ANTITRUST

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1. You should read the instructions, the entire exam and all of the questions before answering any of the questions.

2. This is an open-book (but not open network), three-hour in-class examination. You may consult any materials you wish, except that (i) you may not consult anyone else and (ii) you may not search during the exam on the Internet or on any database service (such as Westlaw or Lexis/Nexis). Please do not discuss the exam with anyone until the examination period is over.

3. This examination consists of five pages. Please make sure that you have all of the pages.

4. There are three questions, with a total of 10 units for weighting purposes for grading. Each question consists of 1 to 4 units, and the weight for the question is set forth next to the question.

5. **Your answer should be no more than 3000 words (approx. 300 words per unit).**

6. Answers should be written in full English sentences and should refer to specific statute sections and cases where relevant. If an exam question is unclear, point out the ambiguity and then answer the question to the best of your ability.

7. In answering the questions, you should assume, except as otherwise provided in the exam itself, that the applicable version of any relevant statute is that set forth in the class materials. The law is the law of today, even if the exam is set at a different time.

8. Good luck!

We are situated in a stylized version of the music business of the recent past and today. This is a story of content and methods of distribution. Start with distribution. Although revenues associated with physical media such as compact discs (CDs) have been dropping over time, physical media sales still generate 50% of revenues, down from 60% three year ago. Digital distribution makes up 40% of revenues and the remaining 10% of revenues are generated from licensing fees such as those paid by radio and TV stations. Digital distribution has been dominated by downloads from three leading distributors, Apple, Amazon and Google Play, but digital distribution itself seems to be on the verge of a change as subscription streaming services (such as Spotify and Pandora) become more important. The subscription services are typically either advertising supported or paid for directly with monthly charges.

As to content, there are three leading firms: Warner, with 15% of the overall music market, Universal with 25% and Sony with 30%. The remaining 30% of the market is split among six firms, the largest of which, MadeUpMusicCo ("MadeUp"), has 10% of the market, with the remaining five firms each having 4% of the market. (Sony, Universal, Warner and MadeUp are often referred to in the industry as the Big Four.)

(The figures in the first two paragraphs are world-wide figures, but, fortunately, also hold exactly in each country on the planet.)

But the great problem of the industry—at least as seen by the content companies—is and remains music piracy. The industry believes that widespread copying of music has made it much harder to sell recorded music and has been looking for solutions to the piracy problem.

Question 1 (3 units)

On January 15, 2014, large chunks of the music industry descended on Las Vegas, Nevada for the annual meeting of the International Federation of the Phonographic Industry (IFPI). The kick-off session was a panel presentation on music piracy by the chief executive officers of Sony, Universal, Warner and MadeUp. In the question and answer session for the panel, an audience member stated that a key reason for piracy was the practice of the music companies of releasing new songs on different platforms at different times throughout the world. The Sony CEO, Susan Synthesizer, responded "You are exactly right. Piracy has always required an industry response and the industry should change its policy on that promptly and Sony will do exactly that."

On the next day, January 16, 2014, the IFPI executive committee met to consider new IFPI policies. (The executive committee consisted of representatives from Sony, Universal, Warner, MadeUp and three individuals not affiliated with the Big Four.) The executive committee announced a new release transparency policy under which IFPI would create a public website tracking release dates of new music by platform.

Two days later, Sony ran a full-page ad in *The New York Times* announcing its new policy "One World Release Program" under which it would release all new content to all platforms throughout the world on Fridays at one minute after midnight. And Sony would announce when new music was going to be released in advance of release.

The CEO of Universal, Ursula Ukulele, saw the Sony ad in the NYT and immediately emailed her counterparts at MadeUp, Mark Maraca, and Warner, Walter Washboard. The email consisted of just the subject line: "Did you see the Sony ad?" Maraca received the email and had indeed seen the Sony NYT ad. Washboard didn't get the email from Ukulele as she had mistyped his email address. Maraca replied to Ukulele's email via email with one sentence: "I did indeed; very interesting." Maraca also fixed Washboard's email address in his reply to Ukulele, so both Ukulele and Washboard received the reply.

One by one, day by day, more ads appeared in *The New York Times*, with first Warner, then MadeUp and finally Universal announcing new release programs that matched the structure of the Sony program.

And in the weeks following the series of ads, new music release dates changed. Before the IFPI meeting, music had been released throughout the week and with no necessary advance notice, but after the ads, a new pattern emerged. On the first Monday of each month, MadeUp would announce the music it would release over the following Fridays of that month. Warner would do the same on the first Wednesday of each month and Sony on the first Saturday of the month. Universal was the only firm not to adopt that pre-announcement pattern, but it did adopt the Friday at 12:01 am release time.

Question: Evaluate. Discuss potential antitrust issues and the likely path of any antitrust litigation concerning those issues. Would your evaluation change if the IFPI annual meeting had been held in London rather than Las Vegas?

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Question 2 (4 units)

The music content firms felt that the industry started to spin out of control with the advent of new technologies, first the Internet with its technology of easy music copying and sharing and then the emergence of the iPod and follow-on products. Each of the Big Four firms were looking for a path to more control (and profits) as the industry continued to change. The continuing decline of physical media sales (CDs) coupled with stagnation in the digital download market suggested that the next important platform would be subscription streaming.

On March 15, 2014, representatives of the Big Four met to establish a new corporation, The Music Licensing Company ("MLC"). The corporation was formed with 100 shares of stock with 30 shares issued to Sony, 25 to Universal, 15 to Warner and 10 to MadeUp with twenty shares held in reserve should other firms join. Each of the firms received a seat on the MLC board of directors.

One by one, each of the four firms also entered into a separate contract with MLC under which MLC would be empowered to license, on a nonexclusive basis, the music firm's entire music catalog to subscription services. These contracts were all signed on identical terms. At the initial board meeting, the board unanimously adopted a resolution under which it agree on what it termed all-or-none licensing meaning that MLC would license all of the music it had the right to license or none of it. (MLC dealt only with subscription distribution and had no direct role in the CDs or digital download markets.)

The MLC board also concluded that it initially would issue two licenses each of which would run for one year. Each of the licenses would be auctioned to the highest bidder. One would be for a flat cash amount and would require that the licensee charge a monthly subscription fee for the licensed music and to provide the music on an ad-free basis (the "fee license"). The second license would allow the licensee to use a "freemium" model. In that framework, listeners don't have to pay, but the music service would insert advertisements between songs and then the subscription service would also offer an ad-free paid version as an alternative (the "freemium license").

Question: Evaluate. Be sure to evaluate MLC's licensing strategy (both as to whether it is likely to be the best approach for making money for MLC and its owners and as to whether the licensing structure raises antitrust issues).

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Question 3 (3 units)

After all of that work, the MLC board was ready to take a break. After the auctions were over, one of the losing bidders for the freemium license approached MLC and asked it to issue an additional freemium license and offered to match the winning bid for the initial freemium license, but MLC declined to issue an additional license.

And one of the small 4% firms in the music content industry, FirstCo, approach MLC and asked to join as a shareholder on the same terms as the other shareholders, but MLC said no once again. That refusal sent off a shudder among the five small firms in the industry. Those firms would now like to merge to the extent they can do so consistent with U.S. antitrust law.

Finally, a potential entrant to the subscription music business, Arodnap, approached Warner regarding licensing its music for the service. Warner's response was: "We are trying to simplify licensing and we think that you will find it easier to deal with MLC." Arodnap reached out to the other Big Four firms and received similar responses.

Question: Evaluate.

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