

Triggering Competition

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Conventional antitrust mechanisms have failed to check unprecedented consolidation in the content industries. What little has been written in the area of antitrust and copyright focuses primarily on the impact of anticompetitive behavior on innovation. This Article looks instead to the impact of excess consolidation on the licensing of intellectual property rights, and specifically on collective management of those rights. Using the recent rate court proceeding between Pandora and ASCAP as a case study, this Article exposes a new type of anticompetitive harm that stems from unchecked industry consolidation: adverse selection in collective rights organizations. This proceeding highlights two unprecedented developments in content licensing: First, the major music publishers withdrew their digital (but not analog) rights from ASCAP, the performing rights organization charged with the collection and administration of public performance royalties. This vote in favor of private negotiation - which resulted in a higher royalty rate than that obtained by ASCAP - challenges the traditional justification for collective rights organizations as the optimal means of licensing content. Second, the District Court for the Southern District of New York, acting as rate court, interpreted the consent decree under which ASCAP operates to deny its members the right to separate, and separately license, their bundle of copyrights. This interpretation directly contravenes 17 U.S.C. §106 of the federal copyright law - which enumerates six separable rights exclusive to copyright owners - and suggests that a tipping point has been reached: conventional antitrust mechanisms not only fail to check anticompetitive behavior, but also introduce additional concerns. Using the Pandora-ASCAP proceeding as a vehicle for reconsidering competition policy in copyright, this Article proposes a series of preventative mechanisms that are triggered by predetermined market power thresholds. This "triggered competition model" utilizes existing statutory licenses, collective rights organizations, and regulatory agencies to offer a more cost-effective and efficient approach to maintaining competition in the copyright industries.

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