 592 F. Supp. 2d 435 (S.D.N.Y. 2008).

<sup>144</sup> The DOJ's investigation ended in 2003. *See* Dep't of Justice, *supra* note 117. However, the plaintiffs allege that at least up until the filing of their complaint in 2007, the major labels continued their collusive activity. *See In re Digital Music Complaint*, *supra* note 100, at 29-30.

<sup>145</sup> *See* United States v. Time Warner, Inc., 1997 WL 118413 (D.D.C. Jan. 22, 1997) (ordering major record labels to comply with civil investigative demands from the DOJ regarding pricing for music videos); *see also In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 216 F.R.D. 197, 217-18 (D. Maine 2003) (approving settlement of class action price-fixing claim in which major labels fixed prices of compact discs); *see also* Polygram

The structure of MusicNet and Pressplay facilitated collusion on pricing.<sup>146</sup> When two or three competitors—like the major music labels—pool their rights into a venture, at some point, the members must determine the prices of content licenses. There is no evidence that pricing was a function exercised independently by each participant, as it was in Movielink. The market for recorded music is highly concentrated, and the major labels comprised over eighty percent of the market when they formed MusicNet and Pressplay. Such high market shares make it very hard for a smaller retailer to retain any bargaining power.<sup>147</sup> Over time, the market has become increasingly concentrated. Sony and BMG merged in 2004, and as of Summer 2012, Universal is awaiting approval to purchase EMI, which would bring the number of major labels to three.<sup>148</sup> High concentration and large market shares increase the potential for anticompetitive conduct because it is easier to facilitate agreements among a few powerful market participants than among several small competitors, as was the case in *BMI*.<sup>149</sup> Unlike in *BMI*, MusicNet and Pressplay offered negligible efficiency for streamlined negotiation. In *BMI*,

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Holding, Inc. v. FTC, 416 F.3d 29, 38 (D.C. Cir. 2005) (finding two major record labels guilty of restraining competition by prohibiting discounts and advertising for particular albums—which inherently increase prices). Additionally, in March of 2012, Sirius XM Radio, Inc. filed a complaint against various record industry trade associations, asserting the labels engaged in a concerted refusal to deal, forcing Sirius XM Radio into a statutory webcasting license and preventing it from obtaining the benefits of a market-negotiated agreement. See Complaint, Sirius XM Radio, Inc. v. SoundExchange and Am. Ass'n. of Indep. Music, No. 12 CV-2259 (S.D.N.Y. filed Mar. 27, 2012).

<sup>146</sup> See *In re Napster, Inc. Copyright Litig.*, 191 F. Supp. 2d 1087, 1109 (N.D. Cal. 2002) (asserting that in forming a joint venture, the labels had to have met to discuss pricing and licensing); see also Matthew Fagin, Frank Pasquale & Kim Weatherall, *Beyond Napster: Using Antitrust Law to Advance and Enhance Online Music Distribution*, 8 B.U. J. SCI. & TECH. L. 451, 534 (2002) (“the known structure of the joint ventures...facilitates collusion on matters of price”). How a venture is organized is one of the factors the FTC considers when determining the legality of a joint venture. See *Collaboration Guidelines*, *supra* note 3, § 3.31(b) (“Competitor collaborations may provide an opportunity for participants to discuss and agree on anticompetitive terms, or otherwise to collude anticompetitively”).

<sup>147</sup> See *Race*, *supra* note 85, at 124 (“When five corporations maintain control over 80 percent of all sound recordings worldwide, retailers have virtually no leverage to resist unreasonable terms.”).

<sup>148</sup> The European Union has launched a full-fledged investigation into Universal’s purchase, which was announced in November 2011. See Richard Smirke, *European Commission Investigation Into Universal’s Purchase of EMI Music Enters Phase Two*, BILLBOARD.BIZ (Mar. 23, 2012), <http://www.billboard.biz/bbbiz/industry/record-labels/european-commission-investigation-into-universal-1006561952.story>. The United States has yet to approve the purchase, as well.

<sup>149</sup> See Brodley, *supra* note 86, at 1553 (describing horizontal joint ventures as the most naturally anticompetitive, especially when the venture enters into a concentrated market in which its parents have high market share).

licensees went from having to negotiate with thousands of composers to just a couple of licensing organizations. MusicNet and Pressplay cut the parties on one side from five to two, hardly achieving the same degree of efficiency.

The FTC has stated that intellectual property arrangements, including pooling agreements, might give rise to per se treatment if there is no efficiency-enhancing integration.<sup>150</sup> Without integration, members merely have an agreement to conspire. The major labels accomplished some economic integration in MusicNet and Pressplay: they shared in the risks, profits, and losses. In fact, their profit sharing formula likely meant they all bore the risks and losses in similar ways. However, even with sufficient integration, pure anticompetitive behavior may be condemned if the venture's primary purpose was to violate antitrust laws.<sup>151</sup>

Another indicator of cartel behavior is logical deficiency, or when the agreement makes no business sense for each participant.<sup>152</sup> The plaintiffs allege that participating in the joint ventures impaired each label's economics.<sup>153</sup> Pressplay and MusicNet were notoriously terrible products, even landing at Number Nine on one list of the "25 Worst Tech Products of All Time."<sup>154</sup> In addition to the limited catalogs at launch, each file came with severe DRM, preventing transfers to iPods or other portable music players.<sup>155</sup> Without an underlying conspiracy, plaintiffs allege, any participant would have left the ventures to make

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<sup>150</sup> *Intellectual Property Guidelines*, *supra* note 20, §§ 3.4, 5.5. See *In re ATM Fee Antitrust Litig.*, 554 F. Supp. 2d 1003, 1016 (N.D. Cal. 2008) (asserting that the more integrated a joint venture is, the more likely it is accomplishing society-enhancing efficiencies); see also *Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 332-33 (2d Cir. 2008) (a highly integrated organization seeking to achieve competitive balance is not per se illegal).

