

## **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 hearings on "State of U.S. Antitrust Law; Mergers and Monopsony or Buyer Power" which took place on Sept 21, 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.

Our reflections on this hearing are grounded in our direct experience of grappling with the consolidation of power we have witnessed in nearly every part of the music business. Our hope is that this ground-level view can help anchor these sophisticated legal debates in real-world outcomes and concrete observations. While these issues impact our entire economy, we can offer general reflections of which arguments ring true or false in our industries, and in adjacent industries.

*Whether the consumer welfare standard is adequate to deal with the competitive challenges of the new economy, and, if not, whether a new standard or standards should be considered? If so, what should the standard(s) be?*

While opinions may vary on the precise details of what standards would be optimal, we can feel confident in affirming that Joseph Stiglitz' essential thesis presented on Sept 21 resonates with the experience of many musicians and composers. The prevalent understanding of the consumer welfare standard has failed to deal with the competitive challenges of the new economy. The antitrust status quo isn't working.

Stiglitz accurately notes that antitrust concerns intersect with consumer protection concerns and that lack of competition can mean that consumers have few choices about whether to patronize a business that raises privacy concerns. This may be viewed from the perspective of producers as well. Musicians may not have any meaningful choice about whether to have their music available on particular digital platform, as choosing to withhold catalog from a dominant digital music service could mean being all but invisible in the marketplace. But what if a platform engages in invasive digital surveillance practices for the purpose of gathering data to use for targeted advertising? Musicians then face a terrible choice: either act as bait to attract your devoted fans to

digital platforms engaged in behaviors they may find objectionable, or find yourself relegated to the margins, unable to grow your fanbase any further.

We've heard a number of potential alternatives to the consumer welfare standard, including the "effective competition" standard advocated by Marshall Steinbaum and Maurice Stucke. The notion advanced by Keith Hylton at this hearing – that no alternatives exist – does not seem credible in light of the robust discussion of potential paths forward – either broadening the current understanding of consumer welfare, moving toward another standard, or some combination.

- *Should antitrust law routinely, or ever, take into account additional public policy concerns raised by the size, wealth, or influence of corporations or individuals? Income and wealth distribution? The bargaining power of large entities? Labor and employment considerations? Other concerns? If so, how should those considerations be defined and evaluated and how should the antitrust laws make trade-offs between competing or multiple considerations?*

The size, wealth, and influence of corporations is a factor in public policy outcomes – we cannot pretend otherwise. Similarly, ideological assumptions undergird and animate the prevalent discourse about antitrust; we find the arguments advanced by Lina Khan convincing on this question.<sup>1</sup> So the issue is not whether these concerns impact antitrust law outcomes, but whether we account for these matters forthrightly or instead pretend that they are not there.

There is a tendency to imagine data-driven, empiricist approaches as insulated from broader questions of politics and power. FMC would never advocate not looking at data, but we need to ask critical questions about what's missing from existing datasets, and about what datasets don't exist and why. As a small nonprofit, we know that our ability to conduct rigorous research and generate good data is limited by resources and capacity, and in this we are certainly not alone. Independent musicians, like other SMEs, typically don't have access to the resources necessary to commission economic studies, to hire expert consultants, or to hire counsel to formulate antitrust complaints. Power disparities mean there are voices we too easily fail to hear and data we cannot access. Empiricism, thus, can never be apolitical.

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<sup>1</sup>Lina M. Khan, *The Ideological Roots of America's Market Power Problem*, 127 Yale L.J. F. 960 (2018), <http://www.yalelawjournal.org/forum/the-ideological-roots-of-americas-market-power-problem>.

Labor and employment considerations should be routinely considered, as well as bargaining power. These are crucial elements in determining whether a healthy and competitive marketplace exists.

Dennis Carlton and other thinkers raises a concern about those of us asking for more aggressive enforcement and integration of a broader range of policy concerns into anti-trust analysis. He suggests that we are asking antitrust to do everything. This argument seems to be a straw-person argument. Asking that antitrust do *more* is not the same as asking antitrust to do everything. Stepped-up antitrust enforcement can be complemented by stronger consumer protection, and legislative efforts addressing a range of concerns.

