Question 1: Key Missing Issues

Issues and Points: 29 point baseline **29**

1. Failure to address (FTA) antitrust status of IFPI (we are told very little about this and nothing about the membership rules for the organization, industry trade associations in and of themselves aren't problematic nor are conferences or panel discussions; joint ventures generally create new value): -1	
2. FTA IFPI releases tracking website (this is typical of the information created by trade associations, though this one might be seen as a practice that facilitates cartelization): -2	
3. FTA status of global release date and pre-announcements as SA 1 violation (the global release date and the pre-announcement policy are limitations on competition; we need to figure out whether there is a qualifying SA1 agreement (below) but assuming that, there can be little doubt that this is a horizontal restraint on trade; the pre-announcement regime lets the firms coordinate their releases of new music; this is pretty close to a version of market division, which remains *per se* illegal; existence of piracy doesn't justify horizontal cartel; not a new product ala *Broadcast Music*): -4	
4. FTA behavior of Sony (on the facts, Sony's behavior appears to be the most unilateral and independent: Synthesizer wasn't acting in response to something done by another CEO and Sony ran the first ad; but Sony could be seen as making offers of coordination (the initial letter in *Interstate Circuit*), both at the IFPI forum and through the ad; but no private or marginal communications here either (nothing extra beyond announcing new policy to the public and no private communications to competitors)): -2	
5. FTA behavior of Universal (Universal through Ukulele raises the type of competitor coordination found to be problematic in *Apple* (the book publisher cartel); of course there is no explicit offer of coordination here but simultaneity was at the core of *Interstate Circuit*): -2	
6. FTA behavior of Warner (Warner via Washboard did no more than receive emails (from competitors to be sure) and then announce in public its new release policy; the Warner facts pose the question of whether an SA1 agreement can be found without any explicit non-public communication by the accused party; *HFCS* suggests that some actual communication is required and the public announcement probably isn't enough given that it isn't private or incremental): -2	
7. FTA behavior of MadeUp (MadeUp via Maraca seems to be acting in furtherance of coordination by responding to Ukulele's email and making sure that Washboard has seen the full email thread): -2	
8. FTA question of whether SA1 agreement exists: (smart competitors who want to collude limit private communications, especially given how much can be accomplished through actions and public communications; Sony has no private communications and Warner just received emails; that said, we didn't have real info on two-way communications for all in *Interstate Circuit* either; Universal appears to act as hub and MadeUp helps with that): -2	

9. FTA path of antitrust litigation (this raises *Twombly*/*Text Messaging* type issues regarding pleading of antitrust claims; the *Text Messaging* spin on *Twombly* seems to point to opportunities for coordination (such as the IFPI meeting in Las Vegas) as well as behavior that is inconsistent with underlying economics; not much info on that here; unlike the gas station example, where fungibility pushes to a common price, nothing in the economics requires the content firms to coordinate on a release date or to pre-announce; all of that is likely to be enough to survive a motion to dismiss and to get to some discovery): -3	
10. FTA standing/injury questions: (government most likely party for case ala *Apple* ebooks case; the injuries at stake here—reduced competition among music content creators—are the types of injuries that the antitrust system is designed to deal with (*Brunswick*)): -1	
11. FTA how answers would change if IFPI meeting had been held in London (under *Hartford Fire*, the SA applies extraterritorially to activities that have a significant and direct effect in the U.S., so nothing would change from the Las Vegas analysis): -2	
Total Deductions	

Question 1: Additional Points

1:	

Question 1: Final Score

Question 2: Key Missing Issues

Issues and Points: 39 point baseline **39**

1. **FTA 2 vs 1 question on MLC** (the Big Four firms want MLC to be treated as a single entity for antitrust purposes, meaning no SA 1 liability possible; unlike *Copperweld* and very much like the analysis in *American Needle*, we have four separate decisionmakers that seem to be joined together (like the *Seely* situation discussed in *American Needle*); all of that suggests that MLC should be treat as a they and not an it making SA1 applicable): **-3**	
2. **FTA joint venture formation issue** (at least in this question, there are no group boycott issues, as there is no one that MLC has refused to do business with; MLC is created as a one-stop shopping firm for content rights for music subscriptions; simplifying transaction costs is a legitimate end (very much like ASCAP and BMI)): **-3**	
3. **FTA application of new product analysis of *Broadcast Music* to case** (MLC will seek to claim new product match with *BMI* given nonexclusive licensing by firms; Court applied rule of reason analysis to that situation and lower court should do so here): **-3**	
4. **FTA all-or-none licenses adopted at MLC board meeting** (this is another version of the blanket license in *BMI*; as we saw in class, that licensing structure has certain efficiency benefits (maximizes use appropriately given zero marginal social cost of use) and takes policing/piracy off of the table; blanket license structure has been heavily (antitrust) regulated under rule of reason and consent decrees; but need for all-or-none licensing is much weaker here (four firms vs. thousands of composers in ASCAP/BMI)): **-3**	
5. **FTA parallel licensing by Big Four to MLC** (this is very much like the publisher deals in the *Apple* ebooks case; even without the explicit coordination that went on there (and we have no info on that here), we should expect deals to be very much in parallel and so the fact that all four licensed to MLC on the same terms doesn't seem to give rise to any real antitrust concerns): **-2**	
6. **FTA MLC as price fixing vs price setting** (this is a replay of *Dagher* where we have the joint venture formation question on the table; like *Dagher*, conditional on the legitimacy of the joint venture, MLC's actions are just price-setting): **-2**	
7. **FTA MLC licensing strategy regarding maximizing profits for MLC** (monopolists maximize profit by limiting output; MLC is the only firm with the ability to offer one-stop shopping to new subscription services of Big Four content; the gap between the transaction costs of licensing for the four firms individually and the ease of licensing directly from MLC gives MLC value that it can try to exploit by limiting the number of licenses): **-3**	

8. **FTA differences in two licenses** (music has typically been monetized using fee-based sales (paying for physical media) as well as sales in a two-sided framework (over-the-air radio where listeners didn't pay directly but advertisers paid for ads); the two MLC licenses replicate that structure): **-3**	
9. **FTA relationship between licensing decisions in subscription market and position in CDs and digital download market** (in the *Apple* ebooks case, we saw that publishers were acting in ebooks to preserve their position in physical books; the music content firms clearly need to think about the relationship among the three different formats for delivering music (CDs, digital downloads and subscription streaming); just like in *Apple*, the fear here is that the content firms will seek to raise prices in one market, subscriptions, to protect their positions in other markets; the piracy issue really complicates that for them, as they must think piracy looms larger for CDs than for subscriptions): **-3**	
10. **FTA antitrust issues raised by MLC licensing strategy** (a great deal turns on how this operates in practice; as a new product, it could be seen as expanding output relative to the baseline, but if the nonexclusivity clause is a sham, it will operate as a direct output restriction that is being created by the Big Four operating together): **-3**	
Total Deductions	

Question 2: Additional Points

1:	

Question 2: Final Score

Question 3: Key Missing Issues

Issues and Points: 29 point baseline **29**

1. **FTA refusal by MLC to grant an additional license to losing bidder** (although firms generally have the right to refuse to deal, that depends on doing so either in a context in which they don't have market power or in which they are exercising legitimately obtained monopoly power; given the behavior in the rest of Q3, this looks like a cartel restricting output): -3	
2. **FTA refusal by MLC to admit FirstCo as shareholder** (this is about the scope of the joint licensing venture; with the Big Four already in, it is hard to think that a second joint venture will be possible; while joint ventures can have legitimate membership rules, see *Northwest Wholesale Stationers*, *Associated Press* makes clear that dominant joint ventures will face SA1/SA2 claims regarding membership rules that distort competition and that appears to be what is happening here): -3	
3. **FTA general merger guideline application to small firms** (the content industry has an industry-wide HHI of 1930 before any mergers take place; a merger of all five small firms into a single firm with a market share of 20% would create an industry with a post HHI of 2250 and that would be a jump of 320 points; that would still leave the industry in the moderately concentrated category, but also means that the mergers would be scrutinized; but given the positions of the other four firms in the industry, a roll up merger of the small five might be procompetitive): -6	
4. **FTA refusal by Warner and others to license content to Arodnap as individual refusal to deal** (firms have broad rights individual rights not to deal with other firms; mandatory dealing obligations only arise in unusual circumstances, such as those in *Aspen Skiing*, but none of the prior history of dealing in that case applies here): -2	
5. **FTA licensing refusal by Warner and others as group boycott** (we have no information regarding whether Warner and the others are acting independently or in concert, but the fact that each firm declined to deal is suggestive of a group boycott): -2	
6. **FTA licensing refusal by Warner and others as turning MLC into content cartel as to subscription market** (the original licenses to MLC were described as nonexclusive, just like the licensing structure in *Broadcast Music*; the refusal to license by each firm coupled with the licensing structure seems designed to make MLC into the exclusive source for subscription rights for content from the Big Four and now look like a price fixing (and not price setting) content cartel): -4	
Total Deductions	

Question 3: Additional Points

1:	

Question 3: Final Score