<sup>151</sup> *Citizen Publ'g Co. v. United States*, 394 U.S. 131, 135-36 (1969) (holding publishing company guilty of antitrust violations despite complete integration of newspaper distribution functions).

<sup>152</sup> See *Merck-Medco Managed Care, LLC v. Rite Aid Corp.*, No. 98-2847, 1999 WL 691840, at \*9 (4th Cir. Sept. 7, 1999) (including in a list of "plus factors" evidencing a conspiracy "irrational acts or acts contrary to a defendant's economic interest, but rational if the alleged agreement existed").

<sup>153</sup> The plaintiff's complaint quotes PCWorld Magazine as saying "'nobody in their right mind will want to use' the services." *In re Digital Music Complaint*, *supra* note 100, at 18. In the absence of an agreement, the plaintiffs claim, the labels would have tried to gain competitive advantages over each other by experimenting with new models to boost their bottom lines. *Id.* at 24.

<sup>154</sup> Dan Tynan, *The 25 Worst Tech Products of All Time*, PCWORLD (May 26, 2006), [http://www.pcworld.com/article/125772-3/the\\_25\\_worst\\_tech\\_products\\_of\\_all\\_time.html](http://www.pcworld.com/article/125772-3/the_25_worst_tech_products_of_all_time.html).

<sup>155</sup> *Starr v. Sony BMG Music Entm't*, 592 F.3d 314, 318 (2d Cir. 2010), *rev'g In re Digital Music Antitrust Litig.*, 592 F. Supp. 2d 435 (S.D.N.Y. 2008).

more attractive products and gain market share in digital music.<sup>156</sup> The FTC advises courts to consider business purposes to ascertain intent, and in MusicNet and Pressplay's case, it is difficult to see what business purpose led any of the labels to stay in the joint venture.<sup>157</sup> Further, the ventures may have hindered innovation in the market for digital music; overly restrictive licensing may have made it prohibitively difficult for new products to enter the market,<sup>158</sup> and the labels did not use their resources to create a new market.<sup>159</sup> Like Premiere, the ventures were not necessary for the creation or distribution of music. It also cannot be said that imposing incredibly consumer-unfriendly terms was a "practical response" to the market, as the performance rights consortiums in *BMI* were.<sup>160</sup>

The major labels' actions after the ventures disbanded further evince an illegal agreement.<sup>161</sup> A cartel need not be a formalized entity to continue functioning,<sup>162</sup> and participants' subsequent conduct may indicate an "original anti-competitive purpose."<sup>163</sup> The opportunities to continue colluding were abundant: all labels are members of the same trade organization, the Recording Industry Association of America,<sup>164</sup> and there is a constant game of musical chairs between top-level executives of major labels, increasing the risk of information sharing.<sup>165</sup> The plaintiffs also allege that each label continued to use

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<sup>156</sup> *In re Digital Music* Complaint, *supra* note 100, at 24. See *Interstate Circuit v. United States*, 306 U.S. 208, 222 (1929) (finding the risk of "diversity in action" in the absence of an agreement as evidence of collusion).

<sup>157</sup> *Collaboration Guidelines*, *supra* note 3, § 3.31. However, it is possible the labels used the ventures as a mechanism to combat piracy and/or open up a new digital music market. See *infra* text accompanying notes 189-199.

<sup>158</sup> *But see infra* discussion accompanying notes 197-199 regarding innovation in new markets.

<sup>159</sup> See *In re ATM Fee Antitrust Litig.*, 554 F. Supp. 2d 1003, 1016 (N.D. Cal. 2008) (excusing the lack of economic integration in a joint venture because members "create[d] a new market by fusing complementary resources").

<sup>160</sup> *Broad. Music, Inc. v. Columbia Broad. Sys. (BMI)*, 441 U.S. 1, 20 (1979).

<sup>161</sup> See *Brodley*, *supra* note 86, at 1535 (stating that a legitimate joint venture may later become illegitimate based on "later developments").

<sup>162</sup> See *U.S. Gypsum Co. v. Ind. Gas Co.*, 350 F.3d 623, 628 (7th Cir. 2003) (defining a cartel as a "continuing cooperative activity that may be discontinued, or amended, from time to time").

<sup>163</sup> *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 761 (1984).

<sup>164</sup> *Hovenkamp & Leslie*, *supra* note 18, at 838 (listing the many cartels that used trade association meetings as opportunities to collude).

<sup>165</sup> By way of example, Edgar Bronfman was a senior executive at Universal when Pressplay was created. When the litigation commenced, he was the CEO of Warner Music. Lucas Shaw, *Edgar Bronfman Jr. steps down as Warner Music Group Chairman*, REUTERS



restrictive MFNs in their licensing practices, which was corroborated by an industry insider in 2006.<sup>166</sup> The sheer number of online music start-ups that have failed due to licensing costs may also indicate prohibitively restrictive terms.<sup>167</sup>

Whether or not each label had the ability to “cheat” on the cartel by licensing outside the venture is the last major point of cartel analysis.<sup>168</sup> With few participants in a collusive agreement, it is unlikely that a member will cheat on the arrangement because others will be quick to discover the defecting behavior. By (originally) only licensing to their own ventures, each label could keep tabs on each other’s behavior as well as keep content under control. After a short period of time, the labels licensed to the opposing venture, so exclusivity was loosened to some degree.<sup>169</sup> Additionally, in 2002, all five labels granted licenses to at least one independent service, Rhapsody,<sup>170</sup> so some cheating was clearly allowed. However, the labels individually refused to negotiate with Napster, leaving it with the sole option of obtaining a MusicNet license, on the terms set by the labels collectively.<sup>171</sup> Such exclusive deals increased the chances for collusion because all participants would

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(Dec. 5, 2011), <http://www.reuters.com/assets/print?aid=USTRE7B42OI20111205>. In July 2011, the CEO of Universal Music became the CEO of Sony Music. Ethan Smith, *Sony Music Recruits CEO*, WALL STREET JOURNAL (Mar. 3, 2011), <http://online.wsj.com/article/SB10001424052748703559604576176500047935830.html>. This kind of movement is incredibly common in the music industry.

<sup>166</sup> *In re Digital Music Complaint*, *supra* note 100, at 23. Like the studios in *Paramount*, the record labels were able to effectively price-fix an entire industry; they just did so with a different tool. While the record labels’ justifications may be deserving of consideration, given the extreme anticompetitive effects generated by the use of MFNs when very few (five) large market players are involved, the inclusion of such provisions in licensing agreements in similarly highly concentrated markets should be deemed per se illegal.

<sup>167</sup> iMeem, Spiralfrog, Project Playlist are just a few of the music companies that have gone bankrupt or were purchased for pennies in the last few years. Greg Sandoval, *What’s driving rise in music sales?*, CNET (Jul. 10, 2011), [http://news.cnet.com/8301-31001\\_3-20077981-261/whats-driving-rise-in-music-sales/](http://news.cnet.com/8301-31001_3-20077981-261/whats-driving-rise-in-music-sales/). As a further illustration of the prohibitive cost of music licensing, the most popular internet radio station in the world, Pandora, had to shut off its European lights because the licensing was too expensive. *Pandora to Block Non-US Listeners*, BBC, <http://news.bbc.co.uk/2/hi/technology/6619919.stm> (last updated May 3, 2007).

<sup>168</sup> In *BMI*, for instance, each composer had the unequivocal right to cheat because it granted a non-exclusive license to the organization. *Broad. Music, Inc. v. Columbia Broad. Sys. (BMI)*, 441 U.S. 1, 12 n.20 (1979).

<sup>169</sup> *In re Digital Music Complaint*, *supra* note 100, at 15.

<sup>170</sup> Mukai, *supra* note 61, at 787.

<sup>171</sup> *In re Napster, Inc. Copyright Litig.*, 191 F. Supp. 2d 1087, 1106 (N.D. Cal. 2002); *see also* *Arista Records L.L.C v. Lime Grp. L.L.C*, 532 F. Supp. 2d 556, 564 (S.D.N.Y. 2007) (describing Lime Wire’s complaint that “[a]s a condition of receiving license agreements from the joint ventures...retail licensees were ‘obligated not to negotiate with the Major Labels directly’”). The Lime Wire claims were never further pursued, because the court held there was no antitrust injury to Lime Wire.

greatly and equally benefit from high prices. Non-exclusive licensing schemes, on the other hand, facilitate competition by subjecting pricing to market conditions. For this reason, exclusivity was the death knell for Premiere, and the lack thereof was the saving grace for Movielink.<sup>172</sup>

MusicNet and Pressplay can be further distinguished from Movie-link. Each label did not retain the right to set its own pricing, which preserved competitive force in Movielink.<sup>173</sup> The labels' conduct looks more like that of the *Columbia Pictures* studios, who shared profits and whose venture was an illogical response to market conditions. In both situations, the ventures should have tried to make their product more attractive to consumers, theoretically with less restrictive licensing. Neither venture was necessary for its primary product to be marketed at all.<sup>174</sup> Further, conduct subsequent to the ventures' termination indicates more cartel-like conditions than existed in *Columbia Pictures*, where there was no evidence of studios forcing HBO and its competitors into restrictive terms after the service was shut down. Like the studios in *Paramount*, the labels tried to price fix the entire industry, committing upstream and downstream harm, and should be condemned for doing so.

C. *Rule of Reason: "Developed. . . Out of the Practical Situation in the Marketplace"*<sup>175</sup>

Despite significant evidence suggesting the existence of a cartel, there is still a good chance a court will afford MusicNet and Pressplay the rule of reason analysis. To benefit from this less damning analysis, the labels must either show the ventures had a legal purpose or secure a "unique market" exception from the court, as in *BMI*.<sup>176</sup> If the plaintiffs are denied per se treatment, they must demonstrate the venture's anticompetitive effects before the defendants can justify their

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<sup>172</sup> See *Race*, *supra* note 85, at 102-03 (focusing on the non-exclusive aspects of the licensing scheme as crucial to escape antitrust liability).

<sup>173</sup> See *id.* at 134-35 (comparing MusicNet and Pressplay's pricing structure with Movielink's, and concluding MusicNet and Pressplay should be much more suspect under antitrust doctrine).

<sup>174</sup> Cf. *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 101 (1984) (affording defendants the rule of reason because some horizontal restraint was necessary to produce the product).

<sup>175</sup> *Broad. Music, Inc. v. Columbia Broad. Sys. (BMI)*, 441 U.S. 1, 20 (1979).

<sup>176</sup> See text accompanying notes 46-58.

conduct as pro-competitive.<sup>177</sup>

The labels will point out that the ventures were cleared by the DOJ, which found they had operated at arm's-length.<sup>178</sup> In *Texaco, Inc. v. Dagher*, the Supreme Court accepted the FTC's approval of a joint venture as definitive on its legality.<sup>179</sup> The labels will more easily articulate that the ventures were legal because they increased efficiencies in licensing<sup>180</sup> and were necessary to enforce copyrights.<sup>181</sup> In arguing for the rule of reason, the labels will note that the Supreme Court has afforded defendants operating in "unusual" markets the lower standard when the markets are not developed enough for courts to confidently apply per se analysis.<sup>182</sup> This is especially true when the issue has arisen only because of the statutory copyright monopoly.<sup>183</sup> Assuming the court accepts one of these arguments, rule of reason analysis stems from a definition of the relevant market, which the plaintiffs assert is composed of digital music, including "internet music" (MP3s, for example) and compact discs (as the physical configurations of digital files).<sup>184</sup>

The anticompetitive effects of the defendants' actions are set forth in the plaintiff's documentation and the subsequent court rulings. The use of MFNs and revenue sharing agreements operated to raise prices to an artificially high point, where participants were no longer subject to free market conditions.<sup>185</sup> MFNs and revenue sharing agreements have been condemned in antitrust jurisprudence for just this reason.<sup>186</sup>

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<sup>177</sup> Nat'l Hockey League Player's Ass'n v. Plymouth Whalers Hockey Club, 419 F.3d 462, 469 (6th Cir. 2005)

<sup>178</sup> Press Release, Dep't of Justice, *supra* note 117; *see also* Mukai, *supra* note 61, at 800-01 (considering arms-length licensing to be crucial to evading antitrust liability).

<sup>179</sup> *Texaco, Inc. v. Dagher*, 547 U.S. 1, 4. However, the Second Circuit has questioned the applicability of *Dagher*, albeit on slightly different grounds, to MusicNet and Pressplay. *Starr v. Sony BMG Music Entm't*, 592 F.3d 314, 326 (2d Cir. 2010), *rev'g In re Digital Music Antitrust Litig.*, 592 F. Supp. 2d 435 (S.D.N.Y. 2008).

<sup>180</sup> However, *see infra* text between notes 149-151, questioning how much efficiency the ventures actually achieved.

<sup>181</sup> *See infra* discussion accompanying notes 190-197 addressing whether this is a valid pro-competitive purpose.

<sup>182</sup> *See Broad. Music, Inc. v. Columbia Broad. Sys. (BMI)*, 441 U.S. 1, 20 (1979) (unusual market conditions militated against per se condemnation); *see also* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 100-101 (1984) (rule of reason for market in which horizontal restraints were necessary).

<sup>183</sup> *BMI*, 441 U.S. at 18.

<sup>184</sup> *In re Digital Music Complaint*, *supra* note 100, at 1.

<sup>185</sup> *Id.* at 23.

<sup>186</sup> *See supra* Part III, and *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 399-400 (1948) (including most favored nations provisions in patent licenses as evidence of a Sherman Act violation); *United States v. New Wrinkle, Inc.* 342 U.S. 371, 375, 377 (1952) (holding that

Additionally, the plaintiffs claim that the use of heavily restrictive DRM had no competitive efficiency because it restricted innovation in the market by hindering interoperability.<sup>187</sup> Third-party developers had no incentive to develop for the digital music market when they were not guaranteed that major label content would be compatible with their applications.<sup>188</sup> Between the use of MFNs and other price-raising measures, and the restrictive DRM that limited output, the plaintiffs should be able to demonstrate anticompetitive effects.

However, the FTC has recognized that some anticompetitive conduct in copyright licensing is necessary and may even serve pro-competitive ends.<sup>189</sup> The defendants will likely offer three pro-competitive justifications for their conduct: anti-piracy, the creation of a new market, and streamlined licensing. None of these will demonstrate decreased prices or increased output, but they are still worthy pro-competitive considerations because of the sensitive nature of intellectual property.

No content owner has successfully defended an antitrust violation by asserting a restraint was necessary to protect its exclusive rights. However, as a pro-competitive justification, anti-piracy has not been fully analyzed by courts either. The issue did not arise in *Columbia Pictures*, in which the venture was not developed to fight copyright infringement, but rather to compete with HBO. Anti-piracy measures were mentioned in passing in Microsoft's immense antitrust battle,<sup>190</sup> and also in *BMI*, in which the court considered the role of the blanket license in "enforcement against authorized copyright use."<sup>191</sup> Dicta in

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charging for patent licenses is an essential part of plan to restrain trade); *In re Yarn Processing Patent Validity Litig.*, 541 F.2d 1127, 1136 (5th Cir. 1976) (finding that a fixed royalty sharing agreement was evidence of price fixing). *But see* *Standard Oil Co. v. United States*, 283 U.S. 163, 174-175 (1931) (holding that fixed royalty sharing agreements are only unlawful if intended to fix prices or otherwise violate the Sherman Act).

<sup>187</sup> *In re Digital Music* Complaint, *supra* note 100, at 18.

<sup>188</sup> *See* Mukai, *supra* note 61, at 802 (asserting that restrictive licensing terms reduce[] the "incentive to innovate and develop the Internet as a means of distribution").

<sup>189</sup> *Intellectual Property Guidelines*, *supra* note 20, § 2.3 (listing efficient exploitation, cost reduction and the creation of new products as some of the pro-competitive benefits of anticompetitive behavior).

<sup>190</sup> *United States v. Microsoft Corp.*, 253 F.3d 34, 63 (D.C. Cir. 2001) (dismissing Microsoft's argument that license restrictions were valid because Microsoft was simply asserting its rights as intellectual property owner); *see also* Herbert Hovenkamp, *Symposium: Intellectual Property Rights and Federal Antitrust Policy Introduction*, 24 J. CORP. L. 477, 479 (examining several approaches to the Microsoft litigation, and noting one scholar's assertion that the "principal purpose of Microsoft's...contracts is...self-protection against fraud or piracy").

<sup>191</sup> *Broad. Music, Inc. v. Columbia Broad. Sys. (BMI)*, 441 U.S. 1, 20 (1979).

the *BMI* opinion implies that anti-piracy measures justified the blanket license as part of the “practical” marketplace response composers undertook.<sup>192</sup> Similarly, Movielink was developed to prevent the spread of unauthorized films over the internet and restricted the files it distributed to that end.<sup>193</sup> If one of copyright’s goals is to allow rights holders to “recoup their investment”<sup>194</sup> in creation, then content owners should be allowed to restrict access to content accordingly. To that end, although price-fixing is condemned under the antitrust laws, the Movielink investigation may imply that the DOJ is willing to give more deference to DRM-type restrictions in order to protect intellectual property. These are more defensible under both doctrines, because DRM is not a refusal to license, and if structured appropriately, can be framed as a lawful extension of a rights holder’s exclusive right to distribute and/or reproduce. However, the licensing practices of MusicNet and Pressplay are clearly distinguishable from those of Movielink, which did not use exclusive agreements nor MFNs, and other courts have condemned antitrust defendants attempting to use market power to fight illegal conduct.

In *Fashion Originators’ Guild of America v. Federal Trade Commission*, the guild’s anticompetitive actions, taken in response to “style piracy,” were deemed illegal.<sup>195</sup> However, fashion designs are not protected by copyright nor any other intellectual property law, so the guild had a much weaker defense than MusicNet or Pressplay. Other courts have stated that “[i]ntellectual property rights do not confer a privilege to violate the antitrust laws.”<sup>196</sup> No countervailing dicta exist in the defendants’ favor. In order to successfully proffer anti-piracy as a pro-competitive justification, they must couch the defense in purely competitive terms: if piracy is allowed to run rampant, then all music will become free. Once the market price drops to zero, all competition is eradicated, which is much worse than *weakened* competition resulting from the joint ventures.

The labels may also suggest the ventures were necessary to develop a new market for digital music. Each label may have been hesitant to

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<sup>192</sup> Performance rights organizations provided an effective way for copyright owners to monitor “unauthorized uses,” and “protect[] against infringement.” *Id.* at 5.

<sup>193</sup> See Race, *supra* note 85, at 97 (noting that the DRM the studios implemented was to prevent unauthorized reproduction).

<sup>194</sup> John T. Cross & Peter K. Yu, *Competition Law and Copyright Misuse*, 56 *DRAKE L. REV.* 427, 429 (2008).

<sup>195</sup> *Fashion Originators’ Guild of Am. v. FTC*, 312 U.S. 457, 467-68 (1941).

<sup>196</sup> *In re Indep. Serv. Orgs. Antitrust Litig.*, 203 F.3d 1322, 1325 (Fed. Cir. 2000) (limiting a patentee’s right to exclude when it has been exercised to the point of monopolization).

join the market individually, but by banding together and reducing risk, MusicNet and Pressplay allowed for greater exploration into how digital music should be marketed and exploited.<sup>197</sup> Creators are afforded copyrights as an incentive for innovation. Thus, protecting their investments when entering a new market is an entirely pro-competitive use of rights holders' intellectual property.<sup>198</sup> However, the labels walk a thin line in this argument because, as market concentration increases, there is a corresponding reduction in the incentive to innovate, and thus they may have harmed the market they were purportedly seeking to open up.<sup>199</sup>

The last attempt at a pro-competitive justification will be to return to the *BMI* argument of consolidated licensing as efficiency-enhancing as well as potentially standard-setting. However, the vast differences between the structure of the ventures and BMI, as well as their respective market conditions, should dispel any analogies. The labels may more successfully argue that in the face of a new digital marketplace, some DRM was necessary in order to ensure interoperability.<sup>200</sup> This is also not a straight-faced argument. First, it ignores and does not justify the fixed prices. Second, by creating two ventures, the labels cannot argue they were a standard-setting organization—there was always the possibility that each venture would develop slightly different standards, unless there was further collusion between the two entities. Third, the DRM was so restrictive that it did not achieve *any* interoperability. Fourth, a standard should make it easier for all third party developers to use the content, but the labels imposed such restrictive terms on parties like Napster that there was no

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<sup>197</sup> See Howard H. Chang, David S. Evans & Richard Schmalensee, *Some Economic Principles for Guiding Antitrust Policy Towards Joint Ventures*, 1998 COLUM. BUS. L. REV. 223, 271 (1998) (asserting that a joint venture entering a new market may need to make as “much money as possible” in order to survive the initial risk market); see also Joseph Kattan, *Antitrust Analysis of Technology Joint Ventures: Allocative Efficiency and the Rewards of Innovation*, 61 ANTITRUST L.J. 937, 943 (1993) (suggesting that reducing competition in a new market makes the market more attractive for new entrants).

<sup>198</sup> See David B. Ravicher & Shani C. Dilloff, *Antitrust Scrutiny of Intellectual Property Exploitation: It Just Don't Make No Kind of Sense*, 8 SW. J. L. & TRADE AM. 83, 121-24 (2001) (arguing that because of the large incentives afforded to copyright owners, competitors often seek to enter an intellectual property market).

<sup>199</sup> See Kattan, *supra* note 197, at 970 (reporting on research that indicates innovation declines as market concentration increases); see also Matthew W. Turetzky, Comment, *DVD Copy Protection Rules Violate the Sherman Act*, 11 WAKE FOREST J. BUS. & INTELL. PROP. L. 103, 123 (2010) (proclaiming that a refusal to license to third parties will “retard[] innovation”).

<sup>200</sup> See Mukai, *supra* note 61, at 790 (asserting a need exists for uniform distribution format, and that such a standard would be beneficial to consumers).

incentive for a retailer to even try to secure licenses. If a standard is pro-competitive, it needs to benefit the industry, and MusicNet and Pressplay did not.<sup>201</sup> However, if a court finds that the ventures were standard-setting organizations, they will automatically be subject to the rule of reason with regard to their standard-setting activities.<sup>202</sup>

Although the defendants have weak pro-competitive arguments overall, courts increasingly are affording joint ventures and intellectual property holders the rule of reason treatment in litigation.<sup>203</sup> The defendants need to assert a legal purpose and efficiency-enhancing integration to receive this more favorable standard of review in the next phase of litigation. Then, they may try to argue that the restraints were necessary to protect their intellectual property monopolies.

#### V. HULU, VEVO, AND ULTRAVIOLET: A NEW WAVE OF DIGITAL DISTRIBUTION

In the last five years, more joint ventures have cropped up in the online space under the same pretenses as MusicNet and Pressplay: content owners seeking to control downstream distribution of their content in the face of piracy. However, these recent initiatives have taken greater notice of antitrust laws, and should escape any anticompetitive allegations. A quick look at Hulu, Vevo, and UltraViolet demonstrates this premise.

Hulu is a joint venture between NBC Universal,<sup>204</sup> News Corporation, and Disney.<sup>205</sup> All three companies produce significant television and motion picture content each year. Hulu offers users licensed movies and television shows to view online,<sup>206</sup> pursuant to two

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<sup>201</sup> See *id.*, at 798 (arguing that for consumers to benefit from a standard, it needs to be “amenable” to users). For more on standard-setting, see Race, *supra* note 85, at 112-13 (describing the benefits and risks to standard setting, including the possibility of “stagnating” innovation).

<sup>202</sup> Standards Development Organization Advancement Act of 2004, 15 U.S.C. §§ 4301-02 (2004).

<sup>203</sup> See James D. Nelson & Victoria M. Pond, *Developments in Antitrust Law That Impact Intellectual Property Licensing Transactions*, 78 DEF. COUNS. J. 274, 284 (2011) (concluding that “[t]he pendulum has swung in favor of intellectual property” with regards to antitrust litigation).

<sup>204</sup> Hulu’s only interface with antitrust law (so far) occurred as a part of Comcast’s acquisition of Hulu parent, NBC Universal. The DOJ required Comcast to give up any ownership stake in Hulu, and provide Hulu with NBC Universal content comparable to what Hulu secures from its other parents. Press Release, Dep’t of Justice, Justice Department Allows Comcast-NBCU Joint Venture to Proceed with Conditions (Jan. 18, 2011), available at [http://www.justice.gov/atr/public/press\\_releases/2011/266149.htm](http://www.justice.gov/atr/public/press_releases/2011/266149.htm).

<sup>205</sup> *About*, HULU, <http://www.hulu.com/about> (last visited Dec. 7, 2011).

<sup>206</sup> HULU (last visited Dec. 7, 2011), [www.hulu.com](http://www.hulu.com).

subscription tiers: ad-supported free viewing and “Hulu Plus,” which offers more content via more devices.<sup>207</sup> It appears Hulu is not boycotting non-parent entities, as it licenses material from over 260 content creators.<sup>208</sup> Hulu content is easy to access, with no extra software download needed. Thus, unlike MusicNet and Pressplay, Hulu is cheap, user-friendly, and full of unrestricted content. Hulu’s free tier is also ad-supported, which makes downstream price-fixing more difficult, because advertisers are free to take their ads elsewhere. As such, in the free tier, there is no retail price to control. And, although it is *possible* each content owner has required a MFN, it is highly unlikely with 260 different contributors. Additionally, Hulu does not appear to have exclusive licenses from its parents, as much of the content viewable on Hulu is also available on other outlets, such as the original broadcasters’ websites and Netflix.<sup>209</sup>

Vevo, a joint venture between Sony Music, Universal Music, and the Abu Dhabi Media Group, exists in the much more concentrated music industry. Vevo streams music videos, which are traditionally owned by record labels, for free.<sup>210</sup> Unlike Hulu, yet similar to Premiere, Vevo was created in response to a direct competitor—YouTube.<sup>211</sup> To facilitate coordination, however, Vevo has contracted with YouTube to provide the “back end” technology for Vevo’s platform. Further, any video on Vevo is accessible via YouTube, motivating Vevo parents Universal and Sony to license only to Vevo and not enter into separate deals with YouTube.<sup>212</sup> Since the net result is the same (videos appear on both YouTube and Vevo), this licensing structure is probably not anticompetitive. Vevo and YouTube’s con-

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<sup>207</sup> *About, HULU*, *supra* note 205.

<sup>208</sup> *Id.*

<sup>209</sup> *See e.g.*, NBC.COM, <http://www.nbc.com> (last visited Dec. 15, 2011).

<sup>210</sup> *Vevo Partners with Abu Dhabi Media Company: Abu Dhabi Media Company Joins Universal Music Group and Sony Music Entertainment for World Class Premium Music Service*, VEVO (Oct. 19, 2009), <http://www.vevo.com/About/PressRelease?release=vevo-partners-with-abu-dhabi-media-company&id=75&date=2009-10-19>.

<sup>211</sup> *See* Tom Lowry, *Vevo Aims to Help Music Companies Cash in on Video*, BLOOMBERG BUSINESSWEEK (Dec. 6, 2009), [http://www.businessweek.com/technology/content/dec2009/tc2009126\\_307441.htm](http://www.businessweek.com/technology/content/dec2009/tc2009126_307441.htm) (quoting Vevo CEO Rio Caraeff as stating that YouTube will lose all Sony and Universal video streams to Vevo); *see also* Brian Stelter, *Music Companies Opening Video Site*, NEW YORK TIMES (Dec. 7, 2009) [http://www.nytimes.com/2009/12/08/business/media/08vevo.html?\\_r=1](http://www.nytimes.com/2009/12/08/business/media/08vevo.html?_r=1) (describing Vevo’s goal of creating a premium music video experience for fans, better than that offered by YouTube).

<sup>212</sup> Eliot Van Buskirk, *Google, Universal to Launch Music Hub ‘Vevo,’* WIRED (Apr. 9, 2009, 12:51 PM), <http://www.wired.com/epicenter/2009/04/vevo-is-real>.



tract is set to expire in 2013.<sup>213</sup>

However, prime Universal content (e.g., Justin Bieber and Lady Gaga videos) was unavailable on MTV.com, Vevo's main competitor after YouTube, until March of 2012 when MTV and Vevo came to a licensing arrangement.<sup>214</sup> The fact that it took an agreement with Vevo for Universal content to be delivered to MTV.com indicates an exclusive licensing arrangement between Vevo and Universal. In such a case, anticompetitive concerns are justified and should be investigated. Vevo also has licenses with several third parties, including EMI and many independent labels, who provide additional content for the service. The remaining major label, Warner Music, partnered with MTV instead.

Vevo, like Hulu, is ad-supported, which should alleviate concerns about price-fixing at the retail level, since the content is free to consumers. However, each label licenses content to Vevo, just as they did to MusicNet and Pressplay. Given the music industry's increasingly high concentration and history of anticompetitive activity, there is the lurking potential of concerted activity, such as the insistence upon MFNs, in the licensing agreements between Vevo and the major labels.

Lastly, UltraViolet, a technology developed by the Digital Entertainment Content Ecosystem ("DECE"), raises the most unique concerns of the three current leading online joint ventures. DECE is comprised of over sixty studios, retailers, manufacturers, cable companies, internet service providers, and hosting companies, and was founded as a patent pool with the goal of setting a standard for online streaming of previously purchased content.<sup>215</sup> Upon purchasing UltraViolet content, a free online "proof of purchase" is sent to

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<sup>213</sup> Vevo is rumored to be "in talks" with Facebook, which could provide a highly-trafficked platform for the video streaming service. See Dan Rys, *MTV Reunites with Vevo, Now Has Licensing Deals from All Four Majors*, BILLBOARD.BIZ, <http://www.billboard.biz/bbbiz/industry/digital-and-mobile/mtv-reunites-with-vevo-now-has-licensing-1006374952.story> (Mar. 6, 2012). In 2011, Facebook began encouraging content distributors to integrate with its platform (most notably providing music service Spotify preferred treatment throughout the site). See *Facebook f8: Mark Zuckerberg on Music, Media and Social Apps*, Apps Blog, THE GUARDIAN APPS BLOG, <http://www.guardian.co.uk/technology/appsblog/2011/sep/22/facebook-f8-mark-zuckerberg-social-live> (Sept. 22, 2012). Only time will tell whether or not Facebook will come under antitrust fire for preferential arrangements with media providers.

<sup>214</sup> See Rys, *supra* note 213.

<sup>215</sup> ULTRAVIOLET (last visited Dec. 7, 2011), <http://www.uvuu.com>; Press Release, Ultraviolet, Digital Entertainment Content Ecosystem (DECE) Completes Design of Ultraviolet, Paving the Way for Consumers to Enjoy Digital Entertainment Across Multiple Platforms 1 (Jan. 6, 2011), available at [http://www.uvuu.com/press/CES\\_JAN\\_6\\_2011\\_Press\\_Release\\_1\\_5\\_11\\_FINAL.pdf](http://www.uvuu.com/press/CES_JAN_6_2011_Press_Release_1_5_11_FINAL.pdf).

UltraViolet's servers, which lets users access the content anywhere, anytime.<sup>216</sup> Because UltraViolet's goal is to be operable with content from most studios and retailers,<sup>217</sup> any kind of coordination on retail pricing is unlikely; the market is too dispersed. The sheer number of DECE participants makes it unlikely that UltraViolet is a cartel, especially considering the varying industries represented, who all have differing interests at the end of the day. However, UltraViolet will be licensing its content from major studios, five of which are UltraViolet parent companies.<sup>218</sup> This structure is in line with that of MusicNet and Pressplay: the licensors and licensees are the same entities. Even if the studios are unable to successfully come to an explicit agreement on prices, they may be able to effect collusion by insisting on MFNs vis-à-vis the major studios or by simply demanding the same terms provided to other similarly-situated studios to which, as parents, they will have access.

A standard-setting patent pool with the scope of UltraViolet should increase output: theoretically, more studios will be willing to put their material online, knowing there is a validation system in place. Further, UltraViolet will provide unprecedented interoperability between content purchased from different vendors. However, if UltraViolet succeeds, it will necessarily have gained substantial market power, and will be expected to maintain a level of transparency to avoid antitrust issues.<sup>219</sup> *Princo Corp. v. International Trade Commission*<sup>220</sup> foreshadows the antitrust issues UltraViolet may face. In 2010, the companies that developed "CD-R" and "CD-RW" technology, allowing for

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<sup>216</sup> Press Release, Ultraviolet, *supra* note 215, at 1.