That said, one of the reasons that sector-specific regulation to protect a competitive environment doesn't yet exist is that certain corporations have amassed political and economic power sufficient to prevent adoption of such legislative measures. One of the roles of antitrust policy is to protect workers, producers, and citizens when they lack sufficient political and economic power to defend their interests in other arenas.

- *How accurate and relevant is recent research identifying increases in concentration across broadly defined economic sectors?*

This research strikes us as accurate, relevant, and broadly consonant with our observations in our own more narrowly-defined industry.

- *What are the highest priority reforms that would improve U.S. antitrust enforcement policy?*

Some possibilities include stronger presumptions in review of mergers and acquisitions, especially vertical mergers, and a willingness to look beyond price effects. More generally, we'd like to see an operational focus on making sure remedies are accessible to all market participants, not just those who can afford expensive economic studies, expert witnesses and antitrust counsel. This may require a greater willingness to consider structural rather than behavioral remedies. An independent musician, small-scale live event promoter, or independent record label may not have the resources or capacities required to document and bring a complaint about an instance of anticompetitive practices. Without legal expertise, they may experience difficulty enlisting the assistance of enforcement professionals. In contrast, clear rules of the road and structural conditions can guard against anticompetitive behavior.

- *Are there material differences between antitrust/competition policy and law in the United States as compared to the rest of the world? What are the long term effects of such differences on U.S. companies and U.S. consumers?*

As we mentioned in an earlier comment, we can observe varying outcomes between EU and US regulators as a way of understanding whether the US approach is sufficient. Commenters have noted varying approaches to large technology companies, but we can look back further to 2012 and the merger of EMI and UMG.

In the case of the 2012 merger of record labels EMI and UMG, some opponents of the merger argued that the new merged label would be able to compel an increase in the price that listeners would pay for music. While this argument was well-tailored to the consumer welfare standard, it was also dubious in a context where music was trending toward “free-to-consumer,” and ultimately the argument was unsuccessful. The consumer welfare standard left little room for the concerns of some independent musicians and labels about greater concentration actually facilitating a *decline* in the consumer-facing price of music, a business approach that is potentially workable for larger entities operating at mass-media scale, but which could undercut the business models of SMEs serving niche genres at a much smaller scale. In the end, the conditions placed on the merger were prompted by European regulators, who required divestiture of several subsidiary record labels. If US regulators had not narrowly focused on short-term price impacts to consumers but had instead been able to consider creative workers’ ability to bring their work to market on their own terms and on sustainable business models to make a diversity of voices and perspectives available to listeners, we would not have needed to rely on EU regulators to defend competition and consumers.

- Do the antitrust agencies (and the courts) exhibit insufficient or excessive attention to the error costs of more or less antitrust enforcement? Should the agencies (and the courts) (and do they) balance pro-competitive and anticompetitive effects across relevant markets and relevant affected persons in the analysis of mergers and conduct matters?

Our experience in the music industries and in adjacent industries suggest a general pattern and problem of under-enforcement. There may be many reasons – such an observation certainly does not require believing that an agency has been captured, or that regulators are anything less than committed to public service. Limited enforcement resources can lead to a pattern of risk aversion.

Granted, the harms of under-enforcement can be difficult to quantify, as we don't have access to the counterfactual condition. Nonetheless, musicians and composers generally feel undefended as small businesspeople. It's uncontroversial in the music community to assert that harms to music workers don't get enough attention from antitrust agencies or courts.

- What is the state and quality of the evidence of monopsony power in the economy? Are there sectors or markets in which the incidence of monopsony power is more likely and more prevalent?

The evidence of monopsony power is strong and growing. More research is needed, but action can still be taken now. As we discussed more extensively in an earlier filing, monopsony is a helpful conceptual framework for understanding YouTube's market power. YouTube's domination in the short-form online video marketplace, enabled by its integration with Google's more general data surveillance business model has distorted the music marketplace and created barriers to entry that prevent more meaningfully remunerative alternatives from emerging. As a result of the monopsony condition, there exists a coercive undercurrent to many licensing deals struck between YouTube and musicians/publishers/labels.