

Future of Music Coalition Letter of Public Comment to the Federal Trade Commission

Future of Music Coalition ("FMC") appreciates the opportunity to share our views in connection with the hearing on "Vertical Merger Analysis; the Role of the Consumer Welfare Standard in U.S. Antitrust Law" which took place on Nov 1, 2018.

FMC is a nonprofit organization working to advance the interests of musicians on the full range of issues that impact their lives and livelihoods. FMC works with musicians, composers, and industry stakeholders to identify solutions to shared challenges. We promote strategies, policies, technologies and educational initiatives that put artists first in any industry that uses music for its business.

As with our other filings, our comments here, while brief, reflect direct experience of grappling with the concentrated power that musicians encounter in bringing their work to the marketplace. Our hope is that this ground-level view can help anchor these sophisticated legal debates in real-world outcomes and concrete observations.

1. *Should the U.S. antitrust agencies publish Vertical Merger Guidelines? What guidance should they provide regarding the assessment of the competitive effects of vertical mergers, including the substantive theories of competitive harm and the treatment of transaction-related efficiencies? Under what conditions, if any, should the guidelines recognize a presumption of anticompetitive harm?*

Vertical Merger Guidelines are badly needed, as a general pattern and practice of under-enforcement currently exists. Musicians and music fans alike have felt unprotected from the harms of consolidation, including in cases like LiveNation/Ticketmaster, which many leading thinkers have argued should be reconsidered.¹ As ownership concentration has accelerated across music industries and in adjacent industries, the problem has become even more urgent.

There should be a rebuttable presumption of harm in vertical mergers, including complements mergers, especially in markets where an oligopoly exists.

Let's consider one example. Recently Spotify acquired a partial ownership stake in digital music distributor Distrokid, which works with self-released musicians and independent labels to deliver their music to various digital music platforms. Spotify quickly announced that Distrokid was their "preferred" distribution partner. Non-disclosure agreements make it difficult to know whether Distrokid is now able to access different terms than rival distributors. What would happen if Spotify ultimately purchases Distrokid outright? On one hand, Spotify would have an incentive to feature material from Distrokid-affiliated artists and labels over other artists and labels on playlists and promotional features. This potentially harms listeners, because music

¹ For one example, see Tim Wu, "Antitrust's Most Wanted," *Medium*. <https://medium.com/s/story/antitrusts-most-wanted-6c05388bdfb7>

could be selected on the basis of commercial partnerships rather than competing for playlist placement solely on the merits of the music. This could be done without any notification to listeners— a practice that would be illegal on FM radio because of the sponsorship identification requirements². At the same time, Distrokid would no longer have an incentive to negotiate aggressively with Spotify for improved rates of compensation to the artists and labels whose catalog it represents.

Where possible, FMC has a general preference for structural remedies and prophylactic bans over behavioral remedies. This is because enforcement of behavioral remedies can be expensive for enforcers working with limited resources, and because reports of violation of behavioral conditions by large merged firms often must come from competitors (who may not have the vantage point to document misbehavior) or from entities that do business with the merged entity. A manager or artist witnessing violation of a behavioral condition/consent decree by a vertically-integrated ticketing company/promotor, for example, may not have the technical/legal expertise to understand that a violation is occurring, or may fear retaliation.

2. *Is the “consumer welfare standard” the appropriate standard for evaluating compliance with the antitrust laws?*

On this question, we would refer the FTC to our comments on the Sept 21, 2018 hearing.³

² As we’ve argued elsewhere, payola-like practices on digital music services is already a problem that merits investigation by the FTC, but more vertical consolidation would make it worse.

³ Comments of Future of Music Coalition are available here <https://www.ftc.gov/policy/public-comments/2018/11/15/comment-ftc-2018-0076-d-0022>