<sup>217</sup> The Ultraviolet holdouts are not insignificant. From the studio side, Disney content will not be compatible with Ultraviolet. With respect to retailing, Apple will not provide Ultraviolet content in its iTunes stores, although an Ultraviolet application may be downloaded on Apple devices to view Ultraviolet content purchased elsewhere. See Richard Gray, *Film Industry Takes on iTunes with Ultraviolet*, THE TELEGRAPH (Nov. 19, 2011, 2:48 PM), <http://www.telegraph.co.uk/culture/film/film-news/8901305/Film-industry-takes-on-iTunes-with-Ultraviolet.html>. However, Disney has not foreclosed the possibility of joining Ultraviolet in the future. See *On the Call: Disney CEO Bob Iger*, CBS NEWS (Feb. 7, 2012), [http://www.cbsnews.com/8301-505245\\_162-57372979/on-the-call-disney-ceo-bob-iger/](http://www.cbsnews.com/8301-505245_162-57372979/on-the-call-disney-ceo-bob-iger/).

<sup>218</sup> Sony, NBCUniversal, Fox, Paramount and Warner Brothers are all members of the Ultraviolet venture. *Where to Find Ultraviolet*, ULTRAVIOLET, <http://www.uvvu.com/partners.php> (last visited Apr. 8, 2012).

<sup>219</sup> Phillip W. Goter, *Princo, Patent Pools, and the Risk of Foreclosure: A Framework for Assessing Misuse*, 96 IOWA L. REV. 699, 715-16 (2011) (discussing the antitrust risks standard-setting organizations face when they gain market power and lack disclosure requirements).

<sup>220</sup> *Princo Corp. v. Internat'l Trade Comm'n*, 616 F.3d 1318 (Fed. Cir. 2010). *Princo* is primarily a patent misuse case, but the court uses misuse and antitrust terminology interchangeably, applying identical reasoning throughout the case. See *id.*

seamless compatibility between different types of compact discs and compact disc players, found themselves in court defending the patent pool joint venture that licensed the technology.<sup>221</sup> In *Princo*, the defendants were accused of including unnecessary patents in the pool, thereby raising the price of the license.<sup>222</sup> The court found that including the additional patents was pro-competitive because they “clear[ed] blocking patents, integrat[ed] complementary technology and avoid[ed] litigation.”<sup>223</sup> The court determined that the joint venture had further significant pro-competitive attributes, including the provision of a greater incentive to innovate due to interoperability.<sup>224</sup> Because a product developed using the CD-R/RW standards could be used in conjunction with many more complementary products than without, the standard encouraged technology companies to develop new technology and products using the standard. For these reasons, standard-setting organizations are by law afforded the rule of reason with regards to restraints on standard setting activities.<sup>225</sup>

Like *Princo*, UltraViolet is a standard-setting patent pool comprised of technology from DECE members and should boost output by increasing interoperability between formats. As a result, UltraViolet should be monitored and subject to disclosure if necessary. However, should UltraViolet end up in court over any of its standard-setting activities, it will automatically receive the rule of reason due to the inherent pro-competitive efficiencies of such a standard-setting organization.

## VI. CONCLUSION

From brick and mortar movie theaters to online interoperability between content formats, copyright owners in the entertainment industry have consistently joined forces to try to retain control over content once it leaves their hands. In some cases, courts have found that the rights holders engaged in anticompetitive price-fixing or exclusive dealing. In others, joint ventures’ conduct has been deemed a perfectly legitimate use of intellectual property. Despite originating from an anticompetitive statutory monopoly, intellectual property joint ventures are analyzed under traditional antitrust doctrine, making it

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<sup>221</sup> *Id.* at 1322.

<sup>222</sup> *Id.* at 1323.

<sup>223</sup> *Id.* at 1325.

<sup>224</sup> *Id.* at 1336.

<sup>225</sup> Standards Development Organization Advancement Act of 2004, 15 U.S.C. §§ 4301-4302 (2004).

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hard to distinguish where a copyright monopoly ends and competition law takes over.

MusicNet and Pressplay should force courts to draw a firm line between copyright and antitrust, clarifying what kinds of joint ventures are subject to per se review. The ventures exhibited many cartel-like qualities and engaged in several layers of anticompetitive conduct, which would traditionally subject them to per se condemnation. The applicable antitrust standard of review will be determined by several factors, including the ventures' purpose. Whether or not the ventures ever harbored a true hope of being viable products or a sincere attempt to pursue a completely untested market in the face of never-before-seen widespread piracy will also affect the analysis. Courts have never scrutinized the anticompetitive conduct of a venture in such an environment, one in which labels face piracy on a global scale. Their inexperience in the matter and the uniqueness of the situation may very well afford the labels the rule of reason treatment.

Although the labels assuredly engaged in highly suspect behavior, antitrust and intellectual property law would benefit from the thorough analysis the rule of reason generates to guide future entertainment companies in their collaborations. MusicNet and Pressplay's actions may just have been a 'sign of the times,' and were more necessary in 2001 than in today's developed digital market. To that point, Hulu, Vevo, and UltraViolet all serve functions similar to MusicNet and Pressplay, but without attaining the same anticompetitive levels. Although the evidence is strong against the labels and could easily justify a per se determination, analyzing MusicNet and Pressplay under the rule of reason, which neither *Premiere* nor the *Paramount* studies received, would provide much-needed guidance to the content industry for future copyright collaborations.